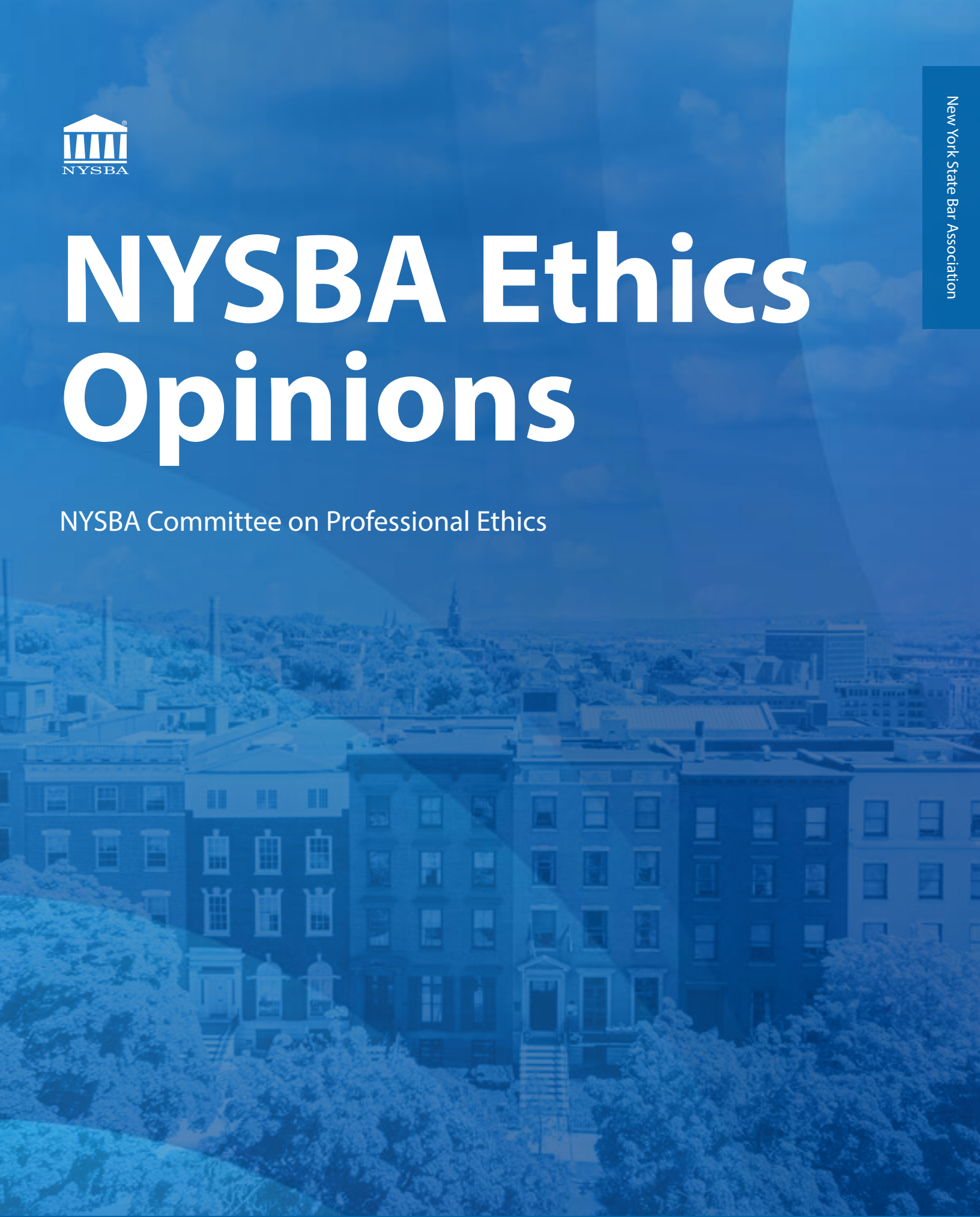
NYSBA

New York State Bar Association

NYSBA Ethics Opinions

NYSBA Committee on Professional Ethics



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Opinion 1265 (04/26/2024) 1978
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Opinion 1267 (06/14/2024) 1984
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Opinion 1268 (07/03/2024) 1988
Confidential information; publication of article about issues arising in a case handled by the lawyer

Opinion 1269 (07/16/2024) 1993
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Opinion 1270 (08/06/2024) 1997
Engagement letters; Recording attorney-client communications; Withdrawing from employment; Advance consent to withdrawal.

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Sharing of Legal Fees with Non-Lawyer; Impermissible Referral Fees; Non-Refundable Retainer

Opinion 1272 (08/27/2024) 2004
Conflict of Interest when part-time Department of Social Services Attorney represents clients adverse to Department of Social Services

Opinion 1273 (08/28/2024) 2008
Referral of real estate matters to lawyer from real estate broker who is also employed by lawyer as an associate

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Opinion 1279 (02/18/2025) 2026
Prohibited referral fees

Opinion 1280 (03/31/2025) 2028
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Opinion 1281 (04/09/2025) 2030
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Opinion 1283 (08/18/2025) 2036
Attorney's Referrals to Title Abstract Company Owned by Referring Attorney

Opinion 1284 (09/16/2025) 2041
Multi-Jurisdictional Practice; Referral Fees; Division of Fees

2000

OPINION 726 (02/02/2000)

TOPIC: Staff counsel; law firm.

DIGEST: A group of lawyers who are salaried employees of an insurance company and whose practice is exclusively in defense of the company's policy holders may hold themselves out as a law firm only if (a) they undertake to act consistently with the professional responsibilities of a law firm and (b) they disclose that they are employees of the insurance company.

CODE: DR 1-102, 1-104(A), (B), 2-102(A)(4), (B), (C), 5-105(D), (E), 5-107(A), (B); EC 2-13.

QUESTION:

May staff counsel of an insurance company hold themselves out as a law firm when they are salaried employees working exclusively on behalf of the company's policy holders?

OPINION:

Whether a group of lawyers employed by an insurance company to represent policy holders[1] may refer to themselves on their letterhead, business cards, and elsewhere as a law firm (*e.g.*, as "Law Firm of A, B, and C," "Law Offices of A, B & C," "A, B & C, Attorneys at Law"), depends on whether doing so would be misleading. *See* DR 2-101(A) ("A lawyer . . . shall not use or disseminate or participate in the preparation or dissemination of any public communication or communication to a prospective client containing statements or claims that are false, deceptive or misleading"); DR 2-102(B) ("A lawyer in private practice shall not practice under . . . a name that is misleading as to the identity of the lawyer or lawyers practicing under such name"); *see also* DR 2-102(C) ("A lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners."); *see generally* DR 1-102(A)(4) ("A lawyer or law firm shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation").

Clearly, it would be misleading and, therefore, impermissible for lawyers to hold themselves out to the public as a law firm if they do not function as a "law firm" for purposes of the Code of Professional Responsibility, which imposes certain ethical responsibilities on law firms. Under the Code,

1 The general rule in New York is that corporations may not practice law and accordingly their lawyer-employees may represent only the corporation and not third parties. Nonetheless, it is not impermissible *per se* for lawyers employed by an insurance company to represent policy holders in litigation in which the insurance company has a duty to defend and indemnify the policyholder. *See* Nassau Co. 95-5 (1995); N.Y. State 109 (1969) (attorneys may be employed as house counsel for insurance company on salary basis); *see also* N.Y. State 519 (1980). Although in individual cases (*e.g.*, where the insurance company disclaims its obligation to indemnify) the representation may give rise to an impermissible conflict of interest, we recognized in N.Y. State 109 (1969) that such a conflict is not inevitable. Where the representation is permissible, however, the lawyer employed by the insurance company, like a private lawyer whose fee is paid by the insurance company, must secure the policy holder's consent to the representation after disclosure of this relationship and, thereafter, must represent that client with undivided loyalty. DR 5-107(A), (B); *see generally* N.Y. State 721 (1999); N.Y. State 716 (1999).

for example, the law firm as an entity, as well as individual attorneys with management responsibility in the firm, must make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules. DR 1-104(A), (B). Certain of the lawyers' conflicts of interest will be imputed to each other, DR 5-105(D), and records of the lawyers' prior and current engagements must be checked to ensure individual and collective compliance with the conflict rules. DR 5-105(E); *see generally* N.Y. State 720 (1999). Within a law firm, lawyers may assist each other in cases, discuss strategy, share confidences, and otherwise pool their resources of intellect and labor. *Cf.* EC 4-2. If lawyers do not acknowledge the professional responsibilities that come with being in a law firm, but act exclusively as individual attorneys or individual attorney-employees, it would be misleading for them to represent themselves to the public as a law firm.

Even if the insurance company's lawyers undertake to work together on behalf of policy holders and consistently with the above--described disciplinary rules regulating law firms, however, there is at least a risk that lawyers may mislead clients and others if they refer to themselves as a law firm by using a style of name that traditionally designates a law partnership. First, clients and others may be misled to believe that the law firm is a partnership, rather than a group of individual employees.[2] Second, clients and others may be misled to believe that the lawyers are independent, rather than employed by the insurance company.[3] Finally, clients and others may be misled to believe that the lawyers' practice includes representing clients in addition to the insurance company's policy holders. In light of these risks, some authorities appear to close the door to any name other than "Law Division of [Insurance Company]" or the equivalent. *Cincinnati Insurance Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999) (noting that "it is difficult to come up with a proper reason for this designation"); California Op. 1987-91.

While cognizant of the risks, some other courts and ethics committees have acknowledged legitimate reasons why staff counsel who share professional responsibility for representing policy holders might seek to use a firm name. Doing so may denote that the lawyers are independent from their employer in the sense that their clients are the policy holders, not the company. Kentucky Op. 99-1. The firm name may also "reflect the nature of their association" (that is, that they practice collectively, not individually). *In re Weiss, Healey & Rea,* 536 A.2d 266, 269 (N.J. 1988).

In New Jersey, the state Supreme Court remanded the matter to a special committee. *See In re Weiss, Healey & Rea, supra.* That committee's report recommended that insurance company lawyers be permitted to practice under a firm name without any explanation or disclaimer when the lawyers share professional and financial responsibility for representing policy holders. Report of the Ad Hoc Supreme Court Committee on Law Firm Names, 125 N.J.L.J. 316 (Feb. 8, 1990). That state thereafter amended its disciplinary rules to implement this recommendation. *See* N.J. Comm. On the Unauthorized Practice of Law, Supplement to Op. 23 (1994).

2 *See In re Weiss, Healey & Rea,* 536 A.2d 266, 268-69 (N.J. 1988); N.J. Op. 593 (1986).

3 See West Virginia State Bar Lawyer Disciplinary Board, Op. 99-01, pp. 12-13; *In re Youngblood*, 895 S.W.2d at 331-332 (representation that attorney-employee is separate and independent from insurer employer "is, at least, false, misleading and deceptive. It may be fraudulent depending upon the circumstances under which it was made"); *In re Weiss, Healey & Rea*, 536 A.2d at 269-70; Virginia State Bar Op. 775 (1986); Ohio Board of Commissioners on Grievances and Discipline Op. 95-14 (1995); but see Nassau Co. Op. 95-5 (1995) (insurance company's attorneys, who are employed on a salary basis as house counsel to represent and defend insureds, need not identify themselves as insurance company employees; however, it is not ethically improper for them to do so).

We concur with those authorities that permit the use of a law firm name as long as it is accompanied by an explanation that the lawyers are employees of the particular law firm. *See* Oregon Op. 1998-153 ("[T]he letterhead used must indicate the relationship between the firm and the Law Division. For example, the letterhead could contain an asterisk identifying the firm as the Law Division for the Insurance Company."); West Virginia Op. 99-01 ("captive law firms" must "disclose their affiliation with the insurance company on their letterhead, business cards, phone book identification, phone answering method, office entrances and pleadings and . . . explain this relationship to each client," except possibly "in pleadings or other communications that might be submitted to a jury").

Our conclusion is that where insurance company lawyers undertake to act consistently with the professional responsibilities of a law firm (*see* DR 1-102, 1-104, 5-105 [E]), they may hold themselves out to the public as a law firm as long as they take adequate measures to avoid creating any misunderstandings about the nature of their practice, their relationships with each other, or their relationship with the insurance company that employs and pays them. In the very least, this will ordinarily mean that, in their letterhead and other public communications with those who might otherwise misunderstand, the lawyers must clearly explain that they are employees of the particular insurance company. Such an explanation is required in New York to comply with Code provisions that are intended to prevent lawyers from misleading clients, prospective clients, and third parties concerning the nature of the lawyers' practice. To the extent that a court rule or other legal obligation makes it inappropriate or impermissible to disclose an affiliation with the insurance company employer to a jury or other adjudicative body, such rule or obligation supercedes the disclosure otherwise required by the Code.

CONCLUSION:

A group of lawyers who are salaried employees of an insurance company and whose practice is exclusively in defense of the company's policy holders may hold themselves out as a law firm only if (a) they undertake to act consistently with the professional responsibilities of a law firm, including the responsibilities imposed on law firms as entities by DR 1-102, DR 1-104, and DR 5-105(E), and (b) they provide a clear explanation in their public communications that they are employees of the insurance company. The Code does not require such an explanation in communications with juries or other adjudicating bodies if other legal obligations are inconsistent with such disclosure in that context.

(13-99)

OPINION 727 (02/04/2000)

TOPIC: Referral of personal injury matters by accounting firm in return for sharing of fees.

DIGEST: Attorney may not accept referral from accounting firm in return for agreement to share contingent fees with accounting firm on personal injury matter.

CODE: DR 2-103(B), (D), 2-107, 3-102(A).

QUESTION:

May an attorney accept referrals from an accounting firm in return for an agreement to share the attorney's contingent fee with the accounting firm?

FACTS:

An attorney plans to enter into a relationship with an accounting firm whereby the accounting firm would send the attorney its personal injury referrals. The attorney would charge a contingency fee of not more than 25-27 percent, while the accounting firm would enter into its own, separate contingency fee agreement "in the range" of seven or eight percent in exchange for accounting services, including "financial planning and counseling with respect to the recovery." The client may not actually need or want financial planning services.

OPINION:

We believe that the arrangement is prohibited by the New York Lawyer's Code of Professional Responsibility ("Code"). The proposal implicates two separate Disciplinary Rules, and violates each.

First, DR 2-103(B) provides that:

> [a] lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by DR 2-107.

As one commentator has noted, "[t]he phrase 'of value' covers a lot of territory." Roy Simon, *Simon's New York Code of Professional Responsibility Annotated* 84 (1999 ed.). *See, e.g.,* N.Y. State 698 (1998) (lawyer may not agree to arrangement whereby medical consultant would refer clients in personal injury cases and lawyer would retain consultant to assist in the representation); Nassau County 98-10 (1998) (lawyer may not agree to discount his fee to clients referred by real estate brokers, because doing so may "give an incentive to clients to utilize these brokers' services [thereby giving something of value to brokers] in exchange for the brokers' promotion of attorneys' legal services"); *see also* N.Y. State 659 (1994) (lawyer may include advertising material in an information package distributed by a car dealer; however, the car dealer may not discuss the advertisement with its customers and, if any payment is made to distribute the advertisement, it must be clear that the third party is neither endorsing nor recommending the use of the lawyer's services); N.Y. State 566 (1984)

(law firm may not pay a fee to be listed under the category "Professional Services" in a real estate brokerage firm's brochure which recommends that home buyers secure the services of an experienced law firm and lists only the particular law firm as one that concentrates in that area of law); Nassau County 89-10 (a lawyer may not permit a relative who is a health care professional to send a letter to his patients announcing that the lawyer's office is open and offering complementary consultations to the patients); Nassau County 87-43 (lawyer may not arrange for financial planners and insurance agents to distribute lawyer's promotional material).

By limiting the legal fee to less than the legal and customary maximum and permitting the balance to be made available to the accounting firm for its separate fee, the proposed arrangement involves compensation by the lawyer to the accounting firm in connection with the referral of the client. This conclusion is inescapable if the client has not sought any accounting services and may not even wish to receive any. Although the attempt to limit the two separate fees to the legal maximum is helpful in avoiding issues under DR 2-106(A)'s prohibition of excessive fees, *see* N.Y. State 572 (1985) (lawyer should reduce legal fee so that separate contingency fee of consultant, together with legal fee, will not be excessive), it does not address the violation of DR 2-103(B) posed by the proposed arrangement, under which the accounting firm is to receive a fee in connection with the referral of the client. Since the accounting services are not sought and may not be desired by the client, the accountant's separate fee agreement appears to "serve as a pretext for avoidance of the prescriptions of" the Code. N.Y. State 698 (1997) (quoting N.Y. State 668 [1994]).

Second, the proposed arrangement violates DR 3-102(A)'s prohibition on fee splitting with non-lawyers. The accounting firm's fee, although entered into separately with the client, is for services not sought by the client and appears to constitute a portion of the contingency fee that would otherwise have been paid to the lawyer. As we recently noted in N.Y. State 705(1997), an arrangement in which a non-attorney company is "'signing up clients and passing them on to lawyers, with a fee skimmed off the top'" (internal citation omitted) constitutes unethical fee-splitting as well as improper solicitation.

CONCLUSION:

For the reasons discussed, an attorney may not ethically enter into the proposed arrangement.

(2-99)

OPINION 728 (05/10/2000)

TOPIC: Communicating with represented party; communicating with unrepresented party; advice to non-client concerning risk of self-incrimination

DIGEST: In civil hearing under General Municipal Law, if pro se civil claimant against municipality faces criminal charges relating to the subject of the claim, attorney for municipality may not communicate directly with the claimant unless attorney is (1) legally authorized to do so, (2) ascertains that the claimant is not receiving legal advice in connection with the civil claim, or (3) receives counsel's permission; if claimant is unrepresented, municipality's attorney has discretion whether to advise claimant of the risk of self-incrimination.

CODE: Canons 6,7; DR 7-101, 7-104(A)(1), (2); EC 7-14, 7-18

QUESTION:

Under General Municipal Law §50-h, an attorney for a New York municipality may take testimony from a person who has filed a claim against the municipality pursuant to General Municipal Law §50-e. On occasion, a *pro se* claim is filed regarding police matters (typically alleging false arrest or excessive use of force) when criminal charges are still pending against the claimant. A transcript of testimony given by the claimant at the hearing could be obtained by the District Attorney by subpoena or court order and used against the claimant in the pending criminal proceeding. May the municipality's attorney advise the claimant that his or her testimony might be incriminating and used against the claimant in a subsequent criminal proceeding? Must the attorney do so?

OPINION:

Whether the municipality's attorney may advise the claimant about the risk of self-incrimination depends in part on whether the claimant is "represented" for purposes of DR 7-104. DR 7-104(A)(1) governs communications with parties who are known to be represented in the particular matter, while DR 7-104(A)(2) governs communications with those who are unrepresented. Additionally, because the inquiry involves the conduct of an attorney for a municipality, not for a private party, the attorney's professional obligations as an advocate, including the attorney's obligation to serve zealously, competently and loyally on behalf of the client, must be understood in light of the concurrent obligation of a government attorney in a civil case, as in a criminal case, to "seek justice":

> A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and should not use his or her position or the economic power of the government to harass parties or to bring about unjust settlements or results. The responsibilities of government lawyers with respect to the compulsion of testimony and other information are generally the same as those of public prosecutors.

EC 7-14.

1. DR 7-104(A)(1)

If the claimant is represented with respect to the matter on which the municipality's attorney would communicate with the claimant, the permissibility of communicating directly with the claimant would principally be governed by DR 7-104 (A)(1), which provides:

> A. During the course of the representation of a client a lawyer shall not:
>
> > 1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Although the claimant under the stated facts appears generally to be unrepresented with respect to the claim against the municipality, since the written notice of claim presumably shows no attorney representing the claimant, this does not preclude the possibility that the claimant's criminal defense lawyer is providing advice concerning how the claimant's testimony with respect to the civil claim might affect the criminal case. The municipality's attorney is aware of the likelihood if not certainty that the claimant has a lawyer with respect to the pending criminal charges, but may not be certain whether the criminal defense lawyer is advising the claimant regarding the legal implications of the related civil claim against the municipality. Thus, there is a question whether the municipality's attorney has any duty of inquiry, or whether the municipality's attorney may communicate directly with the claimant on the theory that the claimant is not "known" to be represented in the matter that would be the subject of communications.

This Committee has previously found that, in some circumstances, a lawyer must confirm that an individual is not represented by counsel in the particular matter before communicating directly with that individual. For example, where a party was known at one time to be represented, but it is reasonable to question whether there is continued representation, "a lawyer must undertake a complete and thorough inquiry to determine the ultimate fact of existing or continuing representation" before communicating directly with the opposing party. N.Y. State 663 (1994) (where opposing party claims to be represented by counsel, but the putative lawyer fails to respond, a lawyer may communicate directly with the party only after a complete and thorough inquiry into the question of whether the party is represented); *cf.* N.Y. State 650 (1993) (lawyers staffing corporation's "help line" telephone as part of corporation's "compliance with the law" program are correctly "require[d] to inquire if the caller is represented by counsel in the matter about which the caller is reporting"); N.Y. State 607 (1990) (lawyer representing person injured in an automobile accident who has no information whether the driver is represented may send correspondence to the driver, but must inform that party to refer the documents to counsel if the party is represented).

Under the circumstances presented here, the municipality's attorney would have a similar duty of inquiry before communicating directly with the claimant as proposed. The attorney knows that the claimant faces a criminal charge arising out of the same situation which generated the notice of claim in the civil matter and knows that the claimant is almost certainly represented, or about to be represented, in connection with the criminal charge. Although the criminal defense lawyer apparently is not prosecuting the 50-e claim on behalf of the client, that lawyer may be advising the client about whether there is a risk that testimony in the 50-h hearing may be used against the client in the criminal

case - the very subject of the municipal attorney's proposed communication. That being so, the municipal attorney may not communicate with the claimant about the risk of self-incrimination unless the municipal attorney ascertains that the claimant is not represented with respect to this matter. Among other possibilities, this may be determined by asking the claimant whether the claimant's criminal defense lawyer or any other lawyer is advising the claimant concerning the 50-h hearing. If it is determined that the claimant *is* represented in the matter, then direct communications with the claimant are limited by DR 7-104(A)(1) to those that are "authorized by law" (*e.g.*, questioning in the context of the 50-h hearing itself) or those to which the claimant's attorney has given prior consent.

2. DR 7-104(A)(2)

Assuming that the claimant is unrepresented in the matter, one must consider whether DR 7-104(A)(2) bars the municipality's attorney from advising the claimant of the risk of self-incrimination. DR 7-104(A)(2) provides:

> A. During the course of the representation of a client a lawyer shall not:
>
> * * *
>
> 2. Give advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

Additionally, an Ethical Consideration contained in Canon 7 provides:

> If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance a lawyer should not undertake to give advice to the person who is not represented by a lawyer, except to advise the person to obtain a lawyer.

EC 7-18.

Although the disciplinary rule, by its terms, forbids a lawyer from giving any advice to a party whose interests conflict with those of the lawyer's client, other than the advice to secure counsel, the rule has been understood to allow a lawyer, additionally, to give certain non-controvertible information about the law to enable the other party to understand the need for independent counsel. For example, in N.Y. State 477 (1977), we opined that the inquiring attorney for an executor of a will could ethically advise the surviving spouse that the spouse might have a right of election against the will as to which independent counsel could give advice. We explained:

> A balance must be struck. The executor's lawyer cannot advise the surviving spouse to exercise a right of election, but he can advise him to seek independent counsel. Cf. DR 7-101(A) with DR 7-104 (A) (2). And, to make certain that the surviving spouse understands the need for independent counsel, as a matter of professional privilege the executor's lawyer may inform him of the possible existence of a right to elect a statutory share against the will.

Similarly, an opinion of the New York County Lawyers' Association noted that, in advising an unrepresented plaintiff to retain counsel, the defendant's lawyer could identify legal issues as to which an independent lawyer could advise the plaintiff:

> At the outset of their dealings, pursuant to DR 7-104(A)(2), inquirer should advise plaintiff that there may be legal issues, such as the possible attorney's charging lien, affecting plaintiff's right to recovery under whatever settlement is reached and that plaintiff should consult a lawyer to advise him about such issues because the inquirer is barred from doing so . . .

N.Y. County 708 (1995).

These opinions are consistent with the general rationale of DR 7-104(A)(2), which is to "protect unrepresented people"[4] as well as with the understanding that "[t]he legal system in its broadest sense functions best when persons in need of legal assistance or advice are represented by their own counsel." EC 7-18. Accordingly, we believe that DR 7-102(A)(2) does not forbid the municipality's attorney from informing the claimant that testimony in the 50-h hearing might be used against the claimant in the pending criminal prosecution, where the municipal attorney's purpose is to enable the unrepresented claimant to appreciate the possible value of a lawyer's advice.

These opinions interpreting DR 7-104(A)(2), as well as the rule itself, also make clear that a lawyer may advise an unrepresented opposing party to secure counsel, and provide related information, consistent with the duty to represent the client competently and zealously. *See* Canons 6 and 7. Generally speaking, the municipality's attorney's task is to gather evidence in the 50-h hearing that may assist the municipality in determining whether to settle the claim or in defending against it. *Cf.* N.Y. State 463 (1977) ("[I]n litigated matters, traditionally a lawyer serves his client, not only as advocate and advisor, but also as an investigator of the facts relevant to his client's cause. The gathering of information and the marshaling of evidence are an inseparable part of the lawyer's duty to serve his client with zeal and competence.") It may be that the municipality's attorney can carry out this task more effectively if the claimant is unrepresented or is unaware that the risk of self-incrimination suggests the need to be represented. Even so, there is nothing in the Code that compels the municipality's attorney to exploit the claimant's ignorance about the need for legal assistance. This is especially so given that the municipal attorney has a duty to "seek justice." The municipal attorney might reasonably conclude that the municipality's interest in dealing fairly with the public justifies advising the unrepresented claimant to secure a lawyer, even in circumstances where a private party's lawyer would be disinclined to give this advice.

At the same time, however, there is nothing in the disciplinary rules that explicitly *requires* the municipality's attorney to advise the unrepresented claimant about the need for a lawyer or the risk of self-incrimination. Therefore, the Code permits the municipality's law department to decide, as a matter of sound public policy and professional judgment, whether or not to advise unrepresented claimants about the need for an attorney and the risk of self-incrimination. If the municipality's law department has no policy on the subject and responsibility for conducting of the 50-h hearing is delegated to individual municipal attorneys, the Code affords those individual municipal attorneys the

4 Simon's Code of Professional Responsibility, 2000 Ed., p. 454, Commentary.

same discretion. The municipal attorneys may make this decision in light of their professional understanding of the municipality's interests and objectives and their understanding of their general obligation, acknowledged in EC 7-14, to "seek justice and to develop a full and fair record, and . . . [not] to bring about unjust settlements or results."

CONCLUSION:

Except where authorized by law, a municipality's attorney may not communicate with a civil claimant who faces criminal charges relating to the civil claim unless the attorney first ascertains that the claimant is unrepresented concerning the subject matter of the proposed communication or, if the claimant is represented, secures the permission of the claimant's lawyer. If the claimant is not receiving advice of counsel concerning the advisability of testifying in the 50-h hearing, the attorney may advise the unrepresented claimant about the risk of self-incrimination and about the advisability of securing an independent lawyer's advice concerning this risk, but is not required to do so.

(37-99)

OPINION 729 (05/10/2000)

TOPIC: Fees interest on disbursements in contingency fee cases.

DIGEST: Not improper for a lawyer to charge interest on disbursements in contingency fee matters under certain conditions.

CODE: DR 2 106(A), (B) & (D).

QUESTION:

May a lawyer charge interest on disbursements paid by the lawyer on the client's behalf in a contingency fee representation?

OPINION:

This Committee has previously opined that it is not *per se* improper for a lawyer to charge interest with respect to delinquent accounts for payment of professional fees as long as (1) the lawyer clearly advises the client before performing services of the fact that interest will be charged on accounts which are delinquent for more than a stated period of time, (2) the stated period is reasonable under all the circumstances of the matter, (3) the rate of interest is reasonable, (4) the fee is not excessive, and (5) the client consents to the interest charge. N.Y. State 399 (1975).

The issue addressed in this Opinion is whether a similar interest charge may be imposed on disbursements in contingent fee cases. Although this Committee has not addressed that specific question, the Association of the Bar of the City of New York's Committee on Professional and Judicial Ethics has addressed a somewhat similar situation. In N.Y. City 1997-1, that committee concluded that a lawyer in contingent fee matter who actually borrowed funds from a bank in order to advance litigation expenses for the client could charge the client interest on the funds advanced to pay these litigation expenses at the rate charged by the bank, as long the interest charge did not exceed the interest charges actually incurred by the lawyer, the provision was clearly explained to the client in advance and agreed to by the client, and, pursuant to DR 2-106(D), the lawyer provided the client with a writing stating the method by which the fee is to be determined.

The present inquiry differs from that posed to the City Bar in that the inquirer does not intend to borrow the funds that will be advanced to the client. However, this distinction is not necessarily material. A lawyer who advances funds for a client is losing the use of those funds, which has an economic cost. While one lawyer is out of pocket, and the other lawyer is not, in both scenarios a lawyer in a contingency matter has incurred a cost and seeks to pass it on to the client.

Accordingly, we conclude that under the Code (and subject to any legal restrictions), a contingent fee attorney may impose an interest charge on unpaid disbursements as long as (1) the client is clearly advised that an interest charge will be imposed on disbursements that are not paid within a stated period of time and the client consents to that arrangement before it goes into effect, (2) the client is billed for the disbursements promptly after they have been incurred so the client may decide whether to pay the disbursements or incur the interest charge, (3) the period of time between the bill and the imposition of the interest charge is reasonable, (4) the disbursement itself is appropriate, *see*

generally ABA 93-379 (1993), and (5) the interest rate is reasonable. Cf. DR 2-106(A) & (B) (a fee cannot be excessive). Although the reasonableness of a rate cannot be determined in the abstract, we do not believe that an interest rate exceeding the lawyer's actual or putative cost of obtaining funds would ever be reasonable in a contingency fee matter.

In addition, because the interest charge is part of a contingent fee arrangement, the interest charge must be included in the written statements required at the beginning and end of a contingent fee representation. *See* DR 2-106(D).

Finally, it is important to note that the amount of and methodology for calculating contingent fees in wrongful death and personal injury cases are governed by court rule. *See* 22 NYCRR § 603.7(e) (1st Dep't), § 691.20(a)-(c) (2nd Dep't), § 806.13(b) (3rd Dep't), § 1022.31(b) (4th Dep't). Whether the proposed interest charge is permissible under these provisions is a question of law on which we do not opine. Contingent fees in other kinds of cases may be subject to court review and/or approval. Whether a court would consider an interest charge appropriate in reviewing and/or approving a contingency fee is also beyond the scope of this Opinion.

CONCLUSION:

If not prohibited by law, a lawyer may charge clients in contingency fee cases interest on unpaid disbursements if the conditions enumerated in this Opinion are met.

(26-99)

OPINION 730 (07/27/2000)

TOPIC: Settlement agreements; restrictive covenants.

DIGEST: Attorney may not enter into settlement agreement that restricts attorney's right to practice law by prohibiting future representation of clients in cases where attorney might use information not protected as a confidence or secret under Code but nevertheless covered by terms of settlement agreement.

CODE: DR 2-108(B); 4-101.

QUESTION:

In connection with the settlement of an employment discrimination case in which the attorney represents the plaintiff employee, may the attorney for the plaintiff-employee agree not to disclose any information concerning: (1) any matters relating directly or indirectly to the settlement agreement or its terms; (2) the business or operations of the defendant corporation; and (3) the termination of the client's employment with the defendant corporation?

OPINION:

DR 2108(B) provides, "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts the right of a lawyer to practice law." This rule is intended (1) to preserve the public's access to lawyers who, because of their background and experience, "might be the best available talent to represent these individuals," (2) to prevent parties from "buying off" the opposing lawyer, and (3) to prevent a conflict between a lawyer's present client and the lawyer's future ones. ABA Op. 93371 (1993). The rule "prohibits lawyers from making or entering agreements that restrict a lawyer's right to represent certain clients or to sue specified parties as part of the settlement of a controversy between private parties." *Annotated Model Rules of Professional Conduct* 46869 (4th ed. 1999) (citing ethics opinions). This rule applies equally to a lawyer who would propose or offer such an agreement and to a lawyer who would accept it.

In the employment discrimination context, DR 2-108 (B) would prohibit an agreement by the employee's lawyer not to represent other employees in claims of discrimination against the defendant employer. Although the proponent of such a restriction might argue that it is needed to prevent the lawyer's improper use or disclosure of information learned in the course of the representation that the lawyer may have a duty to keep confidential, such a restriction is far broader than necessary to serve this purpose and may not be justified on this ground. *Cf.* Ala. Op. RO9201.

The specific agreements presented in this inquiry do not directly restrict the inquirer's right as a lawyer to practice law or to represent similar clients. Nevertheless, the confidentiality language is likely to restrict the inquirer in a relationship with any future client employed (or formerly employed) by the same employer, because the language is so broad that the mere representation of an employee in the future by the inquirer could raise an issue as to whether the confidentiality agreement has been breached. The question is whether DR 2108(B) forbids an attorney from agreeing to such confidentiality terms because they have the effect of restricting on the attorney's right to represent other clients in future cases against the present client's employer.

In general, conditions of settlement that require conduct on the part of a lawyer are permissible if they do not effectively restrict the lawyer from continuing or undertaking other representations and the lawyer's own client has the right to hold the lawyer to the particular conduct. For example, confidentiality provisions that, subject to limited exceptions, prohibit the parties and their lawyers from disclosing the terms of a settlement are common and do not violate DR 2108(B). The obligation to preserve the confidentiality of settlement terms does not effectively restrict the lawyer from representing other clients. Further, the terms of a confidential settlement are client "confidences" or "secrets" within the meaning of DR 4101, which establishes the lawyer's ethical duty of confidentiality. Therefore, the lawyer may not disclose the settlement terms without client consent and, conversely, the client may insist that the lawyer keep this information confidential. Since lawyers may not disclose confidential settlement terms without client consent, it is not an impermissible restriction on the right to practice law to require, as a condition of settlement, that the party's lawyer will not disclose this information. Likewise, other restrictions on disclosure of information covered by the confidentiality rule would ordinarily be permissible. *Cf.* Az. Op. 9504 (1995) (inhouse corporate lawyer may agree to nondisclosure of client confidences as condition of severance agreement).

At the same time, however, terms of a settlement agreement may violate DR 2108(B) if their practical effect is to restrict the lawyer from undertaking future representations and if they involve conditions or restrictions on the lawyer's future practice that the lawyer's own client would not be entitled to impose. *See, e.g.*, ABA Op. 417 (2000) (limitation contained in settlement agreement would effectively bar future representations because the lawyer's inability to use information could materially limit and adversely affect representation of future clients); Colo. Op. 92 (1993) ("Prohibited restrictions may include barring a lawyer representing a settling claimant from subpoenaing certain records or fact witnesses in future actions against the defending party, preventing the settling claimants[‘] lawyer from using a certain expert witness in future cases, and imposing forum or venue limitations in future cases brought on behalf of nonsettling claimants."); N.M. Op. 19855 (1995) (lawyer may not agree, upon settlement, to disclose her entire work product to the opposing party, because doing so "may inhibit her representation of subsequent clients. If this were to occur, defense counsel would accomplish indirectly what they cannot accomplish by directly precluding the attorney from representing other plaintiffs with similar claims.").[5]

In this case, the proposed confidentiality terms appear to apply to some information that, ordinarily, the plaintiff's lawyer would have no duty to keep confidential under DR 4101. For example, there is almost certainly information about "the business or operations of the defendant corporation" that is public information or that can be learned in future representations without relying on confidences or secrets of the current client. The duty of confidentiality under DR 4101 would not preclude the lawyer from disclosing such information. The settlement terms would also be overbroad insofar as information about the defendant's business was learned by the lawyer prior to the representation or insofar as it was understood at the outset of the representation that the lawyer could use information of this nature in representing future clients. For similar reasons, the proposed settlement term that would prohibit disclosure of "*any* information concerning *any* matters relating *directly or indirectly* to the settlement agreement *or* its terms" appears to be overbroad.

5 We note that, by its terms, the rule applies only to restrictions on the lawyer's right to practice law that are imposed in the context of a settlement. Therefore, the rule does not restrict the lawyer and client from entering into a retainer agreement that clarifies the application of the conflict-of-interest rules or expands upon them by restricting the lawyer from undertaking certain future representations of others in matters that may be adverse to the client or that otherwise implicate the client's interests.

These provisions would restrict the lawyer's right to practice law by requiring the lawyer to avoid representing future clients in cases where the lawyer might have occasion to use information that was not protected as a confidence or secret under DR 4101 but was nevertheless covered by the settlement terms. A settlement proposal that calls on the lawyer to agree to keep confidential, for the opposing party's benefit, information that the lawyer ordinarily has no duty to protect, creates a conflict between the present client's interests and those of the lawyer and future clients –precisely the problem at which DR 2108(B) is aimed. *Cf.* DR 5101(A) ("a lawyer shall not . . . continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business . . . or personal interests unless a disinterested lawyer would believe that the representation of the client would not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest").

An agreement restricting a lawyer's right to practice law may be enforceable even if it violates the disciplinary rule. *See, e.g., Feldman v. Minars*, 230 A.D.2d 356, 658 N.Y.S.2d 614 (1st Dept. 1997) (holding that agreement not to solicit clients is enforceable even assuming it violates the rule).[6] Whether this particular proposed agreement, if entered into, would be enforceable or what the consequences of breach would be are questions of law on which this Committee does not opine. Even if an agreement is enforceable, however, it may be impermissible under the Code. *See* N.Y. City 19993 (1999). Accordingly, whether or not the proposed restrictions on disclosure are enforceable, this Committee concludes that, because they are overly broad and would have the effect of restricting the practice of law, they are prohibited by DR 2108(B).

CONCLUSION:

For the reasons stated, the question is answered in the negative.

(2-00)

6 The court's decision in *Feldman v. Minars* has been strongly criticized insofar as it further found that an agreement not to solicit clients would not violate the rule. *See* Simon's *New York Code of Professional Responsibility* 17779 (2000 ed.). The intermediate appellate court's restrictive reading of the rule was influenced by its view that the rule is "an anachronism, illogical and bad policy." It may be worth noting that, despite the expression of this view in a 1997 decision, the Appellate Division made no change to DR 2108(B) when it amended the Code, effective June 30, 1999.

OPINION 731 (07/27/2000)

TOPIC: Conflict of interest; referral of real estate clients to attorney-owned abstract company; employees of lawyer.

DIGEST: Lawyer may not compensate employees for soliciting parties to real estate transaction to engage services of title insurance agency in which lawyer has ownership interest.

CODE: DR 5-101(A); 5-105(C); EC 5-2.

QUESTION:

In connection with representing mortgage lenders and brokers in real estate transactions, may a lawyer compensate the lawyer's employees for soliciting clients or other parties to the transaction to engage the services in that transaction of a title insurance agency in which the lawyer has an ownership interest?

OPINION:

A lawyer represents various mortgage lenders and brokers in real estate transactions. When acting as counsel for such clients in these transactions, the lawyer or employees of the law firm review the title insurance report and policy to assure that, upon closing of the transaction, the mortgage lender has a valid mortgage and appropriate lien against the borrower's property. The title company may be selected by either the lender or the borrower (or the agents of either one or the other). The lawyer owns a title company, but the lawyer does not participate in its day-to-day operations, including making decisions about the insurability of a particular transaction. The lawyer proposes to provide monetary incentives to employees of the law firm based upon the employees' success in soliciting lenders or borrowers to engage the services of the lawyer's title company in transactions in which the law firm represents the lender.

In this Committee's view, the proposed compensation arrangement is impermissible under DR 5101(A). As we recognized in N.Y. State 595 (1988) and further confirmed in N.Y. State 621 (1991), a lawyer may not ethically represent a client in a real estate transaction if the lawyer also acts as a principal in the title insurance agency engaged for that transaction. It follows from this that the lawyer for a party in a real estate transaction may not permit employees to solicit the lawyer's clients to engage the services of a title company in which the lawyer has an ownership interest. Nor may the lawyer compensate employees for making such referrals.

At the outset, this inquiry may implicate issues of federal and state law including the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq,* and the New York State Insurance Law which are beyond the jurisdiction of this Committee to address. This Opinion assumes, without deciding, that the arrangements proposed comply with all applicable statutes and regulations and addresses only the consistency of the proposal with the Code of Professional Responsibility.

In Opinion 595, this Committee considered whether the Code permits a law firm to refer clients to a title abstract company in which the law firm held an interest. In the facts posed in that earlier inquiry, the title abstract company not only performed title searches, but also (as in the inquiry you

pose) prepared the title report and either issued or acted as agent for the underwriter of the title insurance policy. This question was analyzed primarily under DR 5101(A), which concerns conflicts of interest involving a lawyer's personal or financial interests and the lawyer's representation of a client. The Committee recognized that the client's interests inherently conflict with those of the title company regarding what risks will be insured:

> Typically this conflict occurs when the lawyer-owned abstract company prepares a title report or serves as an agent for the title underwriter. In either of these situations, the dual roles [of representing a lender and owning the abstract company] are improper because they require a law firm which as a principal in the abstract company prepares a title report showing exceptions in title and recommending whether a title insurance policy will be issued, to negotiate these issues, as counsel for a party in the underlying transaction, with itself.

N.Y. State 595 (1988). The sharpness of this conflict and particularly the differing economic interests of the lender or borrower and the insurer persuaded us that a lawyer ordinarily could not adequately represent the interests of a party in a real estate transaction in which the lawyer held an ownership interest in a title company preparing the title report and issuing (or acting as an agent for the issuer of) the title insurance policy. *Id.* We concluded that the lawyer could undertake the representation with the informed consent of the parties only in situations in which the title abstract company performed only the ministerial service of conducting a title search.

This Committee's conclusion in Opinion 595, to which we adhere, resolves the question raised by this inquiry. Although the language of DR 5101(A) has been amended since the issuance of N.Y. State 595, we do not believe that the amendments alter the conclusion reached in that opinion. At the time N.Y. State 595 was issued, DR 5101(A) contained no explicit limit on the types of conflicts that could be subject to client consent; nevertheless, in that opinion and in prior ones, this Committee imported the explicit limits on consentable conflicts contained at the time in DR 5105(C) or in EC 52. At that time, DR 5105(C) required a lawyer to determine, in resolving whether client consent could cure a conflict, that it was "obvious" that the lawyer could adequately represent the interests of the client in the matter presenting the conflict; EC 52, now as then, counsels a lawyer to decline a proffered engagement if (among other things) a "reasonable probability" exists that the lawyer's personal interests will adversely affect the advice to be given or the services rendered to the client.

Today, as a result of a recent amendment, DR 5101(A) explicitly limits when client consent may cure a conflict to those circumstances in which "a disinterested lawyer would believe that the representation of the client will not be adversely affected." As explained when the change was proposed, the "disinterested lawyer" standard is more "understandable and objective" than the "obviousness" test. N.Y. State Bar Association, Special Committee to Review the Code of Professional Responsibility, Proposed Amendments to New York Lawyer's Code of Professional Responsibility 61 (Mar. 4, 1997). However, the essential analysis is unchanged.

Accordingly, a lawyer may not ethically refer a client in a real estate transaction to a title company in which the lawyer holds an interest. It follows that a lawyer may not compensate the lawyer's employees for making such referrals.

Nothing in this opinion is intended to detract from this Committee's longstanding view that "it is not improper for a lawyer to engage in a business other than the practice of law provided that the lawyer does not violate any ethical or legal rules." N.Y. State 583 (1987). Nor does this inquiry require consideration of whether a lawyer engaged in some other business may compensate a law firm's employees based on permissible referrals made to that other business. Rather, we note only that, on the facts presented, N.Y. State 595 compels the conclusion that, when a lawyer is representing a lender in a real estate transaction, the lawyer may not compensate the lawyer's employees for referring the borrower or lender to a title insurance company in which the lawyer holds an interest, regardless of whether the lawyer's client (or any other party to the transaction) consents to the lawyer's dual role.

CONCLUSION:

For the reasons stated, the question is answered in the negative.

(12-00)

OPINION 732 (09/28/2000)

TOPIC: Trade name; firm name

DIGEST: A lawyer named "X" whose law firm includes a number of associates may practice under the name "The X Group"

CODE: DR 2-102(A); DR 2-102(B); EC 2-11

QUESTION:

Under DR 2-102(B), may an attorney use his or her surname together with the word "group" as a law firm name where the attorney's firm has a number of associates?

OPINION:

The question is raised by an attorney ("X") who has a number of associates as to whether the attorney's firm may do business under the name "The X Group." This question is governed by DR 2-102(B), which provides in pertinent part:

> A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm . . . .

DR 2-102(B) restricts the use of trade names to protect the public from being deceived about the identity, responsibility or status of the individuals using the name. *Matter of Von Wiegen*, 63 N.Y.2d 163, 177, 481 N.Y.S.2d 40, 47 (1984); *see* EC 2-11 ("The name under which a lawyer practices may be a factor in the selection process. The use of a trade name or an assumed name could mislead non-lawyers concerning the identity, responsibility, and status of those practicing thereunder . . ."); N.Y. State 636 (1992); N.Y. State 459 (1977); N.Y. State 495 (1978); *Matter of Shepard*, 92 A.D.2d 978, 459 N.Y.S.2d 632, 633 (3d Dept. 1983); *see also Friedman v. Rogers*, 440 U.S. 1, 14 (1978) (provision prohibiting the use of trade name by optometrists was not unconstitutional because it furthered the state's interest by protecting the public from deceptive and misleading use of trade names).

Thus, the question is whether the name, "The X Group," would be misleading to the public. Earlier decisions provide some guidance, but ultimately the question whether a particular term would or would not be deceptive calls for an individual determination. By way of example, in *Von Wiegen*, the court held that the use of the phrase "The Country Lawyer" in flyers distributed by the attorney and on his letterhead is not prohibited under DR 2-102. The court reasoned the phrase was simply a motto separate from the attorney's name. The court further held that the public would not be misled because of the format of the flyer and the balance of the letterhead. In contrast, the Third Department held that the use of a firm name "The People's Law Firm of A, Attorney, P.C." in advertising was deceptive and misleading under DR 2-102(A) because the word "People's" misrepresented the nature of the firm. Therefore, DR 2-102(B) prohibited the use of such name by a lawyer as it constituted a prohibited and misleading trade name. *Matter of Shepard*, 92 A.D.2d at 978. Likewise, in N.Y. State

636 (1992), this committee concluded that a lawyer could not use a firm name that did not include the name of any attorneys associated with the firm, because doing so would be misleading.

We do not believe that the name "The X Group" would deceive the public about the identity, responsibility or status of those who use the name. A group is simply "a number of individuals bound together by a community of interest, purpose or function." Webster's Third New World Dictionary (7th ed. 1993). The name "The X Group" signifies nothing more than that the attorney X practices law together with a group of other individuals, which is in fact the case. Unlike the term "People," which the court in *Shepard* found to be misleading to the public, the term "Group" is not misleadingly suggestive, would not induce clients to select the law firm based on erroneous assumptions about the firm, and would not misrepresent the nature of the entity operating under that name.

CONCLUSION:

For the reasons stated, the question is answered in the affirmative.

(28-00)

OPINION 733 (10/05/2000)

TOPIC: Sharing legal fees with non-lawyer employees

DIGEST: Non-lawyers may be compensated based on a profit sharing arrangement but may not be paid a percentage of profits or fees attributable to particular client matters referred by the employee.

CODE: DR 2103(B); DR 3102(A)(3); EC 38

QUESTION:

Does the 1999 amendment to DR 3-102(A)(3) of the New York Lawyer's Code of Professional Responsibility, which permits non-lawyer employees to be compensated based on a "profit-sharing" arrangement, allow a lawyer to pay a non-lawyer employee a percentage of fees attributable to matters referred by the employee?

OPINION:

DR 3-102(A)(3) addresses the topic of lawyers dividing legal fees with non-lawyer employees. The rule recently was amended to expand the circumstances in which a non-lawyer employee may be compensated based on a profit-sharing arrangement:

> A lawyer or law firm may compensate a non-lawyer employee, or include a non-lawyer employee in a retirement plan, based in whole or in part on a profit-sharing arrangement.

The New York State Bar Association Special Committee to Review the Code of Professional Responsibility, which prepared the amendment to DR 3-102(A)(3), offered the following explanation of the change:

> Incorporates the substance of Model Rule 5.4(a)(3) in allowing non-lawyer employees of a lawyer or law firm to participate in a profit-sharing plan with respect to their salaries and bonuses and otherwise to be compensated, in whole or in part, based on the profitability of the lawyer or law firm. Under the current rule, non-lawyer employees may participate in profit-sharing only as part of a retirement plan.

Whereas the Disciplinary Rule previously limited profit-sharing arrangements with non-legal employees to retirement plans, the rule now expressly permits non-lawyer compensation to be "based in whole or in part on a profit-sharing arrangement." *See also* EC 3-8 ("profit-sharing compensation or retirement plans of a lawyer or law firm which include non-lawyer office employees are not improper"); *cf.* Utah State Bar, Ethics Advisory Op. Comm., Op. 139 (1994) (non-lawyer office administrator may be compensated based on a percentage of the net or gross income of the firm so long as compensation is not tied to receipt of particular fees).

The Committee has been asked whether DR 3-102 as amended to permit "profit-sharing compensation" would now allow payment to a non-lawyer employee of a percentage of fees attributable to matters referred by the employee as compensation for the referral. Although the Disciplinary Rule as

amended provides greater latitude with respect to compensation arrangements for non-lawyer employees that have profit sharing as a component, the particular compensation arrangement suggested continues to be unethical.[7]

DR 3-102 generally prohibits the sharing of legal fees with non-lawyers. It has long been believed that "fee-splitting between lawyer and layman . . . poses the possibility of control by the lay person, interested in his own profit, rather than the client's fate." *Emmons v. State Bar*, 86 Cal. Rptr. 367, 372 (Ct. App. 1970). The Code's approbation of lay compensation based on "profit sharing" does not represent a departure from the general prohibition against fee sharing. Rather, it specifies a particular situation where the dangers of lay interference with the exercise of independent professional judgment that are inherent in most fee sharing arrangements are not present. *See* EC 3-8. The limited circumstance contemplated by the 1999 amendment – compensation based on a lawyer or law firm's business performance – is just that; it is not an endorsement of or a departure from the general prohibition against sharing of legal fees.

Indeed, that general prohibition survives not only in DR 3-102; a particular application of the prohibition is reflected in DR 2-103(B), which provides that "a lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client or as a reward for having made a recommendation resulting in employment by a client." *Cf.* N.Y. State 731 (2000) (lawyer may not compensate employees for making a referral to a title company owned by the lawyer). This specific prohibition is not in conflict with the authority to compensate non-lawyers based on a profit sharing arrangement. While non-lawyers may be paid based on a lawyer or law firm's profitability or business performance, a non-lawyer may not be paid a percentage of fees attributable to matters referred by the employee. Indeed, a contrary construction of the new amendment to DR 3-102 would conflict directly with Section 491 of the Judiciary Law, which provides:

§ 491. Sharing of compensation by attorneys prohibited

> 1. It shall be unlawful for any person, partnership, corporation, or association to divide with or receive from, or to agree to divide with or receive from, any attorney-at-law or group of attorneys-at-law, whether practicing in this state or elsewhere, either before or after action brought, any portion of any fee or compensation, charged or received by such attorney-at-law or any valuable consideration or reward, as an inducement for placing, or in consideration of having placed, in the hands of such attorney-at-law, or in the hands of another person, a claim or demand of any kind for the purpose of collecting such claim, or bringing an action thereon, or of representing claimant in the pursuit of any civil remedy for the recovery thereof. But this section does not apply to an agreement between attorneys and counsellors-at-law to divide between themselves the compensation to be received.

Thus, DR 3-102's allowance of profit-sharing arrangements between lawyers and non-lawyers may not be used to circumvent the specific prohibition on fee sharing reflected in Judiciary Law §491 and DR 2-103(B). DR 3-102 does not countenance a compensation arrangement whereby a lawyer

7 Whether and under what circumstances a lawyer may now compensate a non-lawyer employee based on the profitability of a particular client's matter where the payment is not compensation for a referral is beyond the scope of this opinion.

pays a non-lawyer employee a percentage of fees attributable to matters referred by the employee. Other compensation arrangements that have profit sharing as a component would be permitted under the amendment to DR 3-102, provided the arrangement is not designed to reward a lay person for having made the referral or recommendation resulting in employment.

CONCLUSION:

Under DR 3-102(A)(3) as amended, a lawyer may compensate non-lawyer employees based on profit sharing but may not tie remuneration to the success of specific efforts by employees to solicit business for lawyers or law firms.

(18-00)

OPINION 734 (11/01/2000)

TOPIC: Attorney's obligation to report to a client a significant error or omission that may give rise to a possible malpractice claim.

DIGEST: A legal services organization is subject to the same ethical standards as other law offices, and therefore must report to the client a significant error or omission that may give rise to a possible malpractice claim, and depending on the circumstances, it may be required to withdraw its representation of the client.

CODE: DR 5101(A); DR 6102; DR 2110(A)(2); EC 2-6; EC 28; EC 232; EC 51; EC 5-11; EC 77; and EC 78.

QUESTIONS:

1. Is a Legal Aid Society ("Society"), which provides legal services to low-income clients, bound by the ethical standards which require attorneys to disclose significant errors and omissions to their clients?

2. If so, may the Society continue as counsel if, after having made full disclosure of such an error, a client still wants the organization to continue its representation?

OPINION:

As a general rule, whether an attorney has an obligation to disclose a mistake to a client will depend on the nature of the lawyer's possible error or omission, whether it is possible to correct it in the pending proceeding, the extent of the harm resulting from the possible error or omission, and the likelihood that the lawyer's conduct would be deemed unreasonable and therefore give rise to a colorable malpractice claim. Ordinarily, since lawyers have an obligation to keep their clients reasonably informed about the matter and to provide information that their clients need to make decisions relating to the representation, the Society's lawyer would have an obligation to disclose to the client the possibility that they have made a significant error or omission. *See* N.Y. State Op. 396 (1975); EC 77, EC 78.

DR 5101(A) governs the question of whether the Society and its lawyers have a conflict of interest arising out of their personal interest in avoiding civil liability and, if so, whether the lawyers may nevertheless continue the representation with "the client's consent to the representation after full disclosure of the implications of the lawyer's interest." In general, under DR 5101(A), the lawyers would have a conflict of interest if "the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own" interest, and, in that event, the Society could continue the representation with the client's informed consent only if "a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby."

This Committee's prior opinions provide guidance about how these principles generally apply when a lawyer has made a significant error or omission in the course of the representation, although their application will obviously vary depending on the facts of the particular case. For example, in N.Y. State 275 (1972), we addressed the situation of a lawyer who failed to file a claim within the stat-

ute of limitations period. We held that a lawyer had a professional duty to notify the client promptly that the lawyer had committed a serious and irremediable error, and of the possible claim the client may have against the lawyer for damages. Because the error could not be remedied and the representation was all but concluded, we further held that the lawyer should withdraw from the matter after having made the necessary full disclosure. In such a situation, not only was there an inherent conflict between the interest of the client and the lawyer's own interest, but, from an objective perspective, one could not be confident that the quality of the lawyer's work would be unaffected if the representation continued. We advised that, upon withdrawing, the lawyer should recommend that the client retain other counsel. *See also* DR 5101(A); DR 6102; EC 51; EC 26; and EC 511; N.Y. State 295 (1973) (reaffirming N.Y. State 275); N.Y. City 19952 (1995) (a lawyer failed to settle a judgment within time period prescribed by procedural rules).

Of course, not every possible error creates a possible claim for malpractice. Some errors can be corrected during the course of the representation. Others are not particularly harmful to the client's cause. In some cases, it may be questionable whether the lawyer acted erroneously at all. Therefore, when a lawyer makes a mistake in the representation of a client, the likelihood that the lawyer's representation will be affected adversely because of the lawyer's interest in avoiding civil liability will depend upon all the relevant facts.

Earlier opinions also make clear that the Society is subject to the same general standard as other law offices, even though its clients, who have limited financial resources, may find it more difficult to retain other counsel. *See* N.Y. City 19952 (1995) (holding that a legal services organization that may have committed malpractice should withdraw its representation and advise an indigent client to obtain legal advice from an attorney not employed by the organization); DR 5101(A); EC51; and EC 511. If the Society is required to withdraw from the representation because of the possibility that its lawyers' representation will be adversely affected by their own or the Society's interest, another legal services organization may be willing to undertake representation of the client or the client may be able to retain a private attorney on a contingency fee or on a pro bono basis. Unfortunately, it is also possible that the client may go unrepresented if another attorney is unavailable or unwilling to assume the matter. In any case, the Society cannot withdraw its representation until it "has taken steps to the extent reasonably practical to avoid foreseeable prejudice to the rights of the client," the specifics of which would depend on the circumstances of a particular case. *See* DR 2110(A)(2); DR 6102; EC 26; EC 28; and EC 232. However, if the matter is in litigation, the Society must seek permission from the Court before withdrawing. DR 2110(A)(1).

CONCLUSION:

The Society is bound by the same ethical standards as other law offices, and therefore has an obligation to report to the client that it has made a significant error or omission that may give rise to a possible malpractice claim. In such a situation, the Society will be required to withdraw as counsel if its continued representation would be adversely affected by its interest in avoiding civil liability.

(5-00)

2001

OPINION 735 (01/12/2001)

TOPIC: Communications in noncriminal matters with independent contractors of adverse parties

DIGEST: Lawyer in civil litigation may properly communicate with independent contractor of adverse corporate party unless lawyer knows independent contractor has retained counsel in the matter or, under the Court of Appeals analysis in *Niesig v. Team I*, is represented by the corporation's counsel in the matter. However, lawyer may not knowingly elicit information protected by the attorney-client privilege or the work-product doctrine that the accountant has an obligation to keep confidential.

CODE: DR 7104(A)(1)

QUESTION:

In civil litigation, may a lawyer communicate with an independent contractor hired by the opposing corporate party without obtaining the consent of opposing counsel?

OPINION:

A lawyer represents a party in a civil matter pending in a New York court. The opposing party, a corporation, is represented by counsel in the lawsuit. The lawyer would like to contact and interview an accountant who has been working for the corporation for several hours per week as an independent contractor.

The question of whether the lawyer may interview the accountant is primarily governed by DR 7-104(A)(1), which provides:

> A. During the course of the representation of a client a lawyer shall not:
>
> > 1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The purpose of this rule is to preserve the proper functioning of the attorney-client relationship and to shield the adverse party from improper approaches. N.Y. State 652 (1993); N.Y. State 607 (1990).

Outside the criminal context, where the scope and application of the rule has been hotly debated,[1] this Committee and other authorities have uniformly interpreted the rule to apply to any person or entity who is represented in a matter. Thus, the rule applies to a represented party to a transaction as well as a party to a lawsuit; it applies to one who retains counsel in connection with a dispute even prior to the filing of a lawsuit; and during a civil lawsuit it applies to represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties to the lawsuit. *See*, *e.g.*, N.Y. State 607 (1990); N.Y. State 656 (1993) ("we have [previously] described DR 7-104's scope as applicable to represented 'persons,' not merely technical parties") (citing N.Y. State 463 (1977) and N.Y. State 650 (1993)); Roy Simon, Simon's New York Code of Professional Responsibility Annotated 448 (2000 ed.); *see also Monceret v. The Board of Prof'l Responsibility*, 2000 Tenn. Lexis 430 (Tenn. 2000) (attorney barred from communicating with a represented witness); *In re Illuzzi*, 159 Vt. 155 (1992) (attorney barred from communicating with two insurance companies, not named parties in the lawsuit, after they had retained counsel to defend personal injury claims, without defense counsel's prior consent).

Although the Appellate Divisions, in recently amending the Code, declined to accept the New York State Bar Association's proposal that the term "party" in DR 7104 be changed to "person" for reasons of clarity (and not to effect a substantive change in the rule), we do not understand that the decision to retain the term "party" was intended to cut back on the long-standing, universal understanding concerning the scope of DR 7-104(A)(1) in noncriminal cases.

Thus, the question is whether the accountant employed as an independent contractor is known to be "represented" in the matter. (We have previously identified circumstances in which a lawyer has a duty of inquiry before concluding that the individual is unrepresented. *See* N.Y. State 728 (2000) and opinions cited therein.) If the accountant has personally retained a lawyer to provide legal assistance to him in connection with the lawsuit (e.g., regarding the accountant's role as a witness), then the accountant is clearly represented for purposes of the rule. In that event, the lawyer may not communicate with the accountant about the matters involved in the lawsuit without the consent of the accountant's counsel.

Assuming the accountant has not personally retained counsel, the question is whether, for purposes of DR 7-104(A)(1), he or she would be considered to be represented by the corporation's counsel. This question is governed by the analysis set forth by the Court of Appeals in *Niesig v. Team I*, 76 N.Y. 2d 363, 371 (1990). In *Niesig*, the Court recognized that "corporations act solely through natural persons, and unless some employees are also considered parties, corporations are effectively read out of the rule." The Court held that when a corporation is represented in a matter, DR 7-104(A)(1) therefore forbids communications with those "corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter ego') or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally." *Id.* at 374. The Court further stated, "This test . . . per-

1 The extent to which DR 7104(a)(1) and the similar "no contact" rule found in Rule 4.2 of the ABA Model Rules of Professional Conduct apply to criminal matters has been the subject of considerable controversy. *See, e.g.,Grievance Comm. for S. Dist. of N.Y. v. Simels*, 48 F.3d 640, 643 (1995); *United States v. Israel SantiagoLugo*, 162 F.R.D. 11, 12 (1995). Consequently, and also because of additional Constitutional considerations that may be applicable in criminal proceedings, the Committee at this time expresses no opinion as to the application of DR 7104(A) in the criminal context. For an extensive discussion of the issues regarding application of DR 7104(A) in criminal matters, *see* Bruce A. Green, A Prosecutor's Communications with Defendants: What Are the Limits?, 24 Crim. L. Bull. 283 (1988).

mit[s] direct access to employees who [are] merely witnesses to an event for which the corporate employer is sued." *Id*. at 375.

We so no reason why the analysis in *Niesig* would not apply to independent contractors hired by a corporation as it applies to corporate employees and officers. For example, if the lawyer in this inquiry were to know that the accountant had the legal authority to bind the corporation or was responsible for implementing the advice of the corporation's counsel, the lawyer would be prohibited from communicating with the accountant without the consent of the corporation's counsel.

If the accountant has not personally retained counsel in the matter and is not considered to be represented by the corporation's counsel under the *Niesig* standard, however, then DR 7-104(A)(1) would not bar the lawyer from communicating with the accountant. This Committee has consistently opined that a lawyer may properly interview an *unrepresented* witness for the opposing side in a proceeding without the consent of opposing counsel. N.Y. State 577 (1986) (adversary's expert witness); N.Y. State 463 (1977) (child's mother in a paternity proceeding instituted by the Commissioner of Social Services against the putative father).

The extent of permissible communications may be limited, however, if it is known or learned that the accountant possesses information that is protected by the corporation's attorney-client privilege or as attorney work product. We have recognized that a lawyer may not deliberately elicit privileged information from one who is not authorized to make disclosure. N.Y. State 700 (1998). Therefore, the lawyer communicating with the accountant may not knowingly elicit information protected by the attorney-client privilege or the work-product doctrine that the accountant has an obligation to keep confidential. Further, if the lawyer knows in advance or learns in the course of conversation with the accountant that the only relevant information possessed by the accountant is protected from disclosure, as might be the case if the accountant were retained in the matter to lend expert assistance to the corporation's counsel, *see*, *e.g.*, *United States v. Schwimmer*, 892 F.2d 237 (1989); *United States v. Kovel*, 296 F.2d 918 (2nd Cir., 1961), then it would be improper thereafter to communicate with the accountant at all concerning the matter even if the accountant were unrepresented.

CONCLUSION:

Under DR 7104(A), a lawyer who represents a civil litigant may properly communicate with an independent contractor who is employed by the adverse corporate party without consent of opposing counsel if the independent contractor is not represented in the matter. For purposes of the ethical restriction, the independent contractor is "represented" if the independent contractor has retained counsel in the matter or, under the Court of Appeals analysis in *Nieseg v. Team I*, is represented by the corporation's counsel in the matter. In communicating with an independent contractor who is unrepresented, the lawyer may not knowingly elicit information protected by the attorney-client privilege or the work-product doctrine that the accountant has an obligation to keep confidential.

(34-00)

OPINION 736 (01/03/2001)

MODIFIES: N.Y. State 258 (1972)

TOPIC: Mediation; matrimonial matters

DIGEST: Lawyer-mediator may not draft and file separation agreement and divorce papers on behalf of spouses as joint clients unless the lawyer can satisfy the "disinterested lawyer" test of DR 5-105(C)

CODE: DR 5-101(A), DR 5-105(A) & (C), EC 5-20

QUESTIONS:

May an attorney engaged in matrimonial mediation draft and file a separation agreement and divorce papers that incorporate terms agreed upon by the marital parties in the course of the mediation?

OPINION:

As we have recognized in the past, a lawyer who serves as a mediator to assist in the resolution of a possible dispute does not "represent" either party as a client for purposes of the conflict-of-interest rules and other rules governing the lawyer-client relationship. Therefore, even in many situations where a lawyer could not properly represent two clients with differing interests, the lawyer may serve them both as a mediator. This is true in matrimonial as well as other legal contexts. In N.Y. State 258 (1972), although we concluded that a lawyer may not jointly represent the spouses in a divorce proceeding, we also observed, "A lawyer approached by husband and wife in a matrimonial matter and asked to represent both, may . . . properly undertake to serve as a mediator or arbitrator." *Accord* N.Y. City 80-23 (1981) ("The Code's recognition that lawyers may serve as mediators (EC 5-20), as well as ethical aspirations which recognize a lawyer's duty to assist the public in recognizing legal problems and aiding those who cannot afford the usual costs of legal assistance (EC 2-1; EC 2-25), make it inconceivable to us that the Code would deny the public the availability of non-adversary legal assistance in the resolution of divorce disputes").

This is not to say that all matrimonial disputes are appropriate candidates for mediation. Matrimonial mediation may be undertaken in many circumstances, but in some circumstances, as the Association of the Bar of the City of New York recognized in N.Y. City 80-23 (1981),

> the complex and conflicting interests involved in a particular matrimonial dispute, the difficult legal issues involved, the subtle legal ramifications of particular resolutions, and the inequality in bargaining power resulting from differences in the personalities or sophistication of the parties make it virtually impossible to achieve a just result free from later recriminations or bias or malpractice, unless both parties are represented by separate counsel. In the latter circumstances, informing the parties that the lawyer "represents" neither party and obtaining their consent, even after a full explanation of the risks, may not be meaningful; the distinction between representing both parties and not representing either, in such circumstances, may be illusory.

Thus, there will be situations where the lawyer-mediator must not initially undertake, or must thereafter end, the mediation because a party's interests cannot fairly be protected without obtaining independent legal advice, or because a party needs a lawyer's assistance to protect against overreaching. However, the fact that the parties may begin with differing interests that would preclude a joint representation does not, in and by itself, foreclose the possibility of mediation.

The question now before us is whether, at the conclusion of any mediation, having assisted the parties in achieving the general terms of a settlement (which the lawyer-mediator would typically outline in a document), the lawyer-mediator may then proceed to represent the parties and draft and file legal documents on their behalf – in particular, the separation agreement and divorce papers. At that point, of course, the lawyer would be representing two clients who expect to become facial adversaries in a matrimonial litigation, and the representation would be subject to DR 5-105(A) and (C), which address the joint representation of clients with differing interests.

Ethical Consideration ("EC") 5-20, on its face, might appear to foreclose any aspect of a joint representation, inasmuch as it provides:

> A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. The lawyer may serve in either capacity after disclosing such present or former relationships. *A lawyer who has undertaken to act as an impartial arbitrator or mediator should not thereafter represent in the dispute any of the parties involved.*

(Emphasis added.) In our judgment, however, this provision is directed at situations in which the mediation does not successfully resolve the dispute between the parties, and the lawyer-mediator proposes to go from being a mediator between the two parties to representing only *one* of the parties "in the dispute." Thus, as we recognized in Opinion 258 in the matrimonial context in particular, a lawyer who serves as mediator in a matrimonial dispute may not later represent one party against the other if the dispute is not successfully resolved in mediation. We do not believe, however, that it is categorically improper for a lawyer, after successfully concluding a mediation, to represent both parties to the mediation with the consent of each, if there is no longer a "dispute" between them.

As to whether a lawyer-mediator – or, for that matter, any other lawyer – may represent parties to a divorce for the limited purpose of drafting and filing a settlement agreement and divorce papers, or whether such a joint representation is categorically forbidden by DR 5-105(A) and (C), we turn first to Opinion 258, where we opined :

> It would be improper for a lawyer to represent both husband and wife at any stage of a marital problem, even with full disclosure and informed consent of both parties. The likelihood of prejudice is so great in this type of matter as to make impossible adequate representation of both spouses, even where the separation is "friendly" and the divorce uncontested.

We reasoned that dual representation would never satisfy the then "obviousness" test of DR 5-105(C)[2] because of the "substantial likelihood of prejudice or professional conflict of interest in every matrimonial problem."

We now modify our previous view to the extent reflected in this opinion. There can be no question that the representation of parties who are on opposite sides of a divorce case invariably involves representation of "differing interests" for purposes of DR 5-105(A). Therefore, DR 5-105(C) would forbid the dual representation unless, in any particular case, a disinterested lawyer would believe that the lawyer can competently represent the interests of each spouse *and* each client consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. However, because there will be occasions when a "disinterested lawyer" would believe that the lawyer-mediator can competently represent the interests of each spouse by preparing and filing the settlement agreement and divorce papers, we reject the dictate of Opinion 258 that the joint representation is *per se* impermissible in any and all circumstances.

We remain convinced, however, that in the generality of cases, even if the spouses agree on the broad outlines of a settlement at the conclusion of the mediation, a disinterested lawyer will *not* be able to conclude that he or she can competently represent the interests of each spouse. Although there is general agreement on broad settlement terms, many particulars may remain to be worked out in the course of drafting a settlement agreement. Even with respect to the terms on which there appears to be agreement, one or both spouses may benefit from a disinterested lawyer's advice as to whether the agreement meets with the spouse's legitimate objectives and what other procedural alternatives may be available to achieve more favorable terms. One or both spouses may thus benefit from a disinterested lawyer's advice as to (1) his or her legal options, (2) how the settlement terms will or will not meet the client's interests, and (3) alternative ways to fashion a settlement agreement. Likewise, one or both may benefit from the assistance of a disinterested lawyer in negotiating the terms and/or thereafter drafting the terms.

In short, under the disinterested lawyer test of DR 5-105(C), the lawyer may not represent both spouses unless the lawyer objectively concludes that, in the particular case, the parties are firmly committed to the terms arrived at in mediation, the terms are faithful to both spouses' objectives and consistent with their legal rights, there are no remaining points of contention, and the lawyer can competently fashion the settlement agreement and divorce documents. In those circumstances, the *per se* ban of N.Y. State 258 should be relaxed to permit spouses to avoid the expense incident to separate representation and permit them to consummate a truly consensual parting, provided both spouses consent to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.[3]

Because the "disinterested lawyer" test cannot easily be met, the lawyer-mediator may *not* prepare and file a settlement agreement and divorce papers after the conclusion of the mediation as a matter

2 The "obviousness" test has been replaced by the "disinterested lawyer" test, which has been codified in DR 5-101(A) and DR 5-105(C).

3 Full disclosure should include advising both clients of the risk of a legal challenge, since "the absence of independent representation is a significant factor to be taken into consideration when determining whether a separation agreement was freely and fairly entered into" when "the same attorney represented both parties in the preparation of the agreement." *Levine v. Levine*, 56 N.Y.2d 42, 451 N.Y.S.2d 26, 28 (1982).

of regular practice on behalf of spouses who are otherwise unrepresented.[4] Nor may the lawyer-mediator, in advertising, a retainer agreement, or other communications with potential clients, state or imply that, in the ordinary course, the lawyer will routinely prepare and file the divorce papers after the mediation is completed. The likelihood that joint representation will satisfy the standard of DR 5-105(C) is so uncertain prior to the start of the mediation that it would be misleading for the lawyer to indicate that preparing and filing the divorce papers for the spouses is part of the lawyer's standard practice.

In reaching our conclusion, we are not unmindful of the decision in *Levine v. Levine*, 56 N.Y.2d 42, 451 N.Y.S.2d 26 (1982), in which the Court of Appeals held that the mere fact that a separation agreement was prepared by one attorney representing both husband and wife was not sufficient, "in and of itself, to establish overreaching requiring a rescission of the agreement." In *Levine*, after a non-jury trial, the trial court "found no evidence of coercion, undue influence or overreaching practiced by the husband," and made specific factual findings "that the agreement was fair" and "that the attorney had 'managed to preserve neutrality' throughout his joint representation of the couple." Under those circumstances, while acknowledging that "the potential conflict of interest inherent in such joint representation suggests that the husband and wife should retain separate counsel," the Court of Appeals stated that "the parties have an absolute right to be represented by the same attorney provided 'there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement.' (*Christian v. Christian*, 42 NY2d 63, 72, *supra.*)"

Although the Court's reference to the parties' "absolute right to be represented by the same attorney" might be read to supersede DR 5-105(A) and (C), we do not believe that was the Court's intention. We are not aware of any published decisions since 1982, when the Court decided *Levine*, that hold, on the basis of the Court's dicta, that a lawyer may represent spouses jointly in divorce proceedings even when the representation would otherwise be forbidden by DR 5-105(C) because a disinterested lawyer would not believe that the lawyer can competently represent the interests of each. Further, we note that, in *Levine*, the Court did not explicitly address the propriety of the joint representation under the disciplinary rules. Rather, the question before the Court was whether a court would grant the extraordinary remedy of rescission on a particular set of facts. The answer did not turn on whether or not the lawyer properly undertook the representation.[5] Even if, after the representation has come to an end, a court in full possession of all relevant facts concludes that there was "an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement," it may nevertheless have been improper to undertake the representation at the outset, in light of the facts then known to the lawyer and the risk that one or both spouses would be disadvantaged by the lack of independent counsel.

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4 If the spouses *are* independently represented by lawyers who are prepared, insofar as necessary, to advise about the settlement terms, negotiate unresolved terms, and review the settlement agreement and other papers, then we see no restriction on the lawyer-mediator serving as drafter and reducing to writing an oral agreement that encompasses a mutually agreeable understanding between the parties on all issues. In essence, the lawyer will then be serving as a mere amanuensis, and will not be exercising independent professional judgment on behalf of one spouse or the other with respect to the settlement terms.

5 It is well-settled that in a litigation context, the "ethical standards that guide attorneys in their professional conduct . . . cannot be applied as if they were controlling statutory or decisional law". *S & S Hotel Ventures v. 777 S.H. Corp.,* 69 N.Y.2d 437, 515 N.Y.S.2D 735, 738 (1987). Conversely, an ethical violation does not create a cause of action in favor of third parties where the facts do not fit within an acknowledged category of tort or contract liability. *Shapiro v. McNeil*, 92 N.Y.2d 91, 677 N.Y.S.2d 48, 50 (1998).

Finally, we note that, in cases where it is permissible for the lawyer-mediator to draft and file divorce papers, if the lawyer does not make a formal appearance in the divorce proceeding, the lawyer must ensure that his or her role is disclosed to the court. Otherwise, there is a risk that the court will be misled to believe that the papers were prepared by the parties themselves, and, further, the court will not know which lawyer is responsible in the event it has concerns about the preparation and contents of the legal documents. *See* N.Y. State 613 (1990).

CONCLUSION:

An attorney-mediator may prepare divorce documents incorporating a mutually acceptable separation agreement and represent both parties only in those cases where mediation has proven entirely successful, the parties are fully informed, no contested issues remain, and the attorney-mediator satisfies the "disinterested lawyer" test of DR 5-105(C).

(9-00)

OPINION 737 (02/01/2001)

TOPIC: Escrow accounts

DIGEST: A lawyer may not issue a check from an attorney escrow account drawn against a bank or certified check that has not been deposited or has not cleared.

CODE: DR 9102

QUESTION:

In payment of a client's obligations to a third party, may a lawyer issue an attorney escrow check against undeposited or uncleared client funds delivered to the lawyer in the form of a bank or certified check?

OPINION:

Disciplinary Rule (DR) 9-102 establishes the framework for how lawyers must handle clients' funds. For example, DR 9102(A) provides that a lawyer is a fiduciary with respect to the client whose funds are maintained in the lawyer's escrow account and prohibits the lawyer from commingling such funds with the lawyer's own. DR 9102(B)(1) requires a lawyer to maintain an escrow account for client funds "separate from any business or personal accounts of the lawyer or the lawyer's firm, and separate from any accounts which the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity." DR 9102(C)(4) requires a lawyer to promptly pay to the client from escrow those funds which the client is entitled to receive. DR 9102(D) requires certain bookkeeping records be maintained for escrow accounts which, pursuant to subdivision (1) thereof, "specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement."

Implicit in this framework is that a lawyer will not draw on funds belonging to Client A for the benefit of Client B. Yet this is literally what occurs where a lawyer maintains funds belonging to multiple clients in a single unsegregated escrow account and issues a check in payment of the obligation of one client before certified checks or bank checks delivered to the attorney's possession for the benefit of that client in amounts sufficient to cover that obligation are deposited into the lawyer's escrow account and cleared. The issue before this Committee is whether there are practical considerations which, with appropriate safeguards, may permit a relaxation of the ethical proscription against a lawyer, in effect, granting Client B a temporary loan out of funds belonging to Client A.

The issue arises most often in the context of residential real estate closings. In many parts of the State, the seller's attorney or a real estate broker typically holds funds from the buyer in an escrow account. The amount, which in some transactions may be as much as ten percent of the purchase price, represents the buyer's down payment delivered upon execution of a residential purchase contract. This down payment — cleared by the time of closing — may be sufficient for the seller's closing obligations if there is adequate pre-closing planning and communication between the attorneys for the seller, the attorneys for the purchaser and the attorneys for the purchaser's lending institution concerning the correct closing figures and the manner of the purchaser's payment of the balance due. Sometimes, however, open taxes, open judgments or other liens will first appear in a continuation title

search run immediately prior to or at the closing in amounts that exceed the funds already cleared and in escrow. As these encumbrances constitute a cloud on title that must be cleared at the closing in order for the seller to convey good title, the purchaser's title agent must be given adequate funds from or on behalf of the seller to cure the problem or to omit them from the title commitment. For this purpose, only a bank check, a certified check or an attorney's check will typically be accepted.

In these circumstances — where the earnest money or down payment deposited and cleared in escrow is insufficient to satisfy the seller's closing obligations and where bank or certified checks in the proper amounts are not available at the closing — it might seem that a practical solution to avoid the delay, inconvenience and expense of an adjournment would be for the seller's attorney to accept for deposit in his or her escrow account the bank or certified checks tendered by the purchaser or the purchaser's lender for the balance of the purchase price, checks usually made payable to the seller, which the seller then endorses over to the seller's attorney for deposit in the escrow account. The seller's attorney would then issue checks drawn on the escrow account payable in the amounts required to satisfy the seller's closing obligations, including the open taxes, judgments or other liens that encumber the good title that the seller is contractually obligated to convey, and remits the balance of the proceeds to his or her client. Apparently, the title companies and others will accept the escrow check of the seller's attorney, notwithstanding actual knowledge that the bank checks and certified checks delivered to the seller's attorney at the closing have not yet been deposited into the attorney's escrow account and, perforce, have not yet cleared. The seller's attorney is often willing to issue such escrow checks because there are sufficient funds, already cleared on deposit in the attorney's escrow account, to cover the checks issued at the closing. To the extent the total amount of the escrow checks issued at closing thus exceeds the buyer's down payment or earnest money, the funds on deposit in the attorney's escrow account that are used to cover the excess are indisputably funds belonging to other clients.

There are a number of arguments that can be advanced in favor of interpreting DR 9102 to allow a lawyer to issue escrow checks on behalf of Client B that are covered by cleared funds in the same escrow account deposited on behalf of Client A where the lawyer is in physical possession of bank or certified checks appropriately endorsed for deposit into the lawyer's escrow account on behalf of Client B that, if and when cleared, would be sufficient to cover those escrow checks. Some of these arguments have been favorably considered by the authorities in other states. Thus, Florida and Illinois have adopted specific rules permitting lawyers to disburse uncleared funds. *See* Rule 1.15 of the Illinois Rules of Professional Conduct; Rule 51.1(g) of the Rules Regulating the Florida Bar. In addition, New Jersey, North Carolina, and Virginia have approved of the practice, *see* N.J. Eth. Op. 454 (1980), N.C. Eth. Op. RPC 191 (1997), and Va. Eth. Op. 183 (1996), while South Carolina has not. *See In re Hensel*, 2000 WL 640239 (S.C. Sup. Ct. May 15, 2000), S.C. Adv. Op. 7820 (1978). On balance, however, we find none of the arguments sufficiently persuasive to subvert the obvious intended core purpose of DR 9102 — to maintain the integrity of a client's funds for the benefit of that client only, until payment of those funds to, for or on behalf of that client and no other client, is due.

First, it can be argued that an attorney comes into "possession" of funds on behalf of Client B within the meaning of DR 9102(A) when he or she receives the bank checks or certified checks properly endorsed for deposit into his escrow account on behalf of Client B at the closing. Because the risk that a certified check or bank check will not clear is considered to be negligible, it can be argued that the receipt should be analogized to the receipt of cash. However, even cash can be lost or stolen between the time of the closing and the time of the bank deposit, and until the cash is deposited and

credited to the escrow account, the cash does not generate available funds. A bank or cashier's check may also be subject to a stop payment order if the check was procured by fraud. *See, e.g., U.S. Printnet, Inc. v. Chemung Canal Trust Co.,* 270 A.D.2d 544, 703 N.Y.S.2d 821, 823 (3rd Dept. 2000), and cases cited therein. In addition, the checks themselves may turn out to be forgeries. *See, e.g.*, *U.S. v. Van Shutters*, 163 F.3d 331 (6th Cir. 1998) (counterfeit bank checks were used to purchase automobiles) and *U.S. v. Werber*, 787 F. Supp. 353 (S.D.N.Y. 1992) (same). Finally, there has been at least one recent case where a fully licensed mortgage broker was unable to meet its obligations, defaulting on its own checks. *See* "New York State Banking Department Suspends Mortgage Banker's License," Press Release issued July 5, 2000 by NYS Banking Department, available at http://www.banking.state.ny.us.pr/ (visited 12/5/00).

Second, it is doubtless correct that bank checks and certified checks are ordinarily accepted as a proper tender of payment in business transactions and it is therefore argued to be unreasonable to hold an attorney to a higher standard in the administration of his escrow account. The commercial reasonableness of the practice, however, does not fairly address the situation where one client's funds are being used to cover the checks issued on behalf of another client. If a commercial party chooses to accept the minimal risk of loss associated with the acceptance of a bank check or certified check, that same party will bear any loss that actually comes to pass. However, if Client A's funds are used to cover the checks written by an attorney for the benefit of Client B, and the bank or certified check deposited after the checks are issued to cover Client B's obligations is for whatever reason unpaid, it is Client A, a stranger to the transaction, not Client B, a party to the transaction, who will suffer the loss.

Third, it may indeed be true that in most cases it is incidental closing expenses that will be paid if the subject practice is allowed and that, therefore, any loss, already a remote possibility, will likely be in a nominal amount. In the same vein, it is argued that prohibiting the practice will engender delay and inconvenience and may adversely affect the economy. Whether or not these are accurate statements of the risk and the peril seems, however, beside the point. If a client's funds may not be invaded for the benefit of another, the principle must hold no matter what the size or extent of the planned invasion and no matter what may be the detriment to third parties of withholding the use of that client's funds.

Fourth, the practice of writing escrow checks at a closing drawn on the funds of other clients and against undeposited or uncleared bank or certified checks, if prohibited as unethical, can be argued to have a greater adverse impact upon persons of moderate or low income. This is because, where the price of real estate in a given community is lower, the legal fees associated with the closings are often lower as well. There is more pressure upon attorneys who practice in these communities to generate fees on a volume basis and less time may be spent in preparing for closings generally with a view toward "working out" what title and other problems exist at that time. It is these attorneys who may be compelled to raise their fees in order to carry on their residential real estate practices if more pre-closing preparation time is required to satisfy ethical obligations. Alternatively, if additional pre-closing preparation time is eschewed in favor of an occasional adjournment of a closing in order to allow the seller additional time to clear an unexpected title objection or to allow the purchaser additional time to obtain a bank or certified check in a previously uncalculated or uncommunicated payoff amount, this is still likely to result in additional cost to the parties, as the purchaser's lender will often charge a fee to adjourn a closing and the lender itself will often charge a fee to extend a loan commitment.

Although the Committee is sympathetic to the concerns of all parties to a residential real estate transaction who quite understandably would prefer to avoid the increased legal fees or costs

that might be associated with an adjournment of a closing, these considerations are insufficient to overcome the fiduciary obligation that an attorney owes to the attorney's other clients whose funds must not be invaded.

Fifth, it has been suggested that Client A, by allowing his funds to be deposited in an unsegregated attorney escrow account has implicitly consented to the possibility that those funds might be drawn upon in behalf of a Client B, including the small risk that a bank or certified check deposited into the escrow account for the benefit of Client B might be dishonored. The implied consent is said to arise from knowledge of the widespread practice of attorneys writing escrow checks against undeposited or uncleared bank or certified checks. Far from assuming Client A's consent to the practice, this Committee would assume the very opposite — that Client A, if asked, would vigorously object to putting his funds at risk and granting a no-interest loan for the benefit of Client B with whom Client A shares neither a social nor a business bond.

Nor can we ascertain any conditions or qualifications to the issuance of attorney escrow checks against undeposited or uncleared bank or certified checks that might ethically purify the practice. For example, the practice has been found acceptable provided, among other things, that the attorney immediately makes good any loss. *See* N.C. Eth. Op. RPC 191 (1997). But if the attorney is personally willing to take the risk that the checks will not clear, we see no reason why the attorney should not simply advance the disbursements necessary to effect the closing out of his own operating account and await a refund from his escrow account if and when the bank or certified check clears. From a practical as well as a fiduciary perspective, it is far more appropriate for the attorney for both Client A and Client B to make a temporary, no-interest loan to Client A than it is for Client B to make such loan. The attorney has knowledge of the facts and circumstances pertaining to the closing and can evaluate the degree of risk associated with acceptance of the proffered bank or certified check. Client B, on the other hand, neither knows or controls anything and has consented to nothing.

Finally, we note that our conclusion appears to be in seeming conformance with several recent disciplinary determinations of the Appellate Division, Second Department, and we are unaware of any determinations of the First, Third or Fourth Departments which suggest a contrary result. *See Matter of Abbatine*, 263 A.D.2d 228, 700 N.Y.S.2d 211 (2d Dept. 1999) (five year suspension ordered for attorney who, *inter alia*, issued escrow check for $4,147.18 from unsegregated escrow account against $10,000 deposit made 16 days later); *Matter of Ferguson*, 259 A.D.2d 186, 694 N.Y.S.2d 113 (2d Dept. 1999) (one year suspension ordered for attorney who, *inter alia*, issued escrow check against "wired" funds not yet received); and *Matter of Joyce*, 236 A.D.2d 116, 119, 665 N.Y.S.2d 430, 431 (2d Dept. 1997) (indefinite suspension ordered for attorney who, *inter alia*, "[o]n at least four occasions . . . issued checks from his escrow account for a particular transaction in advance of depositing the subject funds into his escrow account, causing checks to clear against the funds of other clients or third parties").

CONCLUSION:

The Committee welcomes further study of the problem addressed in this opinion with a view toward devising solutions that adhere to ethical requirements. However, for the reasons stated, the question is answered in the negative.

(22-00)

OPINION 738 (04/16/2001)

TOPIC: Conflict of interest: referral of clients to title abstract company owned by attorney's spouse

DIGEST: Improper for attorney to refer real estate client to title abstract company in which the attorney's spouse has an ownership interest for other than purely ministerial work

CODE: DR 5101(A), 5105(C)

QUESTION:

May an attorney who represents clients engaged in real estate matters refer those clients to a title abstract company in which the attorney's spouse has an ownership interest?

OPINION:

In N.Y. State 595 (1988), this Committee opined that it was ethically permissible for a law firm to refer real estate clients to a title abstract company in which the firm had an ownership interest "for purely ministerial abstract work," provided the clients gave "an advance, informed consent after full disclosure of the nature of the abstract company's fee structure and the law firm's proprietary interest in the abstract company," and the referral was accompanied by "a notice stating the client's entitlement to receive any appropriate credit for a non-service related fee or disbursement related to the abstract company's role in the transaction." Where, however, the abstract company rendered the additional service of preparing a title report or serving as an agent for the title underwriter, we concluded that "a prohibited conflict of interest arises that may not be cured by the consent of those concerned with the transaction." In N.Y. State 621 (1990), we adhered to the result reached in N.Y. State 595 and clarified and amplified the reasons why the conflict inherent in the dual roles as attorney and principal in an abstract company preparing a title report or acting as agent for the title underwriter was not curable by appropriate disclosure, informed consent and some appropriate credit against the legal fee.

For the reasons stated in N.Y. State 595, as clarified and amplified in N.Y. State 621, we now adhere to the same *per se* result where the abstract company to which a lawyer refers real estate clients for preparation or procurement of a title report and policy is owned by the attorney's spouse.[6]

We note at the outset that the "obviousness" test of DR 5-105(C) – which this Committee read into the closely analogous conflict of interest proscribed by DR 5101(A) – has now been replaced by a "disinterested lawyer" test that has been expressly incorporated in both DR 5105(C) and DR 5101(A). Under DR 5101(A), as amended in 1999, a client's informed consent after full disclosure is insufficient to cure a conflict of interest where "the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests," unless "a disinterested lawyer would believe that the representation of client will not be adversely affected thereby."

6 As we noted in footnote 3 to N.Y. State 621, it is not feasible for this Committee "to prescribe different ethical rules for the variety of ownership, organizational and operational structures that may characterize abstract companies and the differing clients they serve."

The gravamen of the conflict enunciated in our prior opinions was that the dual roles of attorney and owner impermissibly "require a law firm, which as a principal in the abstract company prepares a title report showing exceptions in title and recommending whether a title insurance policy will be issued, to negotiate these issues, as counsel for a party in the underlying transaction, with itself." N.Y. State 595, at 6. In our view, a "disinterested lawyer" would believe that the conflict inherent in those dual roles would adversely affect the representation of the real estate client for the same reasons the conflict would not pass muster under the prior "obviousness" test imported into DR 5101(A). *See* N.Y. State 731 (2000)(noting that notwithstanding replacement of the "obviousness" test with the "disinterested lawyer" standard, "the essential analysis is unchanged").

Turning now to the precise question before us, we held in N.Y. State 208 (1971) that a lawyer for a real estate client could not also act as a broker in the same transaction, notwithstanding prior disclosure and client consent. We reached the same *per se* result in N.Y. State 244 (1972), where the real estate broker *was the lawyer's spouse* because of the "intimate relationship, including financial" between husband and wife. In N.Y. State 291 (1973), we again held that where a lawyer *or spouse* has an interest in a brokerage agency, the lawyer could not accept both a legal fee and a brokerage commission from the same client in connection with the same transaction "for the reasons stated in N.Y. State 244 (1972)."

In N.Y. State 340 (1974), we reached the same *per se* result where the attorney's spouse was a salesperson, rather than an owner, in the brokerage agency, reasoning as follows:

> The intimate relationship and economic interests of husband and wife are inseparable; the acts of one directly affecting the other. The representation by the attorney of customers of the spouse's brokerage firm has been disapproved. N.Y. State 244 (1972). For the same reasons the representation by the attorney of customers of the spouse salesperson is disapproved.

In N.Y. State 493 (1978), we cited with approval and continued to adhere to the view expressed in the above four opinions "that a lawyer cannot act in that capacity on behalf of any party to a real estate transaction in which the lawyer *or his spouse* has acted as broker . . ." (emphasis added).

In the criminal field, we held in N.Y. State 654 (1993) that the district attorney could not represent the People in the same case in which the district attorney's spouse represents a defendant. While criminal cases implicate Canon 9 considerations of fairness and the appearance of fairness to a greater extent than civil cases "[b]ecause the criminal justice system pits the power of the state against an individual on pain of loss of liberty or even life" (N.Y. State 654, at 1), the reasoning of N.Y. State 654 was grounded upon the same rationale as the brokerage commission cases, to wit:

> The professional and financial success of one spouse necessarily benefits the other. N.Y. State 340 (1974); *see also* ABA 340 (1975). Where a client's interest conflicts with that of the lawyer's spouse, or the spouse's client, we previously have analyzed the situation as involving a possible conflict with the lawyer's self-interest under DR 5101(A) and as creating a potentially impermissible appearance of impropriety under Canon 9. *E.g.*, N.Y. State 583 (1987); N.Y. State 493 (1978) (lawyer may not represent party to real estate transaction in which lawyer's spouse was the broker); N.Y. State

409 (1975) (assistant district attorney and assistant public defender spouses cannot be adversaries in the same case); N.Y. State 378 (1975) (defense lawyer and probation officer who are spouses may not be involved in same criminal case); N.Y. State 368 (1974) (assistant county attorney and spouse may not be adversaries in the same case).

While N.Y. State 654 was also grounded upon DR 9101(D) (added to the Code in 1990), which proscribes certain representations where the lawyers on both sides are related as parent, child, sibling or spouse, we pointed out in the opinion that "DR 9101(D) provides a more explicit textual basis in the Code for the above-cited opinions that, prior to its enactment, the Committee based on DR 5101(A) and Canon 9." Indeed, the inclusion of "spouse" in the relationships proscribed by new DR 9101(D) reinforces the continued viability of our prior opinions on the spousal conflicts in the brokerage commission cases.

In short, the fact that the title abstract agency to which a lawyer refers a real estate client is owned, in whole or in part, by the lawyer's spouse, does not insulate the lawyer from the reach of N.Y. State 595 and N.Y. State 621.

CONCLUSION:

An attorney may not refer a real estate client to a title abstract company for other than ministerial title work where the lawyer's spouse has an ownership interest in the abstract company.

(7-01)

OPINION 739 (04/16/2001)

TOPIC: Lawyer referral service; legal fees, domestic relations

DIGEST: Lawyer who represents low or moderate income individual in matrimonial action for a reduced fee may include in retainer agreement provision contemplating an application to the court for counsel fees from the client's spouse at lawyer's customary rate.

CODE: Canon 2, EC 2-25, DR 1-102, DR 2-103(D)(3), DR 2-106(C) (2)(a), Canon 9.

QUESTION:

May an attorney who has agreed to represent a low or moderate income individual in a matrimonial action as part of a bar association sponsored lawyer referral service include in the retainer agreement a provision contemplating an application to the court for counsel fees from the client's spouse based on the attorney's customary rate instead of the reduced rate afforded the client?

OPINION:

Consistent with Canon 2's admonition that "a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available," the Code of Professional Responsibility authorizes bar associations to sponsor or operate lawyer referral services to aid individuals who need assistance in locating lawyers competent to handle their particular problems. DR 2-103(D)(3). Lawyers participating in certain bar association sponsored lawyer referral services fulfill their responsibility to render public interest and pro bono legal service by providing professional services at a reduced fee to individuals of limited financial means. EC 2-25 ("A lawyer has an obligation to render public interest and pro bono legal service. A lawyer may fulfill this responsibility by providing professional service at no fee or at a reduced fee to individuals of limited financial means or to public service or charitable groups or organizations, or by participation in programs and organizations specifically designed to increase the availability of legal services.")

The question presented here is whether a lawyer who has agreed to represent an individual of limited financial means at a reduced rate in a matrimonial action may include in the retainer agreement a provision contemplating that the lawyer may apply to the court pursuant to Domestic Relations Law §237 for counsel fees from the client's spouse, based on the lawyer's higher customary rate.

There is nothing in DR 2-103 itself that would prohibit the proposed retainer agreement. New York has not adopted regulations governing referral services, nor are there any ethics opinions that address this question. Whether such an arrangement is ethically permissible depends, in our view, on whether it would constitute a contingent fee in violation of DR 2-106(C)(2). Because we conclude that it does not constitute a prohibited contingency fee, we answer this question in the affirmative, subject to the conditions we outline below.

For at least a century, the New York courts have proscribed retainer agreements providing for a contingency fee dependent upon procuring a divorce or on the amount of alimony obtained. *See Van Vleck v. Van Vleck*, 47 N.Y.S. 470 (4th Dep't 1897). That prohibition survives today in DR 2-106(C)(2)(a), which provides that:

> [A] lawyer shall not enter into an arrangement for, charge, or collect any fee in a domestic relations matter the payment or amount of which is contingent upon the securing of a divorce or in any way determined by reference to the amount of maintenance, support, equitable distribution or property settlement.

The public policy reasons behind the prohibition of contingent fees in matrimonial actions is to avoid a situation where a lawyer may have an incentive to promote the breakup of the marriage. Although the proposed retainer might be seen as creating a "contingency" because the lawyer is paid at one rate by the client and another if the court orders payment from the client's spouse, it would not appear to be a contingency fee prohibited by the Code. The higher fee which the lawyer may receive from the client's spouse is not contingent upon the dissolution of the marriage or on the amount or distribution of the marital assets because a reconciliation or settlement between the parties does not, by itself, preclude an application for counsel fees made within the context of a pending action. *Sadofsky v. Sadofsky*, 78 A.D.2d 520, 431 N.Y.S.2d 594 (2nd Dept. 1980)(approving wife's application for fees pursuant to DRL §237 although fee application was filed after the parties reconciled, on the grounds that the statute does not require a contrary result, and because applications for counsel fees may be prosecuted by an attorney in his or her own name in the same proceeding). Accordingly, the proposed retainer agreement will not have the effect, or be seen as having the effect, of creating an incentive for the lawyer to seek a dissolution of the marriage in order to assure or enhance the lawyer's fee.

Moreover, we note that an analogous "contingency" results when a court permits a party to a matrimonial action to proceed *in forma pauperis* pursuant to CPLR §1102(d) and assigns counsel without compensation without prejudice to a motion by counsel for compensation pursuant to Domestic Relations Law §237, as is the practice in at least some courts. Lawyers in these courts may fulfill their pro bono responsibilities by representing indigent clients without forgoing the ability to seek compensation from the client's spouse at the lawyer's customary rate. In light of this practice, bar associations sponsoring reduced fee lawyer referral services may believe that prohibiting lawyers who voluntarily agree to represent clients for a reduced fee from applying for compensation at their customary rates may have the effect of discouraging lawyers from participating in such programs. Because we conclude that the proposed retainer provision is not prohibited by DR 2-106(C)(2)(a), we find no basis for substituting our judgment for that of the sponsoring bar association. Nor are we unmindful of the public policy behind the provisions of the Domestic Relations Law authorizing the court to order that the more affluent spouse bear the cost of the less affluent spouse's lawyer.

For the same reasons, we find no reason to limit our conclusion to lawyers who undertake reduced rate representation under the aegis of a bar association program. It is of vital interest to the profession that lawyers be encouraged to accept pro bono assignments, including assignments at reduced fees, and we are loath to place obstacles in the path of attorneys who are willing to render such service either through participation in a bar association program or on their own. EC 2-25.

We note that DR 2-106(C)(2)(b) requires that in domestic relations matters a written retainer agreement be signed by the lawyer and the client "setting forth in plain language the nature of the relationship and the details of the fee agreement." Accordingly, the lawyer should state his or her intention to seek court-ordered counsel fees from the client's spouse at the lawyer's customary rate, rather than at the reduced rate being charged to the client, in plain language in the written retainer.

Finally, we caution that in any ultimate application to the court for counsel fees, the lawyer should disclose to the court the terms of the retainer, including the fact that the lawyer has agreed to represent the client for a reduced fee. *See* DR 1-102(A)(5) (forbidding conduct prejudicial to the administration of justice); *see also* DR 1-102(A)(4) ("A lawyer . . . shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."). In this way, the court can make a fully informed decision whether, in light of the lawyer's agreement to accept a reduced fee from the client, it is appropriate to grant the application.

Because it is not within the Committee's jurisdiction to consider questions of law, we do not opine on whether the proposed retainer agreement comports with the requirements of Part 1400 of the Rules of the Appellate Divisions governing fees in domestic relations cases.

CONCLUSION:

A lawyer who has agreed to represent a low or moderate income individual in a matrimonial action for a reduced fee may include in the retainer a provision contemplating an application to the court for counsel fees from the client's spouse at the lawyer's customary rate, provided that in the making of an application, the lawyer informs the court of the terms under which the lawyer has accepted the engagement.

(1-01)

OPINION 740 (04/23/2001)

TOPIC: Advertising; firm name

DIGEST: A lawyer may not place an advertisement in the Yellow Pages in which the lawyer uses the firm name "A", or inserts the letter "A" before the firm name, in order to insure favorable placement.

CODE: DR 2-101(A), DR 2-102(B), EC 2-11.

QUESTION:

May a lawyer place an advertisement in the Yellow Pages in which the lawyer uses the firm name "A", or inserts the letter "A" before the firm name, in order to insure favorable placement?

OPINION:

This question implicates two provisions of the Code of Professional Responsibility: DR 2-101(A), which contains the general rules governing advertising, and which allows advertising that does not contain claims that are false, deceptive or misleading, and DR 2-102(B), which prohibits lawyers from practicing under a trade name.

Using a name that is not the legal name of one or more partners or former partners in the law firm constitutes use of a trade name within the meaning of DR 2-102(B). DR 2-102(B) separately prohibits trade names and names that are misleading as to the identity of the lawyers practicing under the name. See also EC 2-11. Adding the letter "A" before the name may not be misleading as to the name of the lawyer or lawyers practicing in the firm. The public is certainly used to such a stratagem in the Yellow Pages in other contexts. However, it turns what would otherwise be a representation of the one or more lawyers practicing in the firm (or the name or names of one or more deceased or retired members of the firm or a predecessor firm in a continuing line of succession) into a trade name – something more than the firm name.

Our conclusion with respect to trade names alone would be enough to dispose of this issue. However, we also wish to call attention to EC 2-10. Although DR 2-101(A) prohibits only advertising that is false, deceptive or misleading, EC 2-10 admonishes that, in advertising, "a lawyer should strive to communicate . . . information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel." Inserting the letter "A" before the firm name in order to obtain a more prominent position in the Yellow Pages listing is such a stratagem and should not be condoned.

CONCLUSION:

A lawyer may not place an advertisement in the Yellow Pages in which the lawyer uses the firm name "A", or inserts the letter "A" before the firm name, in order to insure favorable placement.

(20-01)

OPINION 741 (05/25/2001)

TOPIC: Referrals; solicitation.

DIGEST: Lawyer may not participate in a business network that requires reciprocal referrals.

CODE: DR 1-102(A)(2), 2-103(A), (B), 5-101(A), 6-101(A).

QUESTION:

May an attorney ethically participate in a business network that requires members to refer clients to and to accept referrals from other network members?

OPINION:

An attorney wishes to join the local chapter of a business networking organization. Material distributed by the organization indicates that there is a onetime registration fee of $50 as well as annual dues of $240. Only one person from each profession may join a local chapter. The purpose of the organization is to promote networking in order to increase business through marketing. To that end, members attend weekly meetings, receive newsletters, and refer business to each other.

Several aspects of a lawyer's participation in the organization present ethical issues. The first is that an attorney participating in the organization is apparently required to refer clients to other members of the organization. Membership in the organization requires a member to follow its policies, including the following: "Participants are required to bring bona fide referrals and/or visitors to their chapter." The organization's Code of Ethics states: "I will take responsibility for following up on the referrals I receive."

When an attorney's clients seek advice as to the hiring of a real estate broker or an insurance agent, the client should be able to rely on the attorney's independent advice in making a recommendation. The organization's policies, however, would require the attorney to refer the client to the real estate broker or insurance agent who is a member of the organization. Thus, the attorney's personal interests may affect his or her professional judgment. It may be that, with respect to a specific client, the attorney would have referred the client to a broker or agent other than the one who has joined the organization.

The obligation to make referrals to members of the organization creates a conflict of interest under DR 5101(A), which provides:

> A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby, and the client consents to the representation after full disclosure of the implication's of the lawyer's interest.

When a client seeks the attorney's professional advice with respect to a referral, the attorney may properly refer the client to a member of the organization only if the client is informed as to the

attorney's membership in the organization and the obligation to refer the client to another member of the organization. *See* Nassau County Op. 978 (1997) (attorney may agree to refer clients to a medical group provided it is in the client's best interests of the client consents after full disclosure).

Second, we interpret the provision in the policies together with the provision in the organization's Code of Ethics to mean that if another member of the organization has a client who needs legal assistance, that member is required to refer that client to the attorney, as the only attorney in the chapter. We note that in some cases, it would be unethical for the attorney to agree to represent a particular client who is referred. For example, DR 6101(A) provides that "[a] lawyer shall not: 1. Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle . . ." Obviously, there will be some referrals that the attorney is not qualified to handle and he or she cannot agree to undertake representation in these matters. Nor could the attorney agree in advance to accept a matter without knowing whether it will involve the attorney in a matter beyond his or her competence. Likewise, if the attorney did not have adequate time to devote to a matter, representation would not be warranted. Finally, some representations may involve a possible conflict of interest, either with other current or former clients, or with the attorney's own interests, and such a representation would be ethically impermissible.

More importantly, participation in the organization would run afoul of DR 2103(B), which provides:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization. . . .

Qualified legal assistance organizations are defined in DR 1103(D) and the organization is not one that is exempt from the prohibition of DR 2103(B).

Because the attorney is required to pay substantial dues to the organization in exchange for membership that entitles the attorney to referrals from other members and is required to make referrals to these members, the attorney would be transferring something "of value" in order to obtain referrals, which is prohibited by DR 2103(B). *See* N.Y. State 566 (1984) (lawyer may not pay a real estate brokerage firm to endorse or recommend the lawyer); Nassau County Op. 978 (1997) (precluding a lawyer from entering into a "mutual referral relationship" with a health care organization because it constitutes "a thing of value" received for referrals); N.Y. State 524 (1980) (lawyer may not donate legal services to charitable organization for fundraising auction because the lawyer would be directing his or her fee to the organization in return for obtaining employment by a client); *see also* N.Y. State 691 (1997) (lawyer permitted to make charitable donation to nonprofit organization that provides clients with a referral list of attorneys only so long as the donation is clearly intended to be charitable and not part of a tacit arrangement of compensation in exchange for referrals); N.Y. State 659 (1994) (lawyer may permit car dealer to distribute materials that includes lawyer's advertising so long as lawyer does not pay car dealer a fee).

Finally, the organization's materials tout the benefits of "word of mouth" advertising. They state that belonging to the organization is "like having dozens of sales people working for you because all the other members carry several copies of your business cards around with them. When

they meet someone new who could use your products or services they hand your card out and recommend your services." DR 2103(A) prohibits a lawyer from engaging in in-person solicitation, other than from a close friend, relative, client or former client. DR 1102(A)(2) prohibits a lawyer from circumventing a Disciplinary Rule through actions of another. It is ethically permissible for a lawyer to ask another person to hand out his or her business card, without stating more. See N.Y. State 659 (1994). If, however, the other members of the organization (to whom the attorney must make referrals) are encouraged to recommend the lawyer's services orally, this oral conversation might violate the Code. *See, e.g.*, *In re Alessi*, 60 N.Y.2d 229 (1983); *In re Greene*, 54 N.Y.2d 118 (1981) (referral arrangement between lawyer and real estate broker).

CONCLUSION:

A lawyer may not participate in a business networking organization that requires the lawyer to refer clients to other members in exchange for their referral of legal business.

(16-01)

OPINION 742 (05/25/2001)

TOPIC: Confidentiality; Duty to report violations of law

DIGEST: Lawyer who learns in the course of representing client that a third party non-lawyer has violated applicable law may not report same if the information would be protected as a confidence or secret of the client.

CODE: DR 1-103; DR 1-105(A), (B); DR 4-101(A), (C); DR 7-102 (B)

QUESTION:

The inquirer is an attorney admitted in New York and working overseas for a private company. In the course of employment, the inquirer has come across information indicating that a party (not a lawyer) with whom the inquirer's employer has a business arrangement engaged in a violation of law in connection with obtaining an agreement to which the employer and the third party are two of the contracting parties. Although the inquirer worked on the agreement that is the subject of the inquiry, the inquirer's services were not involved in the violation of law that occurred. No other lawyer was involved, and the matter has not been presented to any tribunal. Does the inquirer have an obligation to report the violation of law where the malfeasor is not the client?

OPINION:

Although the inquirer is employed overseas, as an attorney admitted in New York the attorney is subject to the New York Lawyer's Code of Professional Responsibility (the "Code"). *See* DR 1-105(A) (lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs). Whether the rules of professional conduct that would be applied are those of New York or some other jurisdiction depends on whether the lawyer is also admitted in another jurisdiction and, if so, the place where the lawyer "principally practices" or where the lawyer's conduct has its "predominant effect." *See* DR 1-105(B)(2).

Because questions of law are beyond this Committee's jurisdiction, we are unable to advise whether the inquirer would have any legal duty to report a particular violation of law and, if so, to whom.[7] On the facts presented, we cannot identify any ethical obligation to report a violation of law. A lawyer's reporting obligations under the Code are found in DR 1-103, concerning conduct of another lawyer or judge, and in DR 7-102, concerning fraud upon a person or tribunal. The former provision is not applicable because the facts presented in the inquiry do not involve the conduct of another lawyer or a judge. DR 7-102(B)(1) is applicable to situations where a lawyer's client has perpetrated a fraud in the course of the representation, which is not the case here. Finally, DR 7-102(B)(2) is applicable to a lawyer who receives information "clearly establishing" that a person other than the client "has perpetrated a fraud upon a tribunal." The terms "fraud" and "tribunal" are defined in the "Definitions" section of the Code. Specifically, the term "tribunal" is defined to include "all courts, arbitrators and other adjudicatory bodies." Regardless of whether the conduct described would amount to a "fraud" within the meaning of the Code, it did not involve a tribunal and the

7 Likewise, the Committee has no authority to determine whether particular conduct amounts to a violation of law. For purposes of responding to this inquiry we assume that, as reported in the inquiry, such a violation has occurred.

inquirer accordingly would have no obligation to report same under DR 7-102(B)(2). *See also* N.Y. State 523 (1980) (limiting DR 7-102(B)(2) to "information bearing upon a fraud committed in a proceeding where the lawyer's professional services are, or have been, employed)."

Indeed, the inquirer may be prohibited under the Code from reporting to a law enforcement authority the information acquired. DR 4-101 of the Code prohibits a lawyer from revealing or using to its disadvantage confidences or secrets of a client. As used in the Code, the term "secrets" refers to information gained in the professional relationship the disclosure of which "would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A). The information need not be obtained *from* the client to constitute a secret; it is enough that it was "gained in the professional relationship." Accordingly, information regarding a violation of law committed by a third party in the course of obtaining a business agreement with a client may be protected from disclosure as a "secret" if disclosure would be detrimental to the client. *Cf.* N.Y. State 523 (1980) (construing DR 7-102(B)(2); "lawyers should not be required to reveal frauds committed by persons other than their clients when the information would otherwise be protected as a client confidence or secret under Canon 4"). Even if a "secret," the information may be disclosed if it satisfies the "future crime" exception embodied in DR 4-101(C)(3) (permitting a lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime"). Because this Committee does not decide questions of law, we express no opinion on whether disclosure would be permitted under this rule.

CONCLUSION:

A lawyer who receives information that a third party engaged in a business arrangement with a client may have violated the law in the course of obtaining that arrangement may not report the violation to a law enforcement authority if the information is protected as a confidence or secret.

(48-00)

OPINION 743 (05/25/2001)

TOPIC: Labor union; lawyer for organization.

DIGEST: Union attorney who represents union member in an arbitration proceeding must keep union member's confidences. Union attorney who represents union in grievance proceeding under collective bargaining agreement must make clear to union member who is the subject of the proceeding that union member is not the client and that union member's disclosures will not be kept in confidence; having done so, attorney may share disclosures with union and, at union's direction, may distribute arbitrator's decision.

CODE: DR 4101(A), (B) and (C)(1); 5107(B); 5108(A)(2);5109(A)

QUESTION:

Many unions employ attorneys to conduct arbitration proceedings for the benefit of union members who were disciplined by their employers. Depending on the context, the party to the proceeding may be the union or the union member.

In some contexts, the employee and the employer are the parties to the proceeding. This is true, for example, where the arbitration concerns disciplinary charges against a public sector employee under Civil Service Law §75. In that event, the union furnishes and pays the attorney for the employee, but the employee is the client.

In other contexts, although the subject of the arbitration is disciplinary charges against a union member, the union and the employer are the parties to the proceeding. This may be true of proceedings involving either public or private sector employees where a collective bargaining agreement ("CBA") between the union and the employer so provides. In that event, the union has a duty of fair representation but is nevertheless the party to the arbitration. Although the union's lawyer is seeking to protect the union member's interests under the CBA, the lawyer is nevertheless a lawyer for the union, and not necessarily the union member. Ordinarily, to represent the union effectively, however, the union's attorney must communicate with the union member and learn information from the union member concerning the subject of the proceeding.

After hearing testimony and receiving other evidence at the arbitration, the arbitrator transmits his or her decision to the attorney for each party. Depending on the forum, the arbitrator 's decision may also be transmitted to the Public Employment Relations Board, the American Arbitration Association, the Federal Mediation and Conciliation Service or some similar agency. Traditionally, arbitration awards become part of the history of the CBA and may have precedential value both to the union and to the employer.

After the arbitrator issues a decision, may the attorney distribute copies of the decision to other union members if requested to do so by the union?

OPINION:

Under DR 4101, the union attorney has a duty to protect the "confidences" and "secrets" of the attorney's client. The terms "confidence" and "secret" are defined in DR 4101(A) as follows:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

The arbitrator's decision is unlikely to contain client confidences, since the attorney-client privilege will not apply to testimony and evidence introduced at the arbitration. However, the decision is likely to include "secrets" of the client. As discussed below, the critical question in this context is, who *is* the client of the union attorney?

Duty of confidentiality where the employee is the party

When the employee is the party to the arbitration, the union's attorney represents the employee and, thus, owes the employee a duty of confidentiality under DR 4101. This is true notwithstanding that the union supplies and pays the attorney for the employee; indeed, DR 5107(B) specifically provides that when a third party pays the lawyer's fee, the lawyer may not allow that third party to compromise the lawyer's duty to maintain the confidences and secrets of the client. This is comparable to the situation discussed in our earlier opinions where an attorney is retained by an insurance carrier to represent a policyholder. In that situation, the policyholder is the client, and the lawyer must preserve the policyholder's confidences and secrets. *See, e.g., Feliberty v. Damon*, 72 N.Y.2d 112, 120, 531 N.Y.S. 2d 778, 782 (1988); N.Y. State 716 (1999); N.Y. State 721 (1999); N.Y. State 73 (1968); DR 5107(B).

Because the employee is the client in this context, the lawyer may not disclose the employee's "confidences" and "secrets" without the employee's consent. Although the lawyer has disclosed the employee's "secret" in the arbitration proceeding, that information continues to be a "secret" under DR 4101 "if the client has requested [it] be held inviolate or the disclosure of [the information] would be embarrassing or would be likely to be detrimental to the client," unless the information has become generally known. Therefore, the lawyer may not disclose the information outside the arbitration hearing without the client's consent. *Cf.* N.Y. State 721 (1999). Accordingly, whether or not the arbitration decision is a publicly available document, if it contains the union member's secrets, the attorney may not provide it in full to the union or circulate it in full to other union members or to the union without the union member's consent. DR 4101(B); DR 5108(A)(2); N.Y. State 721 (1999). If it is possible to redact the decision so that the employee is not directly identified and cannot conceivably be identified indirectly from the unredacted portions of the decision, however, it may be possible to distribute a copy that is so redacted. *See* N.Y. State 718 (1999).

Duties where the union is the party

In some situations, the CBA between the union and the employer provides the union with control of a "grievance"–that is, an allegation that a CBA has been improperly interpreted or applied, such as the failure to comply with provisions regarding the treatment of an individual or group of individuals, as in the case of discipline or discharge. The union (and not the individual union member)

is the formal party initiating, pursuing and resolving the grievance. *See* Archibald Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 62730 (1956). In this context, the union is the attorney's client. Union attorneys who interact with bargaining unit members do not always make clear, however, that they represent the union exclusively. *See generally* Russell G. Pearce, *The Union Lawyer's Obligations to Bargaining Unit Members*: *A Case Study of the Interdependence of Legal Ethics and Substantive Law*, 37 S. Tex. L. Rev. 1095, 111214 (1996).

When the union's lawyer fails to make it unambiguously clear to the employee that the employee is not a client, the employee may disclose information to the lawyer under the mistaken belief that the lawyer represents the employee as well as the union and the mistaken belief that the lawyer will keep any confidences and secrets. If the lawyer fails to dispel that understanding and interacts with the employee in a manner that makes the understanding reasonable, the lawyer may inadvertently create a lawyer-client relationship with the employee at least for purposes of DR 4101 if not for all purposes. *See generally* Restatement (Third) of the Law Governing Lawyers §14, Comment e. Therefore, at the outset of their discussions, the lawyer must fully explain to the employee the relationship between the lawyer, the employee and the union, including that information imparted by the employee may be disclosed by the attorney to the union and shared by the union with its other members. *Cf.* DR 5109(A). Among other things, the lawyer should advise the union member of the union's practice (if it exists) of distributing the arbitrator's decision to other union members.

Whether, having done that, the lawyer still owes "derivative duties" to the employee is a matter of law that we cannot answer as it is beyond our jurisdiction. We are unaware of any contractual or legal duty that the union owes to its member to preserve the confidentiality of information imparted by the member to the union's attorney, and the inquirer has not advised us that such a duty exists. However, if the CBA or some other agreement or provision of law requires the union to preserve the employee's confidences and secrets, then the lawyer would ordinarily have a duty to do so as well, as an agent of the union. *Cf.* Pearce, *supra*, at 111517.

Assuming that the union itself has no confidentiality obligation to the employee, then the lawyer has none either, so long as the lawyer has made it clear to the employee that the lawyer does not represent the employee and that whatever is told to the lawyer may be shared with the union. In that event, the union may determine whether to direct the lawyer to distribute the decision of the arbitrator and the lawyer may comply. As a matter of good practice, however, the lawyer should consider advising the union of the possibility of distributing a redacted version that avoids identifying the employee directly by name or indirectly by the facts.

CONCLUSION:

For the reasons stated above, when an in-house or staff attorney is employed by the law department of a labor union to represent a union member in an arbitration in which the member is a party, the attorney owes the member a duty of confidentiality and therefore may not disseminate copies of an arbitration decision that contains the member's secrets. When the attorney represents the union as a party pursuant to a collective bargaining agreement, the attorney must make clear to the union member that the attorney represents only the union and that information imparted by the member may be shared with the union and disseminated more broadly at the union's direction; having done so, the attorney may distribute copies of the arbitration decision if directed to do so by the union. (8-01)

OPINION 744 (05/25/2001)

TOPIC: Litigation costs

DIGEST: When plaintiff retains lawyer to bring multiple lawsuits, plaintiff must ultimately be responsible for all litigation expenses, but lawyer may agree that expenses arising from unsuccessful lawsuits will be paid out of recoveries obtained in successful lawsuits, provided the total amount recovered is greater than the total cost of litigation.

CODE: DR 5103(B)

QUESTION:

While representing a plaintiff in multiple lawsuits (e.g., collection matters) pursuant to a single retainer agreement, may an attorney agree that the recoveries obtained on successful claims will be used to offset litigation costs associated with unsuccessful lawsuits?

OPINION:

The inquiry is governed by DR 5103(B), which establishes the client's ultimate responsibility for the costs of litigation. DR 5103(B) provides that "[a] lawyer may advance or guarantee the expenses of litigation . . . provided the client remains ultimately liable for such expenses."

As long as there are sufficient funds recovered on successful claims to offset the expenses associated with the unsuccessful claims, the proposed arrangement would not violate DR 5103(B) because the client would then bear the ultimate responsibility for litigation costs. The lawyer's understanding with the client must provide, however, that if the total costs and expenses of litigation exceed the amounts recovered on the client's claims, the client will be responsible to pay the difference.

CONCLUSION:

When a plaintiff retains a lawyer to bring multiple lawsuits, the plaintiff must be ultimately responsible for all litigation expenses, but the lawyer may agree that expenses arising from unsuccessful lawsuits will be paid out of recoveries obtained in successful lawsuits, provided the total amount recovered is greater than the total cost of litigation.

(13-01)

OPINION 745 (07/18/2001)

TOPIC: Conflict of Interest; referral fee

DIGEST: A lawyer who is disqualified from a matter on non-consentable conflict of interest grounds may not receive a referral fee. A lawyer with a consentable conflict of interest who nevertheless refers the matter to another attorney may receive a referral fee.

CODE: DR 2-107(A) and (D); DR 6-101

QUESTION:

When a lawyer is disqualified from a matter due to a conflict of interest, may the disqualified lawyer receive a referral fee from the lawyer to whom the matter is referred? Would the result be any different if the conflict were consentable by the client?

OPINION:

From the time the New York Lawyers' Code of Professional Responsibility was adopted until it was significantly amended in 1990, DR 2-107(A) prohibited a lawyer from receiving a referral fee merely for "forwarding" a matter to another lawyer. In its pre-amendment form, the Code allowed a lawyer to divide fees with a lawyer in another firm only "in proportion to the services performed and responsibility assumed by each" *See* N.Y. State 535 (1981) (citing DR 2-107[A] before the 1990 amendments). The amended version of DR 2-107(A), however, now permits a division of legal fees where the following three conditions are satisfied:

> (1) The client consents to employment of another lawyer after a full disclosure that a division of fees will be made.
>
> (2) The division is in proportion to the services performed by each lawyer or, *by a writing given the client, each lawyer assumes joint responsibility for the representation*.
>
> (3) The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client.
>
> (Emphasis added).
>
> Similarly, EC 2-22 provides:
>
> Without the consent of the client, a lawyer should not associate in a particular matter another lawyer outside the lawyer's firm. A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed by each lawyer or, *by a writing given to the client, each lawyer assumes joint responsibility for the representation* and if the total fee is reasonable.
>
> (Emphasis added).

In our view, where a lawyer is unable to assume *sole* responsibility for a matter due to a conflict of interest, that lawyer is also disqualified from assuming *joint* responsibility and, therefore, the referring lawyer may not accept a referral fee from the receiving lawyer. *See*, Nassau County Bar Op. 98-07 (1998) (an attorney who is barred from handling a matter due to a conflict of interest may not share in the fee for that matter after the attorney refers the matter to another lawyer); *accord,* ABA Informal Op. 1088 (1968); Florida Ethics Op. 89-1 (1989); Illinois Advisory Op. 9026 (1990); The State Bar of Michigan Standing Committee on Professional and Judicial Ethics RI-116 (1992); N.J. Ethics Op. 629 (1989); Philadelphia Ethics Op. 89-12 (1989); Virginia Ethics Op. 1160 (1988); *but see,* Iowa Ethics Op. 87-32 (1988). Without now deciding what the precise contours of joint responsibility are, we conclude that joint responsibility is more than financial accountability and malpractice liability.

This leaves one remaining issue for our consideration. There are a variety of factual circumstances in which a lawyer may accept or continue employment notwithstanding a conflict of interest. *See, e.g.,* DR 5-101(A) ("A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.") In the case of such a "consentable" conflict, if the lawyer nonetheless chooses to refer the matter – for example, to a more skilled or experienced practitioner in conformity with DR 6-101(A)(1) – we see no reason why the referring lawyer may not ethically receive a referral fee from the receiving lawyer, provided the standard for obtaining client consent is fully met.

CONCLUSION:

A disqualified lawyer cannot assume "joint responsibility" for a matter and therefore, may not be paid a referral fee, unless the referring lawyer obtains client consent under the same standard that would have allowed the lawyer to accept or continue "sole responsibility" for the matter.

(20-00)

OPINION 746 (07/18/2001)

TOPIC: Representing incapacitated client; petitioning for appointment of guardian; attorney-in-fact under durable power of attorney; representation of oneself as attorney-in-fact/petitioner

DIGEST: Lawyer serving as client's attorneyinfact may not petition for appointment of guardian without client's consent unless lawyer determines that client is incapacitated, that there is no practical alternative through use of power of attorney or otherwise to protect client's best interests, and that no one else is available to serve as petitioner. Subject to conflict of interest restrictions, lawyer may represent self in proceeding if client does not oppose petition and lawyer will not be a witness.

CODE: DR 4101, DR 5101, DR 5102(A), DR 5105(A), DR 5108(A), EC 711, EC 712

QUESTION:

When an attorney, who has been named by a client as attorney-in-fact in a durable power of attorney, later determines the client is no longer competent to handle his or her own affairs, may the attorney petition for appointment of a guardian and, if so, may the attorney represent him- or herself (as petitioner) in the guardianship proceeding?

LEGAL BACKGROUND:

Durable Power of Attorney

In 1975, the New York legislature amended the law relating to powers of attorney to permit the granting of a power which would remain in full force even after the grantor became incompetent.[8] This enables individuals to plan for the possibility of future disability by designating persons of their choice to manage their financial affairs[9] This "durable" power was seen as a means of handling matters that might otherwise require the expense, delay, inconvenience and possible embarrassment of having a court appoint a guardian who might be unknown to the grantor. The statute provides a detailed form for the granting of a number of specific and general powers which vest the grantee with a virtually alter-ego status for the grantor. There are some limitations not pertinent to this opinion.[10] Although the power to retain an attorney in the future is not among the specific powers listed in the statutory form, neither does the statute specifically prohibit the retention of an attorney by the attorney-in-fact.

Guardianship under Article 81 of the Mental Hygiene Law

Article 81 of the Mental Hygiene Law was enacted in 1993. The statute allows for the judicial appointment of a legal guardian for one's personal needs, property management or both,[11] when a

8 N.Y. Gen. Oblig. Law §5-1501 *et seq*.

9 1988 Recommendations of the Law Revision Commission.

10 The form does not authorize the making of medical or other health care decisions. N.Y. Gen. Oblig. Law §51501. Also, the agent cannot perform acts which, by their nature, by public policy or by contract, require personal performance. *Zaubler v. Picone*, 100 A.D.2d 620 (2d Dept 1984). Examples are voting and commencing a divorce action in behalf of the principal.

11 N.Y. Mental Hyg. Law § 81.02(a).

person is incompetent to conduct his or her own affairs.[12] The statute contemplates a system which is tailored to meet the specific needs of the individual by taking into account the personal wishes, preferences and desires of the alleged incapacitated person. The guardian is to engage in the least restrictive form of intervention, consistent with the concept that the needs of persons with incapacities are as diverse and complex as they are unique to the individual.[13]

There is a two-pronged test to determine whether a guardian should be appointed. First, the court must consider all of the evidence, including the report of a "court evaluator," and the sufficiency and reliability of all available resources.[14] Included among the "resources" to be considered is a valid power of attorney.[15] Second, the individual must agree to the appointment or must be incapacitated.[16] A determination of incapacity must be based on clear and convincing evidence that the person is likely to suffer harm because he or she is unable to provide for his or her personal needs and/or property management and cannot adequately understand and appreciate the nature and consequences of this inability.[17]

A guardianship proceeding may be brought by one of seven different categories of persons or entities, including "a person otherwise concerned with the welfare of the person alleged to be incapacitated."[18] The court is authorized to award legal fees to the petitioner's counsel, payable from the assets of the incompetent individual.[19]

An attorney-in-fact is required to account to a later-appointed guardian during the continuance of the appointment, notwithstanding the durable nature of the power.[20] It is not clear from New York statutes whether the guardian has the power to revoke a durable power of attorney,[21] although the uncertainty is not germane to this inquiry. The differing and seemingly overlapping roles of the attorneyinfact and Article 81 guardian cause some confusion, but the statute contemplates dismissal of a petition for appointment of a guardian where it is determined that the alleged incapacitated person had, in lucid times, carefully thought out and provided for how his or her affairs might be handled under such circumstances. The existence of a durable power of attorney can be a factor in such a dismissal.[22]

12 *Id.* §81.06, *et seq.*

13 *Id.* §81.01.

14 *Id.* §81.02(a).

15 *Id.* § 81.19(d). "In making any appointment under this article the court shall consider: 1. any appointment or delegation made by the person alleged to be incapacitated in accordance with the provisions of section 51501 . . . of the general obligations law . . ."

16 *Id.* § 81.02(a)(2).

17 *Id.* § 81.02 (b).

18 *Id.* § 81.06(a)(1).

19 N.Y. Mental Hyg. Law § 81.16(f).

20 N.Y. Gen. Oblig. Law § 51505(2).

21 N.Y. Mental Hyg. Law § 81.22(b), prohibits a guardian from revoking a power granted under General Obligations Law §51501, but section 51505(2) provides that the guardian "shall have the same power such principal would have had if he or she were not disabled or incompetent to *revoke, suspend or terminate all or any party of such power of attorney*" (emphasis added). At least one court has acknowledged the conflict. *See Rochester General Hospital (Levin)*, 158 Misc. 2d 522, 529 (S. Ct. Monroe Co. 1993).

22 *See, e.g., Matter of Crump (Parthe),* 640 N.Y.S. 2d 147, *vacated and withdrawn* 230 A.D. 850 (2d Dep't 1996) (alleged incapacitated person made valid power of attorney and health care proxy).

OPINION:

May the attorney-in-fact petition for the appointment of a guardian?

For the reasons discussed below, the lawyer who serves as the client's attorney-in-fact may petition for the appointment of a guardian without the client's consent only if the lawyer determines that the client is incapacitated and that there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests.

Although no disciplinary rule of the Code expressly addresses the representation of an incapacitated client, the obligations of lawyers representing clients with questionable capacity are addressed by ECs 7-11[23] and 7-12.[24] Additional guidance is afforded by various opinions of bar association ethics committees in the state, *see, e.g.,* N.Y. City 1997-2; N.Y. City 19877; Nassau County 98-2, and in the secondary literature. *See, e.g.,* Nancy M. Maurer & Patricia W. Johnson, "Ethical Conflicts in Representing People With Questionable Capacity," in *Representing People With Disabilities* (N.Y.S. Bar Ass'n, 2d ed. 1997); Association of the Bar of the City of New York, Committee on Professional Responsibility, "A Delicate Balance: Ethical Rules for Those Who Represent Incompetent Clients," 52 *The Record* 34 (1997) ("A Delicate Balance"). Additionally, guidance may be found in the literature on legal ethics outside New York. *See, e.g., Annotated Model Rules of Professional Conduct* ("*Annotated Model Rules*") 20927 (4th ed. 1990) (annotation to Rule 1.14 of ABA Model Rules of Professional Conduct); Restatement (Third) of the Law, The Law Governing Lawyers ("Restatement"), §24 (2000). The following general principles emerge from this material.

The lawyer-client relationship is an agency relationship that is ordinarily created by express or implied agreement between the lawyer and client. *See* Restatement, *supra,* §14. Therefore, the client must ordinarily have the capacity to enter into this agreement, *id.* §14, comment d, and to determine the objectives of the representation. *Cf.* EC 7-7; DR 7-101(A)(1). Under agency principles, a lawyer's authority to act for the client would ordinarily terminate upon the client's permanent, total incapacity as it would upon the client's death, but this is not invariably true. *See* Restatement, *supra*, §31, com-

23 EC 711 provides: "The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, . . . Examples include the representation of an illiterate or an incompetent . . . ."

24 EC 712 provides:

> Any mental or physical condition that renders a client incapable of making a considered judgment on his or her own behalf casts additional responsibilities upon the lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, the lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his or her interests, regardless of whether the client is legally disqualified from performing certain acts, the lawyer should obtain from the client all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for the client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of the client. But obviously a lawyer cannot perform any act or make any decision which the law requires the client to perform or make, either acting alone if competent, or by a duly constituted representative if legally incompetent.

ment e. In court proceedings, for example, it may be appropriate for a lawyer to continue to represent the totally incapacitated client in order to protect his or her interests.[25]

In the course of representing a client, a lawyer generally "must provide independent, zealous and competent representation and must preserve the client's confidences in accordance with the provisions of the Code of Professional Responsibility." N.Y. City 1997-2. This is true even where, because of the client's age or mental condition, the client's ability to participate fully in making decisions relating to the representation is impaired. *Id.* When representing a client whose ability to make considered decisions is impaired, the lawyer "must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and act in the best interests of the client." Restatement, *supra*, §24(1). This includes a responsibility to "maintain the flow of information and consultation as much as circumstances allow," including, where it will be helpful, through "the use of a relative, therapist, or other intermediary." *Id.* §24, comment c. Although the lawyer may accept direction from those who are legally authorized to direct the representation on behalf of the client, the lawyer's ultimate responsibility is to the client. *See* N.Y. State 371 (1975); *cf.* N.Y. State 698 (1998).

The lawyer's responsibilities may vary, however, depending on the client's age or mental condition. EC 7-11. Further, the lawyer may have additional responsibilities when "[a]ny mental or physical condition . . . renders a client incapable of making a considered judgment on his or her own behalf," including a responsibility "in court proceedings to make decisions on behalf of the client." EC 7-12. The lawyer may not, however, "perform any act or make any decision which the law requires the client to perform or make, either acting alone if competent, or by a duly constituted representative if legally incompetent." *Id.*[26]

As ECs 7-11 and 7-12 reflect, there is generally no bar to representing a client whose decision making capacity is impaired, but who is capable of making decisions and participating in the representation. Insofar as the client is making reasoned decisions concerning those matters that are for the client to decide and these decisions appear to be in the client's best interests, there would ordinarily be no need for the lawyer even to consider withdrawing from the representation or seeking the appointment of a guardian who would substitute his or her judgment for that of the client. When a client's capacity to make decisions is impaired, seeking to withdraw is generally seen as the least satisfactory response because doing so leaves the client without assistance when it is most needed. *See Annotated Model Rules, supra*, at 225 (citing authority). Seeking the appointment of a guardian or conservator over the client's objection is also generally to be avoided if possible. Often, notwithstanding his or her impairment, the client will be capable of making those decisions relating to the representation that are

25 According to the Restatement:

> The general rule . . . may be inappropriate as applied to a lawyer's beneficial efforts to protect the rights of an incapacitated client. Such a client continues to have rights requiring protection and often will be able to participate to some extent in the representation. . . . If representation were terminated automatically, no one could act for a client until a guardian is appointed, even in pressing situations. Even if the client has been adjudicated to be incompetent, it might still be desirable for the representation to continue, for example to challenge the adjudication on appeal or to represent the client in other matters. Although a lawyer's authority therefore does not terminate automatically in such circumstances, the lawyer must act in accordance with the principles of § 24 [dealing with a client with diminished capacity] in exercising continuing authority.

Restatement, *supra* § 31, comment e.

26 There is disagreement about the scope of this limitation; for example, authorities disagree as to whether or not, in a court proceeding, a lawyer may settle a case when the client lacks capacity to do so. Maurer & Johnson, *supra*, at 1-7 & n.41.

entrusted to the client. *See* Restatement, *supra*, §24 comment c ("Disabilities in making decisions vary . . . ; they may impair a client's ability to decide matters generally or only with respect to some decisions at some times"), *quoted with approval in* N.Y. City 1997-2. Even where the client is incapable of making necessary decisions, however, it will often be preferable not to seek the appointment of a guardian because doing so would be "embarrassing for the client," Restatement, *supra*, §24 comment b, or "too expensive, traumatic, or otherwise undesirable or impractical in the circumstances." *Id.* § 24 comment d.

Thus, seeking a guardian is appropriate only in the limited circumstances where "a client's diminished capacity is severe and no other practical method of protecting the client's best interests is available." *Id.* §24 comment e. *Accord* "A Delicate Balance," *supra*, at 43 (noting "the almost universal view . . . that guardianships, though occasionally necessary, are often quite onerous: they may drain the client's estate, result in protracted legal proceedings, and substitute the judgment of a total stranger for those of the client, the client's family, and the client's personal attorney"); ABA Formal Op. 96-404 (1996) ("The appointment of a guardian is a serious deprivation of the client's rights and ought not be undertaken if other, less drastic solutions are available."); Recommendations of the Conference on Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 989, 991 (1994) ("Recommendations") ("The lawyer should refer or petition for guardianship of the client only if there are no appropriate alternatives."). In such drastic circumstances, notwithstanding the duty of confidentiality imposed by DR 4-101, the lawyer may reveal client confidences and secrets to the limited extent necessary to protect the client. *See* N.Y. City 1987-7 (1987) (when the client is unable to care for him- or herself or property because of alcoholism, and will face financial, if not personal, ruin as a result, the lawyer may disclose confidences to the court in seeking appointment of a conservator, but should seek the court's permission to do so in camera and under seal), *discussed in* Maurer & Johnson, *supra*, at 1-16.

When a question arises concerning the client's capacity, "[c]lients with disabilities should be presumed capable of making decisions and participating in the lawyer-client relationship." Maurer & Johnson, *supra*, at 1-9. In determining whether the client has the capacity to direct the representation, "the lawyer must take account not only of information and impressions derived from the lawyer's [communications with the client], but also of other relevant information that may reasonably be obtained, and the lawyer may in appropriate cases seek guidance from other professionals and concerned parties." N.Y. City 19972; *see generally* Recommendations, *supra*, 62 Fordham L. Rev. at 991.

In light of these general principles, it appears that seeking appointment of a guardian without the client's informed consent will be proper only if the lawyer believes the client is incapacitated, the lawyer cannot adequately protect the client's interests by using the power granted in the durable power of attorney, and there is no other practical alternative that is less restrictive. *See* Recommendations, *supra*, 62 Fordham L. Rev. at 991 (recommending the following as examples of protective actions that the lawyer may take as a preferable alternative to petitioning for guardianship the following: involving family members, use of durable powers of attorney, use of revocable trusts, referral to private care management, referral to longterm care ombudsman, use of care and support systems, referral to disability support groups, and referral to social services or other government agencies). As discussed above, Article 81 favors the least intrusive intervention available to meet the personal and financial needs of a person alleged to be incapacitated; in fact, courts construing that statute have penalized persons for bringing frivolous Article 81 petitions when other resources could be used to

meet the client's needs.[27] Assuming that the client has sufficient assets and a valid power of attorney, the holder of the power of attorney may be able to meet the personal and financial needs of the incapacitated client by hiring necessary personnel to care for those needs, including taking the step of applying for admission to a nursing home under the broad powers of the durable power of attorney.[28] Absent sufficient assets, public assistance may be brought to bear in the process of applying for admission to a nursing home. If there is no valid health care proxy, there is a provision in the statute to bring a proceeding for the appointment of a limited guardian to handle the health care needs of the person whose needs are at issue.[29] In sum, the appointment of a guardian should be sought only where necessary and, in many situations, the lawyer's ability to continue to exercise the power of attorney will make the appointment of a guardian unnecessary.

Finally, even if petitioning for appointment of a guardian is warranted, the lawyer who serves as both lawyer and attorney-in-fact for the client is not necessarily the preferable person to serve in the additional role as petitioner under Article 81. Rather, unless the client consents, "[t]he lawyer should act as petitioner only of there is no one else available to act." Recommendations, *supra*, 62 Fordham L. Rev. at 991. Thus, the lawyer should initially ascertain whether a family member, friend, or other concerned individual is available to serve in that role.

May the attorney represent him- or herself as petitioner in the guardianship proceeding?

If the lawyer currently represents the client, and the client opposes the appointment of a guardian, then the lawyer may not also represent him- or herself (or anyone else) as petitioner in an Article 81 proceeding. Doing so would place the lawyer in a position where he or she is advocating on behalf of one client (the petitioner) in opposition to another current client, thereby creating an impermissible conflict of interest under DR 5-105(A). Indeed, in that event, the client might well expect to receive the attorney's assistance in *opposing* the guardianship petition. Even if the alleged incapacitated person was formerly a client but is no longer one, if he or she objects to the appointment of a guardian the lawyer may be barred by DR 5-108(A) from representing him- or herself (or anyone else) as petitioner, since the current representation would likely be adverse to a former client in a matter substantially related to the subject of the former representation. In that event, as attorney-in-fact, the lawyer should retain separate counsel to process the Article 81 matter.

If the client does not object to appointment of a guardian, the attorney may be forbidden from serving as a lawyer in the guardianship proceeding if there will be a contested hearing under Article 81 on the issue of client incompetence and it is obvious that the attorney would be called as a *witness* in the Article 81 hearing on that issue. In that event, too, the lawyer should retain separate counsel to process the Article 81 matter. DR 5-102(A); N.Y. State 635 (1992).

27 See, for example, *Matter of Crump (Parthe),* 640 N.Y.S. 2d 147, *vacated and withdrawn* 230 A.D. 2d 950 (2d Dep't 1996), where the court ordered the earlier appointed guardian to return the property to the alleged incapacitated person and required the petitioner to pay the guardian's compensation, her own legal fees, the fees of the court evaluator and those of her expert. The court found that the alleged incapacitated person had sufficient assets and valid durable power of attorney and health care proxy.

28 *Cf. Matter of Maher*, 207 A.D. 2d 133 (2d Dept 1994) (affirming trial court's determination that there was no need for an appointed guardian for property management pursuant to Article 81, because the allegedly incapacitated person's attorney had the client's power of attorney).

29 N.Y. Mental Hyg. Law §81.22 (a)(8).

If the client does not oppose the guardianship petition and the lawyer will not serve as a witness, then we are aware of no categorical ethical restriction against the attorney-in-fact representing him- or herself as petitioner in the Article 81 proceeding. Although serving in the dual role means that there is no independent individual client to whom the lawyer is accountable, given other safeguards, we do not believe that this in itself makes the dual role impermissible. For example, while there is an absence of accountability (when an attorney-in-fact hires him- or herself) concerning the extent of attorney fees in processing the Article 81 matter, the court will oversee the reasonableness of such fees. Mental Hygiene Law Sec. 81.16 (f) (". . . court may award reasonable compensation for the attorney for the petitioner . . ."). While there would also be an absence of client scrutiny of the attorney's conduct when the petitioner in the proceeding is not another competent person or entity,[30] once the petition is presented, the court must appoint a "court evaluator," whose duties include consulting with the person alleged to be incapacitated, determining whether the person wishes separate legal counsel, investigating and reporting to the court as to the nature of the incapacity and what action should be taken.[31]

The lawyer must consider whether the lawyer's own interests, including any interests arising out of the role as attorneyinfact, may reasonably affect the lawyer's exercise of professional judgment as lawyer in the Article 81 proceeding, in which event there may be an impermissible conflict of interest under DR 5101. However, we conclude that when one petitions under Article 81 in one's role as attorneyinfact, the dual role as attorneyinfact and lawyer for oneself as attorneyinfact does not give rise to a conflict *per se*. Although we are unaware of any prior ethics opinions precisely on point, we note that, in other contexts, lawyers have been permitted to serve in a fiduciary capacity and, at the same time, to represent themselves as fiduciaries. *See, e.g.*, N.Y. State 610 (1990) (observing that "it is not improper under the Code for a lawyer-draftsman to serve as executor of a will so long as the decision to nominate the attorney is the product of the client's own free will."); N.Y. State 471 (1977) (opining that it would be ethically proper for an attorney to serve as a receiver in a mortgage foreclosure action and retain the attorney's firm as counsel for the action). Moreover, although this committee cannot offer opinions on questions of law, we note that we are unaware of any legal restraint on a person holding both attorneyinfact and attorney at law roles.[32]

Finally, as a matter of sound practice, this problem should be considered and addressed with the client at the time the power of attorney is drafted. Ideally, the lawyer and client will make provisions concerning the client's future incapacity, including the possible need to retain counsel for an Article 81 proceeding and whether the attorney will serve as counsel in the proceeding.[33]

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30 The proceeding may be brought by seven different categories of persons or entities, including "the person alleged to be incapacitated", or "a person otherwise concerned with the welfare of the person alleged to be incapacitated." Entities include the department of social services, a hospital, a school, and a residential health care facility. *Id.* §81.06.

31 *Id.* §81.09.

32 2A N.Y. Jur. 2d §19, citing *Ginsberg. v. Brody*, 185 N.Y.S. 46 (N.Y. App. Term 1920).

33 One can add provisions to the statutory form of durable power of attorney if they are not inconsistent with other provisions of the statutory short form. N.Y. Gen. Oblig. Law §51503. While the naming of an attorney to conduct an Article 81 proceeding is not included in the specified powers, it would not be inconsistent with those powers.

CONCLUSION:

A lawyer serving as a client's attorneyinfact may not petition for the appointment of a guardian without the client's consent unless the lawyer determines that the client is incapacitated; there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests; and there is no one else available to serve as petitioner. Subject to conflict of interest restrictions, if the lawyer petitions for the appointment of a guardian, the client does not oppose the petition, and the lawyer will not be a witness in a contested hearing, the lawyer may represent him- or herself in the proceeding.

(43-00)

OPINION 747 (11/05/2001)

Overrules: N.Y. State 443

Modifies: N.Y. State 690

TOPIC: Contingent Fees; Domestic Relations

DIGEST: Lawyer may not agree to a contingent fee retainer to collect maintenance, child support and/or alimony due based upon an already rendered final judgment following a divorce.

CODE: DR 2-106(B), 2-106(C)(2), 2-106(D); EC 2-1, 2-20; Definition 10.

QUESTION:

May a lawyer enter into an arrangement for, charge or collect a contingent fee in a post-divorce action to collect unpaid maintenance, child support and/or alimony under a final judgment previously entered (hereinafter a "matrimonial collection action")?

OPINION:

This Committee first confronted this question in N.Y. State 443 (1976). In that opinion, the Committee opined that under the then-current provisions of the New York Lawyer's Code of Professional Responsibility ("Code") there was nothing improper in entering into a contingent fee retainer to collect past due alimony and past due child support payments. In reaching that determination, the Committee observed that EC 220 cautioned that "contingent fee arrangements in domestic relations cases are rarely justified," but it expressly distinguished "actions affecting the marital status of the parties," the apparent focus of EC 220, from "cases solely for the collection of past due alimony and of past due child support payments."

Thereafter, the ethics committees of two other bar associations in New York State reached the same conclusion. In N.Y. County 660 (1984), the committee approved a contingent fee arrangement to collect past due alimony and child support, finding that "[i]n such collection matters there is little risk of conflict of interest since the financial relationship between the parties has already been set and the lawyer's duty is merely to enforce the prefixed obligation." Nassau County 9018 reached the same conclusion about an action to collect past due maintenance and a distributive award under a final judgment of divorce previously entered. The committee viewed such an action, in essence, as no different from a standard collection case:

> [S]ince the "domestic relations" case has already been terminated by a judgment, any enforcement proceedings are technically not a part of the earlier "domestic relations case," and, practically, do not involve the "unique character" of a domestic relations case. Enforcement proceedings would, rather, involve the standard collection mechanisms afforded to any judgment creditor under the Civil Practice Law and Rules. Successful collection of the sums would, additionally, produce a fund out of which the fee can be paid. Finally, a divorced client, who by the very nature of the requested representation is being denied both past-due maintenance and a distributive award, might be

unable economically to afford competent representation if a contingent fee is unavailable.

A few years ago, this Committee cited N.Y. State 443 with approval in N.Y. State 690 (1997). In that opinion, the Committee concluded that a lawyer who represents a wife in a divorce proceeding may represent the wife in bringing a tort action for assault against her husband and charge a contingent fee in that tort action. The Committee cited N.Y. State 443 for the proposition that actions affecting the marital property can be distinguished from other actions between the spouses.

Despite N.Y. State 690's passing reference to N.Y. State 443 and the concurrence of two other ethics committees in New York State, the subsequent history of the Code and its interplay with the Appellate Division rules governing procedures for attorneys in domestic relations matters (22 NYCRR Part 1400) (hereinafter "Part 1400") require us to conclude that N.Y. State 443 must be overruled.

In 1990, the Code was amended to add DR 2-106(C)(2), a provision based upon Model Rule 1.5(d). The 1990 version of DR 2-106(C)(2) prohibited a lawyer from "enter[ing] into an arrangement for, charg[ing] or collect[ing] . . . any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of maintenance, support, equitable distribution, or property settlement." Consequently, in 1990, for the first time, the Code contained a disciplinary rule expressly prohibiting a contingent fee in certain domestic relations matters.

In November 1993, the Appellate Division of the New York State Supreme Court adopted the rules contained in Part 1400. The scope provision of these rules is very broad, covering not only the initial proceedings to obtain a divorce, custody, child support, and/or maintenance, but also subsequent proceedings "to enforce or modify a judgment or order in connection with any such claims, actions or proceedings." Rule 1400.2 requires an attorney to provide a prospective client in such a domestic relations matter with a statement of client's rights and responsibilities that includes the following sentence: "Your attorney may not request a fee that is contingent on the securing of a divorce or on the amount of money or property that may be obtained."

Effective July 14, 1994, the Appellate Division amended DR 2-106(C)(2) to clarify, among other things, that the scope of the prohibition on contingent fees in domestic relations matters was limited to "domestic relations matters to which Part 1400 of the joint rules of the Appellate Divisions is applicable."

In 1999, the Code provisions prohibiting contingent fees in domestic relations matters were amended again. First, subdivision 10 of the Code's Definitions was added to define "domestic relations matters," incorporating the following language from the scope provision of Part 1400:

> *Domestic relations matters* means representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, or to enforce or modify a judgment or order in connection with any such claims, actions or proceedings.

Second, DR 2-106(C)(2) was amended by replacing the word "upon" with the phrase "in any way determined by reference to," so that DR 2-106(C)(2)(a) now reads:

(C) A lawyer shall not enter into an arrangement for, charge or collect:

(2) Any fee in a domestic relations matter:

(a) The payment or amount of which is contingent upon the securing of a divorce or in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement.

That change in DR 2-106(C)(2)'s language was recommended by the New York State Bar Association, and adopted by the Appellate Division, "to confirm the breadth of the prohibition against result-based attorneys' fees in matrimonial cases." NYSBA Special Committee to Review the Code of Professional Responsibility Report to the House of Delegates 31 (Feb. 29, 1996). As a result of that change, "the dollar amount of maintenance, support, equitable distribution, or a property settlement cannot even be a factor, much less the sole determinant, of the amount of the legal fee in a domestic relations matter." Roy D. Simon, Jr., *Simon's New York Code of Professional Responsibility Annotated* 182 (2001).

Thus, the literal language of the Code, as amended in 1999, prohibits an attorney from entering into a contingent fee retainer in a matrimonial collection action. The Code's definition of a domestic relations matter would encompass such a collection action, because it would be an action "to enforce . . . a judgment or order in connection with [prior] claims, actions or proceedings" for maintenance, child support, and/or alimony. Further, the amount of the legal fee would be predicated, at least in part, upon the amount of maintenance, child support, and/or alimony recovered, in violation of the literal language of DR 2-106(C)(2).

We question, however, whether prohibiting a contingent fee in a matrimonial collection action serves the public policies animating DR 2-106(C)(2)(a). First, the rule supports the institution of marriage by prohibiting a fee arrangement that would create an economic incentive for a lawyer to fight against reconciliation of the husband and wife and that encourages "bitter and wounding court battles." *See V.W. v. J.B.*, 165 Misc.2d 767, 629 N.Y.S.2d 971, 973 (N.Y. Co. 1995), *rev'd sub nom Weinstein v. Barrett*, 640 N.Y.S.2d 103 (1st Dep't 1996). *See generally* Wolfram, Modern Legal Ethics § 9.4.4 (1986); Restatement (Second) of Contracts, §190(2). Second, it supports the interests and autonomy of the represented spouse and the children by prohibiting a fee arrangement that would create an economic incentive for a lawyer to seek a distribution of property that favors the lawyer, possibly sacrificing the interests of the client and the client's children. *See generally* Wolfram, Modern Legal Ethics § 9.4.4 (1986).

Arguably, neither of these policies is undermined when a lawyer enters into, charges or collects a contingent fee retainer in a matrimonial collection action. First, the fee award is not predicated upon securing a divorce or any other result inconsistent with reconciliation or preservation of the marriage. A matrimonial collection action, as defined above, only arises after a divorce decree already has been rendered. Second, in a matrimonial collection action, a court has already entered a final judgment fixing the amount of maintenance, child support and/or alimony to be paid. Thus, in theory at least, the interests of the client and the client's children could not be sacrificed by the lawyer's pursuit of the largest fee.[34] Viewed from that perspective, the matrimonial collection action is nothing more

34 The Committee is aware, however, that the previously-ordered amount of maintenance, child support and/or alimony may be the subject of overall settlement negotiations when, as sometimes happens, the matrimonial collection action causes the defaulting spouse to seek a future modification of those fixed amounts.

than a supplemental proceeding to enforce a judgment that, in this situation, happens to be a judgment that originated in a domestic relations matter.

The majority of ethics committees in other states that have considered the propriety under Model Rule 1.5 of a contingent fee retainer in a matrimonial collection action have reached that conclusion, determining that a contingent fee arrangement in a matrimonial collection action is not contrary to the public policies underlying Model Rule 1.5[35].2 *See e.g.*, Arizona Op. 93-04; North Carolina RPC 155 (1993); Kansas Op. 9213; South Carolina Op. 9205; Oregon 1991-13; Pa. Inf. Op. 90-98; New Jersey Op. 618 (1988); Colorado Op. 67 (1985; updated for change to the Model Rules in 1995). *But see* New Hampshire Op. 1990 - 91/15 (1991) (interpreting New Hampshire Rule 1.5(d) to prohibit a contingent fee arrangement for the collection of past due amounts of a property settlement owed under an existing divorce decree).

Moreover, contingent fee arrangements may make available to the public legal services that otherwise could not be afforded, thus serving a lawyer's duty to make legal services fully available. EC 2-1. There is some basis to believe that, at least in some cases, the availability of a contingent fee arrangement might make available to the public attorneys who otherwise might not be willing to take on a matrimonial collection action. *See, e.g.*, Nassau County 9018.[36]

There is no "legislative history" regarding the adoption of the broad definition of "domestic relations matter" in Part 1400 or the definition's subsequent incorporation into the Code. Consequently, we cannot say whether the specific issue of contingent fee agreements in matrimonial collection actions – as opposed to other domestic relations actions – was considered in connection with the definition's adoption. Because contingent fee agreements in collection actions may not undermine the public policy of DR 2-106(C)(2)(a), and in light of other states' favorable treatment of such agreements, we believe that the prohibition on such fees should be reviewed and reconsidered. At present, however, we are constrained to read the Code in accordance with its literal language. Because that language so clearly prohibits a contingent fee arrangement in a matrimonial collection action, we conclude that such a contingent fee arrangement is prohibited by DR 2106(C)(2)(a). We therefore overrule N.Y. State 443 and modify N.Y. State 690 with respect to its passing reference to N.Y. State 443.

CONCLUSION:

Under DR 2-106(C)(2)(a), a lawyer may not enter into an arrangement for, charge or collect a contingent fee in a post-divorce action to collect past due maintenance, child support and/or alimony based upon a final judgment previously entered.

(15-01)

35 We note, however, that the language of Model Rule 1.5 differs from the language of DR 2106(C)(2)(a) because of the Code's definition of a "domestic relations matter." Therefore, unlike DR 2106(C)(2)(a), Model Rule 1.5 does not literally prohibit a contingent fee arrangement in a matrimonial collection action.

36 Domestic Relations Law § 237(c) and § 238, which provide for the delinquent spouse's payment of the other spouse's attorneys' fees in certain situations, may limit the circumstances in which a contingent fee arrangement might be necessary to obtain an attorney willing to represent a client in a matrimonial collection action.

OPINION 748 (11/05/2001)

TOPIC: Former prosecutors; conflict of interest.

DIGEST: A former prosecutor may represent criminal defendants investigated and prosecuted during former prosecutor's tenure with a district attorney's office if he or she did not participate personally and substantially in the investigation or prosecution of the defendant, and where doing so violates neither the duty to represent the new client zealously nor the duty to protect the former client's (the government's) confidences and secrets.

CODE: DR 9-101(B); DR 4-101; Canon 7.

QUESTION:

May a former prosecutor who handled white collar criminal prosecutions, appellate work, post-conviction motions, investigations, and occasionally covered for other prosecutors in a twenty-attorney district attorney's office, and who now works in the appeals unit of a Legal Aid office, represent criminal defendants who were indicted and charged during the prosecutor's tenure with the district attorney's office if such representation is limited to defendants in matters in which he or she had no role in the prosecution or investigation of the case and received no confidential or non-public information regarding the matter?

OPINION:

DR 9-101(B)(1) of the Lawyer's Code of Professional Responsibility (the "Code") provides that, except as otherwise expressly permitted by law, a lawyer "shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee." All lawyers in the firm are disqualified from "knowingly" undertaking or continuing such representation unless the disqualified lawyer is effectively screened from any participation in the matter, is apportioned no part of the fee, and there are no other circumstances that create an appearance of impropriety.

In this Committee's Opinion 502, we concluded that a former Assistant District Attorney ("ADA") is disqualified from representing someone indicted during the ADA's tenure as a prosecutor only "where he had access to confidential or non-public information relating to the matter in which he is later retained to act in a private practice or where the circumstances attendant upon the management and operation of the district attorney's office, as well as the character of his former employment, reasonably suggest that he had such access." NY. State 502 (1978). Opinion 502 quotes the "substantial responsibility" language in a prior version of DR 9-101, and cites ABA Opinion 342, in which the ASA Standing Committee on Ethics and Professional Responsibility defined the phrase "substantial responsibility" as follows:

> "substantial responsibility" envisages a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question It contemplates a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question. . . . it is not necessary that the public employee or

> official shall have personally and in a substantial manner investigated or passed upon the particular matter, for it is sufficient that he had such a heavy responsibility for the matter in question that it is unlikely he did not become personally and substantially involved in the investigative or deliberative processes regarding that matter
>
> ABA Op. 342 (1975).

In 1990, DR 9-101 was amended to require that a former government lawyer be disqualified from representing a criminal defendant investigated and prosecuted when the lawyer was a government prosecutor only if he or she "participated personally and substantially" in the matter.'[37] The amendment of DR 9-101 made clear that disqualification must be based on the lawyer's "personal participation to a significant extent" Thus, where an ADA has participated substantially in the investigation or prosecution of a related matter involving a person that he or she wishes to represent in private practice, DR 9-101(B) disqualifies the lawyer from taking on such representation. *See, e.g.*, *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974) (lawyer who was substantially involved in antitrust action against plaintiff while working for the Department of Justice was disqualified from representing municipality in similar antitrust action against General Motors); *Flushing Savings Bank v. Ahearn*, 465 N.Y.S. 2d 574 (2d Dep't 1983) (lawyer disqualified from representing bank in foreclosure action where as an ADA he supervised a related extensive investigation and prosecution involving some of the same parties); *see also Board of Education of City of New York v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir.1979).

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

Even where a former government prosecutor did not participate personally and substantially in the investigation or prosecution of the criminal defendant that the lawyer now wishes to represent, he or she has a duty to protect confidences and secrets that he or she learned as a result of her former position as a government prosecutor. The former prosecutor is prohibited from representing a criminal defendant where to do so would require a violation of either the duty to protect the former client's (here, the government's) confidences and secrets under DR 4-101, or the duty to represent the new client (the defendant) zealously under Canon 7. As we explained in Opinion 638:

37 This language is derived from ABA Model Rule 1.11 (a) and 18 U.S.C. § 207(a)(1)(B).

> [A lawyer who] possesses a confidence and secret within the meaning of DR 4-101(A), which is not otherwise permitted to be disclosed by one of the several preconditions of DR 4-101(C), but which nevertheless must be used under Canon 7 to discharge faithfully and zealously the current proposed representation . . . unquestionably cannot represent the [new client] zealously under Canon 7 without violating . . . DR 4-101(B)
>
> NY. State 638 (1992)

If a former prosecutor is disqualified from representing a defendant under DR 9-101(B), other attorneys in the Legal Aid office may represent the defendant provided that the office effectively screens the former ADA from any participation in the matter pursuant to DR 9-101(8) and that there are no other circumstances attendant to the particular representation that create an appearance of impropriety in the defendant's representation by any attorney in the office.

We note that Opinion 638 also analyzed the conflict that you present under a prior version of DR 5-108. DR 5-108 concerns conflicts of interest involving former clients generally. The version of DR 5-108 discussed in Opinion 638 provided that "[e]xcept with the consent of a former client after full disclosure a lawyer who has represented the former client in a matter shall not . . . [u]se any confidences or secrets of the former client except as permitted by DR 4-101 [1200.19] (C) or when the confidence or secret has become generally known." Based on this language, the Committee concluded that former government attorneys had a duty under DR 5-108 and DR 4-101 to protect a former client's confidences and secrets. In 1999, DR 5-108 was amended to direct former government lawyers to the personal and substantial participation test in DR 9-

101(B). The rule now provides that "[e]xcept as provided in DR 9-101 [1200.45] (B) *with respect to current or former government lawyers*, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure . . . [u]se any confidences or secrets of the former client except as permitted by DR 4-101 [1200.19](C) or when the confidence or secret has become generally known." DR 5-108(A) [N.Y.C.R.R. § 1200.27(A)] (emphasis added). Although the current version of DR 5-108 does not eliminate the need to analyze the former government lawyer conflict issue under DR 4 101and Canon 7, the amendment of DR 5-108 appears to have obviated the need to analyze the conflict under DR 5-108.

CONCLUSION:

A former ADA may represent a criminal defendant charged or indicted while the ADA was in the prosecutor's office if he or she did not participate in a material way in the investigation or prosecution of the defendant or learn confidences and secrets relevant to the defendant's case such that the proposed representation necessarily would lead to a violation of either DR 4-101 or Canon 7. If the former prosecutor is disqualified under DR 9-101(B) or DR 4-101, his or her current law office may represent the defendant provided that the office screens the former prosecutor in accordance with 9-101(B), the former prosecutor is apportioned no part of the fee earned from the representation, and there is no circumstance attendant to the defendant's representation that creates an appearance of impropriety.

(12-01)

OPINION 749 (12/14/2001)

TOPIC: Use of computer software to surreptitiously examine and trace e-mail and other electronic documents

DIGEST: Lawyers may not ethically use available technology to surreptitiously examine and trace e-mail and other electronic documents.

CODE: DR 1-102(A)(4), DR 1-102(A)(5), DR 4-101, DR 7-102(A)(8), Canon 4, Canon 7, EC 4-1

BACKGROUND:

Modern computer technology enables sophisticated users who receive documents by electronic transmission to "get behind" what is visible on the computer screen and determine, among other things, revisions made at various stages, and sometimes even the authors of the revisions. Use of this technology would enable a lawyer who receives e-mail and electronic documents from counsel for an opposing party to obtain various kinds of information that the sender has not intentionally made available to the lawyer. For example, a lawyer who has received the final draft of a contract from counsel for a party with whom the lawyer is negotiating would be able to see prior drafts of the contract and, perhaps, learn the identity of those who made the revisions, without the knowledge or consent of the sending lawyer. How to effectively "block" recipients from access to deletions and prior versions of the "visible" document appears to be unclear and a matter of debate among sophisticated computer users. *See, e.g.,* M. David Stone, "Deleting Your Deletions," P.C. Magazine November 20, 2000.

It is also possible for an e-mail sender to determine the subsequent route of the e-mail, including comments on the e-mail written by its ultimate recipients. Through use of this application a lawyer can place a "bug" in e-mail he or she sends to opposing counsel and learn the identity of those with whom the first recipient shares the message and comments that these persons may make about it. Even if a user can avoid applications that make it possible to place a bug in the user's e-mail, the recipient's forwarded messages can still be traced if the user forwards the message to someone who has not taken these measures. Accordingly, it is virtually impossible to render one's e-mail system "bug-proof." *See* www.privacyfoundation.org/privacywatch, "E-Mail Wiretapping", posted February 5, 2001.

QUESTION:

May a lawyer ethically may use available technology to surreptitiously examine and trace e-mail and other electronic documents in the manner described?

OPINION:

This new technology permits a user to access confidential communications relating to another lawyer's representation of a client, including "confidences" and "secrets" within the scope of DR 4-101 of the Lawyer's Code of Professional Responsibility ("Code")[38] For this reason, we conclude that the use of computer technology in the manner described above constitutes an impermissible intrusion on

38 The Code defines "confidence" as "information protected by the attorney-client privilege under applicable law"; the term "secret" includes all "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A).

the attorney-client relationship in violation of the Code. The protection of the confidences and secrets of a client are among the most significant obligations imposed on a lawyer. As explained in EC 4-1:

> Both the fiduciary relationship existing between lawyer and client and the proper function of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer. A client must feel free to discuss anything with his or her lawyer and a lawyer must be equally free to obtain information beyond that volunteered by the client. . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of a client not only facilitates the full development of facts essential to proper representation of the client but also encourages non-lawyers to seek early legal assistance.

Although the precise question presented in this inquiry has not previously been answered by this Committee or, to our knowledge, by other ethics authorities, we believe the circumstances described are substantively analogous to less technologically sophisticated means of invading the attorney-client relationship that we and other authorities have addressed and rejected as inconsistent with the ethical norms of the profession. For example, the strong public policy in favor of protecting attorney-client confidentiality is expressed in the prohibition against lawyers (1) soliciting the disclosure of unauthorized communications, *see, e.g., Dubois v. Gradco Sys., Inc.,* 136 F.R.D. 341, 347 (D. Conn. 1991) (Cabranes, J.) (Although former employees of adverse corporate party are not within reach of the no-contact rule "it goes without saying that plaintiff's counsel must take care not to seek to induce or listen to disclosures by the former employees of any privileged attorney-client communications to which the employee was privy"); *see also* ABA Formal Op. 91-359; (2) exploiting the willingness of others to undermine the confidentiality principle, *see* N.Y. State 700 (1997); ABA Formal Op. 94-382; and (3) making use of inadvertent disclosures of confidential communications, *see* ABA Formal Op. 92-368.

The Code prohibits a lawyer from engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation," DR 1-102(A)(4) and "conduct that is prejudicial to the administration of justice." DR 1-102(A)(5). We believe that in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine or that may otherwise constitute a "secret" of another lawyer's client would violate the letter and spirit of these Disciplinary Rules. *Accord MMR/Wallace Power & Indus. Inc. v. Thames Assocs*., 764 F. Supp. 712, 718-19 (D. Conn. 1991) (spirit if not the letter of ethical rules precludes an attorney from acquiring, inadvertently or otherwise, confidential information about his adversary's litigation strategy); *In re Wisehart,* 721 N.Y.S. 2d 356*,* 281 A.D. 2d 23, (1st Dep't 2001) (respondent suspended for two years for using documents purloined by his client from opposing counsel); N.Y. City 1989-1 (client's interception of adversary's communications with counsel involved dishonesty and deceit; lawyer may not help client take advantage of such wrongdoing).

In the present inquiry, although counsel for the other party intends the lawyer to receive the "visible" document, absent an explicit direction to the contrary counsel plainly does not intend the lawyer to receive the "hidden" material or information about the authors of revisions to the document. To some extent, therefore, the "inadvertent" and "unauthorized" disclosure cases provide guidance in the present inquiry.

In N.Y. State 700 (1997), we concluded that a lawyer who receives an unsolicited and unauthorized communication from a former employee of an adversary's law firm may not seek information from that person if the communication would exploit the adversary's confidences or secrets. Despite the fact that the Code does not expressly require a lawyer to refrain from encouraging a breach of client confidentiality by opposing counsel's staff, we determined that because use of such information would undermine confidentiality and the attorney-client relationship, it was conduct "involving dishonesty, fraud, deceit or misrepresentation," DR 1-102(A)(4), and "conduct prejudicial to the administration of justice." DR 1-102(A)(5).

In N.Y. State 700 we cited ABA Formal Op. 92-368 in support of our conclusion that the strong public policy in favor of confidentiality outweighed what might be seen as the competing principles of zealous representation (Canon 7) and encouraging more careful conduct. ABA 92-368 concluded that a lawyer who receives confidential materials under circumstances where it is clear that they were not intended for the receiving lawyer (a) should not examine the materials once the inadvertence is discovered, (b) should notify the sending lawyer of their receipt, and (c) should abide by the sending lawyer's instructions as to their disposition.

The circumstances of the present inquiry present an even more compelling case against surreptitious acquisition and use of confidential or privileged information than that presented by the "inadvertent" or "unauthorized" disclosure decisions. First, to the extent that the other lawyer has "disclosed", it is an unknowing and unwilling, rather than inadvertent or careless, disclosure. In the "inadvertent" and "unauthorized" disclosure decisions, the public policy interest in encouraging more careful conduct had to be balanced against the public policy in favor of confidentiality. No such balance need be struck here because it is a deliberate act by the receiving lawyer, not carelessness on the part of the sending lawyer, that would lead to the disclosure of client confidences and secrets.

Nor need we balance the protection of confidentiality against the principles of zealous representation expressed in Canon 7. Our Code carefully circumscribes factual and legal representations a lawyer can make, people a lawyer may contact, and actions a lawyer can take on behalf of a client. Prohibiting the intentional use of computer technology to surreptitiously obtain privileged or otherwise confidential information is entirely consistent with these ethical restraints on uncontrolled advocacy.

Although our jurisdiction does not extend to questions of law, we note that the misuse of some aspects of this technology, particularly the use of e-mail "bugs," may violate federal or state law prohibiting unauthorized interception of e-mail content. S*ee, e.g.,* The Electronic Communications Privacy Act, 18 U.S.C. §§2510 *et. seq*. In that event, such conduct would, of course, be unethical *per se*. DR 7-102(A)(8) ("In the representation of a client, a lawyer shall not . . . [k]nowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule").

Finally, the inquiry that has prompted this opinion underscores the need for all lawyers to exercise care in using Internet based e-mail. Accordingly, we reiterate the admonition we offered in

N.Y. State 709 (1998) that "lawyers must always act reasonably in choosing e-mail for confidential communications, as with any other means of communication." [39]

CONCLUSION:

A lawyer may not make use of computer software applications to surreptitiously "get behind" visible documents or to trace e-mail.

(25-01)

39 As noted in N.Y. State 709 (1998), "in circumstances in which a lawyer is on notice for a specific reason that a particular e-mail transmission is at heightened risk of interception, or where the confidential information at issue is of such an extraordinarily sensitive nature that it is reasonable to use only a means of communication that is completely within the lawyer's control, the lawyer must select a more secure means of communication than unencrypted Internet e-mail."

OPINION 750 (12/14/2001)

TOPIC: Application of disciplinary authority and choice of law rules.

DIGEST: Where conduct of a lawyer licensed in New York clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the ethics rules of that jurisdiction apply to the conduct.

CODE: DR 1-105

QUESTION:

What ethics rules apply to the conduct of an attorney admitted both in New York and another jurisdiction when the conduct in question takes place in the other jurisdiction?

OPINION:

The inquirer is an attorney practicing in Chicago who represents individuals in immigration matters and has inquired about a possible conflict of interest involving a client and a former client. The attorney is admitted to practice in both New York and Illinois.

DR 1-105, which was added to the Code of Professional Responsibility in 1999, provides "choice of law" rules to be applied in the exercise of disciplinary authority in New York[40].[1] Paragraph A of this rule establishes the jurisdiction of the New York disciplinary authorities over New York admitted attorneys. Paragraph B deals with choice of law in the exercise of New York's disciplinary authority. Under DR 1-105(A), a lawyer licensed in New York is subject to the disciplinary authority of New York regardless of where the lawyer's conduct occurs. DR 1-105(B) provides that in the exercise of New York's disciplinary authority, the applicable rules are not necessarily those of New York but may in certain circumstances be the rules of professional conduct of another jurisdiction.

DR 1-105(B)(1) addresses conduct in another jurisdiction in connection with a proceeding before a court before which a lawyer has been admitted to practice, either generally or for a special purpose. In that situation, the rules of the jurisdiction in which the court sits apply.

DR 1-105(B)(2) provides:

> a. If the lawyer is licensed to practice only in this state [New York], the rules to be applied shall be the rules of this state, and
>
> b. If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if the particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

40 DR 1-105 is based on ABA Model Rule 8.5.

Because the conduct in the inquiry does not involve court proceedings, DR 1-105(B)(1) is not applicable. Rather, the first clause of DR 1-105(B)(2)(b) applies to this inquiry. Because the attorney is admitted to practice in New York and Illinois, and the jurisdiction in which the attorney principally practices is Illinois, the ethics rules of Illinois are applicable to the inquirer's question. Furthermore, even if the inquirer principally practiced in New York, the particular conduct in the inquiry has its predominant effect in Illinois. In that situation as well, the ethics rules of Illinois are applicable. *Cf.* N.Y. City 1999-7 (New York ethics rules apply although clients resided in New Jersey and INS petitions were filed in New Jersey because the lawyer's office was in New York and all legal services were performed in New York).

CONCLUSION:

If, in work unrelated to court proceedings, a lawyer is admitted in New York and is admitted and practices principally in another jurisdiction, that jurisdiction's ethics rules apply. However, where particular conduct clearly has its predominant effect in another jurisdiction (such as New York) where the lawyer is licensed to practice, the rules of that jurisdiction will apply.

(32-01)

2002

OPINION 751 (01/31/2002)

(Revised 5/6/02)

TOPIC: Competence; excessive case load

DIGEST: An attorney representing a government agency may not undertake more matters than the attorney can competently handle, but the attorney may accept his or her superior's reasonable resolution of an arguable question of professional duty.

CODE: DR 1-104(F), 2-110(B)(2), 4-101, 6-101(A), 6-102(A), 7-101(A)(2)-(3); EC 7-7, 7-8, 7-13, 7-14.

FACTS:

A lawyer is employed as a staff attorney by a government department of social services ("Department") to represent the Department in various matters. These include representing the Department in child welfare, paternity and support proceedings and other proceedings in Family Court, representing the Department in administrative proceedings and state court proceedings, providing legal opinions to the Commissioner of the Department, and providing legal advice to the Department regarding the interpretation of and compliance with laws and regulations relating to the Department's work.

The office in which the lawyer works has a large case load in relation to the number of staff attorneys. The case load cannot be significantly reduced by the Department, because the Department is required by law to participate in certain legal proceedings. For example, the Federal Adoption and Safe Families Act of 1997, Pub. L. 105-89 (codified in various sections of 42 U.S.C.) requires states to initiate or join proceedings to terminate parental rights of children under ten years of age who have spent 18 of the prior 24 months in State foster care; further, after 12 months in foster care, a child is entitled to a disposition or "permanency" hearing to determine the child's future status, including whether the child should be returned to the parent, continued in foster care, or placed for adoption. Despite the Department's heavy case load, the Department has been unable to obtain approval to hire additional staff attorneys. The staff attorney believes that more matters are being assigned than can be competently handled by any given attorney.

QUESTION:

May a lawyer for a government social services agency accept more matters than the lawyer believes that he or she may competently handle?

OPINION:

The question whether a government lawyer may accept more matters than the lawyer can competently handle is governed by several principles applicable to lawyers generally. To begin with,

once a lawyer undertakes to represent a client in a particular matter, the lawyer must conduct the representation competently. The duty of competence is derived from agency law and is expressed in DR 6-101(A)(2) and (3), which provides that a lawyer shall not "[h]andle a legal matter without preparation adequate in the circumstances" or "[n]eglect a legal matter entrusted to the lawyer." *Accord* American Law Institute, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ("RESTATEMENT") (2000) § 16 (1), (2) (in matters within the scope of a lawyer's representation of a client, the lawyer must "proceed in a manner reasonably calculated to advance [the] client's lawful objectives, as defined by the client after consultation," and "act with reasonable competence and diligence"). Whether particular conduct would entail neglect or inadequate preparation or would otherwise involve incompetent representation depends, of course, on the nature and scope of the particular representation.

Second, a lawyer must decline to represent a client in a particular matter if the lawyer is incapable of providing competent representation. *See* DR 6-101(A)(1) (a lawyer shall not "[h]andle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it"). If it becomes apparent after undertaking a representation that the lawyer is unable to render competent representation consistent with DR 6-101(A), and the lawyer is unable to become competent by associating with another lawyer or by other means, the lawyer must seek to withdraw from the representation. *See* DR 2-110(B)(2) (lawyer must seek to withdraw from employment (after first obtaining court's permission where required) if the "lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule"); DR 7-101(A)(2) ("A lawyer shall not intentionally . . . [f]ail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under DR 2-110 . . .").

Third, implicit in these obligations is a lawyer's duty to avoid accepting more matters than the lawyer can competently handle, and a duty to reduce one's workload if it has become unmanageable. *See* ABA 399 (1996) (legal services lawyers will be required "to withdraw from some matters if funding and staff reductions greatly increase these lawyers' workloads, since maintaining an unmanageable case load violates the lawyer' s duty . . . to provide competent representation"); ABA 347 (1981) ("only those matters that can be handled consistently with each lawyer 's duty of competent, nonneglectful representation should be continued. When faced with a work load that makes it impossible for the remaining lawyers to represent existing clients competently, Legal Services Lawyers should withdraw from a sufficient number of matters to permit proper handling of the remaining matters"); Mich. Op. RI-252 (1996) (disciplinary rules "require lawyers to monitor their workloads and decline new clients if taking them on would create overloads that make competent representation impossible"); Wis. Op. E-84-11 (1984) (an assistant public defender must decline new legal matters and, if necessary, withdraw from a sufficient number of cases to ensure adequate representation in the remaining matters, and a lawyer may not accept an overly burdensome caseload if it interferes with his duty to render competent legal services to his clients); Charles W. Wolfram, MODERN LEGAL ETHICS 187 (1986)[1]. [1]

1 Thus, the lawyer may not justify neglecting a matter, preparing inadequately, or otherwise performing incompetently on the ground that the lawyer had too many matters to handle. Although DR 6-101(A)(2) provides that the lawyer must undertake preparation that is "adequate in the circumstances," this refers to the circumstances of the particular representation. The relevant "circumstances" would not include the excessiveness of the lawyer's work load.

Fourth, when it is clear that the lawyer will be compelled to neglect matters or to prepare inadequately in violation of DR 6-101(A), a subordinate lawyer may not comply with a supervising lawyer's instruction to undertake particular matters. In general, the subordinate lawyer may "act[] in accordance with a supervisory lawyer's *reasonable* resolution of an *arguable* question of professional duty," DR 1-104(F) (emphasis added), at least with respect to the subordinate lawyer's obligations under the disciplinary rules. Therefore, if the question of the lawyer's competence is uncertain, the subordinate lawyer may accept the supervising attorney's reasonable resolution of that question. However, a subordinate lawyer has an independent obligation to determine whether particular conduct comports with the duty of competence under DR 6-101(A) and, thus, whether the lawyer is competent to handle the cases the lawyer has been assigned.

Finally, the duty to represent a client competently cannot be avoided by obtaining the client's consent to provide incompetent representation. The lawyer and client *may* agree on how to define or limit the scope of the lawyer's representation (that is, they may limit the objectives of the representation, the number or type of matters that will be undertaken, or the particular proceedings in which the lawyer will render assistance). *See, e.g.*, N.Y. State 713 (1999); N.Y. State 604 (1989); *see also* EC 7-8 ("the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for the lawyer"). However, they may not limit the scope of the representation in a manner that, under the circumstances, will compel the lawyer to neglect the matter, prepare inadequately, or otherwise represent the client incompetently. *See, e.g.*, Model Rules of Professional Conduct Rule 1.2, Comment ("An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [which requires a lawyer to provide competent representation to a client] . . ."); N.Y. State 664 (1994) (lawyer may give legal advice over telephone only if, *inter alia*, "the limited representation [does] not materially impair the client's rights"). Likewise, although lawyers must comply with certain directions given by the client, *see, e.g.*, ECs 7-7, 7-8, this does not include an obligation to comply with a direction to neglect a matter, to handle a matter without adequate preparation, or otherwise to represent the client incompetently. *Cf.* DR 6-102(A) (a lawyer may not "limit prospectively the lawyer's individual liability to a client for malpractice").

These principles fully apply to lawyers employed by the government to represent government agencies. Nothing in the disciplinary rules suggests that the duty of competence is inapplicable to lawyers who are employed by a client as distinguished from those who are retained by a client[2].[2] Nor is the duty inapplicable to lawyers who represent the government as distinguished from those who represent private parties. On the contrary, if a government lawyer were to neglect matters or to prepare inadequately, the lawyer might violate not only the duty of competence, but also the duty "to seek justice and to develop a full and fair record." EC 7-14; *see generally* N.Y. State 728 (2000); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest*, 41 B.C.L. REV. 789 (2000); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. OF PUBLIC LAW 235 (2000).

2 Although DR 6-101(A)(3) provides that a lawyer shall not "[n]eglect a legal matter entrusted to the lawyer," this does not impose a disciplinary obligation on an employed lawyer to agree to handle every matter that the employer seeks to entrust to the lawyer. Obviously, the rule was not meant to impose such an obligation, since, if it did, the employed lawyer would be obligated to undertake representations even when doing so would result in a disciplinary rule violation.

Accordingly, a government attorney representing a department of social services in judicial or administrative proceedings may not neglect a matter or prepare inadequately. The attorney may not comply with the direction of an agency official to "just show up" or "just do the best you can" without preparation, if the result will be to represent the department incompetently. On the contrary, the staff attorney, as a government official and lawyer for the government, has an independent professional obligation to carry out the department's legal responsibilities in judicial and administrative proceedings in which the staff attorney represents the department, and cannot comply with instructions that would require the lawyer to act antithetically to the law and to the general ethical responsibility to "seek justice." Nor may the staff attorney accept so many matters that the attorney would have no choice but to handle some neglectfully or incompetently. In making the judgment whether handling a matter in a particular way would be incompetent, or whether a case load has become unmanageable, a staff attorney may give weight to a supervising lawyer's reasonable resolution of these questions where they are in doubt, but may not defer where the question is unarguable or the supervising attorney's resolution of it is unreasonable.

Although a staff attorney who is asked to take on an overwhelming number of matters may not accept so many that the lawyer will be unable to handle them all competently, other alternatives are not foreclosed by the disciplinary rules. The staff attorney must consult with the client (through a supervising lawyer or officials in the agency) to attempt to resolve concerns about the excessiveness of the caseload. Indeed, in determining how to proceed in the face of an excessive caseload the staff attorney must, in the first instance, seek direction from the client. *Cf.* DR 7-101(a)(3) (lawyer may not prejudice or damage the client during the course of the professional relationship). The staff attorney should seek the supervising attorney's permission for the staff attorney to reassign matters or withdraw from matters in which the Department does not require legal representation, so that the staff attorney has time to handle essential matters. The staff attorney may assist the department in seeking court appointments of lawyers from the private bar to handle some of the department's cases. If the client refuses to exercise its authority to decide which of the matters should be reassigned or withdrawn from, the lawyer may resign or decline to handle cases that cannot be handled competently and then deal with whatever employment consequences may follow[3]. [3]

CONCLUSION:

An attorney who represents a government agency may not undertake more matters than the attorney can competently handle.

(18-01)

3 Whether a staff attorney may be discharged for declining to accept matters that the staff attorney cannot competently handle is a question of employment law that is beyond this Committee's jurisdiction. *Cf.* Wisconsin E-91-3 (committee declined to answer question whether supervising attorney in public defender's office may sanction staff attorney who declined new matters because of an excessive case load, since the "committee cannot address issues of employment relations").

OPINION 752 (02/22/2002)

TOPICS: Ancillary business organizations; conflict of interest

DIGEST: In certain circumstances, a lawyer owning or operating an ancillary business continues to be barred after the promulgation of DR 1-106 from providing legal and nonlegal services in the same transaction even with the consent of the client.

CODE: DR 1106; DR 1107; DR 5101(A); EC 112.

QUESTION:

New York recently adopted a new disciplinary rule, DR 1-106, addressing the responsibilities of lawyers or law firms providing nonlegal services to clients or other persons. The rule provides, among other things, that in certain circumstances the law firm or lawyer may not be subject to the disciplinary rules of the Code with respect to the provision of nonlegal services. This Committee has previously held that in some transactions – notably real estate transactions – a lawyer who also operates certain ancillary businesses may not provide both legal and nonlegal services in the same transaction, even with the informed consent of the client. The question considered in this opinion is the extent to which those earlier opinions, and the disciplinary rules on which they were based, apply after the promulgation of the new rule.

OPINION:

On July 23, 2001, the Appellate Divisions adopted new rules on multidisciplinary practice, effective November 1, 2001. One of those rules, DR 1106 (22 NYCRR §1200.5b), addresses the responsibilities of lawyers or law firms providing nonlegal services to clients or other persons, including lawyers or law firms that own or control an entity providing nonlegal services to clients of the lawyer or law firm, or themselves operate a business providing nonlegal services that are distinct from the legal services they provide. That rule provides, in pertinent part, that in such circumstances the lawyer or law firm is subject to the disciplinary rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship. DR 1106(A)(3). The rule goes on to state that

> it will be presumed that the person receiving nonlegal services believes the services to be the subject of an attorney-client relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

DR 1-106(A)(4). In short, the rule suggests that the disciplinary rules, or at least certain of them, presumptively will not apply to the lawyer's rendition of nonlegal services if they are distinct from the legal services rendered and if the client is informed in writing that the protections of the attorney-client relationship do not apply.

In a number of opinions that this committee has issued over the years, we have opined that in certain circumstances a lawyer also engaged in a nonlegal business cannot provide both legal and nonlegal services in the same transaction even with the consent of the client. Brokerage businesses are a salient example. We held in N.Y. State 208 (1971), N.Y. State 291 (1973), N.Y. State 340 (1974), and N.Y. State 493 (1978), that a lawyer could not act as a lawyer in the same transaction in which the lawyer or his or her spouse acted as a real estate broker "because of the possible conflict between his client's and his own personal interest." N.Y. State 208 (1971). *Accord* N.Y. County 685 (1991); *see also* N.Y. State 694 (1997) (impermissible to participate in broker-run home buyer's program because of resulting strong interest in broker's success). The rationale is that the broker's interest in closing the transaction interferes with the lawyer's ability to render independent advice with respect to the transaction. We have reached similar conclusions with respect to insurance brokers and securities brokers. N.Y. State 536 (1981); N.Y. State 619 (1991). *But see* N.Y. State 687 (1997) (lawyer-broker can sell insurance to a client where advice about the purchase of insurance products is "merely tangential" to the legal representation); N.Y. State 711 (1998) (same). *See also* N.Y. State 595 (1988), N.Y. State 621 (1991), N.Y. State 738 (2001) (dual role of lawyer for real estate client and abstract title examiner impermissible because of possible need to negotiate exceptions to title).

These decisions, and others like them, were based largely on DR 5101(A), which currently provides that a lawyer is barred from accepting or continuing employment if the exercise of professional judgment on behalf of a client

> will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

See, e.g., N.Y. State 711 (1998).

The question is whether the application of this conflict rule to the dual roles discussed in our earlier opinions survives the promulgation of DR 1106. We conclude that it does.

Compliance with DR 1106(A)(4) does not mean that no rules apply to the relationship between a lawyer and an affiliated business. *See* EC 112 ("Although a lawyer may be exempt from the application of Disciplinary Rules with respect to nonlegal services on the face of DR 1106(A), the scope of the exemption is not absolute"). DR 1-106 only relieves the lawyer or law firm from the application of the disciplinary rules to nonlegal services. The application of DR 5-101(A) that resulted in the prohibitions on dual roles that are discussed above (and others like them) resulted from the application of that rule to the provision of legal services. In some circumstances, that rule will bar a lawyer from offering nonlegal services because the nonlegal business activity would create a conflict with the representation of the client. In the case of the brokerage businesses noted above, the existence of the personal interest created by the prospect of earning fees from the nonlegal business was held to affect the exercise of independent *legal* judgment. It was the effect on the exercise of legal judgment that was the concern, just as with any other personal conflict created by the lawyer's own financial, business or personal interests under DR 5-101(A). That interest could be created by activities or relationships totally unrelated to any business services provided to the client – such as a fervent political belief or personal relationship with a lawyer representing the adversary. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 125 comment c (2000). Thus, the promulgation of DR

1-106 does not alter the application of DR 5-101(A) just because the personal interest that is at issue is the lawyer's participation in a nonlegal business offering services to the client. *See also* EC 1-14 (contractual relationship with nonlegal professional firm under DR 1-107 "might, in certain circumstances, adversely affect the independent professional judgment of the law firm creating a conflict of interest" under DR 5-101[A]).

CONCLUSION:

The prohibitions on acting as a broker and a lawyer in the same transaction and other similar bars on dual roles for lawyers owning or operating ancillary businesses continue to apply after the promulgation of DR 1-106.

(43A-01)

OPINION 753 (02/26/2002)

TOPIC: Ancillary business organizations; mortgage brokerage; title abstract company; conflict of interest

DIGEST: Where a client is represented by a lawyer and uses an ancillary business owned by the lawyer, the rules applicable to personal conflicts of interest and transactions between clients and lawyers continue to apply after promulgation of DR 1-106. Under those rules, a lawyer owning mortgage brokerage and title abstract businesses may not, even with informed consent, represent buyer or seller and act as mortgage broker in the same transaction or act as title abstract company with respect to non-ministerial tasks, but may, where the client consents after full disclosure, act as abstract company with respect to purely ministerial abstract work. The lawyer may, with informed consent, represent the lender in the same transaction in which the lawyer's company acts as mortgage broker, but may not represent the lender in transactions in which the lawyer's title abstract company acts in other than a ministerial capacity. The lawyer may in certain circumstances, with informed consent, represent both the buyer's lender and the seller in the same transaction or, where not required to negotiate terms, the buyer's lender and the buyer in the same transaction.

CODE: DR 1106; DR 1107; DR 5101(A); DR 5105; EC 114.

QUESTIONS:

A lawyer is the sole shareholder of a licensed New York mortgage brokerage corporation and a separate title abstract company. Where the attorney informs the client of the attorney's other business relationships and discloses same to the client in a Statement of Client's Rights in Cooperative Business Arrangements, and where the client gives informed written consent, may the attorney and/or the attorney's companies:

1. Represent the selling client in a real estate transaction and (a) broker the mortgage for the buyer, (b) act as the lender's attorney at closing, and (c) act as the abstract company for the transaction?

2. Represent the buying client in a real estate transaction and (a) broker the mortgage for the buyer, (b) act as the lender's attorney at closing, and (c) act as the abstract company for the transaction?

OPINION:

On July 23, 2001, the Appellate Divisions adopted new rules on multidisciplinary practice, effective November 1, 2001. One of those rules, DR 1106 (22 NYCRR §1200.5b), addresses the responsibilities of lawyers or law firms providing nonlegal services to clients or other persons, including lawyers or law firms that own or control or are otherwise affiliated with an entity providing nonlegal services to clients of the lawyer or law firm. That rule provides, in pertinent part, that where an entity controlled by a lawyer or law firm provides nonlegal services to a person, the lawyer or law firm is subject to the disciplinary rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship. DR 1106(A)(3). The rule goes on to state that

> it will be presumed that the person receiving nonlegal services believes the services to be the subject of an attorney-client relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.
>
> DR 1-106(A)(4).

In opinions issued prior to the new rules, this Committee held that in certain circumstances a lawyer also engaged in a nonlegal business could not provide both legal and nonlegal services in the same transaction even with the consent of the client. In particular, with respect to brokers, we held in N.Y. State 208 (1971), N.Y. State 291 (1973), N.Y. State 340 (1974), and N.Y. State 493 (1978), that a lawyer could not act as a lawyer in the same transaction in which the lawyer or his or her spouse acted as a real estate broker "because of the possible conflict between his client's and his own personal interest." N.Y. State 208 (1971). *Accord* N.Y. County 685 (1991); *see also* N.Y. State 694 (1997) (impermissible to participate in broker-run home buyer's program because of resulting strong interest in broker's success). We do not appear to have addressed mortgage brokers, but have reached similar conclusions with respect to insurance brokers and securities brokers. N.Y. State 536 (1981); N.Y. State 619 (1991). We have also suggested, though, that a lawyer-broker can sell insurance to a client where advice about the purchase of insurance products is "merely tangential" to the legal representation. N.Y. State 687 (1997); N.Y. State 711 (1998).

With respect to abstract title companies, in N.Y. State 595 (1988), N.Y. State 621 (1991), and N.Y. State 738 (2001), we held that a lawyer could, with consent after disclosure, refer real estate clients to a title abstract company in which the lawyer or his or her spouse had an ownership interest "for purely ministerial abstract work," but not where the abstract company provided the additional service of preparing a title report or serving as an agent for the title underwriter. The central rationale was that if the abstract company prepared a report showing exceptions in title and recommending whether a title insurance policy should be issued, the law firm for the party would be required "to negotiate these issues . . . with itself." N.Y. State 738 (2001). *See also* N.Y. State 731 (2000) (lawyer cannot pay employees to refer clients to lawyer-owned title company for non-ministerial tasks).

In N.Y. State 752 (2002), we concluded that these decisions, and similar opinions limiting or barring lawyers from performing dual roles, survive the promulgation of DR 1-106. This is because the decisions were based on the application of DR 5-101(A) to the *legal* services, not the nonlegal services. That rule bars a lawyer from accepting legal employment if the exercise of professional judgment might be affected by the lawyer's own "financial, business, property or personal interests." The pursuit of the nonlegal business activities in the same transaction in which the lawyer was representing a client created an irreconcilable conflict for the lawyer.

We turn now to the particular dual employments suggested by the inquirer.

Representing Buyer or Seller and Acting as Lender's Attorney.

This part of the inquiry does not involve ancillary businesses at all. The inquirer proposes to represent as a lawyer, in the first question, both the selling client and the lender and, in the second,

both the buying client and the lender. These questions are governed by DR 5105, which regulates conflicts of interest in simultaneous representations.

Taking the second question first, the proposal to represent both the buying client and the lender in the same transaction creates the potential for a clear conflict. The role of the lender's attorney can be, in part, to protect the interests of the bank in negotiating the loan agreement with the borrower and obtaining the necessary security on the borrower's property. The role of the buyer's attorney can be, in part, to protect the borrower's interests in those same matters. In situations in which the lawyer for the buyer could be called upon to negotiate with the lawyer for the lender, it would not be possible for one lawyer to play both roles, even with consent, because that would put the lawyer in the position of negotiating with him or herself. The lawyer could not zealously represent both parties. *See* DR 5105(C); N.Y. City 2001-2 ("Situations in which a lawyer or members of a single law firm would be required to negotiate directly with herself or each other on behalf of multiple clients in a transaction . . . will rarely be consentable").

This committee has recognized, however, that in some circumstances there is no negotiation or assertion of rights between the lender and buyer in which a lawyer has any role. As long as full disclosure of the risks of dual representation has been made and knowing consent obtained, we have held such dual representation can be permissible. N.Y. State 8 (1965); N.Y. State 199 (1971); N.Y. State 438 (1976); N.Y. State 694 (1997); *see also* ABA Inf. 643 (1963) (same); ABA Inf. 837 (1965) (same). *But see* Nassau County 98-10 (lawyer may not represent buyer and lender in same residential purchase and mortgage transaction).

This committee has likewise recognized that representation of a seller and a lender, which commonly do not directly negotiate with each other at all, can be permissible with consent after disclosure. N.Y. State 611 (1990). Even here, we have cautioned that there may be circumstances when the dual representation would be barred:

> If, for example, issues arise concerning the acceptability of title, or environmental conditions, or some other condition of closing, the seller may desire to close while the lender may decide it has no obligation to make the loan. . . . Where in a particular matter it is not unlikely that such differing interests may arise, the multiple representation should be declined.
>
> *Id*.

Representing Buyer, Seller or Lender and Acting as Mortgage Broker.

The inquirer also asks whether the brokerage company can act as the buyer's mortgage broker in the same transaction in which the inquirer represents as counsel either the seller or the buyer, and the lender. As noted, this committee has held in a number of opinions that a lawyer cannot act as a real estate broker and as counsel to a party in the same transaction. N.Y. State 208, 291, 340, 493. The rationale for these opinions is that a lawyer should not have a personal stake in the advice rendered, and a broker who is paid only if the transaction closes cannot be fully independent in advising the client as a lawyer.

With respect to the buyer or seller, we see nothing in the nature of the mortgage brokerage business that calls for a different result. The inquirer advises that a mortgage broker is paid a percentage of the money borrowed and only when the loan closes. While the amount of the fee varies widely, the gross mortgage broker fee (before subtraction of the individual salesperson's fee) almost always exceeds the legal fee a lawyer receives for representing a buyer or seller in a typical, uncomplicated purchase or sale in the inquirer's area. Under these circumstances, the rationale of our prior opinions with respect to real estate brokers applies with full force. *See also* Nassau County 89-33 ("By acting as an associate of the mortgage broker for a commission, the attorney would then have a divided loyalty between the obligations to his client and the desire to see the transaction close."); Nassau County 41/87 (similar); N.C. 248 (1997) (attorney may not "certify title or act as settlement agent because [attorney's] personal interest in seeing that [mortgage brokerage corporation] receives its fee or commission for placing the loan could conflict with the client-borrower's desire to close only when it is in his or her best interest to do so"). *But see* S.C. 9604 (permitting dual role, but cautioning, "An attorney must determine that his conflicting role as a mortgage broker will not affect the attorney's ability to judge independently and render candid advice").

The opinions in which we have suggested that a lawyer-broker might sell insurance to a client if the purchase was "merely tangential" to the advice are different, for there the lawyer was not engaged for estate planning or for similar advice that could be influenced by a desire to ensure that the insurance purchase would close. As we said in N.Y. State 711, "[I]f there is a reasonable probability (viewed objectively) that the lawyer's professional judgment will be adversely affected by the lawyer's business interests, then the lawyer must not offer to sell insurance to client." In the case of the mortgage broker, whose interest is in seeing the transaction close, there is such a reasonable probability.

Our opinions do not address at any length whether the prohibition on brokers acting as lawyers extends to lawyers for lenders.[4] Whatever may be the situation with real estate brokers, the lender is in quite a different position in relation to the mortgage broker than the buyer or seller. The mortgage broker is frequently simply a distribution channel for the lender, who sets the terms of the products that will be offered and pays the mortgage broker's compensation. The lender is typically a sophisticated commercial entity. If it is not happy with the relative incentives provided by the amounts it pays for brokerage and legal services, it can decline to consent to the dual representation. If it wishes to have the greater set of "checks and balances" provided by separating the mortgage broker and legal functions, it can do so. Further, the lender will frequently have an ongoing relationship with the mortgage broker/lawyer, thus tempering any impulse by the broker/lawyer to "close at any cost." Finally, there is rarely substantial negotiation of the terms of a residential mortgage, and the lawyer's range of discretion is correspondingly narrower, so any less-than-vigorous representation of the lender will be easier to detect. In short, we do not believe that the dual status of mortgage broker and lender's attorney creates "'such delicate conflicting relationships and inescapable divided loyalties that the likelihood of improper conduct or motivation, without any showing of harm and regardless of disclosure and consent, may give rise to professional misconduct."' N.Y. State 516 (1980) (*quoting Matter of Kelly*, 23 N.Y.2d 368, 378, 296 N.Y.S.2d 937, 945-46 [1968]). With full disclosure and con-

4 N.Y. State 694 (1997) noted in passing that a lawyer could not participate in a real estate broker's program to provide a single, lower-cost attorney to represent the lender and the buyer: "We believe the personal financial incentive for the attorney to use his or her influence over the Purchaser to secure an enforceable contract of sale and to close the transaction is sufficiently great that it is not at all obvious that the Attorney can adequately represent the interests of the Purchaser *and Lender* as well." (Emphasis added.)

sent, we conclude there are transactions in which a lawyer may act as counsel to an institutional lender and as a mortgage broker for that lender.

We are aware that in some circumstances mortgage brokers receive cash compensation from the buyer or undertake, or otherwise have, duties to the buyer to find the best possible mortgage for the buyer. It is possible that in such circumstances the broker's duties to the buyer would raise an insurmountable conflict for the lender's lawyer; however, we do not believe that should call for a per se rule. If, for example, the lender's lawyer was retained only after the loan had been placed with a particular lender, the mortgage broker's duties to the buyer may have been discharged before the lawyer's duties to the lender begin. In addition, we do not deal here with any disclosure obligations the mortgage broker may have to the buyer, as that is not a question of legal ethics.

Representing Buyer, Seller or Lender and Acting as Abstract Company.

As noted, in N.Y. State 595, 621 and 738 we found that a lawyer could not refer real estate clients to a title abstract company in which the lawyer had an ownership interest and that would be hired to provide insurance or perform other than ministerial tasks. That conclusion was based on DR 5101(A). *See, e.g.,* N.Y. State 738 (2001). As set forth above, those rules continue to apply after the promulgation of DR 1106. Our opinion in N.Y. State 595 expressly extended this prohibition to counsel for the lender. The lender's interests in marketable, insured title at the lowest price are little different from the buyer's.

The inquirer reports that in the inquirer's geographic region, abstract companies "do the research, work the file and present the package to the Title Insurance Companies who provide the Title Insurance to the buyer." This appears to go beyond the purely ministerial abstract searching contemplated by our earlier opinions. To the extent that the abstract company examines the title and makes recommendations on insurability or exceptions, it would appear to have an irreconcilable conflict with its attorney-owner's duty to provide independent advice and negotiate title problems, if necessary.

We note one further matter. The inquirer intends to provide clients with a "Statement of Client's Rights in Cooperative Business Arrangements," in order to inform the clients that the services performed by the inquirer through the title abstract company are not legal services and that the protection of an attorney-client relationship does not exist with respect to the nonlegal services. The Statement of Client's Rights in Cooperative Business Arrangements is a statement prescribed by 22 NYCRR §1205.4 for use in alerting clients to the existence of contractual relationships between lawyers and nonlegal professionals commonly involving the reciprocal referral of clients and, to a certain extent, the sharing of premises, overhead and professional fees. *See* DR 1107; EC 114. It is not clear that this Statement is appropriate in these circumstances. The inquirer does not refer to any agreements or understandings for the reciprocal referral of clients between the law firm and the ancillary businesses, which is the focus of the Statement; the Statement does not disclose the fact that the lawyer owns the mortgage brokerage and abstract title companies, which is highly material; and the Statement does not expressly state that the protections of the attorney-client relationship do not exist with regard to the nonlegal services, as required by DR 1106(A)(4). We advise the inquirer to use in place of the Statement of Client's Rights in Cooperative Business Arrangements, or to supplement it with, a statement more tailored to the requirements of DR 1106(A)(4) and DR 5-101(A).

CONCLUSION:

A lawyer who owns a title abstract company and a mortgage brokerage is barred from acting as a lawyer in a transaction in which one or both of those companies is also acting in a variety of situations in which the lawyer's personal interest in a fee (or dividend) from the ancillary businesses compromises the independence of the lawyer's legal advice. Our conclusions on this are summarized in the following chart, in which "Y" means that the lawyer can act in the dual capacity in certain circumstances, with informed consent and under the conditions set forth above and in our prior opinions, and "N" means the lawyer cannot act in the dual capacity at all:

CAN LAWYER ACT IN DUAL ROLE WITH INFORMED CONSENT?			
	Buyer's Lawyer	Seller's Lawyer	Lender's Lawyer
Mortgage Brokerage	N	N	Y
Title Abstract Co. providing insurance or making insurance recommendation	N	N	N
Title Abstract Co. performing only "ministerial tasks"	Y	Y	Y

(43-01)

OPINION 754 (02/25/2002)

TOPIC: Expenses of litigation; interest charged to lawyer passed on to clients.

DIGEST: Plaintiff's counsel in contingent matter may, under certain conditions, pass on to client as costs the interest charged to lawyer on borrowings made to fund litigation expenses.

CODE: DR 2-106(D); DR 5-103(B)(1); EC 5-8.

QUESTION:

May a lawyer borrowing funds to advance expenses in contingent fee litigation pass on to the client the interest charged on such borrowings?

OPINION:

Although a lawyer may not "advance or guarantee financial assistance to the client" in connection with contemplated or pending litigation, A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses. DR 5-103(B)(1). *See also* EC 5-8.

Whether a lawyer who borrows funds in order to advance the expenses of litigation may charge the client the interest incurred by the lawyer on such borrowings is an issue not previously considered by this Committee. In N.Y. State 666 (1994), we held that a lawyer could refer a client to a lender who would provide economic support to the client during the pendency of the case, provided the lawyer had no interest in the lender, received no payment for the referral, and did not compromise client confidentiality in making the referral. In N.Y. State 399 (1975), the Committee held that a lawyer may ethically charge interest on a delinquent account provided the client was given adequate advance notice of and consented to the arrangement, the interest rate and the time period after which interest is charged are reasonable, and the total charges are not excessive. More recently, we considered whether interest could be charged to the client on disbursements paid by the lawyer but not yet repaid by the client. In N.Y. State 729 (2000), we held that it is not unethical for a lawyer to charge interest on unpaid disbursements in a contingent fee matter, provided that

> (1) the client is clearly advised that an interest charge will be imposed on disbursements that are not paid within a stated period of time and that the client consents to the arrangement before it goes into effect, (2) the client is billed for the disbursements promptly after they have been incurred so the client may decide whether to pay the disbursements or incur the interest charge, (3) the period of time between the bill and the imposition of the interest charge is reasonable, (4) the disbursement itself is appropriate . . . and (5) the interest rate is reasonable.[5]
>
> *Id.* at 2.

5 The Committee believes that to satisfy the requirement regarding the reasonableness of the interest rate, the borrowing lawyer must investigate alternative borrowing opportunities.

The opinion also noted in passing that it did not seem economically significant whether the lawyer actually borrowed funds to pay the disbursement or used funds already on hand. In either event the lawyer "has incurred a cost and seeks to pass it on to the client." *Id* (citing N.Y. City 1997-1). That holding is dispositive here.

Thus, if the five conditions described in N.Y. State 729 are met and the lawyer receives no other benefit from the lender than the loan itself, the lawyer ethically may borrow to finance disbursements and pass on the interest incurred to the client. As noted in N.Y. State 666, the lawyer may not compromise client confidentiality in connection with the financing arrangement. Further, in a contingent fee matter the interest charge arrangement must be set forth in the writing required by DR 2-106(D). Finally, whether and how such an arrangement comports with the court rules governing fee calculations in many contingent fee cases (*see* 22 NYCRR §§603.7([e]; 691.20[a]-[c]; 806.13[b] and 1022.31[b]) is a question of law beyond this Committee's jurisdiction.

CONCLUSION:

Subject to the conditions described – including that the client remains ultimately liable for the expenses paid under DR 5-103(B)(1); that the lawyer has no interest in the lender; that client confidences and secrets are not compromised; that the terms of the borrowing are on adequate advance notice to the client; that the time periods after which interest is charged the client and the interest rate are reasonable; that the client consents in advance; that the client may avoid the interest charge by paying the disbursements; and that the disbursements are themselves appropriate – a lawyer may borrow to finance litigation expenses in a contingent fee matter and pass on to the client the interest costs incurred in connection with such borrowings.

(27-01)

OPINION 755 (04/10/2002)

TOPICS: Ancillary business organizations; transactions between lawyer and client; solicitation

DIGEST: The provisions of DR 5104(A), relating to business transactions between a lawyer and client, should not apply to a lawyer's recommendation that the client employ a distinct lawyer-owned ancillary business, where the lawyer takes steps to ensure that the client understands that the protections of the attorney-client relationship do not apply to the non-legal services, as provided for in DR 1106(A). The rules on solicitation do not prevent the lawyer-owned ancillary business from referring existing customers to the lawyer for legal services, including by in-person or telephone contact, but no referral fee may be paid therefor.

CODE: DR 1102(A); DR 1106; DR 1107; DR 2101(C); DR 2102(A), (B); DR 2103(A), (B); DR 5101(A); DR 5-104(A); EC 19; EC 110; EC 111; EC 112; EC 114.

QUESTIONS:

A lawyer is the sole shareholder of a company providing non-legal services to clients or other persons. Where the company provides services to clients of the lawyer, and the lawyer informs the clients in writing in accordance with DR 1-106(A)(4) that the services provided by that business are not legal services and that the protection of the attorney-client relationship does not exist with respect to the non-legal services:

1. To what extent do the disclosure rules and substantive restrictions of DR 5-104(A), relating to business transactions between a lawyer and a client, apply to the non-legal services or to the lawyer's recommendation that the clients employ the non-legal business?

2. To what extent can the lawyer permit the non-legal business to recommend employment of the lawyer by in-person or telephone contact without violating DR 2-103(A)?

OPINION:

On July 23, 2001, the Appellate Divisions adopted new rules on multidisciplinary practice, effective November 1, 2001. One of those rules, DR 1106 (22 NYCRR §1200.5b), addresses the responsibilities of lawyers or law firms providing non-legal services to clients or other persons that are "distinct" from legal services being provided to that person, or are provided through a separate entity. The rule provides, in effect, that the disciplinary rules of the Code of Professional Responsibility will not apply to the non-legal services if the lawyer ensures that the client understands that the non-legal services are not the subject of an attorney-client relationship. The rule provides a procedure for the lawyer to give the client written notice to that effect, which serves to obviate a presumption

that would otherwise arise that the client believes the services are the subject of an attorney-client relationship.[6]

In N.Y. State 752 (2002), we considered one aspect of the effect of DR 1106 in situations in which a company owned or controlled by a lawyer wishes to provide non-legal services to persons who are also clients of the lawyer. We concluded that compliance with the written notice provisions of DR 1-106(A)(4) does not provide a "safe harbor" from all disciplinary rules that could limit the non-legal service provider's ability to provide services to the lawyer's clients. In particular, we concluded that the lawyer's financial interest in certain non-legal businesses – such as brokerages – could make it impossible under the rule governing personal conflicts of interest, DR 5101(A), for the lawyer to render unconflicted professional services in matters where the non-legal business is involved.

We address in this opinion the rules governing mutual referral of business between lawyers and affiliated non-legal service providers in situations where the conflict rules permit the firms to act. In particular, we consider the extent to which the rules on business transactions between lawyers and clients and the rules on in-person solicitation apply to reciprocal referral arrangements between lawyers and ancillary businesses if the notice provisions of DR 1-106 are complied with.[7] The businesses

6 DR 1-106 provides:

> A. With respect to lawyers or law firms providing non-legal services to clients or other persons:
>
> 1.A lawyer or law firm that provides non-legal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the provision of both legal and non-legal services.
>
> 2.A lawyer or law firm that provides non-legal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the non-legal services if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship.
>
> 3.A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing non-legal services to a person is subject to these Disciplinary Rules with respect to the non-legal services if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship.
>
> 4.For purposes of DR 1-106(A)(2) and DR 1-106(A)(3), it will be presumed that the person receiving non-legal services believes the services to be the subject of an attorney-client relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the non-legal services, or if the interest of the lawyer or law firm in the entity providing non-legal services is de minimis.
>
> B. Notwithstanding the provisions of DR 1-106(A), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing non-legal services to a person shall not permit any non-lawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under DR 4-101(B) and (D) with respect to the confidences and secrets of a client receiving legal services.
>
> C. For purposes of DR 1-106, 'non-legal services' shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a non-lawyer.

7 Similar questions, particularly with respect to solicitation, arise under DR 1-107 involving reciprocal referral arrangements between law firms and non-legal professional service firms that are not commonly controlled. That disciplinary rule, which was promulgated at the same time as DR 1-106, must be taken into account in considering these questions, but our primary focus in this opinion is referrals between affiliated legal and non-legal businesses under DR 1106.

as to which this inquiry has arisen are various, including lawyer-owned companies that provide fiduciary, mortgage brokerage and abstract title services for title insurance companies.[8]

Referrals by the lawyer to the non-legal business. We begin with the question of referrals by the lawyer to the non-legal business. While a referral can arise independent of any legal services being provided, it will most commonly occur where the lawyer is engaged to give legal advice on a matter and desires to refer the client to a related non-legal service provider in connection with that matter.

As we found in N.Y. State 752, there is little question that DR 5101(A) applies to the referral. That rule provides for a waiver, with informed consent, of the conflict created by the lawyer's interest in the business to which the lawyer is referring the client. We have issued extensive opinions governing the disclosure necessary when a lawyer recommends employment of a business in which the lawyer has a financial interest. *See, e.g*., N.Y. State 595 (1988) (abstract title company: "a lawyer has a duty to make . . . alternative[] [services] known to the client to the extent they exist" and must disclose "the nature of the abstract company's fee structure and the law firm's proprietary interest in the abstract company"). These rules are not the application of the disciplinary rules to the non-legal business, but rather interpret the kind of disclosure and consent required when a lawyer, exercising his or her professional judgment, considers recommending the employment of a service company that happens to be owned (in whole or in part) by the lawyer.

DR 5-104(A) is a more specific conflicts rule that addresses business transactions between lawyers and clients and provides specific disclosure requirements and substantive fairness limitations applicable to such transactions. The rule states:

> A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:
>
> (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
>
> (2) The lawyer advises the client to seek the advice of independent counsel in the transaction; and
>
> (3) The client consents in writing after full disclosure, to the terms of the transaction and to the lawyer's inherent conflict of interest in the transaction.[9]

8 The question arises in numerous other contexts as well. The Special Committee that proposed DR 1-106 noted a wide range of non-legal businesses that are conducted by law firms or by entities owned by law firms. Among them were: lobbying, economic or scientific expertise, appraisal services, accounting, financial planning, real estate and insurance brokerages, title insurance, various consulting businesses (management, human resources, environmental, etc.), and private investigation. Report of the NYSBA Special Committee on the Law Governing Firm Structure and Operation, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers* 98-103 (2000) [hereinafter, the "MacCrate Report"].

9 Prior to 1999, this provision required only that the lawyer obtain informed consent to the business transaction, and did not have the requirements of independent counsel, written terms, and substantive fairness and reasonableness. It thus essentially duplicated the protections offered by the personal conflicts rule in DR 5-101(A).

We address the application of this rule in two parts: first, whether it applies to the rendition of the non-legal services as such, where they are rendered to a lawyer's client by a business owned or controlled by the lawyer; and second, even if the rule does not apply to those services, whether the lawyer must nevertheless comply with the requirements of the rule in referring the client to the non-legal business.

A central limitation of DR 5-104(A) is that it applies only to transactions if "the client expects the lawyer to exercise professional judgment therein for the protection of the client." This provision is closely parallel to the operative language of DR 1-106, which is that the disciplinary rules apply to non-legal services rendered by a distinct, lawyer-owned business "if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship." DR 1-106(A)(2), 1-106(A)(3). That is, if the person receiving the services could not reasonably believe that the non-legal services are the subject of an attorney-client relationship, it would seem that that person should not expect the lawyer to exercise professional judgment for the protection of the client with respect to those services.

DR 1-106 provides some instruction on how to ensure that the client does not reasonably believe that the non-legal services are the subject of an attorney-client relationship. First, the rule permits that conclusion only where the non-legal services are distinct from legal services provided to the client, or are offered through a separate entity. Second, while a client will ordinarily be presumed to believe that the non-legal services are the subject of an attorney-client relationship, that presumption will not apply if the lawyer advises the client in writing "that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the non-legal services." We conclude that if a lawyer satisfies the requirements of DR 1-106, so that the client does not reasonably believe that the protections of the attorney-client relationship apply to the delivery of non-legal services, those non-legal services will not constitute a business transaction in which the client expects the lawyer to be exercising professional judgment for the protection of the client within the meaning of DR 5-104(A).

We recognize that there is authority that the mere statement by the lawyer, "I am not representing you in this matter," may not be sufficient to cause a client to understand that the lawyer will not be exercising professional judgment for the benefit of the client, because in the context of a long-term attorney-client relationship the "full legal import [of that statement] will escape most laymen." *In re Neville*, 708 P.2d 1297, 1303 (Ariz. 1985). We are not suggesting by this opinion that the mere statement, even in writing, to that effect is an automatic safe harbor, and DR 1-106 does not say so. The writing serves to reverse the presumption against the lawyer that would otherwise exist. It is possible that in certain circumstances, such as where the client is unsophisticated and has had a long relationship with the lawyer and where, despite the existence of a separate entity, the non-legal services are not completely separated from the rendition of legal services, the writing would be insufficient to disabuse the client of a reasonable belief that the lawyer would be acting to protect the client. We conclude only that satisfaction of the test in DR 1-106(A)(2) or (A)(3) will also satisfy the threshold test of DR 5-104(A) – that is, that if a client has a reasonable belief that non-legal services are not the subject of an attorney-client relationship, then in the ordinary case, the client will not expect that professional judgment will be exercised in the delivery of the non-legal services for the protection of the client. *See* N.Y. State 687 (1997) (DR 5104[A] does not apply to non-estate-planning lawyer selling insurance to clients where lawyer "take[s] care to clarify" that he or she is acting as broker and not

lawyer and "the client should not expect the lawyer to exercise professional judgment for the client's protection").

Turning now to the second part of the question, where the lawyer-client relationship predates use of the non-legal service, what of the initial recommendation that the client use the services of the lawyer's company?

There is support for applying DR 5-104(A) to that recommendation in a comment to Model Rule 5.7, which was one of the provisions from which DR 1-106 was derived. *See* MacCrate Report at 326-36.[10] The Model Rule comment states that Rule 5.7 applies to a recommendation by a lawyer that a client use an ancillary business controlled by the lawyer:

> When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a) [which addresses business transactions between lawyers and clients].[11]

There are, however, textual and practical difficulties with applying DR 5-104(A) to a referral to a business that is otherwise exempt from the disciplinary rules. First, such an interpretation requires that the recommendation alone be deemed to be a "business transaction" between lawyer and client.[12] That is a strained reading of that term: the recommendation as such is advice; the relevant "business transaction" is the contemplated transaction with the non-legal business, which under this hypothesis is supposed to be exempt from the application of the rules. Further, if DR 5-104(A) applies to the recommendation, the "transaction and terms" – presumably the terms of the contemplated business

10 Model Rule 5.7 provides:

> (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
>
> (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
>
> (2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.
>
> (b) The term 'law-related services' denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.

11 Ethical opinions under the Rules similarly conclude that a law firm must comply with Rule 1.8(a), or similar provisions, when it refers clients to a lawyer-controlled service provider, although none of the states in question appear to have adopted any provision like DR 1-106 or Model Rule 5.7. *See* N.J. 657 (1992) (lawyer may refer clients to medical-legal consulting business and divorce mediation service owned by lawyer if lawyer complies with Rule 1.8(a), advises client that alternatives exist, and recommends independent counsel); S.C. 93-05 (law firm that provides legal services to retirement plans may own interest in, and refer clients to, ancillary business that provides other services to them if, *inter alia*, law firm complies with Rule 1.8); Calif. 1995-141 (terms under which lawyer refers client to ancillary business must be fair, reasonable, and fully disclosed in writing); Ill. 97-7 (1998) (lawyers may form company to provide legal notices in local newspapers for clients as long as they comply with simpler version of Rule 1.8). *See also* Mich. RI135 (1992) (lawyer/insurance agent recommendation with respect to insurance needed must comply with Rule 1.8(a)); Utah 146A (1995) (lawyer employed as insurance agent (not through separate entity) may sell insurance products to existing legal clients after complying with Rule 1.8(a)). *See also* Restatement (Third) of the Law Governing Lawyers § 126 comment c (2000) ("[W]here a lawyer engages in the sale of goods or services ancillary to the practice of law, for example, the sale of title insurance, the requirements of this Section [the business-transaction section] do apply.").

12 Model Rule 1.8 uses the term "business or financial transaction," which is no different for these purposes.

transaction – must be disclosed in writing and are subject to scrutiny for fairness and reasonableness. This means, first, a significant intrusion into the conduct of the supposedly exempt ancillary business; second, the lawyer-recommended client would be treated differently and have advantages not necessarily provided to other customers of the business; and third, it would be necessary in businesses involving on-going relationships to identify a point in time when the terms would no longer be subject to that scrutiny (for example, would later changes in the terms of an architect or engineer's retention for a major project be subject to fairness-and-reasonableness review under the lawyer's code and, if so, when would that end?).

Whether or not we would reach the same conclusion under the Model Rules, we conclude that a different result is called for under DR 1-106 and DR 1-107. Although the substance of other of the Model Rule comments was incorporated into the ECs that were prepared at the same time as the new rules, *compare, e.g*., Model Rule 5.7 comments 1-3, 5 with EC 1-9, 1-10, 1-11, 1-12, the comment quoted above was not included. Moreover, in addition to the textual and practical difficulties already noted, applying DR 5-104(A) to the referral of a client to a lawyer-owned non-legal business would create anomalies with more-or-less equivalent relationships where those protections would not apply. In particular, DR 1-107 provides for contractual relationships between law firms and non-legal professional service firms for the purpose of offering legal and non-legal services "on a systematic and continuing basis." The relationships may provide for reciprocal referrals as well as "the sharing of premises, general overhead, or administrative costs and services on an arm's length basis." EC 114. Where the non-legal professional firms are not owned or controlled by the law firm, there is no basis to apply DR 5-104(A) to such referrals, because that rule only applies to business transactions with the lawyer. It is difficult to see why there is a greater danger of overreaching when the referral is to a lawyer-owned business than when it is to an unaffiliated business subject to a close, ongoing referral relationship with the lawyer.

In addition, the somewhat rigid protections of DR 5-104(A) have little place in the kind of ongoing referral arrangements contemplated by DR 1-107 and, as a practical matter, by commonly owned businesses under DR 1-106. Under the new rules, these businesses can now advertise the availability of the two or more services "under one roof." DR 2-101(C)(3); DR 2-102(A)(3). It would be artificial in such circumstances to urge the customer to obtain "independent counsel" before using the services that were jointly advertised and are routinely provided, often at standard, published rates.

In short, we conclude that the protections established by DR 5-101(A), requiring the disclosures noted above, and by DR 1-106(A)(2) and (3), requiring that the lawyer ensure that the client understands that the protections of the attorney-client relationship do not apply to the ancillary business, are sufficient protection when a lawyer refers a client to an ancillary business owned or controlled by the lawyer. The referral is not a "business transaction," it is merely advice, and ensuring the integrity of legal advice is the core concern of DR 5-101(A).

We are confident that those provisions are sufficient to allow disciplinary authorities to prevent a lawyer from taking advantage of the attorney-client relationship in making the referral. First, where a client referred by the lawyer enters into an unfair or unreasonable relationship with a lawyer-owned ancillary business, it is likely that a strong presumption will arise that there was insufficient disclosure of the terms and available alternatives, as required by DR 5-101(A). Further, whether or not the specific obligations of DR 5104(A) apply, the courts and disciplinary authorities have long asserted a common law right to ensure that lawyers do not take advantage of their clients in any cir-

cumstances.[13] We conclude only that no independent ethical violation should arise from failure to observe the protocols of DR 5104(A) in these circumstances.

Referrals by the non-legal business to the lawyer. Where the client's relationship with the non-legal business precedes the retention of counsel, under what circumstances may the non-legal business recommend the employment of the lawyer? This is the reverse of the situation considered above in which the lawyer recommends the ancillary business to an existing client. The new rules on multi-disciplinary practice expressly address certain aspects of the problem. As noted above, they permit the lawyer to advertise the fact of the affiliation with the ancillary business and the nature and fees of those businesses. DR 2101(C)(3), 2102(A), (B). The rules also contemplate ongoing referral arrangements between legal and non-legal businesses, although the lawyer is barred from providing a fee to the ancillary company for providing the referral. *See* DR 1107(A)(2), (B); DR 2103(B).

The Special Committee that drafted the new rules recognized that these provisions would be a change from existing law:

> [E]thics committee opinions in New York and other jurisdictions have expressed the concern that lawyers should not use nonlegal business operations as a "feeder" to supply them with legal business leads, and have gone so far as to prohibit lawyers from advertising the fact that they provide such services. In our view, such precautions are unnecessary and contrary to the public interest in receiving accurate and relevant information relating to the abilities, qualifications and services offered by lawyers. Any lingering concern that the public will be harmed by permitting lawyers to inform the public that they also offer nonlegal services would be allayed through the adoption of proposed DR 1106 and its accompanying Ethical Considerations. [14]

What of in-person solicitation? DR 2103(A) by its terms bars a lawyer from soliciting professional employment from a prospective client "by in-person or telephone contact, except that a lawyer may solicit professional employment from a close friend, relative, former client or current client." This rule was not changed when DR 1106 was adopted, but we conclude that it does not prevent a lawyer's affiliated business from referring a customer to the lawyer by in-person or telephone contact. Any other result would mean that the lawyer could orally refer clients to a distinct business but the business controlled by the lawyer could refer customers back to the lawyer only in writing. That would be anomalous, particularly in the context of the close relationships contemplated by the new

13 Under the old version of DR 5-104(A), which included only the informed consent provisions of DR 5-101(A), courts and disciplinary authorities imposed an obligation, based on common-law fiduciary principles, that the lawyer who engaged in business with a client show that the lawyer "took no advantage of the client-lawyer relationship." Charles W. Wolfram, *Modern Legal Ethics* 481 (2d ed. 1986). *See also In re Wong*, 275 A.D.2d 1, 5, 710 N.Y.S.2d 57, 60 (1st Dep't 2000) (noting courts' "inherent power" to regulate conduct and disciplining of attorneys); *NYSBA Lawyer's Code of Professional Responsibility*, Preliminary Statement:

> No codification of principles can expressly cover all situations that may arise. Accordingly, conduct that does not appear to violate the express terms of any Disciplinary Rule nevertheless may be found by an enforcing agency to be the subject of discipline on the basis of a general principle illustrated by a Disciplinary Rule or on the basis of an accepted common law principle applicable to lawyers.

14 MacCrate Report at 339-40. The opinions referred to appear to include N.Y. State 709 (1998), N.Y. State 636 (1992), N.Y. State 536 (1981), and N.Y. County 693 (1992). *See* MacCrate Report at 333 n.23. These opinions were issued under the old version of DR 2103, which did not have the specific prohibitions of in-person or telephone solicitation that were added in 1999, and the opinions consequently did not address the specific question relating to such solicitation discussed below.

rules. It would mean that the employees of the business (including possibly the lawyer him- or herself) could not mention the offering of legal services by the affiliated law firm even though the sign out front and the business cards and announcements on the desk did so. *See* DR 2-101(C)(3); DR 2-102(A). Further, were DR 2103 to require the lawyer-owned business to use only written referrals, we would probably require the same of unaffiliated professional service firms that have a contractual relationship with the lawyer under DR 1107 – *see* DR 1102(A)(2) ("A lawyer or law firm shall not . . . [c]ircumvent a Disciplinary Rule through actions of another") – but this would, we think, clearly go too far in regulating how an unaffiliated service firm conducts its business.

This interpretation applies only to referrals made in the context of the operation of the ancillary business and does not give a lawyer affiliated with an ancillary business free rein to approach customers or former customers of the ancillary business in person or by telephone contact to suggest retention of the lawyer. We are not suggesting, in other words, that the lawyer may make the contacts suggested because the affiliated businesses' customers are "close friend[s], . . . former client[s] or current client[s]" within the meaning of DR 2-103(A), a question we do not address in this opinion.[15]

We recognize that two opinions from Pennsylvania after the adoption of that state's version of Rule 5.7, on which DR 1-106 was modeled,[16] conclude that in-person solicitation of the clients of an ancillary business would be barred by Rule 7.3 (the analogue to DR 2-103[A]). Penn. Inf. Op. 98-20; Phila. 97-11. Pennsylvania does not appear to have adopted, however, provisions recognizing ongoing reciprocal referral arrangements like DR 1-107 and EC 1-14, or the broad permission to engage in joint advertising in DR 2-101(C) and DR 2-102(A) that was adopted at the same time. As noted, the Special Committee that drafted the new rules in New York went beyond the provisions in Pennsylvania in part to do away with "precautions" designed to prevent the use of non-legal business operations as a "feeder" to supply legal business leads. MacCrate Report at 339. *Cf.* Penn. Inf. Op. 93-114 (1994) ("there are a number of ethics opinions . . . that state that a lawyer may not use a nonlegal business as a 'feeder' for the lawyer's legal business").

CONCLUSION:

A lawyer owning or operating a separately incorporated or distinct non-legal business who adequately informs the client that the non-legal business is not subject to the protections of the attorney-client relationship under DR 1-106(A)(2) and (3) may refer clients to the non-legal business without complying with the specific terms of DR 5-104(A). Under DR 5-101(A), however, the lawyer must ensure that the client is fully informed of the lawyer's interest in the non-legal business and of the availability of alternatives. There is no bar on the ancillary business or the lawyer advertising the availability of the dual roles or referring existing customers or clients to the other by in-person or telephone contact, but no referral fee may be paid for that referral.

(43-01[B2])

15 Virtually every ethics opinion to have considered the analogous provision of the Model Rules, Rule 7.3, has concluded that a lawyer and client must have a "prior professional relationship" – the language of the Rule – in the lawyer's capacity *as a lawyer*, and not through some ancillary business. Penn. Inf. Op. 98-20; Phila. 97-11; S.C. 96-04; Calif. 1995-141; Utah 146A (1995); Penn. Inf. Op. 93-114; S.C. 93-05; Mich. RI-135 (1992). *But see* N.C. 2000-9 ("If a prior professional relationship was established with a client of the accounting firm, Attorney may call or visit that person to solicit legal business.").

16 MacCrate Report at 326-36.

OPINION 756 (03/13/2002)

TOPIC: Advertisement of Legal Services; Street Address; Web Site or E-mail Address

DIGEST: Legal services advertisement may not list Web site or e-mail address as sole address, but must also include street address of lawyer's office.

CODE: DR 1-102(A)(4), 2-101(A), 2-101(D), 2-101(K); EC 2-10.

QUESTION:

Must every advertisement of legal services include the street address of the lawyer or firm whose services are being offered or is it sufficient for the advertisement to include only a website or e-mail address?

OPINION:

DR 2-101(K) requires that "all advertisements of legal services shall include the name, office address and telephone number of the attorney or law firm whose services are being offered." With the proliferation of the Internet, the World Wide Web and the use of electronic mail, the question arises whether an attorney may satisfy this mandate by use of a website address or e-mail address without the attorney's street address.

In N.Y. State 709 (1998) the Committee considered the use of the Internet to advertise and conduct a law practice. In the section of that opinion on advertising on the Internet, we observed both that "the Code's advertising rules are intended to protect the public from false and misleading advertisements" and also that "there is no ethical distinction to be drawn among different forms of advertising directed to a general population."

While we have found no explicit definition of the words "office address" as used in DR 2-101(K), we believe the use of a web site or e-mail address as the sole identifier of a firm's office address does not satisfy the requirement of DR 2-101(K). See DR 1-102(A)(4), DR 2-101(A) and DR 2-101(D). Prior to the advent of the Internet, the accepted meaning of the words "office address" was a physical, street address at which the principal office of the firm or lawyer offering legal services is located and to which mail, express deliveries and other communications can be addressed. The dictionary definition is instructive: "[a] place where business is conducted or services are performed <a law office>." *Black's Law Dictionary* 1112 (7th Ed. 1999).

That definition, with its emphasis on a physical place, served – and serves – several useful purposes. Consistent with the goal embodied in EC 2-10, the provision of a street address in advertising of a lawyer's or law firm's services should facilitate a prospective client's ability to make an intelligent selection of a lawyer. The absence of a street address in a widely disseminated advertisement could be misleading by suggesting a physical proximity to the recipient that does not in fact exist and by suggesting the ability to serve in jurisdictions in which the advertising firm or lawyer is not qualified to practice. *See* DR 2-101(A), DR 2-101(D).

The requirement of a street address in lawyer advertising also serves the same purposes as Judiciary Law §470, which requires non-resident New York attorneys to maintain an "office for the transaction of law business . . . within the state." The basic purpose of that requirement is to ensure that attorneys practicing in this state are amenable to contact by their clients, adversaries and other interested parties. *See Lichtenstein v. Emerson*, 171 Misc. 2d 933, 656 N.Y.S.2d 180 (Sup. Ct. 1997), *aff'd* 251 A.D.2d 64, 674 N.Y.S.2d 298 (1st Dep't 1998); *White River Paper Co. v. Ashmont Tissue, Inc*., 110 Misc. 2d 373, 441 N.Y.S.2d 960 (Sup. Ct. 1981). Similarly, the requirement that an advertisement include the street address of the advertising attorney facilitates the ability of a client or prospective client to find the attorney and meet with the attorney at a known physical location. The indication of a physical address also facilitates the personal service or delivery of legal papers and other correspondence where that mode of delivery is elected.

Nothing in the advent of the Internet and the World Wide Web leads us to believe that there has been any change in that accepted definition of "office address" or in the salutary purposes it advances. *See* N.Y. State 709, *supra*, and opinions cited therein.

Thus we believe that the inclusion of a web site or e-mail address as the sole address in an advertisement of legal services does not satisfy the requirement of DR 2-101(K) and we conclude that every such advertisement must include, *inter alia*, the street address of the office of the advertising lawyer or law firm.

CONCLUSION:

Advertising for legal services may not list a website or email address as the sole address, but must also include the street address of the lawyer's office.

(19-01)

OPINION 757 (07/16/2002)

TOPIC: Certification as specialist; advertising

DIGEST: Professional announcements of certification as a specialist that are distributed to members of the bar or mailed to present and former clients are "public" communications within the meaning of DR 2-105 and thus should include the disclaimer set forth in DR 2-105(C).

CODE: DR 2-101(A); 2-102(A)(2); 2-105(A); 2-105(C).

QUESTION:

Must an announcement that a lawyer has been certified in a particular field of law by an organization accredited by the American Bar Association contain the disclaimer set forth in DR 2105(C) if it is (a) mailed to members of the local bar association, (b) reprinted in the local bar association newsletter distributed to its members, and/or (c) mailed to present and former clients?

OPINION:

The inquirer has recently been certified as an "elder law attorney" by the National Elder Law Foundation, a private organization approved for that purpose by the American Bar Association. The inquirer wishes to send an announcement to members of the local county bar associations and to have the announcement reprinted in the local bar association newsletter, which is distributed to its members monthly. The announcement would state that the inquirer has "been certified as an Elder Law Attorney by the National Elder Law Foundation as accredited by the American Bar Association." The announcement would further state that the inquirer's practice would continue to be concentrated in certain areas.

The inquirer asks whether the disclaimer required by DR 2105(C)(2) needs to be included when the announcement is not being disseminated to the general public but only to attorneys who are members of the county bar associations. The inquirer also asks whether it is permissible to send the announcement to existing and former clients.

DR 2105 prohibits a lawyer from "publicly" identifying himself or herself as a "specialist" in an area of law unless he or she has been certified by certain approved organizations. If the lawyer so states, the lawyer must include a disclosure or disclaimer that (1) the certifying organization is not a government entity, (2) certification is not a requirement to practice law, and (3) certification does not necessarily imply greater competence than other attorneys experienced in the field of law. The rule states, in relevant part:

> A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in DR 2-105 [1200.10] (B) or (C).

. . .

A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:

> 1. A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law."

This rule, promulgated in 1999, reflects the holding in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), which recognized a lawyer's First Amendment right to state on letterhead "certified civil trial specialist by the National Board of Trial Advocacy." Justice Marshall's concurring opinion (there was no majority opinion) found the statement not actually misleading, but potentially so, and said that a state could require that such statements be accompanied by disclaimers or disclosure "in order to prevent that claim [of certification] from being misleading." 496 U.S. at 117.

The first question is whether the proposed announcement constitutes a statement that the inquirer is a "specialist or specializes in a particular field of law" within the meaning of DR 2105. The proposed announcement does not use the word "specialist" or "specializes" but rather the term "certified as an Elder Law Attorney." In N.Y. State 722 (1999) we applied DR 2105 to a proposed letterhead notation that would say "certified by AICP [American Institute of Certified Planners]," and noted that if membership in a professional organization "implies certification in a legal field, the reference must comply with DR 2-105(C)." We think it plain from the express references in DR 2-105(C) to certification by precisely the sort of organization involved here that the reference to certification proposed would be covered by the rule regardless of whether the term "specialist" is used.

The next question is whether the announcement constitutes the "public" identification of an area of specialization within the meaning of DR 2-105(A). There is no question that announcements sent to newspapers in any form – announcement cards, press releases, ghost-written articles – will require a disclaimer. We conclude that distributing a professional announcement to a number of people large enough to justify a mass mailing or printing in a newsletter is also "public" for these purposes. We believe this is a natural reading of the term and accords with other provisions of the Code as well as with the evident purpose of the disclaimer.

The term "public" appears not only in DR 2105(A) but also in the Code's general prohibition on false, deceptive or misleading "public communication[s]," DR 2101(A). We have given this term a broad interpretation consistent with its purpose of regulating all forms of advertising and publicity. Thus, we have held letterhead and business cards to be forms of public communication subject to DR 2101(A). N.Y. State 704 (1997); N.Y. State 557 (1984). Since the specific limitations on use of the term "specialist" in DR 2-105 are essentially an application of the general proscription in DR 2101(A), it makes sense to read the term "public" in the two provisions in the same way. We also note that DR 2-102(A)(2) specifically provides that a "professional announcement card" must comply with DR 2-105 if it addresses the nature of the lawyer's practice. That is not dispositive – because the

two provisions can be read to require compliance with DR 2105 only when the professional announcements are distributed "publicly" but it tends to support a view that professional announcements should be viewed as a form of publicity subject to these regulations.

Moreover, the intent of the disclaimer is clearly to ensure that lay readers and potential clients are not misled as to what certification as a "specialist" means. From the point of view of the provision's purpose, therefore, a mailing to current and former clients should include the disclaimer. Further, with almost any mass mailing, and still more with a newsletter announcement, the sender has little idea where the announcements are going to end up. Since sending the announcement to other lawyers is intended in part to encourage lawyers to recommend the specialist to their clients, it is reasonable to suppose that copies of the announcement or newsletter item might well be given to the potential clients.

We are aware that two other ethics opinions have reached the opposite conclusion in somewhat similar circumstances. In Inf. Op. No. 970024, the Missouri Chief Disciplinary Counsel concluded that a similar disclaimer in Missouri's Rule 7.4 did not need to be included in an announcement of certification sent to bar association publications but did need to be included in a press release as well as on business cards and letterhead.[17] Tenn. 2001F144(b) concludes that a prescribed disclosure regarding the nature of certain certifications should be included in Martindale-Hubbell or other directories or websites "available to the general public" but suggests that the disclosure is not necessary in directories "intended for the use of lawyers and not actively marketed to the lay public."[18] *But see* Iowa No. 9039 (1991) (requiring that disclaimer accompany certification statement "whether on a professional card or by any other means or medium of communication," but not addressing bar publications). The rules in each of these states are not the same as the rules here, however. Taking the New York Code provisions as a whole, and the historically broad interpretation of "public," we do not find a basis in the Code for an exemption for certain mass mailings or publications. [19]

CONCLUSION:

A professional announcement card stating a lawyer's certification as a specialist that is mailed to members of the local bar association, reprinted in a newsletter distributed to those members, and mailed to the lawyer's present and former clients should contain the disclaimer set forth in DR 2105(C). (13-01)

17 Missouri's rule refers to "communication[s]" generally and does not contain the qualifier "public" that is in DR 5-105(A). The disclaimer required in Missouri is "that neither the Supreme Court of Missouri nor the Missouri Bar reviews or approves certifying organizations or specialist designations." Mo. Rule of Conduct 7.4.

18 The Tennessee rule requires a lawyer who "publishes or broadcasts a communication with regard to any area of law in which the lawyer practices" to state whether certification by the Tennessee Commission on Continuing Legal Education is available in the area of practice and whether the lawyer has been so certified. Tenn. Sup. Ct. Rule 8.

19 One commentator has suggested that identification as a "specialist," which would be prohibited by DR 2105(A) if made "publicly," is common in legal publications, although the commentator concludes that this practice finds no support in the Code:

> "[L]awyers may apparently hold themselves out as 'specialists' or 'experts' in particular fields of law when advertising to the legal profession as opposed to the general public. Perhaps this is not considered 'publicly' identifying an area of practice. Accordingly, the New York Law Journal and many other legal publications regularly contain advertisements in which lawyers offer their services as 'counsel to the profession' with a 'specialty' in one or more fields of law. The text of DR 2-105(A) does not reflect this exception, and any claim that a lawyer is 'certified as a specialist' must still comply with DR 5-105(C), but the disciplinary authorities appear untroubled by claims of specialization in periodicals aimed mainly at other lawyers."

Roy Simon, *Simon's New York Code of Professional Responsibility Annotated* 208 (2002).

OPINION 758 (12/10/2002)

TOPIC: Retention of Original Trust Account Documents

MODIFIES: N.Y. State 680 (1996)

DIGEST: Trust account documents required to be retained in original form should be retained as paper copies where available to lawyer in the ordinary course of business; otherwise, these documents may be retained in electronic form.

CODE: DR 9-102(D)

QUESTION:

May the items listed in DR 9-102(D)(8) – "checkbooks and check stubs, bank statements, pre-numbered canceled checks and duplicate deposit slips" – be retained by the attorney in electronic form (rather than in the form of paper copies) for the designated seven-year period?

OPINION:

N.Y. State 680 (1996) makes clear that the items referred to in DR 9-102(D)(8) must be retained in their original form; the items listed are "checkbooks and check stubs, bank statements, pre-numbered canceled checks and duplicate deposit slips." Opinion 680, which was issued in 1996, assumes that the original form of the enumerated records will be paper hard copies and that the attorney will be in possession of the cancelled checks and deposit slips. Under modern bookkeeping and banking practices, neither of those assumptions is necessarily correct. The checkbook and bank statement may exist as electronic documents in the first instance; paper checks may be replaced by electronic transfers; even if paper checks are used, they may not be returned to the lawyer by the drawee bank after payment – instead, the bank may provide the lawyer with images of the checks or with a mere descriptive listing of checks paid.

In these circumstances, we interpret DR 9-102(D)(8) to require the lawyer to retain the listed items in their original form, be it paper or electronic. If these items are returned to the lawyer in paper form by the lawyer's bank in the ordinary course of business, the lawyer should retain them in that form. However, the lawyer is not required to undertake extraordinary effort or incur extra expense to obtain these items in paper form.

CONCLUSION:

The items listed in DR 9-102(D)(8) – "checkbooks and check stubs, bank statements, pre-numbered canceled checks and duplicate deposit slips" – should be retained by the attorney in their original form. Where these items are returned to the lawyer in paper form by the lawyer's bank in the ordinary course of business, the lawyer should retain them in that form. However, the lawyer is not required to undertake extraordinary effort or incur extra expense to obtain these items in paper form.

(24-02)

OPINION 759 (12/10/2002)

TOPIC: Deposits into special accounts

DIGEST: Lawyer may use ATM for making deposits into special account.

CODE: DR 9-102

QUESTION:

May an attorney use an automated teller machine ("ATM") for the purpose of making deposits into a special account required by DR 9-102(B)?

OPINION:

DR 9-102 contains several provisions regarding the safekeeping of client property, including the rules on maintenance of client trust accounts and the maintenance of required bookkeeping records. The many demands of DR 9-102 are designed to safeguard clients' funds from loss and to avoid the appearance of impropriety by the lawyer. The rules also assist the lawyer in providing an audit trail to the client documenting the history and status of the funds entrusted to the attorney's care. A discussion of the aspects of DR 9-102 that are relevant to this inquiry follows.

A lawyer possessing funds belonging to another person incident to the practice of law must maintain them "in a banking institution within the State of New York which agrees to provide dishonored check reports" in accordance with rules of the Appellate Division. DR 9-102(B). The funds must be maintained in a "special account" separate from any business or personal accounts of the lawyer or the lawyer's firm. *Id.* The lawyer must identify the special account as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and must obtain checks and deposit slips bearing such title. DR 9-102(B)(2).

DR 9-102 also imposes rigorous record keeping requirements. DR 9-102(C)(3) requires the lawyer to maintain complete records of all funds of a client or third person coming into her possession and to render accounts to the client or third person regarding same. DR 9-102(D)(1) requires a lawyer to maintain the records of all deposits in trust accounts and "any other bank account which concerns or affects the lawyer's practice of law." *See* N.Y. State 680 (1996). The record must "specifically identify the date, source and description of each item deposited." DR 9-102(D)(1). The lawyer must also maintain a record for all special accounts showing, among other things, the source of all funds deposited in such accounts. The lawyer must also retain a copy of all "duplicate deposit slips with respect to the special accounts specified in DR 9-102(B)." DR 9-102(D)(8). The latter three requirements, imposed by DR 9-102(D), provide that the lawyer must maintain the records for seven years after the events they record. All of the financial records required by DR 9-102 must be made available for inspection on demand at the firm's principal New York State office. DR 9-102(I); *see also* 22 NYCRR § 603.15 (1st Dep't), 22 NYCRR § 691.12 (2d Dep't) (establishing procedures for random review of bookkeeping records). DR 9-102(J) emphasizes that a lawyer who fails to retain the records required by DR 9-102, or who fails to produce the records, "shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings."

In N.Y. State 680 (1996), we concluded that, for purposes of complying with the mandatory record-retention provisions of the Code, some records may be maintained in the form of computer images, while other records must be maintained in their original, hard-copy form. In that regard, we concluded that duplicate deposit slips must be maintained in paper form for the seven-year period. In addition, all of the other records noted in the previous paragraph must be maintained in their original form. *See also* N.Y. State 758 (2002).

We believe that it is permissible for an attorney to use an ATM for the purpose of making deposits into a special account, provided the above requirements are satisfied. Therefore, in making the deposit, the attorney must use a deposit slip bearing the title of the special account and must maintain a copy of a duplicate deposit slip recording such transaction for seven years. The record provided by the ATM must also show the amount, account, date, time and place of the transaction so the attorney will have sufficient proof of the deposit prior to receiving official verification from the bank. This record must be maintained with the duplicate deposit slip. The attorney must also verify that the deposit is accurately recorded in the subsequent bank statement.

The attorney must also maintain an independent record of the deposit that includes the "date, source and description of each item deposited." DR 9-102(D)(1).

Although we could find no case in New York addressing a lawyer's use of an ATM in conjunction with a special account, authorities in other jurisdictions have condoned its use if accompanied by careful oversight and review of the transaction. *See Matter of Heiner*, 1 Cal. State Bar Ct. Rptr. 301, 316-317 (Cal. Bar Ct. 1990); *see also* Vapneck, Tuft, Peck and Weiner, California Practice Guide, Professional Responsibility, p. 9:246-247 (2001) (use of ATM card for deposits only does not pose real danger to client trust funds, provided lawyer can document amount deposited on behalf of each client); Vecchione, *Working with Client's Trust Accounts*, www.state.ma.us/obcbbo/ctatips.htm (use of ATM for deposits is permitted, but ATM should never be used for withdrawals).

While we believe that a lawyer depositing funds in a special account via an ATM can comply with the requirements of DR 9-102, a lawyer may not use an ATM for withdrawals from a special account. Doing so would, in effect, violate the dictates of DR 9-102(E), which provides that "[a]ll special account withdrawals shall be made only to a named payee and not to cash."

CONCLUSION:

An attorney may use an ATM for the purpose of making deposits into a special account if the attorney carefully reviews the transaction and otherwise complies with the requirements of DR 9-102.

(27-02)

2003

OPINION 760 (01/27/2003)

TOPIC: Retainer agreement – power of attorney; Lawyer settling matter under power of attorney; Lawyer endorsing settlement check on behalf of client under power of attorney

DIGEST: A lawyer may obtain or use a revocable power of attorney, either in a stand-alone document or as part of the lawyer's retainer agreement, that authorizes the lawyer to settle a case and to endorse the client's name to the settlement check, provided that the lawyer makes full disclosure as to the effect of such power of attorney and provided that (i) the lawyer may only settle a case on terms indicated in advance by the client or if the settlement is submitted to the client for approval, and (ii) a lawyer who endorses a settlement check on behalf of the client must promptly comply with the notice, record keeping and disbursement requirements of DR 9-102.

CODE: DR 1-102(A)(1), (4), (5), (6); DR 9-102(B)(4), (C), (C)(1), (D); EC 7-7.

QUESTION:

May a lawyer's retainer agreement contain a power of attorney authorizing the lawyer to sign a general release and stipulation of discontinuance for the client upon settling the case, or to endorse a settlement check on behalf of the client? May an attorney use a power of attorney executed separately by the client in favor of the lawyer to sign a settlement agreement or to endorse a settlement check made out jointly to the lawyer and the client or solely to the client?

OPINION:

The Code of Professional Responsibility ("Code") does not expressly prohibit a lawyer from obtaining or using a power of attorney from the client authorizing the lawyer to perform a variety of acts on behalf of the client. Indeed, the relationship between attorney and client is generally considered to be an agency relationship in which the client gives the lawyer authority to act on his or her behalf in connection with the representation. Moreover, there are good reasons why a client might wish to give a general or specific power of attorney to the lawyer. *See*, *e.g.*, N.Y. State 746 (2001) (lawyer with a durable power-of-attorney should not petition for the appointment of a guardian without the client's consent if the client becomes incompetent unless there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests). However, without the client's informed consent the lawyer should never use a stand-alone power of attorney or a power of attorney contained in a retainer agreement to exercise rights or prerogatives reserved to the client under the Code or substantive law.

Authority to Agree to Settlement

Even without a power of attorney, a lawyer is authorized to make many decisions on behalf of the client. For example, the lawyer generally is entitled to make decisions in certain areas of legal rep-

resentation not affecting the merits of the cause or substantially prejudicing the right of the client. EC 7-7. In civil cases, however, it is for the client to decide whether to accept a settlement offer. EC 7-7; American Law Institute, Restatement (Third) of the Law Governing Lawyers (hereinafter, "Restatement"), § 22, comment *d* (A lawyer may not make a settlement without the client's authorization. A lawyer who does so may be liable to the client or the opposing party and is subject to discipline.) Nevertheless, a client may authorize the lawyer to negotiate a settlement that is subject to the client's approval or to settle a matter on terms indicated by the client. Restatement, § 22, Comment *c*. A retainer agreement is generally signed before the commencement of the representation or within a reasonable time thereafter, before the lawyer has had an opportunity to ascertain the facts of the case and the willingness of the parties to settle. *See, e.g*., 22 NYCRR Part 1215 (Joint Order of Appellate Divisions establishing requirement to provide written letter of engagement or obtain retainer agreement). Consequently, it is unlikely that at the time of entering into the retainer agreement the lawyer would have been able to make the disclosures necessary to validate using the settlement authority. Therefore, if the lawyer obtains a general power of attorney in advance of the settlement, the lawyer should not use the power to settle the matter without obtaining more explicit instructions from the client after the lawyer and the client have discussed the merits of the case, the client's willingness to settle and the settlement terms that are acceptable to the client.

Court rules may require a lawyer to appear at a settlement conference with the authority to settle a matter. *See, e.g.*, 22 NYCRR 202.19(b)(3) (Uniform Rules - Trial Courts; compliance conference to explore potential settlement); NYCRR 202.16(f)(2)(iii) and (3) (matrimonial matters); 22 NYCRR 600.17(e)(1st Dep't), 22 NYCRR 670.4(a)(2d Dep't) and 22 NYCRR 800.24-b (3d Dept) (all civil matters); Federal Rules of Civil Procedure 16(a) ("At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.") While the lawyer may comply with such rules by appearing with the client, the lawyer may also comply by obtaining express settlement authorization from the client. We see nothing unethical about the lawyer obtaining such authorization in advance. We believe, however, that it would be inconsistent with the Code for the lawyer to use such settlement authorization without obtaining explicit instructions from the client after the lawyer and the client have discussed the merits of the case, the client's willingness to settle and the settlement terms that are acceptable to the client.

Any power of attorney granted to the lawyer for settlement purposes, whether general or specific, must be revocable. *See Hayes v. Eagle-Picher Indus., Inc*. 513 F.2d 892 (10th Cir. 1975); *cf.* Model Rule 1.2, comment 5:

> An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked . . . to surrender the right . . . to settle litigation that the lawyer might wish to continue.

See also Restatement, § 22(3) ("Regardless of any contrary contract with a lawyer, a client may revoke a lawyer's authority to make the decisions described in Subsection (1) [including whether and on what terms to settle a claim]"); Restatement, § 22, comment *d* (A lawyer may not enter into an irrevocable contract that the lawyer will decide on the terms of settlement. A contract that the lawyer as well as the client must approve any settlement is also invalid.)

Settlement Checks

It is not per se unethical for a lawyer to obtain a power of attorney that would authorize the lawyer to sign a settlement check on behalf of a client. Indeed, it will usually be convenient in contingent fee matters for the proceeds of a settlement check to be deposited into the lawyer's trust account for further disposition and accounting. *See*, *e.g.*, *Rohrbacher v. Bancohio Nat'l Bank*, 171 A.D. 2d 533, 567 N.Y.S.2d 431 (1st Dep't 1991) (retainer agreement stated "We hereby authorize you to endorse my name on any check or draft obtained herein, if said check or draft is deposited to your escrow-trust account pending distribution of the proceeds pursuant to the terms of this retainer").

Nevertheless, neither a general power of attorney in favor of the lawyer nor a specific power of attorney authorizing the lawyer to sign settlement checks on behalf of the client would override the provisions of the Code that apply to client money in the possession of the lawyer. In particular, DR 9-102(B)(4) provides that all funds belonging in part to the client – which would include the proceeds of a settlement or judgment where the lawyer claims part of the proceeds as a fee or for reimbursement of expenses – must be deposited in the lawyer's attorney trust account, and the lawyer may not withdraw the part that the lawyer claims to the extent that the client disputes the lawyer's entitlement thereto:

> Funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm shall be kept in such special account or accounts [the attorney trust account], but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

Moreover, under DR 9-102(C) the lawyer must promptly notify the client of the receipt of funds in which the client has an interest and, under DR 9-102(D), the lawyer must properly account for all such funds.

We note that the Appellate Division, Second Department has upheld a disciplinary action against an attorney for using an irrevocable power of attorney in a personal injury action to authorize him to endorse a settlement check. *In re Stanley S. Hansen*, 108 A.D.2d 206, 488 N.Y.S.2d 742 (2d Dep't 1985). The respondent in that case had received a letter of admonition that the routine inclusion of an unconditional power of attorney in his retainer agreements in no-fault collection cases "represented over-reaching and created a dangerous possibility of abuse." We do not read this case as prohibiting any use of a power of attorney to authorize a lawyer to endorse the client's name on a settlement check. Rather, we believe the court was objecting to the irrevocable nature of the power of attorney used by the respondent:

> Notwithstanding the fact that he may (as the Special Referee found) have intended to delete the word "irrevocably" therefrom, there is nothing in the record which would even tend to support his decision to procure an unconditional power of attorney from the client in the first instance.

We are not aware of any cases in New York holding that a revocable power of attorney authorizing a lawyer to sign a settlement check would be per se unethical.

We note that it is a common practice in certain lawsuits – for example, where the defendant's potential liability is the subject of an insurance policy – for the check paying a judgment or settlement to be made out to both the plaintiff and his or her lawyer. This is particularly true in personal injury actions, where plaintiff's counsel may be charging a contingent fee and may have a lien on the proceeds. As the Second Circuit Court of Appeals noted in *Hafter v. Farkas*, 498 F.2d 587 (2d Cir. 1974), drawing a settlement check in the names of both the plaintiff and his or her attorney is a way for the debtor to ensure that both the creditor and his or her lawyer are made aware of the satisfaction. *Id*. at 590.

The regulations of the New York State Insurance Department do not mandate that settlement checks be made out to both the plaintiff and his or her attorney. However, Regulation 64 of the Insurance Department provides that, when an insurer is paying $5,000 or more in settlement of a third-party liability claim to a natural person, it must mail written notice to the claimant at the same time payment is made to the claimant's attorney or other representative. 11 NYCRR §216.9(a). According to an interpretation issued by the office of the General Counsel of the Insurance Department, this provision, which was adopted in 1988, was added to the Insurance Department's Rules at the request of the Clients' Security Fund (now the Lawyers' Fund for Client Protection), which saw it as a necessary response to documented instances of theft where an attorney would forge a client's endorsement on a check and pocket the proceeds. *See* N.Y. Department of Insurance, NY General Counsel Opinion 4-1-2002, available on the Insurance Department's website at http://www.ins.state.ny.us/rg204011.htm (last visited January 8, 2003). Thus, the regulations of the Insurance Department are consistent with DR 9-102. We do not believe that the existence of the Insurance Department regulation obviates the need for the lawyer to give the notice required by DR 9-102(C).

For all these reasons, we believe that it is not per se unethical for an attorney to seek such a power of attorney. If the lawyer uses this authority promptly to cash the check and to deposit the proceeds in the lawyer's trust account, and (i) promptly notifies the client of the receipt of the funds in accordance with DR 9-102(C)(1), (ii) maintains complete records of such funds in accordance with DR 9-102(D), including the deposit and disbursement thereof, and (iii) promptly pays to the client as requested any funds the client is entitled to receive, then no violation of the Code would have occurred. *See also* Wolfram, *Modern Legal Ethics*, Section 4.8, footnote 21 (The need to renegotiate the instrument promptly in order to protect against non-payment argues for obtaining the client's signed permission to sign the client's name to the check as designated endorsee.)

Prompt deposit of the endorsed check into a trust account fully complies with the safekeeping requirements of DR 9-102. If, on the other hand, the lawyer uses the power of attorney to endorse the client's name on the check and does not promptly notify the client and otherwise comply with DR 9-102, then the lawyer will have violated not only DR 9-102, but also DR 1-102(A)(1) (lawyer shall not violate a disciplinary rule), DR 1-102(A)(4) (lawyer shall not engage in conduct involving deceit), DR 1-102(A)(5) (conduct prejudicial to the administration of justice), and DR 1-102(A)(7)(conduct that adversely reflects on fitness to practice law). The lawyer will therefore be subject to discipline and possibly a law suit for conversion of the client's funds. *See, e.g.*, *In re Theodore L. Malatesta*, 124 A.D.2d 62, 511 N.Y.S.2d 246 (1st Dep't 1987). *Malatesta* involved an attorney who converted the proceeds of a settlement check by signing a settlement check made out to the attorney and client. The lawyer argued that he was authorized to do so based on a handwritten notation on the retainer agreement which stated "[subject to] full authority to settle, sign release and endorse check." Although the

court found that the client had not added the language to the retainer agreement, it concluded that, even if the language had been agreed to by the client, it did not excuse the lawyer's conversion of the funds.

CONCLUSION:

A lawyer may obtain and use a revocable power of attorney, either in a stand-alone document or as part of the lawyer's retainer agreement, that authorizes the lawyer to settle a case and to endorse the client's name to the settlement check, provided that the lawyer makes full disclosure as to the effect of such power of attorney and provided that (i) the lawyer may only settle a case on terms indicated in advance by the client or if the settlement is submitted to the client for approval, and (ii) a lawyer who endorses a settlement check on behalf of the client must promptly comply with the notice, record keeping and disbursement requirements of DR 9-102.

(25-02)

OPINION 761 (02/12/2003)

TOPIC: Conflicts of Interest; Husband and Wife; Joint Representation

DIGEST: A lawyer who accepts employment on behalf of a husband to represent him in obtaining permanent residency status for his wife may not concurrently or thereafter represent the wife in seeking residency based on the alleged abuse of the husband; lawyer could pursue wife's residency petition if engagement is structured as a representation of the wife only or as a joint representation with a prospective conflict waiver.

CODE: DR 4-101(A), (B), DR 5-105(A), (C), (D), DR 5-107(A), (B), DR 5-108(A); DR 7-101(A).

QUESTION:

(1) Where a lawyer represents or previously represented an individual in applying for legal permanent resident status for his wife, which has not been granted, is it ethically permissible to represent the wife in obtaining such status based on the current or former client's alleged spousal abuse?

(2) Can a lawyer ethically represent the husband and wife jointly or the wife alone in obtaining legal permanent resident status for the wife where her spouse must file the petition?

FACTS:

The inquirer is an attorney at a firm handling immigration matters for indigent individuals. Often the firm represents the husband, who is married to a non-citizen, in filing an I-130 petition to obtain legal residence (LPR status) for his wife.[1] The Immigration and Naturalization Service (INS) takes approximately seven to ten years to process such petitions. Once the petition is granted, the non-citizen spouse files an I-485 petition. There is often a long delay after the I-130 petition has been granted before the I-485 petition can be filed. After an I-130 petition has been granted, the law firm generally writes to the client "closing out the case" and giving him information on how to follow the case. At some point during this sequence, the wife of the petitioner approaches the lawyer and informs the lawyer that the husband has abused her. Such abuse can serve as the basis for the wife to file a "self-petition" (an I-360) to obtain LPR status, which does not require participation by the husband.

An I-360 self-petition is considered confidential except for law enforcement purposes. If the husband is a non-citizen, i.e. in LPR status, a domestic violence offense can be a deportable offense.

ANALYSIS:

Question 1

It is unclear whether the current and former representations were joint representations or representations of the husband only. In some cases, the firm had discussions with both spouses but in

1 For purposes of this opinion, we will refer to the original client as the husband.

many cases there was no contact with the wife. Nevertheless, the lawyer's ability to represent the wife of a current or former client does not turn on whether it was a joint representation.

The conflicts rules of the New York Code of Professional Responsibility (the "Code") vary depending on whether a person for whom a lawyer provided legal representation is a current client or a former client.

With respect to *current clients*, DR 5-105(A) provides:

> A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent provided in DR 5-105(C).

"Differing interests" is defined in the definitions section of the Code:

> "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest. As noted in the Restatement of the Law Governing Lawyers, unless all affected clients consent, a lawyer may not represent two or more clients in a matter if there is a substantial risk that the lawyer's representation of one or more of the clients would be materially and adversely affected by the lawyer's duties to another client in the matter. *Restatement (Third) of the Law Governing Lawyers* §§ 128, 130 (2000).

Because the interests of the husband and wife are now clearly differing, the Committee does not believe that the inquirer can continue with the representation of either spouse or take on the wife as a new client. The allegations that the wife will be required to make in the self-petition regarding the other spouse's conduct would be prejudicial to the husband's interests. For example, the information could be used by the INS for law enforcement purposes, including criminal prosecution or deportation.

In a joint representation all confidences and secrets are deemed to be shared absent agreement of the co-clients to the contrary. Thus, the lawyer would be obliged to share with both clients any information received from either client that is relevant to the subject matter of the joint representation. If a lawyer receives from one of the co-clients relevant information that the lawyer is unable to share, the joint representation must be terminated and the lawyer must withdraw from the representation of both clients. It is not sufficient for the attorney to end his or her representation of one client after a conflict has developed. Anything less than complete withdrawal from the matter would result in a violation of an attorney's fiduciary obligation to preserve the client's confidences and pursue the client's interests vigorously. *See In re H. Children*, 160 Misc.2d 298, 608 N.Y.S.2d 784 (1994).

The result is the same if only the husband is the current client of the lawyer. The interests of the two clients would clearly be differing within the meaning of the Code. Further, DR 7-102(A)(3) prohibits a lawyer from prejudicing or damaging the client during the course of the professional relationship, an inevitable consequence of the acceptance of the representation of the wife. Additionally, the allegation of spousal abuse is clearly relevant to both representations, yet the lawyer would not be

permitted to disclose this information to the husband because it is protected as a confidence or secret of the wife under DR 4-101(A) and (B).

DR 5-105(C) permits a lawyer to represent multiple clients with differing interests "if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." This is not a practical solution in this situation. It would be impossible to obtain the husband's informed consent to representation of the wife without explaining the nature of the representation. That would require the lawyer to reveal that the wife has informed the lawyer of the alleged abuse, putting the wife in potential danger. The wife should not be asked to consent under DR 4-101(C)(1) to the disclosure of this confidential information, thus making it impossible to obtain the husband's informed consent.

After the I-130 petition has been granted, the law firm closes the case and treats the husband as a former client. With respect to *former clients*, DR 5-108 provides

> . . . [A] lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:
>
> 1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

For reasons similar to those applicable to current clients, however, the lawyer could not represent the wife in filing a self-petition even where the husband is a former client. First, under DR 5-108, the filing of an I-130 petition for the husband on behalf of the wife and the filing of a self-petition by the wife are substantially related matters.[2] The goal of both representations (and both petitions) is to obtain LPR status for the wife. Although different facts must be stated in the I-360 petition (i.e. the abuse), one of the central issues in both petitions is the validity of the marriage. In this respect the wife's interests are materially adverse to the interests of the former client. Thus, the attorney could not ethically undertake representation of the wife with respect to a self-petition because her interests in that petition are materially adverse to those of her husband, the former client.

DR 5-108(A) provides that the lawyer can represent a new client in the same or a substantially related matter where the new client's interests are materially adverse to the interests of the former client provided there is consent of the former client "after full disclosure." For the same reasons stated above with respect to a simultaneous adverse representation, we do not believe that the circumstances here would permit the lawyer to obtain the husband's consent.

Because the lawyer could not represent the wife where the husband is a current or former client, all other lawyers at the firm are similarly disqualified. DR 5-105(D).

2 *See* N.Y. State 723 (1999), which contains an extensive discussion of what constitutes a "substantially related matter." As that opinion notes, factors that would tend to show that the matters were substantially related would include an identity of issues in the two matters or a significant overlap of the contested facts. The most important factor, however, is whether the moving lawyer could have obtained confidences and secrets in the former representation that could be used against the former client in the current representation.

Question 2

The inquirer asks whether the potential conflict may be avoided by structuring the engagement as a representation of the wife only or as a joint representation.

Wife as Client

It is the Committee's opinion that the law firm could structure the relationship so that the wife is considered the sole client from the outset.

An attorney-client relationship generally is entered into when a person contracts with a lawyer for legal services. A contract for legal services need not be explicit; if an attorney leads an individual to reasonably believe that a lawyer-client relationship exists, then such a relationship indeed exists. Restatement (Third) of The Law Governing Lawyers §14 (2000). In ambiguous relationships, the burden is on the lawyer to "clearly and affirmatively *negative* the existence of a client-lawyer relationship." Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 2.5 (3d ed. 2001). When an individual contacts a lawyer to provide services for the spouse's benefit, the determination of whether that person is a client depends on the reasonable expectations and understandings of the layperson. The wife may be the sole client so long as the lawyer explains to both the husband and the wife that the wife is the sole client and his loyalties are to the wife alone. In addition the lawyer should explain to the husband that the communications from the husband to the lawyer, if any, would not be confidential and may be communicated to the wife but communications from the wife to the lawyer will be held in confidence and will not be communicated to the husband.

The ability of the lawyer to represent only the wife is not affected by the fact that it is her husband who is the petitioner for LPR status for his wife. It is the wife whose residency status is at stake, and who is the real party in interest. It is often the case that a lawyer will need the assistance of a third-party, non-client to carry out the objectives of the representation. For example, where a client requires the signature of a guarantor, whether on a lease on in connection with an extension of credit, the guarantor does not become a client by virtue of signing the contract. Furthermore, the fact that the non-client spouse could thwart the objective of the representation—LPR status for the wife—by refusing to sponsor the wife does not alter our conclusion. Similar consequences occur whenever action by a third party on behalf of the client is necessary to effectuate the client's legal objectives.

The fact that the husband pays the fee for filing the petition with the INS does not undermine the attorney-client relationship with the wife. Fees and expenses (including legal fees) are often paid by third parties such as a parent, a borrower or a purchaser. The Code prohibits a lawyer, however, from allowing a third person that pays the lawyer's fee from interfering with both the lawyer's exercise of independent professional judgment on behalf of the client and the lawyer's duty to maintain the confidences and secrets of the client. DR 5-107(B).[3] It also provides that a lawyer may accept compensation for legal services from someone other than the client only with the consent of the client after full disclosure. DR 5-107(A); s*ee* N.Y. State 721 (1999) (full disclosure of all material facts and circumstances required).

3 See also EC 5-1 ("The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. . . .[T]he desires of a third person should [not] be permitted to dilute the lawyer's loyalty to the client.")

In sum, it is ethically permissible for the lawyer to structure the relationship so that the wife is the sole client with respect to the INS petition for legal permanent residence status. Where the lawyer is approached initially by the husband/petitioning spouse, the lawyer must make clear that the wife, and not the husband, is the client.

Joint Representation

As noted above, an attorney generally will be required to withdraw from representation of both parties when a conflict develops between jointly represented clients. In addition, the attorney must share all material information relating to the representation with the co-clients.

On establishing the attorney-client relationship, the co-clients may consent to an alternative arrangement. The co-clients may specifically agree that the lawyer will not share confidential information if requested by the client providing the information. *See* Restatement (Third) of the Law Governing Lawyers § 75, cmt. D (2000)("Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-clients.") For example, if the lawyer initially obtained such an agreement, the lawyer would not be obliged to share with the husband the wife's statement to the lawyer that her husband was abusing her. The clients could also agree that in the event of a conflict, the lawyer will continue to represent only one of the jointly represented clients, such as the wife. *Id.* § 122, illus. 8.

A client's consent to future conflicts is "subject to special scrutiny." *Id*. § 122, cmt.d. The clients' advance consent must be to a conflict that is consentable and the consent must be informed. The future conflict must be described "with sufficient clarity so the client's consent can reasonably be viewed as having been fully informed when it was given." ABA Formal Op. 372 (1993). A prospective waiver of a future conflict is more likely to be effective where the attorney has identified the potentially adverse party and the nature of the conflict. *Id*. In the circumstances under consideration here, the attorney knows, based on past practice, that a conflict is most likely to arise when the wife informs the attorney confidentially that her husband has abused her. Thus, it is unlikely that the advance waiver permitting the attorney to terminate the representation of the husband and continue representation of the wife would be effective unless the husband understood that a possible future conflict would include an allegation of abuse that would support a self-petition by the wife.

CONCLUSION:

A lawyer who has undertaken to represent a husband in obtaining legal permanent residency status for his wife may not thereafter represent the wife in seeking residency status based on alleged spousal abuse. This disabling conflict could be avoided by structuring the engagement as a representation of the wife only, notwithstanding that the husband is the petitioner and may pay for the legal services. Alternatively, the lawyer could represent the wife in seeking permanent residency based on the alleged abuse of her husband if the original engagement was structured as a joint representation with the parties' agreement that not all information acquired during the course of the representation would be shared with both co-clients, and if the parties provided a prospective conflict waiver that contemplated the situation presented and permitted the lawyer to withdraw from the representation of the husband and to continue to represent the wife.

(32A-01)

OPINION 762 (03/05/2003)

TOPIC: Supervision by New York lawyers and law firms of lawyers licensed in foreign countries

DIGEST: Law firm with New York office and at least one affiliated New York lawyer is subject to certain New York disciplinary rules; obligation of New York law firm and of supervisory lawyers to ensure compliance with the New York Code extends only to lawyers subject to the New York Code; New York law firm has broad supervisory responsibilities with respect to affiliated lawyers licensed in foreign countries, and must ensure that compliance by such lawyers with foreign law and ethical standards does not compromise the firm's adherence to the New York Code.

CODE: DR 1-102; DR 1-104; DR 1-105; DR 1-106; DR 1-107; DR 2-101(E), (G), (L); DR 2-102(A), (D); DR 2-105(A); DR 2-106(A), (C)(2); DR 2-111; DR 3-102(A); DR 4-101(B), (D); DR 5-102(B); DR 5-105(E); DR 5-108(C); DR 6-101; DR 7-102(B)(1); DR 9-102(B), (D); EC 1-8; EC 2-19; EC 4-5;

QUESTION:

To what extent must a New York attorney or the attorney's law firm supervise associates, partners and non-lawyers who are admitted to practice in foreign jurisdictions but not in New York?

FACTS:

The inquirer is a lawyer admitted to practice in New York and practices in a law firm that has as partners and associates lawyers licensed in a foreign country who are not admitted in New York or any other state.[4] The firm has an office in New York (where the inquirer works) as well as in the foreign country.

OPINION:

DR 1-104 of the Lawyer's Code of Professional Responsibility (the "New York Code") imposes certain supervisory responsibilities on law firms and lawyers:

> A. A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.
>
> B. A lawyer with management responsibility in the law firm or direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the disciplinary rules.

4 We assume for purposes of this inquiry that the inquirer may ethically form a partnership with the lawyers involved. *See* N.Y. State 658 (1994), in which we opined that whether a New York lawyer could affiliate with an attorney or firm from another country was dependent upon the educational requirements and ethical standards for the attorneys licensed in foreign countries. We assume that the New York lawyer here has made an independent inquiry to ensure that there are not substantial differences in the educational requirements or ethical standards applicable to the foreign attorneys that would make it impossible for the inquirer to uphold his or her ethical obligations. N.Y. State 658, at 3.

> C. A law firm shall adequately supervise, as appropriate, the work of partners, associates and non-lawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

DR 1-104 provides ethical rules both for the law firm (DR 1-104[A] and [C]) and for individual lawyers (DR 1-104[B]). We first discuss the firms to which DR 1-104(A) and (C) apply. We then discuss DR 1-104(A) and (B), which impose supervisory responsibility with respect to compliance with disciplinary rules, and finally the more general supervisory responsibility imposed by DR 1-104(C).

Law Firms Subject to Disciplinary Rules[5]

A limited number of disciplinary rules in the New York Code apply to law firms rather than, or in addition to, individual lawyers.[6] *See* DR 1-102, 1-104, 1-106, 1-107, 2-101(E), (G), (L), 2-102(A), 2-105(A), 2-111, 3-102(A), 5-102(B), 5-105(E), 5-108(C), 9-102(B)(2). Our initial task is determining which firms are subject to these provisions of the New York Code.

The New York Code specifically addresses which lawyers are subject to the disciplinary authority of New York. *See* DR 1-105 ("A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs."). It does not, however, provide a similar rule for "law firms." Although the First Department has adopted such a rule, none of the other Departments in the State has done so.[7] In the absence of a clear rule, the reach of the New York Code as it applies to law firms is uncertain. At a minimum, however, the Disciplinary Rules that are specifically applicable to law firms under the New York Code apply to firms with a New York

5 The Definitions section of the New York Code provides:

> "Law firm" includes, but is not limited to, a professional legal corporation, a limited liability company or partnership engaged in the practice of law, the legal department of a corporation or other organization and a qualified legal assistance organization.

Our discussion of DR 1-104 is applicable to all of these entities.

6 We note that although state law generally treats a partnership as an aggregate of its partners, the New York Code in some cases treats the partnership as an entity and imposes certain obligations on the firm. This requires the firm, through its governance structure, to take steps to satisfy its entity obligations.

7 22 NYCRR 603.1(b), 603.2(b) provide that any law firm (as defined in the New York Code) that has as a member, employs, or otherwise retains an attorney or legal consultant who is subject to the New York Code can be disciplined for professional misconduct under the New York Code. 22 NYCRR 603.1(a) provides that "all attorneys who are admitted to practice, reside in, commit acts in or who have offices in this judicial department, or who are admitted to practice by a court of another jurisdiction and who practice within this department [in certain situations]" as well as those admitted pro hac vice are subject to the New York Code.

Read literally the First Department's rule is extraordinarily broad. It would apply the New York Code to any firm that has a partner or associate who resides in New York or who is admitted to practice in New York. For example, the First Department apparently would apply the New York Code to a Connecticut law firm that has a single partner who lives in Westchester County but who is admitted to practice and practices only in Connecticut. It also apparently would apply the New York Code to an Idaho firm that employs an associate who is admitted in both New York and Idaho, but practices only in Idaho. We question whether the court intended to extend the reach of the New York Code in these circumstances.

office and at least one New York lawyer affiliated with the firm in that office.[8] For purposes of this opinion we refer to such a firm as a "New York firm"; it follows that DR 1-104 applies to a New York firm.

Responsibility With Respect to New York Disciplinary Rules

DR 1-104(A) requires a New York firm to "make reasonable efforts to ensure that *all lawyers* in the firm conform to *the disciplinary rules."* (Emphasis added). Read literally, this might imply that partners and associates of a New York firm who are licensed in a foreign country but not admitted in New York must conform to the New York Code. We believe that this broad reading is unintended. We conclude that DR 1-104(A) requires a New York firm to make reasonable efforts to ensure that lawyers subject to the New York Code who are affiliated with the firm comply with the New York Code.[9]

The New York Code contemplates that New York lawyers will enter into partnerships with lawyers admitted in other jurisdictions, *see*, *e.g.*, DR 2-102(D), and it is common knowledge that the ethics and disciplinary rules of various jurisdictions differ in material ways. Furthermore, this Committee has opined that partnerships of New York lawyers and lawyers licensed in a foreign country are ethical in circumstances where professional standards of conduct applicable to the foreign lawyers are compatible with the New York Code.[10] Thus, it is clear that New York lawyers may enter into partnerships with lawyers who are bound by ethics rules other than the New York Code.

In addition, the rules of the four Departments, which subject lawyers to the Code of Professional Responsibility, vary somewhat, but generally provide that the New York rules with respect to professional misconduct apply to attorneys who are admitted to practice, reside in, commit acts in, or have offices in New York. 22 NYCRR 603.1, 691.1, 806.1, 1022. Thus, a lawyer licensed in a foreign country who has no relationship to New York is not subject to the New York Code under the Appellate Division rules.

A New York law firm must make reasonable efforts to ensure that any lawyer in the firm who is subject to the New York Code complies with its disciplinary rules. DR 1-104(A) does not impose

8 We note that two court rules use the existence of a New York office as a determinant. Part 137, the rule implementing a comprehensive fee dispute resolution program, states that the rule does not apply to "disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in New York, or where no material portion of the services was performed in New York." 22 NYCRR Part 137.1(b)(7). The written letter of engagement rule, Part 1215, contains an identical exception. *See* 22 NYCRR Part 1215.2(4).

9 EC 1-8 contains a similar rule, but capitalizes the term "Disciplinary Rules," providing support for the view that DR 1-104(A) is referring only to the disciplinary rules found in the New York Code.

10 In opining that it would be ethical for a New York lawyer to enter into a partnership with a British lawyer, we commented on the "essential compatibility of our standards of professional conduct and discipline." N.Y. State 542 (1982). Similarly, in finding it would be ethical for a New York lawyer to enter into a partnership with a Japanese bengoshi, we noted that "the standard of professional conduct and discipline in Japan appears to be sufficiently similar in relevant aspects." N.Y. 646, at 3. In neither situation did we require an identity of ethical and disciplinary rules, which is not likely to be the case. *See also* ABA 423 (2001) ("The law and ethical standards applicable to the legal profession in foreign countries will differ from some of the law and ethical standards that apply to U.S. lawyers."); Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 Georgetown J. Legal Ethics 677 (2000) (outlining some differences between ethical rules in EU countries and the United States).

an obligation on a New York law firm to ensure compliance with the Disciplinary Rules by affiliated lawyers licensed in foreign countries who are not subject to the New York Code.[11]

We note that the more general supervisory responsibility imposed by DR 1-104(C) – which specifically embraces "non-lawyers who work at the firm" – may in some circumstances require a New York firm to supervise lawyers licensed in foreign countries to ensure that their conduct does not limit the ability of the firm and its New York lawyers to comply with the New York Code. This responsibility is discussed in the next section.

DR 1-104(B) imposes similar obligations on a lawyer with management responsibility in the law firm or direct supervisory authority over another lawyer. Thus, these individuals have responsibilities to the same extent the law firm has a responsibility under DR 1-104(A) to ensure that lawyers in the firm subject to the New York Code abide by the New York disciplinary rules.[12]

Both DR 1-104(A) and (B) provide that the law firm and lawyers with management or supervisory responsibility in the law firm must make "reasonable efforts" to ensure that other lawyers in the firm conform to the disciplinary rules. While what constitutes "reasonable efforts" will vary from firm to firm, some general standards are applicable. First, the firm should adopt procedures to deal with ethical questions and problems. EC 1-8 suggests that these measures may include "informal supervision and occasional admonition, a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior lawyer or special committee, and continuing legal education in professional ethics." What constitutes reasonable efforts will depend, in part, on the size of the firm and its structure. Informal supervision may be sufficient in a small one-office firm, but detailed written policies and procedures may be necessary in a multi-office firm. *See* ABA Model Rule 5.1, cmt. [2]. The locus for confidential referral of ethical questions confronting a New York lawyer should be another New York lawyer. Other ways in which a firm may carry out its responsibilities include adopting internal standards of conduct or an ethics manual, seeking opinions of bar ethics committees, or consulting outside experts. *See generally New York Code of Professional Responsibility: Opinions, Commentary & Caselaw* bk. xi at 20-22 (Mary C. Daly ed. 2002); Roy D. Simon, Jr., *Simon's New York Code of Professional Responsibility Annotated* 50-52 (2003).

Second, in addition to having procedures in place to respond to ethical inquiries or lapses, the firm has an obligation to respond to any ethical issue that comes to its attention. Third, while the firm does not need to monitor every aspect of every representation undertaken by one of its lawyers, it does have a duty to make inquiries where it has reason to believe there is a likelihood that there may be ethical problems.

11 Under the ABA Model Rules, "[a] partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Model Rule 5.1(a). The ABA Standing Committee on Ethics and Professional Responsibility interpreted this to mean the Model Rules if they are in effect in a jurisdiction and, if not, other ethical and disciplinary rules applicable in the United States or foreign jurisdiction. *See* ABA 423 (2001). The ABA Committee did not address the choice of law question as to which ethical rules apply to lawyers engaged in a multinational legal practice.

12 DR 1-104(B) does not apply to managing or supervisory lawyers who are not subject to the New York Code. So, for example, a British lawyer who directly supervises a New York lawyer in a London office has no responsibility to ensure that the New York lawyer complies with the New York Code.

General Supervisory Responsibilities

DR 1-104(C) requires a law firm adequately to supervise, as appropriate, the work of partners, associates, and non-lawyers who work at the firm. This provision imposes obligations on the New York firm with respect to affiliated lawyers licensed only in foreign countries who are, for this purpose, "non-lawyers."

In general, DR 1-104(C) requires a New York law firm to have systems in place to ensure that the firm's practice will be conducted in a professional and ethical manner. For example, the law firm has an obligation (i) to have a policy and system for detecting conflicts of interest, DR 5-105(E); (ii) to provide accurate bills to clients, EC 2-19; *see* DR 2-106(A); (iii) to retain appropriate records, DR 9-102(D); (iv) to provide retainer agreements where necessary, DR 2-106(C)(2); and (v) to segregate client funds, DR 9-102(B). The law firm must take reasonable measures to assure that its lawyers and non-lawyers are familiar with these procedures and comply with them. It is not sufficient for the firm simply to assume that its lawyers and non-lawyers will comply. *Cf. Dresser Industries v. Digges*, 1989 WL 139234 (D. Md. 1989) (finding nonparticipating partners liable for misconduct of a partner based in part on the firm's failure to have a system in place to assure compliance with disciplinary rules); *Restatement (3d) of The Law Governing Lawyers* § 11(1) (partners can be disciplined for failing to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to applicable code requirements"). The firm's responsibility for developing and implementing systems to ensure professional and ethical practice may be delegated to a management committee or similar group. *See id.* § 11, cmt. d.

Furthermore, DR 4-101(B) imposes on lawyers the obligation to preserve the confidences and secrets of a client. DR 4-101(D) requires that a lawyer "exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client . . . ." *See also* EC 4-5. The firm must acquire, store, retrieve, and transmit client confidential information "under systems and controls that are reasonably designed and managed to maintain confidentiality." *Restatement (3d) of The Law Governing Lawyers* § 60, cmt. d. The firm must take steps to ensure that all persons affiliated with the firm understand the sanctity of this provision. Non-lawyers and lawyers licensed in foreign countries whose confidentiality rules may differ need to be sensitized to the obligation not to disclose or use a client confidence or secret. *See generally* James Altman, "An Associate's Duty to Supervise Non-Lawyers," N.Y.L.J., Oct. 11, 2002, at 28.

In addition, Canon 6 provides that a lawyer should represent a client competently. DR 6-101 specifically provides that: "A lawyer shall not handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it." The presence of another lawyer in the firm competent to handle the matter does not absolve the first lawyer of the obligation under DR 6-101 unless he or she actually consults with the second lawyer. Therefore, a New York firm should assure itself that all lawyers (including lawyers licensed only in foreign countries) working in the New York office are competent to handle matters undertaken by them, and if not, to have in place a procedure for consultation with a lawyer who has competence in the area. As DR 1-104(C) suggests, the degree of supervision will vary with the circumstances, taking into account "the experience of the person whose work is being supervised, the amount of work

involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter."

The supervision mandated by DR 1-104(C) requires reasonable efforts to ensure that adherence to the disciplinary rules of a foreign country by a lawyer licensed in a foreign country does not expose the New York firm or its New York lawyers to the possibility of violating the New York Code. In N.Y. State 646, which permitted New York lawyers generally to enter into partnerships with lawyers licensed in foreign countries, we required that the partnership "not compromise the New York lawyer's ability to uphold ethical standards." Specifically, "the New York lawyer who enters into a partnership with lawyers licensed in . . . [a] foreign country has an obligation to ensure that participation in the law partnership does not compromise the lawyer's ability to abide by the ethical standards of this State, including the standards governing attorney-client confidentiality." *Id*. at 3-4; *see also* D.C. Op. 278 (1998) (same). Furthermore, a New York lawyer is responsible for a violation of the New York Code by a lawyer or non-lawyer employed, retained, or associated with the New York lawyer where the New York lawyer (1) orders, directs or ratifies the conduct or (2) is a partner or has supervisory responsibility for the person who engaged in the conduct and knows of such conduct or in the exercise of management or supervisory responsibility should have known of such conduct so that remedial action should have been taken. DR 1-104(D).

For example, while there might be no per se prohibition against a New York lawyer entering into a partnership with lawyers from Country X where the ethical and disciplinary rules of both jurisdictions are similar, the New York lawyer could not enter into the partnership if one of the Country X partners was not a lawyer. Although such a partnership might be permitted in Country X, the New York lawyer could not enter into the partnership because it would compromise the lawyer's ability to abide by the New York ethical rules. *See* DR 3-103 (lawyer cannot form a partnership with a non-lawyer if the partnership practices law); *see also* ABA 423, *supra*.

Even where forming a partnership with lawyers licensed in foreign countries is ethically permissible, in carrying out its supervisory obligations under DR 1-104(C) the law firm may need to take steps to ensure that particular actions of the foreign lawyers do not compromise the New York lawyer's ethical responsibilities. *Cf*. EC 1-8 ("A law firm should adopt measures giving reasonable assurance that all lawyers in the firm conform to the Disciplinary Rules and that the conduct of non-lawyers employed by the firm is compatible with the professional obligations of the lawyers in the firm.") Suppose, for example, that the ethical rules of Country X generally comport with the New York confidentiality rules but *require* a lawyer to reveal a client's past fraud. Because a New York attorney is prohibited from revealing a client confidence or secret in that situation (DR 7-102[B][1]; DR 4-101), the firm must take reasonable steps to ensure compliance with the New York Code (for example, by ensuring that such confidential information is unavailable to the lawyer licensed in Country X).[13] To ensure that adherence to the disciplinary rules of a foreign country by a foreign lawyer does not expose the New York firm or its New York lawyers to a violation of the New York Code, supervision of the lawyer licensed in the foreign country by the firm should be by a lawyer (or lawyers) familiar with the New York Code.

The New York firm may also have affirmative duties with respect to a client whose matter will be handled in a foreign jurisdiction with differing ethical rules. For example, the firm must explain to

13 If this is impossible because of the size or the nature of the firm, the partnership itself may be unethical.

the client the extent to which the confidentiality rules in the foreign jurisdiction provide less protection than they do in New York.

CONCLUSION:

New York lawyers with management or supervisory authority in law firms with New York offices, as well as the firms themselves, are required to make reasonable efforts to ensure that lawyers subject to the New York Code who are affiliated with the firm in such offices comply with the New York Code. A New York firm has broad supervisory responsibility under DR 1-104(C) with respect to non-lawyers and lawyers licensed in foreign countries in the New York office, and must ensure that compliance by foreign lawyers with the ethical rules of a foreign jurisdiction does not compromise the firm's adherence to the New York Code.

(24-01)

OPINION 763 (05/15/2003)

TOPIC: Third-party payments by credit card; fees deducted from such payments before remittance to client.

MODIFIES: N.Y. State 117 (1969), N.Y. State 362 (1974)

DIGEST: Not improper for lawyer to accept collection payments from debtors by credit card on behalf of creditor-client where funds are placed in trust account and proper safeguards employed, and all requirements regarding contingent or fixed fee forms of engagement are met.

Legal fees may be deducted from such payments before remittance to client if not excessive or in dispute; if disputed, lawyer may not withdraw disputed fees, must forward payment to client to the extent not in dispute and must attempt to resolve dispute. If applicable, the lawyer must submit matter to fee dispute resolution program.

CODE: DR 2-106(A); 2-106(B); 2-106(C) (2)(b); 2-106(D); 2-106(E); 4-101; 9-102(A); 9-102(B)(4).

EC 2-17; 2-19; 2-20; 2-21; 2-23; 9-5.

QUESTION:

May an attorney whose practice includes debt collection matters (1) accept payment by credit card on behalf of a client from the client's debtors; (2) transfer the payment collected into an IOLA[14] or other trust account to be held until a netted payment is remitted to the client; (3) deduct from the trust account an agreed upon sum as the attorney's legal fee, together with all related disbursements except for credit card service fees; (4) remit the netted payment to the client; and (5) pay all applicable credit card service fees from the attorney's own operating account?

OPINION:

A law firm's practice, in large part, includes the representation of one or more creditors in connection with debt collection matters. The Committee is advised that, customarily in this type of practice, an attorney who has successfully collected unpaid sums from a debtor retains approximately 25% of funds collected as a legal fee and remits the remaining 75% to the creditor-client. For purposes of this opinion, the Committee assumes that all fees to be paid to the law firm will not be "excessive" under the factors set forth in DR 2-106(A) of the Code.

The law firm proposes to initiate a payment program whereby debtors of creditor-clients could pay their overdue accounts, or the judgments the firm has obtained against them, by credit card. The debtor would authorize payment either telephonically or by in-person execution of the law firm's credit card debit form. The debtor is to receive full credit for any payment charged, and the client will ultimately receive all monies collected, less only the firm's agreed upon legal fee and the disbursements which are to be deducted prior to remittance.

14 N.Y. Jud. Law § 497.

By undertaking such a program, the firm will be acting in much the same manner as a "merchant" in a retail establishment. When dealing with a retail merchant, a merchant credit card bank charges "points" against any credit card payment that the merchant has received for the sale made. The firm advises that the bank charge is approximately 2% of each dollar of payment received. "Discounts" may be offered to a merchant based on the amount of credit card charges.

In N.Y. State 362 (1974) and N.Y. State 117 (1969), as well as N.Y. State 399 (1975), this Committee answered in the affirmative the question of whether a lawyer could participate in a bank charge card system where the agreement with the bank permits the lawyer's clients to pay for legal services by credit card. Certain minimal safeguards, however, were to be incorporated into any such plan. A*ccord,* Utah State Bar Op. 97-06[15]; So. Carolina Bar Ethics Advisory Opinion 98-08[16]; Colo. Bar Ass'n Opinion 97/98-01.[17]

Preliminarily, the Committee observes that when N.Y. State 117 and N.Y. State 362 were written, the use of credit cards was not as common as it is today and the payment of legal fees by credit card was a novelty. With over thirty years of credit card history to look back upon and little abuse of the arrangement by lawyers or banks, the Committee has reconsidered the safeguards listed in its earlier opinions. In so doing, the Committee concludes that it is no longer necessary to require that the agreement between the lawyer and the bank provide that, in any possible suit against the client, the bank waive all defenses which a holder in due course might have. The Committee also observes that the prohibition against any display of a decal in the lawyer's office has been superseded by substantive law[18] This Committee does not pass upon issues of law, but restricts its opinions solely to ethical issues arising under the Code. Therefore, to the extent herein provided, the requirements of N.Y. State 117 and N.Y. State 362 are modified.

In the present inquiry, and unlike the situations posed in our prior opinions, the monies to be received by the lawyer from credit card payments are from third persons, not clients directly, and are primarily the property of the creditor-client. The payments only partially comprise the lawyer's legal fee. For this reason, the funds must be placed in the lawyer's trust account (or an IOLA account, if the amount of funds received from each transaction is small and/or is to be held for a short period of time). *See generally* DR 9-102, EC 9-5; *see also* N.Y. Jud. Law § 497.

15 The attorney may, among other things, (a) accept cash or a check from a client to be held against unearned fees or costs when the attorney knows that the client obtained funds through use of a credit card; (b) enter into a retainer agreement with a client under which the client gives the attorney a credit card number and authorizes charging the client's credit card when fees are earned and costs incurred; and (c) place a notice on bills to clients that credit card payment is accepted. The opinion also noted that by accepting credit card payments, the attorney has no obligation to enter into a bank-charge credit card arrangement.

16 Client's credit card may be charged for fees so long as the attorney notifies the client before charges are billed to the credit card and offers the client an opportunity to question errors.

17 Credit card payments may be accepted under certain circumstances so long as the arrangement is fair and reasonable, confidentiality is assured, and the attorney's independence is not compromised.

18 In *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), the United States Supreme Court held that lawyers had a First Amendment right to truthfully advertise prices for routine legal services. At the time that N.Y. State 117 and N.Y. State 362 were issued, New York and other states did not permit advertising of any kind. *Bates* and its progeny are controlling on this issue. DR 2-101(A) of the Code now requires that "A lawyer . . . shall not use or disseminate or participate in the preparation or dissemination of any public communication or communication to a prospective client containing statements or claims that are false, deceptive or misleading."

DR 9-102(A) provides that:

> A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

See also DR 9-102(B) which requires, in part, that funds belonging to other persons also be kept in separate accounts, properly identified.

After deposit of the payment in the trust account, the law firm then proposes to deduct its fees and disbursements before remitting the netted sum to the client. DR 9-102(B)(4) provides that:

> Funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

A written agreement with the client will help to minimize the chance of any dispute arising over fees. *See* EC 2-19 and EC 2-23. In circumstances where, as here, the law firm plans to deduct its fee before remitting payment to the client, it is particularly important that there be no misunderstanding regarding legal fees.

If the firm's fee is solely dependent on the collection of funds from debtors, the fee arrangement is contingent and a written agreement is not only advisable, but required. DR 2-106(D) provides that:

> Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of a settlement, trial or appeal, litigation or other expenses to be deducted from the recovery and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and if there is a recovery, showing the remittance to the client and the method of determination.

See also EC 2-20.

Whether fees are contingent or fixed, the firm will be required (subject to narrow exceptions[19]) to provide each client for which it commences a new matter with a written letter of engage-

19 Exceptions are: "(1) representation of a client where the fee to be charged is expected to be less than $3000, (2) representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client, or (3) representation in domestic relations matters subject to Part 1400 of the Joint Rules of the Appellate Division (22 NYCRR) or (4) representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York." 22 N.Y.C.R.R., Part 1215 § 1215.2, effective March 4, 2002.

ment (22 N.Y.C.R.R. § 1215.1, effective March 4, 2002, and DR 2-106(C)(2)(b)) providing an explanation of the scope of legal services to be provided, the fees to be charged and the firm's billing practices, and, if applicable, providing notice of the client's right to arbitration. 22 N.Y.C.R.R. Part 137 ("Fee Dispute Resolution Program") and DR 2-106(E). *See also* EC 2-19 and EC 2-23.

In the event a good faith dispute over fees arises with the client,[20] fees for services may not be withdrawn by the firm from the trust account until the dispute is finally resolved. Except for the amount in dispute, the balance of the funds should be remitted promptly to the client. If the dispute cannot be amicably resolved by the lawyer and client, the law firm must comply, if applicable, with requirements of the fee dispute resolution program recently promulgated as Part 137 of the Rules of the Chief Administrator of the Courts,[21] or promptly take other steps to "resolve amicably any differences on the subject." EC 2-23.

With regard to charges by the merchant credit card bank incurred in consequence of the firm's credit card program, such charges may be deducted from the sum remitted to the client if this arrangement is part of the understanding with the client;[22] otherwise these charges should be deducted from the firm's fees or paid by the firm from its operating account and not passed on to the client.

CONCLUSION:

A law firm whose practice includes debt collection matters (1) may accept payment by credit card on behalf of a client from a client's debtors; (2) should transfer any payments collected by the law firm into an IOLA or other trust account where the payment is to be held until the netted amount can be remitted to the client; (3) may deduct from the trust account an agreed upon sum as the law firm's legal fee, together with all disbursements, so long as the fee is not excessive or in dispute; (4) may not withdraw any amount on account of fees that are disputed, and must promptly forward to the client the balance owing to the client; (5) may deduct the costs and expenses associated with the credit card service from the payment to be forwarded if agreed to by the client; otherwise, the lawyer should pay such expenses out of the firm's fees or its operating account; and (6) should promptly remit the netted payment to the client.

Depending on the nature of the fee arrangement with the client, the law firm should also comply with all requirements of DR 2-106(E) if the fee is contingent, or, alternatively, comply, if applicable, with 22 N.Y.C.R.R. § 1215.1. In the event of any dispute regarding the fee, the law firm should attempt to resolve all disputes amicably and promptly and, if applicable, should comply with the fee dispute resolution program set forth in 22 N.Y.C.R.R., Part 137.

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20 It is assumed that there is little likelihood of a dispute arising between the lawyer and the debtor because payments will only be received by the firm if the collection matter has been resolved and the debtor agrees or wishes to pay the collection amount by credit card.

21 22 N.Y.C.R.R., Part 137 ("Fee Dispute Resolution Program") and DR 2-106(E).

22 *Cf.* So. Carolina Bar Ethics Advisory Op. 98-08 (where, under an attorney's agreement with a credit card company, the latter charges an administrative fee, the attorney may pass such costs on to the client, provided the total fee is "objectively reasonable.").

OPINION 764 (07/22/2003)

TOPIC: Escrow funds; fee agreements; conflicts of interest; Interest on Lawyer Account (IOLA)

DIGEST: Lawyer may only accept IOLA account earnings credit with consent of client after full disclosure

CODE: DR 2-106(A), 5-101(A), 5-107(A)(2), 7-101(A)(3), 9-102(A); EC 2-21

QUESTION:

May an attorney accept an earnings credit against bank charges based upon balances held in the attorney's IOLA account?

OPINION:

A bank is developing a package of banking products designed specifically for attorneys that will include an "earnings credit" based on balances held in an attorney's operating accounts. Subject to this committee's approval, the earnings credit will also be given with respect to balances maintained in an attorney's IOLA account, but not with respect to non-IOLA attorney trust accounts. The earnings credit would only be applied to reduce or eliminate monthly bank fees otherwise chargeable to the attorney, and would not result in a cash payment or bank credit over and above the monthly bank fees. Because the bank would, in addition, waive the monthly maintenance fee associated with the IOLA account, the IOLA Fund would receive more money from IOLA accounts maintained by attorneys who have accepted the earnings credits than from other IOLA accounts.

IOLA accounts are unsegregated interest-bearing transaction accounts with check writing privileges. The interest on IOLA accounts is used to help finance legal services for the poor. The current IOLA interest rate paid by the bank state wide is .35 percent per annum. Pursuant to New York Judiciary Law §497(4)(c)(i) and (ii), "qualified funds" that are not deposited in an unsegregated IOLA account must be deposited in a segregated interest-bearing attorney trust account for the client's benefit, or in an unsegregated interest-bearing attorney trust account provided the bank or the depositing lawyer can separately compute and pay to each client the interest earned by such client's funds.

"Qualified funds" are defined by Judiciary Law §497(2) as:

> moneys received by an attorney in a fiduciary capacity from a client or beneficial owner and which, in the judgment of the attorney, are too small in amount or are reasonably expected to be held for too short a time to generate sufficient interest income to justify the expense of administering a segregated account for the benefit of the client or beneficial owner. In determining whether funds are qualified for deposit in an IOLA account, an attorney may use as a guide the regulation adopted by the board of trustees of the IOLA fund pursuant to subdivision four of section ninety-seven-v of the state finance law.

The qualified funds determination "guideline" authorized by § 497(2) is found at 21 NYCRR §7000.10, and provides that where the deposit is not expected to "generate at least $150 in interest or such larger sum as the attorney or law firm in the exercise of his professional judgment deems may be equivalent to the cost of administering a separate account," the attorney "may choose to place these funds in a pooled IOLA account." The guideline thus reaffirms, in the context of a $150 "safe harbor," the broad IOLA deposit standard of New York Judiciary Law §497(4)(b), which states:

> The decision as to whether funds are nominal in amount or expected to be held for a short period of time rests exclusively in the sound judgment of the lawyer or law firm. Ordinarily, in determining the type of account into which to deposit particular funds held for a client, a lawyer shall take into consideration the following factors:
>
> (i) the amount of interest the funds would earn during the period they are expected to be deposited;
>
> (ii) the cost of establishing and administering the account, including the cost of the lawyer or law firm's services;
>
> (iii) the capability of the banking institution, through subaccounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client.

Judiciary Law §497 also limits a lawyer's exposure to damages or professional misconduct charges arising out of his or her decision to deposit client funds into an IOLA account to "bad faith" claims. Subdivision (5) of the statute states: "No attorney or law firm shall be liable in damages nor held to answer for a charge of professional misconduct because of a deposit of moneys to an IOLA account pursuant to a judgment in good faith that such moneys were qualified funds."

Most segregated interest-bearing attorney trust accounts maintained by the bank are savings accounts. When funds from the attorney trust account need to be disbursed, a transfer is made to the IOLA account from which checks are then drawn. In the metropolitan region, the interest paid by the bank on such savings accounts is currently .65 percent interest per annum. The upstate interest rate is currently .50 percent per annum.

The earnings credit factor to be employed by the bank is progressive. In the metropolitan region, if the aggregate amount of the qualifying account balances, including an IOLA account, were $5,000 or less, there would be no earnings credit. If the amount were between $5,000 and $50,000, there would be a credit of .9 percent annually. For aggregate balances above $50,000, the credit would be 1.0 percent annually. The regime would be the same upstate, except $2,500, not $5,000, would represent the breakpoint between an earnings credit of zero and an earnings credit of .9 percent.

There are a number of ethical concerns which touch upon the question presented, some of which have been brought to our attention by the inquirer. Each concern arises from the same basic dynamic – namely, the statute and regulations governing IOLA accounts give an attorney considerable discretion in determining whether to deposit client funds into an account that pays interest to the client or into an account that pays interest to the IOLA Fund, and where the anticipated interest would be less than $150, such discretion is arguably beyond all review. Whether or not the IOLA Fund ben-

efits from the bank's proposed special program for attorneys, both the bank and the attorney would benefit whenever an attorney exercised his or her discretion in favor of a deposit into an IOLA account. The bank would benefit from paying a lower interest rate and, more importantly, the lawyer would benefit from paying lower monthly bank charges.

Notwithstanding, this arrangement would not, in our opinion, run afoul of the prohibition against charging or collecting "an illegal or excessive fee" set forth in DR 2-106(A), as the earnings credit is not a client generated "fee." Similarly, the bar of DR 9-102(A) against misappropriation of client "funds" or client "property" does not apply, as the proposed earnings credit is neither. In this respect, our prior opinions in N.Y. State 532 (1981) (a lawyer may not seek or accept interest earned on funds held in an escrow account as compensation for serving as an escrow agent), N.Y. State 582 (1987) (a lawyer may not retain interest earned on a settlement check deposited into an escrow account from the date of deposit until the date of check clearance), and N.Y. State 570 (1985) (a lawyer may not retain interest earned on an advance fee where the lawyer and client have agreed to treat the advance fee as client property), which the inquirer seeks to distinguish, are largely irrelevant.

Nor do we believe it is necessary to decide whether the determination to deposit client funds in an unsegregated IOLA account or in a segregated attorney trust account (i) is or is not "the exercise of professional judgment" within the meaning of DR 5-101(A), thereby implicating a potential financial conflict of interest, or (ii) might "prejudice or damage the client" within the meaning of DR 7-101(A)(3).

Rather, the disposition of this inquiry is clearly governed by DR 5-107(A)(2) and EC 2-21. DR 5-107(A)(2) provides: "Except with the consent of the client after full disclosure a lawyer shall not: Accept from one other than the client anything of value related to his or her representation of or employment by the client." EC 2-21 provides: "A lawyer shall not accept compensation or anything of value incident to the lawyer's employment or services from one other than the client without the knowledge and consent of the client after full disclosure."

In N.Y. State 320 (1973), we opined that, absent disclosure and client consent, an attorney could not retain the discount received from title companies without crediting his or her client the amount of the discount. In N.Y. State 461 (1977), we opined that the acceptance of a portion of the commission obtained by a fire adjuster in connection with the loss sustained by the lawyer's client would not be unethical "provided the client, with full knowledge of the facts, has consented to the arrangement and all proceeds secured therefrom by the lawyer are credited or otherwise disbursed to the client." In N.Y. State 576 (1986) (which opinion amplified N.Y. State 351 [1974]), we opined that absent express consent to the contrary, a real estate attorney also acting as title insurance agent must reduce the client's legal fee by the amount of remuneration from such title company. In N.Y State 667 (1994), we reached the same conclusion with regard to requiring disclosure and client consent before an attorney could accept a referral fee from a mortgage broker; however, we there stated that the attorney was not required to remit the referral fee to the client if the client consented to its retention by the attorney. Each of these opinions rested upon the authority of DR 5-107(A)(2), and two of them (N.Y. State 461 and 667) cited EC 2-21.

As the trust funds to be deposited by the attorney into an attorney trust account (IOLA or non-IOLA) will only come into the attorney's hands as a consequence of the representation of a client, and as the proposed earnings credit would reduce or eliminate monthly bank charges that would otherwise

be debited from the attorney's accounts, there is clearly something "of value" that is being offered to the attorney by "one other than the client" which is "related to his or her representation of or employment by the client." That the earnings credit will not influence his or her conduct with regard to the negotiation of a transaction or the prosecution or defense of a claim for which the lawyer was retained does not, in our view, take the matter outside the sweeping purview of DR 5-107(A)(2). For example, if an attorney maintains an average monthly IOLA balance in excess of $50,000, the bank will credit him or her at least $500 in reduction of bank fees for the year, not an insignificant or *de minimus* sum. Such an earnings credit may well influence the attorney's decision as to where client trust funds should be deposited, and that decision would have a direct and adverse financial impact upon the client if an IOLA account is chosen.

We do not, however, see the proposed earnings credit on IOLA accounts as presenting "so great a danger of unfairness, deception, overreaching and conflict of interest, or the appearance thereof" as to warrant a *per se* prohibition. *Compare* N.Y. State 532 (1981) ("While we interpret the Code as requiring a *per se* prohibition against retaining interest earned on escrowed funds in the circumstances stated [lawyer representing client and also serving as escrow agent in real estate transaction], we recognize a possible distinction where interest is paid on a special account in which a lawyer deposits [certain] non-escrow client funds . . ."). Therefore, as contemplated by DR 5-107(A), provided the client has consented to the arrangement after full disclosure, an attorney may accept an earnings credit against bank charges based upon balances held in the attorney's IOLA account.

CONCLUSION:

An attorney may only accept an earnings credit against bank charges based upon balances held in the attorney's IOLA account with the consent of the client after full disclosure.

(26-03)

OPINION 765 (07/22/2003)

TOPIC: Reciprocal referral arrangements with nonlegal professionals.

DIGEST: A lawyer or law firm may enter into a nonexclusive reciprocal referral agreement with a securities broker or insurance agent, with appropriate disclosure of the relationship.

CODE: DR 1-106; DR 1-107; DR 1-107(A), (B), (C), (D); DR 2-103(B)(1); DR 5-101(A); EC 1-14; EC 1-16.

QUESTIONS:

1. Under the amendments to the New York Code of Professional Responsibility (the "Code") effective November 1, 2001, may a lawyer enter into and maintain a contractual relationship with an insurance or securities agent/broker which involves the law firm and the insurance/securities agent/broker referring clients to each other?

2. If this were merely a reciprocal referral agreement rather than a contractual relationship would the answer be any different?

OPINION:

On July 23, 2001, the Appellate Divisions adopted new rules on multidisciplinary practice, effective November 1, 2001. The amendment added two new rules to the Code, DR 1-106 and DR 1-107, and made conforming changes to a number of other rules. In general terms, DR 1-106 addresses the provision of legal and nonlegal services by lawyers or law firms themselves (or by entities owned, controlled or affiliated with lawyers or law firms); DR 1-107 addresses contractual arrangements between lawyers or law firms on the one hand and separate entities providing nonlegal services. We first addressed DR 1-106 in our Opinions 752, 753 and 755. This opinion is our first to deal at length with DR 1-107.[23]

The questions addressed by this opinion concern two provisions of DR 1107: the provision in DR 1107(A) that permits a lawyer to enter into and maintain "a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services . . . as well as other nonlegal professional services"; and an exception in DR 1107(C) for "relationships consisting solely of nonexclusive reciprocal referral agreements or understandings" between a lawyer and nonlegal professional, or their firms. These questions focus on the difference between a "contractual relationship" calling for reciprocal referrals and an "agreement or understanding" calling for the same. While the difference in terminology is important, the essence of the distinction in the rule is in the extent of interconnection provided for by the contract, agreement or understanding.

Contracts under DR 1107(A) can include reciprocal referral arrangements, EC 1-16 ("The contractual relationship permitted by DR 1-107 may provide for the reciprocal referral of clients by and between the lawyer or law firm and the nonlegal professional or nonlegal professional service

23 The text of DR 1-107 is reprinted as an appendix to this opinion.

firm."), as well as sharing of costs, (DR 1107[D]), joint advertising (DR 2101[C][3]), and joint premises (EC 114). The relationship may not, however, include the sharing of fees. DR 1-107(A)(2).

A lawyer who wishes to enter into a DR 1107(A) contract with a nonlegal professional may do so only in accordance with the rule. Among other things, the rule requires the lawyer to make certain specified disclosures to clients (including a prescribed "Statement of Client's Rights in Cooperative Business Arrangements") and limits the professions with which lawyers can so contract to those professions on a list designated by the Appellate Divisions. The rule also sets forth in DR 1-107(B) the requirements for a profession to be included on the Appellate Division list (*i.e.*, Bachelor's degree, licensing, and a comparable ethical code). As of now the list includes only (1) architects, (2) certified public accountants, (3) professional engineers, (4) land surveyors, and (5) certified social workers.

By the terms of DR 1107(C), if an agreement with a nonlegal professional is limited to reciprocal referrals – and does not include, for example, joint advertising, sharing of premises and expenses, and the like – DR 1-107(A) "shall not apply." The implication of DR 1-107(C) is that "relationships consisting solely of non-exclusive reciprocal referral agreements or understandings" between lawyers and nonlegal professionals are carved out of the regulation of DR 1-107 entirely and are left to other rules. [24] The other relevant rule is DR 2-103(B), which provides, in relevant part:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:
>
> (1) A lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by DR 1-107, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; . . . .

This Committee has not squarely addressed whether a non-exclusive reciprocal referral relationship between a lawyer and a non-lawyer constitutes the prohibited "compensat[ion]" or "giv[ing] of value" to the non-lawyer to recommend employment. Our prior opinions that have considered the question have involved situations in which there was a payment to the referring non-lawyer or a sponsoring organization as well as an understanding of a reciprocal referral. N.Y. State 741 (2001) ("Because the attorney is required to pay substantial dues to the organization in exchange for membership that entitles the attorney to referrals from other members and is required to make referrals to those members, the attorney would be transferring something 'of value' to obtain referrals, which is prohibited by DR 2-103[B]"); N.Y. State 566 (1984) (lawyer may not pay a real estate brokerage firm to endorse or recommend the lawyer).

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24 The Appellate Divisions specifically amended DR 1-107(C) after its initial adoption to change the reference in the rule from DR 1-107(A)(1) to DR 1-107(A). Joint Order of the Appellate Divisions, *New York Law Journal* at 11 (December 26, 2001). This brought the rule into line with the language that had been proposed by a New York State Bar Association Special Committee on multidisciplinary practice that had proposed DR 1106 and DR 1107. *See* Report of the New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation*, Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers* 353 (2000)(the "MacCrate Report").

Prior to the adoption of DR 1-107 and to the 2001 amendments to DR 2-103, the Nassau County Bar Association ethics committee opined that mutual referral arrangements were prohibited. Nassau County 97-8 ("While a mutual referral arrangement may not be as obvious a form of compensation as a referral fee, it is 'of value', and a lawyer may not enter into such an agreement in order to obtain referrals.").[25] The conclusion that even a nonexclusive undertaking to make referrals constitutes the giving of "value" is consistent with the language of DR 2-103(B)(1) viewed in isolation, but it leads to anomalies in light of DR 1-107. In particular, while DR 2103(B) provides that reciprocal referral agreements are permissible, it limits the scope of that permission to those agreements permitted by DR 1107, and DR 1107 expressly exempts from its scope certain such agreements that, as discussed below, raise the least concerns. Thus, reading DR 2103(B)(1) to bar "naked" reciprocal referral arrangements would mean that a nonexclusive agreement with an accountant to provide mutual referrals (on a systematic and continuing basis) would be barred as the giving of value, but if the arrangement included some other element – such as shared expenses or joint advertising – it would be permitted.

Nothing in the language or background of DR 1-107 suggests such a result. The language of DR 1-107(C) – that DR 1-107(A) shall not apply to relationships consisting "solely" of nonexclusive referral agreements – suggests that the assumption was that such relationships would be permitted but for the restrictions in DR 1107(A). In addition, the careful distinction between the language of DR 1107(A) permitting "contractual relationships" and the language of DR 1107(C) exempting "agreements or understandings" suggests that the drafters contemplated that the "agreements or understandings" were at best of limited value. Indeed, as discussed further below, any such undertaking to provide referrals must be non-exclusive and qualified by the lawyer's duty to exercise independent professional judgment in making the referral.

Moreover, the New York State Bar Association special committee report that recommended the adoption of DR 1-107 found that nonexclusive reciprocal referral arrangements were not in themselves particularly dangerous, although it said that "some might argue" that they were barred by "the letter of the ethical prohibitions":

> What the interprofessional alliance represents is the contractual formalization of *a reciprocal relationship wherein two businesses mutually agree that they can serve their clients, and benefit themselves, by focusing their referrals on each other to the extent consistent with their professional obligations to their respective clients*. A byproduct, but not an insignificant one for purposes of this discussion, is that the allies generally make efforts to cooperate in rendering their respective services to the mutual clients. *While some might argue that such arrangements fall within the letter of the ethical prohibitions, they are not pernicious in nature because of the responsibility of each of the allies to utilize its best judgment for its clients in selecting the most appropriate "referee."* This is not to say that a rigidly structured agreement could not be viewed as violative of the restrictions on compensating nonlawyers for client referrals. Provisions such as minimum guarantees and exclusive dealing arrangements would

25 The Nassau County ethics opinion also noted that the arrangement was barred by DR 2-103(C), which at that time barred lawyers from requesting a person or organization to recommend or promote the use of the lawyer's services other than by permissible advertising or approved lawyer referral services. Those restrictions were deleted in 1999 along with certain other restrictions on advertising and solicitation.

> transform a symbiotic business relationship into a creature that could have a direct negative impact on clients.

MacCrate Report at 347-48 (emphasis added).[26] The elaborate safeguards that the special committee recommended, including the development of a list of permitted professions, were aimed not at the referral arrangements as such, but at the aspects of DR1107 contractual relationships that go beyond nonexclusive reciprocal referral agreements. Thus, it compared the "alliances" of concern to law partnerships between U.S. and foreign lawyers, *id*. at 351 & n.65, and expressed concern that such alliances "could dilute the lawyers' duties to clients," *id*. at 351, a concern that is very attenuated in the case of relationships consisting only of non-exclusive mutual referrals.[27]

The low level of ethical concern raised by nonexclusive referral arrangements is further seen in the August 2002 amendments to the ABA Model Rules that were designed to track in significant measure the provisions of DR 1-107. The amended Rule provisions expressly contemplate nonexclusive mutual referral arrangements with other professionals. Model Rule 7.2(b)(4) provides:

> A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may . . .
>
> > (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
> >
> > > (i) the reciprocal referral agreement is not exclusive, and
> > >
> > > (ii) the client is informed of the existence and nature of the agreement.

In short, prohibiting nonexclusive reciprocal referral arrangements – relationships, in the words of the Special Committee, "wherein two businesses mutually agree that they can serve their clients, and benefit themselves, by focusing their referrals on each other to the extent consistent with their professional obligations to their respective clients" – would clearly not be consistent with the provisions of DR 1-107, at least with respect to the professions dealt with in that rule (to date, architects, accountants, engineers, land surveyors and certified social workers).

Securities brokers and insurance agents are not on that list. There is, however, no textual basis for restricting nonexclusive reciprocal referral arrangements to the listed professions. To the contrary, DR 1-107(C) expressly *exempts* such arrangements from the requirements of DR 1-107(A), including

26 *See also* N.Y. State 755 at 9 (2002) (noting that the special committee similarly saw little reason to be concerned about lawyers using their lawyer-owned nonlegal businesses as "feeders" to supply them with legal business leads) (quoting MacCrate Report, *supra*, at 339-40).

27 The special committee at one point quotes a comment in the *Restatement of the Law Governing Lawyers* that arrangements whereby lawyers pay nonlawyers for referrals "would give the non-lawyer referring person the power and an incentive to influence the lawyer's representation by an explicit or implicit threat to refer no additional clients or by appealing to the lawyer's sense of gratitude for the referral already made." *Restatement of the Law Governing Lawyers* § 10 cmt. d (2000) (*quoted in* MacCrate Report, *supra*, at 344). This risk could apply to "payments" in the form of a reciprocal referral understanding, although the real issue is not the lawyer's undertaking to focus referrals on the nonlawyer, but the mere fact of the nonlawyer's stream of referrals. The Code directly addresses the latter risk by prohibiting a lawyer from allowing a third party who recommends the lawyer to direct or regulate the lawyer's professional judgment. DR 5107(B).

the limiting reference to the Appellate Division list of professions. In addition, as noted, in recommending the list mechanism, the special committee focused on far more involved interrelationships than "naked" mutual referral arrangements.

We likewise see little policy basis for limiting a lawyer's mutual referral of business to architects, engineers, accountants, land surveyors and certified social workers. Persons seeking legal help commonly need assistance from a far broader set of service providers in resolving their problem: estate planning clients frequently need insurance and investment advice; real estate clients often need real estate and mortgage brokers and title services. If lawyers at least in some circumstances may refer clients to entities providing these services that are affiliated with the lawyer, and vice versa, as we opined in N.Y. State 753, it is difficult to see why other lawyers cannot likewise choose a reputable provider with which they can exchange referrals. This is not the joint provision of services under common advertising or a common roof, which implicates the concerns of confidentiality, improper influence and conflicts that motivated the restrictions in DR 1-107(A) and (B).

Based on these considerations, we conclude that a nonexclusive mutual referral arrangement between a lawyer and an insurance agent or securities broker is permitted by DR 1-107(C) and DR 2-103(B)(1). We note that securities brokers and insurance agents both are educated service providers; are commonly involved in legal matters and lawyers have long experience working with them; and are referred to in the special committee report that led to the adoption of the rule.[28] The relationship cannot, however, go beyond a relatively loose reciprocal referral arrangement to include joint advertising or sharing of expenses, for these closer relationships are reserved to professions on the Appellate Division list.

It is important to emphasize that whether or not accompanied by other features, any reciprocal referral understanding, agreement or contract between a lawyer and nonlegal professional must be nonexclusive. That is, a lawyer can never agree to refer all clients, or a specified quota, to the insurance or securities brokerage entity, because the lawyer must continue to exercise professional judgment on behalf of the client in making the referral. EC 1-16 states:

> The contractual relationship permitted under DR 1-107 may provide for the reciprocal referral of clients by and between the lawyer or law firm and the nonlegal professional service firm. When in the context of such a contractual relationship a lawyer or law firm refers a client to the nonlegal professional or nonlegal professional service firm, the lawyer or law firm shall observe the ethical standards of the legal profession in verifying the competence of the nonlegal professional or nonlegal professional services firm to handle the relevant affairs and interests of the client. Referrals should only be made when requested by the client or deemed to be reasonably necessary to serve the client. Thus, even if otherwise permitted by DR 1-107, a contractual relationship may not require referrals on an exclusive basis.

28 The special committee report refers to a wide range of professionals with whom lawyers have long cooperated on a routine basis via "referrals and working relationships [as] part of everyday professional life," including "accountants, financial advisors, investment bankers, engineers, *brokers*, social workers, and others." MacCrate Report, *supra*, at 98 (emphasis added).

In addition, although the specified disclosures set forth in DR 1-107(A)(3) are not required with respect to relationships consisting only of reciprocal referral arrangements,[29] a reciprocal referral arrangement would generally constitute a conflict of interest under DR 5-101(A) such that the relationship would need to be disclosed and consent obtained before the lawyer made the referral. As the special committee report stated:

> *Even under current ethical principles*, depending upon the economic importance of the relationship to the lawyer, the lawyer must disclose the existence and nature of the interprofessional contractual relationship to clients so that they can make an informed judgment regarding the services of both the nonlegal ally and the lawyer. This is because, as the Restatement notes, the desire of the lawyer to perpetuate the stream of referrals from the ally, if sufficiently significant to the lawyer, may constitute a business or personal interest that could conflict impermissibly with the lawyer's duty to exercise independent professional judgment on the client's behalf. Clearly, a law firm that subsists on referrals from a particular nonlawyer consulting firm, the loss of which would be harmful to the lawyers in the firm, has a strong interest in reciprocation that could tend to convert what would otherwise be a presumption in favor of cross-referrals to the consultants into a mandatory or automatic practice that disregards the particular needs of the client. Informed client consent to such conflict of interest would be essential.

MacCrate Report at 348 (footnotes omitted) (emphasis added). *See also* EC 114 (even contractual relationships permitted by DR 1107 could create a conflict of interest if "the law firm's interest in maintaining an advantageous relationship with the nonlegal professional service firm might . . . adversely affect the independent professional judgment of the law firm").

The nature of the disclosure required by DR 5101(A) will depend on such factors as the terms or nature of the reciprocal referral arrangement; the extent of the lawyer's experience or acquaintance with the work of the nonlegal professional; the amount of the lawyer's business that is currently or expected to be derived from the nonlegal professional's referrals; and any other factor that might reasonably be considered by a disinterested lawyer to affect the lawyer's professional judgment in making the referral. A prudent lawyer will ordinarily disclose to the client any such reciprocal referral arrangement or understanding with a nonlawyer professional to whom a referral is made. In some circumstances, the disclosure might go no further than a statement that "I have worked with X for years and X and I have an arrangement to refer clients to each other when it is appropriate." In other cases the disclosure might need to be more elaborate to satisfy the requirement under DR 5-101(A) that client consent be obtained only after "full disclosure of the implications of the lawyer's interest."

CONCLUSION:

A lawyer or law firm may enter into a non-exclusive reciprocal referral agreement or understanding with a securities broker or insurance agent and, with appropriate disclosure and client consent under DR 5101(A), can refer clients to the securities broker or insurance agent.

29 As noted above, in an amendment to the original rule, the Appellate Divisions changed DR 1107(C)'s reference to the section that does not apply from DR 1-107(A)(1) to DR 1-107(A).

APPENDIX:

DR 1-107 Contractual Relationships between Lawyers and Nonlegal Professionals

A. The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it services. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed "independent professional judgment and undivided loyalty uncompromised by conflicts of interest."[30] Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent professional judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State.

Multi-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and, therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values. However, a lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the pubic, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other nonlegal professional services, notwithstanding the provisions of DR 5101(A), provided that:

1. The profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to section 1205.3 of the Joint Appellate Division Rules;

2. The lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm nor, as provided in DR 2-103(B)(1), shares legal fees with a nonlawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral; and

3. The fact that the contractual relationship exists is disclosed by the lawyer or law firm to any client of the lawyer or law firm before the client is referred to the nonlegal professional service firm, or to any client of the nonlegal professional service firm before that client receives legal services from the lawyer or law firm; and the client has given informed written consent and has been provided with a copy of the "Statement of Client's Rights In Cooperative Business Arrangements" pursuant to section 1205.4 of the Joint Appellate Division Rules.

B. For purposes of DR 1-107(A):

30 "Statement of Client's Rights," 22 NYCRR Part 1210.

1. Each profession on the list maintained pursuant to a joint rule of the Appellate Divisions shall have been designated sua sponte, or approved by the Appellate Divisions upon application of a member of a nonlegal profession or nonlegal professional service firm, upon a determination that the profession is composed of individuals who, with respect to their profession:

    a. have been awarded a Bachelor's Degree or its equivalent from an accredited college or university, or have attained an equivalent combination of educational credit from such a college or university and work experience;

    b. are licensed to practice the profession by an agency of the State of New York or the United States Government; and

    c. are required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession.

2, The term "ownership or investment interest" shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.

C. DR 1-107(A) shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm.

D. Notwithstanding DR 3-102(A), a lawyer or law firm may allocate costs and expenses with a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship permitted by DR 1-107(A), provided the allocation reasonably reflects the costs and expenses incurred or expected to be incurred by each.

(11-02)

OPINION 766 (09/10/2003)

TOPIC: Disposition of files of former client

OVERRULES: N.Y. State 398 (1975)

DIGEST: Former client and/or successor counsel is presumptively entitled to access all attorney files.

CODE: DR 2-106(A); DR 9-102(C)

QUESTION:

What is a lawyer's obligation to a former client who requests the files that were generated in the course of the prior representation?

OPINION:

DR 9-102(C) provides:

A lawyer shall:

* * *

> (4) Promptly pay or deliver to the client . . . as requested by the client . . . the funds, securities, or other properties in the possession of the lawyer which the client . . . is entitled to receive.

The question of which "funds, securities, or other properties in the possession of the lawyer" the client (or successor counsel) is entitled to receive is generally a question of law, not ethics. *See* N.Y. State 623 (1991) ("Which documents may be deemed to belong to the lawyer is not always easy to ascertain; in certain instances, the lawyer's ownership of such documents may be a complex issue of both law and fact."); Nassau Bar Op. 94-19 (funds in IOLA account); Nassau Bar Op. 96-13 (funds in escrow account). The duty to deliver "to the client all papers and property to which the client is entitled" is also a requirement of withdrawal from employment. *See* DR 2-110(A)(2).

Accordingly, the Bar's attention is directed to *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30 (1997), in which the Court of Appeals abandoned the distinction "between documents representing the 'end product' of an attorney's services, which belong to the client, and the attorney's 'work product' leading to the creation of those end product documents, which remains the property of the attorney," opting instead for the "majority" view wherein, "upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding,"[31] the client is "presumptively accord[ed] . . . full access to the attorney's file on a represented matter with narrow excep-

31 *See Lai Ling Cheng v. Modansky Leasing Co.*, 71 N.Y.2d 454, 458 (1989) (court recognized that discharged lawyer possessed a common-law retaining lien on client's file in his possession securing his right "under New York law to the reasonable value of the services he performed") (citation omitted).

tions." 91 N.Y.2d at 34 (citations omitted). The Court cited the final draft[32] of the American Law Institute Restatement (Third) of the Law Governing Lawyers § 58 (proposed final draft No. 1, 1996), as follows:

> The draft Restatement provides that a former client is to be accorded access to "inspect and copy *any documents possessed* by the lawyer *relating to the representation,* unless substantial grounds exist to refuse" (*id.,* § 58[2]) [emphasis supplied]. Even without a request, an attorney is obligated to deliver to the client, not later than promptly after representation ends, "such originals and copies of other documents possessed by the lawyer relating to the representation as the . . . [former] client reasonably needs" (*id.,* § 58[3], comment d).
>
> 91 N.Y.2d at 35.

The Committee recognizes that, consistent with the now rejected "minority view," N.Y. State 398 (1975) suggested that "the client is not entitled to require delivery of the firm's work product" unless, in the context of the particular circumstances, the "firm's duty" to the former client or the "professional courtesy" to be accorded to successor counsel, "are necessary" to guard the client's interest" (citations omitted). To the extent that N.Y. State 398 thus reflects a presumption of non-accessibility that a former client must overcome with respect to a certain class of documents, that view has been plainly rejected by the Court of Appeals in *Sage Realty* and is no longer valid. *See also Gamiel v. Sullivan & Liapakis, P.C.*, 289 A.D.2d 88 (2001); *Getman v. Petro & Ingalsbe*, 266 A.D.2d 688 (1999).

With regard to who bears the cost of file assembly and delivery, we also note the Court of Appeals statement in *Sage Realty* that "as a general proposition, unless a law firm has already been paid for assemblage and delivery of documents to the client, performing that function is properly chargeable to the client under customary fee schedules of the firm, or pursuant to the terms of any governing retainer agreement." 91 N.Y.2d at 38. Of course, the fee for such services may not be excessive. DR 2-106(A). *See also Deane v. Skadden, Arps, Slate, Meagher & Flom*, N.Y.L.J., Aug. 17, 1998 (Sup. Ct. N.Y. County).

CONCLUSION:

As a matter of ethics, upon request by a former client, a lawyer must promptly turn over or provide access to the files which the former client is entitled to possess. As a matter of New York law, a former client is entitled to any document related to the representation unless substantial grounds exist to refuse access. The lawyer may charge such former client reasonable fees for assembling and delivering such files, as reflected by customary fee schedules or any governing retainer agreement.

(35-02)

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32 This section was ultimately published as §46. *See* Restatement Third, The Law Governing Lawyers §46 (2) and (3):

> (2) On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.
>
> (3) Unless a client or former client consents to nondelivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

OPINION 767 (10/08/2003)

TOPIC: Part-time public official or employee; Conflicts of interest; Advertising

DIGEST: Certified impartial hearing officer may not represent clients in hearings in same school district or if other conflict of interest exists; may include certification in advertising.

CODE: DR 1-102(A)(5), 2-101(A), 5-101(A), 8-101(A)(2), 9-101(B)(1), (3)(a), (C), EC 8-8, 9-1, 9-2, 9-4, 9-6, Canon 9

CJC: N.Y. Comp. R. & Regs. tit. 22, §100.6(B)(2), (C).

QUESTION:

A lawyer is certified by the New York State Commissioner of Education as an impartial hearing officer ("IHO") to hear disputes between school districts and parents of students with disabilities regarding the identification, evaluation and educational placement of such students.

1. May the lawyer, in addition to acting as an IHO, also in private practice represent parents in such hearings?

2. May a lawyer so certified refer to the certification in advertising?

OPINION:

Background

The inquirer practices primarily in the area of special education law, representing parents of students with disabilities. When those parents disagree with a determination made by a school district regarding the education of their child, they are entitled to a hearing before an IHO. To be eligible to serve as an IHO, a person must (1) be a New York lawyer in good standing with a minimum of two years practice and/or experience in the areas of education, special education, disability or civil rights, or have been certified as an IHO on or prior to September 1, 2001; (2) have access to the support and equipment necessary to perform the duties of an IHO; (3) be independent, not be an officer, employee or agent of the school district or of the board of cooperative educational services of which such school district is a component or an employee of the State Education Department, not have a personal or professional interest in conflict with his or her objective in the hearing, and not have participated in the formulation of the recommendation to be reviewed; and (4) be certified by the Commissioner of Education as an IHO. To be certified as an IHO, the individual must (1) successfully complete a training program conducted by the Department of Education, (2) attend periodic update programs, and (3) annually submit a certification that the IHO meets the foregoing eligibility requirements. N.Y. Comp. Codes R. & Regs. tit. 8, §200.1(x).

Each school district is required to maintain a list setting forth the name of each IHO certified by the Commissioner of Education who is available to serve in the district. N.Y. Comp. Codes R. & Regs. tit. 8, §200.1(e). The list is prepared by the New York State Department of Education for each county so that individual school districts do not have the discretion to add or subtract names from the

list. An individual IHO may request that his or her name be removed from the list for a particular school district. Appointment of IHOs by a school district may only be made from that district's list and the appointments are made on a rotating basis by alphabetical order. N.Y. Comp. Codes R. & Regs. tit. 8, §200.1(e)(ii). If a particular IHO declines appointment or fails to respond to a request to serve within 24 hours or is unreachable after reasonable efforts, the next IHO on the list will be offered the appointment. N.Y. Comp. Codes R. & Regs. tit. 8, §200.1(e)(ii).

Question One: May a lawyer certified as an IHO also represent parents of students with disabilities in private practice?

The inquirer is considering applying to the New York State Commissioner of Education to be certified as an IHO, but desires to maintain a current practice of representing parents of students with disabilities. Although we see no need for a *per se* prohibition against a lawyer who acts as an IHO from also representing parents of disabled students before individual school districts, there are instances in which the inquirer would be precluded from representing parents of a disabled child in a particular matter or acting as an IHO.

Representing parents in a school district which includes the lawyer on its list of certified IHOs.

DR 1-102(A)(5) provides that a lawyer shall not engage in conduct that is prejudicial to the administration of justice. Canon 9 exhorts a lawyer to avoid even the appearance of impropriety. EC 8-8 states: "A lawyer who is a public officer . . . should not engage in activities in which the lawyer's personal or professional interests are or foreseeably may be in conflict with the lawyer's official duties." EC 9-1 provides: "Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession." *See also* EC 9-2 (improper conduct by lawyers erodes public confidence in the law); EC 9-4 (public confidence in legal system undermined by lawyer stating he or she can circumvent procedures designed to accomplish impartiality); EC 9-6 (every lawyer has a duty to uphold the integrity of the profession).

For the same lawyer to one day be an adjudicator and the next day be an advocate in the same school district presents an appearance of impropriety and is prejudicial to the administration of justice. The lawyer acting as an IHO is a part-time public official. If the lawyer could simultaneously represent clients in the same school district, positions the lawyer advocates for those clients could easily influence decisions made in the school district as an IHO, thereby bringing the lawyer's professional interests in conflict with the lawyer's official duties. The lawyer acting as both an adjudicator and an advocate in the same school district certainly would diminish the faith of the public that justice could be obtained in that school district and would not promote public confidence in either our system of justice or the legal profession. Consequently, if a lawyer who is on the list of IHOs for a particular

county desires to represent clients in a school district within that county, he should arrange to have his or her name removed from the list for that school district.[33]

Related Proceedings

DR 9-101(B)(1) provides that a lawyer may not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. Similarly, DR 9-101(B)(3)(a) states that a lawyer serving as a public officer or employee shall not participate in a matter in which the lawyer participated personally and substantially while in private practice. Consequently, a lawyer could not represent the parents of a child if the lawyer previously was an IHO in a matter in another school district concerning the same child and disability. Similarly, a lawyer could not act as an IHO in the matter if in another school district the lawyer previously represented the parents of the child regarding his or her disability.

Matters involving other certified IHOs.

If a lawyer continues to represent parents of disabled students after being designated an IHO, there will be times when the lawyer will be representing those parents before other certified IHOs. There will also be matters in which a lawyer is acting as an IHO when other lawyers who are designated as IHOs may be representing private clients before the lawyer. We do not believe it is necessary for a lawyer to decline to represent a client in a particular matter merely because the IHO assigned to that matter may have appeared before the lawyer in a prior matter which is now concluded or may in the future appear before the lawyer. Similarly, we do not believe it necessary that a lawyer serving as an IHO recuse himself or herself in a matter merely because the lawyer appearing on behalf of the parents may in the past have served or may in the future serve as the IHO in a matter in which the first lawyer appeared or may appear as the lawyer.

However, it would be impermissible for one lawyer to be hearing a matter as the IHO when another lawyer in the matter is acting as an IHO in a matter in which the first lawyer is appearing on behalf of a party. It similarly would be impermissible for a lawyer to be representing parents in a hearing if the IHO is appearing before the lawyer in another matter in which the lawyer is the IHO. DR 5-101(A) provides that, as a general matter, a lawyer shall not accept or continue employment if the exercise of the lawyer's professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own business or personal interests. DR 8-101(A)(2) states that a lawyer holding public office shall not use the public position to influence or attempt to influence a tribunal to act in favor of a client and Canon 9 states that a lawyer should avoid even the appearance of professional

33 The Code of Judicial Conduct prohibits a part-time judge from practicing law in the court on which he or she serves, N.Y. Comp. Codes R. & Regs. tit. 22, §100.6(B)(2). However, the Code of Judicial Conduct does not apply "to administrative law judges *unless adopted by the rules of the employing agency*", N.Y. Comp. Codes R. & Regs. tit. 22, §100.6(C) (emphasis added). It is uncertain (1) if the term "administrative law judge" as used in the Code of Judicial Conduct encompasses IHOs certified by the Commissioner of Education, and (2) whether the Department of Education or the school district is the "employing agency" of IHOs. In any event, we are unaware of either the Department of Education or any school district having adopted the Code of Judicial Conduct. If the Code of Judicial Conduct is applicable, we believe that the group of all individuals certified by the Commissioner of Education to be IHOs does not constitute a "court" thereunder but that the group of IHOs designated on a list maintained by a particular school district does constitute a "court." *See* N.Y. State 543 (1982) (neither attorney who serves as hearing officer in proceedings to review small claims real property tax assessments nor the attorney's firm may represent private clients in such proceedings in the same jurisdiction); N.Y. Comp. Codes R. & Regs. tit. 22, §122.10(c), (d). Consequently, we would reach the same result under the Code of Judicial Conduct as we do under the Code of Professional Responsibility.

impropriety. Even though both lawyers may be of the highest integrity, the appearance of each acting as a judge while the other is acting as a lawyer in concurrent matters is too unseemly.

In such cases, it would be best for the IHO in the matter arising second to decline the matter so the private client need not find new counsel for the hearing.

Question Two: May a lawyer utilize the IHO certification in advertising?

It would not be improper for a lawyer to advertise certification as an IHO provided that the advertising is not false, deceptive or misleading. *See* DR 2-101(A).

DR 9-101(C) prohibits a lawyer from stating or implying that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal or public official. Consequently, it would be improper for the lawyer to imply to any private client, whether through advertising or otherwise, that the lawyer's designation as an IHO would enable the lawyer in any way to influence a school district or another IHO.

CONCLUSION:

1. A lawyer certified as an IHO by the New York State Commissioner of Education to hear disputes between school districts and parents of students with disabilities regarding the identification, evaluation, or educational placement of students with disabilities may also in private practice represent the parents of students with disabilities in such hearings, but not (a) in any school district in which the lawyer acts as an IHO, (b) if the lawyer previously acted as an IHO in another school district concerning the same child and disability, or (c) in any matter in which the IHO is concurrently appearing as a lawyer in a matter in which the inquiring lawyer is acting as the IHO.

2. A lawyer may use in advertising the fact that the lawyer has been certified as an IHO.

(34-02)

OPINION 768 (10/08/2003)

TOPIC: Definition of "communication" with represented parties; knowledge of adverse party's representation by counsel; statement of client position as legal advice.

DIGEST: A lawyer representing a government agency in a civil matter may be present and counsel the lawyer's own client at a meeting with a person known to be represented in that matter without opposing counsel's consent, provided that the lawyer gives reasonable advance notice to opposing counsel of the lawyer's intention to attend and does not communicate with the opposing party. If a lawyer has a reasonable basis to believe that a person may be represented by counsel in a matter, the lawyer has a duty to inquire further. If a lawyer does not know that a person is represented by counsel in connection with a matter, and participates in a communication with such an unrepresented party, a lawyer's statement of a client's legal position in the matter does not constitute impermissible legal advice to an unrepresented person.

CODE: EC 7-18; DR 1-105(A), (B); DR 7-104(A), (B).

QUESTIONS:

1. May a lawyer representing a government agency attend meetings with non-lawyer representatives of a counter-party to a government contract he or she "knows" to be represented by counsel?

2. May the government lawyer who attends such a meeting advise the client representative during the meeting without consent of opposing counsel?

3. Without consent of opposing counsel, must the lawyer who attends the meeting remain silent during the course of the meeting or may the lawyer at least communicate the government's agency's legal position concerning the matter?

4. When a government lawyer attends such a meeting or receives inquiries from counter-parties regarding agency filing requirements, how does the lawyer determine whether he or she "knows" the counter-party is represented for purposes of DR 7-104?

5. If the government lawyer has determined that he or she does not "know" that the counter-party is represented in connection with the subject of a civil matter, does the lawyer's (a) statement to counter-parties of the government's legal position and/or (b) response to inquiries from counter-parties regarding agency filing requirements constitute impermissible legal advice to an unrepresented party?

OPINION:

Background

A lawyer is employed by a government agency to advise the agency on, among other things, its dealings with government contractors. This employment gives rise to two common circumstances in which the lawyer is asked to have direct contact with non-lawyer representatives of government contractors that employ lawyers in the ordinary course of conducting their business.

In the first of these circumstances, the government agency asks the lawyer to accompany the agency's contracting officers to meetings with representatives of government contractors. These counter-party representatives have the ability to bind their principal or to make statements that may properly be imputed to the principal. The meetings usually involve the exchange of information, rather than negotiation of the contracts, but the encounters may also concern resolution of contractual issues on which the parties disagree and discussion of contractual disputes in which the potential for litigation inheres. Normally, if counsel represents the government contractor in connection with the contractual issue, the contractor's counsel attends the meeting. On other occasions, however, the government contractor, though known to employ counsel, does not bring counsel to the meeting unless the prospect of litigation is likely. The government agency invites its own counsel to these meetings to facilitate the lawyer's advice to the agency (by enabling the lawyer to fully understand the contractor's issues) and/or to have the lawyer set forth the agency's legal position on the matter to the government contractor.

In the second recurring circumstance, the government lawyer receives questions from non-lawyer representatives of government contractors concerning the government agency's requirements for taking certain actions under the contracts, most typically about the kind of documentation the contractor must file with the agency to provide a legal basis for the agency's decision to approve or disapprove the proposed action. Ordinarily, the answers to these questions are clear – that is, the agency's legal position leaves no room for dispute about whether a document must be filed and what the document must say. A failure to file the documentation is certain to produce an unfavorable decision from the agency and there is no assurance that the agency will reach a favorable decision even if the contractor timely and properly completes and files the required documentation.

Committee's Scope of Analysis

This Committee's jurisdiction is limited solely to interpretation of the New York Code of Professional Responsibility and does not extend to resolving questions of law. *See, e.g.,* N.Y. State 739 (2001). This inquiry may implicate various questions of state and federal law, including the laws and regulations of the agency in which a government lawyer serves, on which we offer no view. In addition, in the context of a federal government agency in which a lawyer may be rendering services beyond or outside the boundaries of this State, then the choice-of-law provisions of DR 1-105 may apply. In the event that a lawyer is licensed to practice solely in New York, then the New York Code of Professional Responsibility governs the lawyer's actions, DR 1-105(A), except in the context of the lawyer's conduct in proceedings before a court to which the lawyer is admitted, in which event the rules of the jurisdiction in which the court sits apply unless the court's rules otherwise provide, DR 1-105(B)(1). When a lawyer is admitted in more than one jurisdiction, DR 1-105(B) applies the ethical precepts of the jurisdiction in which the lawyer principally practices unless the predominant effect of the particular conduct at issue occurs in another jurisdiction in which the lawyer is licensed. DR 1-105(B)(2)(b). *See* N.Y. State 750 (2001) (when a lawyer is licensed in both New York and Illinois and principally practices in the latter, the ethical rules of Illinois apply, particularly when the conduct in issue occurred in Illinois). For purposes of this opinion, we assume that the New York Code of Professional Responsibility governs the conduct in question.

DR 7-104 of the Code prescribes the government lawyer's obligations in these circumstances. The rule says:

A. During the course of the representation of a client a lawyer shall not:

1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

2. Give advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

B. Notwithstanding the prohibitions of DR 7-104(A), and unless prohibited by law, a lawyer may cause a client to communicate with a represented party, if that party is legally competent, and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented party's counsel that such communications will be taking place.

We may quickly pass on certain issues that DR 7-104(A)(1) raises in this situation. No question exists that, when a government lawyer is acting for an agency in attending meetings with or responding to inquiries by government contractors, the lawyer is doing so in the "course of the representation of a client." In circumstances involving a purely commercial transaction, DR 7-104(A)(1)'s use of the word "party" means any "person," including a party to a contract or other transaction, whether or not litigation looms. N.Y. State 735 (2001). If the agents of the counter-party at the meeting may speak for and bind their principal, the decision of the New York Court of Appeals in *Niesig* v. *Team I*, 558 N.E.2d 1030, 1035 (N.Y. 1990), instructs that such representatives *are* the principal and hence represented parties within the meaning of DR 7-104(A)(1). N.Y. State 652 (1993). As noted, whether a lawyer is "authorized by law" to communicate with a person the lawyer knows to be represented by counsel is not for us to decide. Subject to any such law, DR 7-104(A)(1) applies to government lawyers in a civil context because "a governmental unit has the same rights and responsibilities in a controversy as any other corporation or individual." N.Y. State 404 (1975) (quoting N.Y. State 160 [1970]); *see* N.Y. State 728 (2000).

Question One: May a lawyer representing a government agency attend meetings with non-lawyer representatives of a counter-party to a government contract he or she "knows" to be represented by counsel?

The question whether a lawyer's silent attendance at a conference between principals constitutes an improper "communication" under DR 7-104(A)(1) is an issue of first impression for this Committee, and our research has been unsuccessful in discovering other opinions, judicial or otherwise, directly addressing the question.

The Code does not define the word "communicate," but the plain and ordinary meanings of the word – to "impart," "convey," "inform," "transmit," or "make known," *Webster's Third New International Dictionary (Unabridged)* 460 (1993); *see Black's Law Dictionary* 253 (5th ed. 1979) – all presuppose some form of transmission of information. Accordingly, we believe that DR 7-04(A)(1) is intended to proscribe only those circumstances in which the lawyer transmits information – whether it

be the government's legal position or negotiation of contractual points – to a person the lawyer knows to be represented by counsel.

Here, the avowed intent of the lawyer's silent attendance at meetings with contractors is to facilitate the lawyer's advice to the government agency about the matter. Such a circumstance falls within the parameters of DR 7-104(B), which regulates a lawyer's conduct in connection with communications between principals in a transaction. The Rule permits a lawyer to cause and counsel a client to engage in such discussions with a represented party, provided the lawyer gives opposing counsel reasonable advance notice. The object of this advance notice provision is to assure the represented party's lawyer the "opportunity to advise his or her own client with respect to the client-to-client communications before they take place." EC 7-18. Because client-to-client communication lacks a key element of DR 7-104(A)(1)'s concern – namely, that lawyers generally are in a better position, by education and training, to overwhelm a non-lawyer and exploit legal knowledge in the course of communicating directly with the non-lawyer – DR 7-104(B)'s requirement of reasonable advance notice is best seen as a guarantee of fairness in the course of dealings between parties represented by counsel. The Rule also prevents opposing counsel from exercising a veto over one party's decision to confer with counsel in connection with a principal-to-principal communication.

Thus, in our view, a lawyer may silently attend a meeting between principals provided the lawyer gives reasonable advance notice to opposing counsel of the lawyer's intention to attend the meeting.

Question Two: May the government lawyer who attends a meeting of principals advise the client representative during the meeting without consent of opposing counsel?

Having given reasonable advance notice of the lawyer's intention to attend the meeting, the government lawyer may provide advice to the government contracting officers before and during the meeting. We caution, however, that the government lawyer may not directly address or otherwise communicate with the opposing party during the meeting, and thus, in giving advice to the lawyer's own client during the meeting, the lawyer must do so at times and places and in a manner that does not amount to a communication by the lawyer to the opposing party. Whether avoidance of such improper communications requires that the lawyer's advice to the government clients during the meeting be given during breaks or otherwise outside the view and hearing of the opposing party will depend on the circumstances, the possibilities of which are too numerous to permit any meaningful fixed rule.

Question Three: Must the lawyer who attends a meeting of principals without opposing counsel's consent remain silent during the course of the meeting or may the lawyer at least communicate the government's agency's legal position concerning the matter?

We have no doubt that a statement of a client's legal position, without more, is within the common and ordinary meaning of the word "communicate" used in DR 7-104(A)(1). "The purpose of this well-established and respected rule is to preserve the proper functioning of the attorney-client relationship and to shield the adverse party from improper approaches." N.Y. State 607 (1990) (citing ABA 108 ([934]). Current authorities agree "that the rule is designed to prevent opposing counsel from impeding an attorney's performance and that the scope of the rule therefore extends even to well-intentioned approaches." American Bar Foundation, *Annotated Code of Professional Responsi-*

bility, Comment, 332 (1979). Although the Rule may have its greatest impact in protecting against intrusive inquiries into the facts underlying a particular matter, its purpose is not confined to such protection. Even were the Rule limited to a discourse on facts, an interpretation we do not accept, a statement of legal position inescapably entails assumptions of fact. Hence, a lawyer's statement of a client's legal position in a matter, no matter how qualified, is a "communication" that DR 7-104(A)(1) proscribes if the other elements of the Rule are present.

Question Four: When a government lawyer attends a meeting of principals or receives inquiries from counter-parties regarding agency filing requirements, how does the lawyer determine whether he or she "knows" the counter-party is represented for purposes of DR 7-104?

DR 7-104(A)(1) applies only if the lawyer "knows" that the party is "represented by a lawyer in that matter." *See* N.Y. State 607 (1990). If a government lawyer knows that a party is represented by counsel in a civil matter, then the lawyer may not communicate with the party on the subject of that matter without such counsel's consent. Wisconsin Opinion 91-6. *See* N.Y. State 728 (2000). The mere fact that a lawyer knows that a corporation has an in-house legal staff, however, does not necessarily mean that a lawyer "knows" that a member of that staff is representing the corporation in that particular matter. *Cf.* N.Y. State 652 (1993) (that a government lawyer may represent an agency in connection with an enforcement proceeding or a permit application does not necessarily mean that the lawyer represents the agency in connection with the promulgation of rules that could potentially affect the outcome of the enforcement proceeding or permit process); *Schmidt* v. *State*, 722 N.Y.S.2d 623, 625 (N.Y. App. Div. 2000) ("[T]he State of New York is always represented by counsel," but this fact does not end the inquiry on whether counsel represents the State on the particular matter in issue).

We have previously opined that when a lawyer has a reasonable basis to believe that a party may be represented by counsel, then the lawyer has a duty of inquiry to ascertain whether that party is in fact represented by counsel in connection with a particular matter. N.Y. State 735 (2001); N.Y. State 728 (2000); N.Y. State 663 (1994). The necessary extent of such an inquiry will depend on the circumstances of a particular matter.

Owing to the diversity of facts in which the issue may arise, it is sufficient to say that DR 7-104(A)(1) requires, at a minimum, that, when a government lawyer has a reasonable basis to believe that a government contractor may be represented by counsel in connection with the subject of the meeting, then the government lawyer must make inquiry of the government contractor about whether a lawyer represents the contractor in the matter. Likewise, in the case of counter-party inquiries regarding agency filing requirements, prudence suggests that if the government lawyer has a reasonable basis to believe that counsel represents the government contractor in connection with the matter, then the lawyer must make inquiry about whether the contractor is indeed represented in such matter.

Question Five: Once a government lawyer has determined that he or she does not "know" the counter-party is represented in connection with the subject of a civil matter, does the lawyer's (a) statement of the government's legal position and/or (b) response to inquiries from counter-parties regarding agency filing requirements constitute impermissible legal advice to an unrepresented party?

The question whether a lawyer may state his or her agency's legal position in a meeting with unrepresented contractors or respond to their questions concerning the agency's filing requirements is

governed by DR 7-104(A)(2)'s proscription against rendering legal advice (other than the advice to secure counsel) to parties not represented by counsel. That rule is intended to protect parties lacking counsel from receiving legal advice from a lawyer whose client's interests are or may be adverse to those of the unrepresented party. *See* N.Y. State 728 (2000); N.Y. State 650 (1993); N.Y. State 358 (1974); *W.T. Grant Co.* v. *Haines*, 531 F.2d 671, 676 (2d Cir. 1976); *Croce* v. *Kurnit*, 565 F. Supp. 884, 889-91 (S.D.N.Y. 1982).

Although the interests of the contractor are or have a reasonable possibility of being in conflict with the interests of the government agency within the meaning of DR 7-104(A)(2), we do not think the government lawyer's statements constitute impermissible legal advice to an unrepresented third party. Rather, the government attorney is stating the *client agency*'s legal position to a third party. Such is especially apparent in the context of the meetings[34] with contractors, in which the lawyer's position as agency counsel is obvious.

This reasoning also applies to communications with government contractors concerning filing requirements in connection with applications for an agency's approval to take actions under the contracts. We are sensitive to the fact that such filings are often the responsibility of a contractor's non-legal personnel, and that DR 7-104(A)(1) need not be an impediment to the smooth operation of government in its dealings with contractors. If the government agency has appointed a lawyer as the person to describe its filing requirements (which presumably are non-negotiable) to government contractors, we do not think that the Rule requires contractors to use a lawyer in order to learn the government's requirements.[35]

CONCLUSION:

If a lawyer for a government agency knows that another lawyer represents the counter-party to a government contract in connection with that contract, then the government lawyer may attend meetings with non-lawyer representatives of the counter-party, provided reasonable advance notice is given to opposing counsel. Without consent of opposing counsel, the government lawyer may advise the lawyer's own client during the meeting, but may not communicate the government's position on the matter or otherwise negotiate with the counter-party.

When a government lawyer attends a meeting among principals or receives inquiries from counter-parties regarding agency filing requirements, in order to determine whether he or she "knows" that the counter-party is represented for purposes of DR 7-104 he or she must take account of all the relevant circumstances, including the parties' prior course of dealing. If a reasonable basis exists for believing that counsel represents a party on that matter, then the lawyer should make inquiry about whether the counter-party is indeed represented.

Once a lawyer has determined that he or she "knows" that a person is not represented by counsel in connection with a civil matter, and participates in a communication with such an unrepresented

34 We note in passing that a government lawyer's mere attendance at public speeches, continuing legal education programs and other public events at which a counter-party may be present without counsel does not give rise to the type of "communication" contemplated by DR 7-104.

35 Obviously the extent of permissible communications may be limited by considerations other than DR 7-104, *e.g.,* "if it is known or learned that [the contractor's representatives] possess[] information that is protected by the corporation's attorney-client privilege or as attorney work product," N.Y. State 735 (2001), which a lawyer may not knowingly elicit, N.Y. State 700 (1998).

party, neither a lawyer's (a) statement to a counter-party of a client's legal position in the matter, nor (b) response to inquiries from such party regarding agency filing requirements, constitutes impermissible legal advice to an unrepresented person. However, should either type of communication involve something beyond ministerial matters, prudence suggests that the lawyer should remind the inquirer that the lawyer represents the government and that the contractor may wish to retain its own counsel in order to be advised on the issue.

(3-03)

OPINION 769 (11/04/2003)

TOPIC: Representing client in transaction with entity proposing to lend against litigation proceeds

DIGEST: If proposed transaction with litigation financing company is legal, attorney may represent client in negotiating and carrying it out and may charge client an additional fee for this service.

CODE: EC 1-5; EC 5-1; EC 7-8. DR 1-102(A)(3); DR 1-106; DR 1-106(A)(3); DR 2-106(A), (B); DR 4-101(B), (C)(1); DR 5-101; DR 5-101(A); DR 5-103(B); DR 5-104(A); DR 5-107(A)(2); DR 7-102(A)(7), (8); DR 9-102(C).

QUESTION:

May an attorney who represents a client in a personal injury matter on a contingency basis also represent the client in a transaction with a litigation financing company that advances the client cash in return for a portion of any eventual settlement or judgment received by the client? If so, may the attorney charge the client a fee for this separate representation in addition to the contingent fee already agreed for the underlying representation?

OPINION:

Representation in the Financing Transaction

According to a recent column in the *ABA Journal*:

> The past several years have seen a dramatic increase in companies . . . that extend funding to plaintiffs . . . during the course of litigation. . . . What they offer is 'non-recourse' funding, meaning that if the case loses at trial or is overturned on appeal, the client is not obligated to reimburse the funder: The loan usually is at a very high rate of interest. Some companies collect a flat sum; others receive a percentage of any final award or settlement.

Eileen Libby, *Whose Lawsuit Is It?: Ethics Opinions Express Mixed Attitudes About Litigation Funding Arrangements*, 89 A.B.A. J. 36 (May 2003). In N.Y. State 666 (1994), we considered the question whether a lawyer could properly refer a client to such a company. Analyzing the question under DR 5-103(B), we concluded that since the lawyer would not be paying or advancing the funds, the mere referral would not violate that section of the Code. We warned of the dangers of compromising confidentiality in disclosing information to the lender and pointed out that the lawyer could not own an interest in the lending institution nor receive any fee or other compensation for the referral. Although we did not opine on the legality of the proposed transaction, we stated that if it was illegal it would be unethical for the lawyer to make the referral.

In response to the continued increase in such lawsuit financings and the *de novo* nature of the question at hand, this Committee hereby revisits the subject of litigation financing transactions. We start by pointing out that whether such a transaction is legal requires an analysis of various court rules, statutes and cases. In this connection we call the bar's attention to New York's longstanding rules prohibiting "maintenance," *see, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 22, §603.18 (2003); N.Y.

Judiciary Law §§488, 489 (Consol. 2003) (prohibiting the buying of claims by attorneys and corporations for the purpose of bringing an action thereon)[36]; N.Y. Gen. Oblig. Law § 13-101(1) (Consol. 2003) (prohibiting the transfer of a claim for damages for personal injury); N.Y. Gen. Oblig. Law § 13-103 (Consol. 2003) (permitting transfer of a judgment for a sum of money); and to New York cases distinguishing between a prohibited transfer of a claim and an assignment of its proceeds, *see Grossman v. Schlosser*, 19 A.D.2d 893 (1963); *Neilson Realty Corp. v. Motor Vehicle Accident Indemnification Corp.*, 47 Misc. 2d 260 (N.Y. Sup. Ct. Spec. Term. 1965). We also note the recent decision of the Ohio Supreme Court holding that such arrangements constitute champerty and maintenance and thus are void and unenforceable against the borrower under Ohio law. *Rancman v. Interim Settlement Funding Corp.,* 789 N.E.2d 217 (Ohio 2003).

As we stated in N.Y. State 666 (1994), we do not opine on the legality of the proposed financing transaction. If what is proposed is illegal, then it would be unethical for an attorney to recommend the action or assist the client in carrying it out. DR 1-102(A)(3) (lawyer shall not engage in illegal conduct that "adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer"); DR 7-102(A)(7) and (8) (lawyer representing client shall not "counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent" or "knowingly engage in . . . illegal conduct"); EC 1-5 ("[E]ven minor violations of law by a lawyer tend to lessen public confidence in the legal profession."); N.Y. State 479 (1978) (illegal conduct is "of course" unethical "with rare exceptions of inadvertent violations involving no moral turpitude"). On the other hand, if the transaction is legal, an attorney may properly assist the client in carrying it out, subject to several caveats.

As we pointed out in N.Y. State 666 (1994), the lawyer cannot own any interest in the financing institution; any such interest would be prohibited by the Code. *See* DR 1-106(A)(3) (lawyer-owner of entity providing non-legal services is subject to the Code if client could reasonably believe such services are part of the attorney-client relationship); DR 5-101(A) (lawyer's financial interests must not interfere with representation); DR 5-104(A) (requirements for lawyer entering into business transaction with client); s*ee also* N.Y. State 752 (2002) (upholding past opinions barring a lawyer's provision of certain legal and nonlegal services in same transaction, even with consent of client). The lawyer cannot receive any compensation from the financial institution because DR 5-107(A)(2) states that without informed client consent, a lawyer cannot be paid "anything of value related to his or her representation of . . . the client" from "one other than the client". Furthermore, the lawyer may not permit the financing institution to in any way affect the exercise of the lawyer's independent professional judgment on behalf of the client. EC 5-1. *See also* Florida Opinion 00-3 (2002).

Depending on the circumstances the lawyer could have a personal interest in respect of the financing transaction that reasonably could affect the exercise of the lawyer's independent professional judgment on behalf of the client and give rise to a conflict of interest under DR 5-101. For example, the lawyer may be disposed to propose the financing transaction to assure that advances of litigation expenses made on behalf of an impecunious client will be repaid. Or the lawyer may wish to tout the ability to refer clients to the financing institution as a means of attracting clients. On the flip

36 The Second Circuit, in interpreting Judiciary Law §489, recognized that "[o]n its face, this statutory command might appear to be remarkably broad in scope, forbidding essentially all 'secondary' transactions in debt instruments where the purchaser had an intent to enforce the debt obligation through litigation." *Elliott Assoc. v. Banco de la Nacion*, 194 F.3d 363, 372 (2d Cir. 1999). The Court held that "Section 489 is not violated when, as here, the accused party's 'primary goal' is found to be satisfaction of a valid debt and its intent is only to sue absent full performance." *Id.* at 381.

side, the lawyer may view such a transaction as potentially disadvantageous to the lawyer's own interests, resulting in the opposite influence on the exercise of the lawyer's professional judgment on behalf of the client. For example, the transaction may impose duties on the lawyer under DR 9-102(C), *see* N.Y. State 717 (1999) (plaintiff's attorney should pay holder of lien from settlement proceeds unless client disputes amount or validity of lien), with the possibility of liability if the lawyer pays out money in disregard of the financing institution's right to a portion of the funds received, *see Leon v. Martinez,* 84 N.Y.2d 83 (1994). Or the transaction might be viewed by the lawyer as likely to reduce the client's incentive to cooperate or settle the case, *see* Florida Opinion 00-3 (2002). If any of these or similar circumstances exist, the lawyer should not undertake the representation in the financing transaction without satisfying the requirements of disclosure and consent set out in DR 5-101(A).

Because the financing institution will likely insist on receiving considerable information about the underlying claim in order to evaluate whether and on what terms to enter into the transaction, the lawyer must be careful not to compromise confidentiality in disclosing information to the financing institution without the informed consent of the client. *See* DR 4-101(B), (C)(1). The lawyer should advise the client that disclosures of confidential information to the financing institution might compromise the attorney-client privilege, *see generally* Paul R. Rice, *Attorney-Client Privilege in the United States*, § 9 (2d ed. 1999), and might therefore cause the information to be available to an adverse party in discovery.

In representing the client in connection with the proposed transaction,[37] the attorney should determine whether he or she may have additional professional obligations stemming from the expansion in the scope of the representation. As a preliminary matter, the attorney should determine whether a new or updated letter of engagement may be required under N.Y. Comp. Codes R. & Regs. tit. 22, §1215.1-.2 (2003) when the lawyer undertakes a new matter for which the fee is expected to be $3000 or more. In addition, EC 7-8 provides in pertinent part that:

> A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to the client need not be confined to purely legal considerations. A lawyer should advise the client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer's objective viewpoint.

The lawyer should consider that an unsophisticated client may reasonably assume that by facilitating the transaction, the lawyer is also endorsing the entering into of the proposed transaction and/or the terms thereof. To address this possibility, the lawyer must either disclaim such responsibility, *see* N.Y. City 2001-03 ("[T]he scope of a lawyer's representation of a client may be limited in order to avoid a conflict"), or advise the client of the costs and benefits of the proposed transaction, as well as possible alternative courses of action. We note that such arrangements may carry extremely high rates of interest. *See Rancman v. Interim Settlement Funding Corp.,* 789 N.E.2d 217 (Ohio 2003)

37 Throughout this Opinion, we are assuming that an existing client in a personal injury matter is seeking representation in connection with a potential financing of litigation claims. Many of the concerns we express herein would be inapplicable if the client had already entered into a final agreement with the financing institution and the attorney was merely being asked to assist in carrying out its terms.

(financing transaction had return exceeding 180 percent per year). Plainly, such lenders might be in a position to take unfair advantage of a client in dire need of cash. We also note that The Florida Bar has gone so far as to discourage the use of such advance funding companies, pointing out that they may create a disincentive for the client to cooperate in the prosecution or settlement of the case and that the harsh terms of the arrangements would rarely be in the client's best interests. *See* Florida Opinion 00-3 (2002).

Charging the Client an Additional Fee for Assisting in the Financing Transaction

In addressing this question, we assume that the original contingent fee agreement with the client only contemplated representation in the underlying personal injury matter and did not anticipate or include the proposed transaction with the financing company. In that circumstance, the attorney's work in connection with this transaction would be a new and different matter for which the attorney may appropriately charge a separate fee. Under DR 2-106(A) that fee must not be "excessive"; DR 2-106(B) lists a number of factors to be considered in determining whether a fee is excessive. Furthermore, in calculating the legal fees for this representation, the attorney must avoid any violation of the Appellate Division Rules regarding maximum fees in personal injury cases. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 22, §603.7(e) (2003). Whether the money received from the financing institution would constitute a "sum recovered" under those rules is a question of law on which we do not opine. In any event, the attorney must ensure that the total fee does not violate any of the Rules of the Appellate Division by exceeding the maximum amounts specified therein.

CONCLUSION:

Subject to the caveats expressed herein, an attorney who represents a client in a personal injury matter may undertake to represent the client in a transaction with a litigation financing company that advances the client cash in return for a portion of any eventual settlement or judgment received by the client. The attorney may charge the client a fee for such representation in addition to the contingent fee agreed to for the underlying representation.

(5-02)

OPINION 770 (11/12/2003)

TOPIC: Plea bargains; donations as part of agreed sentence

DIGEST: If probable cause supports a charge, and if all terms of the sentence are legal, a prosecutor may agree to a plea bargain in which the defendant is required to make a donation: (1) to the statutory program known as STOP-DWI, as long as the district attorney is not also "coordinator" of the county's STOP-DWI program; or (2) to a not-for-profit organization, as long as the prosecutors handling or supervising the case do not have a "personal interest" in the organization that reasonably may affect their judgment; they do not know that any lawyer in the district attorney's office has such an interest; and the donation to the organization does not create an appearance of impropriety. A prosecutor may agree that such donations may be made before the plea is entered, and in exchange for a dismissal of, or an agreement not to bring, charges. Under no circumstances may a prosecutor conceal the terms of the plea bargain from the sentencing court.

CODE: DR 1-102(A)(3), (4); DR 5-101(A); DR 5-105, (A)-(E); DR 7-102(A)(3), (7), (8); DR 7-103(A)

EC 1-5; EC 5-1; EC 7-13

QUESTIONS:

This opinion discusses plea bargains in which a criminal defendant agrees, as part of the sentence, to make a financial donation that is not expressly authorized by statute. The five specific questions considered are as follows:

(1) As part of a plea bargain in which a defendant charged with driving while intoxicated or driving while ability impaired (either charge hereafter "DWI") will plead guilty to a lesser charge, may a prosecutor agree that the negotiated sentence will include a donation by the defendant to the county's STOP-DWI program? [38] Would the answer be different if the district attorney were the coordinator of the county's STOP-DWI program?

(2) More generally, as part of a plea bargain, may a prosecutor agree that the negotiated sentence will include a donation by the defendant to a not-for-profit organization? If so, must the organization be without "ties" to the district attorney's office?

(3) May a prosecutor agree not to bring charges, or to dismiss charges, against a person on condition that the person make a donation to a not-for-profit organization?

(4) As part of a plea bargain that includes a donation by the defendant to a not-for-profit organization, may a prosecutor require that the donation be made before the plea is entered to ensure that the defendant will live up to that part of the bargain?

38 N. Y. Veh. & Traf. Law §1197 authorizes each county to establish and operate a STOP-DWI program, as further described below.

(5) As part of a plea bargain that includes a donation by the defendant to a not-for-profit organization, may a prosecutor agree that the terms of the agreement concerning the donation will not be disclosed to the sentencing judge?

OPINION:

Introduction

All plea bargaining is subject to ethical constraints. Under DR 7-103(A), "A public prosecutor . . . shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause." Under EC 7-13, "The responsibility of a public prosecutor . . . is to seek justice, not merely to convict." A prosecutor, therefore, should not seek a plea to reduced charges unless there is probable cause to believe that the defendant has committed an offense. If there is no such probable cause, the proper disposition is a dismissal. *See Cowles v. Brownell*, 73 N.Y.2d 382, 387 (1989) (if defendant is innocent or the case is unprovable, prosecutor is under an ethical obligation to drop the charges without exacting any price for doing so).

This Committee does not opine on questions of law and, therefore, expresses no opinion on whether the possible plea bargains discussed herein are legally permissible.[39] It is the prosecutor's responsibility to determine whether the proposed dispositions are legal in each case. If a disposition would be illegal, it would also be unethical. *See* DR 1-102(A)(3) (lawyer shall not engage in illegal conduct that "adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer"); DR 7-102(A)(7) and (8) (lawyer representing client shall not "counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent" or "knowingly engage in . . . illegal conduct"); EC 1-5 ("[E]ven minor violations of law by a lawyer tend to lessen public confidence in the legal profession."); N.Y. State 479 (1978) (illegal conduct is "of course" unethical "with rare exceptions of inadvertent violations involving no moral turpitude").

First question: plea bargain requiring a donation to STOP-DWI

STOP-DWI is a statutory program, which a county may elect to establish pursuant to N.Y. Veh. & Traf. Law §1197 ("Section 1197"). The county designates the "coordinator" of the program and may fix his or her salary and expenses. Section 1197 further provides that if a county has estab-

39 The New York Penal Law, Vehicle and Traffic Law and Civil Practice Law and Rules authorize a variety of monetary penalties and forfeitures upon conviction of an offense. We do not find a reported New York judicial decision on the question of whether a sentence for an offense may include a non-statutory payment in lieu of an authorized monetary penalty. It is clear that a sentence of incarceration that exceeds an authorized term is illegal, even if part of a plea bargain. *See*, *e.g.*, *People v. Cameron*, 83 N.Y.2d 838 (1994); *Kisloff ex rel. Wilson v. Covington*, 73 N.Y.2d 445 (1989). It is unclear whether a waiver of appeal that explicitly waives the illegality of a sentence is enforceable. *See People v. Muniz*, 91 N.Y.2d 570 (1998). A sentence promise may be conditioned upon the defendant's prior fulfillment of various obligations that are not expressly authorized by statute. *See*, *e.g.*, *People v. Avery*, 85 N.Y.2d 503 (1995) (completion of drug rehabilitation program); *People v. Fiumefreddo*, 82 N.Y.2d 536 (1993) (linking of codefendants' pleas); *People v. Anonymous*, 758 N.Y.S.2d 806 (N.Y. App. Div. 2003) (cooperation agreement); *People v. Anonymous,* 757 N.Y.S.2d 847 (N.Y. App. Div. 2003) (same); *People v. Lopez*, 290 A.D.2d 323 (2003) (same).

lished a STOP-DWI program, fines and forfeitures collected within that county for certain driving-related offenses must be deposited in a STOP-DWI account controlled by the chief fiscal officer of the county. [40]

The first question posits a plea bargain in which the defendant pleads guilty to a charge reduced from DWI, and in which the reduced charge is not within Section 1197's list of charges whose monetary penalties are paid over to STOP-DWI. May a prosecutor agree that the negotiated sentence on the reduced charge will include a donation by the defendant to the county's STOP-DWI program?

We see no ethical objection to a plea bargain in which, as part of a sentence to a lesser charge, the defendant agrees to make a payment that would have been authorized by law as a penalty for the original charge, as long as the payment is a legally permissible term of the sentence to the lesser charge and the original charge was supported by probable cause.

We believe the answer to the question would be different, however, if the district attorney were also the coordinator of the county's STOP-DWI program. In that situation, the district attorney's dual role would create both a conflict of interest and the appearance that he or she may not be exercising prosecutorial authority in a disinterested manner.

Under Section 1197 the STOP-DWI coordinator is appointed by an officer of the county, is paid salary and expenses fixed by the county, and serves at the pleasure of the appointing body or officer. Among the duties of the coordinator are organizing the STOP-DWI program and making recommendations to the county for the program's funding. The STOP-DWI coordinator is directed by the statute to "coordinate the efforts of interested parties and agencies engaged in alcohol traffic safety, law enforcement, adjudication, rehabilitation and preventive education."

As a practical matter these provisions mean that a STOP-DWI coordinator must create and implement a plan that involves, among others, the local police, the prosecutors, and the courts, and must recommend the budget therefor. The money that funds STOP-DWI, as mentioned above, comes at least in part from monetary penalties levied in DWI cases prosecuted by the county's district attorney.

Prosecutors have a duty to "seek justice." EC 7-13. "This role imposes a responsibility on prosecutors not only to ensure the fairness of the process by which a criminal conviction is attained, but also to avoid the public perception that criminal proceedings are unfair." N. Y. State 683 (1996). "When it is possible to do so . . . prosecutors, like judges, must take reasonable steps to avoid professional and personal activities that will interfere with their ability to serve in a disinterested fashion." *Id.*

40 Paragraph (1)(a) of Section 1197 mandates that fines, forfeitures and other penalties imposed for aggravated driving without a license pursuant to N.Y. Veh. & Traf. Law §§511(3)(a)(i) and 511(2)(a)(ii) and (iii); driving while intoxicated and driving while ability impaired pursuant to N.Y. Veh. & Traf. Law §§1192, 1192-a, 1193 and 1194-a; and vehicular assault and vehicular manslaughter pursuant to N.Y. Penal Law §§120.03, 120.04, 125.12 and 125.13 be paid over to STOP-DWI. Section 1197 does not require that fines levied pursuant to other traffic offenses, such as driving without a license or in violation of a license restriction pursuant to N. Y. Veh. & Traf. Law §509, be paid over to STOP-DWI.

DR 5-101(A) states that a lawyer "shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests . . . ." DR 5-105(B) states that a lawyer shall withdraw from representation of multiple clients if the exercise of independent professional judgment in behalf of a client will be or is likely to be affected by the lawyer's continued representation of the other client, or if it would be likely to involve the lawyer in representing differing interests. [41] Section 3-1.3(a) of the *ABA's Criminal Justice Standards* (1992) states that a "prosecutor should avoid a conflict of interest with respect to his or her official duties." Section 7.1 of the *National District Attorneys Association's National Prosecution Standards* (1991) states that a "prosecutor should avoid interests and activities which are likely to appear to, or in fact do, conflict with the duties and responsibilities of the prosecutor's office."

If a district attorney were to maintain a dual role as the county's public prosecutor and as the county's STOP-DWI coordinator she would contravene these principles. As district attorney he or she has authority to seek monetary penalties as part of sentences, including plea bargains; as STOP-DWI coordinator his or her program and budget roles give him or her a say in the way the resulting funds are spent. This particular arrangement, in which the district attorney holds a second public office, confers authority that a disinterested prosecutor should not have.

In general, there is no ethical principle barring a district attorney from carrying out his or her legally mandated duties on the ground that a benefit to the office may thereby result. Indeed, it is necessary that a district attorney carry out these duties, as she is the official who is authorized to act.[42] For example, a district attorney may pursue a forfeiture action pursuant to CPLR article 13A, which specifically authorizes, under defined circumstances, the district attorney's retention of forfeited vehicles and the reimbursement of the district attorney's expenses, including a proportion of attorney and other salaries. N.Y. CPLR § 1349 (Consol. 2003).

It is not necessary, on the other hand, for the district attorney to hold two offices. If the power of the second office, in this case the office of STOP-DWI coordinator, allows the district attorney to exercise authority over funds collected in criminal proceedings to benefit the first office, there is both a conflict of interest and the appearance that the exercise of authority as prosecutor may not be disinterested. The conflict is that the same person serves two masters: as prosecutor the district attorney's mandate is to "do justice" in each case, but as coordinator of STOP-DWI he or she serves the financial and other needs of the STOP-DWI program. The appearance problem is that the prosecutor's ability to make STOP-DWI budget recommendations to benefit his or her own office may appear to be an incentive to take dispositions that will pay for those budget allocations. Alternatively, STOP-DWI budget recommendations that benefit the police or court personnel could be perceived as a means of

41 Under DR 5-101(A) and DR 5-105(C) the lawyer with the conflict may determine that "a disinterested lawyer would believe" the representation would not be adversely affected and, if so, may proceed with the representation upon obtaining the client's informed consent to the conflict. Even if the conflict in the present inquiry were "consentable" under these rules, it is not clear from whom the prosecutor could obtain consent. When a government or government agency is a client it may consent to a conflict. N. Y. State 629 (1992). However, the district attorney under the circumstances presented here is not the client and cannot waive his or her own conflict.

42 This is analogous to the rule of necessity that allows an elected district attorney to campaign for himself or herself, even though not allowed to engage in active campaigning for others. N. Y. State 675 (1995).

gaining favor with branches of government from whom the district attorney should remain independent.[43]

Therefore, we believe that a district attorney cannot serve as coordinator of STOP-DWI. Our conclusion applies to any criminal proceeding prosecuted by a district attorney's office in which one of the possible outcomes is a payment to STOP-DWI. The district attorney's dual role is problematic in all such situations. Conversely, if there were *no* dual role, it would be ethically permissible for a district attorney's office to include in a plea agreement (or to request after conviction at trial) a monetary penalty resulting in a payment to STOP-DWI. This would continue to be permissible even if the county used STOP-DWI funds for the district attorney's office or other law enforcement purposes.

Second question: plea bargain requiring donation to not-for-profit organization

Is it ethical for a prosecutor to agree in a plea bargain that the defendant will make a donation to a not-for-profit organization as part of the negotiated sentence? If so, must the organization be without "ties" to the district attorney's office?[44]

If the proposed donation would be a legally permissible component of the sentence, it would be ethically permissible as long as the prosecutors handling or supervising the case do not have a "personal interest" in the organization that reasonably may affect their judgment; they do not know that any lawyer in the district attorney's office has such an interest; and the use of the organization does not create an appearance of impropriety.

DR 5-101(A) states that a lawyer "shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests . . . ." Under EC 5-1, "The professional judgment of a lawyer should be exercised . . . free of compromising influences and loyalties." Section 3-1.3(f) of the *ABA's Criminal Justice Standards* (1992) provides, "A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests." Section 7.3(d) of the *National District Attorneys Association's National Prosecution Standards* (1991) provides, "The prosecutor should avoid any private interests, financial or otherwise, which may affect his professional judgment in the exercise of the duties and responsibilities of the prosecutor's office."

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43 On the other hand, a district attorney, as an elected government official, is certainly *not* precluded from making recommendations to local or state or federal government concerning law enforcement expenditures. In our opinion there is a difference between an elected prosecutor who makes such recommendations as part of the well-accepted political tug of war over budgets and a prosecutor who holds two government offices, each of which can be used to benefit the other.

44 As there does not appear to be any provision in New York law authorizing a sentence that includes such a donation we emphasize again that it is up to the district attorney to determine whether the inclusion of such a donation in a sentence is legal (see footnote 39). Moreover, the legality of a contribution to a not-for-profit organization as part of a sentence may depend on, among other things, considerations arising under the First Amendment. For example, requiring a contribution to a religious organization may well make the plea agreement illegal. See *Jane Doe v. D'Amelia*, 81 F.3d 1204 (2d Cir. 1996), in which the Second Circuit held that a plea agreement requiring the defendant to make a sworn statement in church as a condition of a dismissal of charges subjected the prosecutor to suit under 42 U.S.C. §1983 for violating the defendant's First Amendment rights. A contribution to an organization advocating a political position would be out of bounds as well. *See* N.Y. State 675 (1995) ("In a number of opinions, this Committee has expressed the view that 'there is a basic incompatibility between the duties of a public prosecutor and partisan policics.'") (quoting N.Y. State 513 [1979]).

A "personal interest" or "private interest" in this context is not limited to an interest that produces financial benefits. The not-for-profit organization in the question under consideration might be one to which the prosecutor devotes significant time or contributes significant sums of money. The prosecutor's spouse or other close relative might be an officer or director of the organization. Such a situation might bring the organization within the prosecutor's "personal interests," even if a contribution to it pursuant to a plea bargain would not be of financial benefit to her. *See* Roy D. Simon, Jr., *Simon's New York Code of Professional Responsibility Annotated* 454-56 (Thomason/West 2003).

If a prosecutor has a personal interest in the organization to which a donation will be made pursuant to a plea bargain, DR 5-101(A) directs the prosecutor to determine whether his or her exercise of professional judgment would likely be affected thereby. Not all personal interests in not-for-profit organizations are likely to affect professional judgment. Small contributions of time or money to an organization might not, without more, be sufficiently important personal interests to affect a prosecutor's judgment. Even somewhat larger contributions of time or money might not by themselves be likely to affect professional judgment if made to organizations that are so broadly based as to be "generic," such as the United Way or the Red Cross. Whether a prosecutor's involvement with an organization is likely to affect his or her judgment will depend on the nature, size and scope of the prosecutor's involvement as well as the nature, size and scope of the organization. *See id.* at 454-56. If the prosecutor directly handling the case does have a personal interest in the not-for-profit-organization that likely would affect his or her professional judgment, then a contribution to that organization should not be part of the plea bargain.[45]

If there are other lawyers in the prosecutor's office with a personal interest in the not-for-profit organization, should those interests likewise require that the organization in question be left out of the proposed plea bargain? Certainly if there is another lawyer in the office, such as a supervisor, whose professional judgment is brought to bear on the proposed plea bargain, and who has a personal interest in the organization sufficient to affect that judgment, then the organization should be left out of the plea bargain.

Should the organization be excluded from the plea bargain if there is another lawyer in the office with a personal interest in the organization but who is not involved in the case? DR 5-105(D) disqualifies any lawyer in a firm from "knowingly" accepting or continuing a matter if any other lawyer in the firm would be disqualified under DR 5-101(A). This rule of imputed disqualification is not applicable to a prosecutor's office under all circumstances. The New York Court of Appeals has held that imputed disqualification will not be applied to a district attorney's office unless necessary to protect a defendant from "actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence." *People v. English*, 88 N.Y.2d 30, 33-34 (1996) (quoting *Matter of Schumer v. Holtzman*, 60 N.Y.2d 46, 55 [1983]). In *English* the Court held that the absence of contact or opportunity for contact between the conflicted attorney and the prosecutors handling the defendant's case in a "'huge' metropolitan" district attorney's office militated against imputed disqualification. *See also Matter of Morgenthau v. Crane*, 113 A.D.2d 20 (1985) (large metropolitan district attorney's office held not disqualified even though an assistant district attorney, who had been screened from case, was first cousin of defendant). Therefore, as a general matter, whether the attor-

45 As discussed above in footnote 41, although DR 5-101(A) provides for a client's informed consent to a conflict, we do not believe such consent to be available under the circumstances presented.

neys in a district attorney's office should be disqualified by imputation under DR 5-105(D) turns on whether the standard set forth in *English* has been met under the circumstances of the case.

In the question under consideration, as mentioned above, any impermissible conflict may be cured by leaving the proposed organization out of the plea bargain. The disqualification of attorneys or of an entire prosecutor's office is not necessary. For that reason, and despite *English*, our opinion is that the organization should be left out of the plea bargain if the prosecutors handling or supervising the plea know that another attorney within the district attorney's office would be disqualified under DR 5-101(A) from using that organization in a plea bargain.

If the prosecutor does not know of another lawyer in the office who has a "personal interest" in the not-for-profit organization sufficient to trigger DR 5-101(A), must he or she nevertheless investigate whether there is such a lawyer? Neither DR 5-101(A) nor DR 5-105(D) by its terms so requires.[46] However, one may envision a situation in which another lawyer's connection to an organization, though not known to the prosecutors handling the plea, would make it unseemly for the organization to be included in the plea. For example, it may be that the district attorney is the chair and chief fund raiser for the organization contemplated for the plea. Using the organization as the recipient of the donation called for in the plea bargain would certainly create an appearance of impropriety.

Although the concept of appearance of impropriety lacks precise boundaries, it is our opinion that at a minimum the district attorney must be free of a significant "personal interest" in the situation posed. Therefore, the prosecutors handling the case must at a minimum determine whether the district attorney has a "personal interest" in an organization sufficient to create an appearance of impropriety if the organization were to be the recipient of a donation as part of a plea bargain. As discussed above, the nature, size and scope of both the organization and the district attorney's involvement must be considered.

Whether checking is required with respect to other attorneys in the district attorney's office in order to prevent an appearance of impropriety will depend on all the facts and circumstances. Factors to be considered are the size of the office; whether there are other high officials in the office whose personal interests would create an appearance of impropriety; and whether there are lawyers within the office whose involvement with an organization are so well known that use of the organization would create an appearance of impropriety. As a general matter, inquiry should be made of those lawyers personally and substantially involved in the case.

Third question: nonprosecution or dismissal in exchange for donation

Is it ethical for a district attorney to make an agreement not to bring charges, or to dismiss pending charges, against a person on condition that the person make a donation to a not-for-profit organization?

Such an agreement is clearly not ethical unless there is probable cause that the person committed an offense. If probable cause is lacking the proper disposition is either a dismissal or a decision

46 DR 5-105(E) requires that law firms have a system for recording and checking "engagements" in order to avoid conflicts. Whether such a system may have relevance to a district attorney's office for other situations we do not decide. We believe that it should not be applied by analogy to the question under consideration.

not to bring charges in the first place, and no concessions may be extracted in exchange therefor. *Cowles v. Brownell*, 73 N.Y.2d at 387; DR 7-103(A).

As always, the question of whether the agreement is legal must be decided by the district attorney. Furthermore, as discussed above, the lawyers in the district attorney's office should be without known "personal interests" in the organization.

Section 3-3.8(a) of the *ABA's Criminal Justice Standards* (1992) provides in part, "The prosecutor should consider in appropriate cases the availability of noncriminal disposition, formal or informal, in deciding whether to press criminal charges which would otherwise be supported by probable cause . . . ." We do not find anything in the New York Code of Professional Responsibility that contradicts this guideline, although it does not indicate just what may be required of the defendant in exchange for nonprosecution. [47] We conclude that if, as discussed at length above, a donation may ethically be required in exchange for a reduction of charges, the same donation may ethically be required in exchange for a dismissal of, or an agreement not to bring, those charges.[48] We perceive no ethical principle that a guilty plea to some offense is a required condition to the resolution of a potential criminal action.

Fourth question: requiring that the donation be made before the plea

In a plea bargain requiring a defendant to make a donation to a not-for-profit organization, is it ethical to require that the donation be made before the plea is entered, to ensure that the defendant will live up to that part of the bargain? We do not see such prepayment raising any ethical issues other than those discussed above. *See People v Avery*, 85 N.Y.2d 503 (1995) (permitting deferral of sentence until after defendant completes drug rehabilitation program).

Fifth question: nondisclosure of the donation to the sentencing judge

May the district attorney agree that the terms of the plea bargain concerning the donation to the not-for-profit organization will not be disclosed to the sentencing judge?

It is unethical to conceal a material term of a criminal disposition from the court that will ultimately rule on and embody in a judgment the disposition proposed. DR 1-102(A)(4) provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." DR 7-102(A)(3) provides that a lawyer shall not "conceal or knowingly fail to disclose that which a lawyer is required by law to reveal." *See Morrissey v. Virginia State Bar*, 448 S.E.2d 615 (Va. 1994) (prosecutor's concealment of, among other things, material term of plea – a $25,000 charitable contribution – from trial court held violation of Virginia's DR 1-102[A][4]).

47 The potential boundaries of the reciprocal agreement are not unlimited. *See Cowles v. Brownell*, 73 N.Y.2d 382 (1989) (disapproving agreement dismissing criminal charges in exchange for defendant's agreement not to bring lawsuit against municipality in which defendant was arrested); *cf. Town of Newton v. Rumery*, 480 U.S. 386 (1987) (permitting a similar agreement under circumstances there presented).

48 There is a material difference in New York procedure between a dismissal of charges and a decision not to bring charges. A dismissal must be made on motion and determined by the court, and therefore the terms of and reasons for the dismissal are reviewed by a judge. On the other hand, a prosecutor's decision not to bring charges is not subject to judicial review or approval. If the nonprosecution agreement under consideration is an agreement not to bring charges, the prosecutor may arguably have an added ethical burden of appearing to be fair, as no court oversight is involved.

In the context of the issues discussed in this opinion it seems clear that the donation is a material term of the proposed plea bargains – if for no other reason than that there is always a question as to whether such a term is legal. The determination of that question may well vary from case to case, depending on the specific facts of the proposed donation. Certainly the court must have the opportunity to review the terms of the plea bargain, including the proposed donation. Every New York court is charged with the responsibility of determining the appropriateness of every sentence it imposes, even if the sentence is embodied in a plea bargain. *See People v. Farrar*, 52 N.Y.2d 302 (1981).

CONCLUSION:

If probable cause supports a charge, and if all terms of the sentence are legal, a district attorney may agree to a plea bargain in which the defendant is required to make a donation: (1) to the statutory program known as STOP-DWI, as long as the district attorney is not also "coordinator" of the county's STOP-DWI program; or (2) to a not-for-profit organization, as long as the prosecutors handling or supervising the case do not have a "personal interest" in the organization that reasonably may affect their judgment; they do not know that any lawyer in the district attorney's office has such an interest; and the donation to the organization does not create an appearance of impropriety. A prosecutor may agree that such donations may be made before the plea is entered, and in exchange for a dismissal of, or an agreement not to bring, charges. Under no circumstances may a prosecutor conceal the terms of the plea bargain from the sentencing court.

(2-03)

OPINION 771 (11/14/2003)

TOPIC: Website advertising, client testimonials and reports of past results.

MODIFIES: N.Y. State 614 (1990), N.Y. State 539 (1982)

DIGEST: A website advertisement that uses client testimonials or reports of past results is prohibited under DR 2-101(A) if the advertisement creates unjustified expectations, contains insufficient information, or is otherwise false, deceptive or misleading. If the client testimonials or reports of past results are not false, deceptive or misleading, a lawyer need not post a disclaimer that past results do not guarantee similar outcomes in future cases. If the advertisement is false or deceptive, a disclaimer cannot cure the false or deceptive nature of the advertisement. If client testimonials or reports of past results are misleading, an appropriate disclaimer may be sufficient to correct the misleading nature of the advertisement if the disclaimer is prominently placed in the website such that a lawyer reasonably would expect that any prospective client who reads the advertisement will read the disclaimer.

CODE: DR 2-101, 2-101(A), (B), (F), 2-102, 2-102(D); EC 2-10.

QUESTION:

If a law firm's website includes client testimonials and claims of past results as part of its advertising, must the website include a disclaimer that past results do not guarantee similar outcomes in future cases to satisfy the firm's obligations under DR 2-101(A)?

OPINION:

The Lawyer's Code of Professional Responsibility (the "Code") permits advertising and other publicity by lawyers provided that it is not false, deceptive or misleading. DR 2-101(A).[49] *See also* DR 2-102 (ethical requirements regarding professional cards, announcements, letterhead, trade names, etc.); EC 2-10 (in lawyer advertising, "special care should be taken to avoid the use of any statement or claim which is false, misleading, deceptive or unfair"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) ("Advertising that is false, deceptive, or misleading of course is subject to restraint."); *In re Von Wiegen*, 63 N.Y.2d 163 (1984) (prohibition against direct mail advertising was an unconstitutional, content-based restriction because a less-restrictive alternative was available to prevent deception), *cert. denied sub nom. Comm. on Prof'l Standards v. Von Wiegen*, 472 U.S. 1007 (1985). In N.Y. State 709 (1998), this Committee concluded that Internet website advertising is permissible as long as it is not false, deceptive or misleading and otherwise complies with the advertising

49 DR 2-101(A) provides that "A lawyer . . . shall not use or disseminate . . . any public communication or communication to a prospective client containing statements or claims that are false, deceptive or misleading."

rules set forth in the Code. *See also Model Rules of Prof'l Conduct* R. 7.2 cmt. 3 (2004) ("electronic media, such as the Internet, can be an important source of information about legal services").[50]

The Code does not prohibit the use of client testimonials or reports of past results in advertisements. We observed previously that client testimonials have the potential to mislead an "unsophisticated potential client," but declined to adopt a *per se* rule prohibiting the use of client testimonials in advertising. N.Y. State 614 (1990). Instead, we held improper "those client endorsements describing prior results that are . . . statements of 'overblown assurances of client satisfaction,' statements that create unjustified expectations or 'false hopes' or statements that fail to contain sufficient information, thus rendering the statement false, deceptive or misleading." *Id.* Therefore, the use of client testimonials or reports of past results in website advertising will not violate DR 2-101(A) unless the testimonials or reports create unjustified expectations or contain insufficient information such that the advertisement is rendered false, deceptive or misleading.

In addition, the Code does not require that client testimonials or reports of past results in advertisements of legal services be accompanied by a disclaimer of any kind, including one that informs the reader that past results do not guarantee similar outcomes in future cases. In N.Y. State 614, however, this Committee opined that to avoid the unjustified expectations that may be created by such advertising, the advertisement should contain a disclaimer that a client endorsement or other report of prior results does not guarantee or predict a similar outcome with respect to any future matter. To support this conclusion, we referred to N.Y. State 539, in which we held that the intended impression conveyed by reports of past results is "so unverifiable" as to violate former DR 2-101(B), which prohibited advertising claims that "cannot be measured or verified." *See* N.Y. State 539 (1982). DR 2-101(B) has been repealed. Accordingly, to determine whether a disclaimer is necessary in any advertisement that includes client testimonials or reports of past results, the lawyer must determine whether, without a disclaimer, the testimonials or past results render the advertisement false, deceptive or misleading in violation of DR 2-101(A).

A lawyer must review any proposed advertising that will include client testimonials or reports of past performance and decide, in each instance, whether the testimonial or report is likely to mislead the reader. We believe that in some cases, client testimonials and reports of past results in website advertising by their very nature may mislead prospective clients. For example, advertisements that do not distinguish among the facts and law specific to each case have the potential to mislead the public. EC 2-10 provides the following guidance:

> Although communications involving puffery and claims that cannot be measured or verified are not specifically referred to in DR 2-101, such communications would be prohibited to the extent that they are false, deceptive or misleading. Special care should be taken to avoid the use of any statement or claim which is false, misleading,

50 N.Y. State 709 also identified several considerations relating to Internet advertising. For example, we noted that a lawyer should retain a copy of the website advertisement for at least a year after its last posting. N.Y. State 709 (1998) (citing DR 2-101[F]). We also noted that "[t]here is no ethical prohibition in the Code against advertising to solicit clients who reside outside the state of New York with respect to matters as to which the lawyer may competently and lawfully practice," but advised that website advertisements name the jurisdictions in which the lawyer is licensed to practice. *Id.*; *see also* DR 2-102 (D). New York lawyers should also be aware that lawyer advertising laws and rules in other jurisdictions may regulate the content of any website advertising in those jurisdictions.

deceptive or unfair, or which is violative of any statute or rule of court, in disclosing information, by advertisements or otherwise, relating to [the lawyer or law firm].

Indeed, it is possible that the mere volume of information presented in website advertising – which may consist of several pages of information and links to other websites – will increase the chance that the reader will form an unjustified expectation regarding the legal services being advertised.[51]

If the client testimonials or reports of past results in a website advertisement are misleading in the ways described above (but not false or deceptive), cautionary language warning that prior results do not guarantee or predict a similar outcome in future matters may be sufficient to bring the advertisement into compliance with DR 2-101(A).[52] Moreover, compliance with DR 2-101(A) may require additional cautionary language if the testimonial or report is misleading for reasons beyond the mere report of a positive outcome. The disclaimer must be placed in a reasonably prominent location in the website so that the reader is likely to read the disclaimer in connection with his or her review of the testimonial or report of past results. To assess the sufficiency of the placement of a disclaimer, the lawyer should consider the size of the text and the proximity of the disclaimer to the client testimonial or report of past results. If the disclaimer is in a link, the lawyer should also consider the size and placement of the text signaling the reader to access the link and whether this signal sufficiently informs the reader that reviewing the linked disclaimer is material to any assessment of the information conveyed in the advertisement.

We recognize that website advertising is a dynamic and evolving medium, and that there will be an ever-increasing number of ways to post or position a disclaimer. If a lawyer chooses to post one or more disclaimers to cure otherwise misleading client testimonials or reports of past results, the lawyer should be mindful of changes in technology to ensure that the disclaimer remains posted in a manner that increases the likelihood that it is read in conjunction with the otherwise misleading information.

It goes without saying that if an advertisement is false or deceptive – as opposed to misleading because of the unjustified expectations created – no disclaimer, regardless of its content, will cure the ethical violation. Such an advertisement may not be used without violating DR 2-101(A).

CONCLUSION:

A website advertisement that uses client testimonials or reports of past results is prohibited under DR 2-101(A) if the use of the testimonials or report of past results creates unjustified expectations or is otherwise false, deceptive or misleading. The extent to which any use of testimonials or reports of past results is misleading, if at all, must be assessed on a case-by-case basis. If client testimonials and reports of past results in a website advertisement are misleading, a disclaimer may cure the otherwise misleading information conveyed if the disclaimer is sufficiently tailored to address the

51 *See also Model Rules of Prof'l Conduct* R. 7.1 cmt. 3 (2004) ("An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case.")

52 *See Model Rules of Prof'l Conduct* R. 7.1 cmt. 3 (2004) ("The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.").

information that is misleading, and if the disclaimer's placement in the website is such that it is reasonable for the lawyer to expect that anyone who reads the testimonials and reports of past results will read the disclaimer. If an advertisement is false or deceptive, as opposed to being misleading because of the unjustified expectations conveyed, no disclaimer can cure it. To the extent that the conclusions reached in N.Y. State 614 (1990) and N.Y. State 539 (1982) were premised on DR 2-101(B), those opinions are modified consistent with the discussion herein.

OPINION 772 (11/14/2003)

TOPIC: Threatening and presenting criminal, administrative and disciplinary charges to obtain an advantage in a civil matter.

DIGEST: DR 7-105(A) prohibits the presentation and threatened presentation of criminal charges when the purpose is to effect a resolution of a civil dispute; the disciplinary rule does not embrace administrative or disciplinary charges that may be threatened or presented in connection with a civil dispute, regardless of purpose.

CODE: DR 1-102(A)(4), 1-102, 1-102(A) (3), (4), 4-101(A), 4-101(B)(1), 7-101(A)(1),(2),(5), 7-105(A); EC 7-7, 7-15, 7-21.

QUESTION:

May a lawyer representing a client seeking the return of funds alleged to have been wrongfully taken by a stockbroker ("Broker"): (a) make a demand or file a lawsuit on behalf of the client for the return of such funds and thereafter file a complaint against the Broker with either a prosecuting authority ("Prosecutor") or a self-regulatory body having jurisdiction over the Broker, such as the New York Stock Exchange ("NYSE"); or (b) send a demand letter on behalf of the client either (i) stating the client's intention to file a complaint with a Prosecutor about the Broker's conduct unless the funds are returned within a specified period of time, or (ii) pointing out the criminal nature of the allegedly wrongful conduct and requesting an explanation of the Broker's actions?

OPINION:

When a client invests funds with a Broker who is an associated member of a self-regulatory body, such as the NYSE or the National Association of Securities Dealers, and the Broker then wrongfully takes a portion of those funds for his or her own benefit, the Broker's conduct can have a variety of legal consequences. Viewed as a conversion of the client's funds, the taking may become the subject of a civil liability claim asserted by the client, perhaps leading to the filing of a lawsuit or arbitration. Viewed as a theft, the taking may become the subject of a criminal complaint filed by the client with a Prosecutor, perhaps leading to a criminal prosecution. Viewed as a violation of the rules of the NYSE or any other self-regulatory body of which the Broker is associated, the taking may become the subject of a professional disciplinary proceeding to revoke the Broker's license to practice.

Consequently, when a client believes that a Broker has wrongfully taken funds, the lawyer is faced with various choices about how best to represent and promote the client's interests. Of course, it is the client who decides the objectives of the representation. *See* DR 7-101(A)(1); EC 7-7. If the client's primary objective is to obtain the return of such funds, the lawyer is likely to suggest first writing a letter to the Broker demanding the return of the funds. If the Broker does not return the funds within the specified time period, the client often will authorize the filing of a lawsuit or arbitration proceeding against the Broker for conversion. But if the client asks about alternative or additional ways of proceeding, a question of legal ethics is likely to arise: may the lawyer file or threaten to file

a complaint or charge regarding the Broker's alleged wrongful conduct with either a Prosecutor or the NYSE?[53]

I. The Filing of a Complaint With a Prosecutor or the NYSE

A. The General Ethical Rules Regarding the Filing of any Complaint

In deciding whether to file any complaint against the Broker – whether a lawsuit or an arbitration or a letter of complaint with either a Prosecutor or the NYSE – there are a number of applicable disciplinary rules. DR 7-102(A)(2) prohibits a lawyer from "knowingly advanc[ing] a claim . . . that is unwarranted under existing law, except that a lawyer may advance such claim . . . if it can be supported by good faith argument for an extension, modification, or reversal of existing law." DR 7-102(A)(l) prohibits a lawyer from "fil[ing] a suit, assert[ing] a position . . . or tak[ing] other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Thus, before filing any complaint against the Broker, the lawyer must determine that the client's claim is warranted in law and in fact and that the complaint is not being made merely to harass or injure the Broker.

Two other disciplinary rules are relevant in preparing such a complaint. DR 1-102(A)(4) prohibits a lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." DR 7-102(A)(5) states that in representing a client, "a lawyer shall not knowingly make a false statement of law or fact." Together, these two disciplinary rules impose additional ethical limits on what can be said in any such complaint.

Another disciplinary rule that deals specifically with the interplay of the system of civil liability and the criminal justice system, DR 7-105(A), states "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

EC 7-21 explains the purposes underlying DR 7-105(A):

> The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce the adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

Thus, DR 7-105(A) is intended to preserve the integrity of both the system of civil liability and the criminal justice system by making sure that a lawyer's actual or threatened invocation of the criminal justice system is not motivated solely by the effect such invocation is likely to have on a cli-

53 In focusing this opinion on questions regarding the lawyer's actual or threatened filing of a complaint on behalf of a client, we choose not to opine on any related questions regarding whether it would be permissible for a non-lawyer client, who is not bound by the constraints of the New York State Lawyer's Code of Professional Responsibility (the "Code"), to file such a complaint on his or her own behalf. In this opinion, we are concerned only with the lawyer's professional responsibilities regarding the lawyer's own conduct.

ent's interests in a civil matter. When, however, a lawyer's motive to prosecute is genuine – that is, actuated by a sincere interest in and respect for the purposes of the criminal justice system – DR 7-105(A) would be inapplicable, even if such prosecution resulted in a benefit to a client's interest in a civil matter.

Does DR 7-105(A) apply to the lawyer's filing of a complaint about the Broker's conduct with either a Prosecutor or the NYSE?[54]

B. Filing a Complaint With a Prosecutor

Whether the lawyer's filing of a complaint about the Broker's conduct with a Prosecutor violates DR 7-105(A) depends, in part, upon the meaning of the phrase "present criminal charges." If that phrase refers only to a Prosecutor's actions, then a lawyer's filing of a complaint would not qualify as either presentation of such charges, or participation in such presentation.

We have been unable to find any ethics opinions or court decisions interpreting DR 7-105(A) that address the definition of "present criminal charges." Perhaps this phrase was intended as a term of art, referring to the Fifth Amendment's requirement of a grand jury presentment or indictment for capital and infamous crimes. *See* 1 Charles Alan Wright, *Federal Practice and Procedure* § 110, at 459 (3d ed. 1999) ("The Constitution speaks also of a 'presentment' but this is a term with a distinct historical meaning now not well understood. Historically presentment was the process by which a grand jury initiated an independent investigation and asked that a charge be drawn to cover the facts should they constitute a crime."). Likewise, some criminal cases from the 1940s and 1950s refer to a prosecutor's presentation of criminal charges to the grand jury. *See, e.g., Clay v. Wickins*, 101 Misc. 75 (Sup. Ct. Spec. T. Monroe County 1957).

Despite this historical context, the fact remains that numerous ethics opinions and court decisions concerning DR 7-105(A) assume that a lawyer's conduct in reporting allegedly criminal conduct to a prosecutor, with the express or implied request that the prosecutor file criminal charges, is within the scope of DR 7-105(A). *See, e.g.*, *Office of Disciplinary Counsel v. King*, 617 N.E.2d 676 (Ohio 1993); *People v. Farrant*, 852 P.2d 452 (Colo. 1993); *Crane v. State Bar*, 635 P.2d 163 (Cal. 1981); Virginia Opinion 1755 (2001); Nassau County 93-13; Nassau County 82-3.[55]

Based upon this authority, we too conclude that the filing of a complaint based on the Broker's conduct lies within the scope of DR 7-105(A). To fall within the scope of DR 7-105(A), such a complaint need only report the Broker's conduct to a Prosecutor; it need not expressly request that criminal charges be filed against the Broker, because such a request is implicit in the act of filing such a report with a Prosecutor.

54 We assume throughout this opinion that the lawyer's client has consented to the lawyer filing or threatening to file a complaint about the Broker's conduct. Such consent would be necessary under the Code if the disclosure of the Broker's conduct would be embarrassing or detrimental to the client or the client expressly asked the lawyer not to disclose the Broker's conduct, because the lawyer is prohibited from revealing to third parties the client's "secrets," *see* DR 4-101(B)(1), and, by definition, the Broker's conduct would be a "secret" under DR 4-101(A).

55 These ethics opinions and court decisions contain no discussion and, therefore, provide no guidance as to whether the filing of such a complaint is construed as the presentation of criminal charges or participation in the presentation of criminal charges.

DR 7-105(A) does not proscribe the filing of a complaint about the Broker's conduct with a Prosecutor unless the purpose of such a filing is "solely to obtain an advantage in a civil matter." The "solely" requirement makes the propriety of filing such a complaint contingent upon the client's intent. *See* §II (B) below. As long as one purpose of the client in filing such a complaint with a Prosecutor is to have the Broker prosecuted, convicted, or punished, then such a complaint would not offend the letter or spirit of DR 7-105(A). Thus, we conclude that as long as the client's motivation includes that purpose, DR 7-105(A) would not be violated even if the filing of such a complaint resulted in the Broker returning the client's funds and even if the client also intended that result, because the lawyer would not have filed such a complaint "solely" to obtain the return of the client's funds.

C. Filing a Complaint With the NYSE

In considering whether the lawyer's filing of a complaint against the Broker with the NYSE violates DR 7-105(A), we observe that the language of DR 7-105(A) refers only to "criminal charges" as opposed to allegations regarding the violation of administrative or disciplinary rules, regulations, policies, or practices, such as those of the NYSE. In this respect, DR 7-105(A) differs from similar rules in other jurisdictions, such as the District of Columbia and Maine, where the language of the analogous disciplinary rule expressly refers to "administrative or disciplinary charges" in addition to criminal charges, *see* Maine Bar Rule 3.6(c), or just "disciplinary charges," *see, e.g.*, District of Columbia Rule 8.4(g); Virginia Rule 3.4(h). *See also Crane v. State Bar*, 635 P.2d 163 (Cal. 1981) (concerning §7-104 of the California Rules of Professional Conduct then in effect, which prohibited an attorney "from present[ing] criminal, administrative, or disciplinary charges to obtain an advantage in a civil action").

Thus, we conclude that the threatened or actual filing of complaints with, or the participation in proceedings of, administrative agencies or disciplinary authorities lies outside the scope of DR 7-105(A). We recognize that there exist ethics opinions in this and other jurisdictions in which the threatened filing of a complaint with an administrative agency or disciplinary authority has been held to violate DR 7-105(A) or its analogue. *See, e.g.*, Nassau County 98-12; Illinois Opinion 87-7; Maryland Opinion 86-14. These decisions rely at least in part on the similar purposes of the criminal justice system and the administrative law system – to protect society as a whole. However, we reject that general analogy in light of the specific language of DR 7-105(A), which concerns only "criminal charges."[56] In our view, DR 7-105(A) is limited in scope to actions related to "criminal charges." We assume the term "criminal charges" has its ordinary meaning in New York State substantive law. *Cf.* District of Columbia Opinion 263 (1996) (finding that a criminal contempt proceeding growing out of a failure to abide by a Civil Protective Order in a domestic relations matter does not involve "criminal charges" under the substantive law of the District of Columbia).

56 We also reject the specific analysis underlying Nassau County 98-12 (1998). In that opinion, the Committee concluded that DR 7-105(A) prohibits an attorney from threatening to file a report with disciplinary authorities against another attorney. Citing *People v. Harper*, 75 N.Y.2d 313 (1990), the Committee stated: "Threatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges." But *Harper* did not find that DR 7-105(A) covered threats of filing or the actual presentation of disciplinary charges. *Harper* was an appeal from a jury verdict that a witness had received a bribe. The *Harper* Court referred to DR 7-105 solely with reference to the People's argument that "it is improper to use the threat of criminal prosecution as a means of extracting money in a civil suit." 75 N.Y.2d at 318. The *Harper* Court rendered no opinion about the actual or threatened reporting of disciplinary violations by lawyers.

II. Sending a Demand Letter

DR 7-105(A) not only prohibits a lawyer from presenting or participating in the presentation of criminal charges, but also prohibits a lawyer from threatening to do so. Thus, even if a lawyer were to send a letter to the Broker expressing a conditional intent to file a complaint, or even if a lawyer were to send a letter arguing that the Broker's conduct violates the criminal law and asks for an explanation or justification of the Broker's conduct, the lawyer could arguably be in violation of DR 7-105(A) if (i) such communications "threaten to present criminal charges,"[57] and (ii) do so "solely to obtain an advantage in a civil matter."

A. Threats

Some letters contain unambiguous threats to present criminal charges. In *In re Hyman*, 226 App. Div. 468 (1929), the First Department censured a lawyer who wrote a letter to the driver of an automobile that hurt his client, Miss Horn, stating:

> Unless you show some substantial evidence of your willingness to compensate Miss Horn [the attorney's client] for her injuries, I shall have no alternative but to immediately criminally prosecute you for assault against my client. In addition to that I shall institute civil action for the amount of the damages which Miss Horn has suffered.

226 App. Div. at 469. Four years after *In re Hyman*, the First Department censured another lawyer who sent a letter stating that unless money was paid immediately he "would present the matter to the district attorney upon a charge of larceny and embezzlement." *In re Beachboard*, 263 N.Y.S. 492 (N.Y. App. Div. 1933).[58] More recently, the Third Department censured a lawyer for sending a letter to a workman which stated that unless the workman returned a sum of money to his client the lawyer would "have a warrant issued for [the workman's] arrest;" "you will return the money or go to jail." *In re Glavin*, 107 A.D.2d 1006- 1007 (1985).

In each of these cases, the letter refers to future criminal prosecution, but provides the recipient with the opportunity to avoid such prosecution by taking certain remedial action. The recipient is given a choice: either act to remedy the alleged civil wrong or face a criminal prosecution. The fear of criminal prosecution provides the leverage by which the lawyer hopes to coerce the recipient's decision.[59]

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57 Because, for the reasons stated above, the filing of a complaint against the Broker with an administrative or disciplinary authority, such as the NYSE, is not within the scope of DR 7-105(A), the lawyer's threatening to file such a complaint would not violate DR 7-105(A), even if such a threat were intended by the lawyer solely to obtain the return of the client's funds.

58 This short decision does not make it clear whether the respondent lawyer was acting on behalf of a client or for himself in sending the threatening letter. In our view, however, that does not matter. We agree with the numerous decisions in other jurisdictions holding DR 7-105(A) or its counterparts applicable where the respondent lawyer is acting on his or her own behalf. *See, e.g.*, *Somers v. Statewide Grievance Committee*, 715 A.2d 712, 718-19 & n.19 (Conn. 1998); *In re Yarborough*, 488 S.E.2d 871, 874 (S.C. 1997); *In re Strutz*, 652 N.E.2d 41, 48 (Ind. 1995); *People v. Farrant*, 852 P.2d 452, 454 (Colo. 1993).

59 As stated below, in some circumstances such a threat in itself may violate New York's Penal Law because it constitutes criminal coercion or extortion. *See* § II(C) below. In those circumstances, the threat not only violates DR 7-105(A); it also violates DR 1-102(A)(3)'s prohibition against "engag[ing] in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

Based on these cases, we conclude that a lawyer would violate DR 7-105(A) by sending a letter to a Broker stating the client's intention (conditional or otherwise) to file a complaint with a Prosecutor relating to the Broker's conduct, assuming that the sole purpose of the letter were to obtain the return of the Funds. In reaching this conclusion, we consider it immaterial under DR 7-105(A) whether the Broker actually owed the client the requested funds or whether the client had good grounds for believing the funds were owed. As stated below, DR 7-105(A) prohibits a letter that threatens to file a complaint with a Prosecutor solely to obtain a civil advantage, regardless of whether the threat is extortionate or justifiable. *See* § II(C) below.

Other letters are more ambiguous in their intention to present criminal charges. Ethics opinions and courts in other jurisdictions are split on whether such ambiguous communications constitute a threat to present criminal charges. Some ethics opinions and court decisions interpret the mere allusion to a criminal prosecution or criminal penalties or even the use of criminal law labels to describe the opposing party's conduct in a letter as a veiled threat to present criminal charges to a prosecutor. *See*, *e.g.*, *In re Vollintine*, 673 P.2d 755 (Alaska 1983); Virginia Opinion 1755 (2001). *Cf.* District of Columbia Opinion 220 (1991) (finding no relevant distinction "between threats and hints of threats" to file disciplinary charges encompassed within D.C. Rule 8.4[g]). *See generally* Charles W. Wolfram, *Modern Legal Ethics* § 13.5.5, at 717 (1986). Other authorities have held that the mere mention of criminal penalties or the violation of criminal laws does not necessarily show the specific intent to threaten. *See, e.g.*, *In re McCurdy*, 681 P.2d 131, 132 (Or. 1984).

In our view, there is no universal standard to determine whether a letter "threaten[s] to present criminal charges." Such a determination requires the examination of both the content and context of the letter. In our view, a letter containing an accusation of criminal wrongdoing likely constitutes a threat, especially when coupled with a demand that the accused wrongdoer remedy the civil wrong. Whether the accusation is general (simply stating that the Broker's conduct violates the criminal law) or specific (stating that the Broker's conduct violates particular provisions of the criminal law), such an accusation serves the undeniable purpose of coercing the accused wrongdoer. We point out, moreover, that a lawyer who sends a letter containing such a communication is exposed to professional discipline based upon the disciplinary authorities' interpretation of the lawyer's intent in sending the letter or statement.

B. The "Solely" Requirement

DR 7-105(A) does not prohibit all threats to present criminal charges; it prohibits only those that are made "solely to obtain an advantage in a civil matter." For that reason, ethics opinions and court decisions in other jurisdictions have found no violation of DR 7-105(A) or its counterparts when the threat of presenting criminal charges is intended for a purpose other than obtaining an advantage in a civil matter.

Consider, for example, the letter sent by the lawyer in *Decato's Case*, 379 A.2d 825 (N.H. 1977):

> In New Hampshire, it is a crime to obtain services by means of deception in order to avoid the due payment therefore (sic). Without any proof on your part, you have chosen to stop payment on a check after it was made for the payment of services. Unless you communicate directly with me and give me some proof that the damages sustained

> to your son's International Harvester were the result of the failure of Decato Motor Sales, Inc., I shall consider filing a criminal complaint with the Lebanon District Court against your son for theft of services.

379 A.2d at 826. The New Hampshire Supreme Court imposed no discipline based on that letter, holding that the purpose of the lawyer's letter was not to gain leverage in a civil action by the threat of filing criminal charges, because Decato made no demand or request for payment from the letter's recipient – he only asked for information about the recipient's legal position.

Similarly, ethics committees in several other jurisdictions have opined that a letter referring to the criminal sanctions imposed for stopping payment on a check was not sent solely for the purpose of gaining an advantage in a civil matter. *See, e.g.*, Florida Opinion 85-3; Georgia Opinion 26 (1980); Utah Opinion 71 (1979). These opinions rested on the fact that state law imposes a requirement of such notification before bringing a civil action. *But see* New Mexico Opinion 1987-5 ("threats or references to criminal sanctions in demand letters for payment of supplies or recovery of worthless checks would have been improper under former Rule 7-105[A]").

Thus, if the lawyer sent a letter to the Broker stating that the Broker's conduct appeared to violate certain criminal statutes or appeared to carry certain criminal penalties and requesting an explanation or justification of the Broker's conduct, such a letter would not violate DR 7-105(A) if the lawyer intended merely to determine whether the Broker's conduct was actionable, either civilly or criminally, because it was not "solely to obtain an advantage." We acknowledge that basing our conclusion on the lawyer's intent in sending the letter renders the ethical assessment of the lawyer's conduct very fact-specific. However, we think there is no alternative if the "solely" requirement of DR 7-105(A) is to be taken seriously. *See* Connecticut Informal Opinion 98-19 ("Such an examination [of a lawyer's motivation] is very fact specific"); Florida Opinion 89-3 ("The motivation and intent of the attorney involved obviously will be a major factor in determining whether his or her actions are ethically improper. The Committee believes that such determinations necessarily must be made on a case-by-case basis").

We point out, however, that when a lawyer threatens criminal charges unless the recipient takes specified action, the threat is likely to have one clear purpose – the doing of that specified act. Thus, when a lawyer threatens to present criminal charges unless an action is taken which remedies a civil wrong, a presumption is likely to arise that DR 7-105(A) has been violated.[60]

60 The Model Rules have no analogue to DR 7-105(A). The drafters of the Model Rules apparently believed that to the extent DR 7-105(A) serves legitimate purposes, the conduct it proscribes is prohibited by other ethical rules, such as Model Rule 8.4 (which is analogous to DR 1-102), Model Rule 4.1 (which is analogous to DR 1-102[A][4] and DR 7-102[A][5]), Model Rule 4.4 (which is analogous to DR 7-102(A)(1)), and Model Rule 3.1 (which is analogous to DR 7-102[A][2]). *See* ABA 92-363. To the extent that DR 7-105(A) prohibits conduct other than that prohibited by those Rules – such as the actual or threatened presentation of criminal charges in a civil matter to gain relief for a client when the criminal charges are related to the civil matter, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the facts and the law, and the lawyer does not attempt to exert or suggest improper influence over the criminal process, *see* ABA 92-363, – the drafters of the Model Rules appear to have believed that DR 7-105(A) was overbroad because it "excessively restrict[ed] a lawyer from carrying out his or her responsibility to 'zealously' assert the client's position under the adversary system." *Id*. *See also* Geoffrey C. Hazard, Jr. & W. William Hodes, 2 *The Law of Lawyering*, § 40.4, at 40-7 (3d ed. 2000) ("rules like DR 7-105[A] . . . are overbroad because they prohibit *legitimate* pressure tactics and negotiation strategies") (emphasis in original).

C. DR 7-105(A)'s Relation to Illegal Conduct

Under New York law, proof of a threat to present criminal charges unless a certain specified action is performed constitutes a *prima facie* case of criminal coercion in the second degree, *see* N.Y. Penal Law § 135.60(4) (Consol. 2003), and, if property is obtained, makes out a *prima facie* case of extortion, *see* N.Y. Penal Law §155.05(2)(e)(iv) (Consol. 2003). However, New York law provides that such conduct is not unlawful if the person making such a threat "reasonably believed the threatened [criminal] charges to be true and that his sole purpose [in sending the letter] was to compel or induce the [recipient] to take reasonable action to make good the wrong which was the subject of the threatened charge." N.Y. Penal Law § 135.75 (Consol. 2003) (affirmative defense to criminal coercion). *Accord* N.Y. Penal Law § 155.15(2) (Consol. 2003) (affirmative defense to extortion).

Thus, if the lawyer sending a threatening letter to the Broker reasonably believes that the threatened criminal charges are true and the letter only demands that the Broker take an action that is reasonably calculated to remedy the wrongful taking, such a letter would not be unlawful. However, DR 7-105(A) still would apply, because it is immaterial to the literal language of DR 7-105(A) and its purpose whether the threatened criminal charges are true or whether the action demanded is reasonably related to rectification of the allegedly criminal conduct.

CONCLUSION:

For the reasons stated above, the lawyer would not violate DR 7-105(A) by the actual or threatened filing of a complaint against the Broker with the NYSE. The filing of a complaint about the Broker's conduct with a Prosecutor would not violate DR 7-105(A) unless the lawyer's sole purpose in filing such a complaint was to obtain the return of the client's funds in dispute. A letter from the lawyer that threatened the filing of such a complaint unless the Broker returned the funds to the client would violate DR 7-105(A). Under the circumstances described above, a letter from the lawyer that threatened the filing of such a complaint unless the Broker provided information about his or her conduct would not violate DR 7-105(A) because obtaining an advantage in a civil matter would not be the sole purpose of such a threat.

(44-01)

2004

OPINION 773 (01/23/2004)

CLARIFIES: N.Y. State 655 (1993)

TOPIC: Lawyer-member of municipal board; conflict of interest; appearance of impropriety; imputation of disqualification in "of counsel" relationship.

DIGEST: A lawyer who serves on a municipal board is prohibited from appearing before that board on behalf of a private client. Lawyers who are "of counsel" to a law firm are "associated" with the law firm for purposes of DR 5 105(D), and so the firm is likewise disqualified from appearing before the board unless the client gives informed consent. Whether the firm is disqualified by other rules depends on the facts and circumstances, but if not and if the firm does appear, the lawyer-member must recuse him or herself.

CODE: DR 1-102(A)(2),(5); 2-102(A)(4); 5-101(A); 5-105(A),(B),(D); 5-108 (A),(B); 8-101(A)(2); 9-101(B), (C); Canon 9; EC 8-8.

CJC: Canon 2

QUESTION:

1. Is a lawyer who serves on a municipal board prohibited from appearing before that board?

2. If so, is a law firm with which that lawyer has an "of counsel" relationship also disqualified from appearing before that board?

3. If so, does the lawyer's recusal from the board's deliberations on matters involving the firm avoid disqualification?

OPINION:

Question #1: Is a lawyer who serves on a municipal board prohibited from appearing before that board?

In a line of opinions dating back at least to 1970, this Committee has held that an attorney who is a public officer may not represent private clients before the body on which he or she serves. Indeed, most of our opinions have addressed the circumstances in which that prohibition would extend to appearance before bodies, or adverse to entities, other than the one on which the lawyer serves but

over which the lawyer-member has some measure of control as a public officer.[1] We have repeatedly noted two rationales for these prohibitions:

> Rules disqualifying lawyers who are part-time public officials from accepting private clients in certain situations are designed to serve two basic purposes. Primarily the disqualification rules serve to prevent private clients from retaining a part-time public official in the hope of gaining some improper advantage by reason of his lawyer's public office. In addition the rules are designed to prevent public suspicion that the client may be gaining some improper advantage by retaining the public official.

N.Y. State 431 (1976), *quoted* in N.Y. State 435 (1976), 510 (1979), 692 (1997), 702 (1998). The Committee has also opined that at least in some circumstances these ethical concerns would not be cured by recusal from all votes relating to the private representation. N.Y. State 702 (1998) (lawyer-legislator could not appear adverse to district attorney). In so finding, we cited the following sources in the Code: DR 1-102(A)(5) (barring conduct "prejudicial to the administration of justice"), EC 8-8 ("A lawyer who is a public officer, whether full or part-time, should not engage in activities in which the lawyer's personal or professional interests are or foreseeably may be in conflict with the lawyer's official duties."), DR 8-101(A)(2) (lawyer in public office shall not "[u]se the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client"), and Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety").

In addition to enforcing the bar on improper influence and the appearance of impropriety, the Committee has noted that "[t]here may also be special circumstances in which a conflict could arise between the lawyer-legislator's duties or political objectives in the lawyer's role as legislator, and the lawyer's professional obligations to a client. In such circumstances, the lawyer-legislator must apply the principles of DR 5-101(A)," which deals with conflicts of interest affecting the lawyer's exercise of professional judgment on behalf of clients. N.Y. State 692. We noted that where this concern operates, the private client may be able to give effective consent. *Id.*

1 See, e.g., N.Y. State 702 (1998) (lawyer-legislator cannot practice criminal law where legislature has authority over district attorney budget; recusal from voting on budget does not cure conflict); N.Y. State 692 (1997) (part-time legislator cannot represent criminal defendants if legislature has budgetary authority over opposing prosecutor or police); N.Y. State 510 (1979) (part-time deputy town supervisor may not represent private clients in tax certiorari or other proceedings involving town); N.Y. State 435 (1976) (county legislator may not represent client seeking permit from county health department but may represent clients before municipal bodies and county courts or in ministerial processes in county clerk's office); N.Y. State 431 (1976) (county legislator with "line item" control over salaries of district attorney's office may not represent criminal defendants), overruled by N.Y. State 692; N.Y. State 424 (1975) (part-time county legislator should not represent criminal defendants where district attorney's funding is from legislature of which lawyer is member); N.Y. State 364 (1974) (member of school board should not represent property owner seeking reassessment); N.Y. State 209 (1971) (attorney who is city council member may not act as attorney for school district dependent on city services). See also N.Y. State 484 (1978) (member of zoning board of appeals may practice before other agencies of town in matters unrelated to zoning); Kings Point Gate, LLC v. Aroche, 192 Misc. 2d 45 (Nassau Cty. Dist. Ct. 2002) (citing various of these opinions in refusing to disqualify counsel who was town council member in county in which action was pending); Nassau County 93-20 (city council member may not appear before judge or opposite city attorney appointed by council, or where council member may need to cross-examine city official).

Question #2: Is the law firm with which that lawyer has an "of counsel" relationship also disqualified from appearing before that board?

The question presented here is whether the prohibitions on a lawyer appearing before the body of which he or she is a member extend to a law firm with which the lawyer has an of counsel relationship.

DR 5-105(D) provides that all lawyers "associated in a law firm" are disqualified from accepting or undertaking an engagement if any one of them practicing alone would be disqualified under certain enumerated rules: DR 5-101(A), DR 5-105(A) or (B) and DR 5-108 (A) or (B), all concerning conflicts of interest affecting the exercise of professional judgment on behalf of a client or duties of confidentiality to present or former clients, and DR 9-101(B), concerning conflicts arising out of public employment, an issue not applicable here.[2] In order to determine whether the disqualification of the lawyer-public officer from appearing before the body on which he or she serves is imputed to the partners and associates of his or her "of counsel" firm under DR 5-105(D), we must determine the following: (1) whether the disqualification arises out of any of the enumerated rules, and (2) whether an of counsel lawyer is "associated in a law firm" with partners and associates of the firm for purposes of DR 5-105(D).

As noted above, the general ban on a lawyer-public officer appearing before the body on which he or she serves, or before or adverse to entities over which the public officer has some control, arises out of rules relating to the appearance of impropriety, improper influence and conduct prejudicial to the administration of justice. Those rules are not subject to automatic imputation under DR 5105(D). But the bar that we have said may arise in "special circumstances" (where the public officer's duties might conflict with the lawyer's duties to a client) arises out of DR 5101(A), which is

2 DR 9-101(B) addresses situations in which the lawyer-public employee had or has personal involvement in the matter or representation at issue, which we assume is not the case here. DR 9-101(B) provides:

> Except as law may otherwise expressly permit: (1) A lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, and no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless: a. The disqualified lawyer is effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom; and b. There are no other circumstances in the particular representation that create an appearance of impropriety. (2) A lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may knowingly undertake or continue representation in the matter only if the disqualified lawyer is effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom. (3) A lawyer serving as a public officer or employee shall not: a. Participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or b. Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

subject to automatic imputation under DR 5105(D).[3] We turn, therefore, to whether a lawyer-public officer is "associated" with a firm to which he or she is of counsel within the meaning of DR 5-105(D).

DR 2-102(A)(4) provides that "A lawyer or law firm may be designated 'Of Counsel' on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate." We have interpreted the "of counsel" relationship to mean that the of counsel lawyer is "available to the firm for consultation and advice on a regular and continuing basis." N.Y. State 262 (1972). The ABA Ethics Committee has characterized the "of counsel" relationship as "close, regular [and] personal." ABA 90-357 (citing and withdrawing ABA 330 [1972]). The ethics committee of the Association of the Bar of the City of New York has taken a similar view. *See* N.Y. City 1996-8; N.Y. City 1995-8; N.Y. City 81-3 (1982).

Both the ABA and the Association of the Bar of the City of New York have concluded that a lawyer who is "of counsel" to a law firm is "associated" with that firm for purposes of imputation of conflicts of interest. *See* ABA 90-357; N.Y. City 19958 ("attorneys will need to keep in mind that for purposes of analyzing conflicts of interest, 'of counsel' relationships are treated as if the 'counsel' and the firm are one unit"). *See also Nemet v. Nemet*, 112 A.D.2d 359 (of counsel relationship leads to imputed disqualification), *appeal dismissed*, 66 N.Y.2d 602 (1985); N.Y. City 2000-4. The same position has been adopted by the *Restatement of the Law Governing Lawyers*, which states:

> A lawyer who is of counsel to a firm often has more limited access to confidential client information than firm partners and associates and usually a smaller financial stake in the firm. Nonetheless, the incentive to misuse confidential information, the difficulty of determining when it has been misused, the ostensible professional relationship, as well as the administrative ease of a definite rule, justify extending imputation to lawyers having an of-counsel status.

Restatement (Third), The Law Governing Lawyers, § 123 cmt. c(ii) (1998).

We agree with the aforementioned authorities and conclude that if a lawyer acting alone would be disqualified from a particular representation based on any of the rules enumerated in DR 5-105(D), then that disqualification is imputed to a law firm with which that lawyer has an "of counsel" relationship.

Therefore, if a lawyer-public officer is barred from undertaking a client engagement because his or her exercise of professional judgment on behalf of the client would be or reasonably might be

3 In one opinion, this Committee has suggested that a member of a board of zoning appeals exercises professional judgment on behalf of a client within the meaning of DR 5-101(A) in the member's zoning appeals votes. N.Y. State 655 (1993) ("we perceive no obvious danger that the exercise of professional judgment by a lawyer-member of a board of zoning appeals on behalf of a private client *or with respect to the lawyer's zoning board judgments* 'will be or reasonably may be affected by the lawyer's own financial, business, property or personal interests'" when the lawyer represents personal injury clients against town) (emphasis added, footnote omitted). To the extent this remark may be read to suggest that DR 5-101(A) addresses a lawyer-member's votes on the board of zoning appeals, we believe it was misplaced. DR 5101(A) applies only to conflicts affecting "the exercise of professional judgment on behalf of [a] client," not to conflicts affecting other roles a lawyer may assume. Thus, DR 5-101(A) does not serve to protect the board or the town from votes by a member who has a private client with a matter before the board; it serves to protect only the private client from conflicts and thus, in certain circumstances, can be waived by the client, as stated in N.Y. State 692.

affected by the lawyer-public officer's political or fiduciary duties to the municipal board, the law firm would likewise be barred. Thus, for example, if a prospective client sought to hire a partner of the firm to argue against a bill that the lawyer-public officer had offered, the partner could not do so, at least not without the informed waiver of the prospective client.

Question #3: Does the lawyer's recusal from the board's deliberations on matters involving the firm avoid disqualification?

DR 5-105(D) is not the only potential limitation on the law firm's practice before the municipal board. In N.Y. State 632 (1992), we addressed whether the partners and associates of a part-time judge were prohibited from appearing before the municipal zoning board of appeals or planning board. After concluding that the judge would be so barred, this Committee held that whether the partners and associates of the judge could practice before those boards "depends on the particular facts and circumstances":

> None of the Code provisions identified in DR 5-105(D) applies here, where the disqualification of the judge rests on [Code of Judicial Conduct] Canon 2 [mandating avoidance of the appearance of impropriety] and DR 8-101(A)(2). Thus, whether the partners and associates of the part-time judge may practice before the boards of the same municipality depends on the particular facts and circumstances. Clearly the partners and associates of a part-time judge may not represent or imply that hiring the firm will result in using the influence of the judge in zoning and planning matters. *See* DR 9-101(C). The judge may not circumvent the force of CJC's Canon 2 by sending a partner or associate to represent the judge's clients before these boards. *See* DR 1-102(A)(2); DR 8-101(A)(2) and Canon 9. On the other hand, vicarious disqualification should not be imposed if the judge's partners and associates have an ongoing independent practice before these boards, the judge is screened from any involvement, and their practice is conducted without using or even appearing to use the name and influence of the judge.

A similar examination of the facts and circumstances is required to determine whether a partner or associate of a firm can appear before a municipal board of which an of counsel lawyer of the firm is a member.

If the firm appears, the lawyer-member must recuse him- or herself. We have said, "A lawyer holding public office has a duty to abstain from voting or otherwise participating in a matter in which his firm was involved at a time when he was a member of the firm, irrespective of whether the client had been represented by him or by one of his partners or associates." N.Y. State 145 (1970). We think the same precept applies to lawyer-public officer who are of counsel to the firm. Indeed, it is likely that the codes of ethics of many if not most boards would require recusal in such circumstances. *Cf., e.g., In the Matter of Nicholas Quennell*, N.Y.C. Conflict of Interest Board Case No. 97-60 (Art Commission member fined for failure to recuse himself from vote on matter involving his architectural firm).

Many codes of ethics of municipal boards likewise address whether others affiliated with a board member can appear before the board even if the member is recused. *See, e.g.,* N.Y.C. Conflict of Interest Board Advisory Op. 96-04 (law firm of which community board member is a partner may

not appear before board even if member is recused); N.Y.S. Ethics Comm'n Advisory Op. 99-12 (restrictions on practice of a member of a state commission who is of counsel to a firm do not apply to firm as long as the of counsel lawyer does not share in the relevant net revenues). If so, those codes should govern, since any recusal rules are designed to protect the processes of the board, rather than the representation of a client, which is the primary concern of the Code. [4] If the ethics codes of the board do not directly address the question, the law firm may still have a duty under the Code to decline the representation in order to avoid an appearance of impropriety and any suggestion that the client is getting special access to the remaining members of the board. Whether this duty arises will depend on a number of factors, such as the size of the firm and of the board, how long the of counsel lawyer-public officer has practiced with the firm, the extent to which the of counsel lawyer is publicly identified with the firm, and other factors. *Cf.* N.Y. State 513 (1979) (appearance of impropriety bars partner of the chair of the local political committee from serving as city attorney).

CONCLUSION:

A lawyer who serves on a municipal board is prohibited from appearing before that board. Whether a law firm to which the lawyer is of counsel is barred depends on the facts and circumstances. First, any conflicts that could affect the lawyer's ability to represent the client under DR 5-101(A) are imputed to all lawyers in the firm, but the private client may be able to waive the conflict after adequate disclosure. Second, the lawyer-public officer would need to be recused from any matters in which the law firm appears before the board. Third, even with recusal, the law firm may be barred from appearing before the board if, under the circumstances, the law firm's appearing would give rise to a suggestion of special access to the board or other appearance of impropriety.

(20-02)

4 The New York State Ethics Commission has similarly observed that where its rules permit a former state employee to undertake a matter that might otherwise be prohibited by DR 9-101(B), the state ethics rules will govern because DR 9-101(B) contains an exception "as law may otherwise expressly permit." N.Y.S. Ethics Comm'n Advisory Op. 90-14.

OPINION 774 (03/23/2004)

TOPIC: Law firm's supervisory responsibilities upon hiring a secretary, paralegal or other nonlawyer who has previously worked at another law firm.

DIGEST: When a law firm hires a secretary, paralegal, or other nonlawyer who has previously worked at another law firm, the law firm must adequately supervise the conduct of the nonlawyer. Supervisory measures may include i) instructing the nonlawyer not to disclose protected information acquired at the former law firm and ii) instructing lawyers not to exploit such information if proffered. In some circumstances, it is advisable that the law firm inquire whether the nonlawyer acquired confidential information from the former law firm about a current representation of the new firm or conduct a more comprehensive conflict check based on the nonlawyer's prior work. The results of such an inquiry will help determine whether the new firm should take further steps, such as seeking the opposing party's consent and/or screening the nonlawyer.

CODE: DR 1-104(A)-(D),DR 4-101(B),(C), (D), DR 5-105(E) EC 4-2, EC 7-10

QUESTION:

Law firms often hire secretaries, paralegals, or other nonlawyers who have worked at other law firms. What are a law firm's supervisory responsibilities upon hiring a nonlawyer who has worked at other law firms? In particular, must the law firm check for conflicts of interest?

OPINION:

I. A Law Firm's Supervisory Duties Over Nonlawyers Generally

DR 1-104(C) of the New York Code of Professional Responsibility provides that:

> A law firm shall adequately supervise, as appropriate, the work of partners, associates and *non-lawyers* who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter. (Emphasis added).

The requirement to supervise nonlawyers is intended to avoid conduct that would violate the Disciplinary Rules if engaged in by a lawyer. This objective is reinforced by DR 1-104(D), which provides that:

> A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer *or for conduct of a non-lawyer employed or retained by or associated with the lawyer* that would be a violation of the Disciplinary Rules if engaged in by a lawyer if:
>
> > 1. The lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it; or

> 2. The lawyer is a partner in the law firm in which the other lawyer practices *or the non-lawyer is employed*, or has supervisory authority over the other lawyer *or the non-lawyer*, and knows of such conduct, or in the exercise of reasonable management or supervisory authority *should have known* of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated. (Emphasis added).

In short, a law firm must supervise nonlawyers as if they were governed by the Disciplinary Rules. Also relevant are DR 1-104(A) and (B), which also impose supervisory duties on law firms. They provide as follows:

> A. A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.
>
> B. A lawyer with management responsibility in the law firm or direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the disciplinary rules.

One other relevant Disciplinary Rule, DR 4-101(D), provides that:

> A lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

The term "employees" in DR 4-101(D) refers by implication to nonlawyers. Thus, the Code of Professional Responsibility requires lawyers to take reasonable care to ensure that nonlawyers abide by DR 4-101 as if they were lawyers.

II. Supervision of Lateral Nonlawyers

A. Instruction

When a law firm hires a nonlawyer who has previously worked at another law firm, it is advisable that the law firm remind the nonlawyer to protect the confidentiality of information with respect to clients of the other firm. As expressed in EC 4-2, a lawyer is obligated "to exercise care in selecting and training employees so that the sanctity of all confidences and secrets of clients may be preserved." In N.Y. State 422 (1975), we were asked whether an attorney could hire a secretary who recently left a law firm that the hiring attorney is currently opposing. We opined that "the attorney may employ the terminating secretary who has confidential information as to pending adversarial matters, *provided* he cautions the secretary not to divulge any confidential information and will not permit the secretary to do so." N.Y. State 422. Therefore, we believe that a lawyer should ensure that nonlawyers under the lawyer's supervision are trained to protect the confidences and secrets learned at another law firm where the nonlawyer previously worked. Training might include instructing the nonlawyer not to accept any work assignment involving a matter on which the nonlawyer worked at the former firm.

As an additional element of its general supervisory duties under DR 1-104(A), it is advisable that a law firm instruct its lawyers not to solicit or listen to confidential information if the nonlawyer fails to comply with this instruction, and to alert the other firm lawyers involved with the matter. As we concluded in N.Y. State 700 (1998): "A lawyer who receives an unsolicited and unauthorized communication from a former employee of an adversary's law firm may not seek information from that person if the communication would exploit the adversary's confidences or secrets."

B. Checking for conflicts of interest

DR 5-105(E) requires law firms to keep contemporaneous records of prior engagements and to have "a policy implementing a system by which proposed engagements are checked against current and previous engagements." In N.Y. State 720 (1999), we said that the intent of this provision could be effected only "if a firm adds to its system information about the representations of lawyers who join the firm." We do not believe the same principle applies when nonlawyers join a law firm. A nonlawyer does not have former clients and does not "represent" clients at the new firm. Thus, DR 5-105(E) does not require law firms to search for conflicts that may be created when nonlawyers join the firm laterally.

Nevertheless, because DR 1-104(C) requires a law firm to "adequately supervise, as appropriate, the work of . . . nonlawyers who work at the firm," there are circumstances in which it is advisable for a law firm to check for conflicts when hiring a nonlawyer. For example, where a litigation paralegal is being hired by a small firm and worked for a sole practitioner who is now opposing counsel in litigation that was pending while the paralegal worked at the former firm, the risk that the paralegal acquired the opposing party's confidences and secrets is high and the law firm should check for conflicts. In such a case, the law firm should ask the paralegal about his or her role in the matter in question and whether he or she did in fact acquire confidences and secrets.[5]

On the other hand, when a personal injury firm hires a paralegal to perform work that is entirely unrelated to the real estate matters the paralegal worked on at the former employer's firm, we do not think a formal conflict check is necessary.

C. When the nonlawyer possesses confidential information from the former law firm

1. Duty not to exploit the confidential information

If a formal or informal conflict check reveals that a nonlawyer did acquire confidential information about an opposing party at the former job, the law firm must not exploit that information. In N.Y. State 700 (1998), this Committee opined that a lawyer could not take advantage of an offer by an opposing law firm's former nonlawyer employee to provide harmful information about the opposing party: "Just as a lawyer should never initiate contact with a former employee of an adversary's law firm for the purpose of obtaining confidential information of the adversary, neither may a lawyer take

5 *Cf. Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.,* 129 A.D.2d 678 (1987), in which a Suffolk County law firm hired a paralegal who had previously worked for opposing counsel and "had worked on the litigation pending between the parties and had interviewed the plaintiff's manager concerning the facts of this case." The plaintiff moved to disqualify. The Supreme Court denied the motion, saying that the Code of Professional Responsibility does not apply to nonlawyers, but the Second Department reversed. The Second Department agreed that the Code of Professional Responsibility does not apply to nonlawyers, but noted that "it does place a burden on attorneys to insure that their employees conduct themselves in accordance with the [C]ode."

advantage of a former employee's willingness to violate the duty of confidentiality to the former employer's client." The Committee held that a lawyer has a duty to "refrain from encouraging a breach of client confidentiality by opposing counsel's staff."

EC 7-10 states that "The duty of a lawyer to represent the client with zeal does not militate against the concurrent obligations to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." For example, the District Court of Connecticut and the American Bar Association's Ethics Committee have both held that an attorney may not ask an opposing party's former employees for privileged communications.[6] *Dubois v. Gradco Sys., Inc.,* 136 F.R.D. 341, 347 (D. Conn. 1991) ("plaintiff's counsel must take care not to seek to induce or listen to disclosures by the former employees of any privileged attorney-client communications to which the employee was privy"); ABA 91-359 ("the potentially-communicating adversary attorney must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications").

2. Duty to ensure the confidential information remains protected

Under DR 1-104(C), when a law firm is determining the degree of supervision required, an important factor is "the likelihood that ethical problems might arise in the course of working on the matter." The greater the responsibilities of the prospective nonlawyer employee in a matter while at an opposing law firm, the more likely it is that ethics problems will arise in the matter at the new firm, and the greater the degree of supervision that will be merited.

If, for example, at a former employer a secretary occasionally typed letters or took phone messages relating to a current matter of the new firm but does not recall any confidential information about it, a simple warning to the nonlawyer not to disclose any confidences and secrets acquired at the former firm would constitute adequate supervision. If, however, the secretary had played more than a ministerial role in the matter at the former firm and recalls confidential information, screening of the nonlawyer may be required to prevent the misuse of confidential information.[7]

Occasionally, however, a law firm will conclude that screening the nonlawyer will not adequately protect an opposing party's confidences and secrets. For example, if the nonlawyer had substantial exposure to relevant confidential information at the old firm and will now be working closely with the lawyers who are handling the opposite side of the same matter, or where the structure and practices of the firm make it difficult to isolate a nonlawyer from confidential conversations or documents pertaining to a given matter, a law firm may be obliged to adopt measures more radical than screening. Those measures may include the following:

6 Although the district court and ABA were applying Model Rule 4.4(a), which has not been adopted in New York, Model Rule 4.4(a) is analogous to EC 7-10, providing that: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person."

7 This situation was recently addressed in *Mulhern v. Calder,* 196 Misc. 2d 818 (Sup. Ct. Alb. Co. 2003), where the court refused to disqualify a law firm that had hired a secretary who had previously been a secretary/paralegal for opposing counsel and had assisted opposing counsel on the case in question. The court said that a hiring firm "can avoid disqualification by taking steps to ensure that non-lawyer employees with confidential information are kept from divulging or using confidences obtained at the prior firm." The court said that the law firm's timely construction of a screen around the secretary/paralegal was sufficient to protect the firm from disqualification.

(a) Obtaining consent from the opposing law firm's client;

(b) Terminating the nonlawyer, *see Riddell Sports, Inc. v. Brooks*, 1994 U.S. Dist. LEXIS 2290 (S.D.N.Y. 1994) (Leisure, J.) (denying a motion to disqualify where a large firm had terminated a paralegal upon learning that the paralegal had worked on a case still pending between the firms, even though the paralegal had no role in that case at the firm); or

(c) Withdrawing from the matter in question. *Cf. Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.,* 129 A.D.2d 678 (1987) (disqualifying law firm that hired paralegal who had previously worked for opposing counsel and "had worked on the litigation pending between the parties and had interviewed the plaintiff's manager concerning the facts of this case").

CONCLUSION:

When a New York law firm hires a nonlawyer who has previously worked at another law firm, the hiring firm must, as part of its supervisory responsibilities under DR 1-104(C) and DR 4-101(D), exercise adequate supervision to ensure that the nonlawyer does not reveal any confidences or secrets that the nonlawyer acquired while working at the other law firm. A law firm should (i) instruct all newly hired nonlawyers not to divulge any such information and (ii) instruct lawyers not to exploit such information if proffered. The hiring law firm need not always check for conflicts, but should do so in circumstances where the nonlawyer may be expected to have acquired confidences or secrets of an opposing party. If a law firm learns that a nonlawyer did acquire information protected by DR 4-101(B) that is material to a matter in which the adversary is represented by the nonlawyer's former employer, the law firm should adopt appropriate measures to guard against improper disclosure of protected information.

(6-03)

OPINION 775 (05/04/2004)

TOPIC: Incapacitated client; safeguarding wills; client property

DIGEST: When a possibly incapacitated former client asks a lawyer to return the client's original will, the lawyer may communicate with the former client and others to ascertain the former client's condition and wishes.

CODE: DR 2-103; DR 7-104(A)(1); DR 9-102(C)(4); EC 7-11; EC 7-12

QUESTION:

When a possibly incapacitated former client requests the return of the client's original will, may the lawyer who has been holding the will for safekeeping communicate with the former client and others to ascertain whether the client is in fact incapacitated or under undue influence, insofar as necessary to determine how to respond to the client's direction?

FACTS:

A lawyer drafted a will for an elderly client and maintained the original will for safekeeping. Some time later, the former client signed a letter, evidently prepared by someone else, requesting the return of the original will. The lawyer has reason to believe that the former client is not competent and may be acting under the influence of a family member who would benefit if the will is destroyed and the former client's estate passes through intestacy.

OPINION:

If a lawyer is safeguarding a former client's will, the lawyer ordinarily must return the will to the former client upon the client's request. *See, e.g.*, N.Y. State 724 (1999) ("When the lawyer does agree to retain the client's original will, the lawyer . . . must keep custody of it until the client requests it or the lawyer is legally obligated to produce it"); DR 9-102(C)(4) (requiring a lawyer to "deliver to the client or third person as requested by the client or third person the . . . properties in the possession of the lawyer which the client or third person is entitled to receive"). The question in the inquirer's case, however, is how to proceed when the lawyer is genuinely uncertain whether the former client is competent to request the return of the will or the lawyer has legitimate cause for concern that the former client is under undue influence. In N.Y. State 746 (2001), we discussed some of the complexities of representing a client with diminished capacity and the "additional responsibilities" doing so places on a lawyer. *See also* EC 7-11 ("responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client"); EC 7-12 ("Any mental or physical condition that renders a client incapable of making a considered judgment on his or her own behalf casts additional responsibilities upon the lawyer"). Similar complexities may be raised with respect to responding to the request of an incapacitated *former* client.

No disciplinary provision would bar the lawyer from contacting the former client directly in order to ascertain his or her genuine wishes regarding the disposition of the original will or to make a judgment about competence. DR 7-104(A)(1), which regulates communications with represented parties, is not applicable. That rule generally forbids a lawyer from communicating with a represented

party in the course of representing another client. Under the facts cited above, a lawyer's communications with a former client whose will the lawyer is safeguarding would clearly not occur during the course of the representation of another client. Nor does DR 2-103, which regulates solicitation of prospective clients, have any relevance, since the lawyer would not be soliciting professional employment and, in any event, the rule generally does not apply to a lawyer's communications with clients or former clients. If, after conducting whatever inquiry the lawyer deems appropriate, the lawyer still believes the former client is or may be incompetent, the lawyer may seek judicial guidance on how to proceed.

In general, when a lawyer is uncertain about what to do with property that he or she holds for safekeeping, the lawyer may seek judicial guidance. *See, e.g.*, N.Y. 746 (2001) (circumstances under which a lawyer may petition for appointment of guardian for client without client's consent); N.Y. State 717 (1999) (attorney obligated to pay holders of valid liens from settlement proceeds should consider several options for locating the successor of a lienor that is no longer in business, such as applying to the Supreme Court for an order); N.Y. State 710 (1998) (if escrow agreement is silent with respect to dispute resolution procedures, lawyer acting as escrow agent over funds subject of dispute might consider commencing a stakeholder's action and depositing the funds with a court).

CONCLUSION:

When a possibly incapacitated former client asks a lawyer to return the former client's original will, the lawyer may communicate with the former client and others to ascertain the former client's condition and wishes.

(4-04)

OPINION 776 (05/13/2004)

TOPIC: Former prosecutor; conflict of interest

DIGEST: It is a per se prohibited conflict of interest for a former prosecutor to defend an accused if the lawyer participated personally and substantially in prosecuting the defendant on the same charges while serving as a prosecutor.

CODE: DR 4-101; DR 5-101; DR 5-105; DR 9-101(B)(1); Canon 7

QUESTION:

May a former prosecutor ethically serve as defense counsel for an accused if the lawyer participated personally and substantially in prosecuting the defendant on the same charges while serving as a prosecutor?

OPINION:

Analysis Under the Code of Professional Responsibility

The Code provision most applicable to the conduct in question, Disciplinary Rule 9101(B)(1) of the Lawyer's Code of Professional Responsibility (the "Code"), states that a lawyer "shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee" and, unlike DR 5-101 or DR 5-105, does not allow for waiver of the conflict by informed consent. It would therefore be a *per se* prohibited conflict of interest for the lawyer in question, as a former public officer, to defend the same defendant on the same charges.[8]

Moreover, as we stated in N.Y. State 748 (2001), a former prosecutor has a duty to protect confidences and secrets learned as a result of the former employment. The former prosecutor is prohibited from representing a criminal defendant where to do so would violate either the duty under DR 4-101 to protect the confidences and secrets of a former client (the People) or the duty under Canon 7 of the Code to represent the new client (the defendant) zealously, which would require the use of such confidences and secrets for the benefit of the new client.

Application of the Code of Professional Responsibility by the Courts

While the Disciplinary Rules in the Code "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action," the "Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct." Preliminary

8 We note, without any determination as to applicability, that an attorney "who, having himself prosecuted or in any manner aided or promoted any action [or] proceeding in any court, as district attorney or other public prosecutor, afterwards directly or indirectly advises in relation to, or takes any part in, the defense thereof, as attorney or otherwise . . . is guilty of a misdemeanor." N.Y. Jud. Law §493 (Consol. 2004).

Statement. Although the state[9] and federal courts[10] in New York look to the Code for guidance on issues of attorney conduct, a violation of the Code does not automatically lead to disqualification or other civil or criminal sanctions. *See, e.g., People v. Abar*, 99 N.Y.2d 406 (2003); *People v. Smart*, 96 N.Y.2d 793 (2001); *People v. Longtin,* 92 N.Y.2d 640 (1998); *GD Searle & Co., Inc. v. Pennie & Edmonds LLP*, N.Y.L.J., Jan. 26, 2004, at 18 (N.Y. Sup. Ct.); *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999). Indeed, this Committee frequently has noted that conduct that is legal may nevertheless be unethical. *See* N.Y. State 714 (1999); N.Y. State 572 (1985) ("[W]e believe it is appropriate . . . to consider whether there is anything in the [Code] that prohibits the proposed contingent fee arrangement, assuming arguendo that this type of agreement is otherwise valid").

The very existence of the Lawyer's Code of Professional Responsibility implies that lawyers are subject to a standard of conduct higher than what is merely "legal." It follows that conduct that escapes sanction in court may still be subject to professional discipline. *See* Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship – a Response to Mr. Fox*, 29 Hofstra L. Rev. 971, 984 (2001) ("[A] rule that eliminates disqualification as a sanction is vastly different from giving ethical approval to the underlying conduct and does not obviate the ethical breach in representing one current client against another.")

The case law is to the same effect. For example, in *People v. Abar*, 99 N.Y.2d 406 (2003), a defendant sought to set aside his conviction, claiming that he had been denied effective assistance of counsel because his lawyer, the St. Lawrence County Public Defender, had prosecuted him on several of the charges involved in the plea bargain during her prior employment as an assistant district attorney in St. Lawrence County. The New York Court of Appeals refused to set aside the conviction holding that, even if a conflict of interest existed, the conflict "did not operate on the conduct of the defense." *Id.* at 408. *See also People v. Smart*, 96 N.Y.2d 793 794 (2001) ("Under these circumstances, we see no basis to conclude that any potential conflict of interest 'operated on' the defense"); *People v. Longtin,* 92 N.Y.2d 640, 642 (1998) ("To prevail, defendant must demonstrate that 'the conduct of his defense was in fact affected by the operation of the conflict of interest,' or that the conflict 'operated on' counsel's representation"). Significantly, the Court of Appeals in *Abar* acknowledged that "[New York's] disciplinary rules as well as the American Bar Association standards cited by the dissent wisely caution against such potential conflicts." *People v. Abar, supra*, at 408.

In another example, a New York Supreme Court recently declined to grant summary judgment in an action alleging a law firm's breach of fiduciary duties and breach of DR 5-105, notwithstanding that the court did find "a violation of DR [5-]105 has occurred and by a copy of [its] order will report its findings to the Disciplinary Committee." *GD Searle & Co., Inc. v. Pennie & Edmonds LLP*, N.Y.L.J., Jan. 26, 2004, at 18 (N.Y. Sup. Ct.) (order denying summary judgment).

The Court in *GD Searle* also observed that "there is no private right of action to enforce the disciplinary rules." *Id.* at 1. Utilizing similar reasoning, the United States district court in *Gidatex,*

9 *See, e.g., GD Searle & Co., Inc. v. Pennie & Edmonds LLP*, N.Y.L.J., Jan. 26, 2004, at 18 (N.Y. Sup. Ct.) ("[A] violation of the disciplinary rules may constitute evidence of malpractice").

10 *See, e.g.,* S.D.N.Y & E.D.N.Y. Local Civ. R. 1.5(b)(5) (violation of New York Code of Professional Responsibility is one ground for discipline or other relief).

S.r.L. v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999) refused to exclude evidence that had been obtained in violation of disciplinary rules:

> The Second Circuit Court of Appeals has ruled that a court is not obligated to exclude evidence even if it finds that counsel obtained the evidence by violating ethical rules. . . . Likewise, New York State Courts will admit evidence procured by unethical or unlawful means in violation of the [Code].
>
> *Id.* at 126 (citation omitted).

Although courts may be reluctant to enforce the disciplinary rules in the litigation context absent a showing of actual trial taint, the Code of Professional Responsibility remains the primary authority defining ethical conduct for New York lawyers.

CONCLUSION:

A former prosecutor may not ethically serve as defense counsel for an accused if the lawyer participated personally and substantially in prosecuting the defendant on the same charges while serving as a prosecutor.

(20-03)

OPINION 777 (08/30/2004)

TOPIC: Acquiring interest in subject matter of litigation, conflict of interest, lawyer testifying

DIGEST: A lawyer may represent a client in litigation notwithstanding that the lawyer owns a preexisting interest in the subject matter of the litigation, if the lawyer's interests and the client's interests in the outcome of the litigation are not in conflict and the lawyer will not be called as a witness.

CODE: DR 5-101, DR 5-102(A), (B), DR 5-103(A), EC 5-3, EC 5-7.

QUESTION:

May a lawyer who owns an interest in land that is the subject of an annexation dispute between two neighboring towns represent one of the towns in the dispute?

FACTS:

The inquirer is a lawyer who owns an interest in land located in the Town of A. The lawyer filed a petition with the Town of A and with the neighboring Town of B to annex a portion of the property into the Town of B. The A Town Board opposed the annexation; the B Town Board supported it. Inquirer asks whether it is permissible to represent the Town of B *pro bono* in litigation between the two towns over the issue.

OPINION:

The inquiry raises issues under three disciplinary rules: DR 5-101, relating to conflicts between a client's interests and a lawyer's personal interests; DR 5-103(A), barring a lawyer from acquiring an interest in the subject matter of litigation; and DR 5102, relating to lawyers acting as witnesses in matters in which they act as counsel.

Personal conflicts. DR 5-101 provides that:

> A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

The inquirer believes that the inquirer has a unity of interest with the Town of B in the outcome of the litigation, as both the inquirer and the Town wish to annex the land to the Town of B. The inquirer would proceed only after full disclosure of the interest to the Town B Board.

If the interests of the lawyer and the Town of B are fully aligned, then it is likely that a disinterested lawyer would conclude that the inquirer's representation of the client would not be adversely affected by the inquirer's interest in the land, so that Town B may validly consent to the representation after full disclosure. This determination depends on all the facts and circumstances, however. For example, the inquirer should consider whether the inquirer's interests and the Town's may diverge at

some time in the future. "Even if the property interests of a lawyer do not presently interfere with the exercise of independent judgment, but the likelihood of interference can be reasonably foreseen by the lawyer, the lawyer should explain the situation to the client and should decline employment or withdraw unless after full disclosure the client consents, preferably in writing, to the continuance of the relationship." EC 5-3. The inquirer also should consider whether the Town can validly consent to waive the conflict under the standards set forth in N.Y. State 629 (1992).

Proprietary interest in subject matter of litigation. DR 5-103(A) provides that:

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he or she is conducting for a client, except that the lawyer may:
>
> 1. Acquire a lien granted by law to secure the lawyer's fee or expenses.
>
> 2. Except as provided in section DR 2-106(C)(2) or (3), contract with a client for a reasonable contingent fee in a civil case.

DR 5-103(A) does not prevent the inquirer from representing the Town of B, notwithstanding the ownership of an interest in the land that is the subject matter of the litigation, because the Code only prohibits the *acquisition* of an interest in the subject matter of litigation, not the preexisting possession of such an interest.

Other ethics committees have likewise reached the conclusion that DR 5-103(A), or the similar ABA Model Rule 1.8(i), do not prevent a lawyer with a preexisting interest in the subject matter of a litigation from representing a client whose interests are aligned with the lawyer's in that litigation. *See, e.g.*, Maine Opinion 92 (1988) (the rule "does not extend so broadly as to prohibit a lawyer who has an interest in his client from representing the client in litigation provided the lawyer's interest was acquired for reasons independent of and apart from any consideration of litigation which might thereafter be contemplated"); Alabama Opinion 85-23 (attorney who is one of the heirs may represent self and other heirs in filing a petition for division and sale); Alabama Opinion 84-159 (lawyer who is member of property owner's association may represent other property owners in seeking to prevent liens on their property); *see also In re Capobianco v. Halebass Realty, Inc.*, 72 A.D.2d 804 (2d Dep't 1979) (action to foreclose on mortgage not champertous "if the attorney had a legitimate business interest in acquiring the assignment, e.g., as an incidental part of a commercial transaction"); *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 105 (5th Cir. 1978) ("Ordinarily there would be no objection to an attorney representing his wife in litigation").[11]

This does not mean that a lawyer with a preexisting interest in the subject matter of the litigation may represent a party to the litigation without any restrictions. Such an interest will generally give rise to a conflict or potential conflict under DR 5-101. *See also* EC 57 ("The possibility of an adverse effect upon the exercise of free judgment by the lawyer on behalf of the client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of the client or otherwise to become financially interested in the outcome of the litigation"). As indicated by

11 *See also Peggy Walz, Inc. v. Liz Wain, Inc.*, No. 94 Civ. 1579, 1996 WL 88556, at *3 (S.D.N.Y. 1996) (disqualifying plaintiffs counsel, citing DR 5-103(A), where the lawyer had formed the plaintiff corporation with a client after the dispute had arisen). *But see Bachman v. Pertschuk*, 437 F. Supp. 973, 976-77 (D.D.C. 1977) (federal employee cannot represent a class of federal employees against employer-agency, citing, *inter alia*, DR 5-103).

the facts here, however, the conflict under DR 5-101 will often be waivable. Without deciding the issue, we observe that DR 5-103(A) appears to bar acquisition of an interest in the subject matter of the litigation regardless of whether the client is willing to consent. One explanation for this treatment is that the roots of DR 5-103(A) lie in the prohibitions on maintenance and champerty. *See, e.g*., ABA 00-416 ("Rule 1.8(j) [now 1.8(i) which is virtually identical to DR 5103(A)] is rooted in the common law doctrines of maintenance and champerty. The present Rule is intended to prevent conflicts of interest that might interfere with the lawyer's exercise of independent professional judgment on the client's behalf").

Lawyer as witness. DR 5-102(A) provides that, with certain exceptions:

> A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client . . . .[12]

DR 5-102(B) also bars a lawyer from accepting employment in contemplated or pending litigation if the lawyer or a lawyer in his or her firm "may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client."

Thus, the inquirer may be barred from accepting employment on behalf of the Town of B if the lawyer "ought to be" called as a witness on the client's behalf (and no exception applies) or if the inquirer might be called as a witness adverse to the client. *See also* ABA Inf. Op. 899 (1965) (where an attorney both appears *pro se* and represents others in a legal proceeding, "there is . . . the possibility he might become a witness in the proceedings in which case he should not act as an attorney except in rare and unusual circumstances"); *Walz*, 1996 WL 88556, at *3-4 (disqualification would not be appropriate under DR 5102 where other witnesses could testify about the same facts).

CONCLUSION:

The inquirer may represent the Town of B in the dispute with the Town of A, notwithstanding the preexisting ownership interest in the subject matter of the litigation, where the inquirer's interests are aligned with the Town of B's interests and informed consent has been obtained from the Town of B, unless the inquirer ought to be, or in certain circumstances may be, called as a witness on a significant issue.

(12-04)

12 The exceptions are:

1. If the testimony will relate solely to an uncontested issue.
2. If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
3. If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or the lawyer's firm to the client.
4. As to any matter, if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case.

OPINION 778 (08/30/2004)

TOPIC: Conflicts of interest; representing multiple defendants.

OVERRULES (IN PART): N.Y. State 555 (1984)

DIGEST: Lawyer engaged by insurance company may not represent two defendants, one of whom has a potential indemnification claim against the other, unless a disinterested lawyer would believe the lawyer can competently represent the interests of each, the one defendant waives the right to assert indemnification as cross-claim, and both defendants otherwise consent after full disclosure.

CODE: DR 5-105(A), (B), (C); DR 5-108 (A); EC 5-15, 5-16, 5-17

QUESTION:

May a lawyer engaged by an insurance carrier represent two co-defendants who are named insureds when the amount of the plaintiff's claim exceeds the policy limits and one co-defendant has an indemnification claim against the other?

OPINION:

The owner of a building hired a general contractor who agreed to procure a liability insurance policy naming both the general contractor and the owner as insured, and also agreed to defend and indemnify the owner with regard to any claims arising from the construction. A subcontractor's employee was injured and sued both the contractor and the owner for an amount in excess of the policy limits. The insurance carrier seeks to engage one lawyer to defend both the general contractor and the owner.

Under DR 5-105(A) and (B) of the Code of Professional Responsibility (the "Code"), a lawyer must decline to represent multiple clients if the exercise of independent professional judgment on behalf of one client will be or is likely to be adversely affected by the lawyer's representation of the other client, or if it would be likely to involve the lawyer in representing differing interests. DR 5-105(C) nevertheless permits a lawyer to represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. *See* EC 5-15, 5-16, 5-17.

Under the Code, the "differing interests" include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse or other interest." Code Definitions. In the facts at issue, differing interests arise from the owner's contractual rights to indemnification from the contractor with respect to the amount of the claim exceeding the policy limits.[13]

13 If the claim did not exceed the policy limits, the indemnification right becomes irrelevant if the carrier is not disclaiming liability as to any claim against the owner.

Consequently, the lawyer must first determine if a disinterested lawyer would believe that the lawyer can competently represent the interest of both the owner and the contractor. For example, a disinterested lawyer may determine that he or she could not competently represent the interests of both if the lawyer believes that the owner should assert the indemnification rights as a cross-claim or if the complaint alleges an independent claim of negligence against the owner so that the trial will necessarily involve determining the apportionment of liability between the two defendants.[14] Assuming that a disinterested lawyer would believe that the lawyer can competently represent the interest of both the owner and the contractor, the lawyer may do so only if each consents to the representation after full disclosure of the implications of the joint representation and the advantages and risks involved.

Such disclosure should explain the potential advantage to both clients of presenting a unified defense to the plaintiff employee's action and the offsetting disadvantage to the owner of the owner's consequent inability to assert indemnification rights as a cross-claim in the same action. Although the owner could defer asserting the indemnification claim until such time (if ever) as the plaintiff obtains a judgment, the owner would face the risks of (1) necessary witnesses becoming unavailable, (2) a judgment being enforced by the plaintiff against the owner before the indemnification claim has been fully litigated, and (3) the possibility of the general contractor becoming judgment proof. On one hand, both parties would likewise endure the expense and inconvenience of two trials rather than one.[15] On the other hand, if the original litigation were to result in a verdict or settlement for less than the policy limit, joint representation would have, in retrospect, greatly simplified the litigation with no risk to the owner.

In seeking consent to a joint representation the lawyer should explain to both clients any other potential consequences, including (1) the lawyer's obligation, absent each client's agreement to other arrangements, to disclose to one client any confidences and secrets communicated to the lawyer by the other client, N.Y. State 761 (2003),[16] (2) circumstances which may require the lawyer to withdraw from the representation entirely or, with appropriate consent, to continue to represent only one of the clients, N.Y. State 674 (1995), and (3) possible consequences at trial, such as the number of peremptory challenges granted to the defendants.

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14 If the trial will necessarily involve an apportionment of liability between two defendants, a subsequent action by one seeking indemnification from the other may be precluded by the doctrine of collateral estoppel. *Schwartz v. Public Adm'r of County of Bronx*, 24 N.Y.2d 65 (1969).

15 Issues regarding the obligation of the carrier to provide a defense to its insured, the extent to which that obligation may include bringing or defending a cross-claim for an excess amount, and how the responsibility to pay lawyer fees should be divided between the insured and the carrier with respect to the cross-claim are considerations which may be relevant in the insured's determination as to consenting to the joint representation, but are matters of law and of contract on which this Committee does not opine. However, we note that New York courts have generally held that an insured defendant is entitled to defense by a lawyer of his or her own choosing at the insurer's expense when the insurer's interest in defending the lawsuit is in conflict with the defendant's interest. *See, e.g., Public Service Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392 (1981); *Bryan v. State-Wide Ins. Co*., 144 A.D.2d 325 (1988); *cf. Nat. City Bank v. N.Y. Cent. Mut. Fire Ins. Co*., 6 A.D.3d 1116 (2004)(if carrier provided defense, hiring separate counsel to pursue cross-claims was responsibility of insured); *Goldberg v. American Home Assurance Co*., 80 A.D.2d 409 (1981)(no conflict so no entitlement to separate counsel). Regardless of the extent to which lawyer fees may be paid by the carrier, the insured is the client of the lawyer engaged by the carrier, and the lawyer is obligated to represent the insured with undivided fidelity. N.Y. State 73 (1967).

16 To the extent that N.Y. State 555 (1984) suggests that full disclosure to both clients is not required even absent an agreement to that effect "where disclosure to the other joint client would obviously be detrimental to the communicating client," it is overruled.

Because the claim here exceeds the policy limits, both defendants should be advised of their right to have separate counsel with respect to the excess claim. The lawyer contacted by the insurance company may find it advisable to recommend to the owner that he or she seek separate counsel to advise both as to the excess claim and as to the advisability of asserting a cross-claim in the present litigation.

If the owner ultimately determines that the advantages of a unified defense outweigh the disadvantages of deferring the indemnification claim, and the parties otherwise consent, the lawyer may represent both parties. In that event, the lawyer would be precluded from representing either party in a subsequent action to enforce the indemnification rights without obtaining the separate consent of the other client after full disclosure. DR 5-108(A).

The conclusion of this opinion is in harmony with prior opinions of this Committee. N.Y. State 560 (1984) involved two defendants in a medical malpractice action, one of whom as a passive tortfeasor had a potential claim against the other as an active tortfeasor. Because one of the defendants did not consent to a joint representation, the Committee concluded that the lawyer could not represent them both. In N.Y. State 191 (1971) the issue was whether a lawyer could represent both the driver of one car and his adult daughter-passenger against the driver of the other car if the daughter, fully informed, chose to waive any cause of action against her father. Because that opinion involved plaintiffs and did not involve the possibility of a subsequent indemnification action, the opinion discussed only a cross-claim and joint representation and concluded that the lawyer could not represent both the father and the daughter unless the daughter confirmed that in no event would she want to sue her father, no matter how good a cause of action she might have against him. *See also* N.Y. State 349 (1974)(absent special circumstances, lawyer may not represent driver-husband and wife-passenger as plaintiffs if defendant may assert proportionate liability against one plaintiff to reduce damages sought by the other plaintiff).

On the facts of this opinion, it does not appear that it is necessary for the owner to waive any indemnification cause of action against the builder as long as the owner agrees not to assert that cause of action as a cross-claim and otherwise consents.

CONCLUSION:

A lawyer engaged by an insurance company to represent two defendants, one of whom has a potential indemnification claim against the other, may not do so unless the lawyer determines a disinterested lawyer would believe the lawyer can competently represent the interests of each defendant, the defendant with the indemnification claim waives the right to assert it as a cross-claim, and both defendants otherwise consent after full disclosure.

(49-03)

OPINION 779 (11/05/2004)

TOPIC: Paying a National Marketing Organization for Referrals

DIGEST: Improper for an attorney to pay money to a marketing organization in return for that organization providing the attorney with "leads" to potential clients.

CODE: DR 2-103(B)

QUESTION:

May an attorney pay a marketing organization a fee in return for being furnished with a bundle of pre-screened client "leads," consisting of potential clients who may need representation in connection with their Federal income taxes?

BACKGROUND:

A marketing organization ("Marketer") advertises nationally, seeking customers to whom Marketer can provide certain federal income tax reduction services. Marketer obtains intake data from interested customers and screens the file to see if the customer is likely to qualify for various sorts of relief from the Internal Revenue Service. Marketer offers New York attorneys the opportunity to purchase bundles of 20 pre-screened customer "leads" in return for the attorney paying Marketer a one-time sign-up fee of $500 and a fee of $1400 for each bundle of 20 "leads." After an attorney buys a bundle of "leads," Marketer will seek to have the customer sign a Power of Attorney Form and a copy of the attorney's retainer agreement and will collect and transmit to the attorney the suggested partial fee of $1000 obtained from the customer. If the customer decides not to go forward, Marketer makes no refund of the $1400 fee paid by the attorney for the bundle of "leads." Attorneys may purchase as many bundles of "leads" as they wish. The attorney then represents the customer in dealings with the Internal Revenue Service and collects the balance of the agreed upon fee. May an attorney ethically participate in the proposed arrangement?

OPINION:

We note initially that the services in question may be performed by non-attorney CPAs and enrolled agents without those persons being considered to be engaged in the unauthorized practice of law. This Committee has recognized that there are a number of services that can be performed appropriately by both lawyers and non-lawyers, such as tax return preparation, N.Y. State 557 (1984), financial planning, N.Y. State 633 (1992) and legal research done for lawyers, N.Y. State 721 (1999) (outside research service required by an insurance company may be staffed by lawyers or non-lawyer personnel), but we have also consistently held that "when such services are performed by a lawyer who holds himself out as a lawyer, they constitute the practice of law and the lawyer, in performing them, is governed by the Code." N.Y. State 662 (1994) (quoting N.Y. State 557 [1984]). *See also* N.Y. State 636 (1992) (lawyer's operation of business selling standard will forms to public is not practice of law if forms are not individualized and advice is not rendered as to selection of form); ABA 297 (1961) (if activity is the practice of law when performed by lawyer, lawyer does not escape ethical requirements by "announcing he is to be regarded as a layman" for that particular purpose). So the

services performed by the lawyer in the question presented constitute the practice of law and the lawyer would be governed by the Code in connection with these services.

We believe that the participation of an attorney in the arrangement proposed by Marketer is governed by DR 2-103(B):

> B. A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:
>
> 1. A lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by DR 1-107, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; or
>
> 2. A lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by DR 2-107.

The payment by an attorney of $500 and $1400 for a bundle of "leads" to prospective clients would violate DR 2-103(B) because neither of the exceptions in sub-paragraphs (1) or (2) applies. The payments would be compensation paid to Marketer "to recommend or obtain employment by a client," so it would be improper for an attorney to participate in the proposed transaction with Marketer. *See* N. Y. State 741 (2001) (lawyer may not participate in business network that requires reciprocal referrals) and the opinions cited therein. N.Y. State 705 (1998) does not compel a different result; that opinion indicated that a tax reduction company, acting as an agent for a client, could engage a lawyer to represent the client and that the lawyer's fee could be a portion of the money paid by the client to the company, *provided* that the company's own fee was separate and distinguishable from the payment for the lawyer's services. N.Y. State 705 is not applicable because it did not involve a lawyer paying for referrals.

CONCLUSION:

It would be improper for an attorney to pay money to a marketing organization in return for that organization providing the attorney with "leads" to potential clients.

(28-04)

OPINION 780 (12/08/2004)

TOPIC: Retaining copies of client's file over client's objection; limitation of attorney liability.

DIGEST: Generally proper for a lawyer to retain copies of a client's file; proper to require a release of malpractice liability as a condition of returning the file without retaining copies.

CODE: DR 2-110(A)(2), 4-101(C)(4), 6-102(A), 9-102(C)(4); EC 4-6.

QUESTIONS:

1. May a lawyer retain copies of the client's file over the objection of the client?

2. May the lawyer demand a release from liability as a condition of not retaining copies?

OPINION:

1. May copies of file documents be retained by the lawyer?

When a lawyer's employment by a client ends, whether because the lawyer withdraws, the client terminates the engagement or the matter is completed, the lawyer is required to deliver to the client property, including files, which the client is entitled to receive as a matter of law. The New York Code of Professional Responsibility (the "Code") does not provide guidance on which documents the client is entitled to receive as a matter of law. Rather, the Code provides in various sections only that the lawyer is ethically obligated to return to the client that which the client is legally entitled to receive. DR 2-110(A)(2) of the Code, governing withdrawal from employment, requires a lawyer contemplating withdrawal to "[deliver] to the client all papers and property to which the client is entitled." Similarly, DR 9-102(C)(4) of the Code provides that a lawyer shall "[p]romptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive."

The question of which documents the client is entitled to receive is "generally a question of law, not ethics." N.Y. State 766 (1993). *See* N.Y. State 623 (1991) ("Which documents may be deemed to belong to the lawyer is not always easy to ascertain; in certain instances, the lawyer's ownership of such documents may be a complex issue of both law and fact."). *See* Restatement (Third) of the Law Governing Lawyers §46(2).

Although the Code does not explicitly address the issue of whether the *lawyer* has an interest in the file that would permit the lawyer to retain copies of file documents, there can be little doubt that the lawyer has such an interest. As a preliminary matter, nothing in the Code prohibits a lawyer from retaining copies of the file, while EC 4-6 refers to "personal papers of the client" as distinguished from "papers of the lawyer." DR 4-101(C)(4) of the Code provides as an exception to the general rule of confidentiality the lawyer's right to reveal a client's confidences or secrets in order to collect fees or defend against an accusation of wrongful conduct. Implicit in that rule is the lawyer's right to retain copies of the file in order to collect a fee or to defend against an accusation of wrongful conduct New

York case law appears to recognize that both the client and the lawyer have an interest in the file.[17] Finally, the lawyer's right to retain copies of the file may be reflected in a retainer agreement or an engagement letter.

In summary, we agree with the several ethics opinions from other jurisdictions that a lawyer may retain copies of the file at the lawyer's expense.[18] This general rule may be subject to exceptions that we are not required to elaborate on in this opinion, such as where the client has a legal right to prevent others from copying its documents and wishes for legitimate reasons to ensure that no copies of a particular document be available under any circumstances.

17 In *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30, 37 (1997), the Court of Appeals observed that courts have "refused to recognize a property right of the attorney in the file superior to that of the client." The New York Supreme Court case cited in *Sage* for that proposition is *Bronx Jewish Boys v. Uniglobe, Inc.*:

> Under New York law, an attorney has a general possessory retaining lien which allows an attorney to keep a client's file until his/her legal fee is paid. Implied in this is the rule that attorneys have no possessory rights in the client files other than to protect their fee. *In other words, the file belongs to the client.*

Bronx Jewish Boys v. Uniglobe, Inc., 166 Misc. 2d 347, 350, 633 N.Y.S. 2d 711, 713 (Sup. Ct. 1995) (citation omitted, emphasis added). Although *Bronx Jewish Boys* held that the "file belongs to the client", the Court of Appeals in *Sage* observed that both the lawyer and client have an interest in the "client's" file. *See also In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 944-45 (10th Cir.) ("So far as we can determine, it is a general principle of law that client files belong to the client . . . the attorney's interest is only that of a retaining lien and his interest at best is a pecuniary one, not an interest of ownership, nor privacy"), *cert. denied sub nom*, *Vargas v. United States*, 469 U.S. 819 (1984); *Matter of Calestini,* 321 F. Supp. 1313, 1316 (N.D. Ca. 1971) ("In the instance of a legal file, the client has the right to the file. It is therefore 'property' of the client"). *But see* Michigan Ethics Committee Op. R-19 (2000) ("There is no legal support in Michigan for the proposition that the files are the property of the client. The applicable legal precedent involving other professionals closely analogous to lawyers demonstrates that the courts have recognized that such professionals provide services, not goods.")

18 For instance, Nebraska adopted the rule that "a client is entitled to (1) the documents he gave the lawyer; (2) anything acquired in discovery; (3) all correspondence; and (4) all notes, memorandums, and briefs generated by the lawyer," although "*[t]he lawyer may retain copies of the file*, but may not charge for photocopying unless the fee agreement provided otherwise." Neb. Op. 2001-03 (2001), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1201:5501 (emphasis supplied). Similarly, Massachusetts demands that an attorney return to the client any "original documents supplied by the client," as well as "any investigatory or discovery documents for which the client has paid out-of-pocket expenses." Mass. Op. 92-4 (1992), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1001:4603. Massachusetts allows the firm to keep copies of those documents at its own expense. *Id*. A similar opinion was reached by San Francisco, which recognized that although "[t]he lawyer must return all materials the client delivered to him . . . the lawyer may copy a client's file before turning it over." S.F. Bar Op. 1990-1 (1990), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 901:1851. San Francisco also concluded that the lawyer must copy the file at his own expense. *Id*. Alabama allows an attorney to retain a copy of a client's file so long as the attorney bears the cost of reproduction. Ala. Op. 88-102 (1988), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 901:1048 ("A lawyer who previously served as counsel for a client and is replaced by other counsel may keep the client's files only if the client so directs because the files belong to the client. The lawyer may, however, retain copies of the client's file at her own expense").

Likewise, the Ohio State Bar Association requires an attorney to promptly deliver a file to a former client, but permits an attorney to retain copies of the file at the attorney's own expense. Ohio Op. 92-8 (1992), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1001:6856 ("A lawyer whose former client requests receipt of her case file and has paid the lawyer in full must promptly deliver the file to the client. The lawyer may keep a copy of the file but may not charge the client for the copying costs"). The Colorado Bar Association arrived at the same conclusion, requiring that, upon termination, lawyers "surrender papers and property to which the client is entitled." Colo. Op. 104 (1999), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1101:1902. Colorado permits a lawyer "to retain copies of documents surrendered to a client," but adds that the lawyer "may not charge the client for duplication costs." *Id.* Similarly, the Kentucky Bar Association opined, "When a lawyer is discharged, he should deliver to the client all property and files to which the client is entitled . . . [t]he lawyer may wish to copy items in the client's file." Ky. Op. E-235 (1980), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 801:3902.

2. May a lawyer demand a release as a condition of not retaining copies of the file?

Although this Committee has previously held that a lawyer may not insist on a general release as a condition of returning the client's file, N.Y. State 339 (1974), it has not addressed the question whether a lawyer's agreement to give up the right to retain copies of the file may be conditioned on such a release. Because we believe that a lawyer has a right to retain copies of the file, if the client objects to the lawyer's retention of copies, we hold that the lawyer may insist on a general release as a condition of acquiescence.

DR 6-102(A) of the Code prohibits a lawyer from "prospectively" seeking to limit liability to a client for malpractice, but does not prohibit a lawyer from seeking a release for work *already completed*, as contemplated here. A lawyer may "ethically negotiate with a former client for the settlement or release of potential malpractice claims, but only after the lawyer takes specific steps to insure that the negotiations are fair", which steps include advising the client to seek independent counsel in the negotiation and consummation for the release. N.Y. State 591 (1988).[19]

CONCLUSION:

A lawyer may generally retain copies of documents in the client's file at the lawyer's own expense, even over the client's objection. As a condition of foregoing this right, a lawyer may seek to have the client release the lawyer from malpractice liability.

(19-04)

19 To maintain fair negotiations with a former client, a lawyer must adhere to the following conditions: "a client must be fully appraised of the facts pertaining to the representation that may give rise to specific claims against the lawyer; the lawyer has been discharged or has withdrawn from the representation in accordance with DR 2-110; and the lawyer has advised the client to secure independent counsel in the negotiation and consummation of such an agreement." N.Y. State 591 (1988); N.Y. State 275 (1972). To maintain fair negotiations, an attorney may not retain a lien on a client's papers and documents. *Id.* ("Fair negotiations over a release are not possible while the lawyer retains a position of advantage by withholding the client's papers"). Although an attorney may retain a lien on a client's papers until the client compensates the attorney for any unpaid legal fees, N.Y. State 567 (1984), the attorney may not retain the file as a mechanism to secure a release from malpractice. N.Y. State 591 (1988) ("The lawyer may not retain the client's files as a bargaining chip to secure a release."). *See also* Wis. Op. E-85-12 (1986), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 801:9117 ("A lawyer may not condition *the return of client documents* and the settlement of his related fees upon the client's release of any legal malpractice claims . . . unless the client is advised in writing to secure independent counsel in the negotiation and consummation of such agreement") (emphasis supplied).

OPINION 781 (12/08/2004)

TOPIC: Matrimonial lawyer's duty upon discovery that financial statement filed with family Court contained material errors due to fraud by client.

DIGEST: A matrimonial lawyer who learns that a financial statement submitted by the lawyer to family court contains a material omission, and that the client perpetrated a fraud on the tribunal, must call upon the client to rectify the material omission. If the client refuses, the lawyer must withdraw the financial statement. If the lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule, the lawyer must withdraw from the representation, with the court's permission if required under its rules.

CODE: DR 1-102, 2-110, 4-101, 7-102; EC 7-6.

QUESTION:

A matrimonial lawyer, in order to submit a financial statement on behalf of a client, certified the accuracy of the statement to family court.[20] After filing the statement, the lawyer learns that it contains a material error relating to the omission of substantial client assets. Is the lawyer required to withdraw the financial statement?

OPINION:

DR 7-102(B)(1) of the Lawyer's Code of Professional Responsibility (the "Code") states that:

> A lawyer who receives information clearly establishing that the client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.

20 *See* 22 NYCRR §202.16(e) ("Every paper served on another party or filed or submitted to the court in a matrimonial action shall be signed as provided in section 130-1.1[A] of this Title"); *see also* 22 NYCRR §130-1.1A(b) ("By signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous as defined in section 130-1.1(c) of this Subpart"). 22 NYCRR §130-1.1(c) states that:

> (c) For purposes of this Part, conduct is frivolous if:
>
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.
>
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party.

Therefore, the lawyer must first determine if he or she received information "clearly establishing" that the client has committed a fraud. "Fraud" under the Code "does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another." Code, Definition 9. If the lawyer is uncertain of the client's state of mind in making this determination, EC 7-6 states that the lawyer should "resolve reasonable doubts in favor of the client."[21]

If the lawyer has information clearly establishing the client's fraud, then the lawyer must call upon the client to rectify the same, and if the client refuses, the lawyer must "reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret." DR 7-102(B)(1). As we stated in N.Y. State 674 (1995):

> In order to balance the attorney's dual duties to preserve confidences and reveal frauds, we interpret the phrase "confidences and secrets" in DR 7-102(B) to mean those confidences and secrets that must be preserved by DR 4-101. In a case where the lawyer is *permitted* to reveal a confidence or secret under DR 4-101(C), disclosure of the fraud is *mandatory* under DR 7-102(B).[22]

Although a lawyer is generally prohibited from disclosing a client's confidence or secret,[23] DR 4-101(C)(5) permits disclosure to the extent implicit in withdrawing the financial statement because the statement is still being relied upon by the court[24] and because the lawyer certified the accuracy of the statement in submitting it to the court.[25] In short, permissive disclosure under DR 4-101(C)(5) mandates disclosure under DR 7-102(B)(1).

Therefore, the lawyer is required to withdraw the financial statement, and is required to reveal confidences or secrets to the extent implicit in such withdrawal.

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21 *See also Attorney Grievance Commission v. Rohrback*, 323 Md. 79, 93-100 (Ct. of Ap. Md. 1991) (discussion of what constitutes client fraud under Maryland ethics rules).

22 Emphasis added. In N.Y. State 674, this Committee concluded that the false testimony provided by a corporate officer in the first day of testimony before a tribunal did not constitute an ongoing crime such that the lawyer would be permitted to disclose the perjury to the tribunal under DR 4-101(C).

23 DR 4-101(A) defines "confidence" as "information protected by the attorney-client privilege under applicable law," and "secret" as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

24 DR 4-101(C)(5) permits disclosure of confidences or secrets "to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer, and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud."

25 In Nassau County 2003-1, a lawyer learned that his client had misrepresented indigence in order to obtain the lawyer's representation through an indigent lawyer program. The committee concluded that, although the lawyer must call upon the client to "rectify the fraud" and, failing that, to seek to withdraw from the representation, that the fact of the misrepresentation could not be disclosed to the court because the information was protected as a secret. In that case, the lawyer had no role in submitting the fraudulent financial statement that suggested that the client was indigent, whereas here the representation had been certified by the lawyer. *See* DR 4-101(C)(5); s*ee also* N.Y. City 2002-1 (DR 4-101(C)(3) crime exception to confidentiality does not apply if crime is completed or upon "mere suspicion" that client intends to commit a future crime); N.Y. City 1994-8 (even if the lawyer has information clearly establishing that the client has perpetrated a fraud, the information is protected as a secret); *Rohrback*, *supra* n.2, at 93-100 (discussion of what constitutes attorney's assistance in client fraud under Maryland ethical rules).

In addition, the lawyer *may* withdraw from the representation if (i) withdrawal can be accomplished without material adverse effect on the client's interests, or (ii) the client persists in involving the lawyer's services in conduct the lawyer reasonably believes is criminal or fraudulent, insists that the lawyer engage in illegal conduct or conduct that violates the Disciplinary Rules, or has used the lawyer's services to perpetrate a crime or fraud. DR 2-110(C)(1)(b, c and g). The lawyer *must* withdraw from the representation[26] if the lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule. DR 2-110(B)(2).

CONCLUSION:

The lawyer is required to withdraw the erroneous financial statement.

(18-04)

26 With the court's permission if required under its rules.

OPINION 782 (12/08/2004)

TOPIC: E-mailing documents that may contain hidden data reflecting client confidences and secrets.

DIGEST: Lawyers must exercise reasonable care to prevent the disclosure of confidences and secrets contained in "metadata" in documents they transmit electronically to opposing counsel or other third parties.

CODE: DR 1-102(A)(5), 4-101(B), (C), (D); EC 4-5.

QUESTION:

DR 4-101(B) states that a lawyer shall not "knowingly" reveal a confidence or secret of a client. Does a lawyer who transmits documents that contain "metadata" reflecting client confidences or secrets violate DR 4-101(B)?

OPINION:

Word-processing software commonly used by lawyers, such as Microsoft Word and Corel WordPerfect, include features that permit recipients of documents transmitted by e-mail to view "metadata," which may be loosely defined as data hidden in documents that is generated during the course of creating and editing such documents. It may include fragments of data from files that were previously deleted, overwritten or worked on simultaneously.[27] Metadata may reveal the persons who worked on a document, the name of the organization in which it was created or worked on, information concerning prior versions of the document, recent revisions of the document, and comments inserted in the document in the drafting or editing process. The hidden text may reflect editorial comments, strategy considerations, legal issues raised by the client or the lawyer, legal advice provided by the lawyer, and other information.[28] Not all of this information is a confidence or secret, but it may, in many circumstances, reveal information that is either privileged or the disclosure of which would be detrimental or embarrassing to the client. *See* DR 4-101. For example, a lawyer may transmit a document by e-mail to someone other than the client without realizing that the recipient is able to view prior edits and comments to the document that would be protected as privileged attorney-client communications. Or, more dramatically, a prosecutor using a cooperation agreement signed by one confi-

27 David Hricik and Robert R. Jueneman, "The Transmission and Receipt of Invisible Confidential Information," 15 The Professional Lawyer No. 1, p. 18 (Spring 2004); Mark Ward, "The hidden dangers of documents," BBC News World Edition, August 18, 2003, at http://news.bbc.co.uk/2/hi/technology/3154479.stm; "Barry MacDonnell's Toolbox for WordPerfect for Windows – Macros, Tips, and Templates;" February 5, 2004, at http://home.earthlink.net/~wptoolbox?Tips/UndoRedo.html.

28 "How To: Minimize Metadata in Microsoft Word 2002 Documents," at http://support.microsoft.com/?kbid=237361; "How To: Minimize Metadata in Microsoft Word 2000 Documents," at http://support.microsoft.com/?kbid=237361. Most Word document files contain a revision log listing the last 10 edits of a document, and identifying the names of the people who worked on the document and the names of the files in which the data was saved. Richard M. Smith, "Microsoft Word bytes Tony Blair in the butt," June 30, 2003, at http://www.computerbytesman.com/privacy/blair.htm (describing how the British government was embarrassed in February 2003 when 10 Downing Street published a dossier on Iraq's security and intelligence organizations and posted it as a Microsoft Word document on their Web site, which through its metadata revealed the identities of the four civil servants who worked on the document as well as various other documents that contained the same information). Similarly, WordPerfect documents may contain information text that had been cut, copied or deleted, as well as the drafter's username, the drafter's initials, the company or organization name, the name of the computer, embedded objects, comments, and other file properties and summary information. "Barry MacDonnell's Toolbox for WordPerfect for Windows – Macros, Tips, and Templates," February 5, 2004, at http://home.earthlink.net/~wptoolbox?Tips/UndoRedo.html.

dential witness may use the agreement as a template in drafting the agreement for another confidential witness. The second document's metadata could contain the name of the original cooperating witness, and if e-mailed, could expose that witness to extreme risks.

The Lawyer's Code of Professional Responsibility (the "Code") prohibits lawyers from "knowingly" revealing a client confidence or secret, DR 4-101(B)(1), except when permitted under one of five exceptions enumerated in DR 4-101(C). DR 4-101(D) states that a lawyer "shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client." *See also* EC 4-5 ("Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another"). Similarly, a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication, and therefore must assess the risks attendant to the use of that technology and determine if the mode of transmission is appropriate under the circumstances. *See* N.Y. State 709 (1998) ("an attorney must use reasonable care to protect confidences and secrets"); N.Y. City 94-11 (lawyer must take reasonable steps to secure client confidences or secrets).

When a lawyer sends a document by e-mail, as with any other type of communication, a lawyer must exercise reasonable care to ensure that he or she does not inadvertently disclose his or her client's confidential information. What constitutes reasonable care will vary with the circumstances, including the subject matter of the document, whether the document was based on a "template" used in another matter for another client, whether there have been multiple drafts of the document with comments from multiple sources, whether the client has commented on the document, and the identity of the intended recipients of the document. Reasonable care may, in some circumstances, call for the lawyer to stay abreast of technological advances and the potential risks in transmission in order to make an appropriate decision with respect to the mode of transmission. *See* N.Y. State 709 (1998).[29]

Lawyer-recipients also have an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets. In N.Y. State 749, we concluded that the use of computer technology to access client confidences and secrets revealed in metadata constitutes "an impermissible intrusion on the attorney-client relationship in violation of the Code." N.Y. State 749 (2003). *See also* N.Y. State 700 (1997) (improper for a lawyer to exploit an unauthorized communication of confidential information because doing so would constitute conduct "involving dishonesty, fraud, deceit or misrepresentation" and "prejudicial to the administration of justice" in violation of DR 1-102(A)(4) and DR 1-102(A)(5), respectively).[30]

29 Some commentators have suggested that a lawyer has an affirmative duty to remove metadata whenever documents are exchanged with opposing counsel or disclosed to the public. *See, e.g.,* David Hricik & Robert R. Jueneman, The Transmission and Receipt of Invisible Confidential Information, 15 The Professional Lawyer no. 1, p. 18 (Spring 2004) ("To comply with their duty of confidentiality, lawyers should take steps to remove metadata from documents exchanged with opposing counsel or disclosed to the public"). While exercising reasonable care under DR 4-101 may, in certain circumstances, require the lawyer to remove metadata (for example, where the lawyer knows that the metadata reflects client confidences and secrets, or that the document is being sent to an aggressive and technologically savvy adversary), in general the level of care required varies with the particular circumstances of the transmission.

30 Unlike lawyers, non-lawyer recipients of documents containing hidden text have no obligation imposed by the Code to avoid uncovering and exploiting information contained in an e-mailed document's metadata.

CONCLUSION:

Lawyers have a duty under DR 4-101 to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets.

(1-04)

2005

OPINION 783 (01/12/2005)

TOPIC: Interest on delinquent accounts

DIGEST: If a client deliberately disregards an agreement to pay legal fees and expenses, and the letter of engagement or retainer agreement is silent as to interest charges on the delinquency, a lawyer may condition continued representation on the client's agreement to prospectively pay interest on any past due balance for services rendered or to be rendered in the future.

CODE: DR 2-106(A); 2-110(C)(1)(f); 2-110(A)(1).

QUESTION:

If a client deliberately disregards an agreement to pay legal fees and expenses, and the letter of engagement or retainer agreement is silent as to interest charges on the delinquency, may a lawyer condition continued representation on the client's agreement to prospectively pay interest on any past due balance?

OPINION:

In N.Y. State 399 (1975), this Committee held that in order to charge interest on delinquent accounts, a lawyer must advise the client prior to performing services of the fact that interest will be so charged, the definition (time period) of delinquency, and must obtain the client's consent thereto. In addition, the delinquency period, the interest rate and the fee must be reasonable.[1]

If the issue of interest is not discussed prior to commencement of the engagement, and the client deliberately refuses to pay the lawyer's fees or expenses, DR 2-110(C)(1)(f) allows a lawyer to withdraw from representation or, where permission of a tribunal is required, to seek permission to withdraw.[2]

However, we do not believe that a lawyer's only recourse is withdrawal. We believe it is permissible for a lawyer to negotiate the terms of an amended agreement with a deliberately delinquent client and, in consideration of the attorney's not withdrawing, for the client to agree to pay reasonable interest prospectively on any past due balance for services previously rendered or to be rendered in the future. In so finding, we note that the proposed conduct seeks to avoid disruption of the attorney-client relationship and provides the attorney with an alternative to the pre-judgment interest rule of CPLR 5001 so that the attorney is not forced to withdraw and sue the client in order to be made whole.

1 Id. (citing EC 2-16; EC 2-17; EC 2-19; EC 2-23; DR 2-106). See also N.Y. State 729 (2000) (permitting an agreement to pay interest charges on disbursements in contingent fee cases, provided the same "minimum conditions" are met).

2 *See* DR 2-110(A)(1). In N.Y. State 598 (1989) we held that withdrawal may "not necessarily be appropriate where the client is financially unable to pay." But in this opinion we assume that the client is able to pay so that nonpayment is clearly "deliberate."

Allowing an attorney to negotiate reasonable interest on a deliberately delinquent account is also accommodated by New York's engagement letter rules.[3] Generally, these rules require that a lawyer provide a client with an engagement letter that includes "an explanation of attorney's fees to be charged, expenses and billing practices."[4] An "updated" letter of engagement must be provided "[w]here there is a significant change in the scope of services or the fee to be charged."[5] Although questions of law are beyond our jurisdiction, it appears that the rule would require an "updated" letter of engagement to reflect the new interest arrangement.

This Committee expresses no opinion on whether it would be ethical for an attorney unilaterally to impose reasonable interest on unpaid charges where the letter of engagement or the retainer agreement is silent on the issue.[6] In addition, all fee arrangements between attorney and client, including amended fee arrangements, are subject to DR 2-106(A)[7] as well as pertinent laws, rules and regulations.[8]

CONCLUSION:

If a client deliberately disregards an agreement to pay legal fees and expenses, and the letter of engagement or retainer agreement is silent as to interest charges on the delinquent accounts, a lawyer may condition continued representation on the client's agreement to prospectively pay interest on any past balance due for services previously rendered or to be rendered in the future.

(46-03)

3 22 NYCRR Part 1215, entitled "Written Letter of Engagement."

4 22 NYCRR §1215.1(b)(2)(emphasis added).

5 22 NYCRR §1215.1(a).

6 *Cf.* N.Y. City 2000-2 (permitting such unilaterally imposed interest charges provided the lawyer notifies the client that the lawyer intends to charge a reasonable interest rate on unpaid charges and provided the lawyer allows the client a reasonable opportunity to pay the outstanding unpaid balance before interest accrues).

7 "A lawyer shall not enter into an agreement for, charge or collect an illegal or excessive fee."

8 *E.g.,* truth-in-lending or usury laws.

OPINION 784 (01/12/2005)

TOPIC: Ancillary business organizations; conflict of interest

DIGEST: Lawyer-principal in entertainment management firm may represent client of such firm in some but not all types of legal matters.

CODE: DR 1-106; DR 3-101; DR 3-102; DR 5-101; DR 5-104(A).

QUESTION:

May a lawyer, through his or her law firm, represent clients who are separately represented by the entertainment management company in which the lawyer is a principal?

FACTS:

The lawyer is a member of a law firm which concentrates in, among other things, entertainment law. The lawyer is also a principal in a separate management company that represents artists, celebrities, entertainers and corporate clients. Several of the law firm's clients have requested that, through the management company, the lawyer manage their careers in the entertainment industry while the law firm continues to provide them with legal services. Specifically, the management company may enter into (1) a management arrangement with a client or with a business entity owned by the client, for which the management company would receive a standard fee or (2) a business arrangement pursuant to which the management company and the client's business entity would form a separate entity for the purposes of developing the client's business opportunities.

Under either arrangement no non-lawyer employee of the management company will offer legal advice to clients of the law firm, in accordance with DR 3-101, and legal fees will not be shared by the law firm with the management company, in accordance with DR 3-102.

The management company will provide services only to those law firm clients who have requested such services.

OPINION:

DR 1-106(A)(3) of the Lawyer's Code of Professional Responsibility (the "Code") provides that a lawyer who is a controlling party of an entity that the lawyer knows to be providing non-legal services to a client is subject to the disciplinary rules with respect to the non-legal services if the client could reasonably believe that the non-legal services are the subject of an attorney-client relationship. DR 1-106(A)(4) creates a presumption that the client receiving the non-legal services from the non-legal services entity believes the services to be the subject of an attorney-client relationship unless the lawyer *qua* lawyer advises the client otherwise in writing. Furthermore, DR 1-106(B) provides that a lawyer that is a controlling party of a non-legal services entity shall not permit any non-lawyer providing such services to direct or regulate the professional judgment of the lawyer or to cause the lawyer to compromise the duty of confidentiality.

Shortly after DR 1-106 was added to the Code, this Committee issued N.Y. State 752, 753 and 755 (each in 2002). In N.Y. State 752 we noted that notification to the client under DR 1-106 waives application of the disciplinary rules to the *non-legal* services. DR 5-101(A) continues to apply to provision of the legal services and bars the lawyer or law firm from offering non-legal services if the non-legal services activity creates an impermissible conflict with the legal representation. If the management company described above will provide non-legal services to a client of the law firm, the law firm may continue to represent the client only if a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest in the management company.

N.Y. State 752 also discussed earlier Committee opinions which opined that in certain circumstances a lawyer also engaged in a non-legal business cannot provide both legal and non-legal services in the same transaction *even with the consent of the client*. We noted our determination in these earlier opinions that the lawyer could not act as both the lawyer and broker in the same transaction,[9] and that such opinions rest primarily on DR 5-101(A): "[t]he rationale is that the broker's interest in closing the transaction interferes with the lawyer's ability to render independent advice with respect to the transaction." We concluded that those opinions survived the adoption of DR 1-106.

So while the Code does not impose a *per se* prohibition upon either arrangement described above, there are likely to be particular transactions negotiated for the client by the management company in which it is improper for the law firm to represent the client. Identification of those transactions may depend at least in part on the dollar value of the transaction and the method by which the management company is compensated. For example, it would be improper for the law firm to represent the client in connection with a valuable endorsement agreement being negotiated by the management company if compensation of the management company will turn on the legal advice to be rendered. The commission payable to the management company might be ten percent of millions of dollars payable to the client under the endorsement contract, while the legal fees in connection with negotiating and drafting the agreement may be only several thousand dollars. In the eyes of a disinterested lawyer, the management company's interest in closing the transaction would interfere with the law firm's ability to render independent legal advice with respect to the transaction.

There are other services that the law firm could generally render to clients of the management company without violating DR 5-101. Examples of such services include estate planning, real property transactions (if neither the lawyer nor the management company is acting as broker) and tax services.

Although we concluded in N.Y. State 755 that DR 5-104(A) does not apply when a lawyer recommends that the client employ a distinct lawyer-owned ancillary business,[10] if the management company and client's business entity form a separate entity as described above, such formation would constitute a business transaction subject to the requirements of DR 5-104(A). Whether or not the law firm may continue to provide legal services to the client with respect to transactions negotiated by the newly formed entity will be controlled by DR 5-101(A) as discussed above.

9 *E.g.*, real estate broker, N.Y. State 208 (1971); N.Y. State 291 (1973); N.Y. State 340 (1974) N.Y. State 493 (1978); securities broker, N.Y. State 536 (1981); insurance broker, N.Y. State 619 (1991)

10 As long as the lawyer takes steps to ensure that the client understands that the protections of the attorney-client relationship do not apply to the non-legal services. DR 1-106(A)(4).

CONCLUSION:

A lawyer may, through his or her law firm, represent clients who are separately represented by the entertainment management company in which the lawyer is a principal, in some but not all types of matters.

(31-04)

OPINION 785 (02/01/2005)

TOPIC: Communications with represented parties; insurance company

DIGEST: An attorney representing a plaintiff in a personal injury action may engage in settlement discussions with a non-lawyer insurance company claims adjuster over the objection of the attorney assigned by the insurance company to represent the defendant-policyholder with respect to the claim, provided that (i) the insurer is not represented by separate counsel with respect to the matter; and (ii) the plaintiff's attorney does not deliberately elicit information protected from disclosure.

CODE: DR 7-104(A)(1)

FACTS:

An individual injured in an automobile accident (the "Plaintiff") filed a personal injury action against the driver of the vehicle alleged to be at fault (the "Defendant"). In response, the Defendant's insurer assigned counsel to defend against the action. Before the suit was commenced, the Plaintiff's attorney engaged in unsuccessful settlement negotiations with the insurance company's non-lawyer claims adjuster. Subsequent to his assignment, the Defendant's attorney learned that Plaintiff's attorney was persisting in communicating with the adjuster in further settlement attempts. Defendant's attorney thereupon instructed the Plaintiff's attorney to cease all such communications.

QUESTION:

May the Plaintiff's attorney engage in direct settlement negotiations with the adjuster over the objection of the attorney assigned by the insurance company to represent the Defendant?

OPINION:

DR 7-104(A)(1) of the Code of Professional Responsibility (the "Code"), commonly referred to as the "no contact" rule, provides that, in the course of a representation, a lawyer shall not "[c]ommunicate or cause another to communicate on the subject of the representation with a party the lawyer knows *to be represented* by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so."[11]

Is the adjuster a represented party for purposes of the "no contact" rule? Or to restate the question, is the adjuster represented by the same counsel assigned to represent the Defendant? We believe not. 40 years ago in N.Y. State 4 (1964), we stated that: "[W]e see nothing improper in an attorney for a claimant entering into negotiations with the adjuster, even where the negotiations include discussion of the legal aspects of liability." We adhere to this conclusion, which is consistent with our many subsequent opinions on the ethically complex tripartite relationship that exists among an insurance com-

11 Emphasis added.

pany, assigned counsel and a policyholder[12], in holding that contact with the adjuster is not contact with the policyholder.

However, the "no contact" rule will bar unconsented communication with the adjuster if the insurance company is known to be separately represented by counsel with respect to the matter.[13] In addition, an attorney may not deliberately elicit information that is protected by attorney-client privilege or as attorney work product from an unrepresented person, such as the insurance company (for whom the adjuster is an agent).[14] Here, a sizeable portion of the insurance company's file is likely to be protected as work product.[15] Therefore, in discussing settlement with the insurance adjuster, the Plaintiff's attorney must not deliberately elicit such protected information.

CONCLUSION:

An attorney representing a plaintiff injured in an automobile accident may engage in direct settlement discussions with a non-lawyer insurance company claims adjuster over the objection of the attorney assigned by the insurance company to represent the defendant-policyholder with respect to the claim, provided that: (i) the insurer is not represented by separate counsel with respect to the matter, and (ii) the plaintiff's attorney does not deliberately elicit information protected from disclosure in the action.

(7-04)

12 For example, we have stated, "Despite the fact that an insurance company has retained the lawyer pursuant to its contractual duty to defend the policyholder, the client is the policyholder, not the insurance company." N.Y. State 721 (1999) (citing N.Y. State 716 [1999]); *see also* ABA Inf. Op. 1476 (1981) ("When a liability insurer retains a lawyer to defend an insured, the insured is the lawyer's client"); *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc.*, 205 Misc. 1066, 1075, 131 N.Y.S.2d 393, 401 (Sup. Ct. 1954) ("When counsel, although paid by the casualty company, undertakes to represent the policyholder and files his notice of appearance, he owes to his client, the assured, an undeviating and single allegiance"). We also reject the notion that the policyholder and the insurance company can be co-clients of the policyholder's assigned counsel. *See* N.Y. State 721 ("Some U.S. jurisdictions have held that an insurance carrier and an insured are 'co-clients' who have joint rights in the information concerning the representation. New York is not one of them.") (citation omitted); N.Y. State 716 (1999), n. 2 ("[A]t least in New York, the policyholder's agreement to be represented by a lawyer who is compensated by the insurer does not itself make 'co-clients' of the policyholder and the insurer for purposes of the Code of Professional Responsibility. Rather, . . . the policyholder alone is the client").

13 Under certain circumstances, claimant's attorney may have a duty to inquire before concluding that the insurance company is not so represented. *See* N.Y. State 728 (2000).

14 *See* N.Y. State 735 (2001) (independent accountant); N.Y. State 700 (1997) (former employee).

15 *See* Mc Kinney's Cons Laws of N.Y., CPLR 3101(d)(2) (2005) (discussing protections for materials prepared in anticipation of litigation); *Kandell v. Tocher*, 22 A.D.2d 513, 256 N.Y.S.2d 898 (1st Dept. 1965) (applying CPLR 3101(d) to accident report information policyholder gave to his insurance carrier); *Finegold v. Lewis*, 22 A.D.2d 447, 256 N.Y.S.2d 358 (2d Dept. 1965) (same); *see generally* Connors, Practice Commentaries C3101:31 and C3101:32, McKinney's Cons. Laws of NY, CPLR 3101 (2004).

OPINION 786 (04/28/2005)

TOPIC: Pro bono services; expenses of litigation.

DIGEST: A lawyer representing pro bono a provider of legal services to the indigent may not pay the expenses of litigation without the client remaining ultimately liable therefor unless the organization itself is indigent. The test of indigence in these circumstances depends on the financial wherewithal of the organization and not on the purposes it serves.

CODE: EC 2-25, 5-7, 508; DR 5-103.

QUESTION:

Under what circumstances may a lawyer representing *pro bono* a provider of legal services to the indigent pay the expenses of litigation without the client remaining ultimately liable therefor?

OPINION:

Lawyers frequently render legal services to organizations that provide services to the indigent on a *pro bono* basis. That is, in addition to providing services to the clients of the organization, lawyers will offer *pro bono* services to the organization itself on, for example, matters of corporate law, employment issues, or litigation in pursuit of the organization's proprietary interests. Indeed, EC 2-25 encourages lawyers to fulfill their obligation to render public interest and *pro bono* legal service by providing professional services at no fee or a reduced fee to "public service organizations, where the legal services are designed primarily to address the legal and other basic needs of persons of limited financial means." Moreover, that Ethical Consideration encourages lawyers and law firms by providing "financial support for such organizations to assist in providing legal services to persons of limited financial means."

When a lawyer represents a client in litigation, however, the Code prohibits a lawyer from providing financial support to the client except in narrowly defined circumstances. In particular, DR 5-103 provides:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
>
> > 1. A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.
> >
> > 2. Unless prohibited by law or rule of court, a lawyer representing an indigent client on a pro bono basis may pay court costs and reasonable expenses of litigation on behalf of the client.

See also DR 2-101(L)(2) (a lawyer advertising contingent fee rates shall disclose "[t]hat, in the event there is no recovery, the client shall remain liable for the expenses of litigation, including court costs and disbursements").

The rule is based on two concerns: (1) that acquiring an excessive financial stake in litigation may have "an adverse effect upon the exercise of free judgment by the lawyer," EC 57; *see also* EC 58 ("A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to the client."); and (2) excessive subsidizing of lawsuits "would encourage clients to pursue lawsuits that might not otherwise be brought," ABA Model Rule of Prof. Conduct 1.8, comment 10 (2003). *See also* N.Y. State 464 (1977) (opining that "if lawyers were permitted to finance their clients' causes, it would generate unmeritorious suits and ultimately obfuscate the elemental difference between the roles of lawyer and client"); N.Y. State 37(a) (1966) (stating that the "basic purpose" of Canon 42, the predecessor to DR 5-103(B), "is to implement the policies against champerty, maintenance and barratry").

The question addressed by this opinion is whether an organization that provides legal services to the indigent can itself be considered an "indigent client" so as to permit the lawyer to pay the expenses of litigation without the organization remaining ultimately responsible therefor. The question is of some practical importance, as the expenses of litigation can be substantial and the resources of the organization are often fully committed to the service of its mission. Moreover, even if a lawyer has no intention of seeking to enforce the legal right to collect expenses from the organization, the board of the organization may be reluctant to expose the organization to even a theoretical legal obligation in those amounts.

DR 5103(B)(2) establishes a two-part test for the exception provided: the client must be indigent and the lawyer must be proceeding *pro bono*. In the circumstances we are addressing, the client is the organization, not the organization's clients. The question thus is whether the legal services organization itself can meet a test of indigency.

The Code contains no definition of "indigent." New York courts have defined the term "indigent" as "destitute of property or means of comfortable subsistence; needy; poor; in want; necessitous." *Healy v. Healy*, 99 N.Y.S.2d 874, 877 (Sup. Ct. Kings County 1950); *Brown v. Upfold*, 123 N.Y.S.2d 342, 345 (Sup. Ct. Onondaga County 1953). The term is also frequently used to mean "inability to afford counsel." *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 340, 344 (1963) (using "indigent," "unable to employ counsel" and "too poor to hire a lawyer" interchangeably); *Powell v. Alabama*, 287 U.S. 45, 71-72 (1932) (using "indigent" and "unable to employ counsel" interchangeably); *Matter of Stream v. Beisheim*, 34 A.D.2d 329, 331, 333 (2d Dep't 1970) (using "indigent" and "financially unable to retain counsel" synonymously); *People v. Berkowitz*, 97 Misc. 2d 277, 279-80 (Sup. Ct. Kings County 1978) (using "indigency," "financial inability to pay" and "unable to retain proper representation" interchangeably).

There is considerable difficulty in applying these concepts to corporations and associations. As the United States Supreme Court pointed out in holding that corporations and associations were not "persons" entitled to proceed *in forma pauperis*, "[w]hatever the state of its treasury, an association or corporation cannot be said to 'lac[k] the comforts of life,' any more than one can sensibly ask

whether it can provide itself, let alone its dependents, with life's 'necessities.'" *Rowland v. California Men's Colony, Unit II Men's Advisory Counsel*, 506 U.S. 194, 203 (1993).[16]

In at least two cases, courts have suggested that a corporation organized for a public-interest purpose or serving an impoverished population should be permitted to proceed *in forma pauperis*, in part in light of those qualities. *See Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.,* 71 F.R.D. 93, 96 (S.D.N.Y. 1976) (stating that non-profit corporation formed for "a public interest quality" suing under the antitrust laws could proceed *in forma pauperis*) (dictum); *River Valley, Inc. v. Dubuque County*, 63 F.R.D. 123, 125 (N.D. Iowa 1974) (holding that non-profit corporation formed to assist poor people may appear *in forma pauperis* in light of "the nature of plaintiff's operation and the persons served thereby"), *mandamus denied and appeal dismissed on other grounds*, 507 F.2d 582 (8th Cir. 1974). *See also* Comment, *Proceeding In Forma Pauperis in Federal Court: Can Corporations Be "Persons"?,* 62 Calif. L. Rev. 219, 250-52 (1974) (urging adoption of "primary beneficiary analysis" under which leave to appear *in forma pauperis* should be granted when the corporation pursues "non-self-interested claims" and the primary beneficiary of the litigation is the public).

In each of these cases, however, the court also was satisfied that the corporation was impecunious.[17] The public-purpose test was advanced as a test for whether the corporate form was a "subterfuge," *River Valley*, 63 F.R.D. at 125, a consideration that is not relevant in the present context. In any event, these cases (which were overruled by *Rowland*) have been criticized. *See, e.g., Sears, Roebuck & Co. v. Charles W. Sears Real Estate, Inc.*, 686 F. Supp. 385, 387 n.4 (N.D.N.Y. 1988) (stating that "whether a corporation is a 'person' within the meaning of § 1915 does not depend on the purity of the corporation's motives in prosecuting its interests in the court, nor on the sympathy the court holds for the interests being advanced by the corporation"), *aff'd*, 865 F.2d 22 (2d Cir. 1988); *Move Org. v. United States Dep't of Justice*, 555 F. Supp. 684, 692 n.26 (E.D. Pa. 1983) (rejecting *Harlem River* test and commenting with respect to the above-cited Comment, "it is unclear how I should go about determining whether: the plaintiff was formed for 'public purposes'; the financial benefit to be reaped is direct or indirect; the benefit is substantial; the litigation has a 'public interest aspect'; who is the 'primary beneficiary'; and whether the claims are non-self-interested"); *see also Rowland*, 506 U.S. at 207 n.9 ("The language of § 1915 . . . suggests indifference to the character of the litigant and to the type of litigation pursued, so long as it is not frivolous or malicious."); *S.O.U.P., Inc. v. FTC*, 449 F.2d 1142, 1142 (D.C. Cir. 1971) (*per curiam*) ("The public interest motivating SOUP's members, which I join in applauding, does not help make the corporation 'a person . . . unable to pay such costs or give security therefor.'") (statement of Fahy, J.)

16 The statute at issue in *Rowland*, and in the cases cited in the following paragraph of text, provided:

> "[A]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor."

28 U.S.C. § 1915(a) (Supp. IV 1988).

17 *See Harlem River*, 63 F.R.D. at 95 ("The affidavits submitted together with this application establish to the Court's satisfaction the poverty of the plaintiff corporation. Further, they also establish the poverty of the corporation's membership viewed as a group. Thus, the Court finds the requirement of poverty to have been met . . . ."); *River Valley*, 63 F.R.D. at 125 ("Considering the nature of plaintiff's operation and the persons served thereby, and in view of the fact that defendants have effectively cut off all previous sources of funds for plaintiff and directed that plaintiff spend no more money, it appears to the court that the plaintiff is truly in good faith without funds to maintain this action.")

The inclusion of the "indigence" requirement in DR 5103(B)(2) (which is restated in EC 58) was the result of a deliberate choice by the drafters of the rule. The ABA Model Rule provision upon which DR 5103(B)(2) was based was originally drafted to apply to all *pro bono* clients regardless of indigence. Discussion Draft, Model Rules of Professional Responsibility 31 (Jan. 30, 1980) ("A lawyer or legal services organization representing a client without a fee may pay court costs and expenses of litigation on behalf of a client.") The drafters of the Model Rule then substituted the "indigence" standard for the "without a fee" standard. The drafters of DR 5103(B)(2) further restricted the operation of the exception by including both concepts. In addition, in recommending the current text of DR 5103(B), the drafters of the Code declined to adopt the text of the Model Rules that a lawyer might advance litigation expenses "contingent on the outcome of the matter." Instead, the provision in the New York Code retains the more stringent requirement that the client remain "ultimately liable" for the amounts advanced.

The decision in *Rowland* that organizations are not "persons" within the meaning of the federal statute providing for proceeding *in forma pauperis* was based on a number of "contextual features" of the statute that are not shared by DR 5-103(B)(2). 506 U.S. at 201. We detect no like basis in the Code to conclude that the term "indigent client" is limited to natural persons. While we recognize that determining the meaning of the term "indigent" in the context of organizations is difficult, we do not believe it is impossible. The organization at issue in *Rowland*, for example, was an association of prisoners who were not permitted to have bank accounts. We have little doubt that such an association would meet the definition of indigence.

On the other hand, we do not believe the fact that the organization depends on charity or governmental assistance necessarily qualifies it as "indigent." Many nonprofit organizations – universities, museums, and perhaps legal services providers – have very substantial resources. While they may prefer to devote all their resources to the direct service of their mission, all clients would prefer to devote their resources to a cause other than litigation. Basing a test for indigence on the worthiness of the client's cause or on some basis other than financial wherewithal would be inconsistent with the ordinary meaning of the term. Moreover, a test that looked to the purposes the client serves, without further textual guidance in the Code, would be unrestricted in potential scope and potentially arbitrary in application.[18]

We will not attempt in a general opinion such as this to provide monetary guidelines as to what would constitute "indigence." In the end, as with much in the Code, the test will depend on the good judgment of the lawyer. The test should be one that would apply in like fashion to any organization, non-profit or profit-making, and regardless of the perceived societal value of the organization's purposes. It must, in short, depend alone on the financial wherewithal of the organization.

We are mindful that many lawyers offering *pro bono* services to non-profit providers of legal services to the poor are ready as well to bear the expenses of the suit. That is a choice that a lawyer can exercise by declining to seek recovery of expenses that the lawyer has paid on the client's behalf,

18 A New York court has considered a somewhat analogous question and reached the analogous conclusion. *Hospital Credit Exchange, Inc. v. Shapiro*, 59 N.Y.S.2d 812, 816 (N.Y.C. Mun. Ct. 1946) (holding that non-profit membership corporation formed by non-profit hospitals to collect unpaid bills could not take advantage of an exemption for charitable corporations contained in the unauthorized-practice statutes, and noting "[i]t is true that its only clients or customers are charitable hospitals. However, the fact that for a fee it serves only charitable institutions, does not make it a charitable corporation"). Similarly here, the fact that the client represents indigent persons does not without more make the client indigent.

just as any lawyer can decline to collect a fee that is owed. But the lawyer may not, "[w]hile representing a client in connection with contemplated or pending litigation," DR 5103(B) – that is, during the pendency of the suit – relieve a non-indigent organization of ultimate responsibility for the expenses.

CONCLUSION:

A lawyer representing on a *pro bono* basis an organization that provides legal services to the poor may not pay the expenses of litigation without the organization remaining ultimately liable for those expenses unless the organization is itself indigent. The test for "indigence" in this context is one of objective financial wherewithal, and not one that is based on the worthiness of the cause that the organization pursues or the organization's desire to spend its resources in other ways.

(40-04)

OPINION 787 (06/09/2005)

TOPIC: Conflict of interest; missing client

DIGEST: A lawyer who represents a wife in a personal injury matter and her husband on a loss of consortium claim cannot continue to represent either if the wife wishes to accept a settlement offer that would bar the husband's claim. If the husband has disappeared, the lawyer must take all reasonable steps to protect the client's interests and to locate the husband client. After exhausting all reasonable efforts to locate the husband, the lawyer may withdraw from the representation.

CODE: DR 2-110, DR 5-105, DR 5-108, DR 7-101(A)(1); EC 5-15.

QUESTION:

May a lawyer who agreed to represent a wife in a personal injury matter and her husband on a derivative loss of consortium claim continue to represent the wife where settlement of her claim would prejudice the husband's interests? How should the lawyer proceed if the husband has disappeared?

OPINION:

A lawyer was retained to represent concurrently a married woman with respect to a personal injury claim and her husband on a derivative loss of services claim. The husband later abandoned the wife and she obtained a divorce. Although no lawsuit was commenced with respect to either claim, a settlement offer has been made to the wife that she would like to accept. Both the wife and the lawyer have lost contact with the former husband.

Differing Interests

A lawyer may represent multiple clients in the same or related matters unless (i) the exercise of independent professional judgment on behalf of one client will be or is likely to be adversely affected by the lawyer's representation of another client, or (ii) the multiple representation would likely involve the lawyer in representing differing interests. DR 5-105(A).[19] In cases where multiple representation would involve an adverse effect on independent professional judgment or representation of differing interests, a lawyer may undertake or continue the multiple representation if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. *See* DR 5-105(C).

If assisting the wife to effect the settlement would prejudice the husband's separate claim,[20] the lawyer must withdraw from both representations.[21] Continuing to represent both parties would

19 DR 5-105(B); *see also* EC 5-15 ("The lawyer should resolve all doubts against the propriety of the representation."

20 Whether settling the wife's claim would prejudice her former husband's claim is a question of law beyond this Committee's jurisdiction.

21 If the lawyer withdrew from only one representation, the remaining representation would be adverse to the former client "in the same or [a] substantially related matter," a violation of DR 5-108.

involve a simultaneous representation of "differing interests." Specifically, the lawyer would be forced to choose between settling the wife's claim and thus barring the husband from pursuing his loss of consortium claim,[22] or advising the wife to reject the settlement offer that she wishes to accept in order to preserve the husband's claim. In this situation the lawyer could proceed only with the husband's informed consent, which would require explaining to the husband the risk that the loss of consortium claim may be compromised.

Missing Client

Because the lawyer has not been discharged by the husband nor withdrawn from the husband's representation, he or she is obligated to continue to protect the husband's interests through reasonably available means.[23] However, the lawyer's inability to communicate with the client makes it difficult to protect the husband's interests. For example, if the client has not authorized the lawyer to file suit, the lawyer cannot know whether the client wishes to pursue the matter. A lawyer may withdraw from a representation if *either* "withdrawal can be accomplished without material adverse effect on the interests of the client"[24] or "if the client [b]y other conduct renders it unreasonably difficult for the lawyer to carry out employment effectively."[25] DR 2-110(A)(2) requires the lawyer, when withdrawing, to take "steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules."

Before withdrawing, the lawyer must take all reasonable steps to locate the client. Such steps might include sending a letter via certified mail to the last known address, a personal visit to the last known address, or a search of telephone directories, public records or the Internet to determine the client's current address.[26] If the lawyer has exhausted all reasonable steps and decides to withdraw, the lawyer must send written notice of intent to withdraw to the client's last known address, warning the client that the client's claim may be prejudiced by delay, and suggesting that the client obtain other counsel.

Even if the lawyer withdraws from representation of the husband in accordance with DR 2-110(A)(2),[27] the lawyer would be unable to continue to represent the wife if settling her claim would

22 *See, e.g., Buckley v. National Freight*, 90 N.Y.2d 210, 681 N.E.2d 1287, 659 N.Y.S.2d 841 (1997) (settlement of the injured spouse's claim and release generally bars the other spouse's pursuit of loss of consortium claim).

23 DR 7-101(A)(1); see Rhode Island Opinion 1992-94 (attorney must continue to protect missing client's interests).

24 DR 2-110(C).

25 DR 2-110(C)(1)(d).

26 See, e.g., ABA Inf. Op. 1467 (1981) (if after reasonable inquiry and effort the client cannot be located, and problem is not caused by the lawyer's neglect, the lawyer has no duty to file a lawsuit to toll the statute of limitations for a client who has disappeared); Arizona Opinion 01-08 (reasonably diligent search necessary); Philadelphia Opinion 98-8 (if after reasonable efforts to locate the client, the client cannot be found, the lawyer has no further obligation); South Carolina Opinion 98-07 (if after reasonable diligence, the client cannot be found, the lawyer can assume representation has terminated); Wisconsin Opinion E-96-2 (the lawyer must make a reasonable effort to locate the client before withdrawing); Rhode Island Opinion 91-82 (steps to be taken).

27 Taking "steps necessary to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules."

prejudice the interests of the now-former husband client.[28] Absent consent from the former client (the husband), the lawyer could not continue to represent the wife in the same or a substantially related matter where her interests are materially adverse to the former client.

CONCLUSION:

A lawyer who agreed to represent a wife in a personal injury matter and her husband on a derivative loss of consortium claim may not continue to represent the wife absent both clients' informed consent where settlement of her claim would prejudice the husband's claim for loss of consortium. The lawyer may seek to withdraw from representing the missing client subject to the considerations discussed above.

(1-05)

28 DR 5-108.

OPINION 788 (10/21/2005)

TOPIC: Part-time prosecutor represents criminal defendant in a civil matter, conflict of interest, imputation.

DIGEST: A lawyer who has a private practice and serves as a part-time assistant district attorney may not represent a client in a civil matter where the client is being prosecuted by the district attorney's office. The conflict cannot be cured by consent.

CODE: DR 2 110(B)(2), 5 105(B), 5 105(D), 5 108(A)(1).

QUESTION:

The inquirer is a lawyer in private practice who also serves as a part-time assistant district attorney in a small district attorney's office. He shares an office in the district attorney's office and attends staff meetings at which cases are discussed. In his private practice, the inquirer represents a husband and wife in revising their wills. After an initial interview, which resulted in the inquirer requesting certain additional information, the inquirer learns that the district attorney's office in which he works has begun a prosecution of the husband. May the inquirer continue to represent the husband? If there is a conflict of interest, may the conflict be cured by consent?

OPINION:

The Committee concludes that the inquirer may not continue the representation of the husband when the district attorney's office in which the inquirer works is prosecuting the husband. We also conclude that the conflict cannot be cured by consent of the district attorney's office and the private client.

DR 5-105(B) bars a lawyer from concurrent representation of two or more clients if it would "involve the lawyer in representing differing interests," unless each client consents. We have held that part-time prosecutors are limited by DR 5-105 from undertaking certain kinds of work in their private practice: for example, they may not represent criminal defendants in New York State courts[29] or in suing the governmental entity that employs them.[30] Such conflicts are imputed to partners and associates of the part-time prosecutor.[31] This inquiry involves the reverse situation: whether the conflicts of other prosecutors in the office are imputed to the part-time prosecutor so as to bar the part-time prosecutor from conflicting representations in his or her private practice.

DR 5105(D) imputes conflicts under DR 5105(B) to all lawyers "associated in a law firm." A law firm is defined in the Code of Professional Responsibility (the "Code") to include "the legal department of a corporation or other organization." This Committee has repeatedly held that a district

29 N.Y. State 544 (1982).

30 N.Y. State 218 (1971).

31 *See, e.g.*, N.Y. State 450 (1976) ("If the [part-time] town attorney is unable to represent private clients by reason of the foregoing considerations, his partners and associates would similarly be disqualified"); N.Y. State 40 (1966); *see also* N.Y. State 672 (1995) (part-time prosecutor who is partner of judge's law clerk cannot appear before that judge, conflict not imputed to other prosecutors where conflict did not arise from one of enumerated provisions in DR 5-105[D]).

attorney's office should be treated as a law firm for purposes of DR 5105(D).[32] We recognize that a part-time prosecutor's affiliation with the district attorney's office may not be as extensive as that of a typical partner or associate in a law firm. However, the part-time prosecutor has full access to the office's information, attends staff meetings and carries on the work of the office in much the same way that other prosecutors do. His or her affiliation with the district attorney's office is at least as extensive as most of-counsel lawyers' affiliation with their law firms,[33] which this committee and others have held gives rise to imputation.[34] *A fortiori*, because of a greater need to avoid the appearance of impropriety in government, the imputation of conflicts that applies to most "of counsel" lawyers applies to a part-time prosecutor.[35]

Given that there is a conflict of interest, may it be waived?[36] In N.Y. State 657 (1993), we stated that the conflict arising from a part-time prosecutor's acting as criminal defense counsel in New York State courts was not waivable. In that opinion we said, "Because the role of the prosecutor and the defense lawyer are inherently incompatible and the prosecutor has special responsibilities to the public, consent cannot cure the conflict because it is not obvious that the lawyer can adequately represent the Town and the private client."[37] While the inquirer does not seek to act as defense counsel in criminal cases, we believe the same conclusion applies. The risk of the public perceiving favoritism at the prosecutor's office precludes waiver of the conflict.

The Code does not prescribe which representation a lawyer must withdraw from when presented with a non-waivable conflict,[38] but we have said that "[a]s a general rule, disqualification of the entire District Attorney's office is warranted only upon a finding of actual prejudice, a real con-

32 N.Y. State 672 (1995) ("the District Attorney's office is the functional equivalent of a law firm"); N.Y. State 670 n.3 (1994); N.Y. State 638 (1992); N.Y. State 492 (1978) (disqualification for a small DA's office, did not reach the question of "[w]hether that analogy is appropriate *vel non* to the structure and operation of a district attorney's office in a major metropolitan community"); N.Y. State 476 (1977) ("all public offices which exercise prosecutorial duties are treated as private law firms" for purposes of DR 5-105(D) disqualification); N.Y. State 419 (1975); *see also* N.Y. City 200303 (the Code's definition of law firm "of course encompasses large law firms, corporate legal departments, government legal departments, and non-profit law firms"); ABA Model R. 1.0 cmt. 3 ("With respect to the law department of an organization, *including the government*, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct") (emphasis added).

33 "We have interpreted the 'of counsel' relationship to mean that the of counsel lawyer is 'available to the firm for consultation and advice on a regular and continuing basis.'" N.Y. State 773 (2004) (*quoting* N.Y. State 262 [1972]).

34 N.Y. State 773; *see also* ABA 90357; N.Y. City 19958; *Nemet v. Nemet*, 112 A.D.2d 359, 360, 491 N.Y.S.2d 810, 811 (2nd Dep't) (of counsel relationship leads to imputed disqualification), *appeal dismissed*, 66 N.Y.2d 602, 490 N.E.2d 554 (1985); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. c(ii) (1998) (same). *But see Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127, 135 (2d Cir. 2005) ("Given the wide variation in the nature and substance of relationships lumped together under the title 'of counsel,' a *per se* approach is ill-equipped to respect appropriately 'both the individual's right to be represented by counsel of his or her choice and the public's interest in maintaining the highest standards of professional conduct.'") (*quoting Hull v. Celanese Corp.*, 513 F.2d, 568, 569 [2d Cir. 1975]).

35 *Accord* Vermont 2003-4 (conflicts of all attorneys in Attorney General's office imputed to part-time Assistant Attorney General).

36 N.Y. State 629 (1992) (governmental entity is capable of giving consent).

37 *See also State v. Schrager,* 74 Misc. 2d 833, 346 N.Y.S.2d 101 (Crim Term., Queens Cty. 1973) (court approved appointment of Special District Attorney when Assistant District Attorney was criminal defendant); N.Y. State 683 (1996) (The prosecutor's "special duty" to seek justice "imposes a responsibility on prosecutors not only to ensure the fairness of the process by which a criminal conviction is attained, but also to avoid the public perception that criminal proceedings are unfair.").

38 DR 2110(B)(2) (requiring lawyer to withdraw from employment if "continued employment will result in violation of a Disciplinary Rule"). *See also* N.Y. City 2005-05 (describing factors to be considered in deciding which matter a lawyer should withdraw from in the case of unforeseeable concurrent client conflicts).

flict of interest or the risk of misusing confidences."[39] In this case, where the withdrawal of the entire district attorney's office would require appointment of a special prosecutor to prosecute the husband, and where the estate-planning representation is at an early stage, we believe the inquirer should withdraw from representing the husband. If the facts were different, as when withdrawal from representing the private client would cause substantial prejudice to the client, the lawyer may be required to withdraw from the district attorney's office.

There are also situations in which withdrawal from representing the husband or withdrawal from the district attorney's office might not be sufficient, so that the district attorney's office would be required to withdraw from the prosecution. Under DR 5-108(A)(1), if the representation of the husband and the criminal prosecution are "substantially related," the inquirer would have a disqualifying conflict of interest that would be imputed to the district attorney's office under DR 5-105(D) and would prevent the entire district attorney's office from proceeding against a former client of one of its prosecutors. "The most important factor [in determining whether two matters are substantially related] is whether the . . . lawyer did or could have obtained confidences and secrets in the former representation that should be used against the former client in the current representation."[40] If the criminal prosecution involves allegations of secreting assets, for example, an estate-planning representation might be substantially related to that prosecution, requiring appointment of a special prosecutor.[41] If the alleged crime is a traffic offense, however, that is unlikely.

CONCLUSION:

The questions are answered in the negative.

(11-05)

39 N.Y. State 672 (1995); *accord* N.Y. State 670 (1994). While New York law provides for appointment of special prosecutors where an entire county office is disqualified, *see* N.Y. County Law § 701(1)(a) (2005) ("Whenever the district attorney of any county and such assistants as he or she may have . . . are disqualified from acting in a particular case to discharge his or her duties . . . a superior criminal court in the county may . . . appoint some attorney at law . . . to act as special district attorney"), the New York courts have shown reluctance in recent years to disqualify an entire office absent demonstrated prejudice. *Matter of Schumer v. Holtzman*, 60 N.Y.2d 46, 454 N.E.2d 522, 467 N.Y.S.2d 182 (1983) (district attorney should be disqualified only "under limited circumstances"); *People v. Rankin*, 149 A.D.2d 987, 540 N.Y.S.2d 628 (4th Dept. 1989); *Matter of Morgenthau v. Crane*, 113 A.D.2d 20, 22-23, 495 N.Y.S.2d 164, 166 (1st Dept. 1985); N.Y. State 638 n.10 (1992) (reviewing cases).

40 N.Y. State 723 (1999). Other factors include "an identity of issues in the two matters or a significant overlap of . . . contested facts," and whether "the issue in controversy in the second matter arose out of a transaction in which the lawyer represented the former client." *Id.*

41 We have said in the civil context that a lawyer's general knowledge of his or her former client's financial exposure does not make the two representations substantially related unless "there are peculiar aspects of the current representation making such information particularly relevant." N.Y. State 628 (1992); *accord* N.Y. State 723.

OPINION 789 (10/26/2005)

TOPIC: Consultation with a law firm's in-house counsel on matters of professional ethics involving one or more clients of the law firm.

DIGEST: A law firm may form an attorney-client relationship with one or more of its own lawyers to receive advice on matters of professional responsibility concerning ongoing client representation(s), including on matters implicating the client's interests, without thereby creating an impermissible conflict between the law firm and the affected client(s). The law firm's duty to disclose its conclusions will vary with the circumstances of the matter.

CODE: DR 1-102(A); DR 1-104; DR 1-106; DR 1-107; DR 2-101(E); DR 2-102(A); DR 2-103(D); DR 2-105(A); DR 3-102(A); DR 5-101(A); DR 5-105; DR 5-109; DR 9-102; EC 1-8; EC 5-18; EC 7-7; EC 7-8.

QUESTION:

1. When a law firm seeks advice from one or more of its own lawyers about the firm's legal and ethical obligations in connection with representing a client, without first obtaining the client's consent, does the consultation create an impermissible conflict between the interests of the law firm and those of the affected client?

OPINION:

Background

2. A New York-based law firm has appointed a committee of partners charged with (1) advising the firm and its lawyers on legal and ethical obligations and issues of professional responsibility, (2) assuring the firm's compliance with the law governing lawyers, (3) counseling the firm concerning its systems to facilitate such compliance, and (4) representing the firm in challenges to its professional conduct. Included among the issues that these in-house advisors confront are considering the limits on a lawyer's duty of zealous representation, interpreting and applying the rules governing conflicts of interest, addressing a client's allegation that the firm behaved unethically, and assessing whether the firm has failed in the performance of professional duties to a client.

3. Many of these issues involve questions of law and ethics in which the interests of the law firm may not coincide with the interests of the client(s) whose matters occasion the consultation. For instance, in addition to the duties owed to the affected client(s), lawyers may owe potentially conflicting duties to other existing or former clients, to a court or a regulatory tribunal, to adverse counsel, or to the legal system as a whole. Assuring compliance with these multi-faceted obligations may frequently present complex issues of law and ethics. The question here is whether a law firm's consultation with one of its own in-house lawyers on these types of issues creates a conflict of interest with the affected client under the Code of Professional Responsibility (the "Code"). We conclude that it does not.

ANALYSIS:

4. The question presented is new for this Committee and, as far as our research can find, any ethics committee in the country. Three recent cases – *VersusLaw, Inc. v. Stoel Rives, LLP*, 111 P.3d 866, 878, 127 Wash. App. 309, 332 (2005), *Koen Book Distrib. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo*, 212 F.R.D. 283, 283-85 (E.D. Pa. 2002), and *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 220 F. Supp. 2d 283, 286-88 (S.D.N.Y. 2002) – suggest that an in-house legal counsel's advice to law firms may not be subject to claims of attorney-client privilege as against their then-clients based on the courts' view that the firm's consultation with its in-house lawyers introduced a conflict between the law firm and its clients.[42] The question of the applicability of the privilege is an evidentiary issue for the courts. The question of what constitutes a conflict of interest under Canon 5 of the Code is one on which we are free to opine.

5. We begin with consideration of the background in the Code against which lawyers in law firms seek advice from in-house ethics advisers – various provisions of the Code that provide for or envision a law firm's obtaining in-house advice about obligations to clients and construction of an ethical infrastructure to facilitate such consultation. We then consider whether seeking and giving such advice creates a personal conflict for the lawyers involved under DR 5-101(A), and then whether the rendering of such advice to a colleague puts the lawyer in the position of representing two clients with conflicting interests under DR 5-105(A) and (B). Finally, we address the extent to which the law firm is obligated under the Code to disclose to the client the fact of its in-house consultations.

The Code's Support for an Ethical Infrastructure

6. The Code explicitly imposes obligations on a law firm as an institution – a departure from the traditional confinement of ethical codes to regulation of individual lawyers. For example, DR 1-104 requires a law firm to make "reasonable efforts" to assure that its lawyers comply with the Code, mandates adequate supervision of the lawyers in the firm, and allocates responsibility between supervisory and subordinate lawyers in the firm. Other Code provisions also apply to the firm, rather than solely to individual lawyers.[43]

7. These rules necessarily create an obligation to establish protocols, appropriate for the size and practice of the firm, to enable the firm to enforce these standards internally. To envision such a system

42 The three cases all rest on *In re Sunrise Sec. Litig.*, 130 F.R.D. 560 (E.D. Pa. 1989), which held "a law firm's communication with in house counsel is not protected by the attorney client privilege if the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication." *Id.* at 597. The *Sunrise* court relied in part on the so-called "fiduciary exception" to the privilege, *see Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). Other decisions applying that exception, however, such as *Beck v. Manufacturers Hanover Trust Co.*, 218 A.D.2d 1, 17-18 (1st Dep't 1995); *Hoopes v. Carota*, 142 A.D.2d 906, 910-11 (3rd Dep't 1995) (dictum), *aff'd*, 74 N.Y.2d 716 (1989); and *United States v. Mett*, 178 F.3d 1058, 1064 (9th Cir. 1999), find that, when a fiduciary seeks legal advice concerning the fiduciary's *own* potentially conflicting obligations, including with respect to potentially different interests of beneficiaries, the fiduciary may assert privileges against the beneficiaries. *See also* RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. b (1959).

43 *See, e.g.,* DR 1-102(A); DR 1-106; DR 1-107; DR 2-101(E); DR 2-102(A); DR 2-103(D); DR 2-105(A); DR 3-102(A); DR 9-102. *See also* DR 5-105(E) (requiring a system for checking conflicts); N.Y. State 715 (1999); N.Y. City 2003-3 (outlining minimal requirements for conflicts-checking system). Likewise, in issuing its Sarbanes-Oxley attorney conduct rules, the SEC declared that it expects law firms "to put in place procedures to comply with [its] requirements." Press Release, Securities and Exchange Commission 2003-13 (Jan. 23, 2003).

without access to confidential advice on legal and ethical issues affecting the firm's obligations is difficult. EC 1-8 is but one suggestion to this effect:

> A law firm should adopt measures giving reasonable assurance that all lawyers in the firm conform to the Disciplinary Rules and that the conduct of non-lawyers employed by the firm is compatible with the professional obligations of the lawyers in the firm. Such measures may include informal supervision and occasional admonition, a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a senior lawyer or special committee, and continuing legal education in professional ethics.

8. These rules persuade us that the Code endorses and in some cases requires mechanisms within a law firm to promote obedience to a firm's obligations. Those ethical obligations frequently raise issues potentially or actually implicating the interests of one or more clients. Either a law firm must address these issues with one of its own lawyers, or else look to others for this advice. To hold that a law firm must always seek guidance outside its halls in order to preserve an attorney-client relationship – that is, to hire outside counsel (whose fiduciary duties may extend only to the firm) in every instance in which such an adversity arises – is simply impractical in the day-to-day life of many law firms, when issues of professional responsibility frequently require prompt responses most usefully provided by lawyers knowledgeable about the firm, its client relationships and its culture. It also imagines a world in which a lawyer must hire another lawyer to practice law, thereby depriving the firm of the well-recognized right to represent itself. [44]

9. Further supporting this conclusion is the substantial literature supporting an in-house ethical infrastructure. "[A] law firm that assumes some collaborative responsibility for the moral climate of the firm's practice can improve morale, the quality of work, and, perhaps, the moral standards of the firm's lawyers and other employees." CHARLES WOLFRAM, MODERN LEGAL ETHICS § 16.2.2, at 881 (1986). "Research in other organizational contexts shows that [in-house compliance] specialists tend to promote the development of compliance procedures within firms, and may play a leading role in defining industry standards for compliance." Elizabeth Chambliss & David B. Wilkens, *The Emerging Role of Ethics Advisors, General Counsel and Other Compliance Specialists in Large Law Firms,* 44 ARIZ. L. REV. 559, 560-61 (2002). "Many law firms already have an 'ethics committee' or 'ethics partner' to serve as the firm's internal resource for deciding ethics questions, and firms of more than a dozen lawyers that do not yet have an ethics committee ought to form one." ROY D. SIMON, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 68 (2005). "A lawyer confronting something that seems to be an ethics problem should consult a colleague about whether there is such

44 *See United States v. Rowe*, 96 F.3d 1294 (3rd Cir. 1996) (recognizing law firm's right to represent the firm *pro se*); *Hertzog, Calamari & Gleason v. Prudential Ins. Co.*, 850 F. Supp. 255 (S.D.N.Y. 1994) (same); *Lama Holding Co. v. Shearman & Sterling*, 1991 U.S. Dist. LEXIS 7987 (S.D.N.Y. June 17, 1991) (same). *See also In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 595 (E.D. Pa. 1989) ("I am not willing to hold that a law firm may never make privileged communications with in house counsel").

a problem and, if so, how she should go about resolving it." Geoffrey C. Hazard, *The Legal Profession: The Impact of Law and Legal Theory*, 67 FORDHAM L. REV. 239, 247 (1998).[45]

10. We do not believe that the conflicts rules of Canon 5 were intended to prohibit ethics consultation when it is most helpful: during the client representation.

DR 5-101(A): Interests That May Affect Professional Judgment

11. DR 5-101(A) prohibits a lawyer from accepting or continuing employment if the exercise of the lawyer's professional judgment "will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest." DR 5-105(D) imputes this prohibition to every lawyer in the firm. The issue is whether it is a conflict under DR 5-101(A) for a lawyer to seek or give advice on the firm's ethical obligations to its client *while* the firm is representing those clients.

12. We believe that a lawyer's interest in ensuring compliance with the lawyer's ethical duties or obligations, or considering the effects of a possible violation of those duties, does not generally raise issues under DR 5-101(A). A lawyer's interest in carrying out the ethical obligations imposed by the Code is not an interest extraneous to the representation of the client. It is inherent in that representation and a required part of the work in carrying out the representation. It is, in other words, not an interest that "affects" the lawyer's exercise of independent professional judgment, but rather is an inherent part of that judgment. The law firm is not only entitled, but required, to consider the ethical implications of what it does on a daily basis. That the law firm does so through consultation does not change the interest being pursued. Such consultation, moreover, has been a part of law practice for generations and indeed is encouraged by the Code.[46] It is too much a part of the fabric and tradition of legal practice to require specific disclosure and consent.

13. This is not to say that the firm's interest in protecting itself can never give rise to a conflict of interest under DR 5-101(A), or that the firm has no obligation to disclose to the client the conclusions resulting from its seeking or giving advice on its ethical obligations or exposure. A firm's conclusion that it has failed to comply with its ethical obligations might, in some circumstances, reasonably be expected to affect its exercise of professional judgment. As we discuss below, when a law firm learns that a client may have a claim against the law firm arising out of the law firm's rendition of legal ser-

45 *See also* Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721 (2005); Jonathan M. Epstein, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011 (1994); Susan Saab Fortney, *I Don't Have Time To Be Ethical: Addressing the Effects of Billable Hour Pressure*, 39 IDAHO L. REV. 305 (2003); Susan Saab Fortney, *Ethics Counsel's Role in Combating the "Ostrich" Tendency*, 2002 PROF. LAW. 131 (2002); Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves?*, 19 GEO. J. LEGAL ETHICS 271 (1997); Barbara Gillers, *Preserving the Attorney Client Privilege for the Advice of a Law Firm's In-House Counsel*, 2000 PROF. LAW. 107 (2000); Peter B. Jarvis & Mark Fucile, *Inside an In-House Legal Ethics Practice*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 103 (2000); Milton R. Wessel, *Institutional Responsibility: Professionalism and Ethics,* 60 NEB. L. REV. 504, 512-13 (1981)*;* Gail Cox, *Some Firms Keep Own Counsel*, NAT'L L.J., June 30, 1997, at A1; Jonathan D. Glater, *In a Complex World, Even Lawyers Need Lawyers*, N.Y. TIMES, Feb. 3, 2004, at C1; Peter R. Jarvis, *Ethics Advisors Watch Over Firms*, NAT'L L.J., July 13, 1992, at A15; Gary Taylor, *Legal Costs Are Leading Law Firms, Like Their Clients, To Look Inside for Advice*, NAT'L L.J., July 18, 1994, at A1.

46 EC 18.

vices, or that the firm may need client consent in order to commence or continue another client representation, or in other circumstances where the client is called upon to act or decide, then the firm may need to disclose to the client the firm's conclusions with respect to the ethical issues.[47] But we do not believe that the consultation of an in-house ethics resource itself raises issues under DR 5-101(A).

DR 5-105(A) & (B): "Differing Interests"

14. DR 5-105(A) and (B) require a lawyer to "decline" or "not continue" multiple employment if the "exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by" the lawyer's "acceptance" or "representation" of "another client," or "if it would be likely to involve the lawyer in representing differing interests, except to the extent" permitted by DR 5-105(C). This latter rule permits multiple employment "if a disinterested lawyer would believe that the lawyer can competently represent the interests of each and if each consents to the representation after full disclosure of the implications of the simultaneous representations and the advantages and risks involved." We here treat the relationship between an in-house ethics adviser and the lawyers whom he or she is advising like that of an in-house corporate legal officer. The Code treats lawyers who practice as retained advisers to a corporation no different from other lawyers, and it is clear that in-house advisers have an attorney-client relationship with the corporation that employs them.[48] Thus, the question is whether an in-house ethics advisor represents interests "differing" from those of clients.

15. We think not. The Code defines "differing interests" to mean "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse or other interest."[49] The key phrase is that the interest must be one that will "adversely affect *either the judgment or the loyalty of a lawyer to a client*." Because the Code requires adherence to its rules in service of the many duties a lawyer owes, a law firm's consideration of its own legal and ethical obligations in connection with its representation of one or more clients cannot be said to implicate a "differing interest" that will adversely affect the lawyer's exercise of professional judgment nor the loyalty due a client within the meaning of the Code.[50]

16. To suggest otherwise is counter to everything the Code embodies. The purpose of consultation on a lawyer's ethical and legal obligations is to facilitate the inquirer's adherence to applicable law and rules. Seeking advice from an in-house ethics advisor is intended to facilitate the lawyer's proper exercise of professional judgment and a lawyer's appropriate discharge of the duty of loyalty owed to

47 N.Y. State 734 (2000).

48 *See*, *e.g.,* Code, Definitions ("law firm" defined to include "the legal department of a corporation or other organization"); DR 5-109(A) ("lawyer employed or retained by an organization" has the same duty of loyalty to the organization as client); EC 5-18 (same); ABA Model Rule 1.13(a) ("lawyer employed or retained by an organization represents the organization"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §96 cmt. b ("A lawyer may represent an organization either as an employee of the organization [inside legal counsel] or as a lawyer in private practice retained by the organization [outside legal counsel]. In general, a lawyer's responsibilities to a client organization are the same in both capacities.") *See also Rossi v. Blue Cross and Blue Shield*, 73 N.Y.2d 588, 592, 542 N.Y.S.2d 508, 509 (1989) ("The privilege applies to communications with attorneys, whether corporate staff counsel or outside counsel . . . .")

49 Code, Definitions.

50 *See generally* Marc I. Steinberg & Timothy V. Sharp, *Attorney Conflicts of Interest: A Need for a Coherent Framework*, 66 NOTRE DAME L. REV. 1 (1990); *Developments in the Law – Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244 (1981); Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823 (1992).

the client in the same way that an outside client's consultation with a lawyer in the firm is intended to facilitate the client's lawful achievement of legitimate objectives. Considering a lawyer's ethical obligation to represent a client within the bounds of the law, for instance, does not give rise to any rightful claim that such consideration alone adversely affects the lawyer's professional judgment or loyalty, for this is what lawyers are supposed to do. This is true whether the issue at hand is how to conduct oneself in the future or whether conduct in the past was a violation of the Code, for consideration of both questions is part of what clients and the legal system expect lawyers to do, serves to reinforce ethical behavior, and informs future conduct. Simply put, seeking advice on how best to accommodate a lawyer's multi-faceted obligations in service of one or more clients does not, without more, entail the kind of "differing interest" that DR 5-105(A) and (B) regulates. It follows that such consultation does not require compliance with DR 5-105(C) mandating, among other things, advance informed consent to the law firm's representation of itself.

Disclosure Obligations

17. Having concluded that a law firm need not obtain advance informed consent before consulting its own in-house counsel on matters that implicate a client's interests, we must resolve whether a law firm is obliged to advise the client that the firm has consulted with its in-house counsel about a matter of professional responsibility affecting the client. In our opinion, no such obligation exists. Rather, a law firm may in certain circumstances owe the client a duty to advise the client of the firm's *conclusions* about the firm's legal or ethical obligations, but the firm has no duty to advise the client that the law firm has consulted with its own in-house counsel in reaching those conclusions.

18. This result naturally flows from the conclusion preceding it. Clients are entitled to counsel who comply with applicable standards of professional responsibility. Those lawyers are entitled to seek advice on how best to comply with those standards, and to do so without apprehending that seeking the advice is itself a violation of those standards. The Code does not obligate a lawyer to tell a client how the lawyer has reached a conclusion concerning a particular matter of professional responsibility.

19. Whether a law firm has a duty to disclose the fact of its own internal consideration of ethical issues should not be confused with a law firm's duty, in many circumstances, to disclose the products of that consideration. Nothing in this opinion is intended to alter the lawyer's duty to advise a client of circumstances requiring a client to act. Thus, obviously, when a law firm concludes that the firm may not continue to represent the client under DR 5-101 or DR 5-105, then the firm must so advise the client. The timing and extent of a firm's disclosure obligations will vary with the circumstances. For example, if a firm is considering whether to represent differing interests, disclosure obligations arise when the firm determines that a client has a decision to make – that is, when the firm concludes that a client's informed consent is or later may become a prerequisite to its representation of this or another client. In that circumstance, the firm's duty is to provide the affected client(s) with all the information material to the client's decision whether to establish or continue the attorney-client relationship.[51]

51 *See* EC 78 ("A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations."); CHARLES WOLFRAM, *supra*, § 7.2.4, at 343-46.

20. Similarly, we have previously opined that "whether an attorney has an obligation to disclose a mistake to a client will depend on the nature of the lawyer's possible error or omission."[52] Because "lawyers have an obligation to keep their clients reasonably informed about [a] matter and to provide information that their clients need to make decisions relating to the representation," lawyers have an obligation to a client to disclose "the possibility that they have made a significant error or omission."[53] Whether an error or omission must be disclosed depends on all the relevant facts, such as whether the error or omission gives rise to a colorable malpractice claim, is capable of correction or is injurious to the client.[54]

CONCLUSION:

21. In considering its obligations to its clients, a law firm may consult with one or more lawyers in the Firm without thereby violating the Code's prohibition on the unauthorized representation of differing interests or the Code's prohibition on continuing employment if the exercise of the lawyer's professional judgment might be affected by personal interests. The law firm does not ordinarily need to disclose to the clients the fact of such consultation, but may need to disclose the conclusions reached, as when the firm concludes that it has a conflict or that it has made a significant error or omission.

(4-03)

52 N.Y. State 734 (2000).

53 *Id.*; *see* N.Y. State 396 (1975); EC 7-7; EC 7-8.

54 N.Y. State 734.

OPINION 790 (10/27/2005)

TOPIC: Law guardian's conflict of interest when child's parent received non-legal services from guardian's employer.

DIGEST: Conflict may exist where law guardian is employed by agency that has provided services to parent of guardian's ward.

CODE: DR 5-101(A).

QUESTION:

1. May a lawyer employed part-time by an agency that provides services in domestic violence matters accept Law Guardian assignments in the lawyer's private practice if a parent of the ward has received non-legal services from the agency?

FACTS:

2. A non-profit agency provides services in domestic violence disputes and similar types of matters. The services performed range from non-legal services, such as counseling, mental health care, daycare, and other housing and poverty services, to legal representation in civil matters. The agency employs two part-time attorneys and a paralegal. The two attorneys are also appointed from time to time as Law Guardians in their private practices.[55]

OPINION:

3. A Law Guardian appointed by a court to represent the best interests of a child must carry out the Guardian's responsibilities as an advocate of the child's interests and preferences, and an active participant rather than as a neutral party. The Law Guardian's responsibilities can include interviewing persons relevant to the proceeding, obtaining applicable records, reviewing documents exchanged between the parties, making discovery demands and responding to the adversary's requests, participating in pre-trial negotiations and hearings, retaining independent experts, and taking an active role in the trial process.[56]

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55 The Family Court Act lists situations where a court is to appoint a Law Guardian, including proceedings that involve custody disputes, juvenile delinquency, adoption or the placement of the child into the custody of a mental health facility. Family Ct. Act § 249 (2005). *See also* Family Court Act, Article 10 (abuse and neglect proceedings); Social Services Law §358-a (foster care approval proceedings); Social Services Law §392 (foster care review proceedings); Social Services Law §384 (termination of parental rights proceedings); Family Court Act, Article 7 (persons in need of supervision proceedings); Family Court Act, Article 3 (delinquency proceedings).

56 *See* N.Y. State Bar Ass'n, Law Guardian Representation Standards, Vol. II (1999), *available at* http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Shop/Law_Guardian_Representation_Standards_Vol__II__Custody_Cases/1999LAWGUARDIANREPVOLII.pdf.pdf; Fourth Department Law Guardian Program Administrative Handbook (2005), *available at* http://www.courts.state.ny.us/ad4/. See also Weiglhofer v. Weiglhofer, 1 A.D. 3d 786, 788, 766 N.Y.S.2d 727, 729 (3d Dep't 2003) ("Because it appears that Supreme Court ordered and relied on a 'report' from the Law Guardian, we take this opportunity to emphasize that a law guardian is the attorney for the children . . . and not an investigative arm of the court."); *Matter of Dominique v. Colleen C.-G.*, 17 A.D. 3d 1038, 1040, 794 N.Y.S.2d 195, 196 (4th Dep't 2005).

4. Because the Law Guardian is an advocate on behalf of the child, there is a potential for conflicts of interest when one of the child's parents has received non-legal services from an agency that employs the Law Guardian.[57] DR 5-101 states:

> A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's *financial, business, property, or personal interests*, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.
>
> (Emphasis added.)

5. It is in the public interest to encourage persons willing to undertake the duties of Law Guardian to do so, and persons employed by agencies providing poverty services are often peculiarly qualified to serve in that capacity. In the view of the Committee, the fact that the Law Guardian is employed by the agency does not, without more, constitute such a "financial, business, property or personal interest" that might reasonably be said to affect the Law Guardian's professional judgment in every case. Thus, such a lawyer is required to decline an appointment as Law Guardian on grounds of conflict of interest only when the lawyer's professional judgment will be or reasonably may be affected by his or her employment relationship with the agency.

6. Instances in which a conflict may arise between the lawyer's duty to the agency and a duty to the child include the following:

- the agency's lay or professional staff are likely to testify adversely to the interests of the child on a material issue, necessitating that the Law Guardian cross-examine the staff member;
- there is a potential claim that the agency failed to discharge its responsibilities to the ward, a claim that the Law Guardian would be obligated to evaluate;
- the services provided by the agency otherwise will be a significant issue in the case, particularly if the Guardian has a management position with the agency;
- the lawyer has knowledge of, or access to, information that is confidential to the agency (including the parents' records) that would be beneficial to the ward's case; and
- the lawyer serves subpoenas on the agency that the agency opposes on grounds, for example, of confidentiality or privilege.

57 *See*, *e.g.*, *Matter of Fargnoli v. Faber,* 105 A.D.2d 523, 525, 481 N.Y.S.2d 784, 786 (3d Dep't 1984) (declining to appoint non-profit organization as Guardian, finding that "the apparent contacts between petitioner [the mother] and the [non-profit organization] . . . demonstrate, at a minimum, the appearance of a possible conflict of interest, which may infringe upon the independent representation to which the daughters are entitled"); *B.A. v. L.A.,* 196 Misc. 2d 86, 94, 761 N.Y.S. 2d 805, 811 (Fam. Ct. Rockland Cty. 2003) (disqualifying Law Guardian and stating, "the Law Guardian's professional judgment reasonably may be influenced since her adversary [the lawyer for the parent] is a member and president of the Board of Directors of the Legal Aid Society, the agency by which she is employed").

7. In these circumstances – and others in which the lawyer's professional judgment or zeal on behalf of the client might be affected – the lawyer should decline to serve as Law Guardian. If a conflict becomes apparent only after commencement of the Guardianship, the lawyer should withdraw at that time.

8. DR 5-101(A) permits a conflict to be waived if a "disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest." A conflict cannot be cured by consent of the child, however, because a minor is incapable of giving informed consent for purposes of the rule.[58]

CONCLUSION:

9. Depending on the circumstances, a DR 5-101(A) conflict may exist when an agency's part-time lawyer employee acts as a Law Guardian for a child whose parent has received services from the agency, even though the lawyer performed no legal services for the parent at the agency. If a conflict exists, the child is unable to consent to the representation.

(23-05)

58 *See Matter of H. Children,* 160 Misc. 2d 298, 301, 608 N.Y.S.2d 784, 786 (Fam. Ct. Kings Cty. 1994) ("As a matter of law, however, a minor must be presumed to lack the ability to knowingly make such a waiver."); *Shaikh v. Waiters,* 185 Misc. 2d 52, 56, 710 Ct. N.Y.S.2d 873, 877 (Sup. Nassau Cty. 2000) ("Consent to compromised representation by a minor is invalid, and the representation of multiple plaintiffs in such a situation is thus improper.")

2006

OPINION 791 (02/01/2006)

TOPIC: Referrals and solicitation.

AMPLIFIES: N.Y. State 741 (2001)

DIGEST: A lawyer may not participate in an organization that requires the lawyer to refer potential clients or customers to other lawyers or to nonlawyer members in exchange for their referral of legal business, or charges membership fees and other fees and requires nonlawyer members to refer potential clients to the lawyer.

CODE: DR 2-103(B)

We have been asked to reconsider N.Y. State 741 (2001), in which we concluded: "A lawyer may not participate in a business networking organization that requires the lawyer to refer clients to other members in exchange for their referral of legal business." This opinion reaffirms and expands on N.Y. State 741.

FACTS:

The inquiring attorney belongs to a local chapter of a business networking organization. The organization requires members generally to bring referrals or visitors to the chapter meetings, and permits local chapters to set a minimum number of referrals or visitors. The inquirer states, however, that, unlike the business networking organization discussed in N.Y. State 741, her chapter does not require lawyers to refer clients to other members in exchange for their referral of legal business. In addition, the policies of the organization to which the inquirer belongs provide that professional standards outlined in a formal code of ethics supersede the organization's policies.

In exchange for the privilege of membership in the local chapter, a member pays three fees: (1) an "initial registration fee" that goes to the national umbrella organization; (2) an "annual fee" whose purpose is not specified; and (3) an occasional "monthly fee" that is used to pay for working space and breakfast.

OPINION:

A. The Continued Viability of N.Y. State 741.

After reviewing and reconsidering N.Y. State 741 (2001), we continue to believe that its reasoning is sound and its conclusion is correct. A lawyer may not participate in a business networking organization that requires the lawyer to refer clients to other members in exchange for their referral of legal business, and that conclusion is correct whether or not the organization charges the lawyer any membership fees or other fees.

While the inquirer's chapter does not require a lawyer to make referrals to the other members, we believe that an attorney's participation in that chapter would violate DR 2-103(B) of the New York Code of Professional Responsibility because it requires nonlawyer members to make referrals to the lawyer. Even if professional standards in a formal code of ethics (such as the New York Code of Professional Responsibility) supersede the organization's policies for lawyers, we have no indication that similar professional standards governing the various nonlawyer members of the local chapter would supersede their mandate to bring referrals to other chapter members.

In effect, by paying the initial registration fee and the annual fee, the lawyer is paying for referrals. We briefly addressed that aspect of the organization at issue in N.Y. State 741. We will elaborate on that aspect here.

B. The Relevance of DR 2-103(B).

DR 2-103(B) provides as follows:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:
>
> A lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuous basis as permitted by DR 1-107, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; or
>
> A lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by DR 2-107.

In our view, the policies and fees of the networking organization violate DR 2-103(B). A lawyer who pays to join and maintain membership in the organization is giving something of value to the organization, and is giving that value knowing that membership will, at least in part, generate recommendations by other members that may lead to employment of the lawyer by new clients. A lawyer may not pay dues to an organization that requires its members to refer potential clients to the lawyer.

The exceptions to DR 2-103(B) do not apply, for the reasons set forth below.

The networking organization does not fit within the exception in DR 2-103(B)(1), because the organization does not constitute a "contractual relationship" with nonlegal professionals pursuant to DR 1-107. Even if the networking organization qualified as a "contractual relationship" under DR 1-107, it would not satisfy the exception in DR 2-103(B)(1) because members must pay "monetary or other tangible consideration" (*i.e.,* the initial and annual fees) to generate referrals, which violates the "provided however" clause of DR 2-103(B)(1).

The networking organization also does not fit within the exception in DR 2-103(B)(2), because the organization is not a "qualified legal assistance organization." That term is defined in the

Definitions section of the New York Code of Professional Responsibility as "an office or organization of one of the four types listed in DR 2-103(D)(1) through (4), inclusive, that meets all of the requirements thereof. The four types listed in DR 2-103(D)(1)-(4) are: (1) a legal aid office or public defender office, (2) a military legal assistance office, (3) a lawyer referral service, or (4) an organization that recommends, furnishes, or pays for legal services to its members or beneficiaries. The networking organization is not any of these types.

Nor does the payment to the networking organization satisfy the test of the final clause of the exception in DR 2-103(B)(2), "referral fees to another lawyer as permitted by DR 2-107." We are not talking here about referrals arrangements between lawyers in different firms, which present very different issues from referral arrangements between lawyers and nonlawyers.

CONCLUSION:

Upon reconsideration, we adhere to our opinion in N.Y. State 741 (2001), which concluded that a lawyer may not participate in a business networking organization that requires the lawyer to refer clients to other members in exchange for their referral of legal business, whether or not the organization charges the lawyer any fees. We add here that a lawyer also may not participate in a business networking organization that charges membership dues and/or other fees and requires nonlawyer members to refer potential clients to members of the organization who are lawyers.

(20-05)

OPINION 792 (02/14/2006)

TOPIC: Lawyer advertising; testimonial by celebrity client.

DIGEST: Lawyer may advertise on TV or radio using a testimonial by a celebrity client so long as the testimonial is not false, deceptive or misleading and otherwise satisfies the record-keeping requirements for any radio and TV advertising. However, the lawyer may not compensate or give anything of value to the celebrity client for the testimonial, including compensation for the celebrity's time and services in making it.

CODE: DR 2-101(A); 2-101(B); 2-101(F); 2-101(K); DR 2-103(B).

QUESTIONS:

1. May a lawyer or law firm advertise on radio or TV by using a celebrity client to express the client's satisfaction with the law firm's services and the results obtained?

2. If so, may the celebrity client be identified by name?

3. May the lawyer or law firm pay the celebrity client for the client's time and services rendered in making the testimonial?

OPINION:

4. The Lawyer's Code of Professional Responsibility (the "Code") generally permits advertising and other publicity by lawyers provided that it is not "false, deceptive, or misleading." DR 2-101(A). Thus, testimonials by celebrity clients – advertisements using a celebrity client to express satisfaction with the law firm's services and the results obtained – are not permissible if they are false, deceptive, or misleading.

5. In N.Y. State 614 (1990), this Committee concluded that the Code does not impose a ban on all radio or television advertising that uses client testimonials. In that opinion, however, we concluded that it would be improper to use client testimonials describing prior results that "are statements of 'overblown assurances of client satisfaction,' statements that create unjustified expectations or 'false hopes' or statements that fail to contain sufficient information, thus rendering the statement false, deceptive or misleading." We further opined that, in order to prevent misleading the broadcast audience, "some disclaimer should be joined with client endorsements describing prior results to the effect that the endorsement does not guarantee or predict a similar outcome with respect to any future matter on which the lawyer may be retained."

6. N.Y. State 614 was based in part on DR 2-101(B), which at the time prohibited advertisements that contain "puffery, self-laudatory claims regarding the quality of the lawyers' legal services, and claims that cannot be measured or verified." DR 2-101(B) was repealed by the 1999 amendments to the Code. Thereafter, in N.Y. State 771 (2003), which addressed client testimonials on the Internet, this Committee reached conclusions very similar to those we had reached in N.Y. State 614. We concluded that where such client testimonials otherwise would be misleading (but not false or deceptive), a disclaimer like that described in N.Y. State 614 "may be sufficient to bring the advertisement into

compliance with DR 2-101(A)," and we further stated that "compliance with DR 2-101(A) may require additional cautionary language if the testimonial . . . is misleading for reasons beyond the mere report of a positive outcome." N.Y. State 771.

7. We have also previously concluded that client testimonials are not invariably misleading, N.Y. State 771; N.Y. State 614, and we see no reason to conclude otherwise just because the client is a celebrity. Thus, in using a celebrity client testimonial, a lawyer or law firm should ensure that the testimonial is not false, deceptive or misleading in nature. If a true, non-deceptive celebrity client testimonial is misleading, the law firm should determine whether a disclaimer accompanying that client testimonial could be fashioned that would dispel the otherwise misleading quality of the testimonial.

8. We see no reason why the mere identification of the celebrity client by name would be problematic. Indeed, we assume that the identity of the celebrity will be known to at least some of the intended audience merely by virtue of the celebrity's voice or appearance.

9. On the other hand, we conclude that it would violate the Code to pay the celebrity client for a testimonial. DR 2-103(B) states that "[a] lawyer shall not compensate or give anything of value to a person . . . to recommend . . . employment by a client, or as a reward for having made a recommendation resulting in employment by a client," with exceptions not relevant here. We consider the celebrity client's testimonial a recommendation of employment and, therefore, payment of the celebrity client by the lawyer or law firm would violate DR 2-103(B). *Compare* N.Y. State 661 n.2 (1994) (DR 2-103(B) prohibits payment of a client to obtain the client's authorization to dramatize his or her testimonial).

10. In reaching this conclusion, we reject the argument that payment to the celebrity client is merely payment of the cost of the advertisement and, therefore, it should be permissible to make such a payment for the celebrity's time and services in making the advertisement. In N.Y. State 661 we implied that it is permissible to pay non-client actors who participate in lawyer advertisements for their time and services. But when the celebrity is the person actually making the recommendation, he or she is more than an actor with respect to the testimonial; the celebrity is the client making the recommendation. In those circumstances, we believe that there is too great a likelihood that such payment would be a purchase of the celebrity client's willingness to endorse the lawyer and would create the evil at which DR 2-103(B) is directed – a nonlawyer's having "an incentive to refer to lawyers who will pay the highest referral fee, rather than to lawyers who can provide the most effective services." Restatement Third, The Law Governing Lawyers §10, cmt. d (2000).

11. Finally, we note that the Code imposes certain record-keeping and other requirements upon lawyers who engage in any radio and television advertising. *See* DR 2-101(F); DR 2-101(K)

CONCLUSION:

12. A lawyer or law firm may advertise on radio or TV using client testimonials so long as (i) they are not false, deceptive, or misleading and (ii) they satisfy the record-keeping and other Code requirements relating to radio or TV advertising. The celebrity client may be identified by name in such testimonials. But, the lawyer or law firm may not compensate or give anything of value to the celebrity client for the testimonial, including any compensation to the celebrity client for the client's time or services in making the testimonial.
(29-05)

OPINION 793 (03/17/2006)

TOPIC: Conflicts of interest relating to of counsel attorneys

OVERRULES: N.Y. State 262 (in part)

DIGEST: Except for personal conflicts under DR 5-101(A), conflicts imputed to an attorney under DR 5-105(D) will also be imputed to all lawyers in any firm with which the attorney has an of counsel relationship; where two firms share an of counsel relationship, conflicts of one firm will be imputed to the other.

CODE: DR 2-102(A)(4), DR 4-101, DR 5-101(A), DR 5-105(A), (D), (E), DR 5-108

FACTS:

1. Attorney L has an of counsel relationship with both the XYZ law firm and the ABC law firm. The DEF law firm has an of counsel relationship with the MNO law firm.

QUESTIONS:

2. Are conflicts of interest that arise out of Attorney L's relationship with the XYZ Firm imputed to the attorneys associated with the ABC Firm and vice versa?

3. Are conflicts attributable to the DEF Firm imputed to the MNO Firm and vice versa?

OPINION:

4. DR 2-102(A)(4) of the Lawyer's Code of Professional Responsibility provides that "[a] lawyer or law firm may be designated 'Of Counsel' on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate." We have interpreted an of counsel relationship to mean that the of counsel lawyer is "available to the firm for consultation and advice on a regular and continuing basis."

N.Y. State 262 (1972); *see also* ABA 90-357 (characterizing the of counsel relationship as "close, regular [and] personal"); N.Y. City 1996-8 (same.[1]

5. DR 5-105(D) prohibits a lawyer from representing a client in many circumstances where another lawyer in the firm would be prohibited from doing so:

> While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited

1 In N.Y. State 262 (1972) we opined that a law firm could not be designated as "of counsel" to another law firm. DR 2-102(A)(4) was amended in June, 1999 to permit such a relationship. To the extent N.Y. State 262 holds otherwise, it is overruled. We also opined that a lawyer could not be designated as "of counsel" to more than one law firm. We no longer hold to that view. We note, however, that there is a practical limitation on the number of such arrangements that a lawyer may enter into because of the requirement that an of counsel attorney have a significant relationship with the firm. *See* N.Y. State 773 (2004); ABA 351 (1984) (of counsel designation requires a relationship that is "close and regular, continuing and semi-permanent"); N.Y. City 2000-4 (adopting the same standard).

from doing so under DR 5-101(A), DR 5-105(A) or (B), DR 5-108(A) or (B) or DR 9-101(B) except as otherwise provided therein.

6. Imputation of conflicts from one lawyer in the firm to another lawyer in the firm applies to partners and associates, as well as attorneys who have an of counsel relationship to the firm. In N.Y. State 773 (2004), we concluded that a lawyer who has an of counsel relationship is "associated" with a firm for purposes of imputation of conflicts of interest. *See* ABA 90-357; N.Y. City 1995-8; *see also Nemet v. Nemet*, 112 A.D.2d 359 (of counsel relationship leads to imputed disqualification), *appeal dismissed*, 66 N.Y.2d 602 (1985).[2] We agreed with these authorities and stated that "if a lawyer acting alone would be disqualified from a particular representation based on any of the rules enumerated in DR 5-105(D), then that disqualification is imputed to a law firm with which that lawyer has an 'of counsel' relationship." N.Y. State 773.

7. Thus, any representation that lawyer L could not undertake personally based on the rules enumerated under DR 5-105(D) could not be undertaken by any other lawyer associated with the XYZ Firm and vice versa. Similarly, any representation that lawyer L could not undertake personally could not be undertaken by any other lawyer associated with the ABC Firm and vice versa.

Imputation of Conflicts Among Firms that Have a Common Of Counsel Attorney

8. In this inquiry we now turn to the question whether conflicts imputed to L by virtue of his or counsel relationship with the XYZ Firm will be imputed to lawyers associated with the ABC Firm. For example, if attorney X, a partner with the XYZ Firm, is disqualified from a particular representation under DR 5-105(A), all lawyers associated with the firm XYZ, including L, who has only an of counsel relationship, also are precluded from undertaking the representation. DR 5-105(D). Does that disqualification extend as well to all the lawyers with whom L is associated in the ABC Firm? We conclude that generally it does.

9. DR 5-105(D) might be read literally to hold that while X's conflicts are imputed to L, they could not be re-imputed to anyone outside of the XYZ Firm. DR 5-105(D) provides for imputation when a lawyer practicing alone "would be prohibited from [undertaking the representation] under DR 5-101(A), DR 5-105(A) or (B), DR 5-108(A) or (B), or DR 9-101(B)." L's conflict derives from DR 5-105(D), not from one of the enumerated provisions and thus arguably there is no basis to impute that conflict to lawyers associated with the ABC Firm. In N.Y. State 670 (1994), however, this Committee opined: "In cases where the primary disqualification does not fall within the parameters of one of the enumerated Disciplinary Rules, vicarious disqualification is dependent on the facts and circumstances of the individual case."

10. Turning to the facts and circumstances of the inquiry, we believe that in most cases the reasons for the imputation to L of the conflicts of lawyers associated with XYZ apply equally to the imputation to the lawyers associated with ABC. As noted in the *Restatement of the Law Governing Lawyers*:

2 In *Hempstead. Video, Inc. v. Incorporated Village of Valley Stream,* 409 F.3d 127 (2d Cir. 2005), the court refused to disqualify a lawyer and his firm because of imputation of conflicts from another attorney who was of counsel to the firm. Despite the title "of counsel," the attorney did not have a significant continuing relationship with the firm and had no access to confidences and secrets of the firm's clients.

> A lawyer who is of counsel to a firm often has more limited access to confidential client information than firm partners and associates and usually a smaller financial stake in the firm. Nonetheless, the incentive to misuse confidential information, the difficulty of determining when it has been misused, the ostensible professional relationship, as well as the administrative ease of a definite rule, justify extending imputation to lawyers having an of-counsel status.
>
> Restatement Third, *The Law Governing Lawyers* § 123 cmt. c(ii) (1998).

11. We previously opined that a lawyer with an of counsel relationship is associated with a law firm for purposes of the imputation of conflicts. N.Y. State 773. By holding oneself out as having an of counsel relationship with a firm, a lawyer conveys to the public that the lawyer has a continuing relationship with a firm that is close and regular. There is a presumption that a lawyer with an of counsel relationship has access to confidences and secrets of the firm's clients. Thus, the of counsel lawyer has a duty of confidentiality, as well as a duty of loyalty, to the clients of both firms with which the lawyer has an of counsel relationship. We believe that this duty of confidentiality must extend to the other lawyers in the firm.[3]

12. Suppose, for example, that lawyer X, a partner in the XYZ Firm, has agreed to represent Client 1 in litigation against Client 2. Client 2 approaches lawyer Y, also a partner in the XYZ Firm, and asks lawyer Y to represent Client 2 in this litigation. Lawyer Y must decline, as must every lawyer associated with the firm, including L. DR 5-105(A). This disqualification is required in part because all of the lawyers are presumed to have access to confidential information about Client 1 that might be used to Client 1's disadvantage in the representation of Client 2.[4] This imputation should apply as well to all lawyers associated with L in Firm ABC. Because the relationship between L and ABC must be a close, continuing relationship,[5] the presumption arising from L's access to the confidences of Client 1 should be imputed to the lawyers in Firm ABC so as to preclude representation of Client 2 in litigation against Client 1.[6]

13. Another reason for the imputation of conflicts is to protect the principle of loyalty to a client. *See* Model Rules of Professional Conduct R. 1.10 cmt 2 ("The rule of imputed disqualification . . . gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm."). A client of the XYZ Firm is entitled to loyalty from all lawyers associated with XYZ regardless of other arrangements they have made to practice law. Similarly, the client is entitled to the law-

3 This rule would apply as well where one lawyer was a partner or associate in two firms. *See Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976).

4 The lawyer does not need to actually convey confidences and secrets to the lawyers at ABC, which of course would be a violation of DR 4-101. It is the mere access to confidences and secrets that triggers the obligation. *Emle Indus. Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973) (disqualification analysis hinges on whether attorney could have acquired information, not whether it was actually acquired). *Cf. Solow v. W.R. Grace*, 83 N.Y.2d 303, 306; 632 N.E.2d 437, 438; 610 N.Y.S.2d 128 (1994) (disqualification may be avoided by demonstrating that confidential information was not communicated); N.Y. State 723 (1999) ("In some circumstances, the moving lawyer will not be presumed to have acquired confidences and secrets").

5 *See* note 1.

6 *Cf.* N.Y. State 715 (1999) (contract lawyer could not work for two firms representing adverse clients if he is deemed to be associated with both firms even if contract lawyer does not work on the matter); N.Y. State 672 (1995) (implying that conflicts arising under one of the enumerated rules in DR 5-105(D) that would be imputed from one partner to a second partner who was a part-time prosecutor would also be imputed to the DA's office).

yer's continued loyalty when he simultaneously practices at another firm, as well as the loyalty of the lawyers at that second firm.

14. Similarly, the lawyers in two firms that share an of counsel lawyer owe duties of confidentiality to former clients of both firms. Just as the duty of confidentiality bars the lawyers in a firm from appearing adverse to former clients of the firm in matters substantially related to the prior representation, DR 5-108(B); *see* N.Y. State 723 (1999), lawyers in a firm that share an of counsel lawyer with that first firm are subject to the same prohibition.

15. This position is in substantial accord with that taken by the New York City Bar, which treated the of counsel attorney and the firms as one unit where the attorney was of counsel to more than one firm. The committee stated:

> If the law firm reaches the conclusion that an "of counsel" designation is appropriate, it should bear in mind that for purposes of analyzing conflicts of interest, "of counsel" relationships are treated as if the "counsel" and the firm are one unit. N.Y. City 1995-8. The implication of the "of counsel" relationship will be even more far reaching if the per diem attorney is considered "of counsel" to one or more other law firms; conflicts of interest applicable individually to any of the firms or attorneys would be imputed to all of them.

N.Y. City 1996-8.

It is also in substantial accord with the position of the ABA, which imputed all conflicts of two firms due to a common of counsel lawyer.

> In consequence there is attribution to the lawyer who is of counsel of all of the disqualifications of each firm, and, correspondingly, attribution from the of counsel lawyer to each firm, of each of those disqualifications. . . . [T]he effect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications.

ABA 90-357.[7]

16. We conclude that the result will often be different where the conflict arises not from a conflicting representation of a client by another lawyer in one of the firms but from a personal interest of such a lawyer. DR 5-101(A) prohibits representation where an attorney's financial, business, personal or property interests might affect the exercise of the attorney's professional judgment. While the Code requires disqualification of the of counsel attorney, as well as all other attorneys in the firm, when one

7 In ABA 90-357, the committee reconsidered its former view that a lawyer could not be of counsel to more than two firms, and concluded that the Model Rules contained no such restriction. The opinion makes clear that the cost and consequence of multiple relationships was conflict imputation. *See also* California Op. 1993-129 (where lawyer is of counsel to two firms, the firms are treated as one for conflicts purposes); Massachusetts Op. 01-1 (same); Maine Op. 175 (2001) (same); Ohio Op. 97-2 (1997) (same); Vermont Op. 99-5 (same); Wisconsin Op. E-93-1 (adopting ABA 90-357). ABA 90-357 rests on Model Rule 1.10, which provides for imputation of conflicts arising from enumerated rules that are similar to the rules listed in DR 5-105(D), except that Model Rule 1.10 exempts personal interest conflicts from firm-wide imputation if the conflicts do "not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." Model Rule 1.10(a).

of the firm's lawyers is disqualified because of a personal conflict under DR 5-101(A), *see* DR 5-105(D), we do not believe that this circumstance automatically requires the disqualification of the attorneys in the other firm with which the common lawyer has an of counsel relationship. For example, suppose that lawyer A is unable to undertake representation of T Co. in litigation against D Co. because A's father is the treasurer of D Co. and A believes that might affect A's ability to represent T Co. While none of the other 1,000 lawyers in the ABC firm who knew of the relationship, including the of counsel lawyer, could represent T Co. (absent consent), we see no reason why a lawyer in the XYZ Firm, other than the of counsel lawyer, could not represent D Co. On the other hand, there may be circumstances where such cross-imputation would be warranted. For example, suppose the of counsel lawyer was one of only three lawyers in each firm and was a major public figure. In that case, where the of counsel lawyer may be prominently associated with both firms in the minds of the firms' clients and where the relationship among the lawyers of the firms is likely to be particularly close, all lawyers in both firms might be disqualified.

17. We emphasize that imputation of conflicts would not occur where a lawyer's relationship with the firm is more attenuated than that of an of counsel relationship. For example, where a lawyer from Firm A performs legal work on a contract basis with Firm B, or appears as local counsel in a litigated matter principally handled by Firm B, or consults with Firm B on a one-off basis, the lawyer is not deemed "associated" with Firm B. The relationship would not be close, regular, or personal, and the lawyer would not have general access to confidences and secrets of Firm B. Thus none of the lawyer's conflicts from Firm A would be imputed to Firm B.[8] Conversely, even where there is no formal of counsel relationship, imputation may be required in specific cases where the lawyer from Firm A has participated in a matter against a Firm B client and had access to confidences and secrets.[9]

Imputation Where One Firm is Of Counsel to Another Firm

18. A similar question arises when the DEF Firm enters into an of counsel relationship with the MNO Firm. For example, if any lawyer from the DEF Firm is precluded from undertaking a representation, is that disqualification imputed to all lawyers associated with the MNO Firm? Although the Code is silent as to imputed disqualification with respect to *law firms* sharing an of counsel relationship, we do not believe it makes any difference whether the shared relationship is with one lawyer or an entire firm. In order to create an of counsel designation with another firm, the two firms must have a continuing relationship that, for example, would entail access to confidences and secrets of the other firm's clients.[10] Such access should preclude the MNO Firm from representing any client that the DEF Firm could not represent under the enumerated provisions of DR 5-105(D). Were we to conclude

8 *See, e.g., Bison Plumbing City, Inc. v. Benderson*, 281 A.D.2d 955, 722 N.Y.S.2d 660, 661 (4th Dept. 2001) (law firm's disqualification not imputed to "special counsel" to law firm); *Shelton v. Shelton*, 151 A.D.2d 659, 542 N.Y.S.2d 719 (2d Dep't 1989) (mere rental of office space does not create an association where conflicts are imputed); *Gray v. Memorial Medical Center, Inc.*, 855 F. Supp. 377 (S.D. Ga. 1994) (although lawyer had an of counsel title, court found that he was actually a part-time independent contractor and refused to impute conflicts).

9 *See, e.g., Fund of Funds Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977) (entire law firm disqualified where one of its lawyers worked extensively as a co-counsel with another firm that could not undertake the representation).

10 As a practical matter, such a relationship is much like that of two branch offices of a single law firm. For example, DR 5-105(D) prohibits an associate working in the New York office of a law firm from representing a client that could not be represented by an associate in the Seattle office of the firm.

otherwise, a law firm could avoid the imputation required by multiple of counsel relationships by designating the entire firm, rather than a single attorney or multiple attorneys as of counsel.[11]

Conflicts Checks

19. One implication of the possibility of one lawyer having multiple of counsel relationships or of firms having a reciprocal of counsel relationship that imputes disqualifications between the firms is the necessity to do a more extensive conflicts check. DR 5-105(E) provides:

> A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with DR 5-105(D). Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of DR 5-105(D) occurs, shall be a violation by the firm. In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of DR 5-105(D) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of DR 5-105(D).

20. In N.Y. State 720 (1999), we opined that "the intent of the provision can only be effected if a firm adds to its system information about the representations of lawyers who join the firm." This would be true whether the lawyer joining the firm is a partner or associate or has an of counsel relationship. Thus, when lawyer L establishes an of counsel relationship with ABC, the firm has an obligation not only to make inquiries about L's own representations but also the representations of the XYZ Firm so that the ABC lawyers have sufficient information to avoid a violation of DR 5-105(D).[12] Conversely, when L establishes an of counsel relationship with XYZ, that firm has an obligation to make inquiries about the representations of the ABC Firm. This would include past representations because both firms would be precluded from undertaking a current representation of a client whose interests were adverse to a former client of either firm, where the matters were substantially related. DR 5-108; DR 5-105(D) (imputing DR 5-108 conflicts). This is also an ongoing obligation because L and each firm will undertake new representations that may present conflicts for the other firm.[13]

21. Similar obligations arise when the DEF Firm forms an of counsel relationship with the MNO Firm. Because these two firms are essentially treated as one firm, one conflict checking system would cover both firms and all their attorneys.

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11 *See also* Mississippi Op. 180 (1990) (requiring reciprocal attribution of disqualification where two law firms are of counsel); Wisconsin Op. E-93-1 (same).

12 For the possibility that this information may be a confidence or secret or may be considered proprietary information, see N.Y. State 720 (1999). Note that DR 5-105(E) does not require the firm to keep records of personal conflicts under DR 5-101(A). As noted above, in most circumstances there would be no cross-imputation of such conflicts.

13 *See* Massachusetts Op. 01-1 (on taking on a new matter, conflicts databases of both firms where lawyer is of counsel must be checked); Vermont Opinion 99-5 (two firms sharing one lawyer on an of counsel basis must develop a procedure to screen for conflicts).

CONCLUSION:

22. For the reasons explained above, both questions are answered in the affirmative.

(26-05)

OPINION 794 (03/17/2006)

TOPIC: Conflicts among various projects of a law school legal clinic, temporary or contract lawyers.

DIGEST: If the various divisions of a law school legal clinic share common office space and file space, the conflicts of the entire clinic are imputed to the firms of lawyers who supervise only one clinic division or project, and the conflicts of the law firms are imputed to the clinic.

CODE: DR 2-103(D); DR 2-110; DR 5-105; DR 5-108; DR 5-110; DR 9-101; EC 2-25; EC 5-21; EC 5-23.

QUESTION:

1. A law school's legal clinic assigns different personnel to different "projects" (representations grouped by practice area such as a civil rights project or low-income tax project). If lawyers supervise one of the clinic's projects, are all of the clinic's conflicts imputed to the lawyers' respective firms, and *vice versa*? Can any steps be taken to prevent such imputation?

OPINION:

2. So long as the clinic's students work in a common space and have shared access to physical files, the entire legal clinic, including the project in question, is a law firm within the meaning of the Code so that the clinic's entire set of conflicts are imputed to the lawyers' firms, and *vice versa*.

Background

3. A New York lawyer is director of the legal clinic at a law school located in New York State. The legal clinic provides *pro bono* legal services in which law students, supervised by faculty members admitted to the New York bar, represent mostly low-income persons in matters ranging from civil rights actions to domestic violence complaints. Recently, the clinic has established a new project, which will engage the clinic in representing persons allegedly harmed by improper commercial practices. To facilitate this endeavor, this "Consumer Project" has enlisted the aid of one faculty member who is also "of counsel" to a private law firm, as well as another private practitioner who is a partner in a law firm and will be a clinical instructor. The regular faculty member will direct the Project and also "consult" on individual cases. The clinical instructor will supervise the cases and work with the students to represent the Project's clients.

4. The clinic's director wishes to clarify whether the lawyers' participation in the Consumer Project will result in the imputation of conflicts from the entire clinic to the lawyers' firms and *vice versa*. The director is concerned that, in view of the extent of the clinic's other projects, the exercise of clearing conflicts with respect to those other projects may be so burdensome as to discourage the participation of the private law firms in the Consumer Project.

5. In particular, the clinic inquires whether the following segregation measures are sufficient to prevent imputation of conflicts of the other projects to the law firms:

First, the offices of the supervising lawyers will not be part of the clinic's common space, though students assigned to the Consumer Project will continue to work side-by-side with students assigned to other projects.[14]

Second, a separate client information database for storing documents electronically will be established to which only Consumer Project personnel will have access. The other projects will share a separate information database, which will be inaccessible to those involved in the Consumer Project. Client files will likewise be separated, but physically located in the common clinic space.

Third, new matters for the Consumer Project will be cleared for conflicts against the legal clinic's conflict checking system and the conflict checking systems of the two law firms whose lawyers will be participating in the Consumer Project. New matters for the clinic's other projects will likewise continue to be cleared for conflicts against the clinic's conflict checking system, but will *not* be cleared against the systems of the law firms.

Fourth, the legal personnel and administrative assistant involved in the Consumer Project will not have access to the information database of, or responsibility for, any other non-Consumer Project matter.

Finally, the clinic intends to use separate letterhead for the Consumer Project, and to conduct confidentiality training for the students participating in its work.

6. The inquirer asks whether the proposed measures are sufficient to prevent imputation of (i) the clinic's non-Consumer Project representations to the law firms and (ii) the law firms' representations to the other projects of the legal clinic.

7. We conclude that the proposed measures are not sufficient to prevent cross-imputation of conflicts, because of the sharing of work space and physical file space.

Analysis

8. With limited exceptions, the Code of Professional Responsibility treats a law clinic as a law firm. The Code defines a "law firm" to include a "qualified legal assistance organization."[15] A "qualified legal assistance organization" means an "office or organization of one of the four types listed in DR 2-103(D)(1) through (4),"[16] which includes a legal aid office operated or sponsored by a law school.[17] Thus, unless the Code otherwise provides, the rules governing law firms are equally applicable to the law school's legal clinic.[18]

14 The inquirer does not so state, but we assume for purposes of this opinion that the students could not participate in two projects at once, and could not move from one project to another, at least without additional conflict checking.

15 Code, Definitions ¶ 2.

16 *Id.* ¶ 8.

17 DR 2-103(D)(1)(a).

18 S*ee* N.Y. State 688 (1997) (applying DR 5-101 to legal clinic).

9. These rules include the vicarious disqualification rules of DR 5-105(D). DR 5-105(D) says that, "[w]hile lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so" under DR 5-101 (conflicts involving a lawyer's personal or business interests); DR 5-105(A) or (B) (conflicts involving differing client interests); DR 5-108(A) or (B) (conflicts involving former clients); or DR 9-101(B) (conflicts involving prior government service).

10. The Code provides an exception to the rules of imputation for legal clinics. DR 5-110(A) states:

> A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer participates, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm, provided that the lawyer shall not knowingly participate in a decision or action of the organization:
>
> > 1. If participating in the decision or action would be incompatible with the lawyer's duty of loyalty to a client under DR 5-101 through DR 5-111; or
> >
> > 2. Where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer's firm.

11. A law school legal clinic is a not-for-profit legal services organization within the meaning of this rule.[19] The public policy underlying DR 5-110 is to encourage lawyers to contribute *pro bono* legal services and to assist in making legal counsel available to clients with limited means.[20] The rule, however, applies only to lawyers serving as a "director, officer, or member" of such an organization, and does not apply to a lawyer representing clients through the organization.[21] In other words, DR 5-110 distinguishes between lawyers who, on the one hand, administer the organization, make policy, or teach, and on the other hand, the lawyers who represent clients as part of the organization's rendition of legal services. Accordingly, DR 5-105(D) applies in full force to lawyers engaged in the representation of clients through the legal clinic.

12. Whether a lawyer participating in a legal clinic is engaged in the representation of a client is a fact-intensive inquiry. In the circumstances before us, we understand that the full-time faculty member's principal role will be to teach the legal subjects of relevance to the Project, with occasional "consultation" on specific matters. Whether these consultations give rise to the formation of an attorney-client relationship between the teacher and the clinic's client in particular matters depends on all the circumstances. Such a relationship is most likely to exist when the instructor is in receipt of a particular client's confidences and secrets and actively engaged in providing legal services to the client.

19 *See* N.Y. State 688 (1997).

20 EC 2-25.

21 *See* N.Y. State 688 (1997). *See also* N.Y. State 643 (1993) (legal service organization's board member may represent client against organization's client whether board member's client is paying or *pro bono*).

On the other hand, we do not think that a teacher's commentary on abstract facts gives rise to an attorney-client relationship.

13. In this situation, the clinic presumes that the nature of the services provided by both of the supervising instructors consists, at least in part, of attorney-client relationships between the instructors and the clinic's clients. In trying to accommodate this fact to the clinic's ethical obligations as a law firm, the clinic likens the faculty members' situation to that of temporary or contract lawyers. The clinic argues that the safeguards it proposes to implement are akin to those deemed sufficient to relieve temporary or contract lawyers hired for particular matters from DR 5-105(D)'s imputation rule. We disagree.

14. This Committee and others have outlined the circumstances in which contract or temporary lawyers may be treated as "associated" in a firm for imputing conflicts.[22] The common and predominant theme of these opinions is the protection of client confidences and secrets. As we said in Opinion 715, whether a lawyer "should be regarded as being associated with a firm while working on a matter for the firm depends on the nature of the relationship, and especially whether [the lawyer] has access to information relating to the representation of firm clients other than the clients for which [the lawyer] is working directly." We wrote:

> Whether a Contract Lawyer who works in the offices of the employing firm should be deemed to have access to the confidences and secrets of all clients of the firm depends upon the circumstances, including whether the firm has a system for restricting access to client files and for restricting informal discussions of client matters. This, in turn, may depend on the size of the firm and the formality of procedures for restricting access to such information. The mere fact that the Contract Lawyer has an office in the employing firm or uses its library or rest rooms does not necessarily mean that the Contract Lawyer should be presumed to have access to confidential information about all clients in the firm. If the Contract Lawyer has general access to the files of all clients of the firm and regularly participates in discussions of their affairs, then he or she should be deemed "associated" with the firm. However, if the firm has adopted procedures to ensure that the Contract Lawyer is privy only to information about clients he or she actually serves, then, in most cases, the Contract Lawyer should not be deemed to be "associated" with the firm for purposes of vicarious disqualification.

15. A similar conclusion applies in opinions addressing office sharing among separate law firms or lawyers in solo practice. We and others have found that, depending on the facts and circumstances of a particular situation, DR 5-105(D) may prevent lawyers who practice separately but share office space from representing clients with differing interests.[23] Under these opinions, with appropriate safeguards, and assuming that the arrangement is not misleading to prospective and actual clients, the sharing of merely the same leasehold, a library, an electronic research account, restrooms, a central phone system with individual lines, or a common receptionist is not sufficient, alone or in combination, to merge lawyers in separate practices into one. Acceptance of these organizations presupposes,

22 N.Y. State 715 (1999); ABA 88-356; N.Y. City 1995-8; Restatement, Third, The Law Governing Lawyers §123(3) (2000).

23 *E.g.*, N.Y. State 583 (1987); N.Y. State 437 (1976); ABA Inf. 1486 (1982); N.Y. County 680 (1990); N.Y.C. 1995-8 (1995); N.Y.C. 80-63 (1981).

however, that the confidences and secrets of the clients of each separate practice will not be shared or appear to be subject to sharing with lawyers working on a conflicting matter.

16. Such is our objection to the clinic's proposal. Two or more lawyers carrying out conflicting assignments in close proximity in the same space with common tables, facilities and files engender subtle influences that could affect the exercise of independent professional judgment.[24] These "numerous influences might weigh against the unswerving fidelity to the client's interest that professional duty compels."[25] In addition, there is a "real danger that a client's confidences and secrets will be divulged" through the use of "shared clerical staff, common files, or otherwise."[26] "If the physical organization of the office suite places client confidences at risk, it is appropriate to treat the association as a firm or to determine that adverse interests may not be represented."[27]

17. Here, students involved in the Consumer Project will be working side-by-side in the same space with students working on the clinic's other matters. Although an electronic barrier will be erected to prevent access to client documents on a database, no physical barrier separates Consumer Project students from access to the files on other clinic matters or vice versa. Such proximity requires that the legal clinic, including the Consumer Project, be treated as a single law firm. Consequently, by reason of DR 5-105(D), the disabilities of any of the legal personnel of the legal clinic are imputed not only to other members of the clinic but also to the law firms with which the faculty advisors are associated.[28]

18. We are not inattentive to the clinic's concern that our result will discourage the participation of private practitioners but we do not believe that concern allows us to ignore what the Code and its interpreters say. Innumerable lawyers in private practice contribute generously of their time to *pro bono* efforts in keeping with the precepts of Canons 4 and 5. No better place exists to instill these values in the profession than applying the same standards to those studying to join it.

CONCLUSION:

19. So long as a legal clinic's students work in a common space and have shared access to physical files, the entire legal clinic's personnel, including lawyers who supervise only a single project of the clinic, are a law firm within the meaning of the Code so that the conflicts of all those personnel are imputed to the lawyers' firms, and *vice versa*.

(26-04)

24 EC 5-21, EC 5-23.

25 ABA Inf. 1474 (1982) (quoting ABA Inf. 1235 (1972)).

26 ABA Inf. 1474 (1982).

27 *Commonwealth* v. *Alison*, 434 Mass. 670, 691, 751 N.E.2d 868, 890 (2001).

28 *See* N.Y. State 793 (2006) (conflicts of a lawyer who is of counsel to two law firms, including the conflicts of all lawyers in each firm, are imputed to both law firms).

OPINION 795 (04/19/2006)

TOPIC: Medical doctor/lawyer advertising for malpractice claimants.

DIGEST: A medical doctor admitted to the New York bar whose business plan is to advertise for patients to assess the merits of prospective malpractice claims for referral to other lawyers must disclose in advertising that he or she is a lawyer and may not split fees with the other lawyers without obtaining client consent, ensuring that the overall fee is reasonable and taking joint responsibility for the matter.

CODE: DR 1-102(A), DR 2-101, DR 2-103(A) (2)(e), DR 2-103(B), DR 2-107, DR 7-109(C).

QUESTION:

1. May a medical doctor who is a member of the New York bar advertise his or her availability as a doctor to assess the viability of medical malpractice claims, and his or her availability to refer viable claimants to lawyers, without disclosing the doctor's membership in the bar or intention to share in any contingency fee recovered by the lawyer to whom the client is referred?

BACKGROUND:

2. A medical doctor who is also a member of the New York bar currently performs expert medical services for other lawyers in connection with medical malpractice matters, including identifying claims as meritorious, assisting counsel in pretrial proceedings on medical issues, and locating appropriate testifying experts for trial in medical malpractice actions. The inquirer believes that a substantial number of potential malpractice claimants who are unwilling to consult a lawyer, at least initially, about injuries that may give rise to medical malpractice claims may be willing to consult with a physician on that subject. Accordingly, to attract this clientele, the inquirer proposes to advertise the inquirer's medical credentials to the public, offering to ascertain at no cost whether such possible claimants, in the inquirer's judgment, have claims sufficiently meritorious to warrant referral to a lawyer.

3. The inquirer's advertising would state that the purpose of the cost-free physical examination is to determine whether in a medical doctor's judgment a viable legal claim exists, and the inquirer's willingness to refer such viable claims to a lawyer. The inquirer would not refer any claimant to a lawyer without the claimant's advance consent. The advertising would not disclose that the doctor is also a lawyer, nor the inquirer's expectation and intention of being paid a fee by the lawyer to whom the claimant would be referred. In all cases, the inquirer would act solely as a medical consultant, and not represent the claimant as counsel in a malpractice action. In consideration of these services, the inquirer intends to receive a portion of the contingency fee, if any, earned by the lawyer to whom the matter is referred.

OPINION:

4. At the threshold, we mark the limits of our opinion. We offer no view on the rules governing advertising by the medical profession for services unrelated to the practice of law. Assuming the law and rules of the medical profession permit it, we know of no reason why a physician who happens to

have a law degree may not advertise for patients without reference to the law degree as long as the advertiser is offering and actually providing only medical (or for that matter other non-legal) services to the patient. As far as we are concerned, the term "medical" or other "non-legal" services includes offering solely a medical opinion about whether specific medical care may be responsible for an alleged injury.

5. That does not end the inquiry, though, because to us the question is whether a doctor/lawyer occupied in assessing injuries as legal claims is engaged in the practice of law. No easy line unambiguously divides a purely medical opinion about the sources and causes of an injury and a legal opinion on the viability of a medical malpractice claim. The line has consequences for law and ethics, for the non-lawyer/doctor and for the lawyer/doctor. For instance, it may be that, solely as medical practitioners (not experts), non-lawyer/doctors may evaluate the viability of medical malpractice claims without thereby engaging in the unauthorized practice of law – an issue of law on which we do not opine. Likewise, it may be that lawyer/doctors may advertise their ability to evaluate, for medical malpractice cases, the standard of care employed and the extent to which any shortfall in that case resulted in injury, without thereby subjecting the lawyer/doctor to rules governing lawyer advertising.

6. Here, though, we have a doctor/lawyer whose practice consists of considering the viability of a medical malpractice claim for referral to a lawyer. In this context, we believe that the doctor/lawyer is engaged in the practice of law. In N.Y. State 678 (1996), considering a similar question in the context of a lawyer acting as a divorce mediator, we said:

> [A]uthorities have disagreed as to whether to conceptualize divorce mediations as a legal or nonlegal service when provided by lawyers. Our judgment is that, on the present state of facts about how lawyers function as mediators, lawyers who serve as mediators should be presumed to be rendering a legal service. Presumably a lawyer who serves as a mediator outside of the law office, gives no legal advice or opinions, and does not draw up the agreement is not acting in any legal capacity, and is not then governed by the lawyer's code. *This would, however, be a rare case*.
>
> N.Y. State 678 (citations omitted) (emphasis in original).

7. We think that this conclusion is even more true here, where the inquirer intends to consider not only medical issues of causation but also the legal issues of the viability of a claim, which may include questions such as the timeliness of the claim, whether the potential damages warrant pursuit of the claim, and the likelihood of success on the merits. Although instances may occur in which the inquirer might defer such questions to independent counsel, we believe that such instances are likely to be the exception, not the rule. It follows that, because the services being advertised are legal services, the inquirer's advertising must comply with the rules on lawyer advertising. Among other things, this means that advertising that omits the inquirer's legal background would be "false, deceptive or misleading" in violation of DR 2-101.

8. If the inquirer discloses his or her legal background, however, a separate concern arises, and that is the omission from advertising of the inquirer's intention to refer all matters to other lawyers for a share of a fee. Whether a lawyer must disclose in advertising an intention to enlist the aid of other counsel depends on the circumstances of a matter or practice area. We believe, however, that a lawyer holding himself or herself out as a medical malpractice lawyer, with the present intention of never

practicing as such but instead referring all such cases to others, would be engaged in false and misleading advertising in violation of DR 2-101. *Cf.* DR 2-103(A)(2)(e)(a lawyer may not solicit professional employment from a prospective client by written or recorded communication if the lawyer "intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel").

9. Even if we assume the exceptional case – one in which the doctor/lawyer is fully able to separate the medical from the legal – we still conclude that ethical issues infect the inquirer's business plan. In such circumstances, the principal difficulties with the inquirer's plan lie not with the proposed advertising, but with the proposed arrangements between the inquirer and the lawyers who would take the matters. Even if the inquirer were not a lawyer or resigned from the bar tomorrow, the Code forbids the proposed arrangements, whether with a doctor or anyone else.

10. DR 2-103(B) prohibits payments for legal referrals except in certain circumstances, none of which apply here. Here, the lawyer to whom the inquirer refers the matter would be compensating the inquirer for having made a recommendation resulting in employment by a client, a clear violation of that rule. A lawyer may not violate a Disciplinary Rule, nor circumvent one through the actions of another. DR 1-102(A). We believe that this Rule necessarily means that a lawyer may not aid or abet another lawyer in violating a Disciplinary Rule. Thus, this referral-for-a-fee program is impermissible, even for one acting solely as a doctor, because as a lawyer the inquirer would be aiding the violation of a Disciplinary Rule by another lawyer.

11. That is not all. DR 2-107 proscribes dividing legal fees with a lawyer who is not a partner or associate of the lawyer's firm except where the other lawyer acts as a lawyer for the client, assumes joint responsibility for the matter (or performs services in proportion to the fee received), and receives a fee with the client's consent that, together with the other lawyer's fee, is reasonable in the aggregate. Because the inquirer does not intend to act as counsel nor advise the client of participation in any fee arrangement, the proposed course of action would violate this rule. *See also* N.Y. State 698 (1998) (lawyer may not accept medical malpractice case from a medical consultant if consultant requires the attorney's agreement to a contingent consultant fee as a precondition).

12. To the extent that the inquirer may seek to accommodate his or her conduct to the requirements of DR 2-107 – that is, by assuming joint responsibility for the representation as a lawyer who receives a portion of a reasonable contingent fee with client consent – the inquirer clearly could not do so without full compliance with the lawyer advertising rules, including disclosure in advertising of membership in the bar.

CONCLUSION:

13. We end with the same caveat with which we began. We offer no opinion whether a medical doctor may advertise the doctor's availability to provide medical opinions to patients on whether a breach of a reasonable standard of medical care caused a patient's injury. If a medical doctor may do so, we know of no reason why that same medical doctor may not thereafter be paid a fixed (not a contingent) fee by a lawyer as a consulting or testifying expert in a medical malpractice action. See DR 7-109(C) (lawyer may not pay a witness contingent on the outcome of a case). In our view, however, a member of the New York bar who holds a medical degree, and who purports to act only as a medical

doctor with patients visiting the doctor solely as a doctor, may not establish an impermissible referral service for lawyers, split fees with those lawyers, and conceal these arrangements from prospective clients in advertising or otherwise.

(32-05)

OPINION 796 (04/24/2006)

TOPIC: Obligation to inform third parties of potential claims.

DIGEST: A lawyer who represents the administrator of an estate has no ethical obligation to contact creditors holding claims who have failed to file claims in the estate proceeding to advise them that they should do so.

CODE: DR 7-102(A)(5).

QUESTION:

1. If a lawyer who represents the administrator of an estate has advised the attorney for a creditor of the decedent's death, and the creditor's attorney subsequently withdraws a court action on the claim in the apparent but erroneous belief that the estate has no assets, must the lawyer for the administrator contact the creditor's attorney to advise the creditor's attorney that the estate has assets and that the creditor should file a claim?

OPINION:

2. An attorney who represents the administrator of an estate discovered shortly after having been retained that the decedent was the defendant in a litigated matter in which the decedent had defaulted, leading to a default judgment on the merits with a hearing still to be held on damages. As soon as the attorney for the administrator became aware of this litigation, the attorney notified the plaintiff's attorney by letter that the decedent had died, and that the matter was therefore stayed. The attorney for the administrator received no response to his letter or any other inquiry from the plaintiff's attorney.

3. About one year later, when the administrator's attorney was prepared to distribute the proceeds from the sale of the estate's assets, the administrator's attorney checked on the litigation. In so doing, the administrator's attorney discovered that approximately three months after the letters of administration were issued and at least six months after the petition for appointment of the administrator in Surrogate's Court, the attorney for the plaintiff in the litigation sent a letter to the court where the litigation was pending, stating that the plaintiff's attorney was closing the file and that the court could close its file as well. The plaintiff's attorney also advised that the defendant had died and, wrongly, that there was no estate proceeding pending.

4. At the time the attorney sent the court this letter, a search of the Surrogate's Court records would have revealed that a petition had been filed for letters of administration, which petition noted the value of the estate and that the letters had been issued.

5. Assuming that the law imposes no affirmative obligation on the attorney for the administrator to notify potential creditors, where no misrepresentation has been made regarding the assets of a pending estate and the information is properly on file with the Surrogate's Court, the attorney for the estate has no ethical obligation to notify an attorney in a litigation involving the decedent of the fact that the letters of administration have been issued in the estate and/or that the estate does have some assets.

6. Statements made by lawyers to third parties can become a matter of ethical concern. A lawyer may not "[k]nowingly make a false statement of law or fact." DR 7-102(A)(5). The conduct of the attorney for the administrator here does not approach violation of this standard. At no time, whether directly or by implication, did the administrator's attorney indicate that the estate was insolvent. In fact, the implication of the insistence that the lawsuit be stayed pending issuance of letters of administration is to the contrary, that is, it implied that the estate did have assets that would be affected by this claim. The attorney representing the plaintiff did not make further inquiry, and apparently did not check the public record, which would have disclosed the existence of assets in the estate, nor did that attorney file a claim in the estate proceeding.

CONCLUSION:

7. The Committee finds that absent representation to the contrary, an attorney for the administrator of an estate has no ethical obligation to notify the creditor of an estate that the estate has assets and that the creditor should therefore file a claim. We do not opine on whether the administrator's attorney *could* reveal this to the plaintiff's attorney.

(3-06)

OPINION 797 (04/26/2006)

TOPIC: Client fraud/misstatements.

CLARIFIES: N.Y. State 674 (1995) N.Y. State 781 (2004)

DIGEST: Under DR 7-102(B), if a lawyer determines that a client has made false representations to the court in an affidavit, the lawyer must call upon the client to correct the information in the affidavit, and, if the client refuses, the lawyer must withdraw any misstatements the lawyer made in certifying the client's statements. The lawyer must also consider whether the lawyer is required or permitted to withdraw from the representation under DR 2-110(B) or (C).

CODE: DR 2-110(A); 2-110(B), 2-110(B)(2); 2-110(C); 2-110(C)(1)(g); DR 4-101; 4-101(A); 4-101(C); 4-101(C)(3), (5); DR 7-101(A)(1); DR 7-102(A)(2), (3), (4), (5), (7); 7-102(B); 7-102(B)(1); EC 1-1; 1-9; 5-1; 7-10.

QUESTION:

1. A lawyer has filed a probate petition that sought the issuance of letters testamentary to a person who was ineligible to receive them by reason of that person's prior conviction of a felony. The lawyer did not know of these facts when the lawyer filed the petition, but learned them later. What are the lawyer's ethical obligations?

OPINION:

2. A lawyer represents a client who was named the executor under a decedent's will and is the sole beneficiary named in the will and the decedent's only heir at law. The lawyer files the client's oath, required to seek appointment as executor, with the Surrogate's Court. In order to file the papers with the court, the lawyer also signs the form, which constitutes a certification that to the best of the lawyer's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the form contains no material misstatements of fact.[29] The court issues letters testamentary. Subsequently, the client informs the lawyer that the client is a convicted felon. As such, under SCPA §707(1)(d), the client is ineligible to receive letters testamentary. The estate remains unsettled.

3. Does the lawyer have any obligations to the Surrogate's Court and other potentially interested third parties? Is the information about the client's felony conviction protected as a confidence? Must the lawyer withdraw if the client refuses voluntarily to disclose the client's status as a felon?

29 The oath of an executor includes the statement, "I am not ineligible to receive letters [testamentary]." Under the Rules of the Chief Administrator (22 NYCRR § 130-1.1A(b), by signing a paper, an attorney certifies that, to the best of the attorney's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous as defined in Part 130. Under that Part, a paper is "frivolous" if, among other things, it asserts material factual statements that are false. In determining whether the conduct was frivolous, a court will consider whether or not the conduct was continued when its lack of factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party. 22 NYCRR §130-1.1(c).

DR 7-102(B)(1): Authority to Disclose Fraud on Person or Tribunal

4. DR 7-102(B)(1) of the Lawyer's Code of Professional Responsibility (the "Code") states that a lawyer who receives information clearly establishing that the client has, in the course of the representation, perpetrated a fraud upon a person or tribunal

> shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.

5. Whether the client has committed fraud on the court is a legal question beyond the jurisdiction of this Committee. The answer will depend upon whether the client knew that he or she was misstating information or omitting information in the Executor's oath. *See* Code, Definition 9 (fraud includes knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another). If the lawyer concludes that the client has committed a fraud, the lawyer must call upon the client to disclose to the court that the client was not eligible to receive letters testamentary. If the client refuses to make or authorize the correction, as noted above, DR 7-102(B)(1) instructs the lawyer to reveal the fraud "*except when the information is protected as a confidence or secret*." (Emphasis supplied.)

Exception for Information Protected as a Confidence or Secret

6. The extent to which the lawyer may disclose the client's fraud thus depends upon whether the information that would be disclosed is protected as a confidence or secret. Under DR 4-101(A), a confidence is information protected by the attorney-client privilege under applicable law. Determining whether information is protected by the attorney-client privilege is a question of law that is beyond the scope of our jurisdiction. *See* CPLR § 4503.

7. A secret is any information gained by the lawyer in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. Whatever the conclusion with respect to the attorney-client privilege, either the fact of the felony conviction or the fact that the client has committed perjury would qualify as "secrets" under the Code.

Exceptions to Protection as Confidences and Secrets: DR 4-101(C)(3)

8. DR 4-101(C) contains a number of exceptions to the lawyer's duty of confidentiality, including DR 4-101(C)(3) and (5). DR 4-101(C)(3) permits a lawyer to reveal the client's intention to commit a crime and the information necessary to prevent the crime. It does not specifically apply to frauds, unless the fraud itself constitutes a crime. It appears that, because the lawyer did not know of

the client's intention to misrepresent the client's status, but only learned of it after its occurrence, the client's fraud is now a past fraud and DR 4-101(C)(3) is inapplicable.[30]

Exceptions to Protection as Confidences and Secrets: DR 4-101(C)(5)

9. Until 1990, the rule in New York was that, if the client refused to correct a fraud or to authorize the lawyer to do so, the lawyer was prohibited from disclosing the fraud, and was required either to stand by silently or to withdraw from the representation under DR 2-110(C)(1)(g) (lawyer may [but is not required] to withdraw when the client has used the lawyer's services to perpetrate a crime or fraud.)

10. In 1990, DR 4-101(C)(5) was added to the Code. Under DR 4-101(C)(5), a lawyer may reveal confidences or secrets of the client to the extent "implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud."

11. By signing the client's papers in accordance with Part 130, the lawyer has made a representation to the Surrogate's Court. We have considered whether the Surrogate's Court is a person within the meaning of DR 4-101(C)(5). The term "person" is defined in Definition 3 of the Code as *including* "a corporation, an association, a trust, a partnership, and any other organization or legal entity." DR 7-102(B) clearly distinguishes between a "person" and a "tribunal," indicating that the intent of the drafters may have been to exclude tribunals from the ambit of the term "person." In addition, many Code provisions that use the term "person" or "third person" clearly are referring to clients, potential clients, witnesses and other participants in the legal process. *See*, *e.g.*, EC 1-1; EC 1-9. On the other hand, there are several Code provisions where a tribunal logically could be included within the ambit of the term. *See*, *e.g.*, EC 5-1; EC 7-10; DR 7-101(A)(1). We do not believe that the drafters of DR 4-101(C)(5) intended to exclude tribunals from the scope of the term "person" as used in this rule, and thus give lawyers less discretion to correct fraudulent acts towards tribunals than towards others. Accordingly, we believe that DR 4-101(C)(5) gives discretion to a lawyer to withdraw the lawyer's representation under Part 130, which requires the withdrawal of the client's affidavit. The lawyer is not authorized by DR 4-101(C)(5) to explain the reasons for the withdrawal of the affidavit, since that section authorizes the disclosure of client confidences and secrets only to the extent *implicit* in withdrawing the representation.

12. Our opinion in N.Y. State 781 (2004) implicitly reaches a similar conclusion that a tribunal is a third "person" within the meaning of DR 4-105(C). In that opinion, we discussed a matrimonial lawyer who learned that a financial statement submitted by the lawyer to family court contained a material omission. In order to submit the financial statement on behalf of the client, the lawyer had certified the accuracy of the statement to the court. We therefore found that the lawyer had made a

30 Academics and others have suggested that, even if a client's criminal or fraudulent conduct occurred in the past, it might constitute a continuing crime or fraud, and, thus, not constitute past conduct for purposes of DR 4-101(C)(3). Some have suggested that a fraud should be deemed continuing where it has future consequences. Some have suggested that the mere continuation of the harmful effect of an otherwise completed client wrong should not affect the determination of whether the client's conduct is past conduct, especially when disclosure of the future consequences necessarily would involve disclosure of the past conduct. Finally, others suggest a distinction based on whether the client disclosed the wrongful conduct for the purposes of seeking legal advice with respect to the conduct. *See generally* N.Y. City 2002-1.

misrepresentation to the court, and that DR 4-101(C)(5), permitting disclosure to the extent implicit in withdrawing such a certification, was applicable.

13. In N.Y. State 781, we went on to state that, since the lawyer was permitted to reveal the information under DR 4-101(C)(5), the information was not "protected as a confidence or secret" within the meaning of DR 7-102(B)(1), and the lawyer therefore was required to reveal the information to the court to the extent implicit in withdrawing the financial statement, if the client refused to do so. This conclusion was based on our opinion in N.Y. State 674 (1995), which also addressed which information is "protected" as a confidence or secret within the meaning of the last clause of DR 7-102(B)(1), and interpreted the phrase as meaning those confidences and secrets that must be preserved by DR 4-101. We therefore concluded that "where the lawyer is *permitted* to reveal a confidence or secret under DR 4-101(C), disclosure of the fraud is *mandatory* under DR 7-102(B)." (Emphasis in original.)[31]

14. We clarify that this broad language, which was quoted in N.Y. State 781, means only that the lawyer must reveal the fraud to the extent permitted by DR 4-101(C). DR 4-101(C)(5) authorizes disclosure of the client's fraud only to the extent implicit in withdrawing the lawyer's representation under Part 130. Consequently, the facts surrounding the client's conduct are still protected as a confidence or secret. Since DR 7-102(B)(1) requires the lawyer to reveal the fraud "except when the information is protected as a confidence or secret," the lawyer cannot reveal the facts underlying the fraud, but only do what the lawyer is permitted to do – withdraw the lawyer's own certification.

15. In the case at hand, DR 4-101(C)(5) authorizes the lawyer, and therefore the lawyer is required, to withdraw the lawyer's certification. Because the lawyer is not authorized to disclose the nature of the falsehood, the lawyer is not authorized further to disclose the client's secret and therefore is not required to disclose it under DR 7-102(B)(1).

16. The fact that the client is the sole beneficiary named in the will and the decedent's only heir at law should not, in our opinion, affect the lawyer's decision in this matter. The executor has a responsibility to pay creditors of the estate, as well as estate taxes, if any. Consequently, the executor's duties are not only to the beneficiary. Public policy in this state has determined that faithful execution of the duties of executor should not be entrusted to a person convicted of a felony.

17. After withdrawing his or her certification, the lawyer must consider whether the lawyer must withdraw from representing the client. Withdrawal would be mandatory if the lawyer knows that continued employment would result in violation of a Disciplinary Rule. DR 2-110(B)(2). Such rules

31 N.Y. State 781 quoting N.Y. State 674. In N.Y. State 674, the information "protected" was the information that the client had committed perjury in an arbitration proceeding. We concluded that this information was a past fraud and that it could not be characterized as continuing or ongoing for purposes of the future crimes exception in DR 4-101(C)(3). Consequently, we held that, if the client refused to recant the perjury, the lawyer was not authorized to disclose it under DR 4-101(C)(3) and therefore was not required to disclose it under DR 7-102(B)(1). Nassau County 2003-1 is to a similar effect. In that opinion, a lawyer learned that his client had misrepresented indigence in order to obtain the lawyer's representation through an indigent lawyer program. Because the lawyer had not made any representations to the court, the Nassau County Bar Association ethics committee concluded that, if the client refused to rectify the fraud, the information was protected as a secret and the lawyer could not disclose it to the court. (Since continued representation, however, would result in a fraud on the program, the opinion went on to conclude that the lawyer must withdraw from the representation.)

might include DR 7-102(A)(2), (3), (4), (5) or (7). In a matter before a tribunal, court permission may be required for withdrawal. DR 2-110(A).

CONCLUSION:

18. Under DR 7-102(B), if a lawyer determines that a client has made false representations to the court in an affidavit, the lawyer must call upon the client to correct the information in the affidavit, and, if the client refuses, the lawyer must consider what additional steps to take. Where the lawyer has made a representation to the court regarding an affidavit or other filing, the lawyer must withdraw the representation. However, the lawyer is not authorized to disclose the client's confidences and secrets except to the extent implicit in such withdrawal. The client's disclosures to the lawyer do not lose their protection as confidences or secrets simply because the withdrawal of the lawyer's representation may imply to a court that there is a problem with the filing. The lawyer should also consider whether he or she may or must withdraw from representing the client under DR 2-110(B) or (C).

(9-05)

OPINION 798 (09/28/2006)

TOPIC: Practice of criminal law by legislator/lawyer

DIGEST: A lawyer/county legislator may not represent criminal defendants in cases involving members of a police department or district attorney's office over which the legislature has budget or appointment authority. It is irrelevant whether the county or the budget is large or the representation involves only plea bargaining. If the lawyer/legislator is employed by a law firm, other lawyers in the firm are not per se vicariously disqualified, but imputed disqualification may be appropriate where members of the public are likely to suspect that the lawyer/legislator's influence will have an effect on the prosecution of the case.

CODE: DR 1-102(A)(5), DR 5-101(A), DR 5-105(A) and (B), DR 5 105(D), DR 5-108(A) and (B), DR 8-101(A), Canon 9, DR 9-101, DR 9 101(B)(1)(a).

QUESTION:

1. May a lawyer who is also a member of a county legislature practice criminal law in the county where he/she is a legislator if the legislature has budget authority over the police department or district attorney's office? If the lawyer is personally disqualified from representing a client, and the lawyer is associated with a law firm, are the other lawyers in the firm vicariously disqualified?

DISCUSSION:

2. N.Y. State 692 (1997) and 702 (1998) prohibit a legislator/lawyer from participating in a matter that requires the legislator to cross-examine a police officer, or to be adverse to a prosecutor, who works for the county where the legislature has the authority to approve the budget of the county. Thus a legislator/lawyer could represent defendants in federal criminal cases or criminal cases brought by the attorney general of New York, but could not undertake representations in any court in the county in which the budget for the prosecutors or law enforcement witnesses must be approved by the legislative body on which the lawyer/legislator sits. We have been asked a number of questions pertaining to the practice of criminal law by a county legislator:

(1) Whether N.Y. State 692 and 702 may be distinguished where the county in which the legislator serves is large and has a large budget;

(2) Whether the lawyer/legislator may, with the advance consent of the client, handle criminal work in that county if the work involved only plea bargaining, on the understanding that if more were required, the lawyer/legislator would pass the case to another lawyer; and

(3) Whether the lawyer/legislator may take a position in a criminal defense firm in a nearby county that represents criminal-defense clients in the county where the lawyer is a legislator, if the lawyer/legislator is screened from those matters.

Size of County or Budget

3. As we noted in N.Y. State 692, this Committee has been addressing the limits of the private law practice that may ethically be maintained by a part-time legislator for more than 30 years. The purpose of ethical restrictions on the practice of criminal law by legislators is to prevent private clients from retaining a part-time public official in the hope of gaining an improper advantage as a result of the lawyer's public office. DR 8-101(A). They also are designed to prevent public suspicion that the client may be gaining some improper advantage by retaining the public official. *Id*. For example, if the lawyer/legislator would be adverse to law enforcement authorities (*e.g.*, because he or she would have to cross-examine them) or prosecutors over whom the legislature has budgetary control or influence, we believe that the lawyer/legislator should be disqualified because of the possibility that the law enforcement officers or prosecutors would exercise undue caution in handling the case.

4. In N.Y. State 431 (1976), we distinguished between whether the legislature had line item approval over members of the prosecutor's office or rather appropriated a lump sum for the entire office, leaving it to the district attorney to set the salaries of his or her assistants. We allowed the lawyer-legislator to be adverse to a prosecutor or law enforcement officer in the latter case. In N.Y. State 692, however, we rejected that distinction. Although one of the reasons for this rejection was that an appearance of impropriety might exist where a small legislature, small DA's office or small police department was involved in a lump sum budget approval, we did not limit disqualification to these instances. Rather, we stated that a lawyer-legislator should not take on a matter that will require the lawyer to cross-examine a police officer from a police department over which the legislature exercises budgetary or appointment authority or be adverse to a prosecutor whose office is similarly affected. We believe the concerns that motivate this prohibition apply regardless of the size of the legislature at issue. Accordingly, the fact that the legislator's county is large and has a large budget is irrelevant to whether he or she may practice criminal law in the county.

Representation Involving Solely Plea Bargaining

5. This Committee has a series of opinions dealing with the issue of whether a lawyer may limit the scope of representation of a client. For example, in N.Y. State 604 (1989), we held that a lawyer whose client is the subject of a grand jury investigation that could result in serious felony charges and does not have sufficient funds to pay for the lawyer's services beyond the grand jury stage may enter into a limited-scope retainer, provided that the limitation is consistent with competent representation under the Lawyer's Code of Professional Responsibility (the "Code") and provided that the lawyer makes certain disclosures to the client. We express no opinion as to whether a representation limited to post-indictment plea bargaining would be consistent with competent representation under the Code.

6. Even assuming that limiting the scope of the representation to plea bargaining were appropriate under other circumstances, however, we do not believe that a limited representation would circumvent the conflicts described above. In plea bargaining, the lawyer/legislator still would have to conduct an investigation and interview members of the police force, and would be bargaining with the members of the county prosecutor's office. Consequently, all of the policy reasons for our earlier positions apply in this case.

Vicarious Disqualification of Other Lawyers in the Legislator's Firm

7. The third question is whether the lawyer/legislator may take a position as associate, partner or "of counsel" lawyer in a criminal defense firm in a nearby county, without affecting the ability of other lawyers in that firm to represent criminal-defense clients in the county court of the county where the lawyer/legislator is a legislator. In particular, the inquirer asks whether any vicarious disqualification of the other lawyers in the firm can be avoided by the creation of a screening mechanism within the firm.

8. Prior to 1990, our opinions applied vicarious disqualification to the partners or associates of a lawyer-legislator. *See, e.g.,* N.Y. 415 (1975). At that time, DR 5-105(D) of the Code provided that, if one lawyer in a law firm was disqualified from representation, then all were disqualified. In 1990, however, the Code was amended so that such vicarious disqualification applies only when the primary lawyer was prohibited from undertaking the representation under DR 5-101(A), DR 5-105(A) or (B), DR 5-108(A) or (B) or DR 9-101.

9. In N.Y. State 692, the basis of the disqualification of the lawyer/legislator is stated to be DR 1-102(A)(5) (lawyer shall not "engage in conduct prejudicial to the administration of justice"), which is not one of the Code sections for which vicarious disqualification applies under the current text of DR 5-105(D). The ban on a lawyer-public officer appearing before or adverse to entities over which the public officer has some control might also be said to arise out of rules relating to the appearance of impropriety or improper influence. Canon 9, DR 8-101(A). None of these Code sections are sections to which automatic vicarious disqualification applies under DR 5-105(D).

10. In N.Y. State 773 (2004), we discussed whether a lawyer public official could be "of counsel" to a law firm without resulting in disqualification of the law firm from a private representation. We identified two different situations in which vicarious disqualification might apply: (1) Where the lawyer/public official was disqualified under one of the Code sections enumerated in DR 5-105(D), in which case the entire firm is disqualified. This includes a case where the bar against the lawyer/public official arises because the public official's duties might conflict with the lawyer's duties to a client, in which case the disqualification arises out of DR 5-101(A), and other lawyers in the firm are subject to automatic imputation under DR 5-101(D). (2) Where the lawyer/public official was disqualified under a Code section other than one of the enumerated ones, in which case there is no *per se* imputed disqualification of the other lawyers in the firm, although, depending upon the circumstances of the proposed representations, disqualification might be appropriate.

11. Where the lawyer/legislator is a partner or associate of a law firm (including being associated as an "of counsel" lawyer) but does not undertake representations involving questioning of police or taking positions adverse to district attorneys, and does not undertake representations that might conflict with his or her duties as a public official (*e.g.*, lobbying for or against matters being considered by the legislature), we believe the other lawyers in the lawyer/legislator's firm should not be *per se* disqualified from undertaking representations that the lawyer/legislator cannot undertake. A representation by another lawyer in the firm may, however, involve facts and circumstances where the lawyer/legislator's disqualification should be imputed to everyone in the firm.

12. Because the purpose of disqualifying the lawyer/legislator is to avoid the public perception that the lawyer/legislator is misusing his or her influence over police and prosecutors, the circumstances in which others in the firm should be disqualified are those in which the public is likely to suspect that the lawyer/legislator's influence will still have an effect. This is most likely to occur where the lawyer/legislator is particularly prominent, *e.g.*, a party leader, or where the case is particularly prominent, even if the lawyer/legislator is not personally working on the case.

Screening

13. Formal screening may be used as a mechanism to ensure that the lawyer/legislator does not participate in the representation where the lawyer/legislator is personally disqualified. But if the facts and circumstances were such that the disqualification of the lawyer/legislator were imputed to others in the firm, screening would not prevent the imputation. The Code in New York does not generally recognize the efficacy of screening. The only instance where the Code allows screening is in the case of a former government employee who was personally and substantially involved in a matter as a public employee and who later joins the private sector. DR 9-101(B)(1)(a). That is not the case here.

CONCLUSION:

14. A lawyer who is a member of a county legislature may not undertake criminal representation in cases involving members of a police department or district attorney's office over which the legislature has budget or appointment authority. The size of the county or budget is not relevant. The lawyer/legislator may not undertake such a criminal representation that involves only plea bargaining, since the plea bargaining would be with the members of the same prosecutor's office. If the lawyer/legislator is employed by a law firm, the lawyers in the firm are not automatically disqualified from undertaking cases that the lawyer/legislator could not accept, but imputed disqualification may be appropriate where members of the public are likely to suspect that the lawyer/legislator's influence will have an effect on the prosecution of the case.

(35-05)

OPINION 799 (09/29/2006)

EXPLAINS: N.Y. State 779 (2004)

TOPIC: Advertising and Solicitation; Internet Website Directory

DIGEST: Lawyer may not participate in website that charges lawyer a fee to provide information about potential clients whom lawyer will then contact, where the website purports to analyze the prospective client's problem and selects which of its subscribing lawyers should respond, nor may the lawyer contact the prospective client by telephone unless the prospective client has expressly requested a telephone contact.

CODE: DR 1 102(A), DR 2 101(A),(K), DR 2-103(A), (B), (D), DR 3 101 (A)

QUESTION:

1. May a lawyer use the services of a website that forwards inquiries from potential clients to subscribing lawyers, where the subscribing lawyers pay a fee to participate in the service and the service purports to analyze the prospective client's problem and select an appropriate lawyer for the matter?

OPINION:

2. An increasing number of websites and internet services offer to put lawyers in touch with persons seeking representation. In this opinion, we address some of the ways in which the New York Code of Professional Responsibility (the "Code") applies to the use of such services.

3. The websites typically ask potential clients to identify themselves and state the nature of their legal problem. Using such information, the website contacts those lawyers who have subscribed to their service and indicated an interest in undertaking matters of the kind described by the prospect. One or more of the lawyers notified by the website may then contact the prospective client directly by return e-mail and/or by telephone, to ask whether the prospective client wants to retain that lawyer.

4. The extent to which the websites review and evaluate the potential client's statement of the legal problem varies. Some of the websites represent that a staff attorney will screen the requests submitted by the prospective client and screen the prospective attorneys. Others represent that they are not a referral service and do not review the prospective client's submission. Rather they forward the submission automatically to the law firms selected by the client. These sites may provide prospective clients with various tools to limit the attorneys listed, including filters for geographical area or practice area of the subscribing lawyers.

5. The services generally charge the lawyer a fee that is either refunded or discounted if the service does not provide an economic benefit to the subscribing lawyer. The websites the Committee has reviewed are run from locations outside New York.

6. Because of the wide variation in the structure and function of the many web-based services operating in this area, this opinion does not attempt to address every factual permutation. It is only a general guide to the ethical obligations of New York lawyers who make use of web-based matching services.

7. We discuss first two questions raised by the operation of these websites: (a) whether a lawyer who participates in the service is paying for a recommendation in violation of DR 2-103(B); and (b) whether a lawyer who contacts a client referred by the website is soliciting employment from a prospective client in violation of DR 2-103(A). We also provide guidelines regarding such services that arise out of other provisions of the Code.

Paying for a recommendation in violation of DR 2-103(B)

8. DR 2-103(B) provides, with exceptions not applicable here, "A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client . . . ." The question is whether the services "recommend or obtain employment."

9. We begin with the observation that a traditional advertising directory in paper form, such as the "yellow pages," is not recommending or obtaining employment within the meaning of DR 2-103(B). The question is at what point an online "directory" website becomes a referral service for purposes of DR 2-103(B). For example, an online yellow pages that provides tools by which a potential client can filter a list of attorneys by geography and/or practice area (*e.g.,* to create a list of attorneys in "Albany" who do "personal injury" work) does not violate the rule.

10. We find that the line is crossed, however, when a website purports to recommend a particular lawyer or lawyers for the prospective client's problem, *based on an analysis of that problem*. For example, if a potential client describes a slip-and-fall incident on an intake form and the website determines that the problem calls for a personal injury lawyer and then recommends one or more attorneys in that area, the website is "recommending" those lawyers.[32] This conclusion applies whether the website's selection of counsel is the result of human intelligence or a computer program designed to respond to certain key words (*e.g.*, if the potential client uses the words "injury", "doctor" or "fell" on an intake form, the program would characterize the problem as one of "personal injury" in

32 We express no opinion as to whether the website may be operating in violation of Section 495(1)(d) of the Judiciary Law ("No corporation . . . shall . . . furnish attorneys or counsel"). If the website were to be operating in violation of the Judiciary Law or found to be otherwise engaged in the unauthorized practice of law, it would be unethical for a lawyer to participate in its operations. DR 3-101(A).

order to recommend lawyers). Such activity is prohibited by other than a qualified lawyer referral service. DR 2-103(D).[33]

Improper solicitation in violation of DR 2-103(A)

11. We turn next to whether a lawyer using a website under the circumstances described above is engaged in improper solicitation if the lawyer contacts the prospective client by telephone. DR 2-103(A) provides:

> A lawyer shall not solicit professional employment from a prospective client:
>
> > 1. By in-person or telephone contact, except that a lawyer may solicit professional employment from a close friend, relative, former client or current client.

12. While the Code clearly prohibits solicitation of clients by telephone contact, the question here is whether a lawyer responding to a prospective client's posting inviting such contact is engaged in "solicitation." We agree with the New York City Bar[34] that in such situations the client has invited the contact, and that an invited contact is not a "solicitation" within the meaning of the Code (the term is not currently defined). In view of the Code's express prohibition on telephone solicitation, however, we believe that follow-up contacts by phone must be preceded by a clear and unambiguous request from the potential client for telephone contact. For example, it generally would *not* be sufficient that the website contains a statement that by using the website the prospective client thereby consents to having one or more lawyers telephone the client. It generally *would* be sufficient if the potential client is specifically asked to check a box in order to authorize telephone contact.

33 In N.Y. State 779 (2004), we found a violation of DR 2-103(B) where a lawyer pays a marketing organization to furnish the lawyer with "leads" to potential clients. We there explained:

> The payment by an attorney . . . for a bundle of "leads" to prospective clients would violate DR 2-103(B) because neither of the exceptions in sub-paragraphs (1) or (2) applies. The payments would be compensation paid to Marketer "to recommend or obtain employment by a client," so it would be improper for an attorney to participate in the proposed transaction with Marketer.

This language is susceptible to an interpretation that any payment made to a third party for information which enables a lawyer to "obtain" a client is prohibited by DR 2-103(B) unless the circumstances of the payment fall within one of the stated exceptions to the rule. Such an interpretation, which might be deemed to bar participation even in an "electronic yellow pages" service, overstates our conclusion in N.Y. State 779. That opinion should be understood to apply only to those situations in which the organization is effectively making referrals or where it may be deemed to have actively solicited and obtained potential clients for its participating lawyers. In N.Y. State 779, the marketing organization caused its customers to sign a power of attorney form, as well as a retainer agreement, and actually collected a fee for the lawyer to whom the matter would eventually be forwarded. The prospective client was thus effectively committed before the lawyer had agreed to undertake the representation. In every meaningful sense, like the classic "runner," the marketing organization had "obtained" a client and, for a fee, had agreed to forward the client to the lawyer. To the same effect is a recent opinion of the Committee on Professional Ethics of the State Bar of Texas, wherein that body prohibited lawyers from participating in an internet matching service on the grounds that the service was effectively "soliciting or referring prospective clients." Texas Op. 561 (2005). Texas Op. 573 (2006) clarified that Texas Op. 561 was not prohibiting *all* internet matching services, but rather only those services that exercise "discretion" in selecting lawyers.

34 In N.Y. City 2000-1, the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York considered whether a lawyer's response to a website posting by a person seeking legal counsel should be deemed solicitation. The City Bar committee concluded that a lawyer's response did not constitute "advertising" or "solicitation" as those terms are used in the Code. Rather, the City Bar committee reasoned that it was the prospective clients who "in effect, have 'solicited' [the responding] attorneys." Because the method of communication there employed was electronic posting, however, the City Bar did not have to address the issue of whether a participating lawyer could contact the prospect by telephone.

Guidelines for permissible website matching services

13. In addition to the prohibitions contained in DR 2-103, the Code contains other relevant restrictions and rules, which we do not attempt to completely address here. A lawyer's public communications – including directory listings – may not be "false, deceptive or misleading," for example, and must include the name, office address and telephone number of the attorney or law firm whose services are being offered. DR 2-101(A); DR 2-101(K); N.Y. State 756 (2002) ("we believe the use of a web site or e-mail address as the sole identifier of a firm's office address does not satisfy the requirement of DR 2-101[K]").

14. Based on these rules and the foregoing discussion of DR 2-103, we suggest the following guidelines with respect to a website service in which a New York lawyer may pay to participate:

- refrains from recommending its subscribing lawyers or otherwise making claims about the competence or character of its subscribing lawyers;
- refrains from claims that it will analyze the prospect's legal problem in order to find a suitable lawyer;
- explains that its subscribing lawyers have paid to be listed with the service;
- states the office address and telephone number of each lawyer participating in the service;
- specifies the means of communication that its subscribing lawyers may employ when responding to the prospective client's posting and provides for telephone contact only if the prospective client clearly and unambiguously authorizes the service to forward the request and telephone number to the selected attorneys; and
- advises users that the services of the website do not constitute legal representation or the practice of law.

15. In addition, lawyers using such a website should take reasonable measures to prevent the inadvertent disclosure by the prospective client of privileged information.[35] Depending on circumstances, such measures may include some or all of the following:

- the website service should afford the prospective client an opportunity to screen the list of lawyers who will be shown the prospective client's posting and remove lawyers from the list;
- the service should only reveal the prospective client's identity to those subscribing lawyers that the prospect requested;
- the service and the lawyer should minimize the communication of confidential information between the subscribing lawyer and the prospective client until the lawyer has been retained and has completed an appropriate conflicts check;

35 EC 4-1 ("Both the fiduciary relationship existing between lawyer and client and the proper function of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer.").

- the service should caution the prospective client that the information provided to the service may not be protected by the attorney-client privilege, where that statement is applicable.

16. As in any other contact with a current or potential client, when following up the prospective client's posting, the subscribing lawyer should avoid any statements that are "false, deceptive or misleading" under DR 2-101(A); should not engage in any form of "coercion, duress or harassment" under DR 2-103(A)(2)(c); and should otherwise treat the prospective client with the courtesy and integrity expected of all lawyers. *See* DR 1-102(A)(7). Generally, where the prospect indicates an unwillingness to engage the lawyer, the lawyer should refrain from further retention discussions with such party. *Cf.* N.Y. State 481 (1978) (if client indicates hesitancy about designating the client's lawyer as executor, lawyer should "immediately desist and expressly withdraw his suggestion.").

CONCLUSION:

17. For the reasons stated, the question posed is answered in the negative. While websites may be used for advertising purposes, they can not, in exchange for a fee, carry out activities that in a non-web setting would constitute prohibited solicitation or referral.

(22-05)

OPINION 800 (11/03/2006)

TOPIC: Conflicts of interest, appearance of impropriety; part-time prosecutor serving as appointed counsel for indigent respondents in Family Court proceedings.

DIGEST: A part-time prosecutor is not precluded from accepting all assignments as court-appointed counsel in Family Court. In specific types of cases and specific situations, including cases in which law enforcement personnel with whom the prosecutor works as a prosecutor are involved, and cases that are quasi-criminal in nature, the prosecutor is barred from accepting assignments. In other cases, the part-time prosecutor must carefully consider whether conflicts or the appearance of impropriety would preclude the assignment. Any doubt must be resolved against accepting an assignment.

CODE: DR 2-110, DR 5-101, DR 5-105, DR 9-101 EC 5-15, EC 9-1

QUESTION:

1. May a part-time prosecutor accept assignment to represent indigent persons in Family Court proceedings of a neighboring county?

OPINION:

2. A part-time prosecutor seeks appointment to a panel authorized to accept assignment of cases on behalf of indigent respondents in the Family Court in a neighboring county. Attorneys appointed to serve on the assigned counsel program in the Family Court can be assigned to represent either petitioners or respondents (except in child protective proceedings, proceedings involving allegations of willful failure to pay court-ordered support, and paternity proceedings, in which program attorneys are only assigned to represent respondents).

3. The Family Court hears matters involving children and families, including child protective proceedings, adoption, custody and visitation, support, family offense, guardianship, delinquency, paternity, persons in need of supervision (PINS), and foster care approval and review. While certain Family Court matters are more likely to involve related criminal matters, virtually all types of proceedings heard by the Family Court are likely to have some involvement of law enforcement agencies or similar governmental entities. In neglect and abuse cases, for example, multiple government entities are often involved. The local child protective service[36] investigates allegations and the county attorneys present ("prosecute") the case in the Family Court. Family offense cases by their nature pose a great risk of criminal charges being brought. In custody and visitation cases, the practices may vary by county, but many Family Courts request reports from probation departments, in addition to (or instead of) reports from local child welfare officials. Child support cases, too, could involve law enforcement and/or prosecution. In these and other cases, the Family Court may also request reports from other governmental agencies, including the probation department.

4. Whether a part-time prosecutor from a neighboring county can accept assignments to represent indigent people in a Family Court depends on all the relevant facts and circumstances. No *per se*

36 In some situations, local police departments may also be involved in child protective investigations.

rule prohibits all such assignments. Nonetheless, the attorney seeking appointment must carefully consider a number of factors in each type of proceeding and in each individual matter. The attorney must avoid all conflicts of interest, ensuring that neither the attorney's own interests[37] nor the attorney's simultaneous work as a prosecutor[38] preclude the attorney from exercising independent judgment on behalf of his or her clients. In many cases, a conflict might not be apparent at the outset of the case. For this reason, the attorney must be careful to avoid those cases where a conflict is likely to occur. *Cf.* EC 5-15 ("the lawyer should resolve all doubts against the propriety of representation").

5. In at least three situations, the attorney, in our view, would be barred from accepting any assigned cases: matters in which officers or other law enforcement personnel with whom the prosecutor works (or has worked) as a prosecutor are involved; juvenile delinquency proceedings; and Persons in Need of Supervision (PINS) proceedings.

6. As we have previously noted, a part-time prosecutor should not accept defense work in any proceeding in which "investigating officers and law enforcement personnel are those with whom the attorney associates as prosecutor." NY State 544 (1982). We perceive no difference in the Family Court setting.

7. We have previously held that a part-time prosecutor is barred from representing defendants in juvenile delinquency proceedings. N.Y. State 171 (1970). The defense function in juvenile delinquency proceedings, although not categorized as "criminal," is indistinguishable from defense in an adult criminal proceeding. *See* N.Y. State 544 (1982) ("an attorney who has prosecutorial responsibilities as an incident of part-time employment by a local governmental unit is disqualified from the private practice of criminal law in all courts of the state");[39] N.Y. State 427 (1976) (private criminal defense work by a part-time prosecutor is improper).

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37 DR 5-101 of the New York Lawyer's Code of Professional Responsibility (the "Code") provides:

> A. A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

38 DR 5-105 of the Code provides, in relevant part:

> A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C) [regarding consent].
>
> B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 (C).

39 N.Y. State 544 rests on DR 5-105 and DR 9-101:

> The theory is that "since a prosecutor represents the people of the state, it is improper for him [or her] to represent individual clients charged with criminal violations." And "[a]cting as a prosecutor on one case one day, and appearing the next day even in a different court representing a private citizen who had been charged with a criminal act or violation or law would give rise to an appearance of improper conflict of interest."
>
> Quoting N.Y. State 184 (1971).

8. We believe PINS proceedings are functionally indistinguishable from juvenile delinquency proceedings and the same rule should apply. PINS proceedings bear most, if not all, of the hallmarks of defense work. The child is being "charged" with specific conduct, law enforcement personnel are inextricably involved in the proceeding, and the child has a liberty interest in the outcome of the proceeding. Also, the charges must be sustained by proof beyond a reasonable doubt. Although locked detention is no longer a permissible disposition in a PINS proceeding, children adjudicated to be PINS can be removed from their home and placed in facilities where their liberty is severely constricted.

9. Representation of respondent parents in child protective proceedings (Family Court Article X, neglect and abuse) bears special mention. In child protective proceedings, respondent parents are answering to charges from the government regarding their parenting. Ultimately, the parent could temporarily or permanently lose custody of the child as a result of this proceeding. Here, too, even if the government personnel charging the parents are not those with which the part-time prosecutor would be involved, a part-time prosecutor must be particularly sensitive to the appearance of impropriety that may arise from his or her attempting to appear adverse to authorities conducting proceedings very similar to those of a prosecutor.

10. In all cases, the attorney must carefully evaluate the individual facts and circumstances prior to accepting appointment and, consistent with DR 2-110, will often need to withdraw if a conflict arises during the course of the representation.[40] Assigned clients ordinarily have no choice in the assignment. Moreover, clients are likely to be prejudiced if counsel must be substituted during the course of a proceeding. Therefore, the attorney must resolve any doubt against accepting an assignment.[41]

11. The attorney must also strive to ensure that dual roles – part-time prosecutor and part-time advocate for poor people in Family Court – do not give rise to an appearance of impropriety. DR 9-101; EC 9-1. In addition to issues relating to conflicts, the part-time prosecutor would need to ensure that the assigned counsel plan's clients and the public at large do not perceive the attorney's dual roles to be improper.[42]

CONCLUSION:

12. While a part-time prosecutor from a neighboring county may accept assignment to represent indigent people in certain Family Court proceedings, careful analysis must be undertaken in each case. No appointment can be accepted where the appointment would lead to a conflict of interest or create the appearance of impropriety. (8-06)

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40 Client consent, in a case where a conflict is consentable, is often not possible. Consent can only be sought where the prospective client would be empowered to withhold consent freely. Assuming *arguendo* that the prosecutor's office would consent, it would be difficult to obtain voluntary consent from an assigned client. *See, e.g.*, N.Y. State 490 (1978) (When seeking consent, the attorney "should be particularly sensitive to any element of submissiveness on the part of their indigent clients; and, such requests should be made only under circumstances where the [attorney] is satisfied that [his or her] clients could refuse to consent without any sense of guilt or embarrassment.").

41 Because of the high likelihood that conflicts will arise even in cases in which a part-time prosecutor may take on the representation, it may be administratively impractical for the part-time prosecutor to serve on the assigned counsel panel. The administrative burden that would be entailed might lead the panel administrator to establish a policy to exclude part-time prosecutors from the assigned counsel panel.

42 Of course, the attorney cannot suggest that his or her status as a part-time prosecutor would enable the attorney to influence the court or obtain better results for an assigned client. *See* DR 9-101(C).

OPINION 801 (11/17/2006)

TOPIC: Partnership with out-of-state attorney

DIGEST: Not proper for New York attorney to partner with out-of-state attorney if services performed by such attorney are the unauthorized practice of law

CODE: DR 3-101(A), DR 3-102(A)

QUESTION:

1. May a lawyer form a professional partnership with an attorney who is admitted in another state, but not in New York, where the out-of-state attorney would work exclusively from a New York office on matters arising in New York?

OPINION:

2. A New York lawyer is contemplating forming a professional partnership with an attorney who is admitted in another state, but not in New York. The prospective partnership would maintain offices only in New York, and would work exclusively on matters arising in New York. The firm's letterhead and business cards would indicate that the out-of-state attorney is admitted solely in that other state. While the New York attorney and the out-of-state attorney would divide overall case-handling responsibilities equally, the New York attorney would handle all court appearances and retain ultimate responsibility for all legal work performed in the office. The out-of-state attorney would handle office work, including "paperwork" and meeting with clients, but only under the supervision of the New York attorney. The New York attorney would split fees with the out-of-state attorney.

3. As a threshold matter, it is clearly permissible for a New York attorney to form a partnership with a lawyer who is admitted only in another jurisdiction. N.Y. State 175 (1971). A New York lawyer may not, however, form a partnership with an out-of-state attorney if the out-of-state attorney would be engaged in the unauthorized practice of law in New York state. DR 3-101(A) ("A lawyer shall not aid a non-lawyer in the unauthorized practice of law.").

4. The rules on unauthorized practice of law are creatures of statute (Judiciary Law §478), not the ethics code. As a consequence, this Committee does not opine on what specific acts by an out-of-state attorney constitute the unauthorized practice of law. We note, however, that a New York court has held that "when legal documents are prepared for a layman by a person in the business of preparing such documents, that person is practicing law." *Servidone Construction Corp. v. St. Paul Fire & Marine*, 911 F. Supp. 560, 568 (N.D.N.Y. 1995) (finding retainer agreement unenforceable because legal services provided in New York by out-of-state attorney constituted unauthorized practice of law, notwithstanding his partnership with an attorney admitted in New York).

5. If the out-of-state lawyer is engaged in the unauthorized practice of law, then the New York lawyer would violate DR 3-101(A) by partnering with the lawyer. If the out-of-state lawyer were to limit activities to those permitted of a non-lawyer, such as a paralegal, then the New York lawyer would violate DR 3-102(A) by partnering with the lawyer, as it is impermissible for a New York law-

yer to share fees with a non-lawyer. The Committee expresses no opinion on whether these conclusions would apply to partnerships involving an out-of-state lawyer—such as a retired lawyer—admitted in a state other than New York but not working in New York.

CONCLUSION:

6. Where the legal services performed in New York by an out-of-state attorney would constitute the unauthorized practice of law in New York under DR 3-101(A), it is unethical for a New York attorney to form a partnership with the out-of-state attorney.

(7-06)

OPINION 802 (11/28/2006)

TOPIC: Municipal bond counsel; multiple representation.

DIGEST: A lawyer may serve as both "bond counsel" and counsel to the borrower in an issuance of tax-exempt bonds as long as (1) bond counsel's role is limited to opining on the transaction and not negotiating the terms of the bond and (2) borrower consents to the limitation of the lawyer's role or, if there are multiple clients involved, they all consent to the multiple representation.

CODE: DR 5-105(A); DR 5-105(C)

QUESTION:

l. May a law firm serve as both bond counsel and borrower's counsel in connection with the issuance of tax-exempt bonds by a conduit bond issuer such as an industrial development agency or municipal housing authority?

OPINION:

2. A tax-exempt organization described in Section 501(c) of the Internal Revenue Code (the "borrower") intends to submit an application to a local industrial development agency (the "IDA") requesting assistance in connection with a proposed tax-exempt improvement project whereby the IDA will issue tax-exempt bonds for the benefit of the borrower.[43] Prospective underwriters of the bond issue will require the written opinion of "bond counsel" relating to the tax- exempt status of the bonds and their exemption from registration under federal securities laws. The borrower has been a client of the inquiring law firm for a period of time and has asked the law firm to act both as borrower's counsel and as bond counsel in connection with the proposed bond issue.

3. At the outset, we recognize that there is a tension between the roles of bond counsel and borrower's counsel. Bond counsel is expected to provide, for the benefit of prospective bond purchasers, an objective judgment on questions such as the tax-exempt status of the bonds, while borrower's counsel may be expected by some clients to act as a partisan advocate, by, for example, seeking aggressive tax positions.

4. Canon 5 of the New York Code of Professional Responsibility (the "Code") governs a lawyer's duty of loyalty to a client. DR 5-105(A) of the Code provides that a lawyer has a conflict of interest if (i) the lawyer's judgment on behalf of a client is likely to be adversely affected thereby or (ii) the employment would involve the lawyer in representing "differing interests." DR 5-105(C) of the Code provides, however, that a lawyer may represent multiple clients in the face of such a conflict if (i) "a disinterested lawyer would believe that the lawyer can competently represent the interest of each" and (ii) each client consents to the representation after full disclosure of the implications, advantages and risks of so doing.

43 In a typical IDA bond financing the borrower will enter into an installment sales agreement with the IDA pursuant to which the borrower is required to make installment payments sufficient to provide payment of the principal of, and interest on, the bonds issued by the IDA.

5. To analyze this inquiry under DR 5-105, we begin with the question of who the client is when a lawyer is retained as "bond counsel." We see two possibilities. First, the client could be the borrower, who is retaining bond counsel to deliver an opinion on which ultimate investors might rely. In that case, there would be one client in both engagements and no conflict under DR 5-105. The client would need to understand, however, that the duty of the law firm as concurrent bond counsel is solely to opine on the bonds from a neutral perspective[44] and this would limit the lawyer's ability to act as an "advocate." In addition, the law firm may have a duty to disclose that the firm represents the borrower in any opinion it may render, although such a duty stems primarily from contract or tort law rather than from an attorney-client relationship.

6. Alternatively, the borrower could be hiring the law firm to represent another entity, such as the IDA.[45] We understand that such multiple representation is not unusual in this area. A publication of the National Association of Bond Lawyers notes, "In various circumstances and in various jurisdictions, it may not be unusual for a lawyer who serves as bond counsel to serve as issuer's counsel, conduit borrower's counsel, underwriter's counsel, or trustee's counsel in the same or other transaction involving some or all of the same parties."[46]

7. In this case, there are two clients with differing interests. The potential interest of the borrower in aggressive tax approaches is a differing interest from the IDA's presumed interest in conservative tax approaches. The question remains whether such a conflict is waivable under DR 5-105(C). As noted above, DR 5-105(C) requires that the proffered engagement pass a "disinterested lawyer" test and that consent be obtained from the affected clients.

8. We conclude that in most circumstances the conflict is consentable, provided that bond counsel's role is limited to opining on the transaction and not negotiating the terms of the bond. As we noted in N.Y. State 753 (2002), a lawyer may not be put in the position "of negotiating with him or herself." Particularly because of the apparent widespread acceptance of multiple representation in the relevant practice area, however, we conclude that bond counsel's professional judgment in delivering an opinion on the tax-exempt status and validity of the bonds will not necessarily be affected by the fact that he or she is also representing the borrower. Indeed, the borrower will be looking to counsel for counsel's view of the status of the bonds, and there is no reason to believe counsel would render a different opinion to the borrower if counsel were not engaged as bond counsel. Of course, consent of both clients must also be obtained after providing the disclosure required by DR 5-105(C).

9. In addition to the duties arising from the attorney-client relationship, bond counsel may also have obligations to the ultimate purchasers of the bonds who rely on the opinion that bond counsel renders. But those duties primarily derive not from the Code but from contract, tort or other law. We agree with the conclusion of a New Jersey ethics opinion that "[b]ond counsel has a duty to those who

44 *See* American Bar Association Model Rule 2.3 (addressing when a lawyer may provide an evaluation of a matter affecting a client for the benefit of someone other than the client).

45 *See*, *e.g.*, N.Y. State 580 (1987) ("The client [of bond counsel] may properly be viewed as the IDA".).

46 National Association of Bond Lawyers Committee on Professional Responsibility, THE FUNCTION AND PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL 3 (2nd ed. 1995). *Accord*, National Association of Bond Lawyers Committee on Professional Responsibility, THE FUNCTION AND PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL 58 (1987) ("Bond counsel may represent more than one party to the transaction when doing so is permitted under applicable rules regarding multiple representation and conflicts of interest.").

may ultimately purchase the bonds in reliance upon the opinion of bond counsel, but this duty does not spring from an attorney/client relationship, it is based upon the law of torts and the concept of third party beneficiary." New Jersey 658 (1992).

CONCLUSION:

In accordance with the limitations cited herein, the question is answered in the affirmative.

(1-06)

OPINION 803 (11/29/2006)

TOPIC: Provision of out-of-state non-legal services.

DIGEST: If permitted by other jurisdictions' regulation, including their regulation of the unauthorized practice of law, a law firm may engage in debt collection activities outside the state that do not constitute the practice of law, provided the firm makes appropriate disclosures to the client and avoids misleading debtors.

CODE: DR 1-102(A)(4); DR 1-104(A); DR 1-106; DR 3-101(B).

QUESTION:

1. A law firm whose lawyers are admitted to practice in New York represents creditors in New York. It seeks to engage in debt collection activities outside New York without engaging in the practice of law. Under what circumstances may it assist its clients in debt collection activities as a non-legal service in jurisdictions where its lawyers are not licensed to practice?

OPINION:

2. The threshold question is whether the collection activities will violate the regulatory provisions of the jurisdictions in which the activities take place. If so, the law firm may not undertake these activities. For example, the collection activities may constitute the practice of law by the firm's lawyers in the states in which they are not licensed to practice and may therefore constitute the unauthorized practice of law in violation of laws or rules of those other states. If the proposed activities would violate another state's regulation of the unauthorized practice of law, the activities would subject the firm to discipline in New York as a result.[47]

3. Assuming that a firm may engage in collection activities outside New York consistently with other states' regulations, it is not *per se* impermissible for a firm to do so under the New York Code. Assuming that collection services comprise non-legal services that are not prohibited as the unauthorized practice of law, DR 1-106 makes clear that a law firm may provide such services independently of the legal services it provides to its clients. DR 1-106(C) defines "non-legal services" to "mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a non-lawyer." With respect to lawyers or law firms providing "non-legal services" to clients, DR 1-106(A) provides in pertinent part that:

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

47 *See* New York Lawyer's Code of Professional Responsibility, Disciplinary Rule ("DR") 3-101(B) ("A lawyer shall not practice law in a jurisdiction where to do so would be a violation of regulations of the profession in that jurisdiction."); DR 1-104(A) ("A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.").

> 2. A lawyer or law firm that provides non-legal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the non-legal services if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship.
>
> . . .
>
> 4. For purposes of DR 1-106(A)(2) . . ., it will be presumed that the person receiving non-legal services believes the services to be the subject of an attorney-client relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the non-legal services . . . .

Because collection activities outside New York will presumptively be subject to the disciplinary rules governing an attorney-client relationship, a law firm seeking to avoid the obligations of an attorney-client relationship must advise the client in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the non-legal services. Further, the law firm must otherwise avoid misleading the client to believe that it is rendering legal services subject to the protection of an attorney-client relationship.

4. Similarly, the firm must avoid misleading debtors with whom it communicates pursuant to the collection activities.[48] For example, it may not use its law firm letterhead in communicating with debtors and must otherwise avoid suggesting to debtors in such communications that the firm or its representatives are functioning as lawyers engaged in the representation of the creditor-client or that the firm or its representatives might undertake legal action on the creditor-client's behalf.

5. This Committee has recognized that, notwithstanding the adoption of DR 1-106, there will be situations in which concurrently providing legal and non-legal services to a client is impermissible under the conflict-of-interest rules.[49] While a conflict may arise in particular situations, a law firm's collection activities for a creditor-client outside New York ordinarily would not be reasonably likely to impair the firm's exercise of professional judgment in legal matters in New York relating to other collections on behalf of the same or other clients.

CONCLUSION:

6. A New York law firm may assist its clients in debt collection activities as a non-legal service in jurisdictions where its lawyers are not licensed to practice if (1) permitted by the applicable rules of the other jurisdictions, including their regulation of the unauthorized practice of law, (2) the firm advises clients in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the non-legal services, and (3) the law firm does not use its law firm letterhead in communicating with debtors and otherwise avoids misleading debtors. (16-06)

48 *See* DR 1-102(A)(4) (law firm shall not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.").

49 *See* N.Y. State 753 (2002) (lawyer may not represent buyer or seller and also act as mortgage broker or title abstractor in same transaction); N.Y. State 752 (2002) (lawyer may not act as lawyer and also real estate broker/other roles in same transaction).

OPINION 804 (11/29/2006)

TOPIC: Conflict of interest; attorneys for legal services corporation with separate private practices.

DIGEST: Attorney for small legal services corporation may not represent a private client as respondent in a legal proceeding in which petitioner is represented by legal services corporation.

CODE: Definition 2; DR 1-104(A); DR 5-105(D)

QUESTION:

1. May an attorney for a small legal services corporation represent in a private practice a respondent in a Family Court proceeding in which the petitioner is represented by the legal services corporation?

OPINION:

2. The inquirer, a private practitioner, joined with a small group of lawyers to form a qualified legal services corporation. The corporation provides legal assistance and representation to persons charged with a crime or who are entitled to counsel pursuant to certain provisions of the Family Court Act, the Correction Law or the Surrogate's Court Procedure Act and who are financially unable to obtain counsel. The legal services corporation provides such services under a county plan for representation adopted in accordance with Article 18-B of the County Law. The lawyers who formed the corporation all provide indigent legal services on behalf of the corporation. The inquirer states that in providing such services the lawyers do not consult with each other or otherwise discuss cases handled by them on behalf of the corporation. At the same time, each of them receives a *pro rata* share of the fees paid by the county to the corporation, and each of these same lawyers maintains a separate private practice of law.

3. This Committee has long held that the legal staff of a small legal services corporation is like a law firm and that the possibility of disqualifying conflicts must be evaluated on that basis.[50] These holdings are consistent with the definition of a law firm found in the Code: "'Law firm' includes, but is not limited to . . . a qualified legal assistance organization."[51]

4. In this case, the lawyers involved are the legal staff of the legal services corporation, and are thus like a law firm. As such, where, as in this case, one of them would be disqualified from repre-

50 *See*, *e.g.*, N.Y. State 605 (1989) (public defender and legal aid offices); N.Y. State 490 (1978) (legal staff of legal service organization); N.Y. State 102 (1969) (legal aid societies).

51 Code, Definitions 2. In *People* v. *Wilkins*, 28 N.Y.2d 53, 56, 268 N.E.2d 756, 757, 320 N.Y.S.2d 8, 10 (1971), the Court of Appeals stated that the inference that information flows freely among members of a law partnership did not apply to "a large public-defense organization such as the Legal Aid Society." *Wilkins* involved a petition to vacate a conviction based on claimed ineffective assistance of counsel arising out of an asserted conflict. The Court relied heavily on the absence of trial taint or any evidence of prejudice to the convicted defendant. Our holdings, on the other hand, address prospective disqualification under applicable ethical standards. We note as well that *Wilkins* was decided well before the 1999 amendments to the definition of "law firm" in the Code, which added the reference to "a qualified legal assistance organization."

senting a party in a matter because of the concurrent representation of another party in the same matter with a differing interest, all of them would be vicariously disqualified, absent informed consent.[52] Thus, no one of them could in his or her private practice represent the respondent in a family court proceeding in which the petitioner is represented by the legal services corporation or vice versa. The rule exists not only to protect the confidences and secrets of clients but also to recognize the fact, and the expectation of the public, that lawyers in a law firm – including lawyers in a legal services office – have a real and substantial connection, including a financial interest, that aligns their interests.[53]

5. In this case, moreover, consent of the parties would not cure the conflict, because two lawyers from the same "law firm" would be representing opposing parties in a single litigation.[54]

CONCLUSION:

6. An attorney for a legal services corporation may not, in his or her private practice, represent the respondent in a Family Court proceeding in which the petitioner is represented by another of the corporation's attorneys acting in the name of the legal services corporation.

(37-05)

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52 DR 5-105(D); N.Y. State 605 (1989); *People* v. *Mattison*, 67 N.Y.2d 462, 494 N.E.2d 1374, 503 N.Y.S.2d 709 (1986); *Cardinale* v. *Golinello,* 43 N.Y.2d 288, 372 N.E.2d 26, 401 N.Y.S.2d 191 (1977).

53 *See also* DR 1-104(A) (law firm shall make reasonable efforts to ensure that all lawyers in firm conform to disciplinary rules).

54 N.Y. City 2001-2.

2007

OPINION 805 (01/10/2007)

TOPIC: Withdrawal From Employment For Non-payment Of Fees And Expenses

DIGEST: A retainer agreement may not ethically provide for a client's advance assent to a lawyer's withdrawal from employment based on the client's failure to pay agreed legal fees and expenses, but the agreement may advise the client of the lawyer's right to withdraw, subject to court approval where applicable, if the client "deliberately disregards" a payment obligation.

CODE: DR 1 102(A)(1); DR 2 110(C)(1)(f); DR 2 110(C)(5)

QUESTION:

1. May a lawyer include a provision in a retainer agreement that would secure a client's advance assent to a lawyer's withdrawal from employment if the client fails to pay agreed legal fees and expenses in a timely manner?

OPINION:

2. A retainer agreement must not mislead the client with regard to the attorney's obligations, "including the obligation to continue as counsel in the absence of a permissible ground for withdrawing from the representation."[1] It would, therefore, be unethical to include a provision that did not accurately set forth the circumstances under which a lawyer may withdraw from representation where the plaintiff fails to pay legal fees and expenses.[2] A retainer agreement that purported to permit a lawyer to withdraw upon a failure to pay agreed legal fees or expenses in a timely manner, without more, would not accurately state the applicable rules, and therefore would be impermissible.

3. Permissive withdrawal from employment is governed by Disciplinary Rule 2-110(C). That rule provides for withdrawal from employment "if withdrawal can be accomplished without material adverse effect on the interests of the client. . . ." In addition, pursuant to subparagraphs (1) through (6) of that section, a lawyer may withdraw upon twelve specifically enumerated grounds. Those grounds include where the client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees"[3] and where the client "knowingly and freely assets to termination of the employment."[4]

4. In N.Y. State 719 (1999), we addressed the issue of advance assent to a lawyer's withdrawal from employment for nonpayment of fees in domestic relations matters. We stated:

1 N.Y. State 719 (1999).

2 *Id. See also* DR 1-102(A)(1) (lawyer shall not violate a Disciplinary Rule).

3 DR 2-110(C)(1)(f).

4 DR 2-110(C)(5).

> [A]lthough DR 2-110(C)(5) specifically permits withdrawal if the "client knowingly and freely assents to termination of the employment," it does not authorize an agreement *in advance* by which the client assents to termination upon some future occurrence that is unrelated to achieving the objectives of the representation. For assent to be made "knowingly," it must be made with knowledge and understanding of all the facts and circumstances at the time of the termination of the employment.[5]

The same is true outside the domestic relations context.

5. Although it is well established that more than mere failure to pay is required to satisfy the "deliberate disregard" standard, the ultimate determination of whether there has been "deliberate" disregard is highly fact sensitive. For example, an inadvertent failure to pay or a failure to pay a de minimus amount would not, by itself, be "deliberate."[6] Yet, under certain circumstances a client's non-payment of fees because of an inability to pay may be deemed "deliberate."[7] We noted some of the conflicting considerations pertinent to the issue in N.Y. State 598 (1989): potential prejudice to the client, the broad professional obligation to render services to the needy, an attorney's own financial interests, and the need of the tribunal for orderly proceedings. We stated:

> It is impossible to determine in the abstract the appropriate resolution of these competing factors; each case must be assessed to determine a result that will be fair to the client, the attorney and the court, taking the rights and interests of each into account. If the requirement of DR 2-110(C)(1)(f) that the client act "deliberately" in refusing to pay were construed to apply only to a purposeful and intentional choice on the client's part, the several competing factors implicated by a client's inability to pay would in effect be automatically resolved against withdrawal; in particular, the reasonableness of the attorney's expectation of and entitlement to payment for services would be eliminated as a consideration in determining the appropriateness of withdrawal. This interpretation would likely give rise to disputes concerning the extent to which the client is in fact unable to pay and the priorities by which the client manages the expenditure of limited resources. Accordingly, we reject this interpretation. We believe that a client "deliberately disregards and agreement or obligation" to pay legal fees whenever the failure is conscious rather than inadvertent, and is not de minimus in either amount or duration.[8]

6. We also emphasized the particular balancing test that must be employed by a tribunal in evaluating even a conscious failure to pay legal fees, stating:

> Although withdrawal is, therefore, permissible under DR 2-110(C)(1)(f) where a client has failed to pay counsel a known obligation, withdrawal will not necessarily be appropriate in all such circumstances where the client is financially unable to pay. The amount of work performed and paid for in comparison to the work remaining, the amount of the fees paid to date, and the likely effect on the client are some of the fac-

5 N.Y. State 719 (emphasis in original).

6 N.Y. State 598 (1989).

7 N.Y. State 719 (1999); N.Y. State 212 (1971); N.Y. State 187 (1971).

8 N.Y. State 598 (1989).

tors that need to be assessed in ascertaining whether withdrawal is appropriate in a particular case.[9]

7. None of these considerations is reflected in a clause by which a client purports to agree that a lawyer may withdraw if the client fails to pay legal fees and expenses in a timely manner. Accordingly, we conclude that a lawyer may not seek advance assent to the lawyer's withdrawal from employment based on a client's failure to pay legal fees and expenses, and a lawyer may not ethically include such a provision in a retainer agreement.

8. No rule of ethics, however, precludes a lawyer from advising a client in a retainer agreement of the lawyer's right to terminate the employment based on the "deliberate disregard" standard of DR 2-110(C)(1)(f), provided that the client is also advised that if the lawyer is engaged before a tribunal, the lawyer must obtain the tribunal's permission before withdrawing if the tribunal rules so require.[10] Although a lawyer cannot terminate the employment without also taking reasonably practicable steps to avoid foreseeable prejudice to the client, including notice to the client, allowing time for successor counsel to be obtained, and turning over client papers and property,[11] we do not believe that the client must be informed of all these points in the retainer agreement.

CONCLUSION:

9. The question is answered in the negative.

(10-06)

9 *Id.*

10 DR 2-110(A)(1).

11 DR 2-110(A)(2).

OPINION 806 (01/29/2007)

TOPIC: Referrals by foreign lawyers; permissibility of fee sharing.

DIGEST: A New York law firm may participate with a foreign law firm in handling legal matters in New York referred by the foreign firm, and in sharing of legal fees in such matters, where the foreign firm's lawyers have professional education, training and ethical standards comparable to those of American lawyers and the firm otherwise complies with DR 2 107(a).

CODE: DR 2 102(D), 2 107(A), 3 102(A), 3 103(A), EC 3 8.

QUESTION:

Where New York and Italian law firms, neither of whose attorneys reside in or are licensed to practice in the other's country, refer legal matters to each other, may the New York firm share a percentage of its fees with the Italian law firm for matters referred to the New York firm, and if so, under what condition and in what proportions?

OPINION:

A New York lawyer is the member of a New York law firm "affiliated" with an Italian law firm, none of whose attorneys resides in or is licensed to practice law anywhere in the United States. While at least some of the New York firm's attorneys are licensed to practice in other states, none resides in or is licensed to practice in Italy. The word "affiliated" is said to be limited in its meaning to the mutual referral of matters as between the two firms. Although the New York lawyer travels to Italy from time to time to assist the Italian firm there on cases referred by the lawyer's firm (presumably in conformity with Italian law), no attorney from the Italian firm comes to New York to assist the New York firm on cases the Italian firm refers to the New York firm. The Italian firm's participation in such matters involves consultation, advice and guidance, all rendered from Italy. The New York lawyer is satisfied that the Italian firm is in fact a firm of attorneys, all of whom are licensed and in good standing to practice law in Italy pursuant to the laws of that country and that they are bona fide members of the Italian bar.

Assuming that the Italian firm refers a matter to the New York firm that generates a fee to the New York firm and that the Italian firm does not record time on the matter but is available for consultation, advice and guidance and is therefore actively involved in and adding value to the matter, we consider whether the New York firm may share a percentage of its earned fees with the Italian firm, and, if so, in what proportion.

This Committee does not render opinions on issues of law, as opposed to ethics, nor on issues of ethical conduct regulated by the law or codes of professional conduct outside of the State of New York. Its responsibility is limited, rather, to the issuance of opinions based upon the application of the New York Code of Professional Responsibility.

DR 3-102(A) prohibits a lawyer from sharing fees with a "non-lawyer" (except in circumstances not relevant here). The ethical requirements governing the division of legal fees among lawyers not associated with the same firm are prescribed in DR 2-107(A). It reads as follows:

A. A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm, unless:

1. The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

2. The division is in proportion to the services performed by each lawyer or, by a writing given the client, each lawyer assumes joint responsibility for the representation.

3. The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client.

The initial question to be determined is whether the lawyers of the Italian firm are "lawyers" within the meaning of DR 2-107(A) or "non-lawyers" within the meaning of DR 3-102(A).

DR 3-103(A) prohibits lawyers from entering into law partnerships with non-lawyers.[12] While on its face the rule might appear to prohibit affiliations with persons not licensed to practice law in New York, that interpretation is tempered by DR 2-102(D) which provides that if a partnership is formed between lawyers of different jurisdictions, the partnership's letterhead must clearly state the jurisdiction in which each lawyer is licensed to practice law. DR 2-102(D) thus contemplates the formation of partnerships between lawyers of different jurisdictions.[13] In N.Y. State 542 (1982) this committee applied that conclusion to lawyers in a jurisdiction outside the United States — there, Great Britain — and it has likewise applied the conclusion to lawyers in Japan[14] and Sweden.[15]

In N.Y. State 542, this committee observed that a lawyer admitted to practice law in any jurisdiction of the United States is not a "non-lawyer" for the purposes of DR 3-103(A) (citing N.Y. State 175 (1970) and N.Y. State 144 (1970)). With respect to persons recognized as lawyers in non-U.S. jurisdictions, our committee adopted an analysis that compares the educational requirements for admission to practice, and standards of professional conduct and discipline, of the non-U.S. jurisdic-

12 *See also* EC 3-8 ("Since a lawyer should not aid or encourage a non-lawyer to practice law, the lawyer should not practice law in association with a non-lawyer or otherwise share legal fees with a non-lawyer.").

13 *See* ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 41:712 (2007), which states in part as follows:

> Virtually every jurisdiction that has examined the issue allows its attorneys to divide fees with out-of-state lawyers or law firms, provided that the in-state ethics requirements are satisfied. *See Freeman v. Mayer*, 95 F. 3d 569 (7th Cir. 1996); *Sims v. Charness*, 103 Cal. Rptr. 2d 619, 17 Law. Man. Prof. Conduct 83 (Cal. Ct. App. 2001); *Cunningham v. Langston, Frazer, Sweet & Freese P.A.*, 727 So. 2d. 800, 15 Law. Man. Prof. Conduct 66 (Ala. 1999); *see also* Connecticut Informal Ethics Op. 91-7 (1991); District of Columbia Ethics Op. 197 (1989); Maryland Ethics Op. 88-58 (1988); Michigan Informal Ethics Op. CI-938 (1983); Nevada Ethics Op. 4 (1987); New Hampshire Ethics Op. 1984-5/19 (1985); New Mexico Ethics Op. 1983-2 (1983); New York City Ethics Ops. 82-66 and 82-28; Rhode Island Ethics Op. 97-16 (1997); South Carolina Ethics Op. 86-18; Virginia Ethics Op. 1130 (1988).

See also Arizona Opinion 2000-08; California Opinion 1986-88. *Cf.* Delaware Opinion 1980-5 (referral fee prohibited because referring law firm did not maintain "any responsibility for the conduct of a case" once the referral was made).

14 N.Y. State 646 (1993).

15 N.Y. State 658 (1994) (New York law firm may enter into partnership with Swedish law firm provided that the partnership will not compromise the New York lawyer's ability to uphold ethical standards). *See also* N.Y. City 81-72 ("Under the Code of Professional Responsibility, a New York lawyer may enter into a partnership with lawyers from other [foreign] jurisdictions."); Alabama Opinion 2002-02; ABA 01-423.

tion with those of New York State in order to determine whether "to consider such persons beyond the traditional proscription against lay partnerships."[16]

Accordingly, if the Italian legal system is determined upon inquiry to provide persons admitted or licensed to practice law with education, training and ethical standards comparable to those of American lawyers, Italian lawyers may be considered "lawyers" within the meaning of DR 2-107(A). Although, as noted above, we have in the past made such a determination with respect to the legal systems of several other nations, we decline to do so here or in the future, as we believe it is not necessary or appropriate for this Committee to continue to do so.

Thus, if (1) lawyers admitted or licensed to practice law in Italy meet the standard set forth above, (2) the New York firm fully discloses to the client the firm's intent in a matter to share its fees with the Italian firm and has obtained the client's consent to such arrangement pursuant to DR 2-107(A)(1), (3) the total fee in the matter will not exceed reasonable compensation for all legal services rendered to the client (DR 2-107(A)(3)), (4) the Italian law firm takes joint responsibility for the matter or the portion of the fee it earns is in proportion to the services it performs, and (5) the Italian law firm's work on, or taking joint responsibility for, the matter is not otherwise barred,[17] we find no Code prohibition on the New York firm's sharing a percentage of its legal fees with the Italian firm. In particular, under DR 2-107(A)(2), which permits the sharing of fees where a firm takes joint responsibility for the matter, if the criteria set forth above are met, we find no impediment to a foreign lawyer or law firm assuming such joint responsibility.

CONCLUSION:

Based upon the information presented above, and upon the assumption that members of a foreign law firm are in fact "lawyers" and that both firms act in full compliance with the provisions of DR 2-107(A) and are not otherwise disqualified under the Code, nothing in the New York Code prohibits the New York firm from sharing a percentage of its reasonably stated fees with a foreign firm for legal services rendered to clients on matters referred to the New York firm by the foreign firm.

(34-05)

16 *Accord* N.Y. State 658; N.Y. State 646; N.Y. City 81-72.

17 *See, e.g.*, N.Y. State 745 (2001) (opining that if a lawyer is unable to assume sole responsibility for a matter because of a conflict of interest, he or she is also disqualified from assuming joint responsibility for it).

OPINION 807 (01/29/2007)

TOPIC: Imputation of conflicts of interest; dual representation of buyer and seller of real estate

DIGEST: A part-time associate of a law firm is "associated" with the law firm for the purpose of imputation of conflicts of interest. The buyer and seller of residential real estate may not engage separate attorneys in the same firm to advance each side's interests against the other, even if the clients give informed consent to the conflict of interest.

CODE: DR 5-105(C), (D)

QUESTION:

1. A law firm employs a part-time associate who works for the firm two days per week. When not working at this law firm, the part-time associate operates her own separate private practice of law, at a separate location, where she works as a sole practitioner and handles her own clients, maintains her own files and has her own trust account. A client approached the sole practitioner at her separate practice and asked her to represent the client in buying some residential real estate. The seller approached a partner in the law firm that employs the sole practitioner part-time and asked the partner to represent him as the seller in the same transaction. May the law firm, with full disclosure and consent, represent the seller in a residential real estate transaction while its part-time associate, operating out of her separate practice, represents the buyer in the same transaction?

OPINION:

Designation of part-time lawyer as an associate

2. A threshold question is whether it is proper to refer to the part-time lawyer as an "associate" of the law firm. The New York City Bar ethics committee has opined that a lawyer who works for a law firm on a continuing basis and spends 10-15 hours per week on firm matters, but does not work exclusively for that law firm, cannot be referred to by the law firm as an "associate." N.Y. City 1996-8. The New York City Bar opinion cites numerous authorities for the proposition that an "associate" means a "salaried lawyer-employee" and concludes that to call a per diem lawyer—who is paid to work only on specific matters and who does not work exclusively for the firm—an "associate" would be misleading. We agree that it would be misleading to clients and the public to call a lawyer an "associate" where that lawyer is called in from time to time to work only on specific matters and is paid on a per diem basis.[18]

3. We do not believe, however, that a part-time lawyer must work for only one firm in order to be properly called an "associate." Where the part-time lawyer is regularly available to consult with the firm and its clients on a variety of matters, albeit during limited hours, the term "associate" can be proper even though the lawyer does not work exclusively for that firm. In this connection we note that

18 *Cf.* N.Y. State 715 (1999) ("If the Contract Lawyer has general access to the files of all clients of the firm and regularly participates in discussions of their affairs, then he or she should be deemed 'associated' with the firm. However, if the firm has adopted procedures to ensure that the Contract Lawyer is privy only to information about clients he or she actually serves, then, in most cases, the Contract Lawyer should not be deemed to be 'associated' with the firm for purposes of vicarious disqualification.").

a single lawyer can be a partner in two different law firms. *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976). We see no reason that a lawyer cannot be an associate in two law firms where the lawyer has a part-time relationship with each firm, if the relationship with each otherwise bears the typical hallmarks of a firm-associate relationship as it is generally understood.

Imputation of conflicts to a part-time associate

4. Disciplinary Rule 5-105(D) provides that "[w]hile lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101(A), DR 5-105(A) or (B), DR 5-108(A) or (B), or DR 9-101(B) except as otherwise provided therein."

5. A lawyer who is held out to the public as an associate is plainly "associated" with the firm for purposes of DR 5-105(D). The clear implication of calling a lawyer an "associate" of the law firm is that the lawyer is "available to the firm for consultation and advice on a regular and continuing basis." N.Y. State 262 (1972) (term 'of counsel' may only be used where there is a continuing relationship). *See also* N.Y. State 794 (2006); N.Y. State 793 (2006); N.Y. State 773 (2004); ABA 90-357 (1990). A law firm may not denominate a lawyer as an associate and then take the position that the lawyer is not an associate for the purpose of imputation of conflicts of interest.

6. While properly calling a lawyer an associate means that he or she is associated with the law firm for the purposes of imputation of conflicts of interest, calling the same lawyer something else does not by itself mean that conflicts are not imputed. The label is not dispositive. A lawyer who has another title, such as "contract lawyer," will be deemed to be "associated" with the law firm in the circumstances set forth in our opinion N.Y. State 715 (1999).

Associated lawyers representing buyer and seller in real estate transactions

7. The buyer and the seller of real estate will ordinarily have differing interests in the transaction. Such differences, which would require the exercise of independent legal judgment by the lawyers for each party, include such things as the nature of the deed to be given; customs to be followed in making adjustments; points in the title report which may or may not be disregarded; and what title company to use. N.Y. State 38 (1966).

8. We recognized in N.Y. State 38 (1966) and N.Y. State 611 (1990) that "in unusual and very limited circumstances" one lawyer might properly undertake dual representation of both parties to a real estate transaction. Our conclusion was based on former Canon 6 and later on Disciplinary Rule 5-105(C), which provides:

> In the situations covered by DR 5-105(A) and (B) a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

9. We concluded in N.Y. State 162 (1970) that a single lawyer could represent both parties to a real estate transaction where the interests of buyer and seller are not actually or potentially differing or would vary only slightly. In N.Y. State 611 (1990), we opined that a single lawyer could represent

the seller and the lender in a real estate transaction where the parties have reached a complete accord on the business terms of the transaction, no points of importance remain for negotiations, and a title policy is to be obtained. *See also* N.Y. County 615 (1973) (lawyer may represent in a real estate transaction, with their consent, both buyer and seller who had already agreed upon the purchase price, time and manner of payment, and other terms and conditions of the sale).

10. Where such dual representation by a single lawyer might be permissible, we have cautioned that the lawyer "should not routinely assume that dual representation of these parties will be ethically permissible in every transaction." N.Y. State 611. A lawyer undertaking to represent both buyer and seller of real estate should heed the admonition of N.Y. State 38 (1966), repeated in N.Y. State 162: "Dual representation should be practiced sparingly and only when it is clear that neither party will suffer any disadvantage from it. It is difficult to justify, except in unusual and very limited circumstances . . ."

11. Under DR 5-105(D), these limitations on a single lawyer representing two parties in a real estate transaction apply as well to representation by a single law firm. The opinions discussed above, in which we concluded that a single lawyer may, in unusual and very limited circumstances, undertake dual representation of both parties to a real estate transaction, involve cases where there is little or no actual adversity between the two parties and they have both sought out a single lawyer (or law firm) to represent them jointly. This might occur, for example in a family transaction or where two clients of a lawyer or law firm have agreed on substantially all of the terms of the transaction and together ask the lawyer or law firm to document the transaction for them both[19].

12. The situation under consideration in this opinion is quite different: Here a buyer and a seller of residential real estate each determined at the outset of the negotiations to be represented by separate lawyers in separate firms, and the two clients separately approached lawyers in different firms to negotiate the terms of the transaction between them. The parties' decision at the outset that they should be represented by two different lawyers in two different firms reflects an actual adversity and conflict of interest between them that would require the two lawyers to negotiate or bargain against each other as adversaries.

13. A conflict like the one here is not consentable under DR 5-105(C). In such a situation, a disinterested lawyer would not conclude that the two lawyers could "competently represent the interests of each." *See* N.Y. City 2001-2 ("If the dual representations require lawyers to directly negotiate the substantive business terms with each other, the direct adversity could preclude such concurrent representation – even with consent.").[20]

CONCLUSION:

14. The question is answered in the negative.

(11-06)

19 Even in this situation, if potential adversity between the clients became actual, the single lawyer or law firm would usually have to withdraw from representing both of the parties unless the clients have consented to have the lawyer continue for only one of them. DR 5-108(A) (a lawyer may not, without consent, represent a client adverse to a former client in the same or a substantially related matter); EC 5-15.

20 This conclusion is much the same as that which would be reached if two lawyers in the same firm sought consent for one to represent plaintiff and the other defendant in contested litigation.

OPINION 808 (02/12/2007)

TOPIC: Obtaining a security interest in litigation (or its proceeds) to recover fees in prior proceeding.

DIGEST: In the absence of an available charging lien, a lawyer may not obtain a security interest in either (a) a client's cause of action to recover fees from a prior proceeding or (b) the proceeds of such cause of action, if the lawyer represents the client in the litigation pursuing the cause of action.

CODE: DR 5-103A; EC 5-1, 5-7.

QUESTIONS:

1. Third parties are often responsible for the legal fees of individuals and business entities. These arrangements may take the form of insurance or indemnity obligations. The latter is frequently the case for senior executives of companies who, for example, face litigation based upon conduct within the scope of their employment ("Primary Actions"). While the beneficiary of these obligations is the executive (the "Client"), their counsel in the Primary Action obviously has a keen interest in seeing to it that those obligations are honored. When they are not honored, the Client may pursue remedies at law, such as an action for a declaration that the third party has an obligation to fund legal fees and/or a claim for breach of contract for past due sums (a "Fee Litigation").

2. Defense counsel in the Primary Action, however, generally has no direct recourse against the third party for unpaid legal fees. Assuming a charging lien is not available to cover the unpaid fees in the Primary Action (and whether a charging lien does apply is a question of law on which the Committee does not opine), this circumstance raises the following questions:

(a) May a lawyer obtain a security interest in the proceeds of a Fee Litigation, to secure the Client's outstanding legal fees and expenses owed to that lawyer in the Primary Action, when the lawyer is representing the client in the Fee Litigation?

(b) Would the answer to the foregoing question be different if the lawyer took a security interest in (or assignment of) the Fee Litigation itself?

(c) Would the answer to the foregoing questions be different if defense counsel in the Primary Action did not represent the Client in the Fee Litigation?

OPINION:

3. DR 5-103(A) provides that a "lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he or she is conducting for a client. . . ." As we explained in N. Y. State 786 (2005), the rule is premised upon two basic concerns: that (1) acquiring a financial stake in litigation may adversely effect a lawyer's exercise of independent judgment, and (2) the subsidizing of litigation by interested counsel might encourage clients to pursue lawsuits that should not otherwise be brought.

4. These considerations are further reflected in EC 5-7, which provides in part that the

> possibility of an adverse effect upon the exercise of free judgment by the lawyer on behalf of the client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of the client or otherwise to become financially interested in the outcome of the litigation.

Even where the interests of a client and lawyer might appear to be aligned, there is a possibility that the lawyer's judgment might be compromised by the self-interest created by a proprietary interest in the litigation.

5. Defense counsel in the Primary Action obviously has a powerful interest in the successful prosecution of the Fee Litigation, since any recovery therein will primarily be to his or her benefit. Indeed, this distinguishes a Fee Litigation from circumstances in which by statute or otherwise a prevailing party is entitled to an award of legal fees; there, other – primary – relief is also awarded (such as a declaratory judgment that some conduct is wrongful). In a Fee Litigation, the only relief sought is the recovery of legal fees. While the Client may bear responsibility for the fees in the Fee Litigation if it is unsuccessful, the lawyer's particular interest in the result of the Fee Litigation is evident. Thus, obtaining a proprietary interest in the Fee Litigation for the work done in that litigation is likely to create incentives that may affect a lawyer's exercise of independent judgment, and falls within the proscription of DR 5-103(A).

6. While the Rule explicitly proscribes the taking of a "proprietary interest," the Code does not define that term. The common understanding of "proprietary interest" is broad: essentially, an interest in property. Indeed, BLACK'S LAW DICTIONARY (8th ed. 2004) defines "proprietary interest" as any "interest held by a property owner." Further, the concerns animating DR 5-103(A) – which we noted in paragraph 3 above – equally suggest that the term "proprietary interest" should not be unduly circumscribed in defining the scope of DR 5-103(A).

7. In this spirit, we believe that a "security interest" is a "proprietary interest" within the meaning of DR 5-103(A).[21] Were a lawyer to obtain a "security interest" in Fee Litigation, the policies DR 5-103(A) seeks to further would be transgressed: obtaining a security interest, like obtaining any other proprietary interest in the litigation, might (a) affect the lawyer's ability to exercise independent judgment and (b) encourage the pursuit of litigation that should not otherwise be brought.

8. We also understand that there is a distinction between taking a proprietary interest "in the cause of action or subject matter of the litigation" and taking such an interest "in the proceeds" of the Fee Litigation, in the event the lawsuit succeeds.[22] But making such a distinction in applying DR 5-103(A) would subvert its purpose, and invite the very mischief the Rule is designed to avoid.

9. On the other hand, DR 5-103(A) would not prevent an attorney from taking a proprietary interest in Fee Litigation where the lawyer is not representing the Client in the Fee Litigation. In this circumstance, the two underlying reasons for the prohibition under DR 5-103(A) (the potential impingement on a lawyer's independent judgment and the encouragement of lawsuits that should not

21 *See, e.g.,* BLACK'S LAW DICTIONARY 1387 (8th ed. 2004) (defining "security interest" to be a form of "property interest"). *See also* 11 U.S.C. § 101(51) ("security interest" is a "lien created by an agreement").

22 *See, e.g.*, N.Y. State 769 (2003) (distinguishing between a transfer of a claim and an assignment of the proceeds of a claim); *Grossman v. Schlosser*, 19 A.D.2d 893, 244 N.Y.S.2d 749 (2nd Dept. 1963) (same).

otherwise be brought) are not implicated. Thus, a lawyer may acquire a proprietary interest in a client's cause of action or subject of litigation where the lawyer is not representing the client in that particular matter.

10. Moreover, a lawyer is not without recourse in collecting unpaid legal fees. DR 5-103(A)(1) permits a lawyer to acquire a lien "granted by law to secure the lawyer's fee or expenses." As E 5-7 notes, "it is not improper for a lawyer to protect the right to collect a fee for his or her services by the assertion of legally permissible liens, even though by doing so the lawyer may acquire an interest in the outcome of litigation." The Model Rules are different; they permit a lawyer to have not just liens "granted" by law, but also liens "authorized" by law.[23] This difference was purposeful: "authorized" replaced "granted" in order to "permit any legally recognized lien to secure fees to be acquired in property that is the subject of the litigation." ABA 02-427. But, as with DR 5-103(A), the lien must still secure the lawyer's "fee or expenses." One such lien is the "charging lien" granted by Section 475 of the Judiciary Law, which attached to funds created by the attorney's efforts. [24] This opinion assumes, however, that a charging lien is not available in the Fee Litigation, or for some reason not sufficient, to cover the lawyer's work in the Primary Action (a question we do not decide).

CONCLUSION:

11. An attorney may not obtain a security interest in the proceeds of a client's cause of action against a third party for the payment of legal fees. The answer is no different if the attorney were to take a security interest in (or assignment of) the action itself. However, DR 5-103(A) does not prohibit a lawyer taking a proprietary interest in Fee Litigation so long as the lawyer is not representing the Client in the Fee Litigation.

(12-06)

23 Model Rule 1.8(i)(1).

24 DR 5-103(A)(2) also permits contingency fee arrangements.

OPINION 809 (02/12/2007)

TOPIC: Aiding the unauthorized practice of law

DIGEST: A lawyer who continues to represent a client in a transaction in which the counter-party has chosen to be represented by a non-lawyer is not thereby aiding the unauthorized practice of law.

CODE: DR 3-101(A); DR 7-101(A)(3) EC 3-8

QUESTION:

1. Is a lawyer aiding the unauthorized practice of law where the lawyer, in order to carry out the representation of a client in a transaction, communicates and deals with a non-lawyer who has been engaged by the client's counter-party and may be engaged in the unauthorized practice of law?

OPINION:

Underlying Situation

2. There are many situations in which a lawyer, representing a client in a transactional matter, may find that the client's counter-party has chosen to be represented and advised by a non-lawyer. Some examples include:

- The lawyer represents a lender in a refinancing transaction involving assignment of the client's mortgage to a new lender. Various counter-parties to the transaction, such as mortgage brokers, bankers, or the new lender, have chosen to have their part of the transaction managed by non-lawyer entities, sometimes known as "settlement" companies. The settlement companies undertake various tasks, such as reviewing notes for proper endorsements and closing the new loan. None of the counter-parties is represented by a lawyer in the transaction.

- The lawyer represents a seller in a real estate transaction. The buyer is not represented by a lawyer, but instead has engaged a real estate agent to handle the transaction. The lawyer observes the real estate agent advising the buyer on the legal meaning of terms in the transactional documents and preparing for the buyer's signature further instruments affecting the title of the subject real estate.

- The lawyer represents the groom in negotiation of a pre-nuptial agreement. The bride is represented by a person the lawyer knows to be a suspended or disbarred lawyer.

3. In all of these and many similar transactional situations,[25] the lawyer may suspect or may actually know that the counter-party's representative is engaged in the unauthorized practice of law. DR 3-101(A) provides: "A lawyer shall not aid a non-lawyer in the unauthorized practice of law." If

25 This opinion is limited to transactional situations and does not encompass situations involving litigation, in which there may be, for example, special duties to the court. As stated below, while the third of these examples appears clear, we express no opinion whether in these examples the non-lawyer representative is in fact engaging in the unauthorized practice of law.

the lawyer continues to represent his or her own client and therefore necessarily communicates and deals with the non-lawyer representative, has the lawyer violated DR 3-101(A)?

4. Whether a particular action constitutes the unauthorized practice of law (UPL) is a question of law on which this Committee does not opine. *See* N.Y. State 705 (1998). Furthermore, it is a question which can sometimes be quite vexing and without a clear answer. In situations where a lawyer merely suspects that the non-lawyer may be engaged in UPL, the lawyer is under no duty to inquire further. If the situation is unclear, the lawyer may properly proceed with the transaction in the normal manner, dealing with the non-lawyer as necessary to conclude the transaction. In other situations, it may be quite clear to the lawyer that the non-lawyer is engaging in UPL, as where a suspended lawyer is representing and advising a counter-party on a legal matter. In those situations, what is the lawyer's proper course of action?

Meaning of "aid" in DR 3-101(A)

5. We believe that "aid" as used in DR 3-101(A) requires an intention to *substantially* assist or cause another to commit an act that constitutes the unauthorized practice of law, as opposed to doing something for one's own purposes that *incidentally* permits the other person to commit that act.

6. For example, in this Committee's prior opinions concerning DR 3-101(A), we have often concluded that certain acts by a lawyer could constitute aiding UPL. In all of those opinions, the common thread was that the lawyer was engaging in an affirmative act that substantially enabled the non-lawyer to practice law and was done with the purpose and intent of doing so.[26]

7. The situation before us is quite different. Here we have a lawyer who is representing his or her client in a transaction. Through no fault and no act by, and no encouragement from, the lawyer (or the client), the lawyer finds that the counter-party has chosen to engage a non-lawyer to carry out the transaction. This situation was not caused by the lawyer in any way. Further, the lawyer's actions in continuing with the transaction are intended to serve the lawyer's client, not to facilitate the non-lawyer in UPL. The lawyer is not substantially enabling the non-lawyer's engaging in UPL nor is that incidental result intended by the lawyer. Of course, the lawyer must not encourage the non-lawyer to engage in UPL (*see* EC 3-8) and must not steer business to the non-lawyer.

8. We do not believe that merely continuing to represent one's own client—in a transaction into which a third party, not under the lawyer's (or client's) control, has chosen to introduce a non-lawyer who is engaging in UPL— is aiding that non-lawyer in UPL. Absent any affirmative intent or desire to substantially assist the non-lawyer in UPL, or some direct financial or other benefit to the lawyer from

26 N.Y. State 801 (2006) (lawyer may not partner with out-of-state attorney where that attorney would be engaging in UPL); N.Y. State 705 (1998) (explaining when lawyer may accept referrals from non-attorney tax reduction company); N.Y. State 662 (1994) (lawyer may not affiliate with non-lawyer to represent homeowners in small claims proceeding to reduce real estate taxes); N.Y. State 644 (1993) (lawyer may not form corporation with non-lawyer to assist homeowners in obtaining real estate tax reductions); N.Y. State 633 (1992) (lawyer may not enter into contractual arrangement with non-lawyer corporation to provide debt consolidation service to debtors); N.Y. State 618 (1991) (salaried lawyer may not remit legal fees to corporate employer); N.Y. State 557 (1984) (lawyer may not form firm with non-lawyer accountant for purpose of providing legal services); N.Y. State 423 (1975) lawyer may not merge with a non-lawyer collection agency corporation); N.Y. State 343 (1974) (lawyer may not delegate supervision of execution of will to paralegal); N.Y. State 334 (1974) (lawyer may not continue to use suspended lawyer's name in firm name); N.Y. State 304 (1973) (lawyer may not delegate taking of deposition to non-lawyer employee).

the non-lawyer's engaging in UPL (other than the ordinary benefit arising from completing the transaction for which the lawyer was engaged), the lawyer is not aiding UPL. All the lawyer is doing is representing a client; the incidental effect of that proper act is that the non-lawyer is able to engage in UPL.[27]

9. We find affirmative support for this conclusion in DR 7-101(A)(3), which prohibits the lawyer from intentionally prejudicing or damaging the client during the course of the professional relationship. We note that reaching the opposite conclusion—that merely continuing to represent one's own client is aiding UPL—would come at the expense of the client. The lawyer's refusal to deal with the non-lawyer might well mean that the client is forced to forgo the services and advice of his or her own lawyer or to abandon a favorable transaction that the client wants to consummate. Assuming that the client wants to go forward with the transaction, a rule that required the lawyer to refuse to deal with the non-lawyer would allow the counter-party effectively to deny the client the right to have representation by a lawyer.

10. We are aware of some contrary authority. Arizona Opinion 99-07 concluded that it would be improper for an Arizona lawyer to negotiate with a nonlawyer insurance adjuster representing the opposing party.[28] That opinion arose in the particular context of a statute that the Arizona ethics committee concluded would permit adjusters to engage in the "unauthorized" practice of law. Two published dissents disagreed with the majority opinion. One concluded that it was not at all clear that the statutorily authorized adjusters were practicing law. The other dissent followed much the same path we do in this opinion. The dissent noted:

> The ordinary meaning of the word 'assist' is not so broad. Ordinarily the word connotes cooperation or affirmative aid of some kind. . . . The Committee majority's conclusion has immense implications. If negotiating an agreement for another party is "the practice of law", then real estate brokers, sports agents, and accountants (to name only a few of the most obvious examples) are "practicing law". The Committee majority's opinion would prevent a lawyer from negotiating on behalf of a client with any of these professionals.

11. We agree with the Arizona dissent. We conclude that the majority's interpretation of the word "assist" in the Arizona version of DR 3-101(A) failed to balance properly the client's right to zealous representation by counsel against the policy of discouraging the unauthorized practice of law.

CONCLUSION:

12. For the reasons given, the question is answered in the negative. (5-06)

27 By way of a more extreme example, imagine that the lawyer owns an office building; the lawyer rents a suite of offices to Attorney X for a period of years. During that time, X is suspended from the practice of law. The lawyer knows of the suspension and knows that X is continuing to practice law in the rented office. We do not think it would be seriously contended that continuing to comply with the obligations of the lease is aiding UPL.

28 *See also* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 21:8205 ("If the nonlawyer is engaged in unauthorized practice, the lawyer may be subjected to discipline for negotiating or otherwise dealing with the nonlawyer in a way that facilitates the nonlawyer's unauthorized practice of law."); Geoffrey C. Hazard, Jr. and W. William Hodes, THE LAW OF LAWYERING § 5.5:203 (2d Ed. 1993 Supp.) (a lawyer who negotiates with a lawyer not admitted in the state "has assisted this violation, and has violated both Rule 5.5(b) [defining unauthorized practice] and Rule 8.4(a) [prohibiting a lawyer from 'knowingly assist[ing] or induc[ing] another to violate the Rules of Professional Conduct']])". The only directly supporting authority cited by the ABA/BNA MANUAL is the Arizona opinion discussed in the text. The only directly supporting authority cited by the Arizona opinion is the Hazard and Hodes treatise.

OPINION 810 (04/03/2007)

MODIFIES: N.Y. State 165 (1970), 260 (1972)

TOPIC: Representation of private clients by a government contract attorney

DIGEST: An attorney who provides legal services to clients on behalf of a county agency and maintains a private practice may not represent clients in the private practice in a matter in which the attorney participated as a government lawyer so long as the client is entitled to representation by the public agency. The lawyer may, however, represent the client in the private practice with respect to a different matter so long as the lawyer did not solicit the client to engage the lawyer.

CODE: DR 2-103(A); DR 5-108(A); Canon 9; DR 9-101(B)

QUESTION:

1. Under what circumstances may a lawyer who serves as a contract attorney for a county office represent clients in the lawyer's private practice where the lawyer previously had contact with the client in the lawyer's capacity as a government attorney?

OPINION:

2. The inquirer is a contract attorney for a county Office for Aging and maintains a private practice in the same county. The county office provides a range of legal services for elderly clients who qualify. In some circumstances the client who is eligible for representation with respect to a specific matter nevertheless may choose to seek private representation, or a client may not qualify for representation by a county attorney because the matter is outside the scope of services that the county office provides or the client does not qualify for such services. In either case, whether the client seeks private representation by choice or necessity, it may be necessary for the lawyer to refer the client to a private, fee-for-services legal practice. This opinion discusses situations in which a client who has met with the county lawyer may subsequently seek representation by the county lawyer in his or her private practice.

3. DR 9-101(B) of the Lawyer's Code of Professional Responsibility provides that a "lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee." An initial issue is whether DR 9-101(B) applies to the attorney. The attorney in question is technically not an employee of the county, but rather an independent contractor who has contracted to perform services in exchange for a fee. While the Code uses the term "employee," which is not defined, we believe that the intent is to include within the ambit of DR 9-101(B) independent contractors who perform legal services for a public entity, such as the county.[29] A second issue is whether DR 9-101(B) is limited to the case where the attorney has left public employment. We have opined that DR 9-101(B) also applies when the attorney is a public employee and simultaneously continues a private practice.[30]

29 *Cf.* N.Y. State 630 (1992) ("special counsel who regularly represents the town . . . would be the functional equivalent of a member of the town attorney's staff"); N.Y. State 708 (1998) (private lawyer hired to represent public agency subject to DR 9-101[B]).

30 N.Y. State 506 (1979) ("the use of the past tense in DR 9-101(B) is without relevance to a resolution of the question").

4. A third issue is whether DR 9-101(B) applies when the county attorney's client is not the government but a third party. While DR 9-101(B) often applies when the attorney subsequently represents a party in a matter adverse to the government agency for which the attorney worked, the language of DR 9-101(B) is not so limited. By its terms, the rule applies when the attorney represents a private client in a matter in which the lawyer participated personally and substantially while working for the government regardless of whether the attorney is now adverse to the government. Numerous authorities have so noted.[31]

5. We have also previously opined that DR 9-101(B) applies when the government lawyer represented a third party. For example, in N.Y. State 506 (1979) we opined that an assistant county attorney who represented a wife in proceedings brought against her husband under the Uniform Support of Dependents Law could not subsequently privately represent the wife in an action to recover arrearages under a separation agreement. We considered it "immaterial" that the objectives of the contemplated private employment would be fully consistent with those of the lawyer's prior representation. We noted that the impropriety that DR 9-101(B) addresses is that of using a public office to secure private advantage and that the ethical proscription exists regardless of whether the private employment is consistent with the public representation.

6. In an analogous situation the Committee looked to DR 9-101(B) for guidance to determine whether a Legal Aid Society lawyer could continue to represent in private practice those whom the attorney represented while employed by the Society. In N.Y. State 534 (1981), the Committee opined that while DR 9-101(B) literally did not apply because the Legal Aid Society was not a government agency, the former staff attorneys could not undertake to represent for a fee those whom they previously served in connection with matters for which they had substantial responsibility so long as such clients remain eligible to receive representation without charge.

7. In N.Y. State 708 (1998) we opined that an attorney who represented a foster care agency in extra-judicial surrender proceedings may not represent prospective adoptive parents who seek to adopt the child involved in those proceedings. Again, we opined that although DR 9-101(B) did not literally apply because the foster care agency was a private entity, the strong public policy concerns underlying the rule were implicated. We noted:

> DR 9-101(B) should be seen as providing an illustration of a general policy underlying much of Canon 9. It is a policy which may be seen to develop from the Code's expressed purpose to promote public confidence in our system of justice and the various mechanisms, or agencies, which have been created to serve that system. Where the public might reasonably perceive that such agencies are being used for the personal

31 *See* Restatement (Third) of the Law Governing Lawyers § 133 cmt. d (2000) ("adverse involvement is not required"); ABA Model Rule of Professional Conduct 1.11 cmt. 3 (rule applies to congruent interest situations); *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d. Cir. 1974) (switching sides not required). *Cf.* DR 5-108(A)(1) (barring representation "materially adverse" to a former client in same or a substantially related matter); N.Y. State 708 (1998) (DR 9-101[B] is principally intended to ensure the public's confidence in the integrity of public agencies and public processes, whereas DR 5-108[A] is principally intended to protect against the misuse of the former client's confidences).

> advantage of [its] attorneys, consistent with the broad purposes of Canon 9, the attorneys have been prohibited from undertaking various kinds of private employment.[32]

8. We follow the same approach here. Where the attorney has represented a client under the auspices of the county Office for the Aging, the attorney may not subsequently represent the client in the attorney's private practice in connection with the same matter so long as the client is eligible to receive representation from the county office. This properly guards against the concern that the government attorney not use the attorney's public office to private advantage.

9. We next consider situations in which the attorney had contact with the prospective client through the attorney's position with the county office but did not represent the client with respect to the matter for which the client now seeks representation. For example, the lawyer may have met with the client but did not provide representation with respect to a matter either because the matter was not within the scope of services provided by the county office or because the client was not eligible for services. The client subsequently seeks the lawyer's representation with respect to the matter. Alternatively, the lawyer may have represented the client with respect to a matter under the auspices of the county office but the client now seeks representation with respect to a different matter. In each case the lawyer may represent the client provided the lawyer has not solicited the representation and provided the lawyer tells the potential client about the availability of the services the county offers if the client would be eligible for the services.

10. DR 2-103(A) provides:

> A. A lawyer shall not engage in solicitation:
>
> > 1. by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or
> >
> > 2. by any form of communication if:
> >
> > > a. the communication or contact violates DR 2-101(A), DR 2-103(G) or DR 7-111;
> > >
> > > b. the recipient has made known to the lawyer a desire not to be solicited by the lawyer;
> > >
> > > c. the solicitation involves coercion, duress or harassment;
> > >
> > > d. the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or

32 N.Y. State 708 (quoting N.Y. State 534 [1981]). *See also* N.Y. State 514 (1979) (a court-appointed guardian ad litem representing a proposed conservatee may not, after the conclusion of the conservatorship proceeding, accept employment as counsel for the conservator); *Mendicino v. Whitchurch*, 565 P.2d 460 (Wyo. 1977) (lawyer employed in legal aid office disciplined for representing a legal aid client in a private practice in the same matter).

> e. the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

11. Ordinarily a lawyer may engage in in-person or telephone solicitation of representation from a very limited class of people that includes existing or former clients. Nevertheless we believe it would not be appropriate for the attorney working under contract with the county Office for the Aging to solicit either current or former clients in any of the situations described above. This Committee has repeatedly held that lawyers in the public's employ, whether full or part-time, must scrupulously avoid using their public offices to promote their private interests and practices.[33]

12. In N.Y. State 165 (1970) and N.Y. State 260 (1972), the Committee opined that it would be unethical for a public defender to represent in his or her private practice anyone who had contacted the public defender's office for assigned representation. The Committee subsequently modified those opinions and opined that the public defender could represent the accused in a private representation where the contact with the attorney was the result of independent factors and not merely the contact with the public defender's office.[34] The latter opinion left intact the opinions in N.Y. State 165 and N.Y. State 260 that a public defender should not represent a private client where the potential client originally sought public defender representation and was found to be unqualified for public assistance. This portion of N.Y. State 165 and N.Y. State 260 should be limited to the criminal context discussed in those opinions. The concern for the integrity of the criminal justice system calls for a more stringent rule for public defenders than is necessary for civil matters.

13. Where the client is not eligible for representation by the county office, we believe there is not likely to be any perception that the attorney is using the public office to obtain clients so long as the attorney does not solicit the private representation. Particularly with respect to the types of matters handled by the county Office for the Aging, the client may have difficulty obtaining representation and there is no reason to prevent the attorney from undertaking the matter simply because the client consulted the Office for the Aging first in order to determine that the client was not eligible for public representation.

CONCLUSION:

14. A lawyer employed by a government agency may represent in his or her private practice a client who has previously been served by the government agency except where the representation is with respect to a matter in which the government lawyer participated and the client remains eligible for representation by a lawyer for the government agency.

(30-06)

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33 *See, e.g.*, N.Y. State 457 (1977) (state estate tax attorney); N.Y. State 435 (1976) (county legislator); N.Y. State 392 (1975) (state estate tax attorney).

34 N.Y. State 587 (1987).

OPINION 811 (04/13/2007)

TOPIC: Conflicts of interest; public defender

DIGEST: Where a public defender cannot be assigned due to a conflict, the public defender may not review billing vouchers of the counsel assigned to the matter to determine or recommend whether they should be paid.

CODE: DR 5-101, 5-105(C), (D), 7-101(A)(1); EC 5-1, 5-15.

QUESTION:

1. May a public defender employed by the county perform a review of billing vouchers submitted by counsel assigned pursuant to Article 18-B of the County Law where the 18-B lawyer is appointed because the public defender has a conflict?

OPINION:

2. New York law requires each county to establish a plan to provide attorneys for people who are entitled to legal representation in criminal and family matters but who cannot afford to pay for counsel.[35] Counties are permitted to use any of four methods to provide such counsel: a public defender, a private legal aid bureau, a bar association plan for rotation of private counsel, or a combination of these.[36] In many cases, counties that have chosen to establish a public defender in accordance with County Law Article 18-A rely on private attorneys under Article 18-B in cases in which the public defender is unable to represent an indigent litigant because of a conflict of interest with another client of the office (co-defendants in a criminal proceeding, for instance).

3. A number of counties do not have a separate program or coordinator that would have responsibility for reviewing bills submitted by attorneys assigned to represent poor people under Article 18-B. Some counties may require the public defender to review billing vouchers of assigned conflict counsel. Some of these counties go further and include the assigned counsel budget in the appropriation for the public defender's office.[37]

5. The Committee concludes that if the public defender's office is barred from representing a party because of a conflict, it would similarly be barred from reviewing the billing vouchers of assigned counsel to determine whether they should be paid by the county. In reviewing those billing materials, the public defender's office would not only likely be exposed to work product about the trial preparation activities of assigned counsel, but would be called upon to determine or advise the county whether those expenditures were excessive. The office owes a duty of loyalty, EC 5-1, and of zealous advocacy, DR 7-101(A)(1), to its client in the matter that conflicts with the expectation of the county that the office provide impartial advice on whether the bills of the 18-B lawyer are appropriate. This may be viewed as a conflict under DR 5-105 between two clients of the office – the county,

35 N.Y. County Law § 722.

36 *Id.*

37 *See* Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services at 57-58 (Spangenberg Group, June 2006).

which hires the office to provide legal advice on the appropriateness of the 18-B lawyer's bills,[38] and the client in the matter that creates a conflict. Alternatively, it may be viewed as a conflict under DR 5-101 between the interests of the client in the matter and the office's own interest in properly carrying out its obligation to provide impartial review of the bills.[39] Under either view, the result is the same. This prohibition would prevent any member of the public defender's staff from engaging in the review of billing submissions.[40] In short, if the public defender's office is conflicted from representing a party in litigation, the office may not get back involved in the representation by participation in determining whether the assigned counsel's bills should be paid.[41]

6. Conflicts under DR 5-101 and DR 5-105 can often be waived with the informed consent of the affected clients, DR 5-105(C), but several circumstances make it unlikely that consent will cure the conflict here. First, we have noted that it is often difficult to obtain informed consent to waiver of a conflict from indigent clients who have been assigned counsel.[42] Moreover, a lawyer or law office (such as the public defender's office) rarely can represent multiple criminal defendants.[43] Indeed, in seeking the appointment of 18-B counsel because of a conflict, the public defender is likely to have concluded that the conflict was not consentable. If the conflict that precluded the public defender from representing the defendant was not consentable, the same conflict would prevent the public defender from reviewing the bills of the defendant's 18-B counsel and would presumably not be consentable.

CONCLUSION:

8. Where counsel is assigned to represent a criminal defendant because the public defender has a conflict, the public defender may ordinarily not review the bills submitted by assigned conflict counsel so as to determine or recommend whether they should be paid. (35-06)

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38 *See* N.Y. City 2004-3 (assuming that a government lawyer's client is the government agency that employs the lawyer).

39 *See* N.Y. State 767 (2003) (lawyer may not represent parents in hearing before impartial hearing officer where such officer is separately appearing on behalf of private clients before the lawyer acting as impartial hearing officer); N.Y. State 682 (1996) (a lawyer may not accept a referral fee from an investment advisor because of the potential impact on the lawyer's advice to the client).

40 DR 5-105(D) (conflicts under DR 5-105 and DR 5-101 are imputed to all lawyers in a law firm or law office). *See also* EC 5-15 (the lawyer "should resolve any doubts against the propriety of the representation"); N.Y. State 788 (2005) (the conflicts of prosecutors in a small D.A.'s office are imputed to a part-time prosecutor).

41 Our view is limited to the facts here, involving conflicting interests of criminal defendants. We express no view with respect to other circumstances, such as the review of bills in other contexts submitted by counsel for parties whose interests differ only slightly or only potentially from those of the reviewer's client.

42 N.Y. State 800 (2006)("Client consent, in a case where a conflict is consentable, is often not possible. Consent can only be sought where the prospective client would be empowered to withhold consent freely. . . . [I]t would be difficult to obtain voluntary consent from an assigned client."); N.Y. State 490 (1978) (When seeking consent, the attorney "should be particularly sensitive to any element of submissiveness on the part of their indigent clients; and such requests should be made only under circumstances where the [attorney] is satisfied that [his or her] clients could refuse to consent without any sense of guilt or embarrassment.").

43 *See* EC 5-15 ("there are few situations in which the lawyer would be justified in representing in litigation multiple clients with potentially differing interests"); Restatement (Third) of the Law Governing Lawyers §129 cmt. c (2000) ("joint representations in criminal cases often has a material and adverse effect on the representation of each defendant"); ABA Model Rule 1.7 cmt. 23 ("The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant."); *Wheat v. United States*, 486 U.S. 153 (1998) ("[M]ultiple representation of criminal defendants engenders special dangers of which a court must be aware" and a court confronted with possible conflicts "must take adequate steps to ascertain whether the conflicts warrant separate counsel.").

OPINION 812 (05/03/2007)

TOPIC: Communication with a represented party.

DIGEST: Unless prohibited by state or local law, DR 7-104(A)(1) permits a lawyer representing a private party before a town planning board to communicate with individual planning board members about pending determinations provided: (a) the proposed communications solely concern policy issues; and (b) the lawyer gives planning board counsel reasonable advance notice of the proposed communications.

CODE: DR 7-104(A)(1); EC 7-15, 7-18.

QUESTION:

1. Over the objection of counsel representing a town planning board, may in-house counsel for a real estate development company communicate privately, separately, and informally about the developer's pending applications with individual members of the board who support the developer's proposed project?

OPINION:

2. The inquirer is in-house counsel to a limited liability company engaged in the business of shopping center development. In that capacity, the inquirer is the "public face" of the developer and represents the developer before various government bodies to secure required land use permits and approvals.

3. The inquiry concerns a development project for which a State Environmental Quality Review Act ("SEQRA") review and site plan and subdivision approvals are pending before a seven-member town planning board. The project is controversial and has engendered substantial public opposition. The town board, which has no jurisdiction over the determinations to be issued by the planning board, is said to support the shopping center project. However, a majority of the members of the planning board, including the planning board chair, are said to oppose the project.

4. The planning board is represented with respect to the shopping center project by outside counsel. The developer has also secured outside counsel to "formally" represent the developer before the planning board, limiting in-house counsel's role to communicating "separately and informally" on behalf of the developer with the "more receptive" minority of planning board members who support the project. The inquirer states that these communications are "not in the nature of legal advice or assistance" and are "not designed to supplant guidance provided to the board by their own legal counsel." Rather, the separate communications "are confined to the provision and receipt of factual information and the discussion of state and local environmental and land use issues and polices" and are intended "to ensur[e] that supportive members of the planning board have the information they need to counter the opposition's efforts to derail the project, and are able to share facts and strategies with the developer." The developer thus seeks to create an even playing field with "[m]embers of the public who oppose the project [and who] communicate and strategize freely with like-minded members of the planning board, without going through the board's legal counsel."

5. Counsel for the planning board has objected to the separate, private communications regarding the project with individual members of the planning board, and has directed that the inquirer limit his communications to written submissions addressed to the planning board secretary for distribution to the entire board and for inclusion in the administrative record.

6. Against this background, the inquirer asks whether he may ethically persist in the "informal communications" with individual members of the planning board.

7. The inquiry is governed by DR 7-104(A)(1), known as the "no-contact" rule, which provides:

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

See also EC 7-18.

8. Because consent has clearly not been given, and because the planning board is represented with respect to the matter, the proposed communications are prohibited under the "no-contact" rule unless within the meaning of DR 7-104(A)(1): (a) planning board members are not "parties"; or (b) the communications are otherwise "authorized by law." We address each question in turn.

1. Are Planning Board Members "Parties"?

9. The answer to this question is controlled by application of the standard set forth by the New York Court of Appeals for determining the "party" status of employees of corporations and other entities for DR 7-104(A) purposes in *Niesig v. Team I*:

> The test that best balances the competing interests, and incorporates the most desirable elements of the [various] approaches, is one that defines "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel.[44]

10. We have held the *Niesig* test to be applicable to governmental units.[45] Thus, DR 7-104(A)(1), as interpreted by *Niesig*, prohibits "only communications with government officials who have authority, individually or as part of a larger body, to bind the government or to settle a litigable matter, or whose act or omission gave rise to the matter in controversy."[46] Here, as the planning board is invested with the power to issue binding SEQRA, site plan and subdivision determinations with respect to the matter before it, the *Niesig* "party" test is satisfied.

44 76 N.Y.2d 363, 374; 558 N.E.2d 1030, 1035; 559 N.Y.S.2d 493, 498 (1990).

45 N.Y. State 652 (1993); *see also* N.Y. State 768 (2003).

46 N.Y. State 652 (*citing* N.Y. City 1991-4 and Ohio Opinion 92-7).

2. Are the Proposed Communications with the Planning Board "Authorized by Law"?

11. In N.Y. State 404 (1975) we recognized an "implicit exception" to the broad no-contact prohibition of DR 7-104(A)(1) where a "public body is involved," based on the "overriding public interest [which] compels that an opportunity be afforded to the public and their authorized representatives to obtain the views of, and pertinent facts from, public officials representing them." Accordingly, we opined that private counsel could, without the consent of school district counsel, properly communicate about a controversy with an individual member of a school board who disagreed with the school board decision being contested by the lawyer's client. This sentiment – that the literal application of the "no-contact" rule must be tempered by constitutional considerations where the First Amendment right to petition government is implicated – is shared by most authorities.[47]

12. This concern for protecting the First Amendment interests of citizens to contact governmental decision makers has also led to specific no-contact rule exceptions in California and the District of Columbia.[48]

13. The issue of whether a lawyer who is representing a private party in a controversy may communicate about the matter with responsible government officials without the prior consent of government counsel has been comprehensively addressed by the American Bar Association Standing Committee on Ethics and Professional Responsibility in ABA 97-408. Noting the "tension between a citizen's right of access and the government's right to be protected from uncounselled communications by an opposing party's lawyer,"[49] the ABA Committee interpreted Model Rule 4.2, the functional equivalent of DR 7-104(A)(1),[50] to allow unconsented contacts with government officials that would otherwise have been prohibited by the no-contact rule, but subject to three conditions. First, the official to be contacted must have authority to take or recommend action in the controversy. Second, the sole purpose of the communication must be to address a policy issue. Third, advance notice of the proposed communications must be given to the lawyer representing the government official in the

47 *See*, *e.g.*, *American Canoe Ass'n Inc. v. St. Albans*, 18 F. Supp. 2d 620 (S.D. W. Va. 1998) (the right to contact and communicate with government officials is a right of citizenship); ABA Formal Op. 97-408 (1997) (Model Rule 4.2 "does not prohibit a lawyer representing a private party in a controversy with the government from communicating directly with government officials who have authority to take or recommend action in the matter, provided the communication is solely for the purpose of addressing a policy issue, including settling the controversy."); Alabama Opinion 2003-03 (lawyer defending employees and officials of state board of education in suit by county board of education may communicate directly with county board of education members to discuss settlement); Kansas Opinion 00-06 (lawyer for zoning applicant may contact city officials about client's application despite city attorney's contrary directive because "a citizen must always have access to his or her government"); Utah Opinion 115 (1993) (lawyer may contact any employee of a represented government agency after advising the employee of the matter in question and of the lawyer's representation therein); *see also* RESTATEMENT OF LAW GOVERNING LAWYERS (THIRD) § 101(1), at 102 (2000) ("Unless otherwise provided by law . . . the prohibition . . . against contact with a represented non-client does not apply to communications with employees of a represented government agency or with a governmental officer being represented in the officer's official capacity.").

48 California Rule of Professional Conduct 2-100(C)(1) (providing that the general no-contact rule "does not apply to communications with a public officer, board, committee or body"); District of Columbia Rule of Professional Conduct 4.2(d) (providing that the District's no-contact rule does not prohibit "communications by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client").

49 ABA Formal Op. 97-408, at 7.

50 Model Rule 4.2 (Communication with Person Represented by Counsel) provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

matter so as to afford government counsel the opportunity to advise his or her client with respect to the communication, including whether even to entertain it.[51]

14. Insofar as set forth in this opinion, we adopt the approach taken in ABA Formal Op. 97-408 and here conclude, on the facts presented, that the proposed communications fall within the protection of the First Amendment right to petition. They are, therefore, not prohibited by DR 7-104(A)(1), provided that counsel for the planning board is given reasonable advance notice that such communications will occur.[52] Although the precise parameters of the constitutional right to petition are beyond our jurisdiction, we note that communications directed to government officials who do not have the authority to take or recommend action in the matter, or communications that are intended to secure factual information relevant to a claim (for example, mere witnesses to government misconduct), should both be fully subject to the no-contact rule as, in each of these situations, there are no First Amendment considerations at play.[53]

15. Our resolution of this inquiry comes with several important caveats. First, we do not opine on whether additional "private," "separate" or "informal" communications with board members may violate a state statute or local ordinance that governs planning board procedures, or whether such communications may implicate a locally adopted ethics code. Second, we do not here address ex parte communications with an adjudicatory government body, such as a zoning board of appeals, which present different considerations.[54] Third, the inquirer may not deliberately elicit information that is protected by attorney-client privilege or as attorney work product.[55] Fourth, the inquirer should cease contact with a planning board member if the member so requests.[56]

CONCLUSION:

16. Absent the application of state or local ordinances that prohibit or regulate the practice, and subject to the qualifications set forth in this opinion, DR 7-104(A)(1) permits a lawyer representing a private party before a town planning board to communicate with individual planning board members about pending SEQRA, site plan and subdivision determinations *provided*: (a) the proposed communications solely concern municipal development policy issues; and (b) the lawyer gives planning board counsel reasonable advance notice of the proposed communications.

(37-06)

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51 ABA Formal Op. 97-408, at 7-8.

52 *Cf.* N.Y. State 768 (2003) (lawyer representing government agency may be present and counsel the lawyer's own client at a meeting with a person known to be represented in that matter without opposing counsel's consent, provided lawyer gives reasonable advance notice to opposing counsel of lawyer's intention to attend and does not communicate with opposing party).

53 *See* ABA Formal Op. 97-408, at 8-9.

54 *See* EC 7-15 ("The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or quasi-judicial, or a combination of both.").

55 *See* N.Y. State 785 (2005).

56 C*f.* EC 7-18 ("A lawyer who advises a client with respect to communications with a represented person should also advise the client against engaging in abusive, harassing or unfair conduct.").

OPINION 813 (05/07/2007)

CLARIFIES: N.Y. State 803 (2006)

TOPIC: Unauthorized practice of law; debt collection; letterhead

DIGEST: A lawyer who provides debt collection services as a non-legal service may not use law firm letterhead in doing so, but a lawyer who, as a lawyer, represents clients in collecting debts may use law firm letterhead.

CODE: DR 1-106(A), 1-102(A)(4), EC 3-6.

QUESTION:

1. A lawyer in New York has been retained by several debt collection agencies, both in New York and out of state, to assist in the collection of debts. The lawyer has hired employees of the debt collection agencies to assist in this work, including preparing letters to debtors. The employees are located in New York and out of state. May the lawyer use the lawyer's letterhead in sending letters to the debtors?

OPINION:

2. We see no impediment in the New York Code of Professional Responsibility to a New York lawyer, acting as a lawyer, using law office letterhead in seeking to collect a debt, assuming no violation of any other jurisdiction's rules. In N.Y. State 803 (2006) we addressed an inquiry in which a lawyer wished to engage in a debt collection business outside of New York without engaging in the practice of law in the state where that business was conducted. The lawyer was not admitted in that state. Rather, the inquirer there sought to assist clients in collecting debts as a non-legal service, which we assumed was permitted by the rules of that other state. Our opinion focused primarily on the requirements of DR 1-106(A) where a law firm is offering both legal and non-legal services, and in particular the requirement that the lawyer advise the client in writing that the protection of the attorney-client relationship does not exist with respect to the non-legal services.

3. In addition, in paragraph 4 of the opinion we addressed the implications of DR 1-102(A)(4), which prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation." We said:

> Similarly, the firm must avoid misleading debtors with whom it communicates pursuant to the collection activities [citing DR 1-102(A)(4)]. For example, it may not use its law firm letterhead in communicating with debtors and must otherwise avoid suggesting to debtors in such communications that the firm or its representatives are functioning as lawyers engaged in the representation of the creditor-client or that the firm or its representatives might undertake legal action on the creditor-client's behalf.

4. This discussion of the use of firm letterhead related only to the conduct of a collection business as a non-legal activity in a state where that was permitted. Our concern was that the lawyer not

mislead debtors as to the capacity in which the lawyer is acting, so as to suggest, for example, that a lawyer has considered the merits of the claim or is preparing to sue the debtor.

5. In the present inquiry, a lawyer proposes to offer *legal* services to the lawyer's debt-collection-agency clients. In that situation, the lawyer is acting as a lawyer in seeking to collect the debt, and can use law office letterhead in doing so.

6. We caution that in conducting such a debt-collection practice, the lawyer must adequately supervise his or her non-lawyer employees.[57] A lawyer must retain full professional responsibility and meaningful involvement in supervising the activities of law firm employees. As we said in N.Y. State 179 (1971), "It would not be improper to permit a stenographer in the office of the client to type the collection letters in the form prepared by the attorney and to forward them to the attorney, who would read, sign and mail the letters to the debtors in the event the letters met with the attorney's approval." But it would be a violation were the lawyer to turn the sending of the lawyer's collection letters over to the collection agency or to the lawyer's debt-collection employees without any meaningful involvement by the lawyer.[58]

7. As in N.Y. State 803, we express no opinion on any question arising out of the rules relating to the unauthorized practice of law. We do not opine on the law or ethics rules of any other jurisdiction.[59]

CONCLUSION:

8. The New York Code of Professional Responsibility does not prevent a lawyer offering legal services from using the lawyer's law firm letterhead in the course of representing clients in collecting a debt. If the law firm undertakes to offer debt collection services as a non-legal service in places where doing so is otherwise permitted, the lawyer should not use law firm letterhead in doing so, as that would suggest that the lawyer is offering legal services.

(10-07)

57 *See* EC 3-6 (delegation of tasks to clerks, secretaries and other nonlawyers "is proper if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product").

58 *Cf. Clomon v. Jackson*, 988 F.2d 1314, 1320 (2d Cir. 1993) (finding violation of federal law prohibition on use of "false, deceptive or misleading" representations or means in debt collection where lawyer did not determine to whom letters over his name should be sent, did not see, review or approve letters before they were sent, and did not know to whom they were sent).

59 Indeed, we do not opine on what constitutes unauthorized practice of law in New York either, because the rules governing unauthorized practice of law in New York are matters of law, not the Code of Professional Responsibility. New York Judiciary Law §§ 476-a, 476-b, 478, 484-486.

OPINION 814 (03/03/2008)

(Revised and Reissued)

TOPIC: Supervision of a branch office managed by a non-partner.

OVERRULES: N.Y. State 175

DIGEST: In N.Y. State 175 (1971), this Committee opined that the New York Lawyer's Code of Professional Responsibility permitted a multi-state firm to practice in New York under a firm name that included names of non- New York lawyers only if the firm had an active partner admitted in New York. In New York Criminal and Civil Courts Bar Association v. Jacoby & Meyers, decided in 1984, the New York Court of Appeals reached the same conclusion under the New York Judiciary Law. In this opinion, we re- examine the question under the Code based on intervening Code amendments and developments in legal practice. In our view, the Code now permits the New York office of a multi-state law firm to be staffed solely by a non-partner lawyer who is admitted to practice in New York where the non-partner lawyer is supervised by an out-of-state partner who is licensed in another state but not in New York.

CODE: DR 1-104(A), (C); DR 2-102(D); DR 2- 106; DR 4-101; DR 5-105(E); DR 6-101; DR 9-102; EC 1-8; EC 2-28.

QUESTION:

1. May the New York office of a multi-state firm be staffed solely by a non-partner who is admitted in New York, where the non-partner is supervised by an out-of-state partner who is admitted in another state, but not in New York?

OPINION:

2. A lawyer admitted to practice in New York State is contemplating becoming an associate or of counsel to what will be a two-person law firm, with offices in New York and New Jersey. The New York attorney will be paid a salary and will work out of and manage the New York office, but will not share in the overall profits and liabilities of the law firm. The firm will practice in the name of the New Jersey attorney, who is not admitted in New York.

This Committee's Opinion in N.Y. State 175

3. In N.Y. State 175 (1971), this Committee addressed whether a multi-state law firm could use for its New York office a name composed of the names of one or more partners who are not admitted to practice in New York. We noted that before New York adopted the Lawyer's Code of Professional Responsibility (the "Code") in 1970, numerous opinions by other ethics committees[60] had held that the inclusion in the firm name of one never admitted to practice in New York was improper. These opinions rested at least in part on the ground that the name falsely implied that all named partners

60 Opinion 175 cited N.Y. City 684 (1946), N.Y. City 698 (1946), N.Y. City 700 (1946), N.Y. City 749 (1950), N.Y. City 786 (1954), N.Y. County 182 (1920), N.Y. County 426 (1954), ABA Inf. 830 (1965), ABA Inf. 1059 (1968) and ABA 318 (1967).

were locally admitted. We concluded that DR 2-102(D) of the then-new Code had effected a change that undermined those earlier opinions, because DR 2-102(D) expressly permits partnerships among lawyers licensed in different jurisdictions to use the same firm name in each jurisdiction.[61] In light of this provision, we opined in Opinion 175 that a multi-state law firm could use in New York a name composed of the names of one or more lawyers not admitted in New York "provided the circumstances are not such as to cause the local use of the name to be misleading." We concluded, however, that the firm had to have a partner admitted in New York:

> To avoid the danger of franchising [an out-of-state law firm's name] and the risk of misleading the public, the Committee is of the opinion that a multi-state law firm may not use in New York a name composed of one or more lawyers not admitted to practice in New York unless the local lawyer is a true partner with a real share in the over-all profits, liabilities and professional responsibilities of the entire firm.

The Court of Appeals' Opinion in *Jacoby & Meyers*

4. Thirteen years later, in *New York Criminal and Civil Courts Bar Association v. Jacoby & Meyers*, 61 N.Y.2d 130, 136, 460 N.E.2d 1325, 1328, 472 N.Y.S.2d 890, 894 (N.Y. 1984), the New York Court of Appeals (the state's highest court) addressed the same question under New York Judiciary Law section 478, which prohibits the unauthorized practice of law. The Court held that it was not a violation of that statute for a multi-state law firm to practice in New York under a firm name that includes the names of lawyers not admitted in New York, "provided that it has an active partner who is admitted to practice in New York.[62]" The Court did not explain the source of this proviso or its rationale. The Court's opinion was based largely on an interpretation of the Judiciary Law,[63] but it noted that opinions of ethics committees recognize the ethical propriety of practice in New York by

61 DR 2-102 (D) as adopted in 1970 – and unchanged today – provides:

> A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

62 The Court articulated this requirement twice in its opinion. The other reference reads, "A multi-state law firm (consisting of partners admitted to practice in different States) may practice law in New York State *if at least one of its active partners is admitted to practice in this State*, and it may conduct such practice under a firm name comprised of a combination of surnames, although none of them is the surname of a partner licensed to practice in New York." 61 N.Y. 2d. at 132, 460 N.E.2d at 1325, 472 N.Y.S.2d at 891 (emphasis added). The firm in the *Jacoby & Meyers* case had a New York partner resident in New York State, who was supervising "20 or so" offices around New York State. The Court found no violation of Judiciary Law § 478.

63 The Court at one point distinguished between the relative weight to be given statutory law and the provisions of the Code, noting that "the provisions of the Code of Professional Responsibility are not entitled in all instances to be accorded the status of statute or case law," but that DR 2-102(D) (quoted above) "fairly states the appropriate application to multi-state law firms of the provisions of section 478 of the Judiciary Law." 61 N.Y.2d at 135-36, 460 N.E.2d at 1327, 472 N.Y.S.2d at 893.

multi-state law firms that include lawyers not admitted in New York. In that connection, the Court cited our opinion in N.Y. State 175 (1971[64]), among others.[65]

Is N.Y. State 175 Still Valid?

5. Our jurisdiction is limited to questions arising under the Code, and does not extend to interpreting New York's statutes on the unauthorized practice of law. To the extent the Court of Appeals' proviso in *Jacoby & Meyers* was based on those statutes, we express no opinion on the question other than to observe that if the conduct is illegal, it is also unethical.[66] To the extent the proviso in *Jacoby & Meyers* was based in part on our views in Opinion 175,[67] we believe subsequent amendments to the Code, and changes in law firm practices over the last 37 years, call for a re-examination of the conclusion we reached in Opinion 175. Having re-examined that conclusion, we no longer adhere to it, for the reasons set forth below.

6. It is clear from the text of DR 2-101(D), and we have previously opined (for example, in N.Y. State 801 [2006] and N.Y. State 144 [1970]), that a New York attorney may form a partnership with a lawyer who is admitted only in another jurisdiction. Nothing in the Code, however, states that partnership is the only permissible professional relationship between a New York lawyer and an out-of-state lawyer or firm. To the contrary, while the Code repeatedly mentions "partners" and "associates," the Code generally imposes the same ethical obligations on all lawyers whether they are partners or not. In general, under the Code a New York lawyer is a New York lawyer regardless of the title bestowed upon the lawyer by the lawyer's firm.

7. Since Opinion 175 and since the Court of Appeals' decision in *Jacoby & Meyers*, the Code has been amended to provide for explicit regulation of law firms as entities, rather than only of New York lawyers. Under amendments to DR 1-104(A) and (C) of the Code adopted in 1996, a law firm has an obligation to ensure the ethical conduct of attorneys in its New York offices.[68] Thus, the drafters of the Code have chosen to ensure law firm compliance with the Code by directly regulating law firms as entities rather than solely by regulating law firm partners. To the extent the conclusion in Opinion 175 was based on a concern that only a partner can ensure that lawyers in a firm confirm with ethical stan-

64 The Court quoted the portion of our Opinion 175 that stated, "a multi-state law firm practicing in New York may use the same name as in other states." 61 N.Y.2d at 136 n.3, 460 N.E.2d at 1327 n.3, 472 N.Y.S.2d at 893 n.3.

65 In addition, relying in part on our Opinion 175, a state trial court in 1979 held that a multi-state law firm with an office in New York must have at least one partner admitted in New York. *Rosenberg v. Johns- Manville Sales Corp.,* 99 Misc. 2d 554, 558, 416 N.Y.S.2d 708, 710 (Sup. Ct. N.Y. County 1979) (multi- state firm practicing in New York must have at least one partner admitted to practice in New York).

66 DR 1-102(A) states that a lawyer or law firm shall not "(3) [e]ngage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer" or "(5) [e]ngage in conduct that is prejudicial to the administration of justice."

67 We note that the Hon. Hugh R. Jones, the author of the Court's opinion in *Jacoby & Meyers*, served as Chair of our Committee from 1961 to 1964.

68 DR 1-104(A) and (C) provide:

A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.

C.A law firm shall adequately supervise, as appropriate, the work of partners, associates and nonlawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

dards,[69] these amendments substantially undermine that conclusion. These new rules do not require that the firm include any New York lawyers as partners.[70] Indeed, in N.Y. State 762 (2003), we concluded that, "[a]t a minimum, . . . the Disciplinary Rules that are specifically applicable to law firms apply to firms with a New York office and at least one New York lawyer *affiliated* with the firm in that office." (Emphasis added.) This is consistent with 22 N.Y.C.R.R. §§ 603.1(b) and 603.2(b), the only rules that any of the four New York judicial departments have adopted defining which law firms are subject to the Code. Under sections 603.1(b) and 603.2(b), which are in the First Department rules, any law firm that "has as a member, *employs, or otherwise retains* an attorney or legal consultant" who is subject to the New York Code can be disciplined for professional misconduct under the Code. (Emphasis added.)

8. The firm's specific supervisory obligations also do not require that there be a New York partner. The firm is obligated to make reasonable efforts to ensure that all lawyers "conform to the disciplinary rules," and the firm must "adequately supervise" the work of all of the attorneys in the firm. Generally, this requires the firm to develop systems to ensure that its New York lawyers comply with New York's disciplinary rules and that the firm's practice is conducted in a professional and ethical manner.[71]To discharge this duty, the firm may consider establishing systems and procedures: (i) to ensure that lawyers reach agreement with clients on fees and provide accurate bills (DR 2-106; EC 2-28); (ii) to educate lawyers and nonlawyers about the importance of maintaining client confidences and secrets and to assist with the maintenance of client confidences (DR 4- 101); (iii) to keep records of prior engagements and to detect conflicts of interest (DR 5- 105(E)); (iv) to oversee work handled by any New York attorney and ensure that the lawyer is handling his or her matters competently (DR 6-101); (v) to allow non-partners to raise concerns about ethical conduct (EC 1-8); (vi) to segregate client funds and maintain appropriate records (DR 9-102); and (vii) to provide continuing legal education in professional ethics to attorneys (EC 1-8). None of this requires a New York-admitted partner.

9. Indeed, a lawyer in New York may ethically practice as a sole practitioner, without any partners in the firm at all, and may even operate multiple offices. If a lawyer is ethically permitted to prac-

69 See Rosenberg, 99 Misc. 2d at 558, 416 N.Y.S.2d at 710 (multi-state firm must have at least one New York-admitted partner, because an associate is "not capable of setting policy for the firm, or of holding himself out to the public as the firm, or of accepting the legal responsibility for all of its acts and those of its other employees").

70 We are aware that the language of DR 1-104(D)(2) assigns particular responsibility to partners in law firms. It states:

> D. A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if:
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> ***
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> 2. The lawyer is a partner in the law firm in which the other lawyer practices or the non-lawyer is employed, or has supervisory authority over the other lawyer or the non- lawyer, and knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated.

Under this rule, however, the partner is responsible only if he or she knows, or should have known, of the conduct. The same responsibility is imposed on a non-partner lawyer in the firm who has supervisory authority over another lawyer or non-lawyer. Thus, the responsibility imposed by DR 1-104(D)(2) does not depend on the status as a partner but on the status as a supervisor, of which partners are only one category.

71 N.Y. State 762 (2003); *see also* EC 1-8 ("A law firm should adopt measures giving reasonable assurance that all lawyers in the firm conform to the Disciplinary Rules and that the conduct of non- lawyers employed by the firm is compatible with the professional obligations of lawyer in the firm.").

tice alone, with sole and complete responsibility under DR 1-104 for his or her law firm's ethical compliance, it is difficult to see, as a practical matter, why the same lawyer could not maintain responsibility for ethical compliance by the New York office of a law firm whose partners are all based in offices outside New York. Since the Code allows any lawyer admitted in New York to run a law firm alone, there is no obvious reason why the Code should not also allow a lawyer admitted in New York to run the New York office of an out-of-state firm even if the New York lawyer is an associate rather than a partner.

10. Moreover, in the 37 years since Opinion 175, the bar and users of legal services have become familiar with the presence in New York of firms that originated or have their principal offices outside the State – and indeed outside the country – and that practice here under their nationwide or worldwide names. This now-widespread practice draws into question the concerns about "franchising" and consequent dilution of adherence to ethical standards that we had in 1971, when cross-border partnerships were new. In addition, a wide variety of employment and partnership arrangements have become common in law firms since 1971, including "contract partners," "non- equity partners," "contract lawyers" and other appelations. These two developments together call into question the continued viability of our conclusion in Opinion 175 that operating without a New York-admitted partner was inherently misleading. Examining the question against the backdrop of legal practice today, we do not think that the presence of a New York office implies that the out-of-state firm has a New York partner as opposed to a New York lawyer who is, for example, an associate or a non-equity partner. Accordingly, we overrule Opinion 175.

11. We thus find no express or implied requirement in the Code that a firm with a New York office have a partner admitted in New York. Of course, the lawyers in the New York office must comply with New York State statutes on unauthorized practice of law as interpreted by the courts. In addition, the firm's letterhead and advertisements must not misleadingly state or imply that the associates or of counsel who work in the New York office are partners.[72] But as long as the New York office is staffed by one or more lawyers admitted to practice in New York and in good standing in New York, we conclude that the Code does not itself require that the firm have a partner admitted in New York.

CONCLUSION:

12. Under the New York Lawyer's Code of Professional Responsibility, the New York office of a multi-state firm may be managed by an associate or of counsel attorney who is admitted in New York and supervised by an out-of-state partner who is licensed in another state. The law firm is responsible for establishing procedures to ensure that the New York attorney complies with New York's disciplinary rules. We caution lawyers, however, with respect to the Court's statements in *Jacoby & Meyers*, 61 N.Y.2d at 130, 136, 460 N.E.2d at 1325, 1328, 472 N.Y.S.2d at 890, 894, noted above, regarding the requirements of the New York Judiciary Law. If it is illegal under those statutes for a law firm to maintain an office in New York when it has no New York-admitted partner, it would also be unethical. (40-06)

72 DR 2-101(A)(1) (barring advertisements that contain "statements or claims that are false, deceptive or misleading"); DR 2-102(C) ("A lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners."); DR 2-102(D) (permitting a firm to use the same name in various jurisdictions if "all enumerations of the members and associates of the firm make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions"). We do not address what might be required to make a particular communication not misleading.

OPINION 815 (10/25/2007)

TOPIC: Practice of a New York lawyer in a foreign jurisdiction.

DIGEST: A New York lawyer who can lawfully engage in conduct in a foreign jurisdiction that would be the practice of law in New York, even though the lawyer is not formally admitted to practice in the foreign jurisdiction, is generally subject to the ethics rules in the foreign jurisdiction, and not all of the provisions of the New York Code, provided the lawyer principally practices in that jurisdiction and the conduct's primary effect is not in New York.

CODE: DR 1-102(A)(3), DR 1-105(A), DR 1-105(B), DR 9-102, EC 1-12.

QUESTION:

1. What ethics rules govern the conduct of an attorney who is admitted to practice in New York and works principally in a foreign jurisdiction, when the lawyer, although not formally admitted to practice in a foreign jurisdiction, is permitted to engage in conduct there that would be the practice of law in New York?

OPINION:

2. A lawyer admitted to practice in New York is contemplating an employment relationship with a law firm in a foreign jurisdiction. That jurisdiction permits the lawyer to undertake work that would be the practice of law if performed in the New York, but the New York lawyer does not need to be nor will the lawyer be formally admitted to practice in the foreign jurisdiction. Because the New York lawyer will not be formally admitted to practice, the lawyer cannot, for example, represent clients in the courts of the foreign jurisdiction. The jurisdiction has a code of ethics for attorneys who are admitted to practice, but that code does not apply to the New York lawyer because the lawyer is not admitted to practice in the foreign jurisdiction.

3. Under DR 1-105(A), a lawyer admitted in New York is subject to the disciplinary authority of New York regardless of where the lawyer practices. In certain circumstances, however, "[i]n the exercise of the disciplinary authority of this state," the disciplinary rules of another jurisdiction will be applied. DR 1-105(B)(1) provides that in connection with a proceeding in a court to which the lawyer has been admitted, the rules of the court apply. "For any other conduct," DR 1-105(B)(2) states:

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

4. It is clear that DR 1-105(B)(1) applies where the New York lawyer appears in a court in a foreign jurisdiction. If the lawyer cannot appear in court, DR 1-105(B)(1) has no application. With

respect to DR 1-105(B)(2)(b), it is the opinion of the Committee that "licensed to practice" includes not only formal licensing procedures like those required by the states in the United States, but also less formal procedures that authorize a lawyer to undertake activities in a foreign jurisdiction that would constitute the practice of law if they were undertaken in the United States. So long as the activities are lawful in the jurisdiction in which they are performed, it is our view that a lawyer undertaking such activities is "licensed to practice" in that jurisdiction, and that jurisdiction is an "admitting jurisdiction," for purposes of DR 1-105(B)(2)(b). If the lawyer principally practices in that jurisdiction and the particular conduct does not clearly have its predominant effect in New York, then under DR 1-105(B)(2)(b), the rules of the foreign jurisdiction apply.

5. A contrary interpretation would lead to anomalous results. It would be impractical, for example, to require a lawyer living abroad and working in a law firm there with foreign clients – and receiving funds in foreign currency – to keep funds in a New York bank account with only New York lawyers as signatories, as required by DR 9-102(B) and (E).

6. This may mean that a New York lawyer will be permitted to undertake representations that the lawyer could not undertake in New York. For example, the rules of the foreign jurisdiction may permit the lawyer to proceed against a current client in an unrelated matter, which the New York rules prohibit absent client consent. Because that is permitted by the rules of the foreign jurisdiction, however, it would not surprise clients.[73]

7. Although not stated in DR 1-105, we believe that certain rules of the New York Code that apply to lawyers even when not engaged in the practice of law -- such as the rule prohibiting illegal conduct that adversely reflects on a lawyer's honesty, trustworthiness or fitness as a lawyer[74] -- apply wherever the lawyer practices.[75]

CONCLUSION:

8. A New York lawyer who is permitted by the law of a foreign jurisdiction to engage in conduct in a foreign jurisdiction that would constitute the practice of law if undertaken in New York, even though the lawyer is not formally admitted to practice law, is "licensed to practice" in that jurisdiction. If the lawyer principally practices in that jurisdiction and the particular conduct does not have its predominant effect in New York, the rules of the foreign jurisdiction govern the conduct.

(12-07)

73 We do not address in this opinion what rules of imputation would apply in a law firm with lawyers both in New York and outside the country.

74 DR 1-102(A)(3).

75 *Cf.* EC 1-12 (listing rules that apply to a lawyer rendering non-legal services under DR 1-106(A)).

OPINION 816 (10/26/2007)

TOPIC: Advance payment retainer; client trust account.

DIGEST: A lawyer may ethically accept an advance payment retainer, place such funds in the lawyer's own account, and retain any interest earned. The Lawyer may require the client to forward an advance payment retainer to pay for final fees that accrue at the end of the relationship.

RULES: DR 2-106(C), DR 2-110(A); DR 9-102(A), (C).

QUESTION:

1. May a lawyer ethically accept an advance payment retainer and place such funds in the lawyer's own account while retaining any interest earned from such amount?

2. If so, may a lawyer request the client to forward an advance payment retainer to pay for final fees that accrue at the very end of the relationship, with interim fees billed out as they are performed?

OPINION:

3. Recently, we have received inquiries regarding the continued validity of our opinion in N.Y. State 570 (1985), which addressed the ethical propriety of what is commonly known as an advance payment retainer. An advance payment retainer is a sum provided by the client to the lawyer to cover payment of legal fees expected to be earned during the representation. To the extent the fees advanced are not earned during the representation, the lawyer agrees to return them to the client. This form of retainer should be distinguished from a general retainer, which is a sum paid to the lawyer for being available to the client. A general retainer is earned upon receipt.[76] The recent inquiries regarding advance payment retainers may stem from the fact that since we issued Opinion 570 in 1985, there have been several significant developments on the subject of retainer agreements and the language in DR 9-102 has been substantially amended. Therefore, it is now appropriate to revisit the principles stated in N.Y. State 570.

4. In New York State 570 we concluded that fees paid to a lawyer in advance of services rendered are not necessarily client funds and need not be deposited in a client trust account. Therefore, any interest earned on these fee advances may be retained by the lawyer. The opinion cautioned, however, that the lawyer is obliged to return any portion of the fee advance that is not earned during the representation.[77]

5. If the parties agree to treat advance payment of fees as the lawyer's own, the lawyer may not deposit the fee advances in a client trust account, as this would constitute impermissible commingling.[78] "On the other hand, the lawyer may agree to treat advance payment of legal fees as client

76 *See* N.Y. State 570 n. 1.

77 *See* DR 2-110(A)(3) ("A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.").

78 *See* DR 9-102(A)(lawyer may not commingle client funds on property with his or her own).

funds and deposit them in a client trust account; in that event any interest earned on the funds while in the client trust account must be remitted to the client."[79]

6. Since 1985, we have cited N.Y. State 570 on several occasions.[80] N.Y. State 570 has also been cited with approval by the Appellate Division, Fourth Department and the New York city Bar ethics committee.[81] The validity of such an advance payment retainer has also been recently recognized by the Supreme Court of Illinois.[82]

7. In opinion 570, we noted that "it appears that the drafters of the Code of Professional Responsibility did not consider advance payments of fees to be client funds necessitating their deposit in a trust account." Although DR 9-102 has been substantially amended since 1985, the changes do not affect the reasoning of that opinion. DR 2-110(A)(3) requires a lawyer who withdraws from representing a client to "refund promptly any part of a fee paid in advance that has not been earned." As we observed in Opinion 570, this provision does not require that the advance be deposited in a client rust account until earned. This conclusion is supported by the language in DR 2-110(A), which still separately classifies fee advances and client property. DR 2-110(A)(2) requires a lawyer planning to withdraw from representing a client to "deliver to the client all papers and property to which the client is entitled" while DR 2-110(A)(3) separately provides for the refund of any unearned "fee paid in advance." In sum, the standards delineated in N.Y. State 570 for advance payment retainers are still valid today.

8. We note that advance payment retainer agreements, like any other fee agreement between a lawyer and client, must be "fair, reasonable, and fully know and understood by the client."[83] These agreements must also comply with other relevant provisions of the Code. In this respect, we construe DR 9-12 to require the lawyer to maintain complete records of any advance payment retainer received and to render appropriate account to the client regarding the retainer.[84] Although the advance payment retainer is not client property, the client retains an interest in that portion of the retainer that is not yet earned by the lawyer. Furthermore, at the conclusion of the representation the lawyer must promptly return any portion of the advance payment retainer that is not earned.[85] Finally, it would be inappropriate for a lawyer to negotiate a nonrefundable advance payment retainer with the client.[86]

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79 N.Y. State 570

80 See, e.g., N.Y. State 599 (1989) discussing nonrefundable minimum fee provisions); N.Y. State 693 (1997); N.Y. State 764 (2003).

81 See Matter of Aquilo, 162 A.D.2d 58, 560 N.Y.S.2d 583 (4th Dep't 1990) ("Moneys advanced by clients for disbursements need not, unless expressly agreed, but held in trust and may be placed in a general account."); N.Y. City 2002-2.

82 Dowling v. Chicago Options Associates, Inc., ___N.E.2d ___, 2007 WL 1288279, at *7 (Ill., May 3, 2007) ("we recognize advance payment retainers as one of three retainers available to lawyers and their clients").

83 *Jacobson v. Sassower*, 66 N.Y.2d 991, 993, 489 N.E.2d 1283, 1284, 499 N.Y.S.2d 381 (1985); see N.Y. State 599 ("The essence of the matter is clarity").

84 DR 9-102©(3) requires a lawyer to "[m]aintain complete records of all funds, securities, and other properties of a client or third person coming into possession of the lawyer and render appropriate accounts to the client or third person regarding them."

85 DR 9-102©(4) (requiring a lawyer to "pay or deliver to the client or third person as requested by the client or third person the funds, securities or other properties in the possession of the lawyer which the client or third person is entitled to receive").

86 *See* DR 2-106©(2)(b) (prohibiting use of a nonrefundable fee clause in a domestic relations matter); Matter of Cooperman, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d (1994) (holding that the payment of a nonrefundable fee for specific services, in advance and irrespective of whether professional services are actually rendered, is per se violative of public policy).

9. An advance payment retainer will obviously benefit the lawyer by helping to ensure that he or she will be paid for services rendered, at least to the extent of the advance. This form of arrangement can also benefit the client, who may wish to hire counsel to defend the client from judgment creditors. If the lawyer deposited such a retainer in a client trust account, the funds would remain the property of the client and might be subject to claims of the client's creditors, thereby making it difficult for the client to retain counsel.[87] Therefore, it is imperative for a lawyer at the outset of the representation to discuss the advantages and disadvantages of advance payment retainers and to reach an agreement about the treatment of any such advances. These agreements should be confirmed in writing in the engagement letter where one is required.[88]

10. We also conclude that an attorney may request an advance payment retainer for final fees that accrue at the very end of the relationship, with interim fees filled out as they are performed. While such an arrangement is permissible, it must comply with the standards outlined in *Jacobson* and our prior opinions. If the advance payment retainer is intended to be payable only once specific services use performed, it must describe the services that it is intended to cover. If the services outlined in the agreement are not provided, that portion of the advance payment retainer must be promptly returned to the client.[89]

CONCLUSION:

11. A lawyer may ethically accept an advance payment retainer and need not place such funds in a client trust account. If the advance payment retainer is placed in the lawyer's account, the lawyer may retain any interest earned from such amount. A lawyer may request an advance payment retainer for final fees that accrue at the very end of the relationship.

(14-07)

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87 *See, e. g.,* Dowling, ___N.E.2d at___, 2007 wl 1288279, AT *8 ("Paying the lawyer a security retainer means the funds remain the property of the client and may therefore be subject to the claims of the client's creditors. This could make it difficult for the client to hire legal counsel. Similarly, a criminal defendant whose property may be subject to forfeiture may wish to use an advance payment retainer to ensure that he or she has sufficient funds to secure legal representation.").

88 *See* 22 NYCRR Part 1215 (engagement letters are to include, among other things, an [e]xplanation of attorney's fees to be charged, expenses and billing practices").

89 *See* DR 2-110(A)(3); DR 9-102(C)(4); N.Y. State 570.

OPINION 817 (11/02/2007)

TOPIC: Lawyer's participation in residential real estate purchase and sale closing that includes a "seller's concession" and "grossed up" sale price.

DIGEST: Participation in residential real estate transaction that includes a "seller's concession" and "grossed up" sale price is prohibited unless the transaction is entirely lawful, the gross-up is disclosed in the transaction documents and no parties are misled to their detriment.

CODE: DR 1-102(A)(3), (4), (5); DR 7-102(A) (7).

QUESTION:

1. Following written agreement between buyer and seller of real estate as to terms, the purchaser requests that the agreed actual sale price be increased by 3% to cover the purchaser's anticipated closing costs, and that the seller grant purchaser a "seller's concession" in an equal amount. The buyer thereby obtains a mortgage loan based upon an increased amount, the actual purchase price plus the buyer's closing costs.

2. Seller's counsel is advised by the lender that this type of seller's concession is "done all the time" by lenders, and it is apparently authorized in the lender's underwriting manual.[90] Moreover, the lender advises seller's counsel that the practice is also acceptable to the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corp. ("Freddie Mac"), who are among the major purchasers of residential mortgage loans.

3. Seller's counsel is unaware whether the lender's underwriting guidelines, or those of Fannie Mae and Freddie Mac, discuss a price "gross up" and is concerned that there is no assurance that the "ultimate purchaser of the loan" would be aware of the selling price "gross up" used to offset the seller's concession. Moreover, counsel is concerned that the reporting of a "grossed up" selling price on the purchaser's mortgage application and the HUD-1 Settlement Statement may violate federal law, and in particular 18 U.S.C. §§ 1001, 1010, and 1012 (which criminalize fraud in certain transactions concerning the federal government).

4. Counsel asks whether participation in this transaction, as seller's attorney, will violate New York's Code of Professional Responsibility.

OPINION:

5. It is clear that DR 1-102(A)(3) prohibits an attorney from engaging in "illegal" conduct; and DR 7-102(A) provides that "[i]n the representation of a client, a lawyer shall not . . . (7) counsel or assist the client in conduct the attorney knows to be illegal or fraudulent." Therefore, if the conduct at

90 According to the inquirer, the manual appears to approve of seller's contributions up to a maximum of 6% of the selling price (where there is a 10% deposit; if the deposit is less than 10%, the maximum seller's concession allowed is 3%). The lender has also provided seller's counsel with a redacted HUD-1 Settlement Statement from a transaction the bank recently closed, showing the grossed-up contract price on Lines 101 and 401, and the "Seller's Concession" as reductions on Lines 215 and 515.

issue is unlawful or fraudulent, it is *per se* unethical. We do not opine on issues of law, however, so we cannot determine whether it is criminal or fraudulent.

6. This Committee does construe the Code, however. DR 1-102(A)(4) prohibits "conduct involving dishonesty . . . deceit, or misrepresentation." While we have not previously addressed the specific question raised here,[91] two other state ethics opinions have considered closely related questions.

7. First, in North Carolina Formal Ethics Opinion 12 (2001),[92] a developer sold a lot for a certain purchase price, giving an early buyer a credit at closing. The developer, hoping to maintain the price of future sales, wanted the lawyer to obtain deed tax stamps based upon the higher price recited in the purchase agreement. The ethics committee of the North Carolina Bar, applying provisions substantially the same as the applicable New York Code provisions, determined that such conduct would be barred as involving dishonesty and misrepresentation, at least in part because the deed recordation concealed (and was intended to hide) from subsequent purchasers of nearby lots, the fact that the credit had been given.

8. Still more closely on point, in Opinion 710 (2006),[93] the New Jersey Supreme Court Advisory Committee on Professional Ethics considered facts like those presented here. In that opinion, the practice was described as follows:

> A contract for the sale of residential property has been prepared by a realtor and signed by both seller and buyer for a set purchase price with a mortgage contingency. Either during attorney review or thereafter, the lawyers for the seller and the buyer are required to amend the contract by increasing the purchase price and the mortgage contingency amount in like amounts. In addition, the attorneys are asked to amend the contract to provide that the seller give a credit to the purchaser at closing in the same amount, calling it a "seller's concession" or "seller's payment of purchaser's closing costs." The inquirer states that the amendments are calculated to increase the size of the purchaser's mortgage loan and "is a fraudulent practice perpetrated on the ultimate investor."
>
> The Committee notes that in recent years residential mortgage lending has, through the secondary market, become a major category of finance in this country. As a result of federal programs, those who originate loans may earn financing fees at the closing and then convey those loans to entities such as the Government National Mortgage Association (known as Ginnie Mae), the Federal National Mortgage Association (known as Fannie Mae) and the Federal Home Loan Mortgage Association (known as Freddie Mac). These programs, in turn, after buying the mortgages from the originators, then issue "mortgage-backed bonds" to investors, who receive the periodic payments of principal and interest from the borrowers.

91 In N.Y. State 545 (1982) we held that it was improper for a lawyer to execute a Real Property Transfer Report that set forth a purchase price that excluded the cost of a number of "extras." The Committee presumed that the conduct violated the Real Property Law, and was therefore barred by DR 7-102(A)(7), and did not reach the question of "dishonest . . . deceit, or misrepresentation."

92 2001 WL 1949450.

93 2006 WL 3891474.

> This secondary market enables the originating lender to sell the loan, and to originate more loans and financing fees with the sales proceeds. In addition, the secondary market has created an investment market for low risk mortgage based securities, and attracts investment dollars into the residential mortgage business.
>
> On the facts set forth in the inquiry, it appears that the sales contract as amended is submitted to the original mortgage lender, or broker, with the sale price increase and corresponding credit expressly stated, but without any assurance that assignees in the secondary market would be aware of the device employed to increase the size of the mortgage loan.

9. Based upon this description, New Jersey Op. 710 determined that the practice violated the prohibitions contained in New Jersey's Rules of Professional Conduct against counseling or assisting a client in conduct that the lawyer knows is illegal, criminal or fraudulent, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation:

> By manipulating the sales price in the manner described by the inquirer, either the originating lender or the secondary investors may be deceived as to the true market price of the house. The deception is the credit to the buyer given by the seller to offset the increase in purchase price. The credit is not justified by any additional property or rights to be sold to purchaser, or by a legitimate charge against the seller on account of any actual costs assumed by it and otherwise payable by the buyer.
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> . . . .
>
> In the present inquiry, it would seem that the originating lender would have the opportunity to uncover the ruse upon a close reading of the contract and the loan application, and to protect itself before completing the transaction, but it is less clear that persons investing in the secondary market would have the same opportunity, or would have recourse against the assignor in the event a later default occurs and a loss is suffered as a result of the enhanced sales price.

The opinion concludes that a lawyer's participation in the increase in the purchase price and offsetting credit was improper because it "involves a deceit, intending that the mortgage loan investor will rely on the misrepresentations in the contract in determining the size of the mortgage loan." The advisory committee also said that the conduct "compromises the integrity of the underwriting of the loan because it exposes the lender and those who purchase the resulting loan to a greater risk of loss than is knowingly accepted."

10. New Jersey Op. 710 provoked requests for clarification from the Mortgage Bankers Association of New Jersey and the North Central Jersey Association of Realtors.[94] They asserted that New Jersey Op. 710 was based on a misunderstanding of mortgage lending practices and was leading New Jersey attorneys to refuse to work on mortgage loans containing seller's concessions of any kind. The mortgage bankers association said that seller's concessions made to permit financing of closing costs serve a salutary purpose because low-income and first-time buyers often do not realize at the time of

94 Mary Pat Gallagher, Ethics Ban on Seller's Concessions at Closings Limited, 187 N.J.L.J. 1 (Jan. 1, 2007).

contract that they will not have sufficient cash to cover the closing costs.[95] The realtor association asked whether the opinion covered, for example, closing credits for repairs to resolve problems uncovered by the home inspection process.[96]

11. A week after the original issuance, the New Jersey committee clarified that New Jersey Op. 710 "address[ed] fictional and deceptive increases in purchase prices unrelated to the actual circumstances or costs of closing, and contrary to the expectations of the lender or the ultimate holder of the mortgage." The clarification stated that the opinion was meant to bar only those seller's concessions not premised on "a legitimate charge against the seller on account of any actual costs assumed by it and otherwise payable by the buyer," and did "not implicate a contract of sale that explicitly states that the seller shall provide the buyer with a credit against legal and legitimate costs or expenses related to the sale, which would otherwise be absorbed by the buyer, such as actual closing costs."[97]

12. The clarification thus addressed, and found permissible, some shifting of costs otherwise borne by buyers, but continued to find impermissible an increase in the purchase price and an offsetting credit to permit the buyer to finance closing costs.[98]

13. This Committee is neither a legislative, nor a judicial body. Just as we cannot opine on matters of law nor can we "find facts." Thus, while we recognize the evidence that the practice of grossing up the price post-contract has become common, we find the concerns expressed in North Carolina Op. 12 and New Jersey Op. 710 of considerable weight.[99]

14. The issue is whether the lawyer's participation in such a transaction facilitates deception or misrepresentation. It seems obvious that there is potential deception implicit in the transactions, but we cannot determine whether or in what circumstances actual deception will occur. Thus we hold that a lawyer may not ethically participate in such a "gross up" of the actual purchase price and concomitant seller's concession unless there is neither deception nor misrepresentation at work in the transaction and its predictable consequences. At a minimum this means that the gross-up (and not merely the grossed-up purchase price) must be disclosed in the transaction documents. We are persuaded that merely reporting "a seller's concession" may imply either that the seller has agreed to reduce the purchase price he or she would otherwise have obtained or that the reported sales price is the actual price

95 *Id.*

96 *Id.*

97 Notice to the Bar, Clarification of Advisory Committee on Professional Ethics Opinion 710 (Dec. 22, 2006).

98 While New Jersey Op. 710 was thereafter approvingly cited as supporting the imposition of civil liability and professional discipline against attorneys participating in transactions that include seller's concessions, *see* Dodge*, Creative Financing,* 43 Arizona Attorney 8 (June 2007), it has also been strenuously criticized in some quarters, *see* Schonberger, *Real Estate Attorneys Miscast as Mortgage-Market Watchdog,* 187 N.J.L.J. 1123 (March 26, 2007) ("[T]he advisory committee failed to understand that the secondary mortgage investor is not unknowingly buying risk . . . . Perhaps more important is the existence, and actions, of professionals [such as appraisers] between the mortgagor and ultimate secondary market buyer.").

99 This Committee has long recognized that the lawyer's obligation under DR 1-102(A)(4) not to engage in conduct involving deception extends to deception of both clients and non-clients. *See* N.Y. State 626 (1992) (holding that the lawyer must provide non-client borrower with information to judge whether the lawyer's fee is or is not excessive); N.Y. State 796 ¶ 6 (2006) (noting that statements made to third parties "can become a matter of ethical concern" under DR 7-102(A)(5), which bars a lawyer from "[k]nowingly mak[ing] a false statement of law or fact").

of the property, less certain costs the seller has agreed to pay. If neither of these is the case, then reporting a concession, without more, is misleading under DR 1-102.

CONCLUSION:

15. On the facts presented here, and for the reasons above, we conclude that participation in such transactions is unethical unless there is no unlawful conduct, and there is full disclosure in the transaction documents of the substance and effect of the transaction.

(11-07)

OPINION 818 (11/28/2007)

TOPIC: Conflicts of interest; persons paying for representation of another; designated underwriters' counsel.

DIGEST: Designated underwriters' counsel may represent the underwriters in a securities offering even though the issuer appointed and pays counsel, provided that underwriters consent after disclosure of material facts. In certain cases, with informed consent of the affected clients, designated underwriters' counsel may also represent the issuer.

CODE: DR 5-101(A), 5-105(A), (B), (C), 5-107(A), (B).

QUESTION:

1. When a law firm is selected by an issuer of securities to serve as the designated counsel for the underwriters of securities to be issued by that company or other entity, may the attorney also perform legal services for the company or entity?

OPINION:

2. A common practice among issuers that frequently issue investment grade securities is to designate one law firm to represent the investment banks selected to underwrite the issuer's securities offerings (a "Designated Underwriters' Counsel"). This practice is common for both corporate and municipal issuers. Frequently, the issuer will make this designation even before it has determined to undertake an offering, decided on the type of offering, or selected who the underwriters will be.[100] And, often, the selected law firm will continue in that role for a considerable period, spanning multiple offerings.

3. The appointment of a Designated Underwriters' Counsel is thought to benefit the frequent issuer, underwriters and investors. Because such counsel works consistently on offerings of the issuer's securities, it becomes particularly familiar with the issuer, and thereby better able to make judgments about the information that should be disclosed in offering documents. This familiarity may therefore improve the quality of disclosure in offering documents, lower transaction costs and promote the efficiency of the capital markets by allowing seasoned issuers to reach the capital markets quickly, as market and other opportunities arise. The ability to reach the capital markets quickly and opportunistically is particularly important in the context of so-called "shelf" offerings.[101] In addition, having a single law firm as underwriters' counsel for frequent issuers rather than different firms chosen by the lead underwriter for different offerings gives the issuer the benefit of underwriter's counsel more familiar with the issuer's business and able to update its knowledge more quickly and cost effectively.

4. Although – by definition – the Designated Underwriters' Counsel represents the underwriters, the counsel's fees are paid by the issuer. Further, as noted, the Designated Underwriters' Counsel is

100 Letter from Bus. Law Section of the N.Y. State Bar Ass'n to the Sec. and Exch. Comm'n (Dec. 18, 2002), *available at* http://www.sec.gov/rules/proposed/s74502/gesbackman1.htm.

101 *Id.* Under SEC Rule 415, an issuer may file a registration statement in anticipation of selling securities at a later date. With its registration statement "on the shelf," the company is able to go to market quickly when conditions are favorable.

also selected for this work by the issuer. Occasionally, an issuer who becomes familiar with a law firm as underwriter's counsel may wish to hire the firm on an unrelated matter. An issuer may also wish to select, as Designated Underwriters' Counsel, a lawyer or law firm that regularly represents the issuer or that otherwise has a personal relationship with an officer of the issuer (e.g., a family member).

5. A law firm's work for the underwriters in an offering may conflict with the interests of the issuer. For example, there may be competing interests when negotiating the underwriting agreement – the contract pursuant to which the underwriting banks agree with the issuer to underwrite the securities to be sold. Similarly, in the course of preparing for a securities offering, there may be disagreement about what is "material" for purposes of disclosure in offering documents. As the Municipal Securities Rulemaking Board has explained, "The potential for conflict of interest is inherent in the issuer's selection of the counsel whose particular responsibilities may include advocating decisions that the issuer may oppose or may perceive as not to be in its best interest."[102] But while the underwriter and the issuer may be adverse to one another at certain points during the preparation of a securities offering, both have the shared goal of completing the offering in a timely manner and complying with all applicable laws.

ANALYSIS:

6. Against this background, we examine the relevant ethical issues that Designated Underwriters' Counsel must keep in mind when representing the underwriters, both where such counsel performs no legal work for the issuer and where he or she does.

7. Where the law firm performs no work for the issuer. Lawyers are frequently engaged to represent a client where a third party will be responsible for payment of the lawyer's fees. One very common example is where an insurance policy protects the client in connection with a litigated matter. As we said in N.Y. State 721, at 3 (1999), "Despite the fact that an insurance company has retained the lawyer pursuant to its contractual duty to defend the policyholder, the client is the policyholder, not the insurance company." The obligation to exercise independent professional judgment on behalf of the client continues even when the lawyer's fee is being paid by a third person.[103] The mere fact that a third party is paying the lawyer's fees thus does not present a disabling conflict.[104] Nor does the prospect of repeated work, for the same or different clients – be they policyholders or underwriters. Indeed, DR 5-107(A) and (B) specifically contemplates that third parties may be obligated to pay attorneys fees.

8. The Code explicitly requires that a lawyer whose fees will be paid by a third party obtain consent of the client, after full disclosure of all relevant facts and circumstances, before accepting such compensation. Investment banks in the business of underwriting are usually well aware of the role played by Designated Underwriters' Counsel and that their selection was made, and compensation

102 MUNICIPAL SECURITIES RULEMAKING BOARD NOTICE, "Issuer Selection Of Underwriters' Counsel" (Sept. 3 1998), *available at* http://www.msrb.org/MSRB1/reports/0299v191/ucounsel.htm.

103 *See*, *e.g.*, DR 5-107(B) ("Unless authorized by law, a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services, or to cause the lawyer to compromise the lawyer's duty to maintain the confidences and secrets of the client under DR 4-101(B).").

104 *See* Nassau County 2003-2 (attorney may accept legal fees from a private school to represent students with disabilities and their parents in disputes with local school districts over the placement of students in appropriate schools even though in any given case the appropriate school may turn out to be a school other than the private school paying the attorney's fees).

will be provided, by the issuer. Accordingly, the underwriters' consent to the issuer's selection and payment of Designated Underwriters' Counsel is usually implicit in the underwriters' agreeing to serve as an underwriter in the contemplated transaction. But Designated Underwriters' Counsel specifically needs to consider, and fully disclose to the underwriters, any material facts or circumstances – beyond the selection as Designated Underwriters' Counsel by the issuer and what that ordinarily entails – that might bear on the lawyer's ability to exercise independent professional judgment on behalf of the client (the underwriter) or otherwise interfere with the lawyer's ability to adequately represent the client.[105] As an extreme example, such circumstances might include that a substantial percentage of the law firm's work consists of acting as Designated Underwriters' Counsel for the particular issuer whose securities the investment bank will be underwriting, or that the responsible partner is the brother of the issuer's chief financial officer or of the elected official responsible for the designation (in the case of municipal securities).

9. The Code also specifically cautions against the third party unduly interfering with the lawyer's representation of its client. Thus, the third party may not "impose conditions that would lead to inadequate representation or constrain the lawyer's independent professional judgment on behalf of the client."[106]

10. Where the law firm performs work for the issuer. Outside counsel to an organization or municipality obviously owes duties to the client, including the duties of zealous representation and loyalty. Where a law firm that represents an issuer is selected to serve as Designated Underwriters' Counsel, there is a potential for conflict.

11. The Code defines "differing interest" to mean "every interest of a client that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Because the interests of an issuer and its underwriters may differ during the course of an offering (e.g., on what disclosures are necessary), it is possible that a law firm that currently represents both the underwriters and the issuer will be subject to "differing interests" that would preclude accepting the assignment as Designated Underwriters' Counsel or require withdrawing from it.[107]

12. In certain circumstances, however, conflicts can be waived by the clients: a lawyer can represent multiple clients with differing interests if a disinterested lawyer would believe that the lawyer can competently represent the interest of each client, and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.[108] That analysis is fact intensive.[109] For example, if all or substantially all of the lawyer's

105 *See*, *e.g.*, DR 5-101(A) (absent informed consent, lawyer may not accept employment "if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests"); DR 5-105(A) (same if independent professional judgment will be or is likely to be adversely affected by other client relationships).

106 N.Y. State 721, at 4 (1999) (attorney may ethically adhere to an insurance company's numerous guidelines regarding legal research, provided that the attorney remains able to provide competent representation to his or her client).

107 DR 5-105(A), (B).

108 DR 5-101(A); DR 5-105(C).

109 *See* Iowa Opinion 2006-03 (law firm may, with consent, represent issuer in a bond offering where it has represented, or does represent, the underwriter in unrelated matters); N.Y. City 2001-2 (under certain circumstances, law firm may represent multiple clients on different sides of the same transaction).

income was derived from representing the issuer, a disinterested lawyer would likely conclude that the lawyer could not competently represent the interests of the underwriters in connection with an offering.[110] Another example would be if a law firm were asked to represent both the issuer and the underwriters in connection with the offering itself. This is ethically permissible in certain situations, but before undertaking the representation the firm would need to obtain informed consent from each client, and to take precautions in the event that disputes among the clients arose (such as having other counsel, for example, in-house counsel, handle those aspects of the matters).[111]

13. Where consent is available, the lawyer or law firm should, in framing the appropriate disclosure, consider the amount of work done for the issuer, the importance of that work to the law firm (financially or otherwise), and any other connections between the law firm and the issuer. For example, litigators at the law firm acting as the Designated Underwriters' Counsel may be representing the issuer in a lawsuit that will be the subject of due diligence (and, possibly, the subject of disclosure in the offering documents). In considering whether to seek consent of the issuer and underwriter in this situation, consideration should be given to whether the litigators may be called upon to reveal information to the corporate lawyers performing due diligence, and if so on what terms. The lawyer may wish to consider whether it is appropriate to advise the issuer to waive confidentiality vis-à-vis the underwriters and the effect on the privilege of doing so, or instead, for example, to set up firewalls to "screen" off the two sets of lawyers. All of this will require the informed consent of the clients, which consent will be effective only if the disinterested-lawyer test of DR 5-105 is met.

CONCLUSION:

14. A law firm selected to serve as Designated Underwriters' Counsel by a company must carefully consider its relationship with the company selecting it, and assess whether a disinterested lawyer would conclude that the law firm can competently represent the interests of the underwriters in light of its relationship with the company, and if so, ensure that the underwriters appropriately consent to its representation of them.

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110 This example is meant only for illustrative purposes and not to define an outer boundary. Specific facts and circumstances will dictate when the relationship between the lawyer, or law firm, and the issuer is such that the disinterested lawyer test would not be met.

111 *See* N.Y. City 2001-2; N.Y. State 807 ¶ 11 (2007) ("a single lawyer may, in unusual and very limited circumstances, undertake dual representation of both parties to a real estate transaction"). On the other hand, where accommodations can not be made, joint representation may not be possible. *See* N.Y. State 753 (2002) (lawyer may not generally represent both the buyer and the lender in a real estate transaction).

OPINION 819 (12/18/2007)

TOPIC: Settlement of fee arrangements and improper fee splitting.

DIGEST: A lawyer may agree with a client to accept less than the judicially-determined fee in a domestic relations matter, as long as doing so is not inconsistent with any statements the lawyer has made to a tribunal or any such inconsistent statements are corrected.

CODE: DR 1-102(A)(4), DR 2-106(C)(2), DR 3-102(A), DR 7-102(A)(5), DR 9-102 (C)(4).

QUESTION:

1. After a court awards legal fees to a lawyer pursuant to section 237 of the Domestic Relations Law, none of which the other party has yet to pay to the lawyer, may the lawyer, as part of a settlement with the lawyer's own client, agree with the lawyer's client to accept less than the full award of legal fees and, in the event the responsible party later pays any part of the award, to reimburse the client for amounts collected from the responsible party up to the amount of the agreed settlement?

BACKGROUND:

2. A lawyer enters into a fee agreement with a client for the provision of legal services relating to the New York Domestic Relations Law. The fee agreement provides for the client to pay an initial retainer to be credited against total hourly charges. At the conclusion of the matter, the court awards the lawyer an amount equal to the lawyer's total hourly charges pursuant to section 237 of the Domestic Relations Law, which the adverse party is obliged to pay to the lawyer. The adverse party does not pay.

3. To settle the debt created by the fee agreement between the lawyer and the client, the lawyer agrees to accept, in full satisfaction of the amounts owing by the client, an immediate payment equaling the initial retainer plus an additional amount that is less than the lawyer's total time charges (and hence less than the judicial award). In return, the client seeks the lawyer's agreement that, if the adverse party pays the lawyer any amount up to the settlement amount, then the lawyer will remit such sums to the client to make the client whole. The lawyer is concerned whether the reimbursement of such amounts would constitute an illicit fee-sharing arrangement with a non-lawyer.

OPINION:

4. In our view, no such concern is warranted. We assume for our purpose that the arrangement with the client comports with DR 2-106(C)(2), which governs fee agreements in domestic relations matters, as well as Part 1400 of the Rules of the Appellate Divisions, entitled "Procedure for Attorneys in Domestic Relations Matters." Because our charter is limited to addressing matters of ethics and not questions of law, nothing here is meant to be a legal opinion on the meaning of section 237 of the Domestic Relations Law. Subject to the foregoing, and to the caveat below, we do not believe that the proposed settlement is an unethical fee-sharing compact.

5. Section 237 of the Domestic Relations Law authorizes a court, in circumstances set forth there, to order a party to a matrimonial action to pay counsel fees "directly to the attorney of the other spouse to enable that spouse to carry on or defend the action or proceeding as, in the court's discre-

tion, justice requires." The purpose of the statute is to "redress the economic disparity between the monied spouse and the non-monied spouse" by investing the court with the discretion "to make the more affluent spouse pay for the legal expenses of the needier one."[112] Although the statute provides for the payment to be made directly to the attorney, courts may direct the payment to be made to the party if that party has already advanced funds to his or her counsel.[113]

6. When a court awards a fee under section 237, the amounts that may be paid by the responsible party are to replace those that may have been paid by the client, but the award does not release the client from liability from the full amount of any fee agreement if the responsible party does not pay. Thus a court is not permitted, in granting an award under that section, to preclude the lawyer "from seeking to recover payment of the full amount of the attorneys' fees in [a] separate action based on the retainer agreement entered into by" the lawyer and client.[114] Likewise, a court may direct a lawyer, and the lawyer would be required in the absence of an overriding contractual arrangement, to refund to the client any amounts previously paid to the lawyer by the client that the lawyer receives from the adverse party in satisfaction of a section 237 award.[115] The settlement proposed here is consistent with the fee award: the client will end up paying an agreed amount in fees, but only to the extent the responsible party fails to pay the awarded amount.

7. We conclude that the proposed settlement does not violate any Disciplinary Rule, and in particular DR 3-102(A). "The purpose of the rule against fee sharing is to remove any incentive for nonlawyers to engage in undesirable behavior such as (1) interfering with a lawyer's professional judgment in handling a legal matter, (2) using dishonest or illegal methods . . . in order to win a case . . . , or (3) encouraging or pressuring a lawyer to use such improper methods."[116] Such perils typically arise from the sharing of fees with non-client third parties.[117] None of these concerns exists in the allocation of fees between a lawyer and a client, and certainly not in the context of a fee-shifting statute that is designed to ensure that the client is made whole for fee amounts the client may have paid.

8. We caution that the arrangement with the client must be consistent with any statements or submissions made to the court in connection with the application for an award of counsel fees. A lawyer may not engage in conduct involving fraud or dishonesty,[118] and shall not make any knowingly false

112 *O'Shea* v. *O'Shea*, 93 N.Y.2d 187, 190, 711 N.E.2d 193, 195, 689 N.Y.S.2d 8, 9-10 (1999) (footnote omitted).

113 *Ross* v. *Ross*, 90 A.D.2d 541, 542, 455 N.Y.S.2d 113, 115 (2d Dep't 1982).

114 *Law Firm of Joel R. Brandes, P.C.* v. *Ferraro*, 257 A.D.2d 610, 610, 685 N.Y.S.2d 83, 84 (2d Dep't 1999); *accord Seth Rubenstein, P.C.* v. *Ganea*, 41 A.D.3d 54, 65, 833 N.Y.S.2d 566, 574 (2d Dep't 2007) ("an award of attorney's fees to a spouse pursuant to Domestic Relations Law § 237(a) does not preclude attorneys from seeking, from their own client, the balance of fees earned if the retainer agreement permits it").

115 *Tarr* v. *Tarr*, 45 A.D.2d 1050, 1050, 358 N.Y.S.2d 172, 173 (2d Dep't 1974); *see* DR 9-102(C)(4) (A lawyer shall "[p]romptly pay or deliver to the client . . . as requested by the client . . . funds . . . in the possession of the lawyer which the client . . . is entitled to receive.")

116 R. Simon, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 532 (2007 ed.).

117 *See, e.g.*, N.Y. State 727 (2000); N.Y. State 705 (1998).

118 DR 1-102(A)(4).

statement of law or fact in the course of representing a client.[119] It is essential that the lawyer comply with any representation made to the court concerning the use of the funds awarded, or amend any such statement if needed.

CONCLUSION:

9. Subject always to a lawyer's obligation to avoid false or misleading statements to a tribunal, a lawyer may settle a fee agreement with a client by accepting less than the judicially-determined fee in a domestic relations matter and agreeing to reimburse the client for amounts the lawyer later receives pursuant to a fee award up to the amount of the agreed-upon settlement.

(9-07)

119 DR 7-102(A)(5).

2008

OPINION 820 (02/08/2008)

TOPIC: Use of e-mail service provider that scans e-mails for advertising purposes.

DIGEST: A lawyer may use an e-mail service provider that conducts computer scans of e-mails to generate computer advertising, where the e-mails are not reviewed by or provided to human beings other than the sender and recipient.

CODE: DR 4-101; EC 4-3.

QUESTION:

May a lawyer use an e-mail service provider that scans e-mails by computer for keywords and then sends or displays instantaneously (to the side of the e-mails in question) computer-generated advertisements to users of the service based on the e-mail communications?

OPINION:

Our starting point is N.Y. State 709 (1998), which addressed the use of Internet e-mail. We concluded based on developing experience that there is a reasonable expectation that e-mails will be as private as other forms of telecommunication and that therefore, under DR 4-101,[1] a lawyer ordinarily may utilize unencrypted e-mail to transmit confidential information. We also noted, however, that a lawyer may not transmit client confidences by e-mail where there is a heightened risk of interception, and that "[a] lawyer who uses Internet e-mail must also stay abreast of this evolving technology to assess any changes in the likelihood of interception as well as the availability of improved technologies that may reduce such risks at reasonable cost."[2]

In recent years, some e-mail providers have offered free or low-cost e-mail services in which, in exchange for providing the user with e-mail services – sending and receiving e-mail and providing storage on the provider's servers – the provider's computers scan e-mails and send or display targeted advertising to the user of the service. The e-mail provider identifies the presumed interests of the service's user by scanning for keywords in e-mails opened by the user. The provider's computers then send advertising that reflects the keywords in the e-mail. As an example, an e-mail that referred to travel to a particular locale might be accompanied by an advertisement for travel service providers in that locale.

Under the particular e-mail provider's published privacy policies, no individuals other than e-mail senders and recipients read the e-mail messages, are otherwise privy to their content or receive

1 Under DR 4-101 of the New York Lawyer's Code of Professional Responsibility, lawyers are required to preserve the confidences and secrets of their clients, subject to certain exceptions, and to exercise reasonable care to prevent their employees, associates and others whose services they utilize from disclosing such confidences and secrets.

2 N.Y. State 709.

targeted advertisements from the service provider. Consequently, when the e-mail service provider sends or generates instantaneous computer-generated advertising based on computer scans of the lawyer's e-mails with clients, the risks posed to client confidentiality are not meaningfully different from the risks in using other e-mail service providers that do not employ this practice. We conclude, therefore, that the obligation to preserve client confidentiality does not preclude using such a service.[3]

We would reach the opposite conclusion if the e-mails were reviewed by human beings or if the service provider reserved the right to disclose the e-mails or the substance of the communications to third parties without the sender's permission (or a lawful judicial order). Merely scanning the content of e-mails by computer to generate computer advertising, however, does not pose a threat to client confidentiality, because the practice does not increase the risk of others obtaining knowledge of the e-mails or access to the e-mails' content. A lawyer must exercise due care in selecting an e-mail service provider to ensure that its policies and stated practices protect client confidentiality.[4] Unless the lawyer learns information suggesting that the provider is materially departing from conventional privacy policies or is using the information it obtains by computer-scanning of e-mails for a purpose that, unlike computer-generated advertising, puts confidentiality at risk, the use of such e-mail services comports with DR 4-101.

CONCLUSION:

A lawyer may use an e-mail service provider that conducts computer scans of e-mails to generate computer advertising, where the e-mails are not reviewed by or provided to other individuals.

(32-07)

3 DR 4-101(B)(3) of the New York Code provides that a lawyer may not "knowingly . . . [u]se a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure." It might be argued that, under the literal text of this provision, using such an e-mail provider would constitute improper "use" of a client's confidences or secrets for the benefit of a third party – namely, the e-mail service provider that sells the advertising. We do not believe that the incidental "use" here, or the benefits derived therefrom, are within the contemplation of the rule anymore than the profits earned by other providers of services to lawyers, such as litigation support companies, which handle or are exposed to client confidences. *See* EC 4-3 (quoted below). We note as well that the advertisements go only to e-mail recipients who are themselves users of the e-mail service provider and presumably chose to receive the advertising. The use therefore also does not "disadvantage" clients within the meaning of DR 4-101(B)(2) by subjecting them to "junk mail" that the clients have not elected to receive.

4 *Cf.* EC 4-3 ("Unless the client otherwise directs, it is not improper for a lawyer to give limited information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided the lawyer exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.").

OPINION 821 (02/11/2008)

TOPIC: Threat by prosecutor of criminal prosecution to aid enforcement of civil claim.

DIGEST: A prosecutor who suggests a civil resolution in lieu of a criminal prosecution must have probable cause to support the criminal charge.

CODE: DR 7-102(A)(1), (2); DR 7-103(A); DR 7-105(A); EC 7-13; EC 7-21.

QUESTION:

1. May a prosecutor, in aid of civil efforts to recoup alleged overpayments of welfare benefits, communicate to an alleged recipient of such an overpayment that the prosecutor will defer criminal prosecution to allow time for civil resolution but will be required to consider prosecution further if there is no satisfactory civil resolution?

OPINION:

2. An assistant district attorney ("ADA") assigned to the welfare fraud bureau in the district attorney's office in which the ADA serves has been asked by the Department of Social Services ("DSS") in the county to send a letter, drafted by DSS, to persons suspected of having received welfare benefits for which they were not eligible. The letter would state that the District Attorney's office has received a report "prepared by the Investigative/Fraud Unit" that the recipient had received welfare benefits for which the recipient was not eligible. The letter would further state that the District Attorney's office "has accepted this case for proposed review for criminal prosecution," but suggests "as an alternative to prosecution," that the recipient contact a DSS fraud investigator to work out a civil resolution of the claim. The letter invites the recipient to discuss with the DSS investigator any concerns the recipient may have that the complaint is in error or unfounded but goes on to state: "Should this procedure be followed [administrative resolution of the complaint as a civil matter], my office intends to defer any possible prosecution. However, unless the situation, which led to the filing of this complaint, is satisfactorily resolved, I will be required to review this matter again to determine if prosecution is then warranted."

3. The proposed letter, which can be readily characterized as a "we won't prosecute if you pay up" letter, will likely have a coercive effect on its recipient. As such, the letter may be seen to implicate DR 7-105(A), which states, "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter," and EC 7-21, which cautions against using "the criminal process to coerce adjustment of private civil claims."[5]

4. In carrying out his or her special responsibilities as a public prosecutor, a prosecutor needs to be quite careful in suggesting civil resolution as a means of avoiding criminal prosecution. In the Committee's view, the letter proposed here does not fulfill those special responsibilities. In coming to

5 *Cf. Cowles v. Brownell*, 73 N.Y.2d 382, 388, 389, 538 N.E.2d 325, 328, 329, 540 N.Y.S.2d 973, 976, 977 (1989) (Titone, J., concurring in the result) (agreements in which criminal charges are dismissed in exchange for a release from civil liability "offend public policy" because, among other reasons, they "encourage prosecutors to violate" DR 7-105 and EC 7-21).

that conclusion, however, we need not and do not reach the applicability of EC 7-21 or of DR 7-105(A). Rather, we look to DR 7-102(A)(1) and (2) and DR 7-103(A).

5. DR 7-102(A)(1) and (2) enjoin all lawyers not to assert or "advance," *inter alia*, an unwarranted position or claim. Under DR 7-103(A), public prosecutors, in particular, are barred from instituting criminal charges that are not supported by probable cause. EC 7-13 explains: "The responsibility of a public prosecutor . . . is to seek justice, not merely to convict." If there is no probable cause or a case is unprovable, a prosecutor must refrain from instituting charges or, once having done so, must drop the charges and do so without exacting any price.[6] Thus, before making a charge of unlawful conduct against anyone, and throughout the maintenance of that charge, a public prosecutor has a responsibility to investigate the facts and circumstances and to confirm that there is and continues to be probable cause to believe that the target of that charge is guilty and that the charge is provable.

6. Even though the proposed letter states only that the District Attorney's office may "review" the case for criminal prosecution, and invites the recipient to discuss why the complaint is in error or unfounded, we believe that the clear import of the letter is that the ADA who signs it believes that the recipient has committed a crime ("it appears from the report [of the Investigative/Fraud Unit] that you received benefits . . . you were not eligible to receive") and that the recipient will be prosecuted if he or she doesn't pay.

7. In N.Y. State 770, we opined that it would be "clearly not ethical" for a prosecutor to reach an agreement not to bring charges on condition that the person who would be charged make a donation to a non-profit organization, "unless there is probable cause that the person committed an offense."[7] We conclude that the same is true here, where the proposed letter would seek to extract a settlement of a claimed civil liability to DSS.

8. As the Court of Appeals said in *Cowles v. Brownell*, "The prosecutor's obligation is to represent the people and to that end, to exercise independent judgment in deciding to prosecute or refrain from prosecution."[8] If the District Attorney or an ADA has investigated a matter sufficiently to have formed an opinion that there is probable cause, he or she would be, as a general matter, ethically free to seek lawful dispositions other than prosecution to judgment. In that event, the ADA could, for example, write a letter such as the one at issue here calling upon the recipient to pay, or to explain why he or she should not be required to pay, to avoid the commencement of a formal prosecution.

9. Needless to say, if upon investigation the prosecutor is not able to form an opinion that there is probable cause, he or she would be ethically bound not to prosecute and not to seek a *quid pro quo* for abstaining from doing so. *A fortiori*, if a prosecutor has not conducted an investigation sufficient to support an opinion one way or the other, that prosecutor would not be ethically free to charge the

6 N.Y. State 770, at 3 (2003) ("A prosecutor . . . should not seek a plea to reduced charges unless there is probable cause to believe that the defendant has committed an offense."); Cowles, 73 N.Y.2d at 387, 538 N.E.2d at 327, 540 N.Y.S.2d at 975 (if the defendant is innocent or the case is unprovable "the prosecutor [is] under an ethical obligation to drop the charges without exacting any price for doing so").

7 N.Y. State 770, at 10.

8 73 N.Y.2d at 387, 538 N.E.2d at 327, 540 N.Y.S.2d at 975.

would-be recipient with any unlawful conduct or to propose a disposition alternative to prosecution as in the proposed letter.

CONCLUSION:

10. A prosecutor may propose an alternative civil disposition to a criminal charge, but only if, after due investigation, the prosecutor has formed an opinion that there is probable cause to support the charge and that it is provable.

(27-07)

OPINION 822 (06/27/2008)

TOPIC: Lawyer's duty to report violation of disciplinary rule

CLARIFIES: N.Y. State 531

DIGEST: A lawyer who satisfies the prerequisites to trigger mandatory reporting of a Disciplinary Rule by another lawyer must report such conduct to an appropriate authority, such as a tribunal (in a litigated matter) or to the appropriate Grievance Committee. Filing a report with a lawyer assistance program is not sufficient.

CODE: DR 1-102(A), 1-103(A); EC 1-4

QUESTION:

1. If a lawyer has an obligation to report a violation of a Disciplinary Rule by another lawyer, to whom must the lawyer report? Does filing a report with a lawyer assistance program satisfy the reporting requirement?

OPINION:

2. In certain circumstances a lawyer is required by the Code of Professional Responsibility to report a violation of a Disciplinary Rule to the appropriate authority. DR 1-103(A) provides:

> A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of DR 1-102 that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

DR 1-102(A) provides:

> A lawyer or law firm shall not: (1) Violate a disciplinary rule. (2) Circumvent a Disciplinary Rule through the actions of another. (3) Engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. (6) Unlawfully discriminate in the practice of law . . . .

3. The New York State Bar Association has a Lawyer Assistance Program (LAP) to deal with issues of alcohol abuse, substance abuse, and related mental health issues. There are also 17 similar committees formed by local bar associations. According to its statement of purpose, the NYSBA LAP provides education and confidential assistance to lawyers, judges, law school students, and immediate family members who are affected by the problems of substance abuse, stress, or depression. Its goal is to assist in the prevention and early identification of problems that can affect professional conduct and quality of life and to assist in arranging appropriate intervention where such problems are identified.

The services provided by the NYSBA LAP, for example, include early identification of impairment; motivating impaired attorneys to seek help; assessing and evaluating the problem and developing an appropriate treatment plan; providing information on training programs on alcoholism, drug abuse and stress management; and referring impaired attorneys to community resources, self-help groups, outpatient counseling, or detoxification and rehabilitation services.[9] Lawyers who serve on committees or programs have no obligation to report a violation of DR 1-102.[10]

4. This opinion deals with the obligations of lawyers who do not serve on such committees. In N.Y. State 635 (1992) we discussed the four prerequisites that must be met before a lawyer has a reporting obligation under DR 1-103(A). They are:

> (1) The lawyer must possess a sufficient degree of knowledge of ostensibly wrongful conduct; a mere suspicion of misconduct is not sufficient.
>
> (2) Any knowledge included in the lawyer's report must not be protected as a confidence or secret.
>
> (3) The conduct in question must violate a Disciplinary Rule.
>
> (4) The violation must raise a substantial question as to the lawyer's honesty, trustworthiness or fitness.

For purposes of this opinion we assume that a lawyer has satisfied all four tests; that is, the lawyer has a sufficient degree of knowledge of a violation of a Disciplinary Rule by another lawyer that raises a question about the other lawyer's honesty, trustworthiness or fitness and that knowledge is neither a confidence or secret. Thus, the lawyer has a mandatory reporting obligation under DR 1-103(A). The question this opinion addresses is to whom the lawyer must report.

5. DR 1-103(A) requires a lawyer to report the knowledge of a violation "to a tribunal or other authority empowered to investigate or act upon such violation." The inquirer asks whether reporting to an LAP would satisfy that obligation. In our opinion, while lawyers are to be encouraged to refer to an LAP lawyers who are abusing alcohol or other substances or who face mental health issues, such a referral would not satisfy the ethical reporting requirement.[11]

6. DR 1-103 requires reporting to a tribunal or other authority empowered to investigate or act upon such violation. Although the Code does not further specify to whom reporting is required, the phrase "investigate or act" suggests that the "authority" must be a court of competent jurisdiction or a body having enforceable subpoena powers. Thus, a violation in the course of litigation could be

9 *See* http://www.nysba.org/Content/NavigationMenu/ForAttorneys /LawyerAssistanceProgramLAP / Lawyer_Assistance_Pr.htm.

10 DR 1-103(A); *see also* Judiciary Law § 499 (treating the confidential information provided to lawyers on such committees as privileged).

11 We note that lawyers may refer other lawyers to an LAP in situations where the alcohol or substance abuse or mental health issue has not resulted in any violation of a Disciplinary Rule. A lawyer in such a situation may not be so impaired that the lawyer's representation of clients is affected. For example, the lawyer may suffer from stress and depression and need assistance but still be able to perform legal work competently. *See generally* ABA Formal Op. 03-429 (obligations with respect to mentally impaired lawyer within a law firm); ABA Formal Op. 03-431 (lawyer's duty to report rule violations by another lawyer who may suffer from disability or impairment).

reported to the tribunal before which the action is pending. In both a litigation and a non-litigation context, the report could be filed with a grievance or disciplinary committee operating under the powers granted to them by the Appellate Division of the State Supreme Court pursuant to Section 90 of the Judiciary Law and court rules.[12] The report could be filed with the grievance committee in the Appellate Department in which litigation is pending or with the grievance committee in the Department where the lawyer is admitted or where the prohibited conduct occurred.

7. The report need not be made immediately or without some reasonable effort at remediation, particularly where the consequences of reporting the violation may be more harmful to the lawyer's client than some alternative course of action.[13] Once a report has been made to an appropriate authority, notwithstanding the existence of other authorities to which the report could have been made, the reporting lawyer's obligation under the Code will be deemed satisfied.[14]

8. In N.Y. State 531 (1981), the Committee, in holding that members of an LAP may ethically refrain from reporting professional misconduct, noted that the LAP "committee of the bar stands in a position analogous to that of 'a tribunal or other authority empowered to investigate or act.'" In this opinion we clarify that an LAP is not an appropriate authority to which misconduct can be reported. In contrast to a tribunal or grievance committee, an LAP has no formal powers. LAP services are voluntary. Although an LAP may seek to assist a lawyer in need of assistance, the lawyer does not need to respond and may refuse the assistance of the LAP. Furthermore, without the assistance of the affected lawyer, the LAP has no power to investigate whether the impairment has resulted in a violation of a Disciplinary Rule.

9. The purpose of the reporting requirement is to assist courts, disciplinary agencies and other authorities in policing members of the bar.[15] The focus of an LAP is on assisting in the lawyer's recovery process, not on any code violations that may have resulted from the lawyer's impairment. Disciplining a lawyer for a Code violation may be at odds with the recovery process. The fact that a lawyer's impairment has resulted in a violation of the profession's disciplinary rules may be a lever to convince the lawyer that he or she needs help. The process of obtaining that help, however, will not satisfy the profession's obligation to regulate itself.

12 *See*, *e.g.*, Nassau County 98-12 (if reporting is required, lawyer can report to the court or to the grievance committee); N.Y. City 1995-5 (misconduct should be reported to the appropriate disciplinary or grievance committee). *Cf. People v. Romero*, 91 N.Y.2d 750, 698 N.E.2d 424, 675 N.Y.S.2d 588 (1998) (holding that N.Y. Jud. Law § 476-a(1) authorized the attorney general to bring a civil action for unauthorized practice of law).

13 *See*, *e.g.*, *U.S. v. Cantor*, 897 F. Supp. 110 (S.D.N.Y. 1995) ("DR 1-103 must be read to require reporting . . . within a reasonable time under the circumstances"); N.Y. City 1990-3 ("While it may be permissible in certain limited circumstances to postpone reporting for a brief period of time, we reiterate our caution . . . that 'once a lawyer decides that he or she must disclose under DR 1-103(A), any substantial delay in reporting would be improper.'"); N.Y. City 81-40. *Cf. U.S. v. Turkish*, 470 F. Supp. 903, 909 n.7 (S.D.N.Y. 1978) (prosecutor who believes defense counsel's representation of multiple clients is a conflict problem could "in most instances" satisfy DR 1-103(A) by raising the problem directly with the attorney, and then, if necessary, the clients themselves).

14 *See* Nassau County 88–10 ("The code requires that the matter be brought to the attention of the grievance committee, but does not require that it also be reported to the district attorney or other appropriate prosecuting agency having jurisdiction of such matters").

15 EC 1-4 ("The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials"); *see also* Restatement Third, The Law Governing Lawyers § 5 cmt i (collecting authorities regarding the reporting obligation); *Matter of Wieder*, 80 N.Y.2d 628, 636, 609 N.E.2d 105, 108, 593 N.Y.S.2d 752, 755 (1992) (noting that the legal profession relies upon lawyers to report appropriate cases to protect the public and the integrity of the Bar).

CONCLUSION:

10. A lawyer who is required under DR 1-103(A) to report knowledge of misconduct "that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer" may report that knowledge to those agencies described above. Reporting the lawyer's conduct to a lawyer assistance program, while salutary, does not satisfy the lawyer's ethical reporting requirement.

(4-08)

OPINION 823 (06/30/2008)

TOPIC: Joint representation; conflict of interest; withdrawal

DIGEST: A lawyer cannot continue to represent joint clients in litigation if their strategies significantly diverge. The lawyer can continue to represent one of the joint clients in the litigation if the former client provides informed consent to the future representation and the lawyer can represent the current client zealously and competently. The lawyer is required to comply with the court's procedures for withdrawal.

CODE: DR 2-110(A)(1), (2); 4-101(C); 5-105(A), (B), (C); 5-108(A); EC 7-8, 7-9.

QUESTIONS:

1. May a law firm continue to represent joint clients whose strategies significantly diverge in litigation?

2. May a law firm continue to represent one of the joint clients in the litigation after the conflict arises and, if so, under what circumstances?

OPINION:

3. A law firm represents "X" and "Y" in litigation. Prior to the firm's representation of these two clients, they were co-owners of a business, which they then sold. The purchasers sued X and Y. At the outset of the litigation, the interests of X and Y were identical. X and Y interposed a counterclaim against the purchasers.

4. For unknown reasons, the plaintiff purchasers have not vigorously pursued the litigation. X desires to pursue the counterclaim aggressively. Y, however, has directed the lawyer to do nothing and let things remain quiescent.

5. A lawyer may represent multiple clients in the same or related matters unless (i) the exercise of independent professional judgment on behalf of one client will be or is likely to be adversely affected by the lawyer's representation of another client, or (ii) the multiple representation would likely involve the lawyer in representing differing interests.[16] In cases where multiple representation would give rise to an adverse effect on independent professional judgment or representation of differing interests, a lawyer may undertake or continue the multiple representation if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.[17]

6. We addressed the representation of joint clients prior to contemplated litigation in N.Y. State 787 (2005). There, the inquiring lawyer was retained to represent a woman on her personal injury claim and her spouse on a derivative loss-of-services claim. The husband subsequently abandoned the

16 DR 5-105(A), (B).

17 DR 5-105(C).

wife, and she obtained a divorce. The lawyer and the wife lost contact with the client/former husband. Prior to commencement of personal injury litigation on behalf of the husband and wife, a settlement offer was made to the wife, who wanted to accept it.

7. We observed that if assisting the wife to procure the settlement would prejudice the husband's derivative claim, the lawyer was required to withdraw from both representations:

> Continuing to represent both parties would involve a simultaneous representation of "differing interests." Specifically, the lawyer would be forced to choose between settling the wife's claim and thus barring the husband from pursuing his loss of consortium claim, or advising the wife to reject the settlement offer that she wishes to accept in order to preserve the husband's claim. In this situation the lawyer could proceed only with the husband's informed consent, which would require explaining to the husband the risk that the loss of consortium claim may be compromised.

The consent required under DR 5-105(C) could not be obtained from the husband, who could not be located.

8. Not every disagreement regarding the course to be charted in litigation rises to the level of differing interests. EC 7-7 provides, "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of the client, a lawyer is entitled to make decisions."[18] EC 7-8 states that, in areas in which the client is to make the decision, the lawyer should "exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations." But where joint clients, having received appropriate advice, determine to pursue diametrically opposed strategies, either of which is consistent with law and the lawyer's ethical responsibilities, a conflict of interest exists. In the circumstances of this inquiry, moreover, the conflict is not consentable, because the firm cannot simultaneously pursue both clients' objectives – a disinterested lawyer could not conclude that the lawyer could competently represent the interests of each client. Therefore, the firm cannot continue to represent both clients in the matter.

9. Whether the firm can continue to represent either X or Y in the litigation is governed largely by DR 5-108(A), which provides:

> A lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure: (1) Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client. (2) Use any confidences or secrets of the former client except as permitted by section DR 4-101(C), or when the confidence or secret has become generally known.

10. Here, the firm's continued representation of X in this matter, who wishes to pursue the counterclaim aggressively, could be materially adverse to the interests of Y, who prefers that nothing be done, apparently in an effort not to arouse sleeping dogs. Similarly, the firm's continued representation of Y may be materially adverse to X, if achieving Y's goal (no action) would be expected to

18 EC 7-9 adds, "In the exercise of the lawyer's professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of the client."

require the lawyer to take action inconsistent with X's goal of vigorous prosecution of the counterclaim. In either case, unless the clients validly consented in advance to continuing representation of one of them in the event of a conflict emerging, the firm needs to obtain the informed consent of the former client after full disclosure. Insofar as necessary to avoid misunderstanding, the firm should explain that the former client is under no obligation to consent to allow the firm to represent the other client and "that no negative consequences will attend [a] denial of consent."[19]

11. Likewise, while there generally are no confidences between co-clients,[20] to the extent that the lawyer has acquired, under an understanding of confidentiality, information not known to the proposed continuing client, "[t]he former client must also be informed that she has the right to insist that all of her confidences and secrets or specific confidences and secrets be held inviolate."[21] In that circumstance, the firm must also consider whether it can competently represent the interest of the continuing client while keeping the former client's confidence. Any restriction placed on the firm by the former client to preserve certain information protected as a confidence or secret may present a compromising influence that may prevent the firm from representing the current client competently and zealously.[22]

12. In withdrawing from representing X and/or Y, the firm must comply with the court's procedures pertaining to withdrawal.[23] In seeking to withdraw, the firm must take steps "to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client[s], including giving due notice to the client[s], allowing time for employment of other counsel, delivering to the client[s] all papers and property to which the client[s are] entitled and complying with applicable laws and rules."[24]

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19 N.Y. County 716 (1996).

20 *See*, *e.g.*, *Allegaert v. Perot*, 565 F.2d 246, 250 (2d Cir. 1977) ("Neither Walston nor anyone connected with it could have thought . . . that any information given to the law firms conceivably would have been held confidential from the primary clients of the firms."); *Moritz v. Medical Protective Co.*, 428 F. Supp. 865, 872 (W.D. Wis. 1977) ("communications by either client to [the lawyer] concerning the subject matter of the . . . suit . . . were not privileged as to the other client and were not confidences. . . . Nor were they 'secrets' within the meaning of Canon 4."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. *l* (2000) ("Sharing of information among the co-clients with respect to the matter involved in the representation is normal and typically expected.").

21 N.Y. County 716 (1996); *see* N. Y. State 555 (1984) (lawyer may not disclose to one joint client confidential communications from the other joint client relating to the subject matter of the representation, absent express or implied consent).

Attorneys who represent joint clients in the same matter should, in advance of the joint representation, reach an agreement with the joint clients as to the sharing of confidential information. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60, cmt *l* (2000) ("Co-clients . . . may explicitly agree to share information. Co-clients can also explicitly agree that the lawyer is not to share certain information, such as described categories of proprietary, financial, or similar information with one or more other co-clients . . . ."); ABA Model Rule 1.7 cmt. 31 ("The lawyer should, at the outset of the common representation . . . , advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other."). As recently noted by the ABA's Committee on Ethics and Professionalism, "[c]larifying expectations at the onset of the representation is always preferable in these situations, and may affect the ability of the lawyer to continue representing one or the other client after difficulties arise." ABA Formal Opinion 08-450, n.21.

22 *See* ABA Formal Opinion 08-450, at 1 ("a conflict of interest arises when the lawyer recognizes the necessity of revealing confidential information relating to one client in order effectively to carry out the representation of another").

23 DR 2-110(A)(1) ("If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission."); *see, e.g.*, CPLR 321(b) (change or withdrawal of attorney).

24 DR 2-110(A)(2).

CONCLUSION:

13. A lawyer cannot continue to represent joint clients in litigation if their strategies significantly diverge. The lawyer can continue to represent one of the joint clients in the litigation if the former client provides informed consent to the future representation and the lawyer can represent the current client zealously and competently. The lawyer is required to comply with the court's procedures for withdrawal.

(3-08)

OPINION 824 (07/02/2008)

TOPIC: Conflicts of interest – lawyer's own interest; providing legal services without compensation

DIGEST: An attorney may, without compensation, provide a service of monitoring or reviewing a client's investments to identify any potential claims, even though the attorney may later be considered to handle, with compensation, any resulting litigation.

CODE: DR 1-106; 2-103; 5-101.

QUESTION:

1. May an attorney, at the request of a client, review the client's investment portfolio in order to identify any potential securities fraud claims that the client might have in connection with its investments, without charging the client a fee for this service?

FACTS:

2. A law firm regularly represents plaintiffs in the field of securities fraud litigation. As part of its practice, the firm monitors the investment portfolios of existing institutional, pension fund clients. The service involves the client retaining a law firm to monitor the client's investments. The lawyer agrees to notify the client when the lawyer identifies a potential securities fraud claim that, in the opinion of the lawyer, might be pursued by the client. Once notified, the client is free to take no action, hire another lawyer to represent it in connection with the claim, or hire the monitoring lawyer to handle the matter. The monitoring lawyer does not charge any fee to the client for the monitoring service. Should the client select the monitoring firm to represent it, the subsequent litigation is handled pursuant to a separate retainer agreement entered into between the client and the lawyer after the client has made the decision to pursue the matter.

OPINION:

3. There is nothing in the Lawyers' Code of Professional Responsibility prohibiting an attorney from providing legal services without compensation. The fact that the reviewing attorney would be considered to handle any resulting litigation does not change that conclusion. We note that the arrangement to provide a monitoring service creates an attorney-client relationship, with all rights, responsibilities and obligations that apply whenever an attorney-client relationship is established. Among those responsibilities and obligations under the Disciplinary Rules are those pertaining to conflicts of interest and confidences of clients.

4. DR 5-101 provides that "[a] lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests." We do not believe that a lawyer's interest in being hired to pursue any potential securities fraud claim he or she may uncover creates a conflict under this clause. It is inherent in the attorney-client relationship that a lawyer may benefit from a recommendation that legal services are needed with respect to a particular problem.

5. Because the described monitoring services are legal services involving the professional judgment of a lawyer, the provisions of DR 1-106, relating to the provision of legal and non-legal services by a lawyer or law firm, are not relevant to the inquiry. We note that, while it would be prudent to prepare an engagement letter or retainer agreement with respect to the free monitoring service, none is required by the New York engagement letter rules, because the monitoring lawyer is not expected to charge $3,000 or more for the service.[25] The practitioner considering undertaking such an arrangement must, however, assure compliance with the rules prohibiting solicitation.[26] This opinion does not address issues of substantive law.

CONCLUSION:

6. A lawyer may accept retention by a client, without compensation, to review the client's investment portfolio in order to identify any potential securities fraud claims that the client may have, under the circumstances described above, even though the client may retain the lawyer, on a paying basis, to handle any resulting litigation.

(8-08)

25 22 N.Y.C.R.R. § 1215.2(1).

26 DR 2-103.

OPINION 825 (07/15/2008)

TOPIC: Third-party payors; clients referred by, and legal services paid for by, employee assistance program.

DIGEST: There is no ethical bar to lawyer providing legal services by telephone to client referred to the lawyer, and paid for by, an employee assistance program, nor to accepting ancillary private retention by such clients.

CODE: DR 2-103(A), (D), (F)(4); 4-101; 5-101; 5-103; 5-105; 5-105(E); 5-107(A), (B); 5-108; 5-108(A)(2); 6-101. EC 2-34, 8-3.

QUESTIONS:

1. May a lawyer ethically provide legal services via telephone consultation with clients referred by an Employee Assistance Program that pays the lawyer for those services?

2. May the lawyer ethically accept private retention from such employees when their matters cannot be resolved via telephone, and additional legal work not covered by the EAP is required?

OPINION:

3. The evolution of programs intended to make relatively inexpensive legal services available to underserved populations has long been encouraged by the bar.[27] Employee Assistance Programs (EAPs) are employee benefit programs offered by some employers, often in conjunction with a health insurance plan. EAPs are intended to help employees deal with personal problems that might adversely impact their work performance or health. Some EAPs include free or reduced-price legal services offered by one or more lawyers or law firms with which the EAP contracts for this purpose. While employees may be referred to an EAP provider by the employer's human resources department, the employer generally does not otherwise know who is using the program unless there are extenuating circumstances and the proper release forms have been signed.

4. The primary ethical question is one of third-party referral and payment, and provided the Code is in all other respects fully honored, we believe that the proposed arrangement is ethically permissible. A number of the most salient considerations are outlined below.

5. First, while third-party payment for legal services is common, the lawyer receiving such payment must comply with DR 5-107(A) and (B), by making full disclosure to the client and obtaining the client's consent to the arrangement, and ensuring that the employer-payor does not direct or regulate the lawyer's professional judgment or compromise the lawyer's duty to maintain confidences.[28]

27 *See* EC 2-34 and EC 8-3, encouraging lawyers to provide services to persons of limited means.

28 *Cf.* N.Y. State 721 (1999) (lawyer may agree to insurance company's requirement that lawyer use a legal research service as long as, *inter alia*, this does not lead to inadequate representation or constrain the lawyer's professional judgment on behalf of the client).

6. Second, to the extent the lawyer offers anything of value in exchange for the referral of EAP clients to the lawyer, DR 2-103(F) may be applicable. DR 2-103(F)(4) sets forth the circumstances under which a lawyer may "be recommended, employed or paid by, or may cooperate with," a "bona fide organization which recommends, furnishes or pays for legal services to its members or beneficiaries." As long as the EAP has procedures to provide appropriate relief for employees who assert that representation by counsel furnished by the EAP would be "unethical, improper or inadequate under the circumstances of the matter involved," most EAPs will meet those requirements.[29]

7. Third, the fact that these clients are served by telephone consultations does not limit the lawyer's obligations with respect to conflicts of interest. All of the duties imposed by DR 5-101 (personal interests), DR 5-105 (concurrent representation), DR 5-108 (former client conflicts), and DR 5-102 (lawyer as witness) must be fulfilled. Also, DR 5-105(E) requires that the lawyer keep records sufficient to identify conflicts with respect to these clients.

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29 DR 2-103(F)(4)(d). We do not decide in this opinion whether a discount offered by the lawyer to the employer, as the person paying fees for representation of another, would constitute giving something of value to obtain employment by the client, but we merely observe that the requirements of DR 2-103(F)(4) may apply to EAPs. DR 2-103(D) states that "[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment," with certain enumerated exceptions. DR 2-103(F)(4) provides one such exception:

> A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations which promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partners or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:
>
> . . .
>
> a. Any bona fide organization which recommends, furnishes, or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:
>
> b. Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.
>
> c. Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.
>
> d. The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.
>
> e. The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief.
>
> f. The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations.
>
> g. Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

8. Fourth, the lawyer's duties in respect of client confidences and secrets, as defined in DR 4-101 and DR 5-108(A)(2), must be honored, notwithstanding the brevity of the interaction with these EAP clients.

9. Fifth, the rules on in-person solicitation of work set forth in DR 2-103(A) do not bar in-person or telephone solicitation of existing or former clients, but the lawyer may not seek such work if the particular employee has made known a desire not to be so solicited.[30]

10. Sixth, under DR 6-101, the lawyer must provide competent representation in these matters. A determination that the complexity of a problem is such that a telephone consultation will be insufficient must be communicated to the client. As we opined in N.Y. State 664 (1994), "[c]ompetent representation in a particular [telephone consultation] may require" a great deal more than merely providing general legal advice. Any limitation on the scope of the advice offered must be disclosed.

11. Finally, although we do not opine on issues of law, we note that New York's engagement-letter rules, found at 22 NYCRR Part 1215, may require the lawyer to set forth the scope of the engagement and the billing arrangement (among other things) in an engagement letter to, or retainer agreement with, the employer. Those rules also may require a separate letter to, or retainer agreement with, the employee-client for any matters undertaken that are to be paid for by the employee-client if the fees from that separate engagement are expected to amount to $3,000 or more.

12. We assume in respect of the second question that the EAP has no objection to the lawyer accepting private retention from its referred clients. If that is correct, and the lawyer does not improperly seek to be paid separately for work covered by the EAP, we see no reason under the Code why the lawyer may not accept such work.[31]

CONCLUSION:

13. Subject to the conditions described above respecting compliance with all relevant Code provisions, the two questions are answered in the affirmative.

(1-08)

30 DR 2-103(A)(2)(b).

31 *Cf.* N.Y. State 810 (2007) (outlining circumstances in which *public* officer or government-employed lawyer, and private contractors working for county legal services office, may represent those encountered through a legal services program).

OPINION 826 (09/12/2008)

TOPIC: Conflicts of interest; multiple representation

DIGEST: No per se rule prohibits a lawyer from representing plaintiffs in declaratory judgment actions against an insurance carrier and simultaneously defending that carrier against other insureds in other declaratory judgment actions, or from obtaining advance waivers of the conflict. Where the actions involve related issues of law, however, whether the clients can validly consent depends on, among other things, potential "positional conflicts," the possibility that the lawyer may need to cross-examine employees of a client, and the possibility that confidential information derived from one representation may be of use in another.

CODE: DR 4-101(B)(2); DR 5-101(A); DR 5-105(A) and (C); EC 5-15

QUESTION:

1. May a lawyer agree to defend an insurance company in coverage disputes arising out of construction accidents while simultaneously representing other insureds in other coverage cases against that insurance company arising out of unrelated construction accidents?

OPINION:

2. The inquirer is a member of a law firm that regularly represents property owners and construction managers who are defendants in construction accident cases and who were denied insurance coverage. The firm represents these clients, as plaintiffs, in actions filed against the insurance carriers for declaratory relief invalidating the coverage disclaimers and enjoining the carriers to defend and indemnify them, on grounds that the plaintiffs are "additional insureds" in subcontractor liability policies. The firm has been approached by one of the defendant insurance companies to represent it as a defendant in other, unrelated declaratory judgment and injunction actions brought by other insureds. The inquirer asks whether the firm may take on these engagements.

3. A lawyer may not take on or continue the concurrent representation of multiple clients if the representation would "involve the lawyer in representing differing interests" or if "the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected," unless the lawyer obtains the informed consent of each client affected by the conflict "after full disclosure of the implications of the simultaneous representation and the advantages and risks involved" and "a disinterested lawyer would believe that the lawyer can competently represent the interest of each."[32] "Differing interests" are defined broadly by the Code to "include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse or other interest."[33]

4. Here, there clearly is a conflict with respect to the matters involving the carrier that the lawyer or law firm proposes to defend. If the lawyer or law firm takes on those matters, the lawyer or firm

32 DR 5-105(A) and (C).

33 Code Definitions.

will be representing in the existing actions one client – the insurance company – adverse to another client – the insureds – and can proceed only if the conflict is consentable and all clients involved provide informed consent.[34] In considering whether the conflict is consentable and the nature of the disclosure required in obtaining consent, the situation in this inquiry presents particular issues.

5. First, because of the standardized nature of many insurance policies, there is a significant probability that a lawyer or law firm representing the carrier may be called upon to take the opposite side of an issue that the lawyer is simultaneously litigating on behalf of a declaratory judgment plaintiff in another case – for example, the outer time limit for timely notice of claim, the required specificity for a valid notice of disclaimer, or the scope of coverage afforded by a particular clause. This type of "positional" or "issue conflict" does not present an automatic bar to the multiple representation. EC 5-15 states, "[A] lawyer may generally represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts."[35]

6. Even where there is a risk of creating an adverse precedent, such conflicts are generally subject to consent if the client is adequately informed of the issues involved.[36] There may be circumstances, however, in which the lawyer's effectiveness on behalf of one client may be impaired by the representation of the other client, as for example, where the lawyer's own advocacy of the contrary position may be used against the lawyer in the representation of one of the clients, or where the lawyer will feel constrained by the position he or she has taken in one case from arguing vigorously for the contrary position. In such cases, it will generally not be possible to meet the requirement of DR 5-105(C) that "a disinterested lawyer would believe that the lawyer can competently represent the interest of each."

7. A second consideration is whether the lawyer may need to cross-examine an employee of the carrier client in the representation of an insured. There is nothing in the abstract that prevents an adequately advised client from consenting to be sued by the client's lawyer in unrelated matters, particularly if the client is a sophisticated consumer of legal services, as are most insurance companies. But

34 Under the Code, individual lawyers have the conflict, but pursuant to DR 5-105(D) their conflict is imputed to every lawyer in their firm.

35 *See also* Model Rule 1.7 cmt. 24 ("The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client."); ABA 93-377 ("[I]f the two matters are being litigated in the same jurisdiction, and there is a substantial risk that the law firm's representation of one client will create legal precedent, even if not binding, which is likely materially to undercut the legal position being urged on behalf of the other client, the lawyer should either refuse to accept the second representation or (if otherwise permissible) withdraw from the first, unless both clients consent after full disclosure of the potential ramifications of the lawyer continuing to handle both matters."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128(f) (2000) ("A lawyer ordinarily may take inconsistent legal positions in different courts at different times. . . . However, a conflict is presented when there is a substantial risk that a lawyer's action in Case A will materially and adversely affect another of the lawyer's clients in Case B. . . . If a conflict of interest exists, absent informed consent of the affected clients . . . , the lawyer must withdraw from one or both of the matters.").

36 *See*, *e.g.*, Model Rule 1.7 cmt. 24 ("If there is significant risk of material limitation, *then absent informed consent of the affected clients*, the lawyer must refuse one of the representations or withdraw from one or both matters.") (emphasis added); sources cited in the preceding footnote.

depending on such questions as the seniority of the employee, the importance of the testimony, and the nature of the cross-examination, it may be impossible to meet the disinterested-lawyer test where such a suit would require cross-examination of an insurance carrier employee. Similar considerations would be presented if the lawyer were required to cross-examine an expert that the lawyer might have used or be using in a case for the other side.

8. Third, the firm that seeks to represent both the carriers and the declaratory judgment plaintiffs in coverage disputes should be mindful of DR 5-101(A), which concerns conflicts arising from a "lawyer's own financial, business, property or personal interests." To the extent there may be a significant disparity in the fees likely to be generated by the owners and construction managers on the one hand, and the carrier on the other hand, there may be an "inclination . . . to 'soft peddle' or de-emphasize certain arguments or issues – which otherwise would be vigorously pursued – so as to avoid impacting the other case."[37]

9. In addition, a lawyer may not use for the benefit of the insureds any confidential information that the lawyer has learned in the course of representing the carrier.[38] If in a particular case for an insured, for example, the practices of the carrier or of individual employees of the carrier with respect to a certain issue may be called into question, it may well not be possible for the lawyer to avoid using confidential information derived from a prior representation of the carrier regarding those practices.[39] In such cases, again, the lawyer might not be able to satisfy the "disinterested lawyer" test.

10. To the extent that the lawyer concludes that a conflict is consentable, the lawyer should advise the clients of these considerations in obtaining that consent. The lawyer's disclosure should address, as necessary in a particular case and depending on the sophistication of the client, questions such as the possibility that advocating a favorable legal position in one client's case may be prejudicial to a client in another case, the possibility that the lawyer or a lawyer in the firm may need to cross-examine an employee of the carrier, and any other considerations that may reasonably be thought to affect the lawyer's independent professional judgment or the vigor of the lawyer's representation of the clients.

11. A further consideration is whether the lawyer or law firm seeking to represent a carrier in a series of actions while continuing to bring actions by insureds against that carrier may seek an advance waiver of conflicts with respect to future cases the lawyer or law firm may take on. If the conflicts are otherwise consentable, there is sufficient disclosure of the nature of the conflicting representations that may arise and the client is capable of understanding the waiver, a lawyer or law firm generally may ethically request and rely upon the advance waiver of a future multiple-representation conflict.[40] The extent of the disclosure necessary, and potentially the scope of the advance waiver, may depend on, among other things, the sophistication of the client.[41] For example, where a client is relatively unsophisticated in legal matters, an advance waiver is more likely to be enforceable if it is

37 ABA 93-377.

38 DR 4-101(B)(2) bars a lawyer from knowingly using "a confidence or secret of a client to the disadvantage of the client."

39 *See* N.Y. City 2005-2 ("There are situations, however, where information that the lawyer has in his or her mind from the first representation is so material to the second representation that the lawyer cannot avoid using the information.").

40 *See* N.Y. City 2006-1.

41 *See id.* at 5.

limited to lawsuits on behalf of the carrier of the same general kind as the lawyer or law firm is then prosecuting, as opposed to a more open-ended waiver.

12. The lawyer should review the validity of such an advance waiver both when the waiver is given and when it is triggered. For example, the lawyer would not be able to rely on an advance waiver by an insured broadly permitting the lawyer or firm to represent the carrier defendant in other construction-accident suits against other insureds if the lawyer or firm thereafter wishes to take on a lawsuit on behalf of the carrier that would require the lawyer or firm to argue for a position that would limit the lawyer's effectiveness in arguing for the insured.

CONCLUSION:

13. There is no per se rule that would disqualify a lawyer from representing certain declaratory judgment plaintiffs against the insurance carrier and simultaneously defending the carrier against other declaratory judgment plaintiffs in coverage disputes. The possibility of positional conflicts, however, will require careful consideration in each case of the nature of the issues presented and the effect on the representation of other clients of the positions taken on behalf of one. In some cases, considerations such as the identity of the likely witnesses and whether the lawyer has confidential information derived from representation of the carrier that may be of use in the representation of the insured may also limit the lawyer's ability to obtain informed consent to the conflict. For these reasons, the burden of satisfying the "disinterested lawyer" test in these cases will often be a high one.

(17-07)

OPINION 827 (11/03/2008)

TOPIC: Direct payment of client's audit expense from law firm account; sharing of legal fees

DIGEST: Not unethical to cooperate with outside audit of client's billings, nor to pay a percentage of gross billing to the auditor directly from firm account, at the direction of the client.

CODE: DR 1-102, DR 2-103, DR 3-102, DR 4-101

QUESTION:

1. Where a client hires an outside vendor to monitor and administer its legal bills and requires that the lawyer or law firm pay the auditor's bills, may the firm ethically participate in the auditing function and may the lawyer permit the costs of such services to be paid by the law firm, where the bills are based on a percentage of the firm's billings to the client? May the firm permit the payments to the auditor to be made directly from its operating account?

OPINION:

2. A law firm regularly defends an entity in personal injury defense litigation. The entity "self-insures," so no insurance company is involved in retaining the law firm or conducting the client's defense. The client has hired an outside vendor (an auditor) to monitor and administer the client's legal expenses. The auditor's bills will be based on a percentage of the law firm's billing. The client informs the law firm that the law firm must permit the auditor's fee to be withdrawn automatically from the law firm's bank account.

3. In N.Y. State 716 (1999), this Committee considered whether a lawyer might ethically cooperate with an outside auditor hired by an insurer, where the lawyer represented not the insurer, but the insured. There, where the decision to employ the auditor was not the client's decision, we looked primarily to DR 4-101, which deals with the lawyer's duty of confidentiality to the client. We determined that the lawyer would need to obtain informed and knowledgeable consent from the client before sharing confidential billing records with the auditor. We did not, however, view cooperation with the auditor as intrinsically impermissible.

4. Here, where the client has sought the auditor's services, the problem addressed in N.Y. State 716 is less immediate. Even so, a lawyer should take steps to ensure that the client understands any risks for the client that follow from disclosure of billing information to the auditor. These risks include the possibility of further disclosure by the auditor to others, the possibility that the disclosure will waive the attorney-client privilege, and the possibility that the information disclosed to the auditor might somehow be used adversely to the client.[42]

5. Assuming the client understands and wishes to go forward despite these risks, we turn next to DR 3-102 which states that "[a] lawyer or law firm shall not share legal fees with a non-lawyer," with

42 "The nature of the necessary disclosure [to the client] will vary somewhat from case to case and client to client. . . . Ordinarily, however, the lawyer should at least discuss the nature of the information to be found in the billing records sought by the auditor as well as the relevant legal and nonlegal consequences of the client's decision." N.Y. State 716.

exceptions not relevant on these facts. The rule in its apparent simplicity might seem to prohibit the arrangement described above. We think it does not.

6. The arrangements here at issue are simply an incident of fee-negotiation with a client, an agreement to allocate costs between client and lawyer. They are not, properly speaking, fee division. While no lawyer is obligated to agree to the arrangement, the mere fact that the auditor's fee is calculated based upon the lawyer's billings does not make the payment from the lawyer to the auditor the division of a legal fee. Moreover, as we opined in N.Y. State 733 (2000), the intention of DR 3-102 is to secure the client-attorney relationship against outside interference: "fee-splitting between lawyer and layman poses the possibility of control by the lay person, interested in his own profit, rather than the client's fate."[43] This concern is absent in the allocation of fees between a lawyer and a client.[44]

7. The arrangement here also does not raise any concerns under DR 2-103(D), which prohibits a lawyer from "compensat[ing] or giv[ing] anything of value to a person or organization to recommend or obtain employment by a client," again with exceptions not relevant here.[45] Here, the client is already the firm's client. The auditor is engaged by the client to monitor its legal bills, and compensated for that service – not for bringing the client to the lawyer.

This conclusion is not affected by the manner of payment requested by the client. Nothing in the Code bars a lawyer from agreeing to permit the client or the auditor from automatically withdrawing the auditor's fees from the lawyer's operating account.

CONCLUSION:

Subject to the conditions described – notably that the client, with a full understanding of the arrangements and their implications, chooses to employ the auditor – the lawyer may cooperate with and compensate the auditor from the firm's operating account.

(22-08)

43 N.Y. State 733, citing *Emmons v. State Bar of California*, 6 Cal. App. 3d 565, 574, 86 Cal. Rptr. 367, 372 (Ct. App. 1970).

44 *See also* N.Y. State 819 ¶ 7 (2007) (no violation of DR 3-102 when a lawyer agrees to accept less than a judicially determined fee in a domestic relations matter).

45 To similar effect see Judiciary Law § 491, which prohibits the sharing of fees with non-lawyers "as an inducement for placing, or in consideration of having placed, in the hands of such attorney-at-law, or in the hands of another person, a claim or demand of any kind for the purpose of collecting such claim, or bringing an action thereon." *See also* N.Y. State 698 (1998), in which we opined that a lawyer may not accept a case tendered by a "consultant" who makes the payment of a "contingent consultant's fee" a precondition of referral to the lawyer.

2009

OPINION 828 (03/10/2009)

TOPIC: Staff attorneys of state agency; communication with persons represented by counsel; imputation of non-lawyer investigator's conduct

DIGEST: Conduct of state agency's non-lawyer investigators would not be imputed to its staff attorneys unless investigators operated under staff attorneys' supervision

CODE: DR 1-104(C) and (D), DR 7-104(A) and (B)

QUESTION:

1. A certain New York State agency maintains a staff of attorneys and non-lawyer investigators to oversee the operations of its licensees. Usually, an investigation will be undertaken by the agency without any supervision of the investigators by staff counsel. When misconduct by a licensee is discovered, a report will be prepared by one of the investigators for review by counsel; and, where appropriate, counsel may then prosecute the matter pursuant to the New York State Administrative Procedure Act.[1]

2. On occasion, before a matter is assigned to a staff attorney, an investigator will learn that one of the licensees under investigation is represented by counsel. Under such circumstances, what are the ethical obligations of the staff attorneys employed by the agency and do they have any obligation to condition or prevent its investigator from continuing to communicate directly with the licensee?

OPINION:

3. DR 1-104 states in relevant part:

> C. A law firm shall adequately supervise, as appropriate, the work of . . . non-lawyers who work at the firm. . . .
>
> D. A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a non-lawyer employed by or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if:
>
> > 1. The lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it; or

1 We express no opinion on whether the New York State Administrative Procedure Act authorizes the procedures described in this opinion. Our jurisdiction is limited to answering questions of professional ethics and does not extend to deciding issues of substantive or procedural law.

> 2. The lawyer . . . has supervisory authority over the . . . non-lawyer, and knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated.

4. DR 7-104 states in relevant part:

> A. During the course of the representation of a client a lawyer shall not:
>
> > 1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.
>
> * * *
>
> B. Notwithstanding the prohibitions of DR 7-104(A) . . . , a lawyer may cause a client to communicate with a represented party . . . provided the lawyer gives reasonable advance notice to the represented party's counsel that such communications will be taking place.

5. In light of the foregoing provisions, we will initially assume for purposes of our analysis that the agency's investigators are acting under the supervision or control of its staff attorneys. If that were so, then once the staff attorneys knew that the subject licensees were represented by counsel in connection with the agency's investigation of their conduct, the staff attorneys would be prohibited from ordering or directing the agency's non-lawyer investigators to communicate further with the licensees without obtaining the prior consent of the licensees' counsel or complying with the "advance notice" requirement of DR 7-104(B). *See, e.g.,* N.Y. State 768 (2003) (explaining when lawyer "knows" that counter-party is represented by counsel); N.Y. State 735 (2001) (defining "party"). In such circumstances, the lawyers' ethical responsibility would derive from the expectation that they would properly supervise the investigators; it would not derive from the mere fact that they use non-lawyer investigators.

6. On the facts stated, however, the agency's investigators do not appear to be acting under the supervision or control of the staff attorneys. It also does not appear that the staff attorneys have any ethical responsibility under DR 1-104 to supervise the non-lawyer investigators' conduct.[2]

7. The non-lawyer investigators are clearly not "employed or retained" by the staff attorneys. *Cf.* DR 1-104(D). Rather, they are employed by the agency. Similarly, they do not "work at the firm." *Cf.* DR 1-104(C). Rather, they work at the agency. Nor can the investigators be said to be "associated" with the staff attorneys because, as that term is used in DR 1-104, the non-lawyer investigators are deemed to be associated only with the agency, not with its counsel.

2 We caution that, even in the absence of any systemic supervision or control of the non-lawyer investigators, the agency's staff lawyers would still be prohibited by the provisions of DR 1-102(A)(2) ("circumvent . . . through the actions of another") and DR 7-104(A)(1)("cause another to communicate") from directing or causing the non-lawyer investigators to continue having such communications in violation of the lawyer's prescribed ethical responsibilities under the Code.

8. Hence, on the facts here present, the provisions of DR 1-104 must be deemed inapposite to the relationship between the agency's investigators and its staff counsel. Accordingly, absent other factors discussed below, the agency's staff attorneys would have no ethical obligation to supervise the non-lawyer investigators.

9. Although the Code would not necessarily require the agency's staff attorneys to supervise the non-lawyer investigators, the agency could require such supervision as a condition of their counsel's employment. Once such supervision becomes a condition of the staff attorneys' employment, the ethical responsibility described in DR 1-104 would follow. Under such circumstances, the requirements of DR 1-104(C) and DR 1-104(D)(2) would then prohibit the staff attorneys from being willfully ignorant of their investigators' conduct, and responsibility for that conduct could be imputed to the staff attorneys.

10. Ultimately, imputation of the non-lawyer investigators' conduct to the agency's staff attorneys will thus depend on whether the lawyer has "supervisory authority" over the conduct of the non-lawyer. Whether a lawyer has supervisory authority over the conduct of a non-lawyer, *vel non,* will often be a matter of analyzing the operational relationship between the two individuals within the context of the organization, and the purpose and function of the agency in question. Where, for example, the agency requires its investigators to be instructed by staff attorneys concerning the procedures to be followed before undertaking an investigation, the conduct of the investigators will generally be imputed to the attorneys. *Cf.* N.Y. County 737 (2007). Where, on the other hand, there is no requirement or expectation that the agency's investigators will operate under the guidance of the staff attorneys, then consistent with the standards set forth in DR 1-104, the conduct of the investigators will not ordinarily be imputed to the staff attorneys.

11. The new New York Rules of Professional Conduct that will take effect on April 1, 2009 are substantially identical to the Disciplinary Rules construed and applied in this opinion.

CONCLUSION:

12. For the reasons stated, subject to the qualifications set forth above, the question posed is answered in the negative.

(19-08).

OPINION 829 (04/29/2009)

TOPIC: Conflicts of interest, consent confirmed in writing.

DIGEST: A consent to a conflict of interest that was validly given prior to April 1, 2009, the effective date of the new Rules of Professional Conduct, does not need to be obtained anew solely on account of the adoption of the new Rules.

RULES: 1.0(e), 1.0(j), 1.7(b), 1.9.

QUESTION:

1. Under Rules 1.0(e), 1.0(j), 1.7 and 1.9 of the New York Rules of Professional Conduct, which prescribe new rules for a client's consent to a conflict of interest, including a new requirement that such consents be "confirmed in writing," does a lawyer who obtained a consent to a conflict prior to the effective date of those rules need to obtain a new consent to the conflict?

OPINION:

2. New York's Rules of Professional Conduct became effective April 1, 2009. Under Rule 1.7(b), where a lawyer has a conflict of interest arising out of the lawyer's representation of two or more clients or out of the lawyer's own financial, business, property or other personal interests, the lawyer may proceed with the representation or representations if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) *each affected client gives informed consent, confirmed in writing*.[3]

Rule 1.0(j) defines "informed consent" as follows:

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

3 Rule 1.7(b) (emphasis added). Similarly, under Rule 1.9, where a lawyer has a conflict of interest arising out of a representation of a former client, the lawyer may proceed with the representation of the current client if "the former client gives informed consent, confirmed in writing."

Rule 1.0(e) defines "confirmed in writing" as follows:

> "Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

3. These provisions are broadly similar to those that applied under the former New York Code of Professional Responsibility (the "Code"), except that the requirement that client consents be confirmed in writing is new. The Code, which was in effect prior to April 1, 2009, did not specify any particular form for such consents.[4]

4. The inquirer has represented a client for a number of years pursuant to a retainer agreement. The retainer agreement includes a waiver of certain conflicts that may arise out of then-existing engagements, or future engagements, on behalf of other clients. The inquirer asks whether it is necessary to obtain a new consent to conflicts otherwise covered by the existing waiver and execute a new retainer agreement reflecting the new consent.

5. In adopting the new Rules, the Appellate Division of the Supreme Court of the State of New York directed that the new Rules would be effective April 1, 2009, but the Court did not provide for any other transitional rules.[5] There is no basis for concluding that consents given prior to the adoption of the new Rules are impaired or invalid as a consequence of the change in the Rules.[6] Thus, if a consent to a conflict of interest was valid when given, and by its terms continues to apply to ongoing or new representations after April 1, 2009, and the application of the consent to a new matter is otherwise valid, there is no need to re-confirm or re-obtain the consent solely on account of the adoption of the new Rules. (We do not here address the circumstances under which a consent to a waiver may be valid in any other respect.)

6. With respect to the particular inquiry before us, the inquirer states that the consent was contained in a retainer agreement. It thus already satisfied the new requirement that the consent be confirmed in writing, but the same conclusion would apply to oral consents that were validly given prior to the effective date of the new Rules. The new requirement that consent to a conflict be "confirmed in writing" modifies the *giving* of consent. Thus, only consents that are given under the new Rules – that is, on or after April 1, 2009 – must be "confirmed in writing." This conclusion is supported by the second sentence of Rule 1.0(e) (defining "confirmed in writing"), which specifies that the writing must

4 DR 5-101(A) (if "client consents to the representation after full disclosure of the implications of the lawyer's interest"); DR 5-105(C) ("if each [client] consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved").

5 Joint Order of the Appellate Division, December 30, 2008.

6 *See*, *e.g.*, *Hays v. Ward*, 179 A.D.2d 427, 429, 578 N.Y.S.2d 168, 169 (1st Dep't 1992) ("Where a statute states in clear and explicit terms, as here, that it takes effect on a certain date, it is to be construed as prospective in application."); *Murphy v. Board of Education*, 104 A.D. 796, 797, 480 N.Y.S.2d 138, 139 (2d Dep't 1984) ("As a general rule statutes are to be construed as prospective only in the absence of an unequivocal expression of a legislative intent to the contrary, and where a statute directs that it is to take effect immediately, it does not have any retroactive operation or effect . . . ."), *aff'd*, 64 N.Y.2d 856, 476 N.E.2d 651, 487 N.Y.S.2d 325 (1985).

be obtained or transmitted at the time the person gives oral consent or within a reasonable time thereafter. There is no suggestion that consents given much earlier must now meet the formal requirements of the new Rules. We note also that the new Rules do not require that the client actually sign an agreement containing the consent. See Rule 1.0(e)(ii). Moreover, any type of writing, even an e-mail, from the lawyer to the client confirming an oral consent would be sufficient. *See* Rule 1.0(x) (defining "writing" to include email or any other "tangible or electronic record of a communication or representation").

CONCLUSION:

7. The requirements in the new Rules of Professional Conduct that govern obtaining consents to conflicts, including the new requirement that consents be "confirmed in writing," do not apply to consents validly given before the effective date of those Rules. Client consents to conflicts validly given prior to April 1, 2009 do not need to be obtained anew solely on account of the adoption of the new Rules.

(Inquiry 17-09)

OPINION 830 (06/11/2009)

TOPIC: Solicitation; advertising; public education for lay persons

DIGEST: A lawyer may ethically contact lay organizations to inform them that he is available as a public speaker on legal topics, but must adhere to advertising and solicitation requirements under the Rules where the communication is made expressly to encourage participants to retain the lawyer or law firm.

RULES: 1.0(a), 7.1(a), 7.3(a), (q), (r)

QUESTION:

1. May a lawyer contact an organization of laymen and inform them of his availability as a public speaker on legal topics?

OPINION:

2. Before *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), New York's Disciplinary Rules prohibited attorneys from engaging in any and all forms of solicitation. In N.Y. State 379 (1975), this Committee said that those pre-*Bates* Disciplinary Rules prohibited an attorney from initiating any contact to lay organizations. However, as explained in N.Y. State 508 (1979), the New York Code of Professional Responsibility was substantially revised in 1978 in the light of *Bates.* As amended, DR 2-103(A) prohibited only those solicitations that were "in violation of any statute or court rule." Also before *Bates*, certain Ethical Considerations in the Code permitted lawyers to participate only in educational programs conducted or sponsored "under proper auspices" (such as bar associations). After *Bates*, the Ethical Considerations were amended and those restrictions were eliminated.

3. Accordingly, N.Y. State 508 went on to determine that a law firm may organize and promote by mail legal seminars expressly designed for non-lawyers. The Committee explained that "with advertising now permitted and the requirements of the Code relating to sponsorship now repealed, much of the rationale for the traditional prohibition on lawyers organizing and promoting legal seminars, or other programs of public education for lay persons, has been removed." The Committee noted, however, that it did not have the power to pass on whether such direct mailing constituted improper solicitation under New York Judiciary Law § 479, or whether § 479 was constitutional under *Bates* and its progeny.

4. Today, Rules 7.1 and 7.3 of the New York Rules of Professional Conduct, which took effect on April 1, 2009, control attorney advertisements and solicitations. Specifically, Rule 7.1 generally regulates "advertising" by lawyers and Rule 7.3 regulates "solicitation" by lawyers (which is a special form of lawyer advertising).

5. An "advertisement" is defined by Rule 1.0(a) (in the Terminology rule) as follows:

> "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of

which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

6. "Solicitation" is defined in Rule 7.3(b) as follows:

> For purposes of this Rule [7.3], "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

7. Rule 7.3(a) of the Code prohibits a lawyer from engaging in "solicitation" by the following means (among others):

> (1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or
>
> (2) by any form of communication if:
>
> > (i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule.

8. Rule 7.1(a) prohibits any lawyer advertising that "(1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule."

9. Comment 9 to Rule 7.1 expressly recognizes that "lawyers should encourage and participate in educational and public-relations programs concerning the legal system, with particular reference to legal problems that frequently arise." Comment 9 further notes that "[a] lawyer's participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients." However, "a program might be considered to be advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm." In that case, Rules 7.1 and 7.3 would regulate the communications. (The Comments have been adopted only by the New York State Bar Association, not by the Courts.)

10. We also note that Rule 7.1(q) expressly permits a lawyer to "accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services." Further, Rule 7.1(r) provides that "[w]ithout affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice."

11. Applying these rules, definitions, and Comment 9 to this inquiry, a lawyer may contact a lay organization to alert the organization that the lawyer is available as a public speaker on legal topics. However, if the communication is made expressly to encourage participants in the program to retain the lawyer or law firm, then the communication falls within the definitions of "advertisement" and

"solicitation," and such communications concerning the program must comply with Rules 7.1 and 7.3.

12. As previously noted, this Committee lacks jurisdiction to determine whether such communications are permitted under § 479 of the Judiciary Law, which prohibits solicitation by attorneys, and likewise lacks jurisdiction to determine whether § 479 remains constitutional in light of *Bates* and its progeny.

CONCLUSION:

13. For the reasons stated, and subject to the qualifications set forth above, a lawyer may ethically contact lay organizations to inform them that he or she is available as a public speaker on legal topics.

(Inquiry No. 8-09)

OPINION 831 (08/14/2009)

TOPIC: Disclosure of fraud on the tribunal and fraudulent conduct

DIGEST: Where a lawyer learns that a client, before April 1, 2009 (the effective date of the new N.Y. Rules of Professional conduct), had committed fraud on a tribunal, the lawyer's obligation to disclose the fraud is governed by DR 7-102(B)(1) of the former Code of Professional Responsibility, which generally did not permit disclosure of confidences or secrets, and not by rule 3.3 of the new Rules of Professional Conduct, which may require disclosure of confidential information necessary to remedy the fraud. Where the fraud occurred before April 1, 2009, this conclusion applies whether the lawyer learns of the fraud before or after April 1, 2009

RULES AND CODE: 1.0(i), 1.6, 1.7(b)(4), 1.9(a), Code: 3.3(b); Code Definitions "fraud"; DR 4-101, 7-102(B)(1)

QUESTION:

1. Where a lawyer, prior to April 1, 2009, represented a client in obtaining a conditional discharge of a misdemeanor charge, contingent on the client's not being arrested for a period of time, and then, after April 1, 2009, the lawyer learned from the client that the client had been arrested shortly before the plea, must the lawyer disclose the arrest to the prosecutor or the tribunal?

OPINION:

2. The inquirer represented a defendant accused of a misdemeanor. The inquirer arranged a plea bargain under which the defendant pleaded guilty to a violation of disorderly conduct with a conditional discharge. Under the terms of the sentence of conditional discharge, the defendant avoided incarceration or probation as long as she was not arrested within the next six months. In the course of the plea, the client represented to the court and the prosecutor that she (the client) had "stayed out of trouble" since the misdemeanor arrest.

3. A short time later, but after April 1, 2009, the client told the inquirer that in fact she had been arrested the week before the plea in a different county. The inquirer asks whether he must inform the prosecutor or the court about the client's prior arrest.

4. New York adopted new Rules of Professional Conduct that became effective on April 1, 2009.[7] Both the new Rules and the former Code of Professional Responsibility have provisions addressing a lawyer's obligations where a client engages in fraudulent conduct before a tribunal. Both provisions require a lawyer to take remedial measures, but the rules differ on two significant points: First, and most clearly, the provisions differ on the critical question of whether a lawyer must disclose protected confidential information if required to remedy the fraud. Second, the definition of "fraudulent conduct" in the new rules differs from the interpretation we placed on the definition of "fraud" in the old rules with respect to whether fraudulent conduct includes misleading or deceptive conduct short of actual fraud under the applicable law.[8]

7 Joint Order of the Appellate Divisions, December 30, 2008.

8 See paras. 9-10 below

5. Under DR 7-102(B)(1) of the old Code, a lawyer who learned that a client had "perpetrated a fraud upon a person or tribunal" was required to "promptly call upon the client to rectify the same. If the client refuse[d] or [was] unable to do so," the lawyer was required to "reveal the fraud to the . . . tribunal, *except when the information is protected as a confidence or secret.*" (Emphasis added.)[9]

6. Rule 3.3(b) of the new Rules eliminates the exception for confidences and secrets (now called simply "confidential information"). Rule 3.3(b) provides:

> A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

7. Contrary to the Code exception for confidences and secrets, new Rule 3.3(c) expressly states that this duty applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6." (Rule 1.6 defines the protections accorded to confidential information.)[10]

8. There is also a difference in the definitions of the applicable conduct that triggers this requirement, at least as we had interpreted it. The definition of the term "fraud" in the old Code was not a definition as such, but rather a clarification. It said:

> "Fraud" does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another.

9. In the absence of a Code definition of "fraud," we interpreted the term "fraud upon a tribunal" in DR 7-102(B) to refer to the term "fraud" in the law outside of the Code (except to the extent that

9 The italicized language was added to the Code in 1976. *See* N.Y. State 454 (1976). This rule was not absolute. The exception extended only to information "protected" as a confidence or secret. We repeatedly held that information was not protected as a confidence or secret if one of the exceptions to disclosure in DR 4-101 applied. N.Y. State 797 ¶ 13 (2005); N.Y. State 781 (2004); N.Y. State 674 (1995); N.Y. State 466 (1977). In addition, the Court of Appeals stated that in certain circumstances "counsel has a duty to disclose witness perjury to the Court." *People v. Berroa*, 99 N.Y.2d 134, 142, 753 N.Y.S.2d 12, 18, 782 N.E.2d 1148, 1154 (2002) (*citing People v. DePallo*, 96 N.Y.2d 437, 729 N.Y.S.2d 649, 754 N.E.2d 751 (2001)).

10 It is unclear when the disclosure obligations under the new rule end. In past opinions, we appear to have assumed that the disclosure obligations in DR 7-102(B) where information was not "protected" as a confidence or secret ended when the proceeding in question concluded. N.Y. State 674 (discussing whether a lawyer must reveal perjury "discovered after the fact when the proceeding in which the perjury was committed (and later discovered) has not yet concluded"); N.Y. State 466 ("since the existence of the negotiable instrument is not relevant to any pending proceeding"). The New York State Bar Association proposal for the new rule, adopting the language of the ABA Model Rules, would have codified this interpretation in Rule 3.3. The proposal stated, "The duties stated in paragraphs (a) and (b) *continue to the conclusion of the proceeding* and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." New York State Bar Association Proposed Rules of Professional Conduct 160 (Feb. 1, 2008) (emphasis added) (available at www.nysba.org/proposedrulesofconduct020108. As noted in the text, Rule 3.3 as adopted by the courts omits the phrase "continue to the conclusion of the proceeding and." There is thus an argument that the courts in adopting the rule intended the obligation to continue past the end of the proceeding and, potentially, indefinitely – or at least for some reasonable period of time. The broadest version of this interpretation seems to us implausible. We believe the obligation extends for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding – but not forever. If disclosure could not remedy the effect of the conduct on the proceeding, but could merely result in punishment of the client, we do not believe the Rule 3.3 disclosure duty applies.

any such law should require a mental state other than that set forth in the above definition). We said in N.Y. State 797 (2005), "Whether the client has committed fraud on the court is a legal question beyond the jurisdiction of this Committee."[11]

10. The definition of "fraud" or "fraudulent" in the new rule appears to be broader. It provides:

> "Fraud" or "fraudulent conduct" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction *or has a purpose to deceive*, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.[12]

While the new phrase "denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction" codifies our interpretation of "fraud" under the Code, the inclusion of the disjunctive "or has a purpose to deceive" would appear to draw in conduct beyond conduct that constitutes "fraud" under applicable law.[13]

11. In this case, any "fraud" or "fraudulent conduct" occurred prior to April 1, 2009. In N.Y. State 829 (2009), we opined that the new rules requiring that waivers of conflicts of interest be "confirmed in writing"[14] apply only to waivers given by clients after April 1, 2009. We relied both on the language of the particular rules at issue there as well as on the general rule that, unless otherwise clearly stated, statutes are to be construed as prospective in application only.[15]

12. The application of the effective date here is less straightforward. The language of the rule does not provide much guidance. Conceivably, because the rule speaks of a lawyer who "knows" of fraudulent conduct – in the present tense – it could be interpreted to refer to anyone who has such knowledge on or after the effective date, regardless of when the fraudulent conduct occurred and regardless of when the lawyer learned of that conduct. We do not believe this interpretation is correct. The new rule is a dramatic break from the prior understanding of a lawyer's duties in the face of improper conduct by a client or witness.

13. The presumption that new rules do not apply retroactively has particular strength where a person may rely on the pre-existing rules. Where the rules have changed, a client – even a client who has engaged in fraud – should be able to rely on the advice or warnings he or she may have received, or

11 *But see* N.Y. State 681 (1996) ("Regardless of the legal determination of the criminal effect of the client's actions, it appears that the client may be using the lawyer's services to perpetuate a fraud on the tribunal.").

12 Rule 1.0(i) (emphasis added).

13 The use of the disjunctive here was a change from the New York State Bar Association proposal. New York State Bar Association Proposed Rules of Professional Conduct, *supra* n.3, at 4 ("'Fraud' or 'fraudulent conduct' denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction *and* has a purpose to deceive . . . .") (emphasis added).

14 Rules 1.7(b)(4) and 1.9(a).

15 *Id.* ¶¶ 5, 6 & n.4 (citing *Hays v. Ward*, 179 A.D.2d 427, 429, 578 N.Y.S.2d 168, 169 (1st Dep't 1992) ("Where a statute states in clear and explicit terms, as here, that it takes effect on a certain date, it is to be construed as prospective in application."); *Murphy v. Board of Education*, 104 A.D. 796, 797, 480 N.Y.S.2d 138, 139 (2d Dep't 1984), *aff'd*, 64 N.Y.2d 856, 476 N.E.2d 651, 487 N.Y.S.2d 325 (1985)).

the correct understanding he or she had, regarding the "rules of the road" that govern the lawyer-client relationship. We believe the same should apply whether the lawyer learns of the fraud before or after April 1, 2009, as long as the client's fraudulent conduct occurred prior to that date. The client has committed himself or herself when the fraud occurred.[16]

14. In this case, as noted, the fraudulent conduct in question occurred before the effective date of the new rules. We therefore apply DR 7-102(B)(2) and not Rule 3.3(b) to determine whether the lawyer has an obligation to disclose the fact that the client was arrested a week before entering a conditional discharge plea. Even if the client's false representation that he had stayed out of trouble was a "fraud on the tribunal" within the meaning of DR 7-102(B)(1) – as seems likely – it is clear that the information that the lawyer subsequently acquired was a confidence or secret. The lawyer would therefore have an obligation to disclose the information only if the information was not "protected" under DR 4-101.[17] Here, no exception to the duty of confidentiality applies, and therefore the information remains "protected" as a confidence or secret. While under DR 4-101(C)(3) (as under new Rule 1.6(b)(2)) a lawyer may disclose information necessary to prevent a future crime, the inquirer here learned of the client's misrepresentation after it occurred, when it was past wrongdoing, not a future crime.[18]

15. Some writers have questioned whether Rule 3.3 is inconsistent with the protections afforded criminal defendants under the Fifth and Sixth Amendments of the United States Constitution.[19] There is also some question whether the new requirement of Rule 3.3, a court-adopted rule, can override the statutory protection to the attorney-client privilege afforded by CPLR § 4503(a).[20] In view of the result we reach, we express no opinion on these questions.

CONCLUSION:

16. Where a lawyer learns that, prior to April 1, 2009, a client had committed fraud on a tribunal, the lawyer's obligation to disclose the fraud is governed by DR 7-102(B)(1) of the former Code of Professional Responsibility, and not by Rule 3.3 of the new Rules of Professional Conduct. Unlike Rule 3.3, DR 7-102(B)(1) did not permit disclosure of information protected as a confidence or secret in these circumstances.
(16-09)

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16 Of course, once the lawyer learns of the fraud, he or she cannot use the fraudulent testimony in argument or otherwise. That was true under DR 7-102 as it is under Rule 3.3.

17 *See* note 2 *supra*.

18 The answer might be different if the lawyer himself had made a "written or oral opinion or representation . . . believed by the lawyer still to be relied upon by a third person [and that] was based on materially inaccurate information or is being used to further a crime or fraud." In that circumstance, the confidence might not be protected to the extent disclosure is implicit in the lawyer's withdrawing the prior representation. DR 4-101(C)(5).

19 *See*, *e.g*., Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. L. ETHICS 133, 157-163 (2008); John Wesley Hall, Jr., PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE 3d §§ 26:6, 26:21 n.8 (database updated July 2008); Joel Androphy, WHITE COLLAR CRIME § 20:12 (2d ed.) (database updated June 2008); 1 CRIMINAL PRACTICE MANUAL §§ 8:12, 8:23 (database updated March 2009); Formal Op. 92-2, Ethics Advisory Committee of National Association of Criminal Defense Lawyers.

20 "Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing . . . ."

OPINION 832 (12/03/2009)

TOPIC: Attorney's provision of nonlegal services

DIGEST: Where a lawyer sells shelf corporations (a nonlegal service) to people he regards as non-clients, and provides no legal services in connection with those nonlegal services, but the lawyer's status as a lawyer is visible to the public, then absent a disclaimer or other steps, the recipients of the nonlegal services could reasonably believe there is an attorney-client relationship and thus the Rules of Professional Conduct would apply.

RULES: 5.7

COMMENTS: Comments 1 & 3 to Rule 5.7

QUESTION:

1. A sole practitioner would like to provide what the lawyer describes as a "nonlegal service" to non-clients. The "nonlegal service" is the sale of "shelf corporations." (The term "shelf corporation" means a company that has had no recent activity or that was created to be "put on the shelf" to age. Shelf corporations are often sold to investors who want to start a company but do not want to go through the incorporation process.) Do the New York Rules of Professional Conduct (the "Rules") relating to advertising and solicitation apply to the sale of shelf corporations to non-clients?

OPINION:

2. Rule 5.7 contains rules relating to nonlegal services provided by lawyers. (The Appellate Divisions adopted new Rules of Professional Conduct effective April 1, 2009.) The first two subparagraphs – Rule 5.7(a)(1) and (a)(2) – apply if an attorney is providing both legal and nonlegal services to clients. Under Rule 5.7(a)(1) if the nonlegal services are "not distinct" from the legal services provided by the lawyer to the client, then the Rules apply to both the legal and the nonlegal services. Under Rule 5.7(a)(2), if the nonlegal services and the legal services provided by the lawyer to the client are "distinct" from each other, then the Rules apply to both the legal and nonlegal services only "if the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship."

3. Rule 5.7(a)(4) addresses whether a person receiving nonlegal services "could reasonably believe that those services are the subject of an attorney-client relationship." Specifically, the rule states that even where the legal and nonlegal services provided to the client are distinct from each other, it is "presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship *unless* the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services . . . ." (Emphasis added.) However, the specified writing only serves to reverse the presumption, not to prove conclusively that the services are not legal services. As we noted in N.Y. State 755 (2002):

> We are not suggesting by this opinion that the mere statement, even in writing, to that effect is an automatic safe harbor, and DR 1-106 does not say so. The writing serves to

> reverse the presumption against the lawyer that would otherwise exist. It is possible that in certain circumstances, such as where the client is unsophisticated and has had a long relationship with the lawyer and where, despite the existence of a separate entity, the nonlegal services are not completely separated from the rendition of legal services, the writing would be insufficient to disabuse the client of a reasonable belief that the lawyer would be acting to protect the client.

Id. at 5; *see also* Rule 5.7, cmt. 3.

4. The lawyer's intention to sell shelf corporations only to people he regards as non-clients (and not to clients) appears to assume that he would not provide legal advice to the non-client purchasers of the corporations. That assumption may not be warranted. To test that assumption, we consider below three different ways in which the shelf corporations might be sold.

Scenario One: Lawyer Provides Legal Services

5. We first consider the possibility that the lawyer provides legal advice about shelf corporations to the purchasers, such as giving a prospective purchaser the attorney's views about (i) the legality of shelf corporations in general, (ii) the validity of a specific corporation, (iii) the advantages, rights, or benefits of shelf corporations, or (iv) the tax consequences of purchasing or owning a shelf corporation. The Rules do not define legal services, and many services do not fall neatly into the category of legal services because they may legally be undertaken by both lawyers and nonlawyers. However, "when such services are performed by a lawyer who holds himself out as a lawyer, they constitute the practice of law and the lawyer, in performing them, is governed by the Code." N.Y. State 557 (1984) at p. 2.

6. Thus, despite the fact that a nonlawyer might be entitled to provide some advice about a shelf corporation without committing the unauthorized practice of law, when a lawyer provides such advice it becomes the provision of legal services. Thus, if the lawyer provides legal advice about shelf corporations to purchasers, the lawyer would be providing legal services to them. In that situation, the Rules of Professional Conduct – including the rules regarding lawyer advertising and solicitation – would apply both to the legal advice and to the sale of the corporations. Moreover, because the lawyer would actually be rendering legal services, the disclaimer in Rule 5.7(a)(4) would not be effective.

Scenario Two: Lawyer Does Not Provide Legal Services

7. We next consider the possibility that the lawyer provides no legal advice whatsoever to the purchasers about the shelf corporations. For the assumption that the lawyer provides no legal advice to remain true, the lawyer could not answer the kinds of questions a prospective customer might ask that are likely to call for legal advice (*e.g.,* What are the tax consequences? How long may I leave the corporation on the shelf? Do I have to notify the state if I buy a shelf corporation? Is the corporation validly formed?). For example, if the shelf corporations were sold over the Internet, and the attorney was not identified anywhere on the web site as a lawyer, and any information about the corporations was provided only in writing (*e.g.,* via FAQs or links to articles), and purchasers never communicated with the lawyer directly and had no opportunity to ask for advice, then the lawyer would not be giving legal advice to purchasers. In that case the Rules would not generally apply to those sales.

8. Even where the lawyer would be generally exempt from the application of the Rules with respect to the sales, however, the exemption would not be absolute. Some Rules of Professional Conduct, such as Rule 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation), would still apply. Thus, the lawyer could not engage in dishonest, fraudulent, or deceptive conduct relating to the advertising or solicitation of the nonlegal services.

Scenario Three: Lawyer's Status as a Lawyer Is Visible to the Public

9. Finally, we consider the possibility that the attorney does not provide any legal advice to the purchaser of the shelf corporation but the attorney's status as a lawyer is visible to the public (*e.g.,* the attorney uses a law office name or letterhead, or advertises the sales on the lawyer's web site, or puts "Esq." or "J.D." after the lawyer's name). In that case there is a substantial risk that the purchaser of the shelf corporations will be misled as to whether an attorney-client relationship exists. The risk is great because the client may be confused about the nature of the attorney's role. In speaking about the need for the lawyer to avoid potential confusion between legal and nonlegal services provided to an individual, Comment 1 to Rule 5.7 notes that avoiding confusion is essential

> so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that ordinarily accompany a client-lawyer relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services when that may not be the case.

10. The same concerns are relevant when the attorney sells to customers who are aware of the attorney's status as a lawyer. Even if the attorney merely identifies himself as a lawyer when selling shelf corporations but does not promise or provide legal services, the risk of confusion is great and purchasers could reasonably believe that they had an attorney-client relationship with the seller.

11. Where the attorney's status as a lawyer is visible, one way for a lawyer to avoid application of the Rules to the sale of nonlegal services would be to give the purchaser in writing the Rule 5.7(a)(4) disclaimer stating that the no legal services are being rendered and that the protection of an attorney-client relationship does not exist. We emphasize, however, that even if the lawyer provides the disclaimer specified in Rule 5.7(a)(4), it would not be effective if the lawyer actually provided legal advice or other legal services to the customer of the nonlegal business.

CONCLUSION:

12. Where a lawyer provides legal services to a client, the Rules of Professional Conduct apply to the legal services. Where a lawyer provides nonlegal services to non-clients, the Rules generally are not applicable to the provision of the nonlegal services although some Rules of Professional Conduct would still apply. Where the attorney provides no legal services in connection with the provision of nonlegal services such as those here – the sale of shelf corporations – but the attorney's status as a lawyer is visible to the public, then absent a disclaimer or other steps, the recipients of the nonlegal services could reasonably believe there is an attorney-client relationship, and thus the Rules would apply. 28-08

OPINION 833 (12/15/2009)

TOPIC: Clients (Prospective); Communications; Duty of Lawyer.

DIGEST: An attorney is not required to respond to unsolicited letters from incarcerated individuals requesting legal representation.

RULES: Rule 1.18(a); Rule 1.18(e).

QUESTION:

[1] Is an attorney ethically required to respond to unsolicited letters from incarcerated individuals requesting legal representation for personal injury or other claims?

OPINION:

[2] No provision of the New York Rules of Professional Conduct imposes a general obligation upon an attorney to promptly answer unsolicited mail – or to answer it at all. We found that such an obligation arose under the former New York Code of Professional Responsibility only in the context of communications from an adversary or a client. *See* N.Y. State 407 (1975) ("The consistent failure of a lawyer to respond to telephone calls and correspondence from fellow *attorneys* is in violation of the Code. A lawyer is obligated to return telephone calls and inquiries from fellow members of the Bar, as well as from *clients*.") (citing former EC 7-10, EC-7-37, EC 7-38, and EC 7-39); *see also* 22 NYCRR § 1210.1(5) (Statement of Client's Rights provides that a *client* is entitled to have "telephone calls returned promptly"); N.Y. State 396 (1975) ("The consistent failure of a lawyer to respond to calls from his *clients* is in violation of [former] Canons 6 and 9") (all emphasis added).

[3] We do not address whether an obligation to respond to communications from clients and other lawyers continues under the new Rules. We address here only unsolicited communications from incarcerated individuals who are neither adversaries nor clients. In New York, the only guideline of general application regarding an attorney's obligation to respond to unsolicited inquiries from persons other than adversaries or clients appears not in the Rules of Professional Conduct, which are mandatory, but rather in Standard IV of the New York State Standards of Civility, an aspirational goal not subject to enforcement through discipline. Standard IV says: "A lawyer should promptly return telephone calls and answer correspondence *reasonably* requiring a response." 22 NYCRR Part 1200, app. at IV (emphasis added).

[4] Even applying that aspirational standard, however, we believe that an unsolicited letter from an incarcerated individual requesting legal representation does not, without more, reasonably require a response. We also note that a lawyer's receipt of truly unsolicited communications requesting legal representation does not create a lawyer-client relationship. *See, e.g., Knigge v. Corvese*, 2001 WL 830669, at *3-4 (S.D.N.Y. 2001) (holding that multiple voicemail messages seeking legal representation and requesting return phone calls did not result in formation of an attorney-client relationship because it was not reasonable for caller to believe that his "unilateral" decision to leave such messages could result in such a relationship).

[5] Nor, under Rule 1.18 of the New York Rules of Professional Conduct, does the sender become a "prospective client" unless the lawyer subsequently "discusses" with the sender the "possibility of forming a client-lawyer relationship." Rule 1.18(a); *see also* Rule 1.18(e)(1) ("A person who . . . communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship . . . is not a prospective client within the meaning of paragraph [1.18](a)"). Thus, Rule 1.18 confirms our view that an unsolicited letter from an incarcerated individual requesting legal representation, without more, does not reasonably require a response.

[5] This opinion does not address the circumstances, if any, in which an e-mail requesting legal representation or legal advice, although constituting the initial contact between a lawyer and the sender, may be deemed a response to a web site inviting public inquiry, in which case the communication could not be fairly characterized as "unsolicited." *Cf.* N.Y. City 2001-1 (absent a disclaimer warning that information sent by prospective clients will not be treated as confidential, information imparted to an attorney in good faith by a prospective client in an e-mail generated in response to an internet web site maintained by the law firm should be held in confidence even though the attorney has declined the representation).

CONCLUSION:

[6] An attorney is not ethically required to respond to unsolicited letters from incarcerated individuals requesting legal representation.

(7-09)

OPINION 834 (12/15/2009)

Distinguishing N.Y. State 771 (2003) in light of rule changes

TOPIC: Use of disclaimer with client testimonials or endorsements.

DIGEST: Under the New York Rules of Professional Conduct, truthful client testimonials or endorsements are permitted if accompanied by the disclaimer specified in Rule 7.1(e)(3).

RULES: 7.1(a)(1), (d)(3), and (e)(3)

QUESTION:

1. Must an advertisement that contains a client testimonial or endorsement also contain the disclaimer: "Prior results do not guarantee a similar outcome"?

OPINION:

2. Our opinion in N.Y. State 771 (2003) concluded that as long as an advertisement containing client testimonials was not false, deceptive or misleading, it was not necessary for the advertisement to contain the disclaimer that prior results did not guarantee a similar outcome.[21] We now examine whether this conclusion is modified in the New York Rules of Professional Conduct that took effect on April 1, 2009 (the "Rules").[22]

3. Rule 7.1(d)(3) provides that an advertisement that complies with Rule 7.1(e) may contain "testimonials or endorsements of clients . . . and of former clients."[23] Rule 7.1(e)(3) requires advertisements containing testimonials or endorsements of clients to include the following disclaimer: "Prior results do not guarantee a similar outcome." Therefore, under the new Rules, an advertisement that contains a client testimonial requires the prescribed disclaimer concerning results.

4. At the time we decided N.Y. State 771, the New York Code of Professional Responsibility did not have a specific Disciplinary Rule dealing with client testimonials. However, DR 2-101(A) of the Code did prohibit advertisements that were "false, deceptive or misleading," so this Committee examined client testimonials under that standard. We opined under that standard that the nature of the testimonial determined whether a disclaimer of the kind now mandated by Rule 7.1(e)(3) was required. Like DR 2-101(A) of the old Code, new Rule 7.1(a)(1) prohibits testimonials that are false, deceptive or misleading, but now Rule 7.1(e)(3) always requires the disclaimer set out in that subparagraph.

21 N.Y. State 771 was decided in the context of website advertising, but the principles enunciated in that opinion applied to all forms of attorney advertising, as does this opinion.

22 The rule amendments addressed in this opinion are based verbatim on language that took effect on February 1, 2007, when the Courts amended the Disciplinary Rules governing advertising and solicitation in the old Code of Professional Responsibility.

23 A restriction on testimonials or endorsements from current clients is contained in Rule 7.1(c)(1), which provides that an advertisement shall not "include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending." Rule 7.1(c)(1) was declared unconstitutional and its enforcement was permanently enjoined in *Alexander v. Cahill*, 634 F.Supp.2d 239 (N.D.N.Y. 2007), but the defendants (disciplinary counsel in all four Departments) appealed to the Second Circuit, and the appeal was still pending when we issued this opinion. The outcome does not affect our analysis here because Rule 7.1(c) regulates only the types of testimonials and endorsements permitted, not whether they require a disclaimer.

CONCLUSION:

5. We answer the question in the affirmative. Under Rule 7.1(e)(3), an advertisement that contains a client testimonial or endorsement must also contain the disclaimer: "Prior results do not guarantee a similar outcome."

(49-09)

OPINION 835 (12/24/2009)

TOPIC: Multijurisdictional law practice by corporate counsel

DIGEST: The question of whether an out-of-state lawyer may serve as in-house counsel for a New York corporation and maintain an office in New York is not answered by the New York Rules of Professional Conduct, but rather is a question of law beyond the Committee's jurisdiction.

RULES: Rule 5.5.

QUESTION:

1. May a person who is not admitted to practice law in New York but who is admitted to practice law and is in good standing in another U.S. jurisdiction serve as general counsel for a corporation headquartered in New York and maintain an office in New York for that purpose?

OPINION:

2. In New York, as elsewhere, the law generally forbids the unauthorized practice of law ("UPL"), which may include legal work performed by out-of-state lawyers as well as by non-lawyers. (The term "out-of-state lawyer" is not defined in the Rules but we use the term "out-of-state lawyer" for purposes of this opinion to mean a person who is not admitted to practice in New York but is admitted to practice and in good standing in another U.S. jurisdiction.) In New York, §§ 476-a, 478 and 484 of the Judiciary Law govern the unauthorized practice of law. Generally speaking, these provisions forbid individuals from maintaining a law practice or otherwise providing legal services in New York unless they are licensed to practice law in this state or otherwise authorized to render particular legal services in New York (for example, by admission *pro hac vice*).

3. The scope and application of these Judiciary Law provisions is a question of law that courts of New York have addressed, albeit infrequently. *See, e.g.*, *El Gemayel v. Seaman*, 72 N.Y.2d 701, 707 (1988) (finding that "in the circumstances of this case, phone calls to New York by plaintiff, an attorney licensed in a foreign jurisdiction, to advise his client of the progress of legal proceedings in that foreign jurisdiction, did not, without more, constitute the 'practice' of law in this State in violation of [Judiciary Law] § 478"); *Spivak v. Sachs*, 16 N.Y.2d 163 (1965) (holding that a California attorney engaged in the unlawful practice of law in New York by assisting an acquaintance in New York with her divorce, where the California attorney became substantially involved in the client's New York affairs – spending 14 days in New York attending meetings, reviewing drafts of a separation agreement, discussing the client's financial and custody problems, recommending a change in New York counsel and, based on his knowledge of New York and California law, rendering his opinion as to the proper jurisdiction for the divorce action and related marital and custody issues).

4. Among other things, the case law suggests that out-of-state lawyers are not engaging in the "unauthorized practice of law" in New York when they perform "incidental and innocuous" legal work in New York in the course of representing clients from their home jurisdictions. *El Gemayel v. Seaman*, 72 N.Y.2d at 707; *accord Spivak v. Sachs*, 16 N.Y.2d at 168 ("recognizing the numerous multi-State transactions and relationships of modern times, we cannot penalize every instance in

which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York").

5. In New York, the question of whether an out-of-state lawyer is engaged in the unauthorized practice of law in New York is exclusively a matter of law. Unlike the professional conduct rules of most other states, the New York Rules of Professional Conduct ("N.Y. Rules") that took effect on April 1, 2009 do not include provisions modeled on ABA Model Rule 5.5(b), (c) & (d). In jurisdictions in which the courts have adopted provisions comparable to Model Rule 5.5(b)-(d), the provisions have two related effects – they both judicially "authorize" out-of-state lawyers to practice law in the jurisdiction within the limits set by Rule 5.5, and they interpret the conduct authorized by Rule 5.5 as conduct that does not violate the jurisdiction's statutory and common law regulation of UPL. The rule functions as if it were a global *pro hac vice* order admitting every out-of-state lawyer to practice in the jurisdiction within the limits described in Rule 5.5. (Of course, even in states that have adopted ABA Model Rule 5.5, an out-of-state lawyer who desires to appear in court in a state where the lawyer is not licensed to practice must still seek formal admission *pro hac vice* to that court.)

6. The New York State Bar Association has twice recommended (first in 2003, then again in 2008) that the New York courts adopt provisions similar to those in ABA Model Rule 5.5, but both times the Appellate Divisions have declined to do so. Consequently, the N.Y. Rules include no provision comparable to ABA Model Rule 5.5(d)(1), which would authorize out-of-state lawyers to work in New York as in-house corporate counsel other than in proceedings in which *pro hac vice* admission is required. Nor does New York have a court-adopted "in-house registration" rule, like that of many states, authorizing out-of-state lawyers who satisfy registration requirements to practice law in the state. See ABA Model Rule for Registration of In-House Counsel (adopted by the ABA House of Delegates in August 2008).[24]

7. The jurisdiction of this Committee is limited to answering questions about the meaning and application of the New York Rules of Professional Conduct. We do not interpret court rules or statues. The question whether an out-of-state lawyer may serve as in-house corporate counsel with an office in New York without gaining admission to the New York Bar is entirely a matter of state law governed principally by the Judiciary Law, which is statutory. It is not governed by any provision in the N.Y. Rules of Professional Conduct. Consequently, this Committee lacks jurisdiction to answer the question.

CONCLUSION:

8. The question whether an out-of-state lawyer may serve as in-house counsel for a New York corporation and maintain an office in New York for that purpose is a question of law, and is not answered by the New York Rules of Professional Conduct. The question is therefore beyond our jurisdiction and we offer no opinion on the question. Because the question is a recurring one, however, this Committee urges the Appellate Divisions and/or the New York State Legislature to provide further guidance regarding whether and to what extent out-of-state lawyers – especially in-house lawyers who provide services solely to a corporate employer – are authorized to practice law in New York. (35-09)

24 Available at www.abanet.org/legaled/standards/noticeandcomment/ModelRule.DOC.

2010

OPINION 836 (02/25/2010)

TOPIC: Dual representation of Guardian and incapacitated person in a proceeding to terminate the guardianship.

DIGEST: Lawyer who previously represented incapacitated Client in connection with the appointment of a Guardian for Client may later undertake dual representation of both Client and Guardian in a proceeding to terminate the guardianship, provided (a) Lawyer reasonably believes that Lawyer will be able to competently and diligently represent both clients, and (b) Lawyer obtains informed consent from each client, confirmed in writing.

RULES: 1.0(e); 1.0(j); 1.7; 1.14

COMMENTS: Comment 28 to Rule 1.7

QUESTION:

[1.] May Lawyer, who previously represented an incapacitated Client in connection with the appointment of a Guardian for Client, later represent both Client and Guardian in a proceeding to terminate the Guardianship?

OPINION:

[2.] Lawyer represented an incapacitated Client in connection with the appointment of a Guardian for Client. At that time, Guardian (one of Client's adult children) was appointed with Client's consent. Some time later, Client, Guardian, and Client's other adult children all agreed that the guardianship should be terminated. The reasons for terminating the guardianship are twofold: (1) Client has been living independently and no longer needs a Guardian, and (2) Guardian is planning to move across the country.

[3.] Client and Guardian have asked Lawyer to represent them both in a proceeding to discharge the Guardian. We will assume that the court wishes both Client and Guardian to be represented and approves of this dual representation.

[4.] There is always the possibility that a conflict of interest will arise between a guardian and the incapacitated person who is or will be the subject of the guardianship. While such conflicts might be more likely to arise at the inception of guardianship proceedings, they might also occur in connection with the termination of the guardianship. For example, it might be that the guardian seeks to escape the responsibilities of the guardianship even though the incapacitated person would be better served by continuing it. Here, the fact that the Guardian wishes to terminate the guardianship in anticipation of moving across country raises this possibility.

[5.] The proposed dual representation of Guardian and Client in a proceeding to terminate the guardianship must be analyzed under Rule 1.7 of the New York Rules of Professional Conduct, adopted effective April 1, 2009. Rule 1.7 provides:

> RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
>
> (1) the representation will involve the lawyer in representing differing interests; or
>
> (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

[6.] The proposed dual representation will involve Lawyer in representing differing interests because a person who has been found to be incapacitated in the past presumably needs a guardian until proven otherwise, while the Guardian here wishes to be relieved of his guardianship responsibilities. The differing interests create a conflict under Rule 1.7(a)(1). Therefore, the conflict must be analyzed under Rule 1.7(b)(1)-(3) to determine whether it is consentable (*i.e.,* waivable).

[7.] It appears at present that the parties are aligned in interest and agree that the guardianship should be terminated, so any serious clash of interests between Client and Guardian is merely a future possibility. Therefore, unless other factors or circumstances of which we are unaware suggest a different conclusion, we think Lawyer may reasonably believe that he will be able to provide competent and diligent representation to both parties (Client and Guardian) in this matter. In particular, the belief appears reasonable because this representation does not occur in an adversarial setting and the whole matter will be under the supervision of the court.

[8.] If Lawyer, based on an appropriate investigation, reasonably believes that he can provide competent and diligent representation to both clients, then Rule 1.7(b)(1) does not prohibit the dual representation. Moreover, because the proposed dual representation is not prohibited by law and will not

involve the lawyer in asserting a claim by either client against the other, neither Rule 1.7(b)(2) nor Rule 1.7(b)(3) prohibits the dual representation. Provided Lawyer meets the standards set forth in Rule 1.7(b)(1)-(3), the conflict is consentable.[1]

[9.] Consentability alone, however, is not enough. When a conflict is consentable, Rule 1.7(b)(4) requires that Lawyer actually obtain informed consent, confirmed in writing, from each of the clients. Rule 1.0(e) defines "confirmed in writing," and we assume lawyer will confirm any consent in writing in accordance with that definition. Rule 1.0(j) defines the crucial term "informed consent" as follows:

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

[10.] Accordingly, Lawyer must fully inform each party of the possible risks of the dual representation. One such risk is that material disagreements may later arise between the two clients that will preclude Lawyer from reasonably believing that he can continue to provide competent and diligent representation to each of them. In that case, Lawyer would no longer be able to represent both clients, and both clients would have to engage new lawyers unless one client (who would now be a former client) gives informed consent, confirmed in writing, for the lawyer to continue representing the other client.

[11.] When obtaining informed consent from Client, Lawyer must take special care because Client is presently deemed to be incapacitated and under guardianship. However, three sources – Rule 1.14 our Rules of Professional Conduct[2], our prior opinion in N.Y. State 746[3], and New York's Mental Hygiene Law[4] – all support the conclusion that Client may consent to this dual representation despite Client's present legal designation of incapacity. Of course, Lawyer must carefully assess Client's capacity to understand the conflict and to make a reasoned decision whether to consent to the representation despite the conflict. This careful assessment is necessary because if Client's capacity to make reasoned decisions is so diminished that she cannot give informed consent to the dual representation, then Lawyer cannot satisfy the informed consent requirement of Rule 1.7(b)(4). If a lawyer

1 Comment 28 to Rule 1.7 recognizes that "[w]hether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest, even though there is some difference in interest among them."

2 Rule 1.14 ("Client with Diminished Capacity") deals with representing a person with diminished capacity and directs that "the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client."

3 In N.Y. State 746 (2001) (which was based on provisions of the New York Lawyer's Code of Professional Responsibility then in effect), we said "there is generally no bar to representing a client whose decision making capacity is impaired, but who is capable of making decisions and participating in the representation. Insofar as the client is making reasoned decisions concerning those matters that are for the client to decide and these decisions appear to be in the client's best interests, there would ordinarily be no need for the lawyer even to consider withdrawing from the representation or seeking the appointment of a guardian who would substitute his or her judgment for that of the client." This is consistent with recognizing an incapacitated client's ability to consent to the dual representation.

4 The Mental Hygiene Law mandates that an incapacitated person should be afforded the greatest amount of independence and self-determination possible, and states that an incapacitated person retains all of the powers and rights except those which are specifically granted to the guardian. N.Y. Mental Hyg. Law § 81.20 and 81.29.

cannot satisfy the informed consent requirement of Rule 1.7(b)(4), then the lawyer cannot undertake the dual representation.

[12.] In seeking Client's informed consent to the dual representation, Lawyer must take Client's capacity into account and provide Client with information and explanations suitable to Client's understanding. Again, since the discharge of the Guardian will take place only if the court determines it is appropriate, any concerns we might have about the feasibility of obtaining informed consent from the incapacitated Client are substantially mitigated.

CONCLUSION:

[13.] Lawyer who previously represented an incapacitated Client in connection with a the appointment of a Guardian for Client may later undertake dual representation of both Client and Guardian seeking termination of the guardianship, provided Lawyer reasonably believes that Lawyer will be able to competently and diligently represent both clients and Lawyer obtains informed consent from each client, confirmed in writing.

(34-09)

OPINION 837 (03/16/2010)

TOPIC: Confronting false evidence and false testimony.

DIGEST: Rule 3.3 of the New York Rules of Professional Conduct requires an attorney to disclose client confidential information to a tribunal if disclosure is necessary to remedy false evidence or testimony. The exception in former DR 7-102(B)(1) exempting disclosure of information protected as a client "confidences or secret" no longer exists.

RULES: Rule 1.0(k); Rule 1.6; Rule 3.3; DR 4-101; DR 7-102

QUESTION:

1. Inquiring counsel's client gave sworn testimony at an arbitration proceeding concerning a document. The document was admitted into evidence based upon the testimony. Counsel's client also testified concerning the client's actions in preparing the document and submitting the document to the client's employer.

2. In a later conversation between client and counsel, the client informed counsel that the document was forged. Counsel thereby came to know that the document was some of the client's testimony concerning the document were false.

3. Inquiring counsel raises the following questions:

(1) Is counsel required to inform the tribunal that the document in question is a forgery and that some of the testimony relating to the document is false?

(2) If not, what other steps would constitute reasonable remedial measures? In particular, would it suffice for counsel to inform the tribunal and opposing counsel that the evidence and any testimony relating to it are being withdrawn, and that he intends to proceed based on all other evidence properly before the tribunal?

(3) Is counsel required to withdraw from representation of the client? If so, would withdrawal constitute a reasonable and sufficient remedial measure?

OPINION:

4. The New York Rules of Professional Conduct (the "Rules") were formally adopted by the Appellate Divisions and took effect on April 1, 2009. The Rules replaced the New York Code of Professional Responsibility (the "Code"). The Rules are now codified at 22 NYCRR Part 1200 (as was the Code previously). Comments to the Rules also took effect on April 1, 2009 but have been adopted only by the New York State Bar Association, not by the courts.

The Old Code and the New Rules

5. In the former New York Code of Professional Responsibility, DR 7-102(B) provided (with emphasis added):

> A lawyer who receives information clearly establishing that:
>
> (1) the client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the effected person or tribunal, *except when the information is protected as a confidence or secret.*

The New Rules

6. Rule 3.3 ("Conduct Before a Tribunal") now covers the same ground that was previously covered by DR 7-102. Rule 3.3(a)(3) provides, in relevant part:

> If a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3(b) provides, in relevant part:

> A lawyer who represents a client before a tribunal and who knows that a person . . . is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3(c) provides:

> The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.[5]

Analysis of the Changes

7. In Roy Simon, *Comparing the New NY Rules of Professional Conduct to the Existing NY Code of Professional Responsibility (Part II)*, N.Y. Prof. Resp. Report, March 2009, Professor Simon characterized Rule 3.3 as:

> perhaps the most radical break with the existing Code. Under DR 7 (102(B)(1) of the current Code of Professional Responsibility, if a lawyer learns ("receives information clearly establishing") after the fact that a client has lied to a tribunal, then the lawyer "shall reveal the fraud" to the tribunal, "except when the information is protected as a confidence or secret" – which it nearly always will be, because disclosing that a client has committed perjury is embarrassing and detrimental to the client. Thus, the exception swallows the rule, and confidentiality trumps candor to the court in the current Code. In contrast, Rule 3.3(a) provides that if a lawyer or the lawyer's client has offered evidence to a tribunal and the lawyer later learns ("comes to know") that the

5 Rule 1.6 ("Confidentiality of Information") governs a lawyer's obligation to safeguard "confidential information." "Confidential information" under the Rules includes what were formerly referred to under the Code as confidences and secrets. *Compare* former DR 4-101(A) of the Code, with Rule 1.6(a).

> evidence is false, the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(c) makes crystal clear that the disclosure duty applies "even if" the information that the lawyer discloses is protected by the confidentiality rule (Rule 1.6). This is a major change from DR 7-102(B)(1) . . .

8. As noted in Comment [11] to Rule 3.3:

> A disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. *See*, Rule 1.2(d).

9. By its terms, DR 7-102(B)(1) came into play only if (1) the attorney "receive[d] information clearly establishing that" (2) a "fraud" had been perpetrated upon a person or tribunal.

10. Thus, the benchmark for invoking counsel's responsibility has shifted from DR 7-102(B)'s receipt of information clearly establishing fraud on a tribunal to Rule 3.3(a)'s standard of "actual knowledge of the fact in question". Rule 1.0(k) defines "knowingly," "known," "know" or knows" with the proviso that "[a] person's knowledge may be inferred from circumstances." That definition is consistent with Rule 3.3, Comment [8], which observes:

> The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence was false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's actual knowledge that evidence is false, however, can be inferred from the circumstances. *See*, Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

11. Another difference between the old Code and the new Rules is that DR 7-102(B)(1) required a "fraud" to have been perpetrated. Rule 3.3(b) likewise applies only in the case of "criminal or fraudulent" conduct, but Rule 3.3(a)(3) requires a lawyer to remedy false evidence even if it was innocently offered.[6]

12. Remedial measures are limited, however, by CPLR §4503(a)(1), the legislatively-enacted attorney-client privilege. The attorney-client privilege takes precedence over the Rules because the Rules are court rules rather than statutory enactments. However, CPLR §4503's limit on remedial measures extends only to the introduction of protected information into evidence. As explained in Comment [3] to Rule 1.6:

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6 To the extent that this Committee's prior opinions in N.Y. State 674 (1994), N.Y. State 681 (1996), and N.Y. State 797 (2006) premised their results upon the inability of the Committee to ascertain whether a "fraud" had occurred or was occurring, or upon the existence of an "exception" which relieved an attorney of the obligation to disclose a fraud on a tribunal if the fraud was discovered by the attorney via a client confidence or secret, those results would today require a re-analysis in light of the existing Rules.

> The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order.

See Gregory C. Sisk, *Change and Continuity in Attorney-Client Confidentiality: The New Iowa Rules of Professional Conduct*, 55 Drake L. Rev. 347, 381-384 (Winter 2007) (contrasting exceptions to Iowa's confidentiality rule with exceptions to Iowa's attorney-client privilege and asserting that such exceptions "are not exceptions to the attorney-client privilege"); Gregory C. Sisk, *Rule 1.6 Confidentiality of Information*, 16 Ia. Prac., Lawyer and Judicial Ethics §5:6(d)(E)(2009 ed.).

13. As elaborated by Professor Sisk, Rule 3.3 *Candor Toward the Tribunal*, 16 Ia. Prac., Lawyer and Judicial Ethics § 7:3(e)(3)(2009 ed.):

> Unless an exception to confidentiality under the rules (such as the Rule 3.3 duty to disclose false evidence) is directly co-extensive with an exception to the attorney-client privilege, the lawyer is authorized or required to share information only in the manner and to the extent necessary to prevent or correct the harm or achieve the designed purpose, but not to testify or give evidence against the client. When an exception to confidentiality stated in the ethics rules does not align with an exception to the attorney-client privilege, the lawyer's duty of disclosure is limited to extra-evidentiary forms, namely sharing the information with the appropriate person or authorities. In sum, the exception to confidentiality in Rule 3.3 does not permit introduction of attorney-client communications into evidence through lawyer testimony or permit inquiry about those communications as part of the presentation of evidence before any tribunal, absent a recognized exception to the privilege itself.[7]

See also, Michael H. Berger and Katie A. Reilly, *The Duty of Confidentiality: Legal Ethics and the Attorney-Client and Work Product Privileges*, 38-JAN Colo. Law. 35, 38 (January 2009) (concluding that privileged communications are subject to the permissive disclosure provisions of Rule 1.6).

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7 The attorney-client privilege itself would not cover material which falls under the crime-fraud exception to the attorney-client privilege. Because the crime-fraud exception has typically been applied tin situations involving documentary discovery which are quite different from the scenarios contemplated by Rule 3.3, and because the crime-fraud exception has been interpreted to apply only to situations in which the client communication was itself in furtherance of the crime or fraud (*see, e.g.*, *United States v. Richard Roe*, *Inc.*, 68 F. 3d 38, 40 (2d Cir. 1995) ("[A] party seeking to invoke the crime-fraud exception must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof."); *Linde v. Arab Bank, PLC*, 608 F.Supp.2d 351, 357 (E.D.N.Y, 2009) (quoting *U.S. v. Richard Roe, Inc*., for the proposition that the crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud), the precise nature of the interplay between Rule 3.3, the attorney-client privilege, and the crime-fraud exception to that privilege remains to be explored in further court decisions and ethics opinions.

14. In the criminal, as opposed to civil, sphere, Rule 3.3's mandate to disclose client confidential information may be limited or prohibited by the Fifth Amendment (self-incrimination) and/or the Sixth Amendment (ineffective assistance of counsel) to the United States Constitution. See Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 Geo. J. Legal Ethics 133 (Winter 2008). As explained in Comment [7] to New York Rule 3.3:

> The lawyer's ethical duty may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

15. Some decisions construing Rule 3.3's predecessor (DR 7-102) did not find such constitutional limitations, but those decisions addressed "future perjury" situations. *See, e.g. People v. Andrades,* 4 N.Y. 3d 355 (2005) (defendant was not deprived of his rights to effective assistance of counsel and to a fair suppression hearing when his attorney advised the court, prior to defendant's testimony at a *Huntley* hearing, that counsel wished to present the client's testimony in narrative form, or else withdraw from the case, pursuant to the mandates of DR 7-102(A)(4) – (8)); *People v. DePallo*, 96 N.Y. 2d 437 (2001) (defendant was not deprived of his right to effective assistance of counsel when his attorney disclosed to the court that defendant intended to commit perjury); *People v. Darrett*, 2 A.D.3d 16 (1st Dep't 2003) (defendant's counsel improperly revealed more than necessary to the court to convey what proved to be an inaccurate belief that the defendant would commit perjury); *Nix v. Whiteside*, 475 U.S. 157 (1986) (right to effective assistance of counsel as not violated by attorney who refused to cooperate in presenting perjured testimony). Situations involving past rather than future perjury will of necessity await further judicial development.

Duration of the duty to take remedial measures

16. The New York State Bar Association recommended that New York Rule 3.3(c) track ABA Model Rule 3.3(c), and thus include the proviso that "[t]he duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding . . .". The State Bar's proposal also included a Comment [13] to Rule 3.3, which explained that proposed Rule 3.3(c) "establishes a practical time limit on the mandatory obligation to rectify false evidence or false statements of law and fact. The conclusion of the proceeding is a reasonably definite point for the termination of the mandatory obligation." *See* Proposed Rules of Professional Conduct, pp. 132-138 (Feb. 1, 2008). But the State Bar's proposal was not embodied in New York Rule 3.3(c) as adopted by the Appellate Divisions. Therefore, the duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. *Cf.*, N.Y. County 706, n. 1 (1995) (noting that under ABA Rule 3.3(b) the duty to take remedial measures would end at the close of the proceeding). This Committee has noted that the endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. *See* N.Y. State 831, n. 4 (2009).

Application to the facts on this inquiry

17. Rule 3.3(a)(3) does not apply unless the false evidence or testimony that has been offered is also "material." While inquiring counsel has not specifically addressed the question of materiality, for

purposes of this opinion we assume that the testimony and the documentary evidence at issue were "material." *See, e.g.,* N.Y. County 732 (2004) at p. 5 (discussion of the materiality requirement under DR 4-101(C) that permitted withdrawal of a lawyer's opinion if based on "materially inaccurate" information). Were this not the case, inquiring counsel would be under no obligation to take any remedial action, and would instead be bound by the usual obligation to safeguard confidential information imposed by Rule 1.6.

18. Here, whether inquiring counsel's conversation with his client constituted a communication covered by the attorney-client privilege presents an issue of law beyond the Committee's purview. *See, e.g.,* N.Y. State 674 (1994) (noting that whether disclosure is "required by law or court order" is a question beyond the Committee's jurisdiction). However, inquiring counsel has stipulated that he now "knows" that his client has offered material evidence and testimony which was false. Rule 3.3(a)(3) therefore requires inquiring counsel to "take reasonable remedial measures," whether or not the client's conduct was "criminal or fraudulent" (the standard for invoking 3.3(b)).

19. Disclosure of the falsity, however, is required only "if necessary." Moreover, because counsel's knowledge constitutes confidential information under Rule 1.6, and does not fall within any of the exceptions contained in Rule 1.6(b), if disclosure is not "necessary" under Rule 3.3, it would also not be permitted under Rule 1.6. Therefore, if there are any reasonable remedial measures short of disclosure, that course must be taken.

20. In the situation addressed in this opinion, inquiring counsel has suggested an intermediate means of proceeding – he would inform the tribunal that the specific item of evidence and the related testimony are being withdrawn, but he would not expressly make any statement regarding the truth or falsity of the withdrawn items. The Committee approves of this suggestion. This would be the same sort of disclosure typically made when an attorney announces an intent to permit a criminal defendant client to testify in narrative form. It may lead the court or opposing counsel to draw an inference adverse to the lawyer's client, but would not involve counsel's actual disclosure of the falsity. *See People v. Andrades*, 4 N.Y.3d 355 (2005) (counsel advised the court that he planned to present defendant's testimony in narrative form, and counsel's disclosure was open to inference that defendant planned to perjure himself, but counsel's action was proper because it was a passive refusal to lend aid to perjury rather than an unequivocal announcement of counsel's client's perjurious intentions); *Benedict v. Henderson*, 721 F.Supp. 1560, 1563 (N.D.N.Y. 1989) (affirming counsel's use of the narrative form of testimony "without intrusion of direct questions," because counsel thereby met his "obligation . . . not to assist in any way presenting false evidence").

21. Inquiring counsel should be aware that before acting unilaterally, he should bring the issue of false evidence to the client's attention, and seek the client's cooperation in taking remedial action. Comment [10] to New York Rule 3.3 provides:

> The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate

> must make such disclosure to the tribunals is reasonably necessary to remedy the situation . . . .

Counsel's actions are thus mandated by Rule 3.3(a)(3) (after client consultation) and are not subject to the client's veto.

22. Counsel remains under the continuing obligation of CPLR §4503(a) to refrain from offering attorney-client privileged evidence adverse to the client, and in fact is under a continuing obligation to invoke the attorney client-privilege if called to testify or otherwise produce evidence adverse to the client. In addition, counsel should be cognizant of the restriction on *ex parte* communications noted in Rule 3.5(a)(2), and in related Comment [2] to New York Rule 3.5

23. Since counsel is able to proceed without violating these Rules, withdrawal from representation pursuant to Rule 1.16(b)(1) is not required. Indeed, since it would not undo the effect of the false evidence, withdrawal would be insufficient to qualify as a "reasonable remedial measure" under Rule 3.3(a).

CONCLUSION:

24. Rule 3.3 requires an attorney to take reasonable remedial measures even if doing so would entail the disclosure to a tribunal of client confidential information otherwise protected by Rule 1.6. However, if reasonable remedial measures less harmful to the client than disclosure are available, then disclosure to the tribunal is not "necessary" to remedy the falsehood and the attorney must use measures short of disclosure.

(41-09, 46-09)

OPINION 838 (03/10/2010)

TOPIC: Whether a rule-making or rate-making proceeding before an administrative agency or one of its officials should be considered as being before a "tribunal" for purposes of the Rules; and whether ex parte communications in such a proceeding are prohibited.

DIGEST: Whether a rule-making or rate-making proceeding before an administrative agency or one of its officials should be considered a proceeding before a "tribunal" for purposes of the Rules is a question of fact. Principles that would apply to the determination include (a) whether individual parties will be affected by the decision; (b) whether the parties have the opportunity to present evidence and cross-examine other providers; and (c) whether the ultimate determination will be made by a person in a policy-making role or instead by an independent trier of fact such as an administrative law judge. Even if the proceeding is before a "tribunal," Rule 3.5 does not apply unless the proceeding is an "adversary proceeding" and the agency does not have its own rules or regulations authorizing ex parte communications in connection with such proceedings.

RULES: 1.0(l), 1.0(w), 1.7, 1.16, 3.3, 3.4, 3.5, 3.7, 3.9, 4.1-4.4, 8.3, 8.4

QUESTION:

1. When would a proceeding before a New York State administrative agency, such as the Public Service Commission, be considered a proceeding before a "tribunal" for purposes of the New York Rules of Professional Conduct? Is the relevant criterion what the Agency is doing (i.e. adjudication versus rulemaking) or how it is acting (i.e. using an adjudicative process)?

2. If an Agency rule-making or rate-making proceeding qualifies as being before a "tribunal," does Rule 3.5 always prohibit a lawyer from communicating ex parte as to the merits of the matter with a judge or other official of the tribunal?

DISCUSSION:

What is a tribunal?

3. Many of the rules in the New York Rules of Professional Conduct (the "Rules"), as effective April 1, 2009, prescribe lawyer conduct when acting before a tribunal. *See, e.g.* Rule 1.7(b)(3) (conflicts in proceedings before a tribunal), Rule 1.16(c)(13) & (d) (withdrawal in matters pending before a tribunal), Rule 3.3 (candor to a tribunal), Rule 3.4 (fairness to opposing parties and counsel in appearances before a tribunal), Rule 3.5 (impartiality of tribunals), Rule 3.7 (lawyer as witness in matter before a tribunal), and Rule 8.3 (reporting misconduct to a tribunal).

4. The New York Code of Professional Responsibility, which was effective prior to the adoption of the Rules, defined "Tribunal" as including "all courts, arbitrators and other adjudicatory bodies." See Definition 6. The ABA Model Rules of Professional Conduct did not define the term "tribunal" until 2001, when the ABA adopted a definition of "tribunal" that included not only courts but also binding arbitration, legislative bodies, administrative agencies or other bodies "acting in an adjudicative capacity." The definition of "tribunal" in the New York Rules adopts the definition in the ABA

Model Rules. Specifically, New York's definition of "tribunal, which appears in Rule 1.0(w), reads as follows:

> "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

5. Under this definition, acting in an adjudicative manner is not enough to bring agency proceedings within the definition of a tribunal. An administrative agency qualifies as a "tribunal" only when a neutral official, after presentation of evidence or legal argument by a "party or parties," will render a judgment that directly affects the party's interests in a particular matter. The definition of "matter," which is found in Rule 1.0(l), includes an "administrative proceeding . . . involving a specific party or parties."[8]

6. In many administrative agencies, a rule-making proceeding is not a matter before a "tribunal" within the meaning of the Rules because rule-making does not involve a specific party or parties. Rather, rule-making applies generally to all covered persons. In some cases, the agency's procedures may include elements that are also found in an adjudicative proceeding. For example, the proceeding might involve the taking of testimony in formal hearings. However, we believe it is not the taking of testimony or a formal hearing that characterizes a tribunal, but rather the rendering of a legal judgment on the law and the evidence that directly affects the interests of one or more parties to the matter.

7. There is evidence in Rule 3.9, entitled "Advocate in Non-Adjudicative Matters," that the drafters of the Rules did not consider rule-making to be an "adjudicative" procedure.[9] Comments [1] and [1A] to that rule state (with emphasis added):

> [1] In representation before bodies such as legislatures, municipal councils and executive and administrative agencies acting in a *rule-making* or policy-making capacity, lawyers present facts, formulate issues and advance argument regarding the matters under consideration. *The legislative body or administrative agency is entitled to know that the lawyer is appearing in a representative capacity.* Ordinarily the client will consent to being identified, but if not, such as when the lawyer is appearing on behalf of an undisclosed principal, the governmental body at least knows that the lawyer is acting in

8 Because the definition of "matter" in the Rules requires a specific party or parties, we do not give dispositive weight to the decision of the New York Court of Appeals in *Allied Chemical v. Niagara Mohawk*, 72 N.Y.2d 271 (1988). In that case, the Appellate Division found that certain Public Service Commission rulemaking proceedings that involved notice and comment and other "adjudicative-type procedural safeguards," were "quasi-judicial." Since the PSC's rulemaking proceeding had given Allied Chemical a full and fair opportunity to contest the same issue that would be determined in the second proceeding, the Court of Appeals held that the doctrine of collateral estoppel would prevent Allied from litigating the issue before a court. The finding that the PSC proceeding was "quasi-judicial" for purposes of collateral estoppel, however, is not dispositive of whether that type of PSC proceeding satisfies the definition of "tribunal" under the Rules.

9 We also note that the State Administrative Procedure Act ("SAPA") provides certain rules with respect to rule-making (SAPA Article 2) and adjudicatory proceedings (SAPA Article 3). In that regard, SAPA § 102(2)(ii) defines a "rule" as including "prescription for the future of rates," although certain rules regarding subscriber rates contained in an application to the public service commission are not included. Similarly, SAPA § 102(3) defines an "adjudicatory proceeding" as an activity "which is not a rule making proceeding . . . in which a determination of the legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a hearing."

a representative capacity as opposed to advancing the lawyer's personal opinion as a citizen. Representation in such matters is governed by Rule 4.1 through 4.4 and 8.4.

[1A] Rule 3.9 does not apply to adjudicative proceedings before a tribunal. *Court rules and other law require a lawyer, in making an appearance before a tribunal in a representative capacity, to identify the client* or clients and provide other information required for communication with the tribunal or other parties.

8. Comment [1] to Rule 3.9 indicates that, when a lawyer is representing a client before an administrative agency acting in a rule-making capacity, the representation is governed by Rules 4.1 through 4.4 and 8.4.

9. Comment [1A] makes clear that, when a lawyer is acting before a tribunal, disclosure of the client's name is imperative. However, when a lawyer is representing a client in a rule-making proceeding, the lawyer need disclose only that he or she is acting in a representative capacity – the lawyer need not disclose the name of the client. The clear implication of this difference – a lawyer must disclose a client's name when representing a client before a tribunal but not when representing a client in a rule-making proceeding – is that the drafters of the Rules did not consider rule-making to be a proceeding before a "tribunal."

10. Rate-making proceedings may be difficult to classify. They may sometimes be adjudicatory in nature and sometimes not. Rate-making proceedings often affect individual parties, and often involve an administrative law judge who will take evidence and make a recommendation to the agency. However, the determination of rates is often a political or quasi-legislative process, which is based on policy considerations as well as evidence of costs. Such quasi-legislative and policy considerations may implicate the rights of participants to petition the government within the meaning of the First Amendment. ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."). See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (same philosophy that underlies the Petition Clause governs the approach of citizens or groups of citizens to administrative agencies, and the right to petition extends to all departments of the government). Not surprisingly, therefore, Comment [1] to Rule 3.9 indicates that agencies acting in a policy-making capacity are acting in a non-adjudicative capacity.

11. In sum, a government agency may sometimes act in an adjudicative capacity, and thus qualify as a "tribunal," and at other times act in an non-adjudicative capacity, and thus not qualify as a "tribunal." Ultimately, whether the fact-finder in a rule-making or rate-making proceeding should be deemed to be a "tribunal" for purpose of the Rules is a question of fact that is beyond the jurisdiction of this Committee. The Agency's own characterization, or the characterization under the State Administrative Procedure Act, is not necessarily dispositive.

12. To generalize, we believe the determination of whether a particular proceeding is adjudicatory will involve one or more of the following factors:

(a) Whether specific parties will be affected by the decision;

(b) Whether the parties have the opportunity to present evidence and cross examine other providers or evidence; and

> (c) Whether the ultimate determination will be made by a person in a policy-making role or by an independent trier of fact, such as an administrative law judge.

Application of Rule 3.5

13. Rule 3.5, entitled "Maintaining and Preserving the Impartiality of Tribunals and Jurors," is designed to preserve the impartiality of tribunals by prohibiting improper influence through (i) gifts, loans and political contributions, or (ii) ex parte communications. Impartiality is not defined in the Rules, but rather in the Code of Judicial Conduct, where its meaning is given as the "absence of bias or prejudice" for or against "particular parties," and "maintaining an open mind in considering issues." New York Code of Judicial Conduct §100.0(R).

14. Even if it is determined that a particular rule-making or rate-making proceeding is before a "tribunal" because the proceeding involves a neutral official who, after presentation of evidence or legal argument by a party or parties, will render a judgment, on the facts and the law that directly affects one or more parties' interests in a particular matter, Rule 3.5 would not necessarily apply.

15. New York Rule 3.5(a)(2), regarding communications on the merits of a matter, has no direct counterpart in the ABA Model Rules of Professional Conduct. Rather, Rule 3.5(a)(2) is derived from DR 7-110(B) of the former New York Code of Professional Responsibility. Both DR 7-110(B) and Rule 3.5(a)(2) apply only "in an adversary proceeding." Thus Rule 3.5 would only apply if the particular rule-making or rate-making proceeding were deemed to be an "adversarial proceeding."

16. Moreover, even if the rule-making or rate-making proceeding were deemed to be an "adversarial proceeding," an Agency could still determine on its own that Rule 3.5 should not apply. *See, e.g.*, Rule 3.5(a)(2)(iv), which states:

> A lawyer shall not . . . in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except . . . *as otherwise authorized by law* . . . ." [Emphasis added.]

CONCLUSION:

17. Whether a rule-making or rate-making proceeding by an administrative agency or one of its officials should be considered a proceeding before a "tribunal" for purposes of the New York Rules of Professional Conduct is a question of fact. Principles that would apply to the determination include (a) whether individual parties will be affected by the decision; (b) whether the parties have the opportunity to present evidence and cross-examine other providers; and (c) whether the ultimate determination will be made by a person in a policy-making role or instead by an independent trier of fact, such as an administrative law judge.

Even if the proceeding is determined to be one before a "tribunal," Rule 3.5's restrictions on communicating with the tribunal would apply only if (i) the proceeding is determined to be an "adversary proceeding," and (ii) the agency has not adopted its own rules or regulations authorizing ex parte communications in connection with such proceedings. (62-09)

OPINION 839 (03/16/2010)

TOPIC: Group radio advertising.

DIGEST: Group radio advertisement that does not broadcast the lawyer's name, principal law office address and telephone number, but instead directs listeners to contact an agent who provides that information, is prohibited under Rule 7.1(h).

RULE: 7.1(h)

QUESTION:

1. May a lawyer participate in a group radio advertisement that does not broadcast the lawyer's name, principal law office address and telephone number?

OPINION:

2. A lawyer would like to participate in a group radio advertisement in which the lawyer's name and contact information would not be included in the broadcast. Instead, listeners would be directed to call or visit the website of an agent who would provide the lawyer's name, address and telephone number to any listener who identified himself as a New York State resident. In giving out that directory information, the agent would exercise no discretion. The inquirer asks whether this format would comply with N.Y. State 597 (1989), in which this Committee determined that in certain circumstances a lawyer could ethically participate in group television advertisements aimed at persons with particular types of legal problems. Specifically, N.Y. State 597 (at p. 3) did not prohibit a lawyer from participating in a group advertisement:

> if the advertisement presents in a meaningful fashion the names of the lawyers or law firms participating in the group advertisement, along with their addresses and the geographical areas assigned to them, so that the potential client knows the identify of the lawyer to whom his call will be referred and there is no discretion in referrals on the part of the advertising agent.

3. As we recognized in N.Y. State 597, the court rules then in effect in each of the four Appellate Divisions provided: "All advertisements of legal services shall include the name, office address and telephone number of the attorney or law firm whose services are being offered" (N.Y. State 587, p. 2, n. 1). That rule is continued nearly verbatim in Rule 7.1(h), which provides: "All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered." Here, the proposed advertisement will not present the information required by Rule 7.1(h). Rather, an advertising agent will provide the lawyer's name and contact information in response to a listener request. That method does not evidence the presentation "in a meaningful fashion" *in the advertisement* of the lawyer's name, address and assigned geographical area. It thus falls short of what N.Y. State 597 contemplated. Accordingly, we are constrained to conclude that Rule 7.1(h) prohibits the inquirer from participating in the proposed group radio advertisement.

4. We recognize that, as a practical matter, our conclusion precludes lawyers from participating in group advertising on the radio if the group consists of more than a few participants. Unlike a group

television advertisement, in which lawyer directory information for many lawyers might be scrolled across the screen during a voice over, a radio spot does not lend itself to broadcasting lengthy lists. Nonetheless, Rule 7.1(h) is clear and unambiguous, and permitting a group radio advertisement that does not present the names and addresses of all participating lawyers in the advertisement itself would require amendment of the Rule. We urge the State Bar and the Courts to give such an amendment serious attention.

CONCLUSION

5. We answer the question in the negative. A lawyer may not participate in a group radio advertisement that does not broadcast the lawyer's name, principal law office address and telephone number.

(44-09)

OPINION 840 (03/26/2010)

Distinguishing N.Y. State 786 (2005) in light of rule changes

TOPIC: Lawyer paying *pro bono* client's litigation expenses.

DIGEST: Under the New York Rules of Professional Conduct, a lawyer is ethically permitted to pay the litigation expenses of a *pro bono* client whether the *pro bono* client is indigent or not.

RULES: 1.8(e)(2)

CODE: DR 5-103(B)

QUESTION:

1. Is a lawyer ethically permitted to pay the litigation expenses of its *pro bono* client, an organization that provides legal services to the indigent, even though the organization itself is not indigent?

OPINION:

2. A lawyer represents, on a *pro bono* basis, a non-profit organization that provides legal services to indigent people. The lawyer wishes to pay the organization's expenses in the litigation, but the organization itself is not indigent. In N.Y. State 786 (2005), decided under the former New York Code of Professional Responsibility, this Committee concluded that a lawyer was ethically prohibited from paying the litigation expenses of a *pro bono* organizational client that provided legal services to the poor unless the organization itself was indigent.[10] We now examine whether the question would be answered differently under the New York Rules of Professional Conduct that took effect on April 1, 2009 (the "Rules").[11] We conclude that it would.

3. At the time N.Y. State 786 was issued, DR 5-103(B)(2) of the New York Code of Professional Responsibility required that a client be *both* pro bono *and* indigent in order for the lawyer to be permitted to pay the client's litigation expenses. In contrast, Rule 1.8(e)(2) of the New York Rules of Professional Conduct provides that "a lawyer representing an indigent *or* pro bono client may pay court costs and expenses of litigation on behalf of the client." (Emphasis added). Therefore, under the new Rules, as long as the lawyer is representing the client on a *pro bono* basis, the lawyer may pay the *pro bono* client's court costs and expenses of litigation whether the *pro bono* client is indigent or not.

10 N.Y. State 786 adopted a test for indigence of an organization relating to "objective financial wherewithal, and not one that is based on the worthiness of" the organization's cause or motivations.

11 The rule amendments addressed in this opinion pre-date the April 1, 2009 amendments (which included adoption of the ABA Model Rules format). Specifically, the rule amendments at issue here originally took effect on February 1, 2007 in conjunction with extensive amendments to the advertising and solicitation rules in the old New York Code of Professional Responsibility.

CONCLUSION:

4. A lawyer providing *pro bono* legal representation to an organization that provides legal services to the indigent is ethically permitted to pay the organization's litigation expenses whether or not the organization is indigent.

(47-09B)

OPINION 841 (04/12/2010)

TOPIC: Lawyer sending e-mails to other lawyers seeking referrals of people injured by a particular pharmaceutical product.

DIGEST: E-mails to other lawyers requesting referrals of clients are not "solicitations" regulated by Rule 7.3. However, the e-mails must comply with Rules 7.4 and 8.4(c).

RULES: 1.0(a); 1.5(g); 7.1; 7.3; 7.3(b); 7.4; 8.4(c).

COMMENTS: Rule 7.1, cmt. 7; Rule 7.3, cmt. 1.

QUESTION:

1. May a lawyer send e-mails to other lawyers asking them to refer cases to the sending lawyer involving people injured by a particular pharmaceutical product?

FACTS:

2. A lawyer who handles cases involving people injured by a particular pharmaceutical product proposes sending e-mails to other lawyers advising them that he is handling such cases and inviting the recipients of the e-mails to refer such cases to the lawyer.

OPINION:

3. Rule 7.3 of the New York Rules of Professional Conduct (the "Rules") establishes restrictions on solicitation by lawyers and sets forth the filing requirements for any permitted solicitation. Rule 7.3(b) defines the term "solicitation." It states that, for purposes of Rule 7.3:

> "solicitation" means any *advertisement* initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. [Emphasis added.]

4. The communication in question here contains many elements of Rule 7.3(b) – it is "by a lawyer . . . targeted at . . . a group of recipients"; the "primary purpose" of the communication is "the retention of the lawyer"; and a "significant motive" for the communication is "pecuniary gain." But the communication lacks one crucial element of a solicitation: the communication is not an "advertisement" because it will be sent to other lawyers. Rule 1.0(a) (which defines "advertisement") expressly excludes communications to other lawyers from the definition of "advertisement." Specifically, Rule 1.0(a) provides:

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

5. Since the communication in question will be sent only to other lawyers, it is not an "advertisement." Therefore, it is also not a "solicitation" within the meaning of Rule 7.3(b). *See* Rule 7.3, cmt. 1 ("By definition, a communication that is not an 'advertisement' is not a solicitation.") A communication that is not a "solicitation" is not subject to the filing requirements (or any other requirements) of Rule 7.3. Moreover, since the communication is not an advertisement, it is also not subject to the provisions of Rule 7.1 ("Advertising"). Comment 7 to Rule 7.1 provides that communications to other lawyers are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm sending them.

6. Of course, the communications must nonetheless comply with Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation," and they must comply with Rule 7.4 ("Identification of Practice and Specialty"), which prohibits a lawyer or law firm from stating that the lawyer or law firm is a "specialist" or "specializes" in a particular field of law except in special circumstances.

7. Finally, if the attorney sending the communications intends to share a portion of the fee with a referring attorney, the sending attorney must comply with Rule 1.5(g), which regulates a division of legal fees with another lawyer not associated with the same law firm.

CONCLUSION:

8. A lawyer may ethically send e-mails to other lawyers asking for referrals of clients who have been injured by a particular pharmaceutical product. Since a communication to other lawyers is expressly excluded from the definition of "advertisement," the communication is not an advertisement, and is therefore also not a "solicitation." Consequently, it is not subject to the provisions of either Rule 7.1 or Rule 7.3. However, it is subject to the provisions of Rule 7.4 and Rule 8.4(c).

(64-09)

OPINION 842 (09/10/2010)

TOPIC: Using an outside online storage provider to store client confidential information.

DIGEST: A lawyer may use an online data storage system to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality will be maintained in a manner consistent with the lawyer's obligations under Rule 1.6. In addition, the lawyer should stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client's information, and should monitor the changing law of privilege to ensure that storing the information online will not cause loss or waiver of any privilege.

RULES: 1.4, 1.6(a), 1.6(c)

QUESTION:

1. May a lawyer use an online system to store a client's confidential information without violating the duty of confidentiality or any other duty? If so, what steps should the lawyer take to ensure that the information is sufficiently secure?

OPINION:

2. Various companies offer online computer data storage systems that are maintained on an array of Internet servers located around the world. (The array of Internet servers that store the data is often called the "cloud.") A solo practitioner would like to use one of these online "cloud" computer data storage systems to store client confidential information. The lawyer's aim is to ensure that his clients' information will not be lost if something happens to the lawyer's own computers. The online data storage system is password-protected and the data stored in the online system is encrypted.

3. A discussion of confidential information implicates Rule 1.6 of the New York Rules of Professional Conduct (the "Rules"), the general rule governing confidentiality. Rule 1.6(a) provides as follows:

> A lawyer shall not knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of a lawyer or a third person, unless:
>
> > (1) the client gives informed consent, as defined in Rule 1.0(j);
> >
> > (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
> >
> > (3) the disclosure is permitted by paragraph (b).

4. The obligation to preserve client confidential information extends beyond merely prohibiting an attorney from revealing confidential information without client consent. A lawyer must also take reasonable care to affirmatively protect a client's confidential information. *See* N.Y. County 733

(2004) (an attorney "must diligently preserve the client's confidences, whether reduced to digital format, paper, or otherwise"). As a New Jersey ethics committee observed, even when a lawyer wants a closed client file to be destroyed, "[s]imply placing the files in the trash would not suffice. Appropriate steps must be taken to ensure that confidential and privileged information remains protected and not available to third parties." New Jersey Opinion (2006), *quoting* New Jersey Opinion 692 (2002).

5. In addition, Rule 1.6(c) provides that an attorney must "exercise reasonable care to prevent . . . others whose services are utilized by the lawyer from disclosing or using confidential information of a client" except to the extent disclosure is permitted by Rule 1.6(b). Accordingly, a lawyer must take reasonable affirmative steps to guard against the risk of inadvertent disclosure by others who are working under the attorney's supervision or who have been retained by the attorney to assist in providing services to the client. We note, however, that exercising "reasonable care" under Rule 1.6 does not mean that the lawyer guarantees that the information is secure from *any* unauthorized access.

6. To date, no New York ethics opinion has addressed the ethics of *storing* confidential information online. However, in N.Y. State 709 (1998) this Committee addressed the duty to preserve a client's confidential information when *transmitting* such information electronically. Opinion 709 concluded that lawyers may transmit confidential information by e-mail, but cautioned that "lawyers must always act reasonably in choosing to use e-mail for confidential communications." The Committee also warned that the exercise of reasonable care may differ from one case to the next. Accordingly, when a lawyer is on notice that the confidential information being transmitted is "of such an extraordinarily sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyer's control, the lawyer must select a more secure means of communication than unencrypted Internet e-mail." *See also* Rule 1.6, cmt. 17 (a lawyer "must take reasonable precautions" to prevent information coming into the hands of unintended recipients when transmitting information relating to the representation, but is not required to use special security measures if the means of communicating provides a reasonable expectation of privacy).

7. Ethics advisory opinions in several other states have approved the use of electronic storage of client files provided that sufficient precautions are in place. *See, e.g.*, New Jersey Opinion 701 (2006) (lawyer may use electronic filing system whereby all documents are scanned into a digitized format and entrusted to someone outside the firm provided that the lawyer exercises "reasonable care," which includes entrusting documents to a third party with an enforceable obligation to preserve confidentiality and security, and employing available technology to guard against reasonably foreseeable attempts to infiltrate data); Arizona Opinion 05-04 (2005) (electronic storage of client files is permissible provided lawyers and law firms "take competent and reasonable steps to assure that the client's confidences are not disclosed to third parties through theft or inadvertence"); *see also* Arizona Opinion 09-04 (2009) (lawyer may provide clients with an online file storage and retrieval system that clients may access, provided lawyer takes reasonable precautions to protect security and confidentiality and lawyer periodically reviews security measures as technology advances over time to ensure that the confidentiality of client information remains reasonably protected).

8. Because the inquiring lawyer will use the online data storage system for the purpose of preserving client information - a purpose both related to the retention and necessary to providing legal services to the client - using the online system is consistent with conduct that this Committee has deemed ethically permissible. *See* N.Y. State 473 (1977) (absent client's objection, lawyer may pro-

vide confidential information to outside service agency for legitimate purposes relating to the representation provided that the lawyer exercises care in the selection of the agency and cautions the agency to keep the information confidential); *cf.* NY CPLR 4548 (privileged communication does not lose its privileged character solely because it is communicated by electronic means or because "persons necessary for the delivery or facilitation of such electronic communication may have access to" its contents).

9. We conclude that a lawyer may use an online "cloud" computer data backup system to store client files provided that the lawyer takes reasonable care to ensure that the system is secure and that client confidentiality will be maintained. "Reasonable care" to protect a client's confidential information against unauthorized disclosure may include consideration of the following steps:

(1) Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information;

(2) Investigating the online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances;

(3) Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored; and/or

(4) Investigating the storage provider's ability to purge and wipe any copies of the data, and to move the data to a different host, if the lawyer becomes dissatisfied with the storage provider or for other reasons changes storage providers.

10. Technology and the security of stored data are changing rapidly. Even after taking some or all of these steps (or similar steps), therefore, the lawyer should periodically reconfirm that the provider's security measures remain effective in light of advances in technology. If the lawyer learns information suggesting that the security measures used by the online data storage provider are insufficient to adequately protect the confidentiality of client information, or if the lawyer learns of any breach of confidentiality by the online storage provider, then the lawyer must investigate whether there has been any breach of his or her own clients' confidential information, notify any affected clients, and discontinue use of the service unless the lawyer receives assurances that any security issues have been sufficiently remediated. *See* Rule 1.4 (mandating communication with clients); *see also* N.Y. State 820 (2008) (addressing Web-based email services).

11. Not only technology itself but also the law relating to technology and the protection of confidential communications is changing rapidly. Lawyers using online storage systems (and electronic means of communication generally) should monitor these legal developments, especially regarding instances when using technology may waive an otherwise applicable privilege. *See, e.g.*, *City of Ontario, Calif. v. Quon*, 130 S. Ct. 2619, 177 L.Ed.2d 216 (2010) (holding that City did not violate Fourth Amendment when it reviewed transcripts of messages sent and received by police officers on police department pagers); *Scott v. Beth Israel Medical Center*, 17 Misc. 3d 934, 847 N.Y.S.2d 436 (N.Y. Sup. 2007) (e-mails between hospital employee and his personal attorneys were not privileged

because employer's policy regarding computer use and e-mail monitoring stated that employees had no reasonable expectation of privacy in e-mails sent over the employer's e-mail server). *But see Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 990 A.2d 650 (2010) (despite employer's e-mail policy stating that company had right to review and disclose all information on "the company's media systems and services" and that e-mails were "not to be considered private or personal" to any employees, company violated employee's attorney-client privilege by reviewing e-mails sent to employee's personal attorney on employer's laptop through employee's personal, password-protected e-mail account).

12. This Committee's prior opinions have addressed the disclosure of confidential information in metadata and the perils of practicing law over the Internet. We have noted in those opinions that the duty to "exercise reasonable care" to prevent disclosure of confidential information "may, in some circumstances, call for the lawyer to stay abreast of technological advances and the potential risks" in transmitting information electronically. N.Y. State 782 (2004), *citing* N.Y. State 709 (1998) (when conducting trademark practice over the Internet, lawyer had duty to "stay abreast of this evolving technology to assess any changes in the likelihood of interception as well as the availability of improved technologies that may reduce such risks at reasonable cost"); *see also* N.Y. State 820 (2008) (same in context of using e-mail service provider that scans e-mails to generate computer advertising). The same duty to stay current with the technological advances applies to a lawyer's contemplated use of an online data storage system.

CONCLUSION:

13. A lawyer may use an online data storage system to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality is maintained in a manner consistent with the lawyer's obligations under Rule 1.6. A lawyer using an online storage provider should take reasonable care to protect confidential information, and should exercise reasonable care to prevent others whose services are utilized by the lawyer from disclosing or using confidential information of a client. In addition, the lawyer should stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client's information, and the lawyer should monitor the changing law of privilege to ensure that storing information in the "cloud" will not waive or jeopardize any privilege protecting the information.

(75-09)

OPINION 843 (09/10/2010)

TOPIC: Lawyer's access to public pages of another party's social networking site for the purpose of gathering information for client in pending litigation.

DIGEST: A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation.

RULES: 4.1; 4.2; 4.3; 5.3(b)(1); 8.4(c)

QUESTION:

1. May a lawyer view and access the Facebook or MySpace pages of a party other than his or her client in pending litigation in order to secure information about that party for use in the lawsuit, including impeachment material, if the lawyer does not "friend" the party and instead relies on public pages posted by the party that are accessible to all members in the network?

OPINION:

2. Social networking services such as Facebook and MySpace allow users to create an online profile that may be accessed by other network members. Facebook and MySpace are examples of external social networks that are available to all web users. An external social network may be generic (like MySpace and Facebook) or may be formed around a specific profession or area of interest. Users are able to upload pictures and create profiles of themselves. Users may also link with other users, which is called "friending." Typically, these social networks have privacy controls that allow users to choose who can view their profiles or contact them; both users must confirm that they wish to "friend" before they are linked and can view one another's profiles. However, some social networking sites and/or users do not require pre-approval to gain access to member profiles.

3. The question posed here has not been addressed previously by an ethics committee interpreting New York's Rules of Professional Conduct (the "Rules") or the former New York Lawyers Code of Professional Responsibility, but some guidance is available from outside New York. The Philadelphia Bar Association's Professional Guidance Committee recently analyzed the propriety of "friending" an unrepresented adverse witness in a pending lawsuit to obtain potential impeachment material. See Philadelphia Bar Op. 2009-02 (March 2009). In that opinion, a lawyer asked whether she could cause a third party to access the Facebook and MySpace pages maintained by a witness to obtain information that might be useful for impeaching the witness at trial. The witness's Facebook and MySpace pages were not generally accessible to the public, but rather were accessible only with the witness's permission (*i.e.,* only when the witness allowed someone to "friend" her). The inquiring lawyer proposed to have the third party "friend" the witness to access the witness's Facebook and MySpace accounts and provide truthful information about the third party, but conceal the association with the lawyer and the real purpose behind "friending" the witness (obtaining potential impeachment material).

4. The Philadelphia Professional Guidance Committee, applying the Pennsylvania Rules of Professional Conduct, concluded that the inquiring lawyer could not ethically engage in the proposed

conduct. The lawyer's intention to have a third party "friend" the unrepresented witness implicated Pennsylvania Rule 8.4(c) (which, like New York's Rule 8.4(c), prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation"); Pennsylvania Rule 5.3(c)(1) (which, like New York's Rule 5.3(b)(1), holds a lawyer responsible for the conduct of a nonlawyer employed by the lawyer if the lawyer directs, or with knowledge ratifies, conduct that would violate the Rules if engaged in by the lawyer); and Pennsylvania Rule 4.1 (which, similar to New York's Rule 4.1, prohibits a lawyer from making a false statement of fact or law to a third person). Specifically, the Philadelphia Committee determined that the proposed "friending" by a third party would constitute deception in violation of Rules 8.4 and 4.1, and would constitute a supervisory violation under Rule 5.3 because the third party would omit a material fact (*i.e.,* that the third party would be seeking access to the witness's social networking pages solely to obtain information for the lawyer to use in the pending lawsuit).

5. Here, in contrast, the Facebook and MySpace sites the lawyer wishes to view are accessible to all members of the network. New York's Rule 8.4 would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted.[12] Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so.

CONCLUSION:

6. A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction).

(76-09)

12 One of several key distinctions between the scenario discussed in the Philadelphia opinion and this opinion is that the Philadelphia opinion concerned an unrepresented *witness*, whereas our opinion concerns a *party* – and this party may or may not be represented by counsel in the litigation. If a lawyer attempts to "friend" a *represented* party in a pending litigation, then the lawyer's conduct is governed by Rule 4.2 (the "no-contact" rule), which prohibits a lawyer from communicating with the represented party about the subject of the representation absent prior consent from the represented party's lawyer. If the lawyer attempts to "friend" an *unrepresented* party, then the lawyer's conduct is governed by Rule 4.3, which prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer's role, and prohibits the lawyer from giving legal advice other than the advice to secure counsel if the other party's interests are likely to conflict with those of the lawyer's client. Our opinion does not address these scenarios.

OPINION 844 (10/08/2010)

TOPIC: Lawyer/legislator serving as appointed counsel for indigent respondents in Family Court proceedings.

DIGEST: Rules 8.4(d) and 1.11(f)(2) prohibit a county legislator from accepting appointments by the Family Court to serve as attorney for the child in juvenile delinquency, PINS, neglect, or abuse proceedings.

RULES: 1.11(f)(2) and 8.4(d).

QUESTION:

1. Where a county legislature approves funding and appointments for both the office of county attorney and the office of counsel for the county department of social services, may a part-time county legislator accept appointment by the Family Court to serve as attorney for the child (formerly known as law guardian) in juvenile delinquency, PINS, neglect or abuse proceedings?[13]

OPINION:

2. This Committee has addressed analogous situations before. Under the authority of former DR 1-102(A)(5) (lawyer shall not "engage in conduct prejudicial to the administration of justice") and former DR 8-101(A)(2) (lawyer who is also public official shall not "use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client"), this Committee has determined that a lawyer/legislator may not represent criminal defendants in cases involving members of a police department or district attorney's office over which the legislature has budget or appointment authority. N.Y. State 798 (2006); N.Y. State 692 (1997). The prohibition applies even if the legislator would abstain from all votes affecting the police budget or the district attorney's budget. N.Y. State 702 (1998). The language of DR 1-102(A)(5) and DR 8-101(A)(2) has been incorporated without change into the New York Rules of Professional Conduct as Rules 8.4(d) and 1.11(f)(2), respectively.

3. Rules 8.4(d) and 1.11(f)(2) apply with equal force to prohibit service as attorney for the child in juvenile delinquency and PINS proceedings for three reasons: (a) the legislator's role is the functional equivalent of a criminal defense attorney, (b) the child's liberty is at stake, and (c) the legislator would be adverse to the county attorney's office, whether or not the legislator actually cross-examines county-funded or county-appointed law enforcement or other personnel.

4. We recognize that neglect and abuse proceedings are somewhat different from juvenile delinquency and PINS proceedings. For example, the attorney for the child may, in a particular neglect and abuse case, take the same position as the county attorney or the county department of social services with respect to the proposed placement of a child, the proposed termination of parental rights, or other issues. Nonetheless, for two reasons, both equally important, we believe that the ethical prohibition against accepting any of these Family Court appointments should be the same.

13 "PINS" stands for "persons in need of supervision."

5. First, the public may perceive that the county legislator may be receiving favored treatment from the county attorney or the county department of social services. This perception is not dissipated in situations where the legislator agrees with those offices regarding a recommended disposition of a particular neglect or abuse case. To the contrary, the perception of favored treatment may be reinforced – perhaps the public will believe that the county attorney or department of social services agrees with the legislator's position not because it is correct but rather because the legislator holds budget or appointment authority over them and they are afraid to disagree.

6. Second, looking beyond mere perception, there is an unacceptable risk that representatives of the county attorney's office or of the county department of social services will in fact compromise their independence and adjust their positions in a neglect or abuse proceeding to conform to the legislator's recommendations or views as attorney for the child in a particular case. That is, there is a real risk that the county attorney's office or the county department of social services, in deference to the county legislator's status, will agree with the legislator either to curry favor and secure the legislator's budget or appointment support, or to avoid antagonizing the legislator and precipitating retaliatory opposition to the budget and appointment requests that those offices must submit for legislative approval.

CONCLUSION:

7. We answer the question in the negative. It is not ethically permissible for a county legislator to accept appointments by the Family Court to serve as attorney for the child in juvenile delinquency, PINS, or neglect and abuse proceedings.

(4-10)

OPINION 845 (10/14/2010)

TOPIC: Lawyer/real estate broker sharing her brokerage commission with lawyers who refer buyers or sellers.

DIGEST: A lawyer who is also a real estate broker may ethically offer to share her broker's commission with attorneys who refer buyers or sellers to her if either (a) the referring lawyer is not representing the buyer or seller in the real estate transaction, or (b) the referring lawyer is representing the buyer or seller in the real estate transaction but remits or credits the referral fee to the client and obtains the client's informed consent to the potential conflict arising from the referral fee.

RULES: 1.0(a) 1.7, 1.8(f), 8.4(a).

FACTS:

1. An attorney has recently decided to work as a real estate broker, but has not given up her New York law license. She desires to advertise that she will pay a percentage of her broker's commission to attorneys who refer buyers or sellers to her. In the past, she has received similar letters from other attorneys, but she is unsure if it such offers are ethically acceptable.

QUESTION:

2. May a licensed lawyer who is also a real estate broker (but is acting solely as a broker in any real estate transaction) ethically advertise that she will share her broker's commission with attorneys who refer buyers or sellers to her?

OPINION:

3. The Committee assumes for purposes of this analysis that (a) the inquiring attorney is functioning solely as a real estate broker, not as a lawyer, in the real estate transactions in question, and (b) if the inquiring attorney offers any legal services in other matters, they will be distinct from the non-legal services which she renders as a real estate broker, and (c) the attorney will comply with Rule 5.7 of the New York Rules of Professional Conduct (the "Rules"), effective April 1, 2009, if it is applicable.

A. Communications to Other Lawyers Are Not "Advertisements"

4. As a preliminary matter, an advertisement that an attorney places solely in her capacity as a real estate broker, with no intention of attracting legal business, is not an "advertisement" within the meaning of Rule 1.0(a) of the New York Rules of Professional Conduct. Rule 1.0(a) provides as follows:

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

5. Here, since the purpose of the inquiring attorney's communications offering to share her brokerage commissions is not "the retention of the lawyer" as a lawyer, the broker's communication lacks an essential element of an "advertisement" under Rule 1.0(a). Also, the attorney proposes to direct her referral fee offer to other lawyers, and Rule 1.0(a)'s definition of "advertisement" expressly excludes "communications to . . . other lawyers."

B. Referral fees to lawyers who represent the buyers or sellers in the transaction

6. The Committee's jurisdiction is limited to interpreting and applying the Rules. The Committee does not render opinions on questions of law, and thus does not opine on whether the proposed arrangement violates any statute or regulation. If the proposed arrangement violates any state or federal law or regulation, it perforce would be unethical. N.Y. State 667 (1994); N.Y. State 595 (1988); N.Y. State 576 (1986). For purposes of this opinion, however, the Committee assumes, with respect to substantive law outside the Rules of Professional Conduct, that an attorney lawfully may accept a share of a real estate brokerage commission, that a real estate broker may lawfully pay a share of her commission to a lawyer as a referral fee, and that the proposed arrangement otherwise is legal.

7. Rule 8.4(a) provides that a lawyer shall not "violate or attempt to violate the Rules of Professional Conduct, [or] knowingly assist or induce another to do so . . . ." We therefore focus our analysis on whether another attorney's *receipt* of the referral fees that the inquiring attorney proposes to pay would violate the Rules of Professional Conduct. If so, then the inquiring attorney's payment of such fees would "assist or induce another" (the receiving lawyer) to do so.

8. This Committee has often opined that a lawyer cannot act as a lawyer in the same transaction in which a lawyer acts a real estate broker because of the possible conflict between the client's interest and the lawyer's own personal interest. *See, e.g.,* N.Y. State 752 (2002); N.Y. State 493 (1978); N.Y. State 340 (1974); N.Y. State 291 (1973); N.Y. State 208 (1971). "The rationale is that the broker's interest in closing the transaction interferes with the lawyer's ability to render independent advice with respect to the transaction." N.Y. State 752 (2002). Thus, acting as both a lawyer and broker in a real estate transaction was a nonconsentable conflict under DR 5-101(A) of New York's former Code of Professional Responsibility, which prohibited a lawyer from accepting or continuing employment if the exercise of professional judgment on behalf of a client "will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents . . . ."

9. The successor to DR 5-101(A) is Rule 1.7(a)(2), which prohibits representation if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." This prohibition applies in the circumstances before us unless, per Rule 1.7(b)(1) and (b)(4), "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and the client gives "informed consent, confirmed in writing."

10. In this Committee's opinion, under Rule 1.7 it remains a nonconsentable conflict for an attorney to act as both a lawyer and broker in the same transaction. That leads to the question whether a

lawyer who could not act as counsel in a real estate transaction may nevertheless receive a share of the broker's commission in that transaction.

11. This Committee opined in N.Y. State 745 (2001) that a lawyer who is disqualified from a matter on nonconsentable conflict of interest grounds may not receive a referral fee for referring that matter. *Cf.*, Nassau County 89-33 (N.Y.L.J., Dec. 4, 1989, at 7, col. 1) (mortgage broker prohibited from paying a commission to an attorney, whom the broker would denominate as an "associate" broker, if the associate broker would also represent the client in the real estate transaction).

12. Rule 8.4(a) says that a lawyer shall not "knowingly assist or induce another" to violate the Rules of Professional Conduct, so an attorney functioning as a real estate broker is prohibited from paying a referral fee or partial commission to a referring attorney if the attorney-broker knows that the referring attorney's acceptance of the payment would breach these Rules. *See, e.g.*, Nassau County 93-3 (N.Y.L.J., March 28, 1994, at 8, col. 4) (an attorney has an affirmative duty to report the misconduct of another lawyer who has undertaken to act as a lawyer and real estate broker on the same transaction).

13. Accordingly, under Rule 8.4(a), if the inquiring lawyer/broker knows that the referring attorney will simultaneously represent the buyer or seller in the real estate transaction *and* keep a share of the real estate brokerage commission, the inquiring attorney may not share her brokerage commission with the referring attorney.

C. Referral fees to lawyers who represent buyers or sellers in the transaction but remit or credit the referral fee to the client

14. The next question is whether a lawyer/broker may properly pay referral fees where the attorney receiving the referral fee is (or will be) acting as a lawyer for the referred brokerage client in the same real estate transaction but the receiving attorney agrees to remit or credit the referral fee to the client.

15. In N.Y. State 753 (2002), we explained the rationale for the ban on an attorney serving as both a real estate broker and a lawyer in the same real estate transaction: "a lawyer should not have a personal stake in the advice rendered, and the broker who is paid if the transaction closes cannot be fully independent in advising the client as a lawyer." If the lawyer receiving the referral fee will remit or credit the full amount to the client, that will largely remove the receiving attorney's "personal stake" but it will not entirely negate the potential for conflict. Even if the lawyer remits or credits the referral fee to the client, the attorney will still have an incentive to refer real estate clients to a broker who pays a referral fee (*i.e.,* shares her commission) because the referral fee (in effect a reduced real estate brokerage commission) will enable the attorney to offer potential clients a reduced brokerage fee (or an equivalent cash payment or credit) for utilizing the attorney's services, thus attracting more business to the attorney.

16. In N.Y. State 682 (1996), we noted that our prior opinions have allowed an attorney to receive a referral fee from providers of non-legal services or products for referring clients if (a) the client consents after full disclosure, (b) the legal fee and the referral fee together do not constitute an excessive fee for legal services, and (c) the attorney remits the referral fee to the client if the client so requests.

In these opinions, the referral concerned a product or service that was "fairly uniform among providers" and either was (1) "required in an objectively determinable quantity incident to the legal services performed by the attorney" (*e.g.,* a mortgage and title insurance in connection with a real estate transaction), or (2) was "unconnected with any particular legal services" (*e.g.* certificates of deposit). These conflicts were consentable because "the fungible nature of the products or services and the objectively determinable amount at issue insulate the client from any ill effects from the attorney's conflicting interest."

17. On the other hand, N.Y. State 682 also noted two prior opinions stating that the attorney's receipt of a referral fee or other financial interest in a transaction with the client was "absolutely forbidden" where the interests of the attorney and client were in such direct conflict that a client could not give meaningful consent to the conflict transaction. The conflict in those opinions was that the attorney's remuneration "varied according to the quantity of the product or service . . . purchased by the client, which was itself based upon the attorney's legal advice . . . ." *See* N.Y. State 682 (1994) (investment advice); N.Y. State 671 (1994) (life insurance); N.Y. State 619 (1991) (life insurance). The prospect of a commission might tempt the attorney to give the client different (and inferior) legal estate planning advice due to the attorney's financial interest. Thus, N.Y. State 682 explained and extended the analysis in N.Y. State 671 as follows:

> [N]o meaningful consent is available to permit an attorney to retain life insurance referral fees. The services of an investment advisor, similar to life insurance carriers, vary substantially among different providers. Also like life insurance, the amount of the product or services required – *i.e.,* the amount of money entrusted to the investment advisor – is not objectively determined by the transaction, presenting the potential that the attorney might increase the referral fee by recommending that more of the client's funds be entrusted to the advisor without appropriate regard to the client's interests. . . .
>
> Accordingly, disclosure and consent would not cure the direct and substantial conflict between the client's and lawyer's interests inherent in accepting a referral fee from the investment advisor, even where the client is offered the choice to claim the referral fee and the attorney purports to exercise independent judgment in framing his or her initial recommendation to consult an investment advisor. Clients view recommendations of other professionals as part of their representation by their lawyers, and expect that lawyers will act as trusted fiduciaries in such matters.

18. We think the present situation – real estate brokerage – falls somewhere in between "fairly uniform" products and services like title insurance and certificates of deposit (where receiving a referral fee in connection with client work is routinely consentable as long as the referral fee is remitted to the client), on the one hand, and highly variable products and services like life insurance and investment advice (where receiving a referral fee is nonconsentable even if the referral fee is remitted to the client), on the other hand. While the quality of real estate brokerage services varies among providers, the services are "required in an objectively determinable quantity incident to the legal services performed by the attorney" because a client typically employs only one broker per transaction, commissions are relatively standard, and the size of the broker's commission depends on the price of the home the client purchases. Moreover, although a referral fee gives the lawyer a financial incentive to

refer a client to that particular broker even if the fee is passed on to the client, clients are generally aware that they have many real estate brokers to choose from, and clients are generally capable of evaluating different brokers.

19. Therefore, this Committee believes that a real estate lawyer may ethically accept a referral fee with the client's informed consent, including a reminder that the client is free to choose a real estate broker other than the one her lawyer recommends. ("Informed consent" is defined in Rule 1.0(j) to include the lawyer's communication of "information adequate for the person to make an informed decision," including "the material risks of the proposed course of conduct and reasonably available alternatives.") As a corollary, a lawyer/broker may pay a share of her commission to a lawyer who refers a buyer or seller if the referring lawyer obtains her own client's informed consent and remits or credits the commission to that client.

20. There is one more step. The lawyer/broker (the inquirer here) must confirm that the referring attorney will remit or credit the fee or commission to the client. This should be readily ascertainable and does not threaten privileged communications between the referring lawyer and her client. However, because of practical difficulties and the danger of intruding on the attorney-client relationship, the lawyer/broker need not confirm the referring attorney's compliance with the disclosure and consent requirements, (This point is further explained below in the last paragraph before our conclusion.)

D. Referral fees to lawyers who do not represent the referred clients in the transaction

21. The final question is whether a lawyer/broker may properly pay referral fees to an attorney who refers clients on real estate transactions in which the referring attorney will not be representing the client. We are not aware of any New York ethics opinion addressing this precise issue, but several other jurisdictions have considered whether a lawyer may generally accept a referral fee from a person providing a non-legal product or service to a referred client. The results have been inconsistent. Many of the conflicting authorities were collected in Pennsylvania Opinion 2000-100, 2000 WL 567996, which concluded as follows:

> [T]he Rules permit a lawyer to accept a referral fee from a service provider, provided that the lawyer is scrupulous in determining under the particular circumstances that payment of the referral fee will not impact the lawyer-client relationship or the lawyer's exercise of independent professional judgment and that the client consents to the arrangement on the basis of full disclosure and consultation.

22. In N.Y. State 764 (2003), this Committee approved an attorney's acceptance of an earnings credit against bank charges based upon balances held in the attorney's IOLA account as long as the attorney made full disclosure to the client and obtained the client's informed consent, even though the earnings credit "may well influence the attorney's decision as to where client's trust funds should be deposited, and that decision would have a direct and adverse financial impact upon the client if an IOLA account is chosen." The Committee's conclusion was based on the language of former DR 5-107(A)(2) and EC 2-21. That language is now contained, with little change, in Rule 1.8(f), which provides, in relevant part, as follows:

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

23. We believe that N.Y. State 764 remains applicable under Rule 1.8(f). Thus, assuming that the requisites set forth in Rule 1.8(f) are met, a lawyer attorney may ethically accept referral fees or commissions from non-legal service providers in matters where the lawyer is not representing the client.

24. As a real estate broker, an attorney generally is not ethically obligated to affirmatively monitor the details of compliance of the attorneys from whom the lawyer/broker receives referrals. In particular, the lawyer/broker is not expected to monitor whether referring attorneys make full disclosure to, and obtain informed consent from, their clients. Ordinarily, therefore, it would not be a violation of Rule 8.4(a) for the inquiring attorney to offer and pay referral fees to attorneys for client referrals if the referring attorneys will not actually be representing the clients in the real estate transactions at issue.

25. However, an attorney cannot ignore obvious violations, *see*, Rule 1.0(k) ("knowledge may be inferred from circumstances"), so if the inquiring attorney knows that a referring attorney has not obtained informed consent from that client regarding the referral to the lawyer/broker, then the lawyer/broker should (a) withhold the referral fee until the referring attorney cures the violation, or (b) refuse the referral, or (c) take other appropriate remedial steps so that she does not assist another lawyer in violating the Rules of Professional Conduct.

CONCLUSION:

26. Because the inquiring attorney is still a licensed attorney, Rule 8.4(a) prohibits her from assisting another lawyer in conduct that would violate the Rules of Professional Conduct. Accordingly, whether the inquiring attorney may share her real estate commissions with referring attorneys depends on whether the referring lawyer would be violating the Rules by accepting the referral fee.

27. An attorney is prohibited from simultaneously representing a client in a real estate transaction and receiving a portion of the brokerage commission (*i.e.,* a referral fee) from a real estate broker to whom the attorney refers a client, unless the attorney remits or credits the referral fee to that client. An attorney functioning as a real estate broker (such as the inquiring attorney) is therefore prohibited from knowingly paying a referral fee or sharing a commission without confirming that the commission will be remitted, or equivalent credit given, to the referring attorney's client.

28. However, an attorney functioning as a real estate broker is not prohibited from paying a referral fee or sharing her real estate commission with an attorney who refers her clients to the lawyer/broker if the referring attorney will not be representing the client in the real estate transaction at issue.

(12-10)

OPINION 846 (10/27/2010)

TOPIC: Contacts by non-lawyer insurance company representatives with workers' compensation claimants represented by counsel

DIGEST: A lawyer for an insurance carrier may not, without prior consent of claimant's counsel, send forms directly to a specific claimant where the lawyer knows the claimant is represented by counsel with respect to the claim, but if the lawyer gives reasonable advance notice to claimant's counsel, the lawyer may cause the insurance carrier's employees to send the forms. The fact that a lawyer designed, or assisted in designing, forms to be sent by non-lawyer employees of the carrier to claimants as a class does not trigger the requirements of Rule 4.2, even though the lawyer knows that some of the claimants are represented by counsel.

RULES: 4.2.

CODE: DR 7-104(A)(1).

FACTS:

1. An insurance carrier provides workers' compensation insurance for employers in New York State. The insurance company employs (or contracts with) personnel to act as claims adjusters, examiners, investigators or third-party administrators to investigate and manage workers' compensation claims. (Although the personnel have varying titles, we will refer to all of them in this opinion by the generic term "claims adjusters.") The claims adjusters are not lawyers (or at least are not acting as lawyers in the claims adjuster jobs). In the course of investigating and managing claims, the claims adjusters regularly communicate with claimants.

2. The facts presented to us indicate that every claimant with whom the claims adjusters communicate is a party to an ongoing Workers' Compensation Board proceeding, and some of the claimants are represented by legal counsel regarding their claims. The carrier knows which claimants are represented by counsel because 12 NYCRR § 300.17 requires attorneys or licensed representatives representing claimants to file a "notice of retainer" with the Workers' Compensation Board "immediately upon being retained" and to transmit a copy of this form to the insurance carrier "at the time of filing." Whether claimants are represented by counsel or not, the carrier sends forms to claimants that seek information on their work status or entitlement to benefits. The insurers may later use the information on these forms against the claimants (*e.g.,* to seek a change in benefits due to a claimant's status, or to disqualify a claimant from receiving benefits if the representations on a form prove false).

3. When an insurance carrier sends a form to a claimant in the above circumstances, is an attorney for the insurance carrier violating the New York Rules of Professional Conduct (the "Rules") if:

(a) the form is sent by an attorney to a specific claimant? or

(b) the form is sent by a non-attorney to a specific claimant at the direction of an attorney? or

(c) the form is sent by a non-attorney *not* acting under an attorney's direction, but an attorney designed or assisted in designing the form and will use the information from the form? or

(d) the form is sent on a regular basis via computerized process without human intervention, but an attorney designed or assisted in designing the form or will use the information from the form? or

(e) the attorney provides reasonable advance notice to the claimant's counsel?

(f) If the answer to question (e) is yes, what constitutes "reasonable advance notice" in the case of written and oral communications?

OPINION:

4. The most relevant provision of the Rules of Professional Conduct for this inquiry is Rule 4.2, which has two subparagraphs. Rule 4.2(a) prohibits lawyers from communicating or causing another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, without the prior consent of the other lawyer. Rule 4.2(b), however, permits a lawyer to "cause a client" to communicate with a represented person, and counsel the client with respect to those communications, *provided* the lawyer gives "reasonable advance notice" to the represented person's counsel that such communications will be taking place.[14]

5. We note at the outset that the restrictions of Rule 4.2 do not apply if a lawyer "is authorized . . . by law" to communicate or cause another to communicate with a represented party. Thus, if the Workers' Compensation Board has validly authorized insurance carrier attorneys to con-

14 Rule 4.2 provides:

> (a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.
>
> (b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

Because the facts presented to us indicate that every claimant in question is at all relevant times a party to an ongoing Workers' Compensation Board proceeding, we need not address here whether Rule 4.2 restricts contact with a represented person who is not a "party" to a relevant proceeding. *Compare Grievance Comm. for Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995) (criminal defense lawyer did not violate DR 7-104(A)(1) by interviewing witness represented in related matter) *with* N.Y. State 735 (2001) (in noncriminal cases, the term "party" in DR 7-104(A)(1) should be read broadly to cover represented witnesses) *and* N.Y. State 785 (2005) ("[T]he 'no contact' rule will bar unconsented communication with [a nonparty insurance] adjuster if the insurance company is known to be separately represented by counsel with respect to the matter.").

tact claimants, or to cause claims adjusters to contact claimants directly, with respect to matters before the Board, then Rule 4.2 would not restrict such contacts.[15]

Question (a):

6. Assuming that the restrictions of Rule 4.2 apply to sending the forms in question, it is clear that Rule 4.2(a) would prohibit the insurance carrier's attorneys from sending the forms themselves, absent prior consent of the claimant's counsel, if the lawyer knows that the claimant is represented by counsel.

Questions (b) and (e):

7. Where the lawyer directs the insurance company's non-lawyer agents to send a form to a specific claimant, Rule 4.2(b) applies and the lawyer may ordinarily "cause a client to communicate with a represented person." In that case, the lawyer may proceed without the "prior consent" of the claimant's counsel as long as the lawyer gives "reasonable advance notice" to the claimant's counsel.

Question (f):

8. Rule 4.2 does not further define what constitutes "reasonable advance notice." We believe the term must be interpreted in light of the purpose of the requirement, which is to permit the represented party's lawyer to counsel his or her client on what to do when the client is contacted by the insurance company. The notice thus must be provided in a manner and with enough time so that the receiving lawyer has a reasonable amount of time, under all the circumstances, to contact his or her client regarding the planned communication. This is consistent with the sound guidance contained in former EC 7-18 of the New York Code of Professional Responsibility, which stated, in relevant part:

> "Reasonable advance notice" means notice provided sufficiently in advance of the direct client-to-client communications, and of sufficient content, so that the represented person's lawyer has an opportunity to advise his or her own client with respect to the client-to-client communications before they take place.

15 The Board's regulations provide that a licensed representative for an insurance carrier should "communicate with an adverse party who is represented by an attorney or licensed representative only through such attorney or representative," see 12 NYCRR § 302-2.6, but some Board opinions state that this regulatory limitation on communications with an adverse party "applies only to licensed representatives, whom the Board regulates, and attorneys for the parties, who are regulated by the Appellate Division and by the Code of Professional Responsibility, in their professional dealings with the adverse parties in litigated matters, and does not apply to claimants, employers and carriers themselves." *Matter of Nick Tahou's Inc.,* 2008 NY Wrk. Comp. 70210028, 2008 NY Wrk. Comp. LEXIS 9427. *See also Fink Baking Co.,* 2007 NY Wrk. Comp. 34566, 2007 NY Wrk. Comp. LEXIS 10305 (carrier did not err in asking its investigator to obtain represented claimant's written statement regarding work activity because "a carrier has an absolute right . . . to have direct contact with claimants on behalf of its insured"); *NYS Dept of Corrections*, 2001 NY Wrk. Comp. 59800320, 2001 NY Wrk. Comp. LEXIS 97590 (restriction in § 302-2.6 "applies to the representatives of claimants, employers and carriers, not to the claimants, employers and carriers themselves"). We express no view on whether the Board's regulations permit communications with claimants when those communications would be prohibited by Rule 4.2, or whether the Board's decisions supersede the restrictions of Rule 4.2. Those are questions of law beyond our jurisdiction.

Questions (c) and (d):

9. The more difficult questions concern the level of attorney involvement in the design of the forms, and the procedures for sending the forms, that will constitute "causing" the client to communicate with the claimant for purposes of Rule 4.2. We considered a related question in N.Y. State 828 (2009). In that opinion, a New York State agency maintained a staff of non-lawyer investigators who would conduct investigations of agency licensees "without any supervision of the investigators by staff counsel." When misconduct by a licensee was discovered, a report would be prepared by one of the investigators for review by counsel and possible prosecution by counsel. We opined that the non-lawyer investigator's conduct in contacting represented licensees would not be imputed to the agency's staff attorneys unless the attorneys were charged with "supervision or control" of the investigators, which was not the case. We observed:

> Where, for example, the agency requires its investigators to be instructed by staff attorneys concerning the procedures to be followed before undertaking an investigation, the conduct of the investigators will generally be imputed to the attorneys. . . . Where, on the other hand, there is no requirement or expectation that the agency's investigators will operate under the guidance of the staff attorneys, then . . . the conduct of the investigators will not ordinarily be imputed to the staff attorneys.

10. We did not specifically address in N.Y. State 828 the extent to which a lawyer's involvement in setting up or designing a general program of contacts with counterparties, some of whom may be represented by counsel, would constitute "supervision or control." With respect to the present inquiries, we conclude that the fact that an attorney designed or assisted in designing a form to be sent to claimants generally – some of whom may be represented by counsel – does not, for the purposes of Rule 4.2, constitute "causing" the carrier to communicate with those claimants who are represented. In other words, designing a form to be sent by non-lawyers does not by itself amount to supervision and control over the non-lawyers.[16]

11. This conclusion is based on sound policies. A client such as the insurance carrier here should be able to consult with its lawyers on generalized or mass communications with claimants or other counterparties. If an attorney's design or advice about mass communications triggered Rule 4.2 based merely on the statistical probability (or even certainty) that some of the counterparties would be represented by counsel, then insurance carriers and similar clients might be chilled in seeking such advice—a perverse result that was not the intent of Rule 4.2.[17] Rather, we believe Rule 4.2 is triggered by an attorney's involvement in sending a communication to a specific claimant (or set of claimants) only when the attorney knows that the specific claimant (or set of claimants) is represented in the matter in question. Thus, we answer questions (c) and (d) in the negative.

16 Another rule about causing another to violate the Rules of Professional Conduct is Rule 8.4(a), which provides that a "lawyer or law firm shall not violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." A lawyer who complies with Rule 4.2(b) by causing another person (a client) to communicate with the opposing party upon reasonable advance notice to opposing counsel is not violating Rule 4.2(a). Thus, a lawyer who complies with Rule 4.2(b) also is not violating Rule 8.4(a).

17 A lawyer should not, of course, design the form so as to seek privileged information or to discourage represented claimants from consulting with their counsel. *See* Rule 4.2, Cmt. 1 (Rule 4.2 protects represented parties against "uncounseled disclosure of information relating to the representation") and Rule 4.2, Cmt. 11 (lawyer "may not advise the client to seek privileged information").

CONCLUSION:

12. In answer to question (a), an attorney for the insurance company may not, without obtaining consent of the claimant's counsel under Rule 4.2(a), send a form directly to a specific claimant where the lawyer knows that the claimant is represented by counsel with respect to the workers' compensation claim.

13. In answer to questions (b) and (e), the attorney for the insurance carrier may direct a non-lawyer employee of the carrier to communicate with a represented claimant after the attorney gives "reasonable advance notice" to the claimant's counsel within the meaning of Rule 4.2(b).

14. In answer to question (f), such a communication must be provided in a manner and with enough time so that the receiving lawyer has a reasonable amount of time, under all the circumstances, to contact his or her client and advise the client what to do when contacted by the insurance company.

15. In answer to questions (c) and (d), where non-lawyer claims adjusters send forms to claimants who are represented by counsel, or where a computerized process sends such forms without human intervention to represented and unrepresented claimants, Rule 4.2 does not apply simply because a lawyer designed or assisted in designing the forms unless the attorney knows that a specific claimant is represented by counsel in the matter.

(24-10)

OPINION 847 (12/21/2010)

TOPIC: Conflicts of interest; lawyer's responsibilities to third parties; lawyer as corporate officer.

DIGEST: An attorney may represent the beneficial owner of a mortgage note and mortgage, and may concurrently serve as an officer of the mortgagee of record, for the purposes of executing a mortgage assignment to the beneficial owner and prosecuting a mortgage foreclosure action in the assignee's name.

RULES: 1.0(f); 1.7(a); 1.7(b).

QUESTION:

1. May an attorney represent the beneficial owner of a mortgage note and mortgage, and concurrently serve as an officer of the mortgagee of record, for the purposes of executing a mortgage assignment to the beneficial owner and prosecuting a mortgage foreclosure action in the assignee's name?

FACTS:

2. In 1993, the real estate mortgage industry created an electronic registration system for mortgages. Mortgage Electronic Registration Systems, Inc. ("MERS"), a Delaware corporation, was established to act as nominee and mortgagee of record for members of the system (the "MERS System"). The purpose of the MERS System was to facilitate the transfer and assignment of mortgages in the secondary mortgage market by bypassing, in favor of instant and inexpensive private electronic registration, the more cumbersome preparation and expensive recording of paper mortgage assignments in the real property records of the nation's municipal recording authorities. In New York, regardless of how many electronic assignments of the mortgage occurred within the MERS System, MERS would remain the mortgagee of record as reflected by the public records of the county clerks.

3. In 2006, the New York Court of Appeals upheld the continuing utility of the private MERS System by affirming a writ of mandamus and declaring that the Suffolk County Clerk was statutorily required to record and index mortgages, assignments of mortgage, and discharges of mortgage that named MERS as nominee or mortgagee of record. *See Merscorp, Inc., v. Romaine*, 8 N.Y.3d 90 (2006).

4. In connection with the specific question before us, the inquirer has related the following facts, which we assume to be true. The inquirer is an attorney ("Attorney") who represents the current mortgagee ("Client") in a pending residential mortgage foreclosure action. The inquirer does not represent MERS in the foreclosure action, and does not otherwise represent or provide legal services to MERS. The mortgage instrument executed by the mortgagor and the initial lender at the closing in October 2007 provided that MERS would be the mortgagee of record "acting solely as a nominee for Lender and Lender's successors and assigns." The initial lender subsequently sold the mortgage loan, and the inquirer's Client is the current assignee and holder of the note and mortgage, which is duly registered in the MERS System, but not in the real property records of the county clerk.

5. Many residential foreclosure actions brought in the name of MERS, as nominee and mortgagee of record, have foundered on the question of MERS' standing to sue. *See, e.g., LaSalle Bank*

National Association v. Lamy, 12 Misc.3d 1191(A), 2006 WL 2251721 (N.Y. Sup. Ct. Suffolk Cty. 2006) (citations omitted) ("this court and others have repeatedly held that a nominee of the owner of the note and mortgage, such [as] MERS, may not prosecute a mortgage foreclosure action in its own name as nominee of the original lender because it lacks ownership of the note and mortgage at the time of the prosecution of the action"). To avoid dismissal or delay for lack of standing, some members of the MERS System, including inquirer's Client here, have elected to prepare and record a paper assignment with the county clerk before commencing the foreclosure action. That way, the plaintiff in the foreclosure action will not be merely the mortgagee of record; rather, the plaintiff will be the real party in interest and the holder of the mortgage note.

6. To accommodate the expeditious preparation and recording of these paper assignments from MERS as assignor to Client, as assignee, a three-party agreement entitled "Agreement for Signing Authority" was entered into between MERS, Client and Attorney in December 2007. This agreement appointed Attorney, plus three non-lawyer members of Attorney's staff, as assistant secretaries and vice presidents of MERS, and authorized each of them (i) to execute, on MERS behalf, any assignment of any mortgage lien or any release of any mortgage loan registered to Client in the MERS System, and (ii) to execute all documents necessary to foreclose upon real property secured by a mortgage loan registered to Client in the MERS System.

OPINION:

A. Are There Conflicts Under Rule 1.7(a)(2)?

7. Against this background, we are asked whether Attorney's dual role – officer of MERS (or supervisor of three employee non-lawyer officers of MERS) and counsel for Client – constitutes a conflict of interest. This inquiry is governed by Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the "Rules"), which addresses conflicts between a client and the personal interests of the client's lawyer. Specifically, Rule 1.7(a)(2) provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

8. Because Attorney here was selected, engaged and paid by Client, not by MERS, to prosecute the foreclosure proceeding, there is no basis for a "reasonable lawyer" to conclude, under Rule 1.7(a)(2), that there exists a "significant risk that [Attorney's] professional judgment on behalf of [Client] will be adversely affected by lawyer's own financial, business, property or other personal interests" arising from Attorney's limited signing authority on behalf of MERS.

B. Are There Conflicts Under Rule 1.7(a)(1)?

9. We will also address Rule 1.7(a)(1), which addresses conflicts between or among multiple clients. Rule 1.7(a)(1) provides as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . (1) the representation will involve the lawyer in representing differing interests.

10. Rule 1.7(a)(1) is not at issue because MERS is not a client of Attorney. Rather, Attorney represents only one client, the mortgagee. Nonetheless, for the sake of completeness, we note that there are no "differing interests" between MERS and Client that would create a conflict of interest under Rule 1.7(a)(1). Rule 1.0(f) defines "differing interests" to include "every interest that will adversely affect either the judgment or loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest." There are no differing interests between MERS and Client because the mortgage assignment from MERS to Client did not convey any tangible interest in real property. Rather, MERS was merely a nominee mortgagee of record without any economic interest in the outcome of the foreclosure proceeding. Similarly, MERS's express grant to Attorney of the requisite authority to prosecute the foreclosure action is not adverse to MERS.

11. Moreover, even if a conflict of interest did arise under subparagraphs (a)(1) or (a)(2) of Rule 1.7, the conflict was cured pursuant to Rule 1.7(b). It was cured when Attorney obtained informed consent from the affected Client, confirmed in writing, as reflected in the Agreement for Signing Authority described above.

12. It is conceivable, of course, that in preparing and prosecuting the foreclosure action, Attorney will discover some error or omission on the part of MERS that has created a viable defense to the foreclosure action or that could result in substantial delay to the entry of a mortgage foreclosure judgment in Client's favor. For example, it is possible that the electronic records of the MERS system are materially incomplete or inconsistent with Client's putative status as mortgagee. This circumstance, in which Attorney erroneously relied upon the accuracy of the MERS System in exercising the Attorney's signing authority to create and record a paper assignment in anticipation of a mortgage foreclosure action, might rise to the level of conflicting fiduciary obligations between Attorney as assistant secretary and vice president of MERS, on the one hand, and Attorney as foreclosure counsel for Client, on the other hand. Such a situation would require further analysis under Rule 1.7(a)(2) and (b). However, as far as we have been informed, such a conflict does not exist here.

13. We do not opine on the application of the Real Property Law, or other State or federal statutes, to the execution of the mortgage assignment or any other documents submitted in the foreclosure action. That is beyond our jurisdiction as an ethics committee.

CONCLUSION:

14. Based on the facts presented, and subject to the qualifications stated, we answer the inquiry in the affirmative. An attorney may represent the beneficial owner of a mortgage note and mortgage, and concurrently serve as an officer of the mortgagee of record, for the purposes of executing a mortgage assignment to the beneficial owner and prosecuting a mortgage foreclosure action in the assignee's name.

(45-10)

OPINION 848 (12/22/2010)

TOPIC: Attorney newsletters; advertisements; disclaimers about prior results

DIGEST: Whether a publication by a lawyer or law firm is an "advertisement" depends on its content, its intended purpose, and the targeted audience. With certain exceptions, if a publication is an advertisement, it must be labeled "Attorney Advertising," and if it makes certain types of claims it must include the precise disclaimer set out in Rule 7.1(e)(3). If a law firm's website is an advertisement, it must say "Attorney Advertising" on the home page.

RULES: 1.0(a) and 7.1(d), (e) & (f)

FACTS:

1. A law firm ("Law Firm") is contemplating publishing an educational newsletter, which is intended to be informative. Law Firm will publish the newsletter in both hard copy and electronic formats. Law Firm will send the newsletter to current clients, former clients, persons who are not clients, attorneys, and persons not in any of those categories who have affirmatively opted to receive the firm's newsletters, announcements, emails, or blog posts. Law Firm wants to direct the recipients of the newsletter to the firm's website and to the firm's attorneys, but does not want such references to render the newsletter an "advertisement" that will be governed by Rule 7.1.

2. Law Firm also publishes marketing brochures, blogs and announcement emails, and Law Firm currently maintains a website that includes its own disclaimer regarding prior case results. The disclaimer reads as follows: "Case results depend upon a variety of factors unique to each case and matter. Similar results are not guaranteed in any future case." Neither this disclaimer nor the statement "Attorney Advertising" appears on the home page of Law Firm's website.

QUESTIONS:

3. Is a law firm's educational newsletter an "advertisement" under the New York Rules of Professional Conduct if it refers to the lawyers and law firm who send out the newsletter?

4. Must a law firm use the exact disclaimer language included in Rule 7.1(e)(3) of the New York State Rules of Professional Conduct regarding prior results, or is substantially similar language acceptable?

5. Does language disclaiming similar results in future cases as those achieved in prior cases relieve a law firm of the need to state "Attorney Advertising" on the home page of its website?

OPINION:

A. Is Law Firm's Educational Newsletter an "Advertisement"?

6. The first question is whether Law Firm's educational newsletter is an "advertisement" within the meaning of the New York Rules of Professional Conduct (the "Rules"). This question is important because if a communication is deemed to be an "advertisement" as defined in Rule 1.0(a), then the

language and format of the communication are governed by Rule 7.1.[18] For example, Rule 7.1(f) requires that most lawyer advertising must be labeled "Attorney Advertising."

7. Rule 1.0(a) defines "advertisement" as follows:

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

8. In determining whether Law Firm's contemplated educational newsletter is an attorney advertisement within the meaning of Rule 1.0(a) – and is therefore subject to the mandates set out in Rule 7.1 – we consider three factors: (i) the intent of the communication, (ii) the content of the communication and (iii) the targeted audience of the communication.

9. Regarding the first factor – the intent of the communication – Law Firm's newsletter is deemed to be advertising under Rule 1.0(a) only if its primary goal is "the retention of the lawyer or law firm." Contact or biographical information about the lawyers or the law firm contained in the newsletter does not, without more, transform an otherwise educational communication into advertising. As with general marketing materials (such as pencils, pads, and T-shirts), stating the firm's name, logo and contact information does not change attorney communications into advertising under the Rules "if their primary purpose is general awareness and branding, rather than retention of the law firm for a particular matter." *See* Rule 7.1, Cmt. 8; *cf.* Rule 7.1, Cmt. 10 (if information disseminated in connection with not-for-profit sponsorship by a firm is limited to the name of the law firm, contact information, brief description of areas of practice and the fact of sponsorship of the event, the communication is not considered advertising.)

10. Regarding the second factor – the content of the newsletter – Comment 7 to Rule 7.1 provides the following guidance:

> Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising. However, *a newsletter*, client alert, or blog *that provides information or news primarily about the lawyer or law firm* (for example, the lawyer or law firm's cases, personnel, clients or achievements) *generally would be considered advertising*. [Emphasis added.]

Thus, whether the newsletter is considered advertising will depend in part on its content.

11. Regarding the third factor – the audience for the communication — the definition of "advertisement" expressly excludes existing clients or other lawyers. Accordingly, communications that otherwise meet the criteria for an advertisement are not required to conform to the strict requirements of Rule 7.1 if they are directed to existing clients or other lawyers. Moreover, we believe that certain

18 In *Alexander v. Cahill*, 598 F.3d 79 (2nd Cir. 2010), the Second Circuit affirmed almost all of a district court decision that certain provisions of Rule 7.1 are unconstitutional. Defendants filed a petition for certiorari in the United States Supreme Court on August 9, 2010, but that petition has been denied.

communications to former and prospective clients are not advertisements. Specifically, according to Rule 7.1, Comment 7:

> Communications to former clients that are germane to the earlier representation are not considered to be advertising. . . . Communications, such as proposed retainer agreements or ordinary correspondence with a prospective client who has expressed interest in, and requested information about, a lawyer's services" are not advertising . . .

12. If Law Firm determines that its educational newsletter is an advertisement under the Rules – which will depend mainly on the intent (purpose) and content of the newsletter – then Law Firm should consider the audience for the newsletter in order to determine whether it must be labeled "Attorney Advertising." If the newsletter is produced in hard copy and mailed to the general public, then Law Firm must include the "Attorney Advertising" label required by Rule 7.1(f). Likewise, if the newsletter will also be circulated and made available electronically via the firm's website, via email, and via blogs, and posts, where the precise nature of the receiving audience is unknown, Law Firm must include the phrase "Attorney Advertising" on the electronic versions of the newsletter. However, Law Firm has the option of omitting that language in versions of the newsletter that are sent only to existing clients, other lawyers, or persons who meet the exceptions for former and prospective clients discussed above, because communications to those persons are not advertising even if their primary purpose is the retention of the lawyer or law firm.

B. Must Law Firm Use the Precise Disclaimer Set Out in Rule 7.1(e)(3)?

13. The second question is whether Law Firm must use in its newsletter the exact disclaimer language included in Rule 7.1(e)(3) of the New York State Rules of Professional Conduct regarding prior results, or instead whether substantially similar language would be acceptable.

14. We do not know the content of the proposed newsletter, but we will assume it will contain some of the categories of information governed by Rule 7.1(d), which allows a law firm to include certain types of information in an advertisement (*e.g.,* "statements that are reasonably likely to create an expectation about results the lawyer can achieve," and "statements that compare the lawyer's services with the services of other lawyers"), *provided* the advertisement complies with Rule 7.1(e). In turn, Rule 7.1(e)(3) states, in relevant part, as follows:

> (e) It is permissible to provide the information set forth in paragraph (d) provided . . .
>
> > (3) it is accompanied by the following disclaimer: *"Prior results do not guarantee a similar outcome."* [Emphasis added.]

15. We believe the precise disclaimer language specified in Rule 7.1(e)(3) is required, and that paraphrasing or similar language does not comply with the Rules. Rule 7.1 is written with great specificity regarding both content and format. For example, the disclaimer just quoted from Rule 7.1(e)(3) is placed inside quotation marks, and the last line of Rule 7.1(f) (quoted below) provides that in the case of email advertising, "the subject line shall contain the notation 'ATTORNEY ADVERTISING." (Quotation marks and capital letters in the original.) We think this high degree of specificity as to language and formatting dictates strict compliance with the requirements of Rule 7.1(e)(3). Language that is substantially similar to the specific disclaimer language prescribed in Rule 7.1(e)(3) is not suf-

ficient and does not negate the need to include the precise disclaimer set out in Rule 7.1(e)(3). Omitting that exact language violates the plain language of the rule.

16. We also believe, however, that a law firm may include additional language alongside the Rule 7.1(e)(3) disclaimer as long as the additional language does not undermine or contradict the Rule 7.1(e)(3) "prior results" disclaimer. Nothing in Rule 7.1 prohibits additional language unless it is false, deceptive, or misleading – *see* Rule 7.1(a)(1). But when an advertisement contains information falling within the ambit of Rule 7.1(d), a law firm does not satisfy Rule 7.1(d) and 7.1(e)(3) by substituting other language for the mandated language. It must include the exact wording set out in the rule.

C. Must Law Firm's Home Page Say "Attorney Advertising"?

17. The third question is whether language disclaiming similar results in future cases as those achieved in prior cases relieves Law Firm of the need to state "Attorney Advertising" on the home page of its website. This question is controlled by Rule 7.1(f), which provides as follows:

> *Every advertisement* other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), *shall be labeled 'Attorney Advertising'* on the first page, or *on the home page in the case of a web site*. If the communication is in the form of a self-mailing brochure or postcard, the words 'Attorney Advertising' shall appear therein. In the case of electronic mail, the subject line shall contain the notation 'ATTORNEY ADVERTISING.' [Emphasis added.]

18. Under Rule 7.1(f), all of Law Firm's communications that fall within the definition of "advertisement," including the home page of the firm's website, must include the phrase "Attorney Advertising." Thus, if Law Firm's newsletter, website, marketing brochures, blogs, announcement emails, or other communications constitute advertising under the Rules, then the communication must be labeled as "Attorney Advertising" unless specifically exempted by the Rules. The "Attorney Advertising" label "serves to dispel any confusion or concern that might be created when non-lawyers receive letters or emails from lawyers" and the recipients otherwise might not otherwise know whether these communications are advertisements or educational items. *See* Rule 7.1, Cmt. 5. Conversely, because advertisements in newspapers and on television and radio are "self evidently advertisements" and there is "no risk of such confusion or concern," the Rules do not require those forms of advertising to include the label "Attorney Advertising."

CONCLUSION:

19. Whether a newsletter or other law firm communication is an "advertisement" under the New York Rules of Professional Conduct depends on three factors – the content of the communication, the intent (purpose) of the communication, and the targeted audience of the communication. If a particular communication is an "advertisement" within the meaning of Rule 1.0(a), then it is governed by Rule 7.1. However, limited references to the law firm, its lawyers, and their contact information do not transform an otherwise educational newsletter into an advertisement.

20. Advertisements that include information of the types set out in Rule 7.1(d), such as statements that are reasonably likely to create an expectation about results the lawyer can achieve, statements

that compare the lawyer's services with the services of other lawyers, or statements describing or characterizing the quality of the lawyer's or law firm's services, must include the specific disclaimer language set out in Rule 7.1(e)(3), which states: "Prior results do not guarantee a similar outcome." The Rules permit additional language that does not contradict or undermine that disclaimer, but the Rules do not permit substitute language.

21. Finally, every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto) must be labeled "Attorney Advertising" as prescribed by Rule 7.1(f), and the statement "Attorney Advertising" must also appear on the home page of the firm's website if the website is an "advertisement." The presence of the "prior results" disclaimer required by Rule 7.1(e)(3) does not relieve a law firm of the obligation to include the words "Attorney Advertising" on its home page.

(10-10)

2011

OPINION 849 (01/19/2011)

TOPIC: Conflicts analysis of concurrent representation of a bank and an equipment manufacturer in a vendor equipment financing program

DIGEST: A lawyer who has previously represented a bank in connection with an equipment vendor financing program may later represent the equipment vendor regarding the vendor's participation in such a program while continuing to represent the bank on unrelated matters, provided the lawyer obtains the informed consent of each client, confirmed in writing.

RULES: 1.0(f), 1.7

FACTS:

1. The inquiring lawyer represents a bank (the "Bank") in connection with an equipment vendor financing program. In this program, the Bank agrees with an equipment supplier to provide equipment lease financing for the supplier's customers to enable the customers to acquire the supplier's equipment. Among the documents in the program is a lease in which the supplier is the lessor and the supplier's customer is the lessee. If, among other things, the customer satisfies the Bank's credit standards, then the supplier sells the lease to the Bank for an amount approximating the cost of the financed equipment.

2. The Bank retained the inquirer several years ago to advise it in connection with its program with a particular equipment supplier (the "Supplier"), which had provided the form lease documents. The inquirer reviewed these lease documents to ensure they were purchase-worthy from the Bank's perspective, and advised the Bank on certain modifications that the inquirer considered appropriate.

3. The Supplier has not previously engaged the inquirer to perform legal work. Rather, the Supplier's in-house finance and legal staff conduct the negotiations over the lease with the Supplier's customers and draft the lease documents, with occasional input from inquirer (in his capacity as the Bank's counsel) and from the Bank's finance personnel. The Supplier's staff is not experienced in this negotiation and drafting, so the Supplier has asked the inquirer whether he would be available to represent the Supplier to perform various tasks.

QUESTIONS:

4. May the inquiring lawyer represent the Supplier in any or all of the following activities while continuing to represent the Bank in unrelated matters?

- Taking over from the Supplier's in-house staff the negotiation and drafting of new leases with the Supplier's customers. These new leases would be sold to the Bank or possibly used in similar financing programs that the Supplier establishes with other lenders.

- Assisting the Supplier in organizing an efficient lease documentation process and educating its staff on equipment financing.

- Representing the Supplier in various transactions (other than its financing program with the Bank).

5. If the inquirer agrees to represent the Supplier in this matter, he anticipates amicably ending his representation of the Bank with respect to the Supplier's program while continuing to represent the Bank from time to time on other, unrelated matters. The inquirer asks whether agreeing to represent the Supplier as requested would raise any conflict issues. We conclude that certain of the representations would give rise to conflict issues, and these issues turn on the same analysis whether the inquirer continues to represent the Bank in unrelated matters (and thus remains inquirer's current client) or ceases to represent the Bank (and thus becomes the inquirer's former client) while continuing to work on the financing program for the Supplier.

OPINION:

6. Rule 1.7 of the New York Rules of Professional Conduct (the "Rules") governs concurrent conflicts of interest. Rule 1.7 says, in summary, that a conflict of interest arises if a reasonable lawyer would conclude that (i) the representation of one client will involve the lawyer in representing differing *client* interests or (ii) there is a significant risk that the lawyer's own interests will adversely affect the exercise of the lawyer's professional judgment on a client's behalf. If either type of conflict exists, then the lawyer may proceed only if the lawyer reasonably believes the lawyer can provide competent and diligent representation to each affected client and the lawyer obtains each affected client's informed consent, confirmed in writing.

7. Rule 1.9 governs conflicts of interest with former clients. Rule 1.9 says, in applicable part, that a lawyer who has formerly represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the subsequent client's interests are materially adverse to the first client's interests unless the subsequent client gives informed consent, confirmed in writing.

8. According to the inquirer's plan, the Bank will remain a current client on matters unrelated to the Supplier's financing program and become a former client on the substantially related matter of the Supplier's financing program. Whether the inquirer's proposed representation of the Supplier constitutes a conflict of interest depends on whether the Bank's interests will differ from those of the Supplier in any of the three assignments the Supplier has suggested, as well as on whether a significant risk exists that the lawyer's own interests (for instance, the importance of his ongoing relationship with the Bank to his law practice) will adversely affect the lawyer's professional judgment on behalf of either the Supplier or the Bank. We analyze in turn each task that the Supplier has asked the inquirer to perform.

9. ***Taking over the negotiation and drafting currently done by the Supplier's in-house staff.*** Although lease negotiations are between the Supplier and its customer as counterparties, the lease transaction is in contemplation of the Bank's acquisition of the lease. In some situations, the Bank's involvement as a lender or other participant in a transaction in which the inquirer (who is still the

Bank's lawyer on other matters) represents another party may give rise to a conflict of interest, and in other instances it may not. This is a case-by-case determination.

10. In the circumstances here, we believe that the particular interests of the Bank and the Supplier will involve the lawyer in representing "differing interests" within the meaning of Rule 1.7(a)(1) and Rule 1.0(f) (defining "differing interests" as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest"). While the Bank and the Supplier appear to be broadly aligned in interest in the proposed transactions with the Supplier's customers, the interests of the Bank and the Supplier may be "differing" within the meaning of the Rule with respect to the issues that are likely to arise in negotiation of the lease terms. In particular, the Supplier will likely be primarily interested in closing an equipment leasing deal, while the Bank is likely to be primarily interested in ensuring that the Supplier's customer satisfies the Bank's credit standards.

11. These divergent goals are sufficient to implicate the concerns of Rule 1.7(a) regarding the representation of differing interests. *See* Rule 1.7, cmt. [7] ("Differing interests can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client); N.Y. City 2001-2 (law firm may represent client whose interests in transaction are adverse to those of a current client in a separate matter if a disinterested lawyer would believe that the law firm can competently represent the interests of each client). The divergent goals also sufficient to implicate the concerns of Rule 1.9(a) in barring a lawyer from representing a new client (the Supplier) whose interests are "materially adverse" to the interests of a former client (the Bank) in a matter substantially related to the lawyer's work for the former client (the lawyer's work on behalf of the Bank regarding the Supplier's equipment financing program).

12. Nevertheless, we do not believe that the circumstances necessarily create a conflict beyond the capacity of informed consent to cure. If the inquirer reasonably believes that he will be able to "provide competent and diligent representation" to the Supplier in this matter and to the Bank in the unrelated matters – *i.e.,* that he will neither "pull his punches" in representing the Supplier's interests as a lessor in order to serve the Bank's interests as a lender, nor diminish his vigor in representing the Bank in unrelated matters – and if both clients give informed consent, confirmed in writing, then the inquirer is ethically permitted to take on the negotiations with the Supplier's customers regarding leases while continuing to represent the Bank in unrelated matters. *See* Rule 1.7(b)(1), (4).

13. ***Assisting Supplier in organization and education.*** The same is true with respect to the second of the requested assignments, assisting the Supplier's with education and organization. Although these activities could be said to be in the Bank's interests in minimizing the Bank's transaction costs, the main point of the exercise is to affect the negotiations between the Supplier and the Supplier's customers, which could give rise to the same differing interests with the Bank as the actual negotiation and drafting of the lease documents. For instance, when training the Supplier's employees, the lawyer would have to decide whether to instruct employees to negotiate credit terms aggressively (for the Bank's benefit) or to relax credit terms to obtain the customer's prompt acceptance (for the Supplier's benefit). Yet here, too, we do not believe that the conflict is necessarily non-consentable. As before, if inquirer reasonably believes that inquirer will be able to "provide competent and diligent

representation" to the Supplier in this matter and to the Bank in unrelated matters, and if both clients give informed consent confirmed in writing, the inquirer is ethically permitted to provide this assistance to Supplier while continuing to represent the Bank in other matters.

14. ***Working on Supplier transactions outside of Bank program.*** The inquirer's representation of the Supplier in matters not involving the Bank would not raise any special conflict issues apart from those we discuss above. To the extent that inquirer needs to obtain the Bank's consent to conflicts arising out of any future representations of the Bank adverse to the Supplier, the extent of the representation of the Supplier may be material to any consent.

CONCLUSION:

15. A lawyer who has previously represented a bank in connection with an equipment vendor financing program may later represent the equipment vendor regarding the vendor's participation in the financing program while continuing to represent the bank on unrelated matters, provided the lawyer obtains the informed consent of each client, confirmed in writing.

(27-10)

OPINION 850 (01/19/2011)

TOPIC: Law firm name – former partner

DIGEST: A law firm may not use the name of a former partner in the firm name if the former partner continues to practice law elsewhere.

RULES: 7.5(b), 8.4(d)

QUESTION:

1. May a law firm use the name of a former partner in its firm name if the former partner departs from the firm but continues to practice law as general counsel to a corporation?

FACTS:

2. The inquirer is a member of a law firm, fictionally styled ABCD. Named partner B was recently hired as an officer and general counsel of a closely held corporation located in the same city as the firm. Upon accepting this position, B withdrew as a partner of ABCD. B continues to have a close social relationship with the law firm and regularly refers matters to the firm, but B no longer participates in law firm matters and neither draws an income nor takes a salary from the firm.

3. ABCD prefers not to change the law firm name, however, "due to cost and the possibility of confusion that would be caused by a name change." ABCD, which is comprised of twenty-five lawyers (of whom ten are partners), "does nothing intentionally to trade off B's name or reputation." Based on the fact that B is now employed by a corporation as general counsel, does not compete with the law firm in any way, does not hold himself out as being available to take on matters from the public, and does not take on matters from the general public for compensation, the inquirer asks whether B has "retired" from the practice of law so that the firm can continue to include B in the firm name.

OPINION:

4. The question is governed by Rule 7.5(b) of the New York Rules of Professional Conduct, which provides that "[a] lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm. . . ." *Cf.* Rule 7.5, cmt. 1 ("In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status. Lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact, and thus lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact"). Rule 7.5(b) includes an exception, however, allowing a firm to "use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession."

5. In N.Y. State 266 (1972), we interpreted the relevant portion of Rule 7.5(b)'s identical predecessor provision in the New York Lawyer's Code of Professional Responsibility, DR 2-102(B), and concluded that "[a] law firm may continue the name of a retired partner in the partnership name pro-

vided he does not practice law independently of the firm. . . .” We noted that “[s]o long as the former partner has a continuing relationship with the firm and to the extent he practices law it is with his former firm, he will not be considered to be practicing independently of the firm and the firm may properly continue his name as part of the firm name.”

6. Here, however, B is still actively engaged in the practice of law as the general counsel to a corporation. While Rule 7.5(b) allows a law firm to use the name of a retired member of the firm, B has not “retired” from the practice of law within the meaning of that provision. See 22 NYCRR § 118.1(g) (“An attorney is ‘retired’ from the practice of law when, other than the performance of legal services without compensation, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law.”); cf. Rule 1.17(a) (“Retirement shall include the cessation of the private practice of law in the geographic area . . .”). Therefore, Rule 7.5(b) does not permit the continued use of B’s name in the firm name. See also former New York Lawyer’s Code of Professional Responsibility EC 2-11 (“the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public”).

7. Moreover, using the firm name ABCD after B’s withdrawal as a partner of ABCD, even though B continues the active practice of law elsewhere in the same geographic area, violates Rule 7.5(b), because the name ABCD “is misleading as to the identity of the lawyer or lawyers practicing under [the] name.” See North Carolina Formal Opinion 20 (2007) (opining that if an attorney leaves a firm and begins engaging in the private practice of law, the firm could not continue to use the attorney’s surname in the firm name because it would be misleading): Maryland Ethics Op. 00-03 (1999) (professional corporation may not continue to include the name of a former member of the firm who is no longer a shareholder and is practicing elsewhere, as such designation would be misleading); District of Columbia Op. 277 (1997) (“[i]t is . . . misleading to include in a firm name the name of a lawyer practicing elsewhere”); see also Rule 8.4(d) (“A lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”).

CONCLUSION:

8. A law firm may not use the name of a former partner in its firm name when the former partner departs from the firm but continues to practice law as general counsel to a corporation.

(55-09)

OPINION 851 (01/19/2011)

TOPIC: Using a law firm photograph in a newspaper advertisement.

DIGEST: An advertisement for a law firm may feature a photograph with non-lawyer employees of the firm provided that the advertisement, viewed as a whole, is not misleading about the size of the firm, its ethnic or gender diversity, or whether those pictured are lawyers.

RULE: 7.1

QUESTION:

1. May an advertisement for a law firm feature a photograph of the entire firm, including non-lawyer staff such as paralegals and secretaries?

OPINION:

2. Rule 7.1(a) of the Rules of Professional Conduct states that "[a] lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: (1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule."

3. A photograph in a law firm's advertisement makes "statements or claims" within the meaning of Rule 7.1(a). The issue before us is whether a photograph of a law firm that includes non-lawyers such as paralegals and secretaries would violate Rule 7.1 by creating a misimpression about the size of the firm, the ethnic or gender diversity of its personnel, or whether all those appearing in the photograph are lawyers.

4. This Committee's prior opinions state that, when a law firm holds a non-lawyer out to the public, the firm must identify the non-lawyer as such to avoid confusing or misleading the public. For instance, we have opined that the name of a non-lawyer may appear on law firm letterhead as long as the letterhead includes appropriate disclosure of the non-lawyer's professional status. *See* N.Y. State 500 (1978) ("While non-lawyer status will no longer preclude the use of a person's name on a firm's letterhead, his name should be accompanied by language that makes clear his non-lawyer status."). Similarly, a law firm may permit a paralegal to use a business card with the law firm's name as long as the card identifies the paralegal as a non-lawyer. *See* N.Y. State 640 (1992) (when a law firm lists a paralegal on a letterhead or business card "the primary concern is to insure that the listing is not false, deceptive or misleading"). Each of these prior opinions interpreted DR 2-101, the predecessor of Rule 7.1, but the principles are the same. *See also* ABA Inf. Opinion 89-1527 ("The listing of nonlawyer support personnel on lawyers' letterheads is not prohibited . . . so long as the listing is not false or misleading. In order to avoid being misleading, the listing must make it clear that the support personnel who are listed are not lawyers.").

5. The Connecticut Bar Association's Committee on Professional Ethics addressed a similar question and concluded that an advertisement containing a photograph of a firm's two lawyers and the firm's paralegals would not violate that state's ethics rules as long as the "proposed advertisement makes it clear that [the] paralegals are not lawyers or otherwise competent to practice law (*i.e.,* they are staff or assistants)." Connecticut Inf. Opinion 92-27.

6. We agree with Connecticut's approach, and we conclude here that an advertisement containing a photograph of a law firm is ethically permissible if the photograph, viewed in the context of the advertisement as a whole, is not misleading. One way to ensure that a firm photograph including non-legal staff is not misleading would be to accompany the photograph with a caption specifying the professional status of each person in the photograph or stating that the photo includes non-legal staff.[1]

CONCLUSION:

7. The question presented is answered in the affirmative, subject to the qualifications stated above. An advertisement for a law firm may feature a photograph that includes non-lawyer employees of the firm provided that the advertisement, viewed as a whole, is not misleading about the size of the firm, its ethnic or gender diversity, or whether the people in the photograph are lawyers.

(8-10)

1 *Cf. Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010), *petition for cert. denied*, *(U.S. Dec 13, 2010)) (No. 10-203).* In *Alexander*, the Second Circuit addressed the constitutionality of parts of DR 2-101(C) and DR 2-103(G), including DR 2-101(C)(3)'s prohibition of attorney advertising featuring "the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply[ing] that lawyers are associated in a law firm if that is not the case." 598 F.3d at 90. The Court interpreted this provision to apply "only to situations in which lawyers from different firms give the misleading impression that they are from the same firm." *Id.* Subject to that interpretation, the Court held that the provision did not violate the First Amendment. *Id.*

OPINION 852 (02/10/2011)

TOPIC: Settlement agreements requiring attorney to indemnify client's obligation to third party

DIGEST: An attorney may not agree to indemnify a client's obligations to a third party as part of a settlement of the client's claim.

RULES: 1.2(a); 1.8(e); 5.6(a); and 8.4(a).

QUESTION:

1. May a lawyer agree to indemnify a client's obligations to a third party as part of a settlement of the client's claim?

OPINION:

2. The inquirer represents several plaintiffs in asbestos litigation. She notes that, under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA"), defendants and insurance carriers have new reporting requirements in connection with settlements of personal injury claims. Under these new requirements, whenever there is a settlement, the defendant and its insurer have a duty to report certain payment details to the government and can be fined significantly if they fail to report. According to the inquirer, "the defendants and their insurers have been formulating ways to cover themselves in the event that plaintiffs provide them with the wrong information." The inquirer notes that one of the things frequently requested from the plaintiff's attorney is an indemnification with regard to Medicare liens owed by the attorney's client.

3. The applicability and requirements of the MMSEA are questions of law beyond the scope of this Committee's jurisdiction. We note, however, that the scenario posed by the inquirer is strikingly similar to those addressed in several recent ethics opinions. For example, in N.Y. City 2010-3, the New York City Bar's Committee on Professional and Judicial Ethics addressed whether an attorney representing a settling plaintiff may enter into a hold harmless/indemnity agreement for the benefit of the settling defendants. The opinion noted that plaintiffs in personal injury litigation frequently obtain financial assistance from Medicaid, Medicare, workers compensation carriers, or private insurance coverage. Furthermore, when a plaintiff is entitled to funds through a damages award or settlement at the conclusion of the litigation, such carriers or agencies may be entitled by statute or contract to reimbursement from the plaintiff for any payments the carriers or agencies have made to the plaintiff. These entities therefore frequently seek to recoup amounts the defendant has paid to the plaintiff in the litigation. *See, e.g., Fasso v. Doerr*, 12 N.Y.3d 80 (2009) (plaintiff's health insurer permitted to intervene in plaintiff insured's medical malpractice action to assert an equitable subrogation claim against defendant doctor for reimbursement of the payments the health insurer made for plaintiff's medical expenses); *Teichman v. Community Hosp. of Western Suffolk*, 87 N.Y.2d 514 (1996) (noting that if an injured party receives settlement monies from a tortfeasor to cover medical expenses that were paid by plaintiff's insurer, the insurer may recoup its disbursements from its insured).

4. As noted in N.Y. City 2010-3, defendants and their attorneys who settle cases generally are aware that payments made under a settlement agreement may be subject to the liens or claims of plaintiff's insurance providers or other creditors. In addition, defendant tortfeasors may be subject to

subrogation claims brought by plaintiff's health insurers. *See Fasso*, 12 N.Y.3d at 86-87 ("It is well established that when an insurer pays for losses sustained by its insured that were occasioned by a wrongdoer, the insurer is entitled to seek recovery of the monies it expended under the doctrine of equitable subrogation"). To protect themselves against any potential liability for those claims, defendants frequently demand language in the settlement agreement stipulating that the settling plaintiff will hold defendants harmless from any claims made by insurers or other creditors. Defendants also frequently demand that the plaintiff's attorney personally guarantee the plaintiff's indemnification obligation and hold defendants harmless from any third party claims.

5. Rule 1.8(e) provides, in pertinent part, "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client." Rule 1.8(e)(1)-(2), however, states exceptions providing that the lawyer may "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter," and may pay court costs and expenses of litigation on behalf of "an indigent or pro bono client."

6. "Financial assistance" comes in many forms, including gifts, loans, and guarantees. *See, e.g.,* ABA 04-432 (lawyer's posting or arranging for the posting of a bond to secure release from custody of a client the lawyer represents in the matter in which the client has been detained constitutes "financial assistance" under Model Rule 1.8(e), but falls within the ambit of the exception in subparagraph (e)(1) for "court costs and expenses of litigation"); Missouri Opinion 125 (2008) ("Any type of guarantee to cover a client's debts constitutes financial assistance."). *Cf.* New York Rule 1.8, cmt. [10] ("Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation."). An attorney's agreement to indemnify the client for the client's failure to meet her own obligations, such as the payment of a Medicare lien, constitutes a "guarantee [of] financial assistance" that is prohibited by Rule 1.8(e). *See* N.Y. City 2010-3.

7. As noted above, Rule 1.8(e)(1)-(2) creates exceptions to the prohibition against advancing or guaranteeing financial assistance to the client in connection with litigation and permits the lawyer to advance or pay "court costs and expenses of litigation" in certain situations. A lawyer's agreement to indemnify or guarantee the client's obligations under a settlement does not fall within this exception because the settlement obligation does not constitute a "court cost" or "expense of litigation." As Comment [9B] to Rule 1.8 explains:

> [P]aragraph (e) limits permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above.

See N.Y. City 2010-3 ("a client's obligation to use settlement proceeds to satisfy a lien or other indebtedness is a personal obligation of the client, and, for purposes of the Rule, is indistinguishable from the client's obligation to pay other expenses such as medical expenses or residential rent").

8. While Rule 1.2(a) requires a lawyer to "abide by a client's decision whether to settle a matter," the lawyer cannot pursue or enter into a settlement that violates the Rules. *See* Rule 1.2, cmt. [1] (a lawyer should "take whatever *lawful and ethical* measures are required to vindicate a client's cause or endeavor") (emphasis added); *see also* Rule 5.6(a)(2) ("A lawyer shall not participate in offering or making . . . an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy."); Rule 5.6, cmt. [2] ("Paragraph (a)(2) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client."). Therefore, a lawyer cannot pursue or enter into a settlement agreement that requires the lawyer to advance or guarantee financial assistance to the client in violation of Rule 1.8(e) even if the client desires such a course of action.

9. Insofar as a lawyer may not agree to indemnify his or her own client's obligations to a third party as part of a settlement of the client's claim, it is also impermissible for another lawyer to enter into a settlement that requires such an indemnification. *See* Rule 8.4(a) ("A lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct [or] knowingly assist or induce another to do so").

CONCLUSION:

10. Rule 1.8(e) prohibits a lawyer from agreeing to indemnify a client's obligations to a third party as part of a settlement of the client's claim, and Rule 8.4(a) prohibits another lawyer's participation in a settlement that requires such an indemnification.

(46-10)

OPINION 853 (03/01/2011)

TOPIC: Law firm name including name of partner who becomes inside counsel to a corporation.

DIGEST: A name partner who becomes inside counsel to a corporation will not be "retired" under Rule 7.5(b) so as to allow the firm to retain the partner's name in the firm's name. The firm also may not retain the partner's name in the firm's name if the partner's time working as inside counsel is considered an open-ended leave of absence, or if the partner becomes of counsel to the firm and minimizes his participation in the firm while working as inside counsel. Finally, if the partner is simultaneously associated with both the law firm and the corporation's legal department, the conflicts of one may be imputed to the other.

RULES: 1.7(a), 1.10(a)&(e), 5.1, 7.5(a)&(b).

QUESTION:

1. Inquirer is a name partner of a law firm (the "Firm"). Another name partner (the "Partner") in the Firm "will transition to an in house corporate position shortly." The Partner has not yet withdrawn from the Firm, and Inquirer hopes that the Partner will remain a partner of the Firm. The Firm wishes to retain the Partner's name in the Firm's name, and Inquirer poses three questions about the permissibility of doing so:

> A. May the Firm retain the Partner's name in the Firm's name because the Partner will be "retired"?
>
> B. May the Firm retain the Partner's name in the Firm's name because the Partner may be treated "essentially on a leave of absence, notwithstanding that he continues as a partner and can come and go as he pleases"?
>
> C. May the Firm retain the Partner's name in the Firm's name if the Partner becomes "of counsel" to the Firm and "minimizes his participation" in the Firm?

After addressing these questions, we raise a question of our own regarding whether conflicts of the corporation's legal department will be imputed to the Firm, and vice versa.

OPINION:

2. The main rule governing questions about law firm names is Rule 7.5(b) of the New York Rules of Professional Conduct (the "Rules"), which provides:

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

Question A: Will the Partner be "retired" under Rule 7.5(b)?

3. Rule 7.5(b) permits a law firm to "include in its name the name or names of one or more . . . retired members of the firm," so the first question is whether a Partner working in house at a corporation will be "retired" within the meaning of Rule 7.5(b). In N.Y. State 850 (2011), we opined that a lawyer who is still actively engaged in the practice of law as the general counsel to a corporation has not "retired" from the practice of law within the meaning of Rule 7.5(b). We therefore concluded that a law firm "may not use the name of a former partner in its firm name when the former partner departs from the firm but continues to practice law as general counsel to a corporation." For the same reasons, the Partner in the inquiry here will not be "retired" under Rule 7.5(b), and the Firm cannot retain his name in the Firm's name on that basis.

Question B: May the Partner be treated "as essentially on a leave of absence, notwithstanding that he continues as a partner and can come and go as he pleases"?

4. The next question is whether the Partner may be treated as if he were a partner essentially on "leave of absence" while he is working in house at the corporation, allowing the Firm to retain his name in the Firm's name on that basis. In N.Y. State 381 (1975), this Committee opined that the name of a professional legal corporation "may not properly include the name of [a] former partner who is practicing law with another firm." An in-house lawyer at a corporation is practicing with another law firm because Rule 1.0(h) defines "Firm" or "law firm" to include "the legal department of a corporation or other organization."

5. Moreover, while the Partner is working in house at the corporation, the facts suggest that the Partner would not be active in the Firm. In N.Y. State 346 (1974), we opined that a law firm may not list on its letterhead an "inactive" partner practicing in another jurisdiction because "there is no proper purpose to be served by such a listing," and the "designation of an inactive partner would only tend to confuse the public as to the status and responsibility of the inactive member." Similarly, in N.Y. County 735 (2006), the committee opined that whether a lawyer's name may properly be included in a firm's name under the predecessor to Rule 7.5(b) involves a "qualitative" test of whether the lawyer is "sufficiently involved to provide the supervision required of the law firm collectively and himself individually as a manager of the law firm and partner" under DR 1-104 (the predecessor to Rule 5.1). That committee also concluded that if the lawyer in question "were not in fact practicing with the firm," then the name of the firm that includes the absent lawyer would violate the rule governing law firm names. We agree with that conclusion.

6. Accordingly, we conclude that the name of a partner who is not retired from the practice of law, but is practicing elsewhere and is not actively involved in the supervision and management of the law firm's practice, cannot be included in the firm's name.

7. We note that the inquiry here refers to "essentially . . . a leave of absence," but the facts suggest an open-ended departure to practice elsewhere with no particular expectation by the Firm that the Partner will ever return. We express no view on whether a partner who leaves a firm for a relatively brief period, or leaves in other circumstances with the expectation of returning, must always remove his or her name from the law firm's name.

Question C: May the Firm retain the Partner's name in the Firm's name if the Partner takes "of counsel" status and "minimizes his participation" in the Firm?

8. The third question is whether the Firm may keep the Partner's name in the Firm name if the Partner takes of counsel status and "minimizes his participation" in the Firm. As a threshold matter, there is no prohibition on retaining in a firm's name the name of a former partner who has retired and taken of counsel status. *See* ABA 90-357 (1990) (finding no risk of misleading the public in that situation). *See generally* N.Y. City 1995-9 ("There is no requirement that a firm's name consist exclusively of partners; a person's continuing 'of counsel' relationship with the firm is enough").

9. But the Partner here will not qualify as an "of counsel" lawyer while working full time as an in house lawyer at a corporation. An of counsel relationship is one in which "the of counsel lawyer is 'available to the firm for consultation and advice on a regular and continuing basis.'" N.Y. State 793 (2006). The ABA Standing Committee on Ethics and Professional Responsibility has described the "core characteristic properly denoted by the title 'counsel'" as "'a close, regular, personal relationship.'" ABA 90-357 (1990). *See also* Rule 7.5(a)(4) ("A lawyer . . . may be designated 'Of Counsel' . . . if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate.")

10. In an opinion closely on point, the Ethics Advisory Panel of the Rhode Island Supreme Court opined that a law firm could not continue to use the name of a partner who took a position as inside counsel and became "of counsel" to the firm. Rhode Island Opinion 94-65 (1994). The Panel stated that "if the lawyer is a named partner of the firm and is retiring to become 'of counsel,' the lawyer's name may be retained in the firm name. This is not true if instead of retiring, the lawyer is withdrawing to practice in another place, to take other employment or is taking a leave of absence." (Citations omitted.) The panel reasoned that retaining the lawyer's name in the firm's name under the circumstances "connotes a partnership and is therefore misleading to the public." The Nebraska Lawyers' Advisory Committee recently reached a similar conclusion. In Nebraska Opinion 10-04 (2010), the committee opined that if a "retired partner resumes the practice of law outside and apart from the firm, continued use of the attorney's name in the former firm's name is misleading to the public and therefore prohibited. This is true even if the attorney becomes 'of counsel' to the former firm after resuming practice." The committee reasoned that "[w]hen an attorney is actively practicing law and the attorney's name appears in a firm name . . . there is an implicit representation to the public that the lawyer is a partner or principal in that firm with fully shared responsibility for the firm's work."

11. We agree with the Rhode Island and Nebraska committees, and we therefore conclude that, as we understand the facts here, the Firm may not continue to include the Partner's name in the Firm's name if the Partner becomes of counsel and minimizes his participation in the Firm while working as inside counsel at a corporation.

Listing of predecessor firm

12. Although we have concluded that it would be inappropriate to retain the Partner's name in the Firm name under any of the alternative scenarios presented, the Firm may wish to consider whether it meets the criteria for listing, on its letterhead and professional announcement cards, "the names and dates of predecessor firms in a continuing line of succession," under Rules 7.5(a)(2), (4). If so, the Firm may note the former Firm name on its letterhead and announcement cards. However, even if the

Firm may do so, under the facts here it may not use that former name as the Firm's name on an ongoing basis. *See, e.g.,* N.Y. State 622 (1991) (articulating factors for determining when a law firm may continue to use the name of a successor law firm).

Imputation of conflicts of interest

13. Finally, although Inquirer has focused on questions about retaining the Partner's name in the Firm's name, we perceive an additional issue regarding imputed conflicts of interest. Rule 1.10(a), New York's main rule on imputation of conflicts, provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein."

14. The term "associated" is not defined in the Rules. We have previously opined that "the concept extends beyond lawyers who are partners, associates or 'of counsel' in a firm, [but] it does not apply to all lawyers who are in any way 'connected' or 'related.'" N.Y. State 715 (1999) (whether a contract lawyer is "associated" with a law firm "depends on the facts and circumstances of the employment"). The touchstone is whether the lawyer "has general access to the files of all clients of the firm and regularly participates in discussions of their affairs." *Id.* Thus, conflicts may be imputed from the Partner to the Firm if, after he assumes the position of inside counsel, the Partner continues to be "associated" with the Firm, albeit on a basis that is too attenuated for him to be held out as either a name partner or of counsel.

15. More broadly, if the Partner is simultaneously associated for purposes of Rule 1.10(a) with both the Firm and the legal department of the corporation, the conflicts of the Firm and the legal department will generally be shared and must become part of both of their conflict-checking systems under Rule 1.10(e). For example, in N.Y. State 793 (2006), we considered the circumstance when an attorney ("L") simultaneously had an of counsel relationship with two law firms, XYZ and ABC. We concluded that if attorney X, a partner with the XYZ firm, was disqualified from a particular representation under the predecessor to Rule 1.7(a), then all lawyers associated with the firm XYZ, including L, were also disqualified, and the disqualification generally extended to the lawyers with whom L was associated in the ABC law firm. *See also* N.Y. City 2007-2 (discussing the imputation of conflicts in the context of a "secondment," such as a temporary assignment of a lawyer to a corporate client, and discussing how to safeguard against imputation); ABA 90-357 ("the effect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications"); D.C. Opinion 338 (2007) (a lawyer may be a partner in one firm and of counsel to another firm, but "any disqualification of a lawyer in either firm will be imputed to all lawyers in both firms," unless an exception applies).

CONCLUSION:

16. The Partner, who is becoming inside counsel to a corporation, will not be "retired" under Rule 7.5(b), and it would therefore be improper to retain the Partner's name in the Firm's name on that basis. Nor may the Firm continue to retain the Partner's name in the Firm's name if the Partner is considered to be on an open-ended leave of absence, or if the Partner takes of counsel status and minimizes his participation in the Firm while working elsewhere as inside counsel. If the Partner is simultaneously "associated" with both the Firm and the legal department of the corporation, the con-

flicts of the each one will generally be imputed to the other, and the conflict-checking systems of both the corporation's legal department and the Firm need to take the other's conflicts into account.

(35-10)

OPINION 854 (03/11/2011)

TOPIC: Reporting known or suspected violation of Rules of Professional Conduct by another lawyer.

DIGEST: Lawyer who was employed by another lawyer must report knowledge of former employer's violation of the Rules of Professional Conduct if the violation raises a substantial question about the employer's honesty, trustworthiness, or fitness as a lawyer and if the report does not disclose confidential information. If the former employee lacks knowledge, he may report a good faith belief or suspicion of the former employer's professional misconduct to an appropriate authority if the report does not disclose confidential information, but may not communicate that belief or suspicion to the employer's clients.

RULES: 1.6, 8.3(a) & (c).

FACTS:

1. Lawyer A (for "Associate") was formerly employed by another lawyer, Lawyer P (for "Partner"). Lawyer A believes that Lawyer P wrongfully failed to pay wages and premiums on employer-provided health insurance, overbilled clients, and misrepresented to his clients the services that he could perform for them. (Lawyer A does not suggest that any of the clients were his personal clients, and we assume for purposes of this inquiry that they were not.)

QUESTION:

2. Lawyer A (the inquirer) has raised two related questions:

> A. May (or must) Lawyer A report Lawyer P's alleged misconduct to a disciplinary authority?
>
> B. May (or must) Lawyer A inform Lawyer P's clients about Lawyer P's alleged misconduct?

OPINION:

Question A: **May (or must) Lawyer A report Lawyer P's alleged misconduct to a disciplinary authority?**

3. The most relevant rule in the New York Rules of Professional Conduct (the "Rules") is Rule 8.3. That rule provides, in pertinent part:

> (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
>
> * * * * *
>
> (c) This Rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6; or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

4. In N.Y. State 635 (1992), which construed DR 1-103 (the nearly identical predecessor to Rule 8.3), this Committee opined that a lawyer in Lawyer A's situation *must* report professional misconduct by another lawyer (here, Lawyer P) if four criteria are satisfied. Those criteria are consistent with the New York Rules of Professional Conduct that took effect on April 1, 2009. The four criteria are as follows:

A. Lawyer A has "actual knowledge" or a "clear belief" as to the pertinent facts, *i.e.,* more than a "mere suspicion" or a "reasonable belief";

B. None of the information that would be essential for Lawyer A's report is protected as confidential information (see Rule 8.3(c)(1)) and none of the information was gained while participating in a bona fide lawyer assistance program (see Rule 8.3(c)(2));

C. Based upon Lawyer A's knowledge about the facts, Lawyer A knows or has a "clear belief" that Lawyer P has violated one or more Rules of Professional Conduct; and

D. The violation "raises a substantial question" as to Lawyer P's "honesty, trustworthiness or fitness as a lawyer" (Rule 8.3(a)).

5. As in N.Y. State 635, we express no opinion here on the question whether Lawyer P's alleged conduct was a "violation of the Rules of Professional Conduct" or, if it was, whether the violation raises a "substantial question" as to Lawyer P's "honesty, trustworthiness or fitness as a lawyer . . . ." Rule 8.3(a). Answering those questions would require us to make factual determinations about circumstances that may well be disputed, and would require us to evaluate the past conduct of an attorney other than the inquirer. As in N.Y. State 635, "It is for [Lawyer A] to determine, based on his knowledge of all the pertinent facts and circumstances, whether the foregoing prerequisites have been met" and, therefore, whether Lawyer A *must* report Lawyer P's misconduct to an appropriate tribunal or disciplinary authority.

6. Even if Lawyer A determines that he is not *required* to report lawyer P, he is nevertheless *permitted* to report his reasonable suspicions of misconduct if the report does not reveal confidential information protected by Rule 1.6. "As a general proposition, a lawyer is always free to report evidence of what may constitute improper conduct by another attorney, subject to the obligations to preserve client confidences and secrets. The lawyer need not have actual proof of misconduct; a good faith belief or suspicion that misconduct has been committed is a sufficient basis for making a report." N.Y. State 635 at p. 4, *citing* N.Y. State 480 (1978.) *See also* SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 77 (2008 ed.) ("a lawyer may report another lawyer based on rumor, suspicion, or hearsay, and may report activities raising less-than-substantial questions about a lawyer's fitness as a lawyer").

7. But the freedom to report a good faith belief or suspicion of misconduct should not become a pretext for a report intended "to gain advantages or concessions from other lawyers in the course of litigation, in private business transactions, or in interpersonal relationships, or by attorneys acting purely out of spite." N.Y. State 635 at p. 4. Even though disciplinary complaints are confidential under Judiciary Law §90, "it would be patently improper for a lawyer to make a report of misconduct and subject another lawyer to investigation without having a reasonable basis for doing so or solely to gain a tactical advantage in a matter." *Id.* (citations omitted). *See also* SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED, *supra,* at 78 (mandatory reporting rule "should not be used as a weapon against opposing lawyers or competing law firms").

Question B: **May (or must) Lawyer A inform Lawyer P's clients about Lawyer P's alleged misconduct?**

8. Lawyer A is not *required* to inform Lawyer P's clients about Lawyer P's alleged misconduct. However, assuming Lawyer A does not improperly disclose confidential information concerning any client, and assuming Lawyer A acts in good faith, Lawyer A is *permitted* to disclose knowledge (as distinguished from a suspicion) of Lawyer P's misconduct to the affected client or clients. (Whether such a disclosure could violate the dictate of § 90 of the New York Judiciary Law that disciplinary complaints shall be confidential unless and until professional discipline is publically imposed is a question of law as to which we offer no opinion.)

9. However, before making any such discretionary report to Lawyer P's clients, Lawyer A should carefully consider the dangers of informing another lawyer's clients about that lawyer's misconduct. As this Committee observed in N.Y. State 480 (1978), the dangers inherent in reporting another lawyer's misconduct to that lawyer's clients are greater than the dangers of reporting the lawyer's misconduct to appropriate authorities. In particular, divulging another lawyer's alleged misconduct to that lawyer's clients may unnecessarily endanger that lawyer's attorney-client relationships.

10. Moreover, a lawyer may not inform another lawyer's clients about mere suspicions of the other lawyer's misconduct. We recognized in N.Y. State 480 that a lawyer may properly report mere suspicions to an appropriate authority, but we perceived "a substantial danger in permitting a lawyer to approach present clients of the suspected counsel" because in that instance "the sanctity of the attorney-client relationship weighs far more heavily in favor of proscribing the communication. . . . Usually the interests of all can best be served by reporting suspicious conduct to an appropriate authority. The former client's confidence in his present counsel should not be jeopardized unnecessarily."

11. In deciding whether to disclose either actual knowledge or a clear, good faith belief of misconduct by another lawyer to anyone other than an appropriate tribunal or disciplinary authority, therefore, a lawyer should carefully weigh (i) the certainty or uncertainty of his belief (*i.e.,* whether the belief rises to the level of knowledge or a clear belief, as opposed to a mere suspicion), (ii) the risk of unnecessary and perhaps unwarranted damage to the other lawyer's attorney-client relationships, and (iii) the countervailing risks of irreparable injury to the interests of the other lawyer's clients absent prompt and effective disclosure to them.

CONCLUSION:

12. Lawyer A must report the conduct of his former employer, Lawyer P, to an appropriate authority if all four of the following criteria are met: (1) Lawyer A has knowledge or a clear belief concerning the pertinent facts (*i.e.,* he has more than a reasonable belief or mere suspicion); (2) Lawyer A's report will not reveal confidential information protected by Rule 1.6 or information that Lawyer A gained while participating in a bona fide lawyer assistance program; (3) the conduct by Lawyer P constitutes a violation of one or more Rules of Professional Conduct; and (4) the violation raises a substantial question as to Lawyer P's honesty, trustworthiness or fitness as a lawyer.

13. If all four of those criteria are met, Lawyer A may also report such misconduct to the affected clients of Lawyer P – but before informing the clients, Lawyer A should carefully weigh both dangers to Lawyer P's attorney-client relationships if the affected clients are informed against the countervailing dangers to the clients if they are not informed.

14. Even if Lawyer A is not satisfied that all four criteria have been met, Lawyer A may nevertheless report a good faith belief or suspicion of Lawyer P's alleged misconduct to an appropriate authority, provided that the report of the suspected misconduct does not require the disclosure of confidential information or information that Lawyer A gained while participating in a bona fide lawyer assistance program. But Lawyer A may not inform Lawyer P's clients about mere suspicions of Lawyer P's misconduct.

(17-10)

OPINION 855 (03/14/2011)

TOPIC: Conflict of interest; referral of clients to spouse's litigation financing company.

DIGEST: A lawyer conducting litigation for a client may not refer the client to a litigation financing company owned by the inquiring lawyer's spouse to provide financial assistance that the lawyer personally would be barred from providing.

RULES: 1.8(e), 1.8(i), 8.4(a).

QUESTION:

1. When clients of a personal injury law firm have financing needs in connection with contemplated or pending litigation, may a lawyer at the firm refer such clients to a legal financing company formed by the lawyer's spouse for the purpose of advancing funds to clients?

OPINION:

2. The inquirer practices law at a firm that handles personal injury cases. Clients of the firm are sometimes unable to pay living expenses or litigation expenses, and they may turn to a litigation financing company for help. The inquirer's spouse would therefore like to establish a litigation financing company to aid such clients, and the inquirer would like to refer clients to the spouse's litigation financing company.

3. This plan implicates provisions in the New York Rules of Professional Conduct (the "Rules") concerning financial assistance to clients, taking a proprietary interest in a client's matter, and violating a Rule of Professional Conduct through the actions of another.

Prohibitions in Rule 1.8

4. Rule 1.8 is entitled "Current Clients: Specific Conflict of Interest Rules." Rule 1.8(e), which is identical to DR 5-103(B) of the former Code of Professional Responsibility as amended in 2007, provides:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
>
> (2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and
>
> (3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the

> lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

5. If the inquiring attorney had asked this Committee whether a lawyer could *personally* form a litigation financing company to advance funds to clients, the Committee would have concluded that such an act violates Rule 1.8(e). Under Rule 1.8(e), the inquirer personally could not advance funds to clients in the form of loans. As Comment [10] to Rule 1.8 provides:

> Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.

6. Nor could the inquirer overcome the prohibition against giving financial assistance to a client by obtaining the client's informed consent. As observed in SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 116 (West 2009 ed.), "Rule 1.8 . . . makes some personal interest conflicts non-consentable no matter how fully a lawyer discloses the potential for conflicts of interest that will harm the client." Rule 1.8(e) addresses a type of personal conflict of interest that is not waivable by the client and cannot be cured by the client's consent.

7. Likewise, a lawyer may not evade the prohibition on financial assistance to clients by purchasing an interest in a client's litigation instead of providing a loan. Purchasing a proprietary interest would violate a different provision, Rule 1.8(i), which is substantially identical to former DR 5-103(A). Rule 1.8(i) states:

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
>
> (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
>
> (2) contract with a client for a reasonable contingent fee in a civil matter subject to Rule 1.5(d) or other law or court rule.

8. However, there is at least one legitimate route to avoiding the restrictions imposed by Rule 1.8(e) and (i): a lawyer may refer a client to a financial institution in which the lawyer has no interest. In N.Y. State 666 (1994), a lawyer wished to refer a client to a financial institution that would lend the client money for living expenses. Repayment of the loan would be contingent on the successful resolution of the client's claim for personal injuries. The Committee concluded that "a mere referral to the lending institution would not be unethical per se," considering that the lawyer did not propose to "pay" or "advance" any part of the loan. "The lawyer's sole function would be to refer the client to a lending institution that then would assess the value of the claim and take a lien on its proceeds to secure the loan."

9. In N.Y. State 769 (2003), which specifically concerned the litigation financing industry, we acknowledged that a lawyer could ethically refer clients to a litigation financing company, but we

added: "As we pointed out in N.Y. State 666 (1994), the lawyer cannot own any interest in the financing institution; any such interest would be prohibited by the Code."

Referring Clients to the Lawyer's Spouse

10. That background brings us to the question posed here. If a lawyer may ethically refer a client to a lending institution in which the lawyer has no interest for the purpose of obtaining a loan contingent on the outcome of the client's case, may a lawyer refer a client to a lending institution owned by the lawyer's spouse?

11. The Committee has frequently concluded that various rules relating to conflicts involving financial interests apply both to the lawyer and to the lawyer's business relationships with the lawyer's spouse. *See*, *e.g*., N.Y. State 738 (2001) (referral to title abstract company in which spouse had an interest); N.Y. State 493 (1978), (lawyer or spouse as broker); N.Y. State 340 (1974) (lawyer and spouse as salesperson in a brokerage agency); N.Y. State 291 (1973) (lawyer or spouse with interest in a brokerage agency); N.Y. State 244 (1972) (lawyer and spouse real estate broker). For example, in N.Y. State 738 we asked: "May an attorney who represents clients engaged in real estate matters refer those clients to a title abstract company in which the attorney's spouse has an ownership interest?" We had stated in two previous opinions that a lawyer could not refer a real estate client to a title abstract company in which the lawyer personally owned an interest unless the abstract work was "purely ministerial" and the lawyer obtained consent from the client after full disclosure. Noting the unified financial interests of husband and wife, and based on N.Y. State 244, N.Y. State 291, N.Y. State 340, and N.Y. State 493, we concluded in N.Y. State 738 that an attorney "may not refer a real estate client to a title abstract company for other than ministerial title work where the lawyer's spouse has an ownership interest in the abstract company."

12. We believe the same conclusion applies when a lawyer refers clients to a litigation financing company owned by the lawyer's spouse, at least to the extent the lawyer personally would be barred from providing financial assistance to a client. Moreover, referring clients to a litigation financing company owned by the lawyer's spouse would usually also implicate Rule 8.4(a), which provides: "A lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Referring clients to the spouse's financing company would violate Rule 1.8(e) "through the acts of another," essentially using the spouse as a front for advancing improper financial assistance to a client for whom the lawyer is conducting litigation.

CONCLUSION:

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

(18-10)

OPINION 856 (03/17/2011)

TOPIC: Limiting the scope of a representation to particular stage of a matter.

DIGEST: A lawyer may limit the scope of the representation of a client provided that the client gives informed consent to the limitation, the scope of the representation is reasonable under the circumstances, and the limitation is not prejudicial to the administration of justice. However, even if the original limitation is permissible, the ethical obligation to represent the client may extend beyond the initial limitation contemplated by the lawyer and client if withdrawal from the representation requires court permission and the court withholds or denies that permission.

RULES: 1.2(c), 1.16(c)-(e), 8.4(d).

QUESTION:

1. May a lawyer limit representation of a client in a criminal case to representation for arraignment purposes only?

OPINION:

2. A union legal services plan regularly retains a lawyer to represent union members in criminal matters for arraignment purposes only. After arraignment, the legal services plan requires the union member to personally obtain counsel (either the original legal services plan attorney or some other private attorney) for the remainder of the criminal matter or, if the member cannot afford to retain counsel, to seek a court-appointed or legal aid attorney. Occasionally, however, a court will disregard the terms of the union's legal services plan and order a legal services plan attorney to continue representing the union member after arraignment, even if the member cannot afford the attorney's fees and the member does not personally retain the legal services plan's attorney.

A. Is limited representation ethically permissible?

3. The first question that arises is whether it is ethical for a lawyer to enter into a limited scope representation (in this case, through arraignment only) and then withdraw unless the client personally retains him or her.

4. The attorney-client relationship is generally contractual in nature, and the lawyer and client may ordinarily determine the scope of their relationship, but any contractual limitation on the scope of the lawyer's representation must be consistent with the New York Rules of Professional Conduct (the "Rules").

5. Limited representation is directly addressed in Rule 1.2(c) of the Rules of Professional Conduct, which provides as follows:

> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

6. Comments [6] and [6A] to Rule 1.2 are helpful in understanding this rule. Those Comments provide, in relevant part, as follows:

> [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client.
>
> [6A] In obtaining consent from the client, the lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded. In addition, the lawyer must disclose the reasonably foreseeable consequences of the limitation. In making such disclosure, the lawyer should explain that if the lawyer or the client determines during the representation that additional services outside the limited scope specified in the engagement are necessary or advisable to represent the client adequately, then the client may need to retain separate counsel, which could result in delay, additional expense, and complications.

7. Rule 1.2(c) had no direct equivalent in the former Disciplinary Rules, but this Committee issued an opinion on limited representation under the old Code of Professional Responsibility. That opinion, N.Y. State 604 (1989), is consistent with Rule 1.2(c) and its Comment and is useful in applying Rule 1.2(c) to the present inquiry.

8. In N.Y. State 604, we opined that a lawyer may limit the scope of a representation to the investigative and grand jury proceedings in a matter if three conditions are satisfied. First, the lawyer must obtain the client's agreement to the limitation after the lawyer has disclosed "all relevant circumstances," including: (i) the potential outcomes of the limited representation, (ii) the possibility that the client may need to promptly retain new counsel depending on the outcome of the limited representation, and (iii) any facts affecting the substantive rights of the client or the client's ability to retain replacement counsel. This condition parallels the "informed consent" requirement in Rule 1.2(c). Second, the scope of the representation must be sufficiently broad to allow the lawyer to render practical (*i.e.,* competent) service to the client. This condition matches the requirement in Rule 1.2(c) that the limitation must be "reasonable under the circumstances." Third, the lawyer's limited representation must not be prejudicial to the administration of justice (*e.g.*, it must not violate a court rule or unreasonably delay the court's calendar). This condition is today found in Rule 8.4(d) of the Rules of Professional Conduct, which prohibits a lawyer or law firm from engaging in "conduct that is prejudicial to the administration of justice."

9. Simila*r*ly, on the facts before us here, we believe that limiting the representation to arraignment pursuant to the union legal services plan is ethical provided that the lawyer complies with Rule 1.2(c) and Rule 8.4(d). We believe the lawyer can comply with those rules by satisfying the three conditions set out in N.Y. State 604: (a) the lawyer must obtain the client's consent after giving the client the information necessary to make an informed decision whether to agree to the limitation, (b) the limitation must be reasonable under the circumstances (*i.e.,* the scope of the representation must be sufficiently broad to enable the lawyer to render competent service), and (c) the limitation must not be prejudicial to the administration of justice.

10. As to the language in Rule 1.2(c) concerning notice to the tribunal and/or opposing counsel "where necessary," we think notice of the limited representation is "necessary" under Rule 1.2(c) only

if a court rule requires such notice, and we lack jurisdiction to interpret court rules. *See generally* N.Y. County Lawyers 742 (2010) (interpreting the notice clause of Rule 1.2(c) in the context of "ghostwriting").

B. Is withdrawal after arraignment ethically permissible?

11. The second question that arises is whether the union legal services plan lawyer may freely withdraw following arraignment if the client cannot afford to pay the lawyer's fees and does not enter into a new retainer agreement with the lawyer providing for post-arraignment representation.

12. Ordinarily, if a lawyer has obtained, in advance, the client's knowing and free assent to terminate the representation upon the occurrence of certain specified events, then the lawyer may withdraw when those events occur. *See* Rule 1.16(c)(10) ("Except as stated in paragraph (d), a lawyer may withdraw from representing a client when . . . the client knowingly and freely assents to termination of the employment"). In addition, N.Y. State 604, while not directly discussing advance assent to withdrawal, indicates that a lawyer may ethically agree with a client to terminate a representation after "a discreet stage of a matter," and arraignment is such a "discreet stage."

13. Of course, there are some limitations on advance consent to withdrawal. We expressed some of those limitations in N.Y. State 719 (1999), where a domestic relations lawyer's retainer agreement said that the lawyer would have "good cause" to withdraw if (among other things) the client failed to follow the lawyer's advice, failed to approve an expert recommended by the lawyer, failed to pay any bill within thirty days, or failed to approve a change in the lawyer's hourly rate. We concluded that these grounds for withdrawal were not authorized under DR 2-110 (the predecessor to Rule 1.16), and that the withdrawal provisions were therefore improper under the general principle that a retainer agreement "may not authorize the attorney to withdraw from the representation under circumstances in which withdrawal would be impermissible under DR 2-110." We also said that the provision in DR 2-110 permitting withdrawal when a client "'knowingly and freely assents to termination' . . . does not authorize an agreement *in advance* by which the client assents to termination upon some future occurrence that is unrelated to achieving the objectives of the representation." (Emphasis in original.)

14. We applied the reasoning of N.Y. State 719 in N.Y. State 805 (2007). There we concluded that a retainer agreement "may not ethically provide for a client's advance assent to a lawyer's withdrawal from employment based on the client's failure to pay agreed legal fees and expenses," but could "advise the client of the lawyer's right to withdraw, subject to court approval where applicable, if the client 'deliberately disregards' a payment obligation."

15. N.Y. State 719 and N.Y. State 805 are distinguishable from the situation here. Both of those opinions rested on a lawyer's attempts to gain through a retainer agreement the right to withdraw on grounds not set forth in the withdrawal rule (then DR 2-110, now Rule 1.16). The situation before us now, in contrast, is more like the situation in N.Y. State 604, which approved a retainer agreement in which the client agreed that the lawyer could terminate a representation after "a discreet stage of a matter." That describes the facts at hand. Also, the "objectives of the representation" (providing counsel for the client at arraignment, which can occur on short notice) have been met here. Accordingly, our reasoning in N.Y. State 719 and N.Y. State 805 do not prohibit a retainer agreement in which a lawyer obtains a client's informed advance consent for the lawyer to withdraw after arraignment. By

representing the client through arraignment, the lawyer has completed the representation that the client expected the lawyer to undertake.

16. However, even if a lawyer validly obtains a client's informed advance consent to withdraw after a discrete stage (such as after arraignment), the lawyer must also comply with Rule 1.16(d), which provides: "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission." As N.Y. State 604 observed, the Appellate Division rules in all four departments require both assigned and retained counsel to represent a defendant in trial court "until the action or proceeding has been terminated" in that court. Those rules remain in effect today. *See* 22 NYCRR § 606.5(a)(1) (First Department); 22 NYCRR § 671.2 (Second Department); 22 NYCRR § 821.1(a) (Third Department); 22 NYCRR § 1022.11(a) (Fourth Department). Although interpreting the rules of the Appellate Divisions is beyond the jurisdiction of this Committee, we can confidently observe that permission to withdraw from the representation is likely to be required with respect to representation in a criminal matter once the lawyer has entered an appearance on behalf of a client for purposes of an arraignment, whether or not the client is willing or able to pay the attorney for future stages of the representation.

17. Rule 1.16(d) also provides: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Thus, even if the original limitation on the representation was ethical, and even if the lawyer has good cause for terminating the representation because the client knowingly and freely assented, in advance, to the lawyer's withdrawal after arraignment, Rule 1.16(d) requires the lawyer to continue the representation if ordered to do so by the court. The court may take into account whether or not the client can afford to pay the lawyer's fees for continuing the representation after arraignment – that is up to the court – but if the court orders the lawyer to continue the representation, then Rule 1.16(d) requires the lawyer to continue the representation even if the client cannot pay for the representation.

18. Finally, we caution that even when a court permits the lawyer to withdraw from the representation of a criminal defendant at the end of arraignment, Rule 1.16(e) obligates the lawyer to "take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client. . . ." Rule 1.16(e) notes that these steps may include, among others, (i) "allowing time for the client to employ other counsel," (ii) "delivering to the client all papers and property to which the client is entitled," and (iii) "complying with applicable laws and rules." *Cf.* N.Y. State 604 ("it is not unethical for a lawyer . . . to terminate his or her services under the contract upon indictment, as long as there is enough time between the indictment and the trial date for the client to hire and prepare new counsel.").

CONCLUSION:

19. A lawyer may limit the scope of the lawyer's representation of a client provided that the lawyer complies with Rule 1.2(c) and Rule 8.4(d). A lawyer can comply with Rules 1.2(c) and 8.4(d) by satisfying three conditions: (a) the lawyer must obtain the client's consent after giving the client the information necessary to make an informed decision as to the limitation, (b) the scope of the representation must be reasonable under the circumstances, and (c) the limitation must not be prejudicial to the administration of justice. However, even if the initial limitation on the scope of the representation is permissible, a lawyer's ethical obligation to represent a client may extend beyond the initial limita-

tion if a court's permission to withdraw from the representation is required and the court denies permission. Finally, if the court does grant permission to withdraw, the lawyer must take steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client.

74-09

OPINION 857 (03/17/2011)

TOPIC: In-person distribution of announcements of law firm's name change.

DIGEST: Distribution of law firm's announcements by a lawyer's employee must not involve in-person contact with recipients, or the distribution will constitute forbidden in-person solicitation.

RULES: 7.1, 7.3, 7.5

QUESTION:

1. May an attorney have her employee personally distribute professional announcements to nearby residences?

OPINION:

2. The inquiring attorney has changed the name of her law firm and wishes to have her paralegal personally deliver an announcement of the renaming to residences near her office.

3. Rule 7.5(a)(2) of the New York Rules of Professional Conduct (the "Rules") permits lawyers to use professional notices announcing a law firm's name change, provided the announcements comply with Rule 7.1 ("Advertising"). However, the methods of distributing such announcements are subject to some restrictions. In particular, Rule 7.3(a) prohibits lawyers from engaging in solicitation by "in-person or telephone contact" unless the recipient is "a close friend, relative, former client or existing client." Rule 7.3(b) defines "solicitation" to mean, in pertinent part:

> any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group or recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.

4. This Committee addressed the issue of the hand-delivery of advertising in N.Y. State 659 (1994). There, the inquiring attorney asked whether he could allow his law firm's advertisement to be included in an "information package" to be distributed by a car dealer to car buyers. The Committee concluded that hand-delivery of the packet to car buyers by the dealer would not transform the distribution into a prohibited in-person solicitation by the lawyer. We said:

> The Committee . . . does not perceive any substantive difference between sending an advertisement through the mail and having it handed to a recipient as part of an information package. It is presumed that the delivery of the information package will not be made by the attorney (and thus would not involve in person solicitation of a prospective client by the attorney), and that the car dealer or his employee will deliver the information package but not discuss the advertisement with the purchaser.

5. The Committee's conclusion in N.Y. State 659 that the car dealer's personal distribution of the lawyer's advertisement was not a forbidden in-person solicitation rested on the facts that the car dealer was not being paid by the attorney and would not discuss the advertisement with car buyers.

Here, however, the proposed delivery agent is the attorney's own paid employee and agent (her paralegal), so N.Y. State 659 is not dispositive.

6. The lawyer cannot have her paralegal do what the lawyer herself is forbidden to do, so the propriety of the proposed distribution by the lawyer's paralegal rests on whether the paralegal's hand-delivery of the announcement constitutes in-person solicitation in violation of Rule 7.3(a). *See* Rule 8.4(a) ("A lawyer or law firm shall not (a) violate or attempt to violate the Rules of Professional Conduct . . . through the acts of another").

7. The inquirer contends that the delivery would not meet the definition of "solicitation" in Rule 7.3(b) because the announcement is not an "advertisement" within the meaning of Rule 1.0(a). It is not an advertisement or solicitation, the inquirer says, because its "primary purpose" is not "pecuniary gain." We reject that contention. The inquirer is not offering her services pro bono, and the primary motive is surely the hope that once the recipients of the announcement know she is in the neighborhood, some of them will retain her. *See* Rule 7.3, Comment [2] (contrasting a lawyer's advertisement "that has as a significant motive for the lawyer to make money" with "a public-interest lawyer offering pro bono services.") We therefore conclude that the name-change announcement is an "advertisement" within the meaning of Rule 1.0(a) because it is a communication by the inquiring lawyer about her firm whose "primary purpose . . . is the retention of the lawyer or law firm." Similarly, we conclude that the announcement is a "solicitation" within the meaning of Rule 7.3(b) because "a significant motive . . . is pecuniary gain" and it is "directed to, or targeted at," a specific recipient or recipients. (Comment [3] to Rule 7.3 notes that any advertisement that is made by in-person or telephone contact is "directed to or targeted at" a specific recipient or recipients.)

8. Given that the name-change announcement is a solicitation, we see two possibilities. On one hand, if the inquirer proposes to have her paralegal deliver these announcements in a manner that will bring the paralegal into personal contact with the residents, the Committee concludes that the delivery will constitute an impermissible in-person solicitation (unless the recipients are close friends, relatives, former clients, or existing clients). On the other hand, if the paralegal will simply leave a name-change announcement at a residence – for example, by hanging the announcement on a door handle or placing it on a porch – and if the paralegal has no personal contact with the recipients, then the paralegal's delivery of the announcements will not constitute forbidden in-person solicitation. The ban in Rule 7.3(a) is not against all solicitation – it is only against in-person solicitation. The inquirer must avoid in-person solicitation through her paralegal.

9. Rule 7.3 imposes various additional requirements and restrictions on any solicitation directed to a recipient in New York State, but the inquirer has not raised any issues concerning those requirements and restrictions, so we do not address them. We assume that the inquirer will study and abide by all applicable provisions of Rule 7.3.

CONCLUSION:

10. Provided the announcements are delivered without any personal contact between the inquirer's paralegal and the recipients, provided the announcements conform to the requirements of Rule 7.1, and provided the inquirer abides by all applicable requirements and restrictions of Rule 7.3, the inquirer may cause her paralegal to deliver the name-change announcements to residences.
(43-10)

OPINION 858 (03/17/2011)

TOPIC: Conditioning in-house attorney's employment on execution of a confidentiality agreement.

DIGEST: A general counsel licensed in New York may ethically require staff attorneys to sign a confidentiality agreement that arguably extends staff attorney confidentiality obligations, after their employment ends, to information not otherwise protected as confidential information under the New York Rules of Professional Conduct, if the agreement makes plain that such confidentiality obligations do not restrict the staff attorney's right to practice law after termination and do not expand the scope of the staff attorney's duty of confidentiality under the Rules.

RULES: 1.6(a), 1.9(c), 5.6(a)

QUESTION:

1. As a condition of an in-house staff attorney's employment or continued employment, may a New York lawyer acting as in-house general counsel for a New York not-for-profit corporation require an in-house staff attorney to enter into an employee confidentiality agreement which (1) prohibits the employee-attorney from disclosing information deemed confidential, including information as to the employer's trade secrets and business and regulatory activities; and (2) contains a "savings clause" providing that the restrictive covenant shall be interpreted consistently with applicable rules of professional conduct and will not restrict the lawyer's right to practice law following employment?

FACTS:

2. The inquiring attorney, a New York attorney, is the in-house general counsel of a New York not-for-profit corporation (the "Corporation"). The Corporation has regional offices across the country, including in New York, and it employs in-house staff attorneys who are members of the New York bar. This inquiring attorney wants to require the Corporation's in-house attorneys to enter into the same confidentiality agreement imposed on all other current or prospective employees as a condition of employment or continued employment. The proposed confidentiality agreement is a form agreement intended to have effect in multiple jurisdictions.

3. The Corporation provides regulatory and business services and engages in research and marketing activities. These services and activities involve highly sensitive information. The information that the Corporation seeks to keep confidential may relate to the Corporation and may also relate to its customers, vendors and members.

4. The proposed confidentiality agreement purports to bar employees from using or disclosing information (except as required by the scope of the employee's employment duties) that the Corporation has delineated as confidential. The proposed agreement provides that these confidentiality obligations survive termination of employment – indefinitely as to all trade secrets, and for two years with respect to any other confidential information. However, the proposed confidentiality agreement sets forth exclusions for previously acquired information, public knowledge, or information available from other sources, and sets forth an exception for compliance with court orders.

5. The proposed confidentiality agreement also contains a "savings clause" applicable only to licensed attorneys. The savings clause expressly limits the agreement's confidentiality restrictions by providing that the agreement "shall be interpreted to be consistent with" the applicable rules of professional conduct or ethics rules and that it "shall not expand the scope" of an attorney's duties to maintain privileged and confidential information under any such rules.[2]

OPINION:

6. The central question here is whether the proposed confidentiality agreement will restrict an in-house lawyer's right to practice law following employment. Rule 5.6(a)(1) of the New York Rules of Professional Conduct (the "Rules") prohibits lawyers from participating in, offering or making agreements that restrict the right of a lawyer to practice law upon the termination of an employment relationship. Specifically, Rule 5.6(a)(1) provides as follows:

> (a) A lawyer shall not participate in offering or making:
>
> > (1) a partnership, shareholder, operating, employment, or other similar type of agreement that ***restricts the right of a lawyer to practice after termination of the relationship***, except an agreement concerning benefits upon retirement. . . . [Emphasis added.]

7. The main purposes of Rule 5.6(a)(1) are to protect the ability of clients to choose their counsel freely and to protect the ability of counsel to choose their clients freely. *See* Rule 5.6, cmt. [1] ("An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."); N.Y. State 129 (1970) ("A covenant restricting a lawyer after leaving the partnership from fully practicing his profession appears . . . to be an unwarranted restriction on the right of the lawyer to choose his clients in the event they seek his services and an unwarranted restriction on the right of the client to choose the lawyer he wishes to represent him"); *see also Cohen v. Lord, Day & Lord,* 75 N.Y.2d. 95, 98 (1989) ("The purpose of the rule is to ensure that the public has the choice of counsel"). Agreements prohibited by Rule 5.6 have the practical effect of restricting the pool of available attorneys and thus limiting a client's choice of legal counsel and a lawyer's autonomy in accepting new engagements.

8. When one New York lawyer seeks to impose a confidentiality provision on another New York lawyer as a condition of employment, a pivotal question is whether the confidentiality provision defines protected information more expansively than Rule 1.6(a), which itself is quite broad. Rule 1.6(a) provides, in pertinent part, as follows:

> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-cli-

2 The proposed agreement that we address in this inquiry provides:

> If I am a licensed attorney, this confidentiality provision is not meant to restrict my right to practice law, after I cease to be an employee, in violation of the applicable rules of professional conduct (such as Rule 5.6 or its equivalent), and the confidentiality provision shall be interpreted to be consistent with all such rules. The confidentiality provision shall not expand the scope of my duty to maintain privileged or confidential information under Rule 1.6, Rule 1.9, or other applicable rules of professional conduct.

> ent privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

9. A New York attorney's continuing obligation of confidentiality after termination of employment is almost equally broad, though not unlimited. Rule 1.9(c) provides that a lawyer who has formerly represented a client in a matter, or whose present or former firm has formerly represented a client in a matter, shall not thereafter:

> (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
>
> (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

10. If the proposed confidentiality agreement protects more information than Rules 1.6(a) and 1.9(c), a New York lawyer who enforces the agreement after an in-house legal employee terminates employment may be violating Rule 5.6(a)(1) by restricting the former in-house lawyer's practice of law. However, as a practical matter, because the definition of confidential information in Rule 1.6 is so broad, most contractual confidentiality provisions are not likely to exceed the scope of a New York lawyer's confidentiality obligations under the Rules.

11. This Committee's prior opinions regarding restrictive covenants that affect competition, and the Committee's prior opinions regarding obligations that restrict a lawyer's right to practice law, arose in the quite different contexts of partnership agreements and settlement agreements. *See* N.Y. State 129 (1970) (lawyer must not "be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of the lawyer to practice law after the termination of the relationship created by the agreement"); N.Y. State 730 (2000) (lawyers must not enter into a settlement agreement whose overly-broad confidentiality provisions restrict the right of the lawyer to practice law). Thus, N.Y. State 129 and N.Y. State 730 do not control the present situation. Much more closely on point are New Jersey Opinion 708 (2006) ("it may be reasonable for a corporation to request its lawyers to sign a non-disclosure or confidentiality agreement, provided that it does not restrict in any way the lawyer's ability to practice law or seek to expand the confidential nature of information obtained by the in-house lawyer"); and Washington State Advisory Opinion 2100 (2005) (confidentiality provision that dealt specifically with a lawyer's post-employment activities unrelated to the practice of law did not violate Rule 5.6(a)).

12. In any event, the proposed confidentiality agreement in question contains a so-called "savings clause." This savings clause specifically states that, as applied to licensed attorneys, the agreement's provisions are not meant to restrict the employee's post-termination right to practice law in violation of the applicable rules of professional conduct or in violation of the ethics rules of the jurisdictions in which the attorney is licensed. The agreement also provides that it is to be interpreted consistently with all such rules and does not expand the duty to maintain confidentiality under those rules.

13. The effect of this "savings clause" is to make plain that, to the extent the limitations imposed by the proposed agreement appear to be more stringent than the Rules, the limitations in the agreement apply only to an attorney's use and disclosure of information with respect to the practice of law. Thus, even if the contractual confidentiality provision on its face might be construed to expand the scope of an attorney's confidentiality obligations beyond those provided by the Rules, the savings clause keeps the agreement within the confines of the Rules and renders further analysis under Rule 5.6 unnecessary. *See* Connecticut Informal Opinion 02-05 (2002) (deciding, in connection with a proposed employment agreement that would apply to lawyers, that a savings clause in the agreement "fairly vitiates ethical concerns over executing, procuring execution, and/or enforcement of the agreement while seeking to preserve legitimate non-ethical concerns").

14. We therefore determine that the proposed confidentiality agreement does not run afoul of Rule 5.6(a)(1). In making this determination, this Committee does not reach or imply any conclusion as to whether the confidentiality agreement is enforceable. However, we have noted that "an agreement restricting a lawyer's right to practice law may be enforceable even if it violates the disciplinary rule." N.Y. State 730 (2000) *(citing Feldman v. Minars*, 230 A.D.2d 356 (N.Y. 1st Dep't 1997)). Conversely, a contractual provision that passes ethical muster may be unenforceable. In either case, enforceability is a question of law beyond our jurisdiction.

CONCLUSION:

15. A general counsel who is a New York attorney may require in-house staff attorneys to sign a confidentiality agreement that might otherwise extend staff attorney confidentiality obligations, after the employment period, to information not otherwise protected as confidential information under the Rules, if the agreement makes plain that such confidentiality obligations do not restrict the former in-house attorney's right to practice law following employment and do not expand the scope of the attorney's duty of confidentiality under the Rules.

(2-11)

OPINION 859 (03/25/2011)

TOPIC: Part-time government attorneys: conflicts of interest, imputed conflicts, non-consentable conflicts.

DIGEST: A part-time Department of Social Services attorney's representation, in a criminal proceeding, of a private client who is also a respondent in unrelated child abuse and neglect proceedings brought by Social Services, creates an incurable conflict of interest that is imputed to the other members of the Social Services legal unit.

RULES: 1.0(f) & (h), 1.7, 1.8, 1.9, 1.10, 1.11.

FACTS:

1. A County's Department of Social Services ("Social Services") has a legal unit ("Legal Unit") that employs one full-time attorney (the inquirer) and one part-time attorney. The full-time attorney supervises the Legal Unit and has an office at Social Services. The part-time attorney is in private practice and does not have an office at Social Services. However, the part-time attorney frequently visits Social Services and its Legal Unit to retrieve and discuss files, to conference cases, and to obtain supplies.

2. Social Services brought a child neglect petition against an individual (the "Respondent"), and the Legal Unit assigned the case to the part-time attorney. Upon assignment, the part-time attorney realized that the Respondent is the part-time attorney's client in an "unrelated" local criminal proceeding.[3]

QUESTIONS:

3. These facts raise four related questions:

   a. May the part-time attorney represent the Respondent in the child neglect proceedings brought by Social Services?

   b. Would consent (waiver) by the Respondent (or Social Services) cure the conflict?

   c. If the conflict cannot be cured by consent, may the full-time attorney in the Legal Unit prosecute the child neglect proceedings?

   d. Would a screening process avoid or cure the conflict?

3 The inquirer has informed the Committee that the criminal proceeding is "unrelated." We accept that representation for purposes of this opinion and we understand it to mean that the criminal proceeding involves a different factual setting, although it is difficult to imagine how the existence of a criminal proceeding, and the facts relating to the criminal proceeding, would not be potentially germane to Social Services in prosecuting a neglect and abuse proceeding involving the Respondent. *Cf.* Rule 1.9, cmt. [3] (explaining meaning of "substantially related").

OPINION:

4. To represent Social Services against the Respondent, and simultaneously to act on behalf of the Respondent in an unrelated criminal proceeding, will involve the lawyer in representing "differing interests," a phrase defined by Rule 1.0(f) to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."

5. Rule 1.7(a)(1) of the New York Rules of Professional Conduct prohibits concurrent representations involving "differing interests," unless they are permitted by Rule 1.7(b). Rule 1.7(b) provides as follows:

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

6. The first of these four conditions – the lawyer's reasonable belief that the lawyer can competently and diligently represent each affected client – is the "by far the most important" element in the analysis. ROY D. SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 102 (West 2009 ed.). It determines whether a conflict can or cannot be cured by disclosure and consent. (A conflict is also non-consentable when a representation is "prohibited by law" or when the same lawyer is representing both sides in the same proceeding before a tribunal, but those situations are not presented here.) "The consentability language in Rule 1.7(b) is somewhat different but nevertheless essentially equivalent to language formerly found in DR 5-101(A) and DR 5-105(C)." *Id.*

7. This Committee has repeatedly opined that a part-time prosecutor who is also in private practice is barred from representing criminal defendants in any state court New York. *See* N.Y. State 544 (1982) ("attorney who has prosecutorial responsibilities as an incident of part-time employment by a local governmental unit is disqualified from the private practice of criminal law in all courts of the state.");. N.Y. State 657 (1993) (if part-time attorney for Town prosecutes traffic violations, then he is "precluded from representing, in criminal cases, a defendant in any court of the State," and consent cannot cure the conflict); N.Y. State 788 (2005) (part-time prosecutor may not act as criminal defense counsel in New York State courts, "risk of the public perceiving favoritism at the prosecutor's office precludes waiver of the conflict"). We have also said that a part-time prosecutor is barred from representing a criminal defendant in a civil matter and that the conflict "cannot be cured by consent." *Id.* Here we determine that the Department of Social Services attorney is subject to these principles.

8. In N.Y. State 788, a part-time prosecutor, as part of her private practice, had begun revising wills for a husband and wife when the lawyer learned that another attorney in the same prosecutor's office was bringing criminal charges against the husband. Applying the Disciplinary Rules then in effect in New York, the Committee concluded that (i) a prosecutor (including a part-time prosecutor) may not represent a private client in a civil matter if the private client is also a criminal defendant in a matter brought by the same prosecutor's office, (ii) the part-time prosecutor's conflict could not be cured by consent, and (iii) the conflict was imputed to the entire prosecutor's office. We advised the part-time prosecutor to withdraw from representing the client in the civil matter if withdrawal could be accomplished without prejudice to the client. However, if withdrawal would prejudice the civil client, and if the civil matter was "substantially related" to the criminal matter, then the entire prosecutor's office should be disqualified and a special prosecutor appointed. "If the criminal prosecution involves allegations of secreting assets, for example," we said, "an estate-planning representation might be substantially related to that prosecution, requiring appointment of a special prosecutor. If the alleged crime is a traffic offense, however, that is unlikely.")

9. N.Y. State 657 and 788 both noted that prosecutors have special responsibilities to the public that render the roles of prosecutor and defense counsel "inherently incompatible." In addition, there are significant risks of an actual or perceived miscarriage of justice because a prosecutor's office may show favoritism to persons who hire part-time prosecutors to represent them in other matters. *See also* N.Y. State 683 (1996) (a prosecutor's "special duty" to seek justice "imposes a responsibility on prosecutors not only to ensure the fairness of the process by which a criminal conviction is attained, but also to avoid the public perception that criminal proceedings are unfair.").

10. N.Y. State 800 (2006) dealt with a situation closer to the one here. A part-time prosecutor sought to represent indigent persons in Family Court matters. We held that "a part-time prosecutor is not precluded from accepting all assignments as court-appointed counsel in Family Court." Yet we also said that "[i]n specific types of cases and specific situations, including cases in which law enforcement personnel with whom the prosecutor works as a prosecutor are involved, and cases that are quasi-criminal in nature, the prosecutor is barred from accepting assignments." We emphasized that the attorney "must avoid all conflicts of interest, ensuring that neither the attorney's own interests nor the attorney's simultaneous work as a prosecutor preclude the attorney from exercising independent judgment on behalf of his or her clients . . . ."

11. N.Y. State 800 also focused on ways in which law enforcement matters may be intertwined with Family Court matters (including child protective proceedings, adoption, custody and visitation, support, family offense, guardianship, delinquency, paternity, persons in need of supervision (PINS), and foster care approval and review). We said:

> [V]irtually all types of proceedings heard by the Family Court are likely to have some involvement of law enforcement agencies or similar governmental entities. In neglect and abuse cases, for example, multiple government entities are often involved. The local child protective service investigates allegations and the county attorneys present ("prosecute") the case in the Family Court. Family offense cases by their nature pose a great risk of criminal charges being brought . . .

12. Therefore, the Committee concluded in N.Y. State 800 that the part-time prosecutor was barred from accepting assigned cases in three situations: (a) matters involving law enforcement personnel with whom the lawyer works (or has worked) as a part-time prosecutor; (b) juvenile delinquency proceedings; and (c) PINS proceedings. The Committee then singled out representation of respondent parents in abuse and neglect proceedings (*i.e.,* child protective proceedings) for "special mention," saying:

> In child protective proceedings, respondent parents are answering to charges from the government regarding their parenting. Ultimately, the parent could temporarily or permanently lose custody of the child as a result of this proceeding. Here, too, even if the government personnel charging the parents are not those with which the part-time prosecutor would be involved, a part-time prosecutor must be particularly sensitive to the appearance of impropriety that may arise from his or her attempting to appear adverse to authorities conducting proceedings very similar to those of a prosecutor.

13. The role of the Social Services attorney when prosecuting child abuse and neglect proceedings is comparable to the role of the D.A.'s office in criminal prosecutions. In both, the attorney represents the interests of the state in matters with grave consequences (incarceration in one, custody and parentage in the other). Like the D.A. in criminal prosecutions, the Social Services prosecutor has a special role that is "inherently incompatible" with the role of defense counsel. *See* N.Y. State 657 and N.Y. State 788.

14. The public can assume that individuals will be driven by great forces to do everything they can to avoid the consequences of a prosecution or a finding of child abuse and neglect. That urge may include – or so the public might believe – hiring a part-time Social Services attorney in an unrelated proceeding to secure an advantage in the child abuse and neglect case. This creates significant risks of an actual or perceived miscarriage of justice due to potential favoritism shown to persons who hire part-time prosecutors to represent them in other matters.

15. Moreover, the personnel with whom the part-time Social Services attorney will work in neglect and abuse proceedings will often include law enforcement personnel. *See* N.Y. State 800. Those same personnel may oppose the part-time Social Services attorney when representing the defendant in the criminal matter. In the criminal defense role, therefore, the part-time Social Services attorney might have to impeach the same law enforcement personnel on whom Social Services relies in abuse and neglect proceedings. Accordingly, a part-time Social Services attorney prosecuting an abuse and neglect case cannot "reasonably believe[]" that he or she will be able to "provide compe*te*nt and diligent representation to each affected client" within the meaning of Rule 1.7(b)(1).

16. Regarding our first and second questions, therefore, we conclude that the part-time attorney may not represent the Respondent in the child neglect proceedings brought by Social Services, and we further conclude that informed consent (waiver) by the Respondent or by Social Services (or by both) cannot cure the conflict.

17. That brings us to our third question: May the full-time Social Services attorney who works in the same office with the inquiring attorney prosecute the abuse and neglect case against the Respondent while the part-time attorney defends the Respondent in the "unrelated" criminal matter? We also

answer no to this question. Under Rule 1.10(a): "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein." The full-time and part-time Social Services attorneys are "associated in a firm" under Rule 1.10(a) because Rule 1.0(h) defines a "firm" to include "lawyers employed in . . . a government law office . . . ." This conclusion is consistent with N.Y. State 788, which reiterated our long-held view that a D.A.'s office must be treated as a "law firm" for purposes of imputation of conflicts.

18. Thus, the part-time lawyer's conflicts are imputed to the entire Social Services Legal Unit. The part-time Social Services attorney has access to information about the office and its cases. This access is comparable to the access enjoyed by a lawyer who is "of counsel" to a law firm. An of counsel lawyer's conflicts are imputed to all lawyers in the firm. *See* N.Y. State 773 (2004) (if lawyer who serves on municipal board is disqualified from a particular representation, the disqualification is imputed to a law firm with which that lawyer has an "of counsel" relationship). Therefore, under Rule 1.10(a), the part-time attorney's conflicts are imputed to all attorneys in the Social Services Legal Unit.

19. Conversely, the part-time attorney's conflicts of interest arising from government service are imputed to (and therefore disqualify) the part-time attorney's partners and associates in private practice. *See* N.Y. State 450 (1976) (if part-time town attorney is disqualified, then his firm is also disqualified from representing private clients in matters where clients may need building permits, zoning variances, etc., from the town).

20. Turning to our fourth question, can a screening mechanism prevent imputation of the conflict? No. Under Rule 1.11(b)(1), screening mechanisms apply only to *former* government employees moving to private practice. Screening cannot prevent imputation of a *current* employee's conflicts to the other attorneys in the government office.

21. However, screening is not the only solution. If the part-time attorney stops working at Social Services, then the imputation will cease. Social Services may then continue prosecuting the parents for abuse and neglect as long as Social Services lawyers do not possess confidential information about the Respondent that the part-time attorney represents in private practice. *See* Rule 1.10(b) (when a lawyer terminates an association with a firm, the firm may not oppose any client of the terminated lawyer if any lawyer in the firm still has confidential information about the terminated lawyer's client).

22. Alternatively, if the part-time attorney can and does ethically withdraw from representing the Respondent in the unrelated criminal matter, Social Services may continue to prosecute the Respondent (who would now be the part-time attorney's former client) for abuse and neglect. Since the facts state that the criminal matter is not substantially related (and is indeed unrelated) to the abuse and neglect proceedings, Social Services would not need the consent of the part-time attorney's former client pursuant to Rule 1.9. *See* N.Y. State 788 (D.A.'s office may continue prosecuting former client of part-time D.A. as long as criminal prosecution is not substantially related to matter in which part-time prosecutor represented defendant in private practice.)

CONCLUSION:

23. The part-time Social Services attorney may not represent the Respondent in abuse and neglect proceedings brought by Social Services. The full-time attorney is disqualified from representing Social Services in the child neglect and abuse proceedings against the Respondent while the part-time attorney is representing the Respondent in the unrelated criminal matter. These conflicts of interest are not curable by consent or by screening, but may be cured if the part-time attorney either terminates his association with Social Services or withdraws from representing the Respondent in the unrelated criminal matter.

(14-10)

OPINION 860 (04/26/2011)

TOPIC: Compensation of nonlawyer "Business Developer" by law firm with grant writing business.

DIGEST: If grant writing involves legal services, then Rule 5.4(a) prohibits a law firm from paying a nonlawyer Business Developer a percentage of grants awarded to clients, and the Business Developer may not advertise or solicit grant writing business in violation of Rules 7.1, 7.2, and 7.3.

If grant writing does not involve legal services, but the law firm also provides legal services to grant writing clients, then the law firm must determine if the legal services are "distinct" from the nonlegal grant writing services. If the legal and nonlegal services are not distinct, then the Rules of Professional Conduct apply to both the legal and nonlegal services. If they are distinct and the law firm gives grant writing clients the written disclaimer set forth in Rule 5.7(a)(4), then Rules governing advertising, solicitation, and compensation will not apply to the grant writing services (but Rules not dependent on an attorney-client relationship will still apply).

RULES: 5.4(a), 5.5, 5.7(a), 7.1, 7.2, 7.3, 8.4.

QUESTION:

1. A law firm assists municipal and not-for-profit clients in applying for competitive grants. (We use the term "client" in this opinion to mean the same thing as "customer" – the term "client" does not imply that an attorney-client relationship exists.) The law firm poses a series of related questions:

2. a. May the law firm hire a nonlawyer "Business Developer" to help attract new clients for the law firm's grant writing services?

   b. If so, may the law firm pay the Business Developer a percentage of grants awarded to clients that the Business Developer brought to the firm? (The Business Developer would not prepare grant applications.)

   c. Does it make a difference whether the Business Developer is an independent contractor rather than an employee?

   d. Does it matter whether grant writing services are legal services or nonlegal services?

OPINION:

3. The inquiring law firm has a number of municipal and not-for-profit clients who have signed retainer letters engaging the law firm's services in connection with applying for grants. (We refer to these services as "grant writing services.") When the law firm identifies a grant opportunity, it contacts clients who have signed retainer letters and brings the grant opportunity to their attention. If a client wishes to pursue the grant opportunity, the client passes a resolution to pursue it, after which the law firm writes the grant application. The law firm may be compensated on either an hourly basis or on a contingent fee basis.

Are Grant Writing Services "Legal Services"?

4. The initial question raised by the inquiry is whether the law firm's grant writing services are legal services, nonlegal services, or a combination of the two.

5. Comment [2] to Rule 5.5 of the New York Rules of Professional Conduct (the "Rules"), which deals with the unauthorized practice of law, states: "The definition of the 'practice of law' is established by law and varies from one jurisdiction to another." We do not render opinions on matters of law (and defining unauthorized practice is a matter of law), but we note that Ethical Consideration 3-5 of the former Code of Professional Responsibility gave the following helpful guidance: "Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client . . . ."

6. A definition of "nonlegal services," on the other hand, is expressly contained in the Rules of Professional Conduct. Rule 5.7 provides: "For purposes of this Rule, 'nonlegal services' shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." This definition begs the question of what constitutes unauthorized practice of law, but it seems likely that grant writing services may be performed without giving legal advice. If that is the case, then the grant writing services at issue here would constitute nonlegal services – but since we lack jurisdiction to say definitively whether the grant writing services are legal services or nonlegal services, our opinion will explore the consequences of both determinations.

Consequences If Grant Writing Services *Are* Legal Services

7. If the grant writing services *are* legal services, then the Rules would prohibit the law firm from soliciting grant writing business in person or by telephone contact from persons other than close friends, relatives, existing clients, and former clients – *see* Rule 7.3 – and the law firm would be prohibited from violating this Rule "through the acts of another," such as a Business Developer – *see* Rule 8.4(a).

8. Moreover, if grant writing services are legal services, then paying the Business Developer a percentage of the grant awards would violate Rule 5.4(a) (which bars a lawyer from sharing legal fees with a nonlawyer). This would be true whether the Business Developer is an employee of the law firm or a non-employee agent (*i.e.,* an independent contractor). *See* N.Y. State 565 (1984) (paying marketing and public relations firms a commission or percentage of fees from clients the firms obtained would be an improper division of fees with a nonlawyer).

9. However, despite the general prohibition in Rule 7.2(a) on compensating a person to recommend clients, the law firm could hire a nonlawyer Business Developer to engage in advertising and solicitation activities in which lawyers themselves could ethically engage. *See* Rule 7.2, cmt. [1] (a lawyer may "compensate employees, agents and vendors who are engaged to provide marketing or client development services"). For example, the Business Developer, like the lawyers in the firm, could develop printed or web-based marketing materials and could solicit grant writing business in person or by telephone from the law firm's existing and former clients.

Consequences If Grant Writing Services *Are Not* Legal Services

10. If grant writing services *are not* legal services, we need to apply Rule 5.7 ("Responsibilities Regarding Nonlegal Services"). That rule applies in two situations that might arise in the circumstances of this inquiry.

11. Rule 5.7(a)(1) applies where (i) the law firm simultaneously provides both legal and nonlegal services to a client, and (ii) the legal and nonlegal services are "not distinct" from each other – for example, where the law firm provides both grant writing services and tax advice or other legal services related to the grant application.

12. Rule 5.7(a)(2) applies where (i) the law firm simultaneously provides both legal and nonlegal services to a client, but (ii) the legal and nonlegal services *are* "distinct" from each other – for example, where the law firm represents the client in a tort suit unrelated to the grant application. In such cases, a question arises whether the client receiving the nonlegal services mistakenly believes that they are legal services because they are being delivered by a law firm. Rule 5.7(a)(4) addresses this question, stating:

> For purposes of paragraph (a)(2) . . . it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person in writing that the services are not legal services and that the protection of a lawyer-client relationship does not exist with respect to the nonlegal services. . . .

Thus, Rule 5.7(a)(2) requires the law firm to answer two questions – (i) is the firm providing both legal and nonlegal services, and (ii) if so, are the two distinct?

13. Whether the law firm is providing both legal and nonlegal services is a question of fact. The main question is whether the law firm is giving legal advice to a client that is also a grant writing client. As we noted in N.Y. State 832 (2009), even when a nonlawyer could provide a "nonlegal" service without engaging in the unauthorized practice of law, if a law firm in fact provides legal advice in connection with a nonlegal service, then the law firm would be providing legal services as well as nonlegal services.

Are the Legal and Nonlegal Services "Distinct"?

14. If the law firm is providing both legal and nonlegal services to the same client, then the applicability of the Rules of Professional Conduct depends on whether the legal and nonlegal services are "distinct" from each other. If they *are not* distinct, then the Rules of Professional Conduct apply to both the legal and the nonlegal services. Rule 5.7(a)(1). If they *are* distinct, then the Rules do not apply to the nonlegal services, *unless* "the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship." Rule 5.7(a)(2).

15. The question whether the nonlegal services are "distinct" is easier to answer when the legal and nonlegal services are provided by two different entities (*i.e.,* the law firm provides only legal services and a separate entity provides the nonlegal services). Where the law firm itself provides both legal and the nonlegal services, however — as the inquiring firm proposes here – clients may have dif-

ficulty distinguishing between the two. If the law firm's legal advice is related to the law firm's provision of grant writing services, we think the legal and nonlegal services are "not distinct." For example, if the law firm writes a grant and also advises the grant writing client regarding the legal conditions of the grant or the tax implications of obtaining the grant, the line between the legal and nonlegal services may be far from distinct.

16. Even if a separate entity (rather than the law firm itself) provides the nonlegal services, client confusion remains a concern if the separate nonlegal entity provides the nonlegal services from the law firm's own offices because the client is aware of the law firm's status as a law firm. *Cf.* N.Y. State 832 (2009) (risk of confusion when attorney's status as a lawyer is visible to the public). In that case, the law firm must either give the disclaimer set forth in Rule 5.7(a)(4) or abide by the Rules of Professional Conduct with respect to the nonlegal services.

What If the Law Firm Provides No Legal Services to the Client?

17. If grant writing services are not legal services, then another possibility is that the law firm may provide only grant writing services and provide no legal advice to a client, either in connection with the grant writing services or in unrelated matters. In that case, the law firm could hire and pay the Business Developer on terms that would not be permitted by the Rules if the law firm were also performing legal services for the client.

18. However, even if the law firm does not provide any legal advice to a grant writing client, confusion may arise. If the law firm provides the grant writing services out of its own offices, a substantial risk arises that the client may be misled as to whether an attorney-client relationship exists. As explained in Comment [1] to Rule 5.7: "The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services when that may not be the case." To avoid this confusion, the lawyer should give the grant writing client the written disclaimer suggested by Rule 5.7(a)(4) (quoted in ¶ 10 above). The disclaimer would explain that the grant writing services are not legal services and that the protection of an attorney-client relationship does not exist with respect to those services. *See* N.Y. State 832.

19. Even if the Rules on advertising, solicitation, and compensation do not apply to the grant writing services because the law firm is not providing legal services to the client and has given the disclaimer set out in Rule 5.7(a)(4), the law firm would remain subject to all Rules that do not depend on the existence of a legal representation or an attorney-client relationship. *See* Rule 5.7, cmt. [4]. For example, the law firm could not engage in illegal, dishonest, fraudulent or deceptive conduct, and could not state or imply an ability to influence a public official improperly or to achieve results using means that violate the Rules or other law. *See* Rule 8.4(c), (e). The law firm also would be required to provide appropriate supervision of nonlawyers who work for the law firm. *See* Rule 5.3.

CONCLUSION:

20. If grant writing involves legal services, then Rule 5.4(a) prohibits a law firm from compensating a nonlawyer Business Developer (whether an employee or outside contractor) by paying a per-

centage of grants awarded to clients. Moreover, the Business Developer may not advertise or solicit business in violation of Rules 7.1, 7.2, and 7.3.

21. If grant writing does not involve legal services, but the law firm also provides legal services to grant writing clients, then the law firm must determine whether the legal and nonlegal services are "distinct" from each other within the meaning of Rule 5.7. If they are "not distinct," then the Rules apply to both the legal and nonlegal services, so the activities and compensation of the Business Developer will be subject to Rules 5.4(a), 7.1, 7.2, and 7.3.

22. If the law firm provides "distinct" legal and nonlegal services – or if it provides only nonlegal services – to grant writing clients, and if the law firm gives grant writing clients the written disclaimer set forth in Rule 5.7(a)(4), then the Rules governing advertising, solicitation, and compensation do not apply to the grant writing services. In that case, the law firm may pay a Business Developer on terms that would not otherwise be permitted by the Rules – but Rules not dependent on the existence of a legal representation or an attorney-client relationship will still apply to the law firm.

(7-10)

OPINION 861 (04/29/2011)

TOPIC: Name and ownership of the New York office of a law firm

DIGEST: The New York office of a law firm cannot operate under a trade name, nor can it operate under a name that does not include the name of any current or deceased partner or a name that combines the name of a current or deceased partner with a trade name. The New York office of a law firm operating as a PLLC may have as one of its owners another PLLC located outside New York so long as all of the owners of the out-of-state PLLC are attorneys and all legal fees generated by the out-of-state PLLC are distributed only to attorneys. A lawyer admitted in New York and another jurisdiction that permits a law firm to practice under a trade name may be of counsel to a firm with a trade name.

RULES: 5.4, 7.5(b), 8.5

FACTS:

1. The inquirer is admitted to the New York bar and is of counsel to a law firm that currently operates in State X. The law firm has asked the inquirer to open a New York office of the firm. The firm's name in State X is the XYZ Law Group, where "X," "Y," and "Z" are the first letters of the firm's practice areas.

QUESTIONS:

2. These facts raise four distinct questions:

   a. May the New York office of a law firm ethically operate under the name XYZ Law Group where "X," "Y," and "Z" are the first letters of the firm's practice areas?

   b. May the New York office of a law firm ethically operate under the name Doe XYZ Law Group where Doe is the name of a New York-admitted lawyer who is of counsel to the firm?

   c. May a New York firm that operates as a PLLC have an out-of-state PLLC as an owner?

   d. May a New York lawyer be of counsel to an out-of-state firm that is permitted to operate under a trade name?

OPINION:

Question (a): May a law firm ethically operate in New York under the name XYZ Law Group where "X," "Y," and "Z" are the first letters of the firm's practice areas?

3. The first question is answered by Rule 7.5(b) of the New York Rules of Professional Conduct, which provides:

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

> firm name containing names other than those of one or more lawyers in the firm . . . and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. . . . A lawyer or law firm may not include the name of a nonlawyer in its firm name . . . .

4. Although Rule 7.5(b) does not define "trade name," in N.Y. State 740 (2001), this Committee opined that "using a name that is not the legal name of one or more partners or former partners in the law firm constitutes use of a trade name." In N.Y. State 636 (1992), this committee concluded that a lawyer could not use a firm name that did not include the name of any attorneys associated with the firm, because doing so would be misleading. Thus, a New York firm could not operate under the name XYZ Law Group because XYZ Law Group, under these facts, is a trade name.

Question (b): May the New York office of a law firm ethically operate under the name Doe XYZ Law Group where Doe is the name of a New York-admitted lawyer who is of counsel to the firm?

5. The second question involves the use of the surname of a non-partner in the out-of-state firm coupled with the trade name of the out-of-state firm. In N.Y. State 732 (2000), this Committee opined that an attorney named X and a number of associates could practice under the name the X Law Group. That opinion followed N.Y. State 495 (1978), where this Committee opined that the Law Firm of John Doe could not operate a branch under the name "Law Firm of Richard Roe" where Richard Roe was not a partner in the John Doe law firm. We noted: "If there is no true relationship analogous to that of partners between the firm's stockholders and the lawyer who is intended to staff its branch office, the use of that lawyer's name for the branch office would be misleading. The relationship must be analogous to that of a true partnership and must include a genuine sharing of profits, liabilities and professional obligations." Thus the use of the name Doe XYZ Law Group (and the like) would be improper where Doe was not a partner of the firm.

6. Even if the attorney whose name was used as part of the law firm name was a partner in the firm and admitted to practice in New York, the New York office of the firm could not practice under the name Doe XYZ Law Group. Rule 7.5(b) also requires that the firm name not be misleading as to the identity of the lawyers practicing under such name. A trade name can be used as a motto that is used in conjunction with the name(s) of lawyer principals. *See* N.Y. State 636 (1992) (approving use of the term "The Will Store" in conjunction with names of the law firm's principals); *von Wiegen v. Committee on Professional Standards*, 63 N.Y.2d 163 (1984) (approving the use of "The Country Lawyer" as a motto in conjunction with the lawyer's name). Use of the trade name as part of the firm name, however, is misleading, since the public will have no idea as to what the letters refer.

Question (c): May a New York firm that operates as a PLLC have an out-of-state PLLC as an owner?

7. The third question involves ownership of one PLLC by another. Under the proposal made to the inquirer, the New York branch office of the XYZ Law Group would be set up as a New York PLLC. The XYZ Law Group operates as a PLLC in State X and would be an owner of the New York branch office.

8. Rule 5.4 of the New York Rules provides that "[a] lawyer or law firm may not share legal fees with a nonlawyer" (with exceptions not relevant here). The question is whether Rule 5.4 would prevent the PLLC located in State X from being an owner of the New York PLLC. So long as the PLLC in State X is owned entirely by attorneys[4] and all legal fees generated by the State X PLLC are distributed only to attorneys, there is no sharing legal fees with a nonlawyer within the meaning of Rule 5.4. In that case, the PLLC in State X could be an owner of the New York PLLC. (Whether the substantive law regarding PLLCs in New York or in State X allows one PLLC to own all or part of another PLLC is a question of law on which we express no opinion.)

Question (d): May a New York lawyer be of counsel to an out-of-state firm that is permitted to operate under a trade name?

9. The fourth question addresses whether a lawyer admitted in New York and in another jurisdiction that permits a law firm to practice under a trade name may be of counsel to a firm with a trade name even though the lawyer could not do so in New York. Rule 8.5(a) provides that a lawyer admitted to practice in New York is subject to the disciplinary authority of New York regardless of where the lawyer's conduct occurs. Rule 8.5(b)(2) provides, however, that "[i]f the lawyer is licensed to practice in [New York] and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices." Because the conduct—practicing with a firm that uses a trade name—principally occurs in the other jurisdiction, the applicable ethical rules would be those of the other jurisdiction. Assuming it is ethical to practice under a trade name in that jurisdiction (a question we do not have the jurisdiction to answer), the lawyer could do so.

CONCLUSION:

10. To summarize, we answer the four questions as follows:

(a) The New York office of a law firm may not ethically operate under a trade name.

(b) The New York office of a law firm may not operate under either a name that does not include the name of a current or deceased partner or a name that includes the name of a current or deceased partner combined with a trade name.

(c) A law firm operating as a PLLC in New York may have as one of its owners another PLLC operating in State X so long as all of the owners of the PLLC in State X are attorneys and all legal fees generated by the PLLC in State X are distributed only to attorneys.

(d) A lawyer admitted in New York and another jurisdiction that permits a law firm to practice under a trade name may be of counsel to a firm with a trade name.

(26-10)

4 By "attorney" we mean a person licensed to practice law in a US jurisdiction or in a jurisdiction determined upon inquiry to provide persons admitted or licensed to practice law with education, training and ethical standards comparable to those of American lawyers. *See* N.Y. State 806 (2007) (interpreting the predecessor to Rule 5.4, DR 2-107(A)).

OPINION 862 (05/10/2011)

TOPIC: Imputed conflict of interest in a public defender office

DIGEST: A part-time Assistant Public Defender cannot, in his private practice, represent a client that another full-time or part-time Assistant Public Defender in the same Public Defender office cannot represent because of a conflict of interest unless the conflict can be and is waived.

RULES: 1.0(h) & (p); 1.7, 1.9, 1.10(a) & (d); 7.2(b).

FACTS:

1. An attorney with a solo private practice located in County A is also a part-time Assistant Public Defender in the Public Defenders Office of County B. The County B Public Defenders Office includes five full-time Public Defenders and four part-time Assistant Public Defenders, two of whom are assigned to the Criminal Courts and two of whom are assigned to the Family Court in County B. The inquirer is one of the two part-time Assistant Public Defenders assigned to the Family Court.

2. When a lawyer in the County B Public Defenders Office has a conflict of interest in a criminal case, a common method of resolving the conflict is to ask the County B Criminal Courts to appoint an attorney from its Assigned Counsel list. The inquirer would like to be added, in his private practice capacity, to the County B Criminal Courts Assigned Counsel list. If he is added to that list, he would be assigned to represent criminal defendants in matters where another Assistant Public Defender (full-time or part-time) has a conflict of interest. However, the inquirer is uncertain whether the other Assistant Public Defender's conflict of interest would be imputed to him.

QUESTION:

3. May a part-time Assistant Public Defender in a county Public Defenders Office accept an assignment from the Criminal Courts of that county to represent a defendant when another full-time or part-time Assistant Public Defender in the same county Public Defenders Office cannot represent that defendant because of a conflict of interest?

OPINION:

4. The factual premise of this inquiry is that another Assistant Public Defender in the county Public Defenders Office has a disqualifying conflict of interest that prevents him from representing a particular client in the county's Criminal Court. We will assume for purposes of this opinion that the other Assistant Public Defender's conflict arises under one of three provisions: (i) it arises under Rule 1.7(a)(1) because of a conflict with another current client (*e.g.*, the Assistant Public Defender already represents a co-defendant in the same matter), or (ii) it arises under Rule 1.7(a)(2) because of the Assistant Public Defender's personal interests (*e.g.*, the Assistant Public Defender is related to the alleged crime victim), or (iii) it arises under Rule 1.9 because of a conflict with a former client (*e.g.*, the Assistant Public Defender would need to cross-examine a prosecution witness who is his former

client in a substantially related matter).[5] The question before us is whether any of those conflicts would also disqualify the other Assistant Public Defenders in the same office, including the inquirer. The answer depends on whether the conflict is imputed to the inquirer under the New York Rules of Professional Conduct (the "Rules") and, if so, whether the imputed conflict can be cured by consent.

A. Is the other Assistant Public Defender's conflict imputed?

5. To determine whether a conflict of interest is imputed, we look at New York's imputation rule, Rule 1.10(a), which provides as follows:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

6. We have assumed that the other Assistant Public Defender is "prohibited . . . by Rule 1.7, 1.8 or 1.9" from taking on the matter in question. Therefore, whether Rule 1.10(a) imputes the other Assistant Public Defender's conflict to the inquirer depends on whether the inquirer and the disqualified Assistant Public Defender are "associated" in a "firm."

7. Is the Public Defender's Office a "firm"? We conclude that it is. Rule 1.0(h) defines "firm" or "law firm" to include "lawyers employed in a qualified legal assistance organization." Rule 1.0(p), in turn, defines a "qualified legal assistance organization" to mean "an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof." A "public defender office . . . operated or sponsored by a government agency" is one of the four types expressly listed in Rule 7.2(b)(1)-(4). Thus, the attorneys in the inquirer's Public Defender Office constitute a "firm."

8. Is the inquirer "associated" in the firm (the Public Defender's Office) with the disqualified Assistant Public Defender? We conclude that he is. The phrase "associated" includes part-time attorneys as well as full-time attorneys. *See* N.Y. State 173 (1970) (part-time public defender cannot privately represent one of two co-defendants with conflicting interests where the other co-defendant is represented by the public defender office). The fact that the inquirer appears as a Public Defender only in Family Court rather than in the Criminal Courts does not change the result. The inquirer still is "associated" with the disqualified Assistant Public Defender in the same "firm" (the County B Public Defenders Office) even though his area of practice is different from that of the conflicted Assistant Public Defender. Rule 1.10(a) imputes conflicts to all lawyers in a firm, in all practice areas, not just to lawyers in the same department or practice area.

9. Therefore, under Rule 1.10(a), the other Assistant Public Defender's conflict is imputed to the inquirer. This result is consistent with our past opinions. *See, e.g.,* N.Y. State 592 (1988) and N.Y. State 462 (1977) (applying the imputation rule to all attorneys in a public defender office). Although

5 We recognize that conflicts could conceivably arise under other rules. For example, if the conflicted Assistant Public Defender is in the midst of negotiating media rights with the defendant with respect to the alleged crime, or if the conflicted Assistant Public Defender is a former prosecutor, or if the conflicted Assistant Public Defender witnessed the alleged crime, then a conflict could arise under Rule 1.8(d) (addressing media rights), or Rule 1.11 (governing conflicts for former government employees), or under Rule 3.7 (the advocate-witness rule). Conflicts of that type are relatively rare, however, and the inquirer did not mention any of them, so we will not address them in this opinion.

those opinions were decided under DR 5-105(D) of the former Code of Professional Responsibility, we continue to follow them because Rule 1.10(a) is nearly identical to DR 5-105(D).

B. Can the imputed conflict be waived?

10. Rule 1.10(d) provides an avenue for curing the inquirer's imputed conflict. Rule 1.10(d) provides: "A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7." Thus, if the inquirer can satisfy the conditions in Rule 1.7(b) for waiving conflicts of interest, then the inquirer's imputed conflict will be cured. To qualify to seek a waiver from the affected clients pursuant to Rule 1.10(d), a lawyer (here, the inquirer) must meet all of the following four conditions set forth in Rule 1.7(b):

> 1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> 2. the representation is not prohibited by law;
>
> 3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> 4. each affected client gives informed consent, confirmed in writing.

11. We will assume that the inquirer's representation would not be "prohibited by law" within the meaning of Rule 1.7(b)(2) and that the inquirer's representation would not involve the assertion of a claim by one client against another client in the same litigation within the meaning of Rule 1.7(b)(3). Therefore, the key to determining whether the conflict can be waived is whether the inquirer "reasonably believes" that he "will be able to provide competent and diligent representation" to the assigned client within the meaning of Rule 1.7(b)(1) despite the other Assistant Public Defender's conflict of interest, and whether informed consent to the conflict, confirmed in writing, can be obtained from the necessary client(s) or former client.

12. Whether the inquirer could reasonably believe that he "will be able to provide competent and diligent representation" to the client in question depends on all of the facts and circumstances. Since the inquirer has not yet been appointed to a case pursuant to the Assigned Counsel program, we do not have those facts and circumstances and cannot make a determination regarding Rule 1.7(b)(1). However, assuming that the imputed conflict is consentable, we can provide some general guidance about obtaining consent under Rule 1.7(b)(4).

13. To cure a conflict, Rule 1.7(b)(4) requires informed consent from "each affected client." Which clients are affected depends on why the conflict arises. If the imputed conflict arises under Rule 1.7(a)(1) because of another current client, then the inquirer (or some other attorney in the Public Defender's office) must obtain informed consent, confirmed in writing, from both the inquirer's assigned client and the conflicted Assistant Public Defender's current client. If the conflict arises under Rule 1.7(a)(2) because of the conflicted Assistant Public Defender's personal interests, then consent is required only from the inquirer's own assigned client, because no other client is affected. If the conflict arises under Rule 1.9 because of the conflicted Assistant Public Defender's former client,

then the inquirer must obtain consent from the conflicting former client. (Since the inquirer did not personally represent the former client, we assume that the inquirer does not personally possess any confidential information of the former client. If the inquirer were in possession of any of the former client's confidential information that has not become generally known, further analysis would be necessary.) In any case, each affected client's consent must be confirmed in writing. If all required consents are obtained and confirmed in writing, then the inquirer's disqualification by imputation will be cured and the inquirer may represent the assigned criminal defendant.

CONCLUSION:

14. A lawyer who is a part time Assistant Public Defender in a county Public Defender office may not agree to represent a criminal defendant when another full-time or part-time Assistant Public Defender in the same Public Defender Office is prohibited from representing that defendant because of a conflict of interest arising under Rule 1.7 or 1.9 unless the lawyer's imputed disqualification can be and is waived as provided in Rule 1.10(d).

(1-11)

OPINION 863 (05/10/2011)

TOPIC: Out-of-state lawyer's practice of immigration law in New York State; disclosing jurisdictional and practice area limitations on letterhead and business cards.

DIGEST: Whether a lawyer not admitted in New York may practice immigration law in New York is a question of law beyond the Committee's jurisdiction. If a lawyer may practice immigration law in New York, her letterhead and business cards must fairly disclose the jurisdictional and subject matter limitations on her practice.

RULES: 5.5, 7.1(a), 7.3, 7.5(a) & (d), 8.4(b), 8.5

QUESTIONS:

1. May a lawyer who is not admitted in New York State, but who is currently working at an immigration law firm within the state, practice law in New York State exclusively in immigration matters?

2. Assuming that the lawyer is permitted to engage in practice in New York State exclusively in immigration matters, must the lawyer's letterhead and business cards disclose jurisdictional and subject matter limitations on her practice?

OPINION:

3. The inquirer is licensed in Texas, but not New York. She works at an "immigration law firm" within New York State that "exclusively practice[s] immigration law." She inquires about her right to practice immigration law in New York and about the scope of her duty under Rule 7.5(d) to disclose the jurisdictional limitations on her practice on the firm letterhead, on her business card, and on her email signature block.

Question 1: May an Out-of-State Lawyer Practice Immigration Law in New York?

4. Whether an "out-of-state lawyer" may practice law in New York State is a question of law beyond the scope of the Committee's jurisdiction. N.Y. State 835 (2009). (We use the term "out-of-state lawyer" to mean a person who is not admitted to practice in New York but who is admitted to practice and in good standing in another U.S. jurisdiction.) As we observed in N.Y. State 835, the unauthorized practice of law in New York is governed by Judiciary Law §§ 476-a, 478 and 484. In particular, Judiciary Law § 478 provides that it is unlawful for a person not admitted in New York "to hold himself out to the public as being entitled to practice law . . . or advertise the title of lawyer."

5. Federal law provides that a member in good standing of the bar of the highest court of any state, who is not under suspension or otherwise restricted in his or her practice of law, may practice before a Federal Immigration Court. *See* 8 C.F.R. §§ 1001.1(f), 1292.1(a)(1). Whether these federal provisions permit a lawyer to engage in a limited practice of law in New York State without being admitted in New York is purely a question of law that is not answered by the New York Rules of Professional Conduct. Therefore, it is beyond our jurisdiction. N.Y. State 835.

6. Assuming the inquirer is permitted to "exclusively practice immigration law" in New York, the issue arises as to whether the New York Rules of Professional Conduct apply to her conduct within New York State. The inquirer assumes that the Rules do apply, but this is also a question of law beyond the scope of the Committee's jurisdiction. Rule 8.5(b)(2), which addresses the rules of disciplinary conduct that will be used to examine the inquirer's conduct, *i.e.,* conduct that is not "in connection with a proceeding in a court," refers only to lawyers admitted in New York State.

7. Although the inquirer is not admitted in New York, the New York Rules more than likely will govern her proposed conduct in New York State. The New York Rules of Professional Conduct specify that the Rules apply to lawyers who are not admitted in New York, but who offer to provide legal services in New York. *See* Rule 7.3(i) (provisions of Rule 7.3 governing solicitation "shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State."). Furthermore, Judiciary Law § 90(2) states that the Supreme Court "shall have the power and control over attorneys and counselors-at-law," thus broadly establishing judicial governance over the conduct of attorneys practicing within the State. *See also* N.Y. State 761 (2003), n.4 (noting broad applicability of New York Code under Appellate Division Rules and concluding that "Disciplinary Rules that are specifically applicable to law firms under the New York Code apply to firms with a New York office and at least one New York lawyer affiliated with the firm in that office").

8. New York courts have also noted that they retain the "inherent authority" to discipline attorneys for misconduct independent of any violations of New York's rules of conduct, which focus exclusively on prohibitions applicable to a "lawyer." *See In re Wong*, 275 A.D.2d 1, 710 N.Y.S.2d 57 (1st Dep't 2000) (interpreting similar provisions in prior Code of Professional Responsibility). In the end, however, whether the inquiring lawyer is subject to the jurisdiction of the New York courts and to the applicable rules governing the attorney's conduct are questions of law beyond the scope of the Committee's jurisdiction.

Question 2: How Must the Inquirer Describe Her Practice Limitations?

9. Assuming that the inquirer may engage in practice exclusively in immigration matters in New York State, must the lawyer's letterhead, business cards, and email signature block disclose jurisdictional and/or subject matter limitations on her practice? That question is addressed by Rules 7.1 and 7.5.

10. Rule 7.1(a)(1) prohibits a lawyer from using or disseminating any advertisement that "contains statements or claims that are false, deceptive or misleading." Rule 7.5(a) provides that a lawyer's professional cards and letterhead (among other things) must be "in accordance with Rule 7.1 . . . ." Rule 7.5(d) provides, in pertinent part, that when a law partnership practices in New York with lawyers licensed in different jurisdictions, "all enumerations of the members and associates of the firm on its letterhead and in other permissible listings [must] make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions."

11. The inquirer asks if she can satisfy those Rules by simply stating "Admitted in Texas" or if she must additionally note: "Practice limited solely to Immigration and Nationality Law."

12. Assuming the New York Rules apply to the inquirer's conduct, we believe that compliance with Rules 7.5(a) and 7.5(d) in these circumstances requires that the lawyer note on the firm letterhead where her name appears, and on her business cards, that (a) she is admitted to practice only in Texas, and (b) her practice in New York is limited solely to immigration matters. *See* New Jersey Supreme Court Committee on Unauthorized Practice of Law, Committee on Attorney Advertising, Opinion 44 (2008) (if an out-of-state attorney is practicing exclusively immigration law in New Jersey, "all communications (including the firm's letterhead, business cards, website, and advertising materials) must specifically state that the attorney is not licensed in New Jersey and that the attorney's practice is limited to immigration matters"); Pennsylvania Ethics Op. 2005-14 (2005) ("Rules 7.1 and 7.5b require that the inquirer note on all her letterhead, office signage, business cards and on/in any other publicity or advertising vehicles, that she is admitted only in the state to which she is licensed, and that her practice in Pennsylvania is strictly limited to Immigration and Naturalization").

13. For a lawyer in these circumstances to simply list that she is "Admitted in Texas" would not sufficiently "make clear the jurisdictional limitations" on the lawyer's practice as required by Rule 7.5(d). *See* ABA Informal Op. 777 (1965) (a legend such as "Admitted to Practice in New York" would be improper because "it would not negative the right (or admission) to practice in the District" of Columbia, where the lawyer was not admitted). The requirement that the inquirer list the state in which she is licensed is essential to enable a member of the public to ascertain if a lawyer is admitted in good standing. Without this information, it would be unduly burdensome for potential clients and others to ascertain whether the inquirer is in good standing.

14. In addition, we believe that it would be prudent (though not required by the Rules) for the inquirer to add that she is "not licensed in New York State" (or words to that effect). That limitation would avoid any possible confusion regarding whether the inquirer is or is not licensed in New York.

15. A lawyer's jurisdictional and subject matter limitations need not necessarily be included in an email signature block. If, however, the email constitutes an "advertisement" as defined in Rule 1.0(a), then it must comply with Rule 7.1(a). If it is also a "solicitation" under Rule 7.3(b) (defining certain types of advertising as "solicitation"), then it must also comply with Rule 7.3. Even if an email is not an advertisement (and thus also is not a solicitation), the lawyer must not state or imply through any communication that she is admitted to practice in New York. *See* Rule 8.4 (c) (prohibiting a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation").

CONCLUSION:

16. Whether a lawyer who is not admitted to practice law in New York State may engage in a practice within New York State exclusively limited to immigration law is purely a question of law that is not answered by the New York Rules of Professional Conduct and is therefore beyond our jurisdiction. Assuming the lawyer is permitted to practice exclusively immigration law in New York State, and assuming that the New York Rules govern the lawyer's conduct, then the lawyer must note on her letterhead and on her business cards that (a) she is admitted to practice only in Texas, and (b) her practice in New York is limited solely to immigration matters. Finally, even though the Rules do not require her to do so, the inquirer would be prudent to add that she is "not licensed in New York State" (or words to that effect).

(19-10)

OPINION 864 (05/10/2011)

TOPIC: Fee sharing and co-counsel arrangements with a lawyer not licensed in New York; disclosure in retainer and closing statements

DIGEST: A lawyer is ethically permitted to work on a personal injury case with an out-of-state lawyer and share legal fees with that lawyer if the arrangement complies with Rule 1.5(g).

RULES: 1.5(g), 5.1, 5.4(b), 5.5, 7.5(d).

QUESTION:

1. The inquirer, a New York lawyer who desires to works on a personal injury case in New York with a lawyer who is admitted in another state but not New York (the "Out-of-State Lawyer"), raises three related questions:

> A. May the New York lawyer share legal fees with the Out-of-State Lawyer?
>
> B. If so, should the name of the Out-of-State Lawyer and the basis for the division of fees be placed in the retainer agreement that the New York lawyer provides to the client?
>
> C. Should the Out-of-State Lawyer's name and the basis for the division of fees be included in any retainer statement and/or closing statement that the New York lawyer files with the Office of Court Administration?

OPINION:

2. The inquirer, a personal injury lawyer who is admitted and practicing law in New York, has been contacted by the Out-of-State Lawyer, who represents a client in another state on certain matters. The client was injured as the result of an accident that occurred in New York. The Out-of-State Lawyer suggests that the New York lawyer "handle" the case but that the Out-of-State Lawyer remain involved and be compensated for her work out of the recovery proceeds. The inquirer asks whether the fee sharing arrangement is ethically permissible even though the Out-of-State Lawyer is not admitted in New York. In addition, the inquirer asks about how to prepare the retainer agreement for the client and what to disclose about the Out-of-State Lawyer under the rules of the Appellate Divisions.

Question A: Sharing Legal Fees with an Out-of-State Lawyer

3. Rule 1.5(g) of the New York Rules of Professional Conduct states that a lawyer shall "not divide a fee for legal services with another lawyer who is not associated in the same law firm" unless three factors are met:

> (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

4. Implicit in the inquirer's question is whether a non-New York lawyer qualifies as a "lawyer" for purposes of the fee-sharing safe harbor set forth in Rule 1.5(g). The issue is an important one because the term "lawyer" when used in a New York Rule of Professional Conduct does not have a constant, fixed meaning, and may have different meanings in different rules and contexts. *See, e.g.,* Wally Larson, Jr. and Lewis Tesser, *Who is the "Lawyer" Governed by New York's Disciplinary Rules*, Bloomberg Law Reports – New York Law at 8-11 (June 2009).

5. Consider the predecessor of Rule 5.1(a) – DR 1-104(A) – which provided: "A law firm shall make reasonable efforts to ensure that *all lawyers in the firm* conform to the Disciplinary Rules." (Emphasis added.) In N.Y. State 762 (2003), which inquired about supervisory responsibilities in a New York law firm that had offices in multiple states, we interpreted that language to require a New York firm to make reasonable efforts only to ensure that "lawyers subject to the New York [Rules] who are affiliated with the firm comply with the New York [Rules].". Since Rule 5.1(a) is virtually identical to DR 1-104(A), that interpretation still holds. Thus, the term "lawyer" in Rule 5.1(a) means a lawyer admitted in New York and subject to New York Rules for purposes of the conduct at issue.

6. In other Rules, however, we have interpreted the term "lawyer" to mean something broader. For example, Rule 5.4(b), like its predecessor DR 3-103(A), prohibits a lawyer from forming a law partnership with a "nonlawyer." In N.Y. State 806 (2007), we noted that the predecessor of Rule 7.5(d) – DR 2-102(D) – explicitly contemplated partnerships between New York lawyers and lawyers licensed in other jurisdictions. We concluded that while the predecessor of Rule 5.4(b) might appear on its face to prohibit partnerships between a New York lawyer and a non-New York lawyer, the language of Rule 7.5(d) must mean that a "nonlawyer" is someone not subject to comparable educational requirements for admission and standards of training, professional conduct and discipline. In other words, a "lawyer" need not be admitted and practicing in New York to qualify as a "lawyer" for purposes of Rule 5.4(b). *See also* N.Y. State 542 (1982) (a lawyer admitted to practice law in any U.S. jurisdiction is not a "non-lawyer" under DR 3-103)

7. Various other New York Rules also use the term "lawyer" to refer to something broader than a New York-admitted practitioner. For example, Rule 7.3(i) states that the restrictions on solicitation apply to a "lawyer" who is "not admitted to practice in this State" but who solicits retention by New York residents. Rule 7.5(d) refers to "lawyers licensed in different jurisdictions." And Rule 8.5 refers to a "lawyer admitted in this state" and "lawyer licensed to practice in this state," implying that the term "lawyer" standing alone could apply to those not admitted or licensed in New York State.

8. In N.Y. State 806 (2007), which is even more closely on point, we construed DR 2-107(A), which was the predecessor of Rule 1.5(g). We concluded that a New York law firm is ethically permitted to "participate with a foreign law firm in handling legal matters in New York referred by the foreign firm, and *in sharing of legal fees* in such matters, where the foreign firm's lawyers have professional education, training and ethical standards comparable to those of American lawyers and the firm otherwise complies with. DR 2-107(A)." (Emphasis added.) We reasoned that if an examina-

tion shows that Italian lawyers have education, training and ethical standards comparable to those of American lawyers, Italian lawyers may be considered "lawyers" within the meaning of Rule 1.5(g). N.Y. State 806 also noted (in footnote 2) that virtually every jurisdiction examining the issue has permitted its lawyers to divide fees with out-of-state lawyers, provided that in-state ethics requirements are satisfied.

9. What we implied in N.Y. State 806, we now make explicit. Lawyers from other U.S. jurisdictions are "lawyers" within the meaning of Rule 1.5(g), and New York lawyers may share fees with lawyers from other U.S. jurisdictions as long as the fee-sharing arrangement complies with the terms of Rule 1.5(g). We do not believe that sharing fees with the Out-of-State Lawyer will diminish the quality of the representation or undermine the inquirer's ability to fulfill the duties of loyalty and confidentiality. *See generally* ROY SIMON, SIMON'S CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED at 447 (2008) ("Unlike a disbarred lawyer or a lawyer disqualified due to a conflict of interest, the out-of-state lawyer could handle the matter personally if he came to New York to be admitted *pro hac vice.*"); Rule 5.4, cmt. [1] (the prohibition on fee-sharing with nonlawyers is intended to protect the lawyer's professional independence of judgment). *Cf.* Rule 1.5, Cmt. [7] ("Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.").

10. We assume that the Out-of-State Lawyer would not violate New York's rules against unauthorized practice of law. If our assumption is incorrect, then the inquirer might be violating Rule 5.5(b) (lawyer shall not aid nonlawyer in the unauthorized practice of law). *See* N.Y. State 801 (2006) (interpreting the term "nonlawyer" for purposes of DR 3-103(A), the Code predecessor of Rule 5.5(b), to mean a non-New York lawyer, and interpreting DR 3-103(A) to prohibit a New York attorney from partnering with an out-of-state attorney whose services constitute the unauthorized practice of law).

Question B: The Retainer Agreement Provided to the Client.

11. Given that the New York lawyer and the Out-of-State Lawyer will be dividing the legal fees from the personal injury action, the New York lawyer asks whether the name of the Out-of-State Lawyer and the basis for the division of fees must be placed in the retainer agreement that the New York lawyer intends to provide to the client. Two provisions of Rule 1.5 are potentially relevant.

12. Rule 1.5(c) addresses the specific contents of the "writing" that a lawyer must promptly give to a client in a contingent fee matter. That writing must state "the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated." The writing must also "clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party." But despite this high level of detail, Rule 1.5(c) does not say that the share of the fee that each lawyer will receive must appear in the required writing. Nor does it say that the writing must be a retainer agreement.

13. Rule 1.5(g)(2) (already quoted above) requires that the inquirer obtain the client's agreement to employment of the Out-of-State Lawyer "after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing" – but

it does not say that this information must appear in the retainer agreement. We assume that the inquirer will comply with Rule 1.5(g).

14. We therefore conclude that the New York Rules of Professional Conduct do not require either the name of the Out-of-State Lawyer or the basis for division of fees to be included in a retainer agreement. It may be that court rules outside the Rules of Professional Conduct require such information. *See, e.g.,* 22 NYCRR Part 1215 (requiring a written letter of engagement or a retainer agreement in certain matters, and specifying their contents). But interpreting court rules is outside the jurisdiction of this Committee.

Question C: The Closing Statement Filed with OCA.

15. The inquirer also asks whether the Out-of-State Lawyer's name and the basis for the fee division must be reflected on any retainer and/or closing statements filed with the Office of Court Administration. The *inquirer* appears to be referring to the requirements of court rules such as 22 NYCRR §603.7 (1st Dept.) and §691.20 (2nd Dept.), which prescribe filing requirements in claims or actions for personal injuries, property damage, etc. (The Third and Fourth Departments of the Appellate Division do not have analogous requirements.) Again, our Committee's jurisdiction is limited to interpreting the New York Rules of Professional Conduct. We do not interpret the filing requirements of the First or Second Judicial Departments as set forth in the Rules of the Appellate Courts.

CONCLUSION:

16. A New York lawyer handling a personal injury case referred by an out-of-state lawyer is ethically permitted to work on the case with the out-of-state lawyer and share legal fees with the out-of-state lawyer, provided that the arrangement complies with Rule 1.5(g).

(6-11)

OPINION 865 (05/10/2011)

TOPIC: Estate planner serving as attorney for executor; conflict of interest; legal malpractice

DIGEST: Lawyer who prepared estate plan for decedent may represent executor despite recent change in law of legal malpractice in *Estate of Schneider v. Finmann* (N.Y. 2010) provided that lawyer does not perceive a colorable claim of legal malpractice arising out of the estate planning.

RULES: 1.7, 1.10(a), 1.16.

FACTS:

1. The inquirer prepared an estate plan for his client and supervised the execution of a Will in furtherance of the plan. The Will named the deceased client's nephew executor of his estate. The client has recently died, and the estate is ready for administration. The nephew has asked the inquirer to represent him in connection with the estate's administration, but the inquirer is concerned because a recent change in the law permits executors to sue estate planners for malpractice, and both the estate plan and the Will were prepared well within any period of limitations possibly applicable to the inquirer's conduct (meaning that the statute of limitations will not be available as a defense to any claim).

QUESTION:

2. In light of *Estate of Schneider v. Finmann,* 15 N.Y.3d 306 (2010), may an attorney who prepared an estate plan for a client agree to act as counsel to the executor after the client's death?

OPINION:

3. On June 17, 2010, in *Estate of Schneider v. Finmann*, 15 N.Y.3d 306 (2010), the New York Court of Appeals overruled a long line of cases in the estate planning field. The overruled cases had held that the doctrine of privity effectively barred the estates of deceased estate planning clients from filing a legal malpractice suit against the lawyers who planned the decedent's estate. In *Schneider,* the Court of Appeals held that the executor or personal representative of the decedent "stands in the shoes of the decedent," and therefore has "the capacity to maintain a malpractice claim on the Estate's behalf." *at* 309.

4. Shortly after publication of the Court's decision in *Schneider*, a number of authorities speculated on the consequent expansion of an executor's obligations and liabilities, as well as the obligations and liabilities of lawyers providing estate planning services. Although the Court did not expressly give the estate's *beneficiaries* the right to bring a suit for legal malpractice, some commentators suggested that an aggrieved beneficiary might ask the executor to sue a lawyer whose alleged incompetence had caused them to receive less from the estate than they believed they otherwise would have obtained. *See, e.g.,* David Siegel, *New York State Law Digest*, No. 607, at 3-4 (July 2010). Others questioned whether an attorney could ethically agree to represent an executor in connection with the administration of any estate that the attorney had planned.

The relevant rule: Rule 1.7

5. We begin our analysis with Rule 1.7 of the Rules of Professional Conduct, which states in relevant part:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation . . . (2) the representation is not prohibited by law . . . (3) the representation does not involve the assertion of a claim by one client against the another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

6. Before applying Rule 1.7, we distinguish three different situations:

> A. The lawyer who prepared the estate plan realizes at the outset – before commencing representation of the executor in the administration of the estate – that he (the lawyer) may have committed legal malpractice and that the executor would have a colorable malpractice claim against him.
>
> B. The lawyer at the outset of representing the executor in the administration of the estate does not perceive any basis for claiming that he (the lawyer) committed malpractice, and does not believe the executor would have a colorable malpractice claim against him.
>
> C. The lawyer did not initially perceive any basis for a legal malpractice claim against him, but has come to realize during the representation of the executor that he (the lawyer) may have committed legal malpractice and that the executor would have a colorable malpractice claim against him.

Situation A: Lawyer perceives colorable legal malpractice claim at outset

7. In the first situation – the lawyer who prepared the estate plan and/or drafted the Will realizes at the outset that the legal work was negligent to a degree that gives rise to a colorable (*i.e., prima facie*) claim of malpractice – a conflict of interest arises under Rule 1.7(a)(2). The conflict arises because there is a "significant risk" that the lawyer's professional judgment will be adversely affected. Moreover, if the lawyer realizes that the executor could assert a colorable claim of malpractice against the lawyer, the consent provisions of Rule 1.7(b) could not be satisfied. To permit the lawyer to undertake such a representation would place the lawyer in the manifestly untenable position of having to counsel the executor on whether to sue himself (the lawyer). In such circumstances, the lawyer could not "reasonably believe[]" that he could provide "competent and diligent representation" to the executor. In that instance, Comment [14] to Rule 1.7 is instructive. It says:

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

8. Accordingly, if the preparer/drafter believes at the outset that the executor has a colorable claim of legal malpractice against him, then the preparer can neither ask for the executor's consent to the conflict nor represent the executor if the executor volunteers consent to the conflict. Therefore, the lawyer may not agree to represent the executor – and pursuant to the imputation rule, Rule 1.10(a), no other lawyer in the lawyer's firm may represent the executor either.

9. Moreover, we have held that an attorney is ethically bound to report to a client any significant error or omission that may give rise to a claim of malpractice. *See, e.g.,* N.Y. State 734 (2000) (legal services organization must report to client a "significant error or omission that may give rise to a possible malpractice claim"); N.Y. State 275 (1972) (lawyer has "affirmative duty" to advise client that lawyer's failure to act resulted in claim being barred by statute of limitations). An executor "stands in the shoes of the decedent" (*Schneider*). Thus, a lawyer in the first situation must report to the client (who was formerly the decedent, but is now the executor) that the lawyer's preparation of the estate plan has given rise to a colorable claim of malpractice against him. The same opinions, however, have noted that not all errors or omissions will give rise to a claim of malpractice. Some errors or omissions are insignificant, and there is no need to report them. That is essentially the second situation, which we address next.

Situation B: Lawyer *does not* perceive colorable legal malpractice claim at outset

10. In the second situation – the lawyer who prepared the estate plan or drafted the Will does not believe at the outset that the executor could assert a colorable claim for legal malpractice against him – our conclusion is different. If the preparer/drafter perceives no apparent basis for a claim of malpractice, then no "significant risk" arises that the lawyer's professional judgment on behalf of the executor will be adversely affected by the lawyer's own interests, and the need to obtain consent under Rule 1.7(b) is not triggered. Accordingly, there is no reason to require the lawyer or the lawyer's firm to decline representation of the estate. In such cases, the Court's decision in *Schneider* should have no effect on the long established practices of the trusts and estates bar, and the lawyer may agree to represent the executor after the client's death. Moreover, even if the lawyer perceives some insignificant error or omission in the prior representation, the lawyer has no duty to report it to the client.

Situation C: Lawyer perceives colorable legal malpractice claim during representation

11. In the third situation – the lawyer does not perceive any basis at the outset for claiming that he committed malpractice, but comes to believe during the representation that the executor has a colorable claim for malpractice against the lawyer – the conflict again becomes nonconsentable. Just as in the first situation, the lawyer is in the untenable position of having to counsel the executor on whether to sue the lawyer. Rule 1.7(a)(2) does not distinguish between conflicts that exist at the outset of a representation and conflicts that arise during a representation. In either situation, the conflict is nonconsentable, both for the lawyer and for all other lawyers associated with his firm. Pursuant to Rule 1.16(b)(1), the lawyer must withdraw (with the court's permission, if required) to avoid a violation of the Rules, and must upon withdrawal "take steps, to the extent reasonably practicable, to avoid fore-

seeable prejudice to the rights of the client" (the executor). Moreover, as in the first situation, the lawyer must report the apparent legal malpractice to the executor.

12. In sum, if the lawyer who prepared the estate plan knows at the outset or anytime after the representation of the executor commences that the quality of the plan is subject to a colorable challenge (or where the plan has in fact been challenged) on grounds that it was incompetently prepared, the lawyer cannot represent the executor, and furthermore must disclose to the executor any facts that would permit the executor to evaluate the apparent malpractice. If not, the lawyer may represent the executor in the administration of the estate.

13. Thus, the Court's decision in *Schneider* has not changed the basic conflicts issues in cases where legal malpractice in preparing the estate plan is not apparent. Lawyers who are engaged in estate planning have traditionally handled the administration of the estates that they have planned. For example, it has long been held that fiduciaries may retain their own firms to act as counsel on the estates that they administer. *See, e.g.,* N.Y. State 471 (1977) (receiver in a mortgage foreclosure action may retain the law firm of which he is a member as his counsel). The apparent risk in such retention has been viewed as outweighed by various advantages – both practical and economic – in permitting lawyer-fiduciaries and their firms to serve in both capacities. These advantages are outweighed only when the lawyer who prepared the plan perceives a colorable claim of legal malpractice, in which case Rule 1.7(b)(1) makes the conflict nonconsentable.

Settling a legal malpractice claim

14. A lawyer may settle a claim for malpractice with a client provided three conditions are satisfied: (a) the client has been fully apprised of the facts pertaining to the representation that may give rise to specific claims against the lawyer; (b) the lawyer has been discharged or has withdrawn from the representation; and (c) the lawyer has advised the client to secure independent counsel in the negotiation of the settlement agreement. *See, e.g.,* N.Y. State 591 (1988) ("A lawyer may ethically negotiate with a former client for the settlement or release of potential malpractice claims, but only after the lawyer takes specific steps to insure that the negotiations are fair," including withdrawing from representation). To satisfy this line of opinions, a lawyer who perceives a colorable malpractice claim against himself for his estate planning must withdraw pursuant to Rule 1.16 before seeking to settle the claim, and must apprise the client (the executor) of the facts giving rise to the malpractice claim and of the desirability of engaging independent counsel to evaluate the claim.

CONCLUSION:

15. In light of *Estate of Schneider v. Finmann,* a lawyer who prepared an estate plan for a client may agree to act as counsel to the executor after the client's death as long as the lawyer does not perceive a colorable claim for legal malpractice before or during the representation of the executor. However, if the lawyer does perceive a colorable claim for legal malpractice before or during the representation, then the conflict is nonconsentable and the lawyer (and all other lawyers associated with his firm) must decline or withdraw from the representation and the lawyer must inform the executor of the facts giving rise to the claim.

(50-10)

OPINION 866 (05/23/2011)

TOPIC: Disclosure of confidential information to prevent reasonably certain death or substantial bodily harm or to prevent a crime; confidential information acquired after termination of representation

DIGEST: Under the New York Rules of Professional Conduct, a lawyer is permitted (but not required) to disclose a current or former client's confidential information if the lawyer reasonably believes disclosure is necessary to prevent reasonably certain death or substantial bodily harm or to prevent the client or former client from committing a crime. Information relating to the representation of a client may be confidential information even though it is acquired after the client-attorney relationship has ended.

RULES: 1.6(a)-(b); 1.9(c)

QUESTIONS:

1. When a lawyer has acquired confidential information about a client or former client evidencing a risk of death or substantial bodily harm, do the New York Rules of Professional Conduct (i) require the lawyer to disclose such information, (ii) prohibit the lawyer from disclosing such information, or (iii) give the lawyer discretion whether or not to disclose such information?

2. Can information acquired after the termination of a representation constitute confidential information of the former client?

FACTS:

3. Inquirer assisted two principals, Doe and Roe, in forming a business (the "company"). Inquirer's professional services consisted principally of preparing the organizing documents and assisting with organizational activities and filings. Inquirer understood that Doe and Roe on their own would carry forward the company's business (*e.g.,* obtaining any necessary registrations and licenses, negotiating any leases or contracts, and the like). Four months after inquirer organized the company, without the direct assistance of inquirer, the company received its operating license as a center for the on-site provision of certain services to the public.[6]

4. Inquirer provided no further assistance after forming the entity, and the clients did not ask him for any further assistance. Accordingly, inquirer believes that his representation of Doe and Roe in connection with the company concluded when he completed the organizing steps. However, inquirer never sent a termination letter to Doe and Roe, and Doe and Roe never expressly terminated inquirer's services. In other words, Doe and Roe have never explicitly acknowledged or confirmed, either in writing or orally, that inquirer's representation has terminated.

6 Examples of businesses that provide services to the public and require an operating license from the government include private schools, nursing homes, restaurants, hospitals, hospices, day care centers, and rehabilitation facilities. For purposes of our opinion, it would make no difference which type of business inquirer represented.

5. After notice of formation of the company was published but before the company received an operating license, inquirer provided legal assistance to Doe in his individual capacity. Inquirer's legal services to Doe individually concerned a matter unrelated to the organization or business of the company owned by Doe and Roe together.

6. Also after the company had been organized but before the company received its operating license, inquirer overheard a conversation that is the centerpiece of the inquiry here. Inquirer has not identified the speakers, but during the conversation, one of the speakers said that the principals of the company had failed to secure a license because the water available in the premises where the company proposed to provide on-site services had failed to meet required water quality standards. The speaker also said that the principals intended to submit a water sample from another location for testing in order to meet the required water quality standard. Apart from this conversation, inquirer has no knowledge of the water quality at the proposed premises and no knowledge (as distinguished from belief or suspicion) of what in fact the company or anyone acting on its behalf said or did with respect to water quality to secure an operating license.

7. Inquirer asks whether the New York Rules of Professional Conduct (the "Rules") require him to disclose the information about the water quality, prohibit him from disclosing the information, or give him discretion whether or not to disclose the information. In addition, given his belief that his representation of Doe and Roe with respect to their company ended before he overheard the conversation about water quality, inquirer asks whether the information he acquired after the attorney-client relationship ended is protected by the Rules as "confidential information."

OPINION:

8. At the outset, regardless of ethical requirements, inquirer would be well-advised to consider discussing his concerns with the client or former client. Such a discussion would be consistent with Comment [6A] to Rule 1.6, which advises a lawyer to remonstrate with the lawyer's client before making a disclosure of confidential information permitted under Rule 1.6(b)(1), (2) or (3). Even where possible disclosure would not be governed by Rule 1.6 and the advice of Comment [6A] to remonstrate would not apply, such a conversation would afford the Doe and/or Roe an opportunity to remediate the problem, if any, or to allay inquirer's concerns that a problem exists.

Meaning of the term "confidential information"

9. We now turn to the Rules and their application to the facts presented. If the information inquirer heard in the critical conversation is not "confidential information," then the rules protecting confidential information (discussed below) do not apply and inquirer is free to disclose the contents of the conversation if he so desires. We therefore first consider whether the information that inquirer overheard in the critical conversation is "confidential information" protected by the Rules.

10. "Confidential information" is defined in Rule 1.6(a) as "information *gained during **or** relating to* the representation*, whatever its source*," that meets one of three criteria: (i) it is protected by the attorney-client privilege, or (ii) it is likely to be embarrassing or detrimental to the client if disclosed, or (iii) the client has asked that the information be kept confidential. (Emphasis supplied.) Given the nature of the critical conversation, there can be little doubt of its potential, if revealed, to embarrass or harm not only the company but also its principals. Thus we are brought to the questions of whether

the critical conversation is information "gained during or relating to" either the representation of the principals, Doe and Roe, or the separate representation of Doe. If the answer is "yes" to either of those questions, either with respect to the principals in the joint representation or to Doe in the individual representation, then the information gleaned from the conversation is confidential information protected by Rule 1.6. If the information is confidential information, then inquirer must not reveal it or use it to the disadvantage of the client unless an exception to Rule 1.6 applies. We will first address the remaining elements of confidential information, and then address the possible exceptions.

11. The Rules generally protect confidential information with respect to current and former clients to the same extent. Rule 1.9(c) provides, in pertinent part, that a lawyer shall not reveal confidential information of a former client protected by Rule 1.6 except as would be permitted or required with respect to a current client. But whether information qualifies as "confidential information" in the first place does differ depending on whether a client is a present or former client. Under the definition in Rule 1.6(a), information can be "confidential information" simply if it is acquired "during" the representation, but information acquired after the representation terminates can be "confidential information" only if it "relates" to the representation. Since it is unclear from the facts whether Doe and/or Roe are current clients or former clients, we will address both possibilities.

Protection of information gained during the attorney-client relationship

12. The question is whether inquirer's representation of Doe and Roe was a continuing representation at the time of the critical conversation or, in the alternative, whether it had previously ended. The answer to the question depends on whether the clients reasonably believed that they continued to have a client-attorney relationship with inquirer (*e.g.,* whether the principals reasonably believed that inquirer stood ready to provide legal advice and counsel to them on demand, pursuant to the initial retainer or engagement letter). *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §14 (lawyer-client relationship arises when a person manifests intent to a lawyer that the lawyer provide legal services for the person and the lawyer either manifests consent to do so or knows the person reasonably relies on the lawyer to do so). This inquiry is highly fact dependent.

13. The facts presented here are ambiguous. On the one hand, inquirer provided services to the principals only in connection with the organization of the company. He completed that assignment before he overheard the critical conversation and provided no further services to the principals or to the company after the company was organized. On the other hand, inquirer has had no written or oral communication with the company or its principals explicitly marking an end to the representation. Other factors that could bear upon whether the representation continued beyond the critical conversation include: (a) the terms of the original retainer or written letter of engagement, particularly any stated scope and duration of the engagement; (b) the length of time between the completion of the organizing work and the time of the critical conversation; and (c) whether either or both of the principals were continuing to communicate with inquirer about company business at or near the time of the critical conversation.

14. Under the facts presented, we cannot say conclusively whether inquirer's representation of Doe and Roe had ended by the time of the critical conversation. For example, it is unclear what the retainer or engagement letter provided, how much time passed after inquirer finished organizing the

company, whether the principals communicated with inquirer about company business after the organizing work was done, who took part in the critical conversation, or the purpose of the conversation.

15. In addition, inquirer represented Doe individually at roughly the same time that he represented Doe and Roe together. Revelation of a conversation suggesting that Doe, his co-member Roe, or the company they owned had falsified test data concerning drinking water in order to secure a license to operate would be embarrassing or detrimental to Doe, so the critical conversation is protected confidential information as to Doe as well. Therefore, inquirer must apply the same analysis to his representation of Doe as to his representation of Doe and Roe jointly.

16. If either the company or Doe continued to be inquirer's current client, then we must ask whether the information was acquired "during . . . the representation." Literally read, this requirement could be merely temporal, so that any information whatsoever that a lawyer learns from any source after a lawyer begins and before the lawyer finishes representing any client is "confidential information" if disclosure would be detrimental or embarrassing to the client or if the client requested that the lawyer not discuss the information. This reading would extend to information learned from third parties having no connection to the subject matter of the representation or even in the course of another representation. We do not think this purely temporal reading is sound.

17. A more sensible reading is that "during" implies some connection between the lawyer's activities on behalf of the client and the lawyer's acquisition of the information – for example, if the lawyer learned the information because of the lawyer-client relationship.[7] We do not need to decide here the precise parameters of any such requirements beyond the temporal. Although we do not know the circumstances of the conversation that the lawyer overheard, it is clear that the information can be traced directly or indirectly to the principals, and that should be enough to meet any requirement beyond the temporal that may be implied by the phrase "during . . . the representation." Thus, if the representation of either Doe and Roe or of Doe alone was continuing at the time inquirer learned the information, then inquirer is bound by Rule 1.6 with respect to the contents of the conversation. In other words, absent an exception to his duty of confidentiality under Rule 1.6, he may not disclose the information to anyone.

Protection of information acquired after the termination of a representation

18. If, on the other hand, inquirer's representations of Doe and Roe had already terminated – and Doe and Roe were former clients rather than current clients – when he overheard the critical conversation, the question arises whether information acquired after the termination of a representation can constitute confidential information of a former client. We conclude that it can.

19. Rule 1.6(a) defines confidential information to include both information acquired "during" the representation and information "relating to" the representation. Either element is sufficient. Thus, if the information contained in the conversation related to the representation, then inquirer is bound by

7 *Cf.* Nassau County Bar Op. 05-1 (duty not to prejudice a client "during the course of" the representation in DR 7-101(A) (now Rule 1.1(c)(2)) "extends only to the professional services the lawyer is rendering to the client"); Roy Simon, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 34 (2009 ed.) ("Rule 1.1(c)(2) does not prohibit a lawyer from prejudicing or damaging a client *outside* the scope of the representation. . . . as long as [the lawyer's] activities do not undermine or negate the professional work the lawyer is performing for the client.").

Rules 1.6 and 1.9(c) with respect to that information even if inquirer gained the information after the representation ended. Whether information learned after a representation has concluded is information "relating to" that representation depends upon a variety of factors, including but not limited to: (a) whether the information concerned or grew out of specific aspects of the representation and was revealed in the lawyer's presence because of the lawyer's prior representation; (b) whether the information came from the client or the client's close associates (*e.g.,* independent contractors who conducted the water tests), as opposed to coming from third parties; and (c) whether lawyer learned the information as a result of further active inquiry or investigation after the representation ended, as opposed learning the information accidentally.

20. In this case, if licensure was discussed or contemplated by inquirer during his representation of the company, or if inquirer participated in the critical conversation with one or both of the principals or close associates, or if inquirer sought the information in any way, then the overheard conversation would be more likely to be deemed "relating to" inquirer's representation of the company. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59, cmt. c ("post-representation confidential client information might be acquired, for example, in the form of information on subsequent developments").

21. If, however, the issue of licensure was never part of the representation of Doe and Roe and was not discussed with or addressed by inquirer, and if there is no reason to think that the participants in the conversation permitted or intended inquirer to overhear the conversation because of his prior representation, one could reasonably argue that the conversation was unrelated to the representation of the company and therefore not within the scope of Rule 1.6 vis à vis the company.

22. To recapitulate our analysis so far, if inquirer concludes that he had no on-going client-attorney relationship either with the two principals or with Doe individually at the time of the critical conversation, and if he concludes that the information gleaned from the critical conversation does not relate to either representation, then neither Rule 1.6 nor Rule 1.9(c) nor any other provision of the Rules of Professional Conduct bears upon the question of whether inquirer may or may not disclose the information gained from that conversation. If, however, inquirer concludes that either or both representations had not ended, or if he concludes that the information gleaned from the critical conversation relates to either or both of the representations, then inquirer's knowledge of the conversation and its content is information gained "during" or "relating" to the representation, and is thus "confidential information" whose disclosure is governed by Rule 1.9(c) and/or Rule 1.6. Because such information must not be revealed or used to the disadvantage of a client unless an exception applies, we will now address the possible exceptions to the duty of confidentiality.

Do any exceptions to the duty of confidentiality apply?

23. Rule 1.6(a) provides that a lawyer may not disclose confidential information unless at least one of three circumstances obtains: (i) the client gives "informed consent"; (ii) disclosure is "impliedly authorized to advance the best interests of the client" and is either "reasonable under the circumstances" or "customary in the professional community"; or (iii) disclosure is permitted by Rule 1.6(b). Here, the first two exceptions – informed consent or implied authorization – do not appear to apply, but we need to determine whether one or more of the permissive bases for disclosure set forth in paragraph (b) may apply.

24. Two exceptions are potentially relevant here. The first is Rule 1.6(b)(1), which provides that "a lawyer *may* reveal or use confidential information to the extent that the lawyer reasonably believes necessary (1) to prevent reasonably certain death or substantial bodily harm." (Emphasis supplied.) This exception recognizes "the overriding value of life and physical integrity" (Comment [6B]), but is a wholly discretionary exception – it says "may," not "must." *See* Rule 1.6, cmts. [6]-[6D]. The second potentially relevant exception is Rule 1.6(b)(2), which extends a similar exception to disclosure that the lawyer reasonably believes necessary "to prevent the client from committing a crime." The remaining exceptions in paragraph (b) have no apparent application in this case.

25. Whether death or substantial bodily harm to anyone is a "reasonably certain" outcome of exposure to the drinking water in the licensed premises is a question of fact and judgment. See Rule 1.6, cmt. [6A]. For this exception to apply, the lawyer must believe that death or substantial bodily harm is reasonably certain to ensue from exposure to the drinking water at issue here, and that belief must be reasonable, and the lawyer must conclude that disclosure is "reasonably necessary" to prevent such death or bodily harm. "Such harm is reasonably certain to occur if it will be suffered imminently or if there is present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat." Rule 1.6(b), cmt. [6B]. Here, where inquirer does not know if the submission of the improper water sample even took place, and does not know what is wrong with the actual water at the licensed premises, it seems unlikely that the lawyer could form a reasonable belief, based on the limited facts that he knows, that death or substantially bodily harm is reasonably certain to occur.

26. Whether the company or anybody on its behalf has committed a crime (such as larceny by false pretenses or operating a business requiring a license without a valid license), and whether that crime is a continuing one, are questions of law beyond the jurisdiction of this Committee. If a lawyer reasonably believes that the client is engaged in a continuing crime or intends to commit a new crime, then to the extent necessary to prevent the continuation of the original crime or the commission of a new crime, the lawyer may (but need not) disclose the contents of the conversation. *See* Rule 1.6(b)(2). *See generally* N.Y. City 2002-1 (2002) (interpreting the phrase "intention of a client to commit a crime" and discussing continuing crimes). However, Rule 1.6(b)(2) does not permit disclosure of confidential information concerning a completed or past crime; it applies only to confidential information necessary to prevent a continuing or otherwise future crime.

27. In deciding whether to make a disclosure that is permissible under Rule 1.6 (b), a lawyer should consider, *inter alia,* the factors set forth in Comments [6] through [6D] to Rule 1.6. The admonition in Comment [6A] that we pointed out in paragraph 8 above especially bears repeating:

> When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure under paragraphs (b)(1), (b)(2) or (b)(3), the lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client.

CONCLUSION:

28. Under the New York Rules of Professional Conduct, a lawyer is permitted (but is not required) to disclose confidential information of a current or former client if the lawyer reasonably believes dis-

closure is necessary to prevent reasonably certain death or substantial bodily harm or to prevent the commission of a crime by the client or former client. Information is confidential if the lawyer acquires the information "during" a representation, provided there is some connection between the lawyer's activities on behalf of the client and the lawyer's acquisition of the information, but information "relating to" the representation of a client may be confidential information even if it is acquired after the client-attorney relationship to which it relates has ended.

(58-09)

OPINION 867 (05/31/2011)

TOPIC: Simultaneous representation of lender and seller in residential real estate transaction

DIGEST: Different lawyers in the same law firm may not represent the lender and the seller in a residential real estate transaction unless the lawyers each satisfy the requirements of Rule 1.7 and other applicable Rules.

RULES: 1.0(e) & (f), 1.4, 1.6, 1.7, 1.10

QUESTION:

1. Do the New York Rules of Professional Conduct that took effect on April 1, 2009 permit different lawyers in the same law firm to represent both the mortgage lender and the seller in a residential real estate transaction, or does such representation instead present a non-waivable conflict of interest?

OPINION:

2. Rule 1.7 ("Conflict of Interest: Current Clients") addresses the limited circumstances under which one lawyer may represent multiple clients in the same transaction. Rule 1.7 serves the combined functions of DR 5-101 and DR 5-105 of the former New York Code of Professional Responsibility (the "Code"), but Rule 1.7 contains more detail and requires that client consent be confirmed in writing. Rule 1.7 provides as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
>
> > (1) the representation will involve the lawyer in representing differing interests; or
> >
> > (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> >
> > (2) the representation is not prohibited by law;
> >
> > (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> >
> > (4) each affected client gives informed consent, confirmed in writing.

3. This Committee previously addressed whether a lawyer may represent both a lender and seller in the same transaction. In N.Y. State 611 (1990), issued under the former Code, we concluded:

> A lawyer may not represent the lender and the seller in a real estate transaction unless after weighing the specific facts and circumstances the lawyer is satisfied that it is not likely that the interest of these parties will differ and unless both clients consent after full disclosure of the implications of multiple representation.

4. Other opinions under the Code also concluded that a lawyer may sometimes represent more than one party to a real estate transaction. *See, e.g.,* N.Y. State 438 (1976) (allowing joint representation of lender and borrower with their informed consent if a disinterested lawyer would believe the lawyer can competently represent both); N.Y. County 615 (1973) (allowing representation, with informed consent, of buyer and seller who had already agreed upon the principal terms and conditions of sale); N.Y. State 162 (1970) (allowing lawyer to represent both buyer and seller with their consent if their interests are not actually or potentially differing); N.Y. State 38 (1966) (representation of buyer and seller "should be practiced sparingly and only when it is clear that neither party will suffer any disadvantage from it"). Under the new Rules, our view of dual representation of a lender and seller in non-litigated real estate transactions remains unchanged. We now analyze the specific situation presented here.

A. Do the clients have "differing interests" under Rule 1.7(a)(1)?

5. Before accepting the dual engagement, the lawyers for each party must assess whether their prospective clients have "differing interests." The phrase "differing interests" is defined in Rule 1.0(f) as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest." Comment [8] to Rule 1.7 provides general guidance on determining whether dual representation would involve the lawyer in representing "differing interests":

> [8] Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. For example, the professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions that each client might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

6. Even where it may appear that there is a unity of interest or a common objective between the seller and the lender in a relatively simple real estate transaction and no direct negotiations will take place between the seller and the lender, the representation will usually involve the lawyer in repre-

senting "differing interests."[8] As we noted in N.Y. State 611, a conflict might arise where the seller would want to close the sale but the lender might decide it has no obligation to make the loan.

B. Is the conflict consentable under Rule 1.7(b)?

7. If a conflict based on differing interests exists under Rule 1.7(a)(1), then the lawyer must determine whether the conflict is consentable under Rule 1.7(b). A concurrent conflict of interest is consentable if (1) the lawyer reasonably believes that he or she can provide "competent and diligent representation" to each client affected by the conflict; (2) the representation is "not prohibited by law"; and (3) the lawyer will not be required to assert "a claim by one client against another client" that the lawyer represents in the same litigation or proceeding before a tribunal. We have no reason to believe that the dual representation would be "prohibited by law," and representation in a real estate transaction will not require the lawyer to assert any claims in litigation. However, we must assess the element in Rule 1.7(b)(1): whether the lawyer can reasonably believe that he or she can provide competent and diligent representation to both parties. Comment [28] to Rule 1.7 provides valuable guidance on this element. It provides, in relevant part:

> Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to one another, but common representation is permissible where the clients are generally aligned in interest, even though there is some difference in interest among them.

8. Another source of guidance is N.Y. City 2001-2, which said that lawyers contemplating dual representation in a transaction should consider multiple factors, including the following:

> 1. The nature of the conflict. In a transaction where common interests predominate over issues in dispute, the possibility of an adverse effect on the exercise of the lawyer's independent professional judgment is significantly mitigated. .. . .
>
> 2. The likelihood that client confidences or secrets in one matter will be relevant to the other representation. . . . To the extent that neither client's confidential information could be used to its disadvantage in the conflicting representation or to the advantage of the other client, this concern is not implicated. . . .
>
> 3. The ability of the lawyer or law firm to ensure that confidential information of the clients will be preserved.. . . . [S]creening and the establishment of other information control devices may be appropriately offered by the lawyer or demanded by the client as a condition of the client's consent. . . .
>
> 4. The ability of the lawyer to explain, and the client's ability to understand, the reasonably foreseeable risks of the conflict. . . . [T]he sophistication of the client is a

8 Because we conclude that there are *always* differing interests under these circumstances, it is not necessary to analyze the second prong of Rule 1.7(a)(2), *i.e.* whether the lawyer's personal interests likewise create a conflict. In other settings, however, conflicts may arise from a lawyer's personal interests rather than from differing interests.

> factor that must be considered in determining the effectiveness of client consent to a transactional conflict. . . .
>
> 5. The lawyer's relationship with the clients. . . . [T]he lawyer [must] be able to represent both clients with equal and undiminished vigor. . . .

9. Regarding the factor of sophistication (factor # 4 above), N.Y. City 2001-2 stated that "sophisticated corporate and institutional clients can consent to conflicts which might be non-consentable in cases involving unsophisticated lay clients who are not represented by independent counsel in connection with the consent." Nevertheless, we have imposed some limits on dual representation even with respect to sophisticated clients. *See e.g.,* N.Y. State 823 (2008) (lawyer cannot continue to represent either joint client in a litigation if their strategies significantly diverge); N.Y. State 807 (2007) (the fact that buyer and seller each sought independent counsel to represent them in negotiations against the other reflected a level of adversity that could not be waived when, unbeknownst to buyer and seller, the attorneys they separately approached turned out to be associated in the same firm).

10. Lawyers at the same firm should be especially cautious before agreeing to represent two parties to a residential (as opposed to commercial) real estate transaction, even if the interests of the two clients are generally aligned and the potential for litigation or disclosure of confidences seems small. The typical seller in a residential real estate transaction is relatively unsophisticated when compared to the institutional lender who, by its size, power, and business potential to the law firm, may have an inherently stronger relationship with the lawyer.[9] This imbalance could interfere with the lawyer's ability to provide competent and diligent representation to each affected client, implicating Rule 1.7(b)(1). *Cf.* Rule 1.7, cmt. [33] ("each client in the common representation has the right to loyal and diligent representation").

11. The factor of confidentiality is especially important in determining whether simultaneous representation of the lender and seller is permissible. Confidentiality is governed by Rule 1.6 ("Confidentiality of Information"). Under Rule 1.6(a), a lawyer representing the seller in a real estate transaction has a duty of confidentiality to the seller. If concerns arise regarding the acceptability of title, or environmental problems, or any condition of closing, then Rule 1.4 ("Communication") may obligate the lawyer to advise the lender of the facts giving rise to those concerns, but Rule 1.6(a) may prohibit the lawyer from disclosing that information to the lender absent the seller's informed consent. The opposing mandates of Rule 1.4 and Rule 1.6 may thus create an irreconcilable conflict of interest. For example, the lawyer cannot recommend that the seller disclose environmental problems with the property simply to please the lender, but the lawyer cannot recommend that the lender close the loan without learning about those problems. When a lawyer must disclose one client's confidential information to another client in order to represent the second client competently and diligently, but the disclosure is prohibited because the first client will not consent and no exception to the duty of confidentiality applies, then the conflict is ordinarily non-waivable because the lawyer cannot provide competent and diligent representation to each client. *See* N.Y. City 2005-2 (the "critical question is whether the representation of either client would be impaired").

9 If the lawyer or law firm anticipates repeat business from the lender but not from the seller, for example, the lawyer must carefully determine whether the expectation of future business from the lender creates a significant risk that the lawyer's professional judgment on behalf of the residential seller will be adversely affected by the lawyer's own financial interests. If so, a conflict would be triggered under Rule 1.7(a)(2) as well.

C. Has the lawyer obtained each client's informed consent, confirmed in writing?

12. Where a lawyer has determined under Rule 1.7(b)(1) that the conflict arising from a multiple representation is consentable, Rule 1.7(b)(4) requires the lawyer to obtain each affected client's "informed consent, confirmed in writing," after full disclosure of the implications of the multiple representation. Informed consent is defined in Rule 1.0(j) to denote "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives."

13. As an integral part of obtaining informed consent, the lawyer should explain the implications of the multiple representation for the attorney-client privilege and the lawyer's duty of confidentiality to each client under the Rules. When obtaining informed consent, lawyers should advise clients – unless the parties have an explicit understanding to the contrary – that information gained in the representation may not be privileged if a dispute later arises between the parties, *see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 (2000), and that the lawyer may be forced to withdraw from one or both representations if a dispute arises between the two clients, *see* Rule 1.7(a)(1), or if either client will not allow the lawyer to convey confidential information material to the other client's matter, *see* Rule 1.7, cmt. [27] ("lawyer will have to withdraw from one or both representations if one client decides that some matter material to the representation should be kept secret from the other"); Rule 1.7, cmt. [31] ("as part of the process of obtaining each client's informed consent, the lawyer should advise each client that . . . the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other").

14. Each client's consent must be confirmed in writing. Rule 1.0(e) gives a lawyer a choice of three methods: (1) the lawyer may obtain a writing from the client to the lawyer confirming that the client has given consent; (2) the lawyer may promptly transmit a writing to the client memorializing the client's oral consent; or (3) the lawyer may obtain confirmation directly from the client in a statement on the record in a proceeding before a tribunal. Here there is no proceeding before a tribunal, but either of the first two methods of confirming consent will suffice.

D. May different lawyers from the same firm represent the lender and the seller?

15. The specific question here is not whether *one* lawyer may represent both the lender and the seller in the same residential real estate transaction, but rather whether *different* lawyers at the same law firm may represent both the lender and the seller in that transaction. The analysis that applies to different lawyers within a law firm who seek to represent two parties to a residential real estate transaction parallels the analysis that applies to one lawyer seeking to represent two parties in the same transaction. The imputation rule under the New York Rules of Professional Conduct, Rule 1.10(a), provides that while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8, or 1.9. However, Rule 1.10(d) states that a disqualification by imputation "may be waived . . . under the conditions stated in Rule 1.7." Those conditions include the informed consent of each client. The law firm therefore must first determine whether the two proposed clients have differing interests under Rule 1.7(a)(1) or if there is a significant risk that the lawyer's judgment will be adversely affected by the lawyer's personal interests under Rule 1.7(a)(2). Either situation will create a conflict.

16. If there is a conflict, lawyers in the same firm must not undertake the dual representation unless the representation complies with Rule 1.7(b). If, after carefully weighing the facts and circumstances of the particular transaction, both lawyers in the firm reasonably believe that they can provide competent and diligent representation to their respective clients despite the differing interests between the clients, if the dual representation is not prohibited by law, and if the lawyers obtain informed consent from each client confirmed in writing, the representation of the lender and the seller by different lawyers in the same law firm is permitted. Otherwise, it is not.

CONCLUSION:

17. Different lawyers at the same law firm may not represent both the mortgage lender and the seller in a residential real estate transaction except in the very limited circumstances where the lawyers can satisfy their obligations to each client under Rule 1.7 and other applicable Rules.

(25-09)

OPINION 868 (05/31/2011)

TOPIC: Concurrent representation of corporation and sole shareholder, director and officer.

DIGEST: An attorney may concurrently represent a corporation and its sole shareholder, director and officer in prosecuting a property damage action on behalf of the corporation, and in defending against a third-party claim against the president of the corporation alleging that the claim is fraudulent.

RULES: 1.0(f), 1.7(a)(1), 1.13(d).

FACTS:

1. The inquirer is an attorney ("Attorney") who represents a corporation ("Corporation") in an action against a trucking company ("Trucker"). The President ("President") of the Corporation is the sole shareholder, director and officer of Corporation. In the action against the Trucker, the Corporation alleges that the Trucker caused damages to the Corporation's valuable goods (some fragile antique furniture) while the goods were in transit.

2. The insurance carrier for the Trucker conducted an investigation regarding the allegedly damaged goods and concluded that the Corporation's claim for damages was fraudulent. (The carrier believes the antiques were already damaged before they were shipped.). The Trucker therefore interposed a third-party claim against the President of the Corporation personally and referred the matter to the District Attorney for possible criminal prosecution. The President of the Corporation has asked Attorney to continue representing the Corporation in its civil claim against the Trucker and, in addition, to represent him personally both as a third-party defendant in the civil action and as a criminal defendant in any criminal prosecution that may be lodged against him.

QUESTION:

3. Is there a conflict of interest between the Corporation and its President that would prohibit Attorney from representing both the President personally and the Corporation under these circumstances?

OPINION:

4. Rule 1.13, entitled, "Organization as Client," and Rule 1.7, entitled, "Conflict of Interest: Current Clients," of the Rules of Professional Conduct ("Rules") govern this inquiry. Rule 1.13(d) provides as follows:

> A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

5. Rule 1.13(d) therefore requires us to analyze Attorney's simultaneous representation of the Corporation and the President according to the provisions of Rule 1.7. Under Rule 1.7(a)(1), Attor-

ney's simultaneous representation of the Corporation and its President creates a concurrent conflict of interest if a reasonable lawyer would conclude that such representation will involve the lawyer in representing "differing interests." The term "differing interests" is defined by Rule 1.0(f) to mean "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."

6. In many situations, differing interests arise when an organization and one of its officers are accused of fraud, because the organization cannot properly defend against the fraud charges without investigating the conduct of the individual officer – but the individual officer prefers not to be investigated. ROY SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 103 (2009 ed.). Here, however, inasmuch as the President is the sole shareholder, director and officer of Corporation, this principle has no practical application.

7. First, if the fraud allegations are proven and the civil action is determined in the Trucker's favor, the adverse financial consequence to the Corporation will pass through to the President as the sole owner of Corporation. The Corporation and the President therefore do not have "differing interests" in the matter. Rather, the President and the Corporation are united in interest in devising a successful strategy to prosecute the damages claim and to oppose the third-party fraud claim.

8. Second, engaging separate counsel for the President would likely be of significant benefit to the Trucker and prejudicial to both the Corporation and the President in the civil litigation. Lost would be the advantage of one attorney shaping a united defense strategy that would limit damaging disclosures. Separate counsel might also impede the obvious strategy that should be employed for the benefit of President, which would be to allow Corporation to accept responsibility in any civil settlement and in the disposition of any related criminal charges.

9. Our conclusion applies only to the particular facts presented, and would not necessarily hold if there were additional shareholders, officers or directors. We also note that even where, as here, a corporation has a single owner and director, if the corporation is insolvent, differing interests may exist between the corporation and its creditors.[10]

CONCLUSION:

10. On the facts presented, an attorney may concurrently represent a corporation and its sole shareholder, director and officer in prosecuting a property damage action on behalf of the corporation and may simultaneously defend the shareholder/director/officer against a third-party fraud claim.

(30-10)

10 *See, e.g., RSL Commc'ns PLC v. Nesim Bildirici,* 649 F. Supp.2d 184, 202 (S.D.N.Y. 2009) ("[T]he duty that directors owe to the creditors of an insolvent corporation under New York law is defined primarily by the 'trust fund doctrine.' Specifically, 'officers and directors of an insolvent corporation are said to hold the remaining corporate assets in trust for the benefit of its general creditors.' As such, "directors of an insolvent corporation owe a fiduciary duty to preserve the assets of the corporation for the benefit of creditors.'") (internal citations omitted).

OPINION 869 (05/31/2011)

TOPIC: Permissible law firm names.

DIGEST: A law firm may not include an area of law in the law firm name. A sole practitioner may use the terms "Firm" or "Law Firm" as part of the law firm name.

RULES: 7.1(a), 7.5(b).

QUESTIONS:

1. A lawyer we will call John Smith would like to use a name such as "The Smith Tax Law Firm" for his practice, and he has asked two questions about the propriety of doing so.

A. May a firm name include an area of law in which the lawyer or law firm practices (such as "Tax" in this case)?

B. May a solo attorney practice under a name containing the word "Firm"?

OPINION:

Question A: May Mr. Smith include the word "Tax" in the name of his firm to identify an area of his law practice?

2. Apart from the context of firm names, lawyers are generally permitted to identify their practice areas. Rule 7.4(a) of the New York Rules of Professional Conduct (the "Rules") provides: "A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law . . . ."

3. Thus, a lawyer who complies with other relevant ethical rules (such as those prohibiting deception, regulating advertising, and restricting claims of specialization) could describe his firm as a "tax law firm" on a website or in other advertising apart from the law firm name. Under Rule 7.5 ("Professional Notices, Letterheads and Signs") a lawyer may state the nature of a legal practice, to the extent permitted under Rule 7.4 ("Identification of Practice and Specialty"), in the contexts of professional cards (Rule 7.5(a)(1)), professional announcement cards (Rule 7.5(a)(2)), office signs (Rule 7.5(a)(3)), and letterheads (Rule 7.5(a)(4)).

4. Law firm names, however, are subject to more stringent regulations than the regulations that govern advertising. With limited exceptions, a lawyer in private practice may not "practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm . . . ." Rule 7.5(b). This rule serves to protect the public from being deceived as to the identity, responsibility or status of those who use the firm name. *See* N.Y. State 732 (2000) (applying trade name prohibition in former Code of Professional Responsibility).

5. The prohibition against trade names is broad, permitting use of little beyond the names of lawyers presently or previously associated with the firm. As an indication of this breadth, other parts of Rule 7.5(b) create exceptions allowing a firm name to include the names of deceased or retired partners or requiring firms to add terms such as "PC," "LLC," or "LLP" only in specified circumstances, suggesting that absent those circumstances, such names or terms might create impermissible trade names.

6. Precedents from this Committee confirm the breadth of the trade name prohibition. In N.Y. State 740 (2001), we said: "Using a name that is not the legal name of one or more partners or former partners in the law firm constitutes use of a trade name" within the meaning of the predecessor to Rule 7.5(b). In N.Y. State 445 (1976), we disapproved the firm name "Community Law Office." To support our decision, we cited former EC 2-11, which indicated that "a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such."

7. This broad prohibition has been applied to disallow firm names adding even limited terms to the names of the lawyers in the firm. In one case, "The People's Law Firm of Jan L. Shephard, Attorney, P.C.," was disapproved by a court not only as a deceptive name but also as a prohibited trade name. *In re Shephard*, 92 A.D.2d 978, 979 (3d Dept. 1983). Indeed, N.Y. State 740, *supra,* found that an impermissible trade name would result merely from adding the letter "A" to the front of the names of lawyers associated with the firm. These precedents were decided under the Code of Professional Responsibility, but the prohibition of trade names in the Rules continues in the same terms, and we interpret it in the same way.

8. Another restriction on law firm names is that lawyers may not make deceptive or misleading statements, whether in advertisements or otherwise. *See* Rule 7.1(a)(1) (prohibiting "false, deceptive or misleading" statements in lawyer advertisements) and Rule 8.4(c) (prohibiting a lawyer or law firm from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation"). The phrase "Tax Law Firm" as part of a firm name may be literally true, but literal truths can nonetheless be misleading. We are concerned that unsophisticated consumers could read "The Smith Tax Law Firm" as saying more than just that the firm practices tax law. The name would be misleading to the extent it suggests that there is a legal entity called a "tax law firm" – falsely implying an officially recognized subcategory of law firms that have more authority or more skill to practice tax law than do "ordinary" law firms.

9. We recognize that restrictions on a law firm's use of a trade name may raise constitutional issues. *Compare Friedman v. Rogers*, 440 U.S. 1 (1979) (upholding a Texas law prohibiting optometry trade names), *with Alexander v. Cahill*, 598 F.3d 79, 95 (2d Cir.), *cert. denied,* 131 S. Ct. 820 (2010) (distinguishing *Friedman* on its facts but also noting doubt as to *Friedman*'s continued validity). As of now, however, the courts have not struck down Rule 7.5(b). Nor was that provision challenged in *Alexander v. Cahill.* If the constitutionality of the prohibition on the use of trade names by private lawyers is someday litigated, one of the issues may be the potential for deception that we have mentioned above. Ultimately the courts may or may not see that potential as sufficient to justify the restriction, but the constitutionality of the prohibition on trade names is a question of law beyond our Committee's jurisdiction.

10. However, language that may be impermissible as a trade name may be permissible as a separate firm "motto." *See In re Von Wiegen*, 63 N.Y.2d 163, 176 (1984) (finding that "The County Lawyer," which appeared underneath the firm name on the firm's letterhead, was a permissible "motto" rather than an impermissible "trade name"); *see also* N.Y. State 636 (1992) ("We see nothing inherently misleading in the phrase 'The Will Store' and thus perceive no per se ethical proscription on the use of that phrase as a motto in conjunction with the name or names of one or more lawyer principals, but a trade name may not stand alone if the firm is comprised of lawyers and some of its activities, if carried on by lawyers, would constitute the practice of law").

Question B: May Mr. Smith use the name "The Smith Law Firm" even though he is the only lawyer in the firm?

11. Mr. Smith also asks whether he may use the name "The Smith Law Firm." We conclude that he may do so. Even though Mr. Smith is a sole practitioner, his use of the word "Firm" in the name of his practice would not violate Rule 7.5(b). Indeed, "The Smith Law Firm" would clearly and accurately identify the one lawyer practicing under that firm name. Use of the word "Firm" would not suggest that more than one lawyer is involved. *See* Rule 1.0(h) (defining "law firm" to include a "sole proprietorship").

CONCLUSION:

12. Mr. Smith may not use the name "The Smith Tax Law Firm" because including a practice area in the firm name renders it an impermissible trade name and is misleading to the extent it implies that there is an officially recognized entity called a "tax law firm." He may, however, use the name "The Smith Law Firm" even though he is the only lawyer in the firm.

(48-10)

OPINION 870 (05/31/2011)

TOPIC: Non-exclusive referral agreement between lawyer and nonlawyer debt reduction company; contingent legal fee based on the amount of debt reduction lawyer obtains for clients.

DIGEST: A lawyer may enter into a non-exclusive reciprocal referral agreement with a debt reduction company that is also the lawyer's client, provided the referral arrangement is non-exclusive. The lawyer may also enter into a contingent fee agreement with a debtor client for legal services in connection with debt reduction. However, if the lawyer knows that a client is unlikely to have sufficient financial resources to meet the agreed-upon future payment obligations to creditors, then a contingent fee based on the nominal reduction in debt may be excessive.

RULES: 1.5, 1.7, 5.7, 5.8, 7.2.

QUESTIONS:

1. The inquirer asks two questions:

   A. May a lawyer enter into a non-exclusive reciprocal referral arrangement with a debt reduction company?

   B. May a lawyer represent debtors who are customers of the debt reduction company when they need legal services to assist with their debt reduction efforts, and charge a contingent fee calculated as a percentage of the amount of debt reduction obtained?

FACTS:

2. The inquiring lawyer is considering entering into a business arrangement with a debt reduction company (the "Debt Reduction Company" or the "Company"). The lawyer and the Debt Reduction Company will not have any common employees; they will not share offices; and the lawyer will not hold any equity interest in the Debt Reduction Company.

3. From time to time, as the Debt Reduction Company's needs arise, the lawyer will provide legal services to the Company on a fee-for-services basis. Examples of services the lawyer might provide to the Company include incorporation, licensing, defense of tort and workers' compensation claims, and other business matters. The lawyer will also represent customers of the Debt Reduction Company when those customers need legal services that the Company cannot provide and the customers ask the lawyer to provide those legal services, but the Company will not pay the lawyer to represent its customers. Rather, the customers will pay their own legal fees.

4. Debt reduction companies are engaged in the business of offering ways for consumers to reduce their debt. Although the services and products of the companies may vary widely, the three most common means for debt reduction are bankruptcy, debt renegotiation, and debt consolidation. Each of these methods may entail legal and nonlegal services.

5. Here, the lawyer and the Debt Reduction Company wish to enter into a non-exclusive reciprocal referral agreement in which each will agree to refer potential clients to the other. If a client ini-

tially contacts the lawyer for debt reduction services, the lawyer will ordinarily refer the client to the Debt Reduction Company for nonlegal services if the need for such services appears. Conversely, if the client initially contacts the Debt Reduction Company for debt reduction services, the Company will ordinarily refer the client to the lawyer for any needed legal services. The agreement will provide that referrals in both directions are optional (*i.e.,* the Company will remain free to refer customers to other lawyers, and the lawyer will remain free to refer debtors to other debt reduction companies, or to make no referral at all).

6. The agreement will also provide that the lawyer will refer clients to the Debt Reduction Company only when the lawyer believes the referral to be in the best interest of the client. The lawyer will represent debtor-customers who choose to select the lawyer as their counsel. When the client retains both the lawyer and the Debt Reduction Company, the Company will provide nonlegal services associated with debt reduction. The client will pay a contingent fee to the Debt Reduction Company, measured as a percentage of the debt reduction obtained. At the same time, the lawyer will provide legal services associated with debt reduction to the client. The client will pay a contingent fee to the lawyer, likewise measured as a percentage of the debt reduction obtained. Each of the fees – the fee to the Debt Reduction Company and the fee to the lawyer – will be calculated, billed and collected separately.

OPINION:

Question A: Is a Non-Exclusive Referral Arrangement Permissible?

7. Under the New York Rules of Professional Conduct (the "Rules"), may the inquirer enter into an agreement with the Debt Reduction Company that will provide for each party to refer clients to the other on a non-exclusive basis? The lawyer will refer clients to the Debt Reduction Company only when the lawyer believes that the referral to Company is in the client's best interest. If not, the lawyer will either make no referral (because the client does not need debt reduction services) or will refer the client to some other debt reduction service (because another service is better suited to the client's needs than the Company). In N.Y. State 765 (2003), we approved such an arrangement under DR 1-107(C) and DR 2-103(B).

8. Former DR 1-107(C) is substantively identical to Rule 5.8(c), which provides that the restrictions imposed on relationship between lawyers and nonlegal professional service companies by Rule 5.8 "shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm." The introductory language in former DR 2-103(B) is identical to the introductory language in Rule 7.2(a), which provides that a lawyer "shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client" (with exceptions not applicable here). Therefore, the reasoning of N.Y. State 765 applies here and the proposed non-exclusive referral arrangement is permitted under the Rules.

9. We also need to ask, however, whether a non-exclusive reciprocal referral relationship makes the lawyer "affiliated" with the Debt Reduction Company within the meaning of Rule 5.7. Under Rule 5.7(a)(3), if a lawyer is "affiliated" with an entity that provides nonlegal services, the nonlegal ser-

vices will be subject to the Rules if the recipient of the nonlegal services "could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship." Rule 5.7(a)(4) states that such a reasonable belief is presumed, but that the presumption may be rebutted if the lawyer either (i) has a "*de minimis*" interest in the entity providing the nonlegal services, or (ii) "has advised the person receiving the nonlegal services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services . . . ." Comment [4] to Rule 5.7 points out that even though the presumption of an attorney-client relationship may be rebutted in this manner, the scope of the exemption is not absolute. Only the Rules that are dependent on the existence of an attorney-client relationship may be exempted in this manner.

10. The very limited arrangement proposed here does not make the lawyer "affiliated" with the Company under Rule 5.7. In our view, something more than a non-exclusive referral arrangement is needed to rise to the level of an affiliation under that Rule. Here, the only connections between the lawyer and the Debt Reduction Company are the non-exclusive referral agreement and that each – independently – intends to calculate their fee based on a percentage of the debt reduction attained. The lawyer and the Debt Reduction Company have no common employees; they do not share offices; the lawyer has no e*quity inte*rest in the Company; and we accept the lawyer's representation that the referral arrangement will be non-exclusive both in name and in fact. Under these circumstances, we conclude that the lawyer is not "affiliated" with the Debt Reduction Company within the meaning of Rule 5.7.

11. Even though we conclude that Rule 5.7 does not apply to this very limited relationship, and even though the referrals are to be made on a non-exclusive basis, the lawyer may need to disclose the relationship with the Company to the lawyer's clients or prospective clients, and obtain their informed consent, before referring them to the Company or accepting them as clients based on referrals from the Company. The disclosure and consent may be necessary to comply with Rule 1.7(a) (governing representations involving "differing interests" and representations where the lawyer's financial or other person interests create a "significant risk" that the lawyer's professional judgment will be "adversely affected"). *See* N.Y. State 765 ("a reciprocal referral arrangement would generally constitute a conflict of interest . . . such that the relationship would need to be disclosed and consent obtained before the lawyer made the referral"). Here, the need for disclosure is heightened because the reciprocal referral relationship is with one of the lawyer's clients (the Company). Even without the reciprocal referral relationship, Rule 1.7 might require the lawyer to disclose to debtor clients that he is referring them to another client (or that they have been referred to him by another client), and to obtain their informed consent before making a referral to the Company (or accepting a referral from the Company).

12. In addition, while Rule 5.7(a)(4) does not require the lawyer to disclose to clients that the services rendered by the Debt Reduction Company are not legal services and therefore do not enjoy the protection of a client-lawyer relationship, the lawyer may still consider it prudent to make this disclosure to avoid confusion or surprise on the part of clients who might otherwise believe that the Company is providing legal services.

Question B: May the Lawyer's Fee Be a Percentage of the Debt Reduction?

13. Rule 1.5(c) authorizes a fee contingent on the outcome of a matter unless a contingent fee is prohibited by Rule 1.5(d) or other law. In N.Y. State 390 (1975), we recognized that contingent fees are permitted unless prohibited by statute, rule, regulation or ordinance. In N.Y. State 697 (1997), we approved a hybrid fee (a combination of an hourly fee and a contingent fee) provided the fee was not excessive. We are not aware of any prohibition on charging a contingent fee for legal services that produce a debt reduction. Based on that understanding, we conclude that the proposed fee arrangement is proper, assuming that the fee is not excessive or illegal. *See* N.Y. State 705 (1998) ("if the lawyer may receive a fee contingent on the amount by which taxes are reduced, the lawyer may receive a fee that is a percentage of the tax reduction company's fee, where that fee is itself a percentage of the amount by which taxes are reduced").

14. The lawyer should consult Rule 1.5(a)(1)-(8) for a list of factors to consider when evaluating whether the contingent fee is excessive in all of the circumstances. In this connection, we note that, in many cases involving nonlawyer debt reduction companies, it has been reported that the client is expected to pay a percentage fee based on the amount of debt reduced, as reflected in an agreement with creditors. In some cases that debt reduction is contingent on the debtor meeting all of the obligations of the agreement in the future. If the lawyer knows that a particular client is unlikely to have the financial resources to meet those obligations, then the nominal amount of debt reduction obtained may significantly overstate the amount of the debt reduction ultimately attained, and hence may overstate the value of the legal and nonlegal services to the debtor. In such a case, the proposed contingent fee based on a percentage of the nominal debt reduction may produce an "excessive" fee, which would be prohibited under Rule 1.5(a). (We express no opinion on the propriety of the fee arrangement between the client and the Debt Reduction Company, since our jurisdiction is limited to interpreting the Rules of Professional Conduct as they apply to lawyers.)

CONCLUSION:

15. A lawyer may enter into a non-exclusive referral agreement with a debt reduction company, provided the arrangement is non-exclusive in fact. Although the very limited relationship at issue here does not make the lawyer "affiliated" with the Debt Reduction Company within the meaning of Rule 5.7, the lawyer would nevertheless be prudent to provide clients with the disclaimer set out in Rule 5.7(a)(4). In addition, to comply with Rule 1.7, the lawyer may need to disclose the non-exclusive reciprocal referral arrangement to clients and prospective clients, and obtain their informed consent, before referring clients to the Debt Reduction Company or accepting clients referred by the Debt Reduction Company.

16. A lawyer may enter into a contingent fee agreement for legal services in connection with debt reduction work. However, if the lawyer knows that a particular client is unlikely to have adequate financial resources to meet the reduced obligations, a contingent fee based on the nominal reduction in debt (as opposed to the actual reduction ultimately attained) may be excessive.

(31-10)

OPINION 871 (05/31/2011)

TOPIC: Conflicts of interest with former clients

DIGEST: An attorney may not oppose a former client in a different matter without the former client's informed consent, confirmed in writing, if a reasonable lawyer would perceive a substantial risk that the attorney would normally have learned confidential information during the prior representation that could be used against the former client in the present matter.

RULES: 1.9(a) & (c)

QUESTION:

1. May an attorney represent a new client who is adverse to a former client in a different matter?

OPINION:

2. The inquiring attorney wishes to represent a husband (the "Husband") in a divorce proceeding against his wife (the "Wife"). However, the attorney is concerned because he represented the Wife three years ago in a Family Court matter. In that Family Court matter, the Wife sought to modify a child visitation order regarding her child from a previous relationship. That child is not the Husband's child, and the Husband was not involved in the previous matter. However, the Husband and the Wife have three children in common through the present marriage. An existing Family Court order has already determined custody issues regarding the three children in common, and the inquiring attorney considers it "likely" that the existing custody order regarding these three children will be incorporated into the ultimate divorce decree. The inquirer does not say, however, whether the Wife agreed to the existing custody order or whether she will agree to its incorporation into the divorce decree. May the inquirer represent the Husband in the divorce proceedings?

3. Under Rule 1.9(a) of the New York Rules of Professional Conduct (the "Rules"), an attorney may not represent a client whose interests are materially adverse to a former client, unless the former client gives informed consent, confirmed in writing, if the matter on behalf of the present client is "substantially related" to the matter in which the attorney represented the former client. According to Comment [3] to Rule 1.9:

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that ***there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter***. [Emphasis added.]

4. Here, the matters plainly do not involve "the same transaction or legal dispute." The matter the inquirer handled for the Wife was a visitation dispute in which the Husband was not involved, whereas the new matter is a divorce action in which the Husband is involved. But as explained by Comment [3] to Rule 1.9, the matters are nevertheless "substantially related" for purposes of Rule 1.9(a) if "a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would

materially advance the [present] client's position in the subsequent matter." Comment [3] also provides an illustration that may apply here: "For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce."

5. We emphasize that the "reasonable lawyer" test articulated in Comment [3] is not whether the lawyer *actually* obtained confidential information about the former client in the prior matter that would be useful against her in the present matter. Rather, the test is whether a reasonable lawyer would perceive a sizeable *risk* that a competent lawyer handling the prior matter would *normally* have gained confidential information about the former client that could be turned to the present client's advantage in the matter against the former client. In other words, the "reasonable lawyer" test *presumes* that an attorney has confidential information about a former client if a reasonable lawyer would see a substantial risk that a typical attorney would have acquired such information in the prior matter. As Comment [3] explains:

> . . . A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and ***information that would in ordinary practice be learned by a lawyer providing such services.*** [Emphasis added.]

6. Here, the former representation of the Wife concerned visitation rights of third parties regarding a child unrelated to the marriage in which a divorce is now sought. A reasonable lawyer may conclude that the inquirer, in that former representation, would normally have obtained information concerning such things as the Wife's financial resources, the home life of the child, and the Wife's parenting skills. If that information is also relevant in the impending divorce action, a reasonable lawyer might also perceive a significant risk that the inquirer will use that information to the Husband's material advantage (and to the Wife's material disadvantage) in the divorce proceeding. However, applying the reasonable lawyer test to determine whether to matters are "substantially related" within the meaning of Rule 1.9 requires a factually intensive analysis, and we have only a skeletal version of the facts. What a "reasonable lawyer" would conclude in the situation at hand depends on a more nuanced description of the nature of the two matters than we have been given here.

7. For example, if the parenting ability or financial condition of the Wife were issues in the prior representation, or if other issues would normally have given a competent attorney reason to seek out confidential information during the prior representation that would materially advance the interests of the Husband (and be materially damaging to the Wife) in the divorce case, then the "reasonable lawyer" test of Comment [3] would be satisfied and the two matters will be deemed "substantially related" under Rule 1.9(a).

8. If the former matter and the present matter are deemed "substantially related," then Rule 1.9(a) prohibits the inquirer from representing the Husband in the divorce matter absent the Wife's informed consent, confirmed in writing. The terms "confirmed in writing" and "informed consent" are defined in Rule 1.0(e) and (j) respectively as follows:

(e) "Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

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

9. Whether or not the prior and present matters are substantially related, the inquirer must abide by the restrictions of Rule 1.9(c) in the divorce proceeding and elsewhere. Specifically, Rule 1.9(c)(1) prohibits the inquirer from *using* confidential information of the former client to the disadvantage of the former client "except as these Rules would permit or require with respect to a current client or when the information has become generally known," and Rule 1.9(c)(2) prohibits the inquirer from *revealing* confidential information of the former client that is protected by Rule 1.6 – whether to her advantage, disadvantage, or otherwise – "except as these Rules would permit or require with respect to a current client."

CONCLUSION:

10. Whether an attorney may oppose a former client in a new and different matter without the former client's informed consent (confirmed in writing) depends on whether a reasonable lawyer would perceive a substantial risk that a competent attorney would normally have learned confidential factual information during the prior representation that could be used against the former client in the new matter.

(14-11)

OPINION 872 (06/03/2011)

TOPIC: Attorney nicknames and translations of foreign names

DIGEST: An attorney may, consistent with the Rules of Professional Conduct, use a different first name than the one the attorney listed on the Roll of Attorneys, assuming the name used is not misleading as to the attorney's identity. The attorney must, however, comply with any applicable statutes, rules or guidelines governing attorney registration and name changes.

RULES: 7.5(b), 8.4(c).

FACTS:

1. The inquirer is admitted to practice in New York State and has a Polish first name. This first name is the name under which the inquirer is listed on the Roll of Attorneys and Counselors-at-Law maintained in the office of the Clerk of the Court and the name he uses when submitting papers to court and in any formal communication. For the simplicity of informal communication in English, the inquirer would like to use a somewhat different first name, which he says is an accurate translation of his name from Polish to English. He would also like to use this English name on business cards and on his firm's website.

QUESTION:

2. For purposes of business cards, informal communications, and a law firm website, may an attorney use a first name different from the one the attorney has listed on the official Roll of Attorneys?

OPINION:

A. Applicable Rules of Professional Conduct

3. Two provisions of the New York Rules of Professional Conduct are relevant here. Rule 7.5(b) provides, among other things, that "[a] lawyer in private practice shall not practice under a trade name [or] a name that is misleading as to the identity of the lawyer or lawyers practicing under such name." And Rule 8.4(c) prohibits an attorney from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation."

4. Under the circumstances presented here, a lawyer's use of an English name is not misleading as to the identity of the lawyer and is not dishonest, fraudulent, deceitful, or a misrepresentation. Therefore, the name does not run afoul of either Rule 7.5(b) or Rule 8.4(c). We therefore conclude that an attorney may ethically use an accurate English translation of his first name listed on the Roll of Attorneys in informal communications, on business cards, and on his firm's website. Similarly, an attorney could use a name that is not necessarily an accurate translation, such as a nickname by which the attorney is commonly known, as long as the name is not misleading as to the lawyer's identity.

5. Our conclusion here is consistent with prior opinions in this realm. In N.Y. City 82-37 (1982), the inquiring attorney practiced for a number of years and was a name partner in his law firm. He

sought to obtain a legal name change for himself and his family in court, and asked the City Bar's ethics committee whether he could continue to use his original name in the practice of law after legally changing his name. Because the attorney had practiced under his original name for many years, the Committee saw little "possibility that his continued use of this name after the name change [was] intended or likely to mislead." Accordingly, the Committee concluded that using the name would not violate DR 2-102(B), the predecessor provision to Rule 7.5(b). Similarly, in N.Y. City 638 (1943), the ethics committee concluded that it was ethically permissible for an attorney who had been admitted to practice under her "married name" to use her "maiden name" in the practice of law.

B. Statutes, court rules, and judicial guidelines

6. Compliance with the Rules of Professional Conduct that we have cited above, however, may not be sufficient. The attorney should also abide by any statutes, court rules, and judicial guidelines that govern an attorney in these circumstances. For example, Judiciary Law § 468 ("Official registration of attorneys to be kept by the chief administrator of the courts") requires the Chief Administrator of the Courts to maintain an official register of attorneys and counselors-at-law in the state of New York. Likewise, in Part 118 of the Rules of the Chief Administrator of the Courts ("Registration of Attorneys"), a provision at 22 NYCRR § 118.1(e) requires that attorneys periodically file registration statements on a form provided by the Chief Administrator of the Courts, which must include, among other things, the name of the attorney. If the information on file changes, 22 NYCRR § 118.1(f) requires that "the attorney shall file an amended statement within 30 days of such change."

7. Furthermore, each of the four judicial departments within the Appellate Division maintains a Roll of Attorneys and Counselors-at-Law in the respective office of the Clerk of the Court. The Second Department's website, under "Attorney Matters/Change of Name/Introduction" notes the following:

The name under which an attorney is authorized to practice law is the name under which he or she was admitted to practice and which is recorded in the Roll of Attorneys and Counselors-at-Law maintained in the office of the Clerk of the Court. An attorney may not begin to practice under a different name without the prior approval of an application to do so by the Appellate Division in the Department in which he or she was admitted. Such a change may, under limited circumstances defined by law, be made administratively by the Clerk of the Court. All others require an application to the court for an order authorizing the change.

http://www.nycourts.gov/courts/ad2/attorneymatters_NameChangeApplications.shtml. The other three judicial departments have adopted similar procedures. See http://www.courts.state.ny.us/courts/ad1/Committees&Programs/CFC/index.shtml#NameChange (1st Dep't); http://www.courts.state.ny.us/ad3/Admissions/AttorneyNameChange.pdf (3rd Dep't); http://www.nycourts.gov/courts/ad4/Clerk/AttyMttrs/baradmin.html#Name (4th Dep't).

8. The Second Department's guidelines on "Name Change Applications" note that "[t]here are often reasons to seek a change of the name under which an attorney is authorized to practice law that do not fall within the statutes permitting such a change to be made administratively and thus require the change to be made by court order." Specifically listed among the situations requiring a court order

are cases in which an attorney "wishes to practice under the familiar form of the given names under which he or she was admitted to practice, such as 'Jimmy Carter' rather than 'James Earl Carter.'"

9. The scope, interpretation, and application of the cited statutes, rules and guidelines present questions of law beyond the jurisdiction of this Committee. Our jurisdiction is limited to interpreting the New York Rules of Professional Conduct. We note, however, that the inquiring attorney must comply with all applicable statutes and court rules. Assuming the use of the English translation of the attorney's first name comports with these requirements, the inquirer's proposed use of that name is not unethical under the Rules.

CONCLUSION:

10. For purposes of business cards, informal communications, and a law firm website, an attorney may, under the New York Rules of Professional Conduct, use a different first name from the one the attorney listed on the Roll of Attorneys as long as the name used is not misleading as to the attorney's identity. The attorney must, however, comply with any applicable statutes, rules or guidelines governing attorney registration and name changes.

(19-11)

OPINION 873 (06/09/2011)

TOPIC: Offering a prize to join attorney's social networking sites

DIGEST: The Rules of Professional Conduct do not prohibit an attorney from offering a prize to join the attorney's social network as long as the prize offer is not illegal, but if the primary purpose of the prize offer is the retention of the attorney, then it will constitute an "advertisement" and will be subject to the rules governing lawyer advertising. If the prize offer is an advertisement, and if it is targeted to specific recipients, and if a significant motive is pecuniary gain, it will also constitute a "solicitation" and will be subject to additional requirements and restrictions.

RULES: 1.0(a) & (c), 7.1, 7.2, 7.3, and 8.4(c).

QUESTION:

1. May a lawyer offer a prize as an incentive to connect to the inquirer on social networking sites?

OPINION:

2. The inquirer currently uses various social networking sites, including Facebook, LinkedIn and MySpace. The inquirer is considering offering the chance to win a prize (to be determined) for connecting to the inquirer on one of those sites. By building the inquirer's social network this way, the inquirer hopes to market the inquirer's legal services more effectively.

3. The Committee assumes that the proposed "prize" will be awarded randomly to someone simply for agreeing to connect to the inquirer on one of the inquirer's social networking sites (*e.g.,* for agreeing to become a new "friend" or "contact"). The Committee also assumes that a person will not be required or expressly invited to retain the inquirer as an attorney in order to be eligible for the prize.

4. Preliminarily, we note that there may be laws or regulations governing sweepstakes and games of chance that could apply to the inquirer's proposal. The Committee does not address these issues because the Committee does not opine on questions of law. The Committee has considered solely whether, assuming that the proposal is legal, it is also permissible under the New York Rules of Professional Conduct (the "Rules"). The Committee likewise has not considered whether a prize offer would violate the Terms of Use of any particular social network. The Terms of Use are a matter of contract between the inquirer and the social networking sites and are not within the Committee's jurisdiction.

A. New York Rules of Professional Conduct Relevant to a Prize Offer

5. We begin by setting forth various provisions in the New York Rules of Professional Conduct that are relevant to the question posed.

6. New York Rule 7.1 ("Advertising") governs advertisements by lawyers and law firms. Rule 1.0(a) defines the term "advertisement":

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

7. Rule 7.2 ("Payment for Referrals") governs various types of compensation for marketing. Rule 7.2(a) of provides as follows:

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

8. Rule 7.3 ("Solicitation and Recommendation of Professional Employment") governs advertisements directed at particular potential clients. Rule 7.3(a) provides:

> A lawyer shall not engage in solicitation:
>
> (1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client . . . .

9. Rule 7.3(a)(1) uses the term "computer-accessed communication," which is defined in Rule 1.0(c) as follows:

> "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

10. Rule 7.3(b) defines "solicitation":

> For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.

11. Finally, Rule 8.4 ("Misconduct") contains the general prohibition, in Rule 8.4(c), that a lawyer or law firm shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

B. Applying the Rules of Professional Conduct to the Prize Offer

12. A "solicitation" in Rule 7.3(b) is by definition an "advertisement" that meets additional criteria, so something cannot be a "solicitation" unless it is first found to be an "advertisement." *See* Rule 7.3, cmt. [1] ("Not all advertisements are solicitations. . . . All solicitations, however, are advertise-

ments with certain additional characteristics."). If the proposed prize offer is not an advertisement as defined by the Rules, it will not fall under the strictures that apply to advertising or solicitation. Therefore, we must first determine whether the offer is an advertisement. If so, we must then determine if it is also a "solicitation" under Rule 7.3(b).

Is the prize offer an "advertisement"?

13. To fall within the definition of "advertisement," the communication offering the prize must be for the "primary purpose" of the inquirer's retention. The fact that business development might be the inquirer's ultimate goal in offering the prize would not trigger the Rules on advertising any more than it would trigger those Rules if, for example, the inquirer were to join a local Chamber of Commerce, Kiwanis Club, or bar association, or if the inquirer were to take other steps to expand the inquirer's personal social circle, with the aim of meeting potential new clients. As stated in Comment [6] to Rule 7.1:

> Not all communications made by lawyers about the lawyer or the law firm's services are advertising. Advertising by lawyers consists of communications made in any forum about the lawyer or the law firm's services, the primary purpose of which is retention of the lawyer or law firm for pecuniary gain as a result of the communication. . . .

See also Rule 7.1, cmts. [7] - [9] (regarding various communications that may or may not be advertisements, depending on the circumstances).

14. If the prize offer is merely posted on the inquirer's own social networking sites and people gain a chance to win the prize simply by connecting with the inquirer – not for retaining the inquirer – it is not likely to be an "advertisement" even if the site elsewhere identifies the inquirer as an attorney. If, however, the prize offer itself describes the inquirer as an attorney or describes the inquirer's legal services or law firm (or both), the prize offer would be an "advertisement" subject to all of the strictures of Rule 7.1, such as the mandatory use of the label "Attorney Advertising."

15. Whether or not the prize offer is an advertisement, the inquirer must be honest. As observed in Comment [6] to Rule 7.1:

> [A]ll communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law. . . .

Is the prize offer a "solicitation"?

16. If posting the prize offer is considered an "advertisement," we must also ask whether it will also be considered a "solicitation" within the meaning of the Rules. Under Rule 7.3(b), the advertisement for a prize offer will be a solicitation if is "directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives" and a "significant motive" is "pecuniary gain." If the prize offer is a solicitation, it will be subject to the special requirements of Rule 7.3.

17. Of particular relevance in the social networking context is Rule 7.3(a), which prohibits solicitation by (*inter alia*) "real-time or interactive computer accessed communication" unless the recipient is "a close friend, relative, former client or existing client." (The inquirer has not suggested that those exceptions would apply to most recipients of the prize offer.) A "computer-accessed communication" is defined in Rule 1.0(c) as "any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device . . . ." Communications by targeted electronic messages – *e.g.,* posting the offer on a social networking site or sending it via email – would fall within the rubric of a "computer-accessed communication." However, the closing sentence of Comment [9] to Rule 7.3 states: "Ordinary email and websites are not considered to be real-time or interactive communication." Thus, if the inquirer merely posts the prize offer on his Facebook or other social networking site, or sends the offer to recipients by email, then the offer will not be considered a prohibited "real-time or interactive computer-accessed communication" under Rule 7.3(a)

18. The policy reasons underlying the general prohibition against in-person solicitation, telephone contact, and real-time or interactive computer-accessed communications are set out in Comment [9] to Rule 7.3, which provides:

> Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and are regulated in the same manner. . . .

19. In sum, the prize offer will be an "advertisement" and must comply with Rule 7.1 only if the inquirer's "primary purpose" is the "retention" of the inquirer or his law firm." Furthermore, the prize offer will be a "solicitation" only if it is an "advertisement" *and* is "directed to, or targeted at, a specific recipient or group of recipients" (whether the recipients are already part of the offeror's own social network contacts or are outside the offeror's social network contacts). If the prize offer is a "solicitation," it will be subject to the strictures of both Rules 7.1 and 7.3. No matter how the communication of the prize offer is labeled, it must be truthful per Rule 8.4(c).

20. Finally, the proposed prize offer does not violate Rule 7.2(a)'s ban against compensating or giving "anything of value" to a person "to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client . . . ." The inquirer is offering the chance to win a prize merely for connecting to the inquirer on a social networking site, not for recommending or employing the inquirer as a lawyer.

CONCLUSION:

21. Offering a prize offer to join an attorney's social network is not prohibited by the Rules of Professional Conduct as long as the offer does not constitute illegal conduct. If the primary purpose of the prize offer is to promote retention of the attorney's legal services (which is a factual question), then it is an "advertisement" and is subject to Rule 7.1 and other Rules governing lawyer advertising. If it is an advertisement that also meets the definition of a "solicitation," then it is subject to Rule 7.3 as well. If the attorney communicates the prize offer by posting it on a social networking site or send-

ing it by mail, and if the attorney does not communicate the offer in person, by telephone, or by a real-time or interactive computer-assisted communication (other than to recipients who are close friends, relatives, former clients, or existing clients), then the communications about the prize offer are not prohibited by Rule 7.3(a).

22. If the prize offer is not an advertisement, it also cannot be a solicitation and will therefore be subject neither to Rule 7.1 nor to Rule 7.3. However, like every communication by a lawyer – advertisement, solicitation, or neither – it will be subject to the general prohibition in Rule 8.4(c) against conduct involving dishonesty, fraud, deceit or misrepresentation.

(70-09)

OPINION 874 (07/20/2011)

TOPIC: Part-time prosecutor's representation of criminal defendants in town courts

DIGEST: An attorney who represents criminal defendants in a town court may not accept a position as a part-time prosecutor of vehicle and traffic offenses.

RULES: 1.7(a) and (b)

QUESTION:

1. May an attorney who represents criminal defendants in town courts accept a position as a part-time prosecutor with respect to vehicle and traffic matters in a local justice court in the same county?

OPINION:

2. The inquirer represents criminal defendants in town courts and asks whether he could accept a position as a part-time prosecutor with respect to vehicle and traffic matters in a local justice court in the same county. He notes that there are only a small number of traffic tickets (about five to seven a month) in the local justice court.

A. Is there a conflict of interest?

3. It has long been the opinion of this Committee that an attorney who has prosecutorial responsibilities as an incident of part-time employment by a local governmental unit is disqualified from the private practice of criminal law in all courts of the state. In N.Y. State 544 (1982), we observed that "a part-time local attorney, insofar as he prosecutes violations of local law, acts on behalf of the people of the state." Because a prosecutor represents the people of the state, it is improper for the attorney to represent any individual client whom the people of the state have charged with a criminal violation. "Acting as prosecutor on one case on one day, and appearing the next day even in a different court representing a private citizen who had been charged with a criminal act or violation of law, would give rise to an appearance of improper conflict of interest." N.Y. State 184 (1971).

4. In N.Y. State 544, at 5, we elaborated on the rule as follows:

> A part-time local attorney may undertake a criminal defense without conflict of interest or appearance of impropriety if (1) his statutory or other responsibility to prosecute criminal proceedings on behalf of the locality does not require him, in any case, to prosecute any crimes or offenses designated as such by the Penal Law or any other law enacted by the Legislature of the State of New York, (2) the defense does not require him to appear before a judicial or other official of the locality he publicly represents, (3) the local government unit by which he is employed, or a violation or a construction of one of its ordinances, is not involved, (4) the offense charged is unlike any of those which he prosecutes, and (5) the investigating officers and law enforcement personnel involved are not those with whom he associates as prosecutor.

5. Absent satisfaction of the foregoing five qualifications, the part-time prosecutor is forbidden to undertake a criminal defense case anywhere in the State of New York. N.Y. State 544 at 1.

6. In N.Y. State 544 and again in N.Y. State 657 (1993), we specifically considered whether the responsibility to prosecute vehicle and traffic infractions caused the attorney to fail to meet the first qualification (his "responsibility to prosecute criminal proceedings on behalf of the locality does not require him . . . to prosecute any crimes or offenses designated as such by . . . the Legislature of the State of New York") – and in both opinions we opined that the prosecutor failed that condition. In N.Y. State 657, which interpreted N.Y. State 544, we said that "if the lawyer's responsibilities . . . include prosecuting violations of the New York State Vehicle and Traffic Laws, the lawyer is precluded from representing, in criminal cases, a defendant in any court of the State." This prohibition is absolute.

7. The number of cases prosecuted each month is irrelevant. In fact, it is irrelevant whether a part-time prosecuting attorney actually prosecutes any offenses during the period in which he represents a criminal defendant so long as he has the responsibility to do so. As we said in N.Y. State 657, "The fact that the lawyer only negotiates settlements and is not permitted to do trial work does not avoid the prohibition . . . ." We have also noted that an "independent contractor" and other "local part time attorneys for municipalities, regardless of their title or actual responsibilities, may not undertake criminal defense cases pending before judicial officers of the same locality, notwithstanding their ability to handle such matters in other courts of the State." N.Y. State 657, *citing* N.Y. State 234 (1972) (as modified by N.Y. State 544). Thus, neither the attorney's job title nor the attorney's part-time status can overcome the absolute prohibition.

8. Furthermore an attorney's defense of the criminal defendant would require the attorney to appear in other town courts. Thus, the attorney would fail to satisfy the second qualification in N.Y. State 544 as well ("the defense does not require him to appear before a judicial or other official of the locality he publicly represents") because the attorney would be appearing before a judicial official of the locality the attorney publicly represents.

9. We recognize that the opinions we have discussed here were decided under DR 5-105 and DR 9-101 of the New York Lawyer's Code of Professional Responsibility, which was superseded by the New York Rules of Professional Conduct on April 1, 2009. Nevertheless, the result is the same today. Rule 1.7(a)(1) provides, in relevant part:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . :
>
> (1) the representation will involve the lawyer in representing differing interests. . . .

10. Rule 1.0(f), in turn, defines differing interests as follows:

> "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

11. Representing the state as a prosecutor and at the same time representing a criminal defendant, even in a totally unrelated case, would involve the attorney in representing "differing interests." Thus, the attorney has a conflict under Rule 1.7 unless it can be waived.

B. Can the conflict be waived?

12. Former DR 5-105(C) provided for a waiver of the conflict with the consent of the affected clients. Specifically, in 1993, it permitted a lawyer to represent multiple clients with "differing interests" if each consented to the representation after full disclosure of the possible effect of the representation on the exercise of the lawyer's independent professional judgment and if it was obvious that the lawyer could adequately represent the interests of each client. In N.Y. State 657, we concluded that the conflict addressed there, which involved a lawyer who prosecuted violations of Vehicle and Traffic Laws, could not be waived. "Because the role of the prosecutor and the defense lawyer are inherently incompatible and the prosecutor has special responsibilities to the public," we said, "consent cannot cure the conflict because it is not obvious that the lawyer can adequately represent the Town and the private client." That conclusion is also true under Rule 1.7(b), as we will now discuss.

13. Rule 1.7(b), like DR 5-105(C), provides for a waiver of a conflict. Rule 1.7(b) provides:

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

14. Despite the differences in language between DR 5-105(C) and Rule 1.7(b), we continue to believe that the role of the prosecutor and the criminal defense lawyer are "inherently incompatible." Therefore, a lawyer who is both a prosecutor and a criminal defense lawyer will not "be able to provide competent and diligent representation to each affected client" as required by Rule 1.7(b)(1). Since that condition cannot be satisfied, the conflict is non-consentable. Client consent will not cure the conflict.

CONCLUSION:

15. An attorney who represents criminal defendants in a town court may not accept a position as a part-time prosecutor of vehicle and traffic offenses.

(23-11)

OPINION 875 (07/20/2011)

TOPIC: Non-testifying expert compensation; percentage of recovery

DIGEST: Lawyer may ethically agree to handle a case on a contingent fee basis even if the client already has separately retained a non-testifying expert on a contingent fee basis.

RULES: 1.5(a), 5.4(a)

QUESTION:

1. May a lawyer ethically agree to handle a case on a contingent fee basis if the client already has signed a retainer with a non-testifying expert providing that the expert is to be compensated based on a percentage of the recovery in the action?

OPINION:

2. An out-of-state lawyer (the "out-of-state lawyer") has asked a lawyer admitted to practice in New York State (the "New York lawyer") to handle a case in New York as co-counsel to the out-of-state lawyer. The out-of-state lawyer's client has already signed a contract with a non-testifying expert in the case. The contract calls for the expert to be compensated by a percentage of the recovery in the case (*i.e.,* on a contingent fee basis). The out-of-state lawyer has signed a separate retainer agreement with the client by which the out-of-state lawyer is to be compensated at one-third of any recovery.

3. The proposed fee-splitting arrangements between the out-of-state lawyer and the New York lawyer have not been disclosed, but we assume that the New York lawyer's fee would also be contingent on recovery, and would either be a share of the out-of-state lawyer's fee or would be a separate fee that, when combined with the out-of-state lawyer's fee, would not to exceed one-third of the total recovery.

4. The role of the non-testifying expert is not specified in the inquiry, so we do not know whether and to what extent the role of that expert and services that expert is expected to provide overlap with the services to be provided by the lawyers.

5. There also is no indication that the engagement of the out-of-state lawyer was procured by the non-testifying expert. Nor is there any indication that the out-of-state lawyer will take a reduced fee to facilitate the client's payment of a separate contingent fee to the non-testifying expert (in a percentage matching the percentage by which the out-of-state reduced his fee) as a way of compensating the expert for a referral.

6. Because the New York lawyer is being retained by the client after the client has already entered into separate contingent fee engagements with the non-testifying expert and the out-of-state lawyer, we have no concern as to fee splitting with a non-lawyer, and we have no concern regarding the professional independence of the lawyer and the lawyer's duty of loyalty to the client.

7. This situation does not implicate Rule 5.4(a), which prohibits a lawyer from sharing legal fees with a nonlawyer (except in certain situations not applicable here). The purpose of Rule 5.4(a) is to

promote the professional independence of the lawyer and help to ensure that the professional responsibility of the lawyer to the client is direct and not compromised by external influences. *See* Rule 5.4, cmt. [1]. These policies are not implicated here because the lawyer's relationship with the client remains direct, and the lawyer is not sharing fees with the non-testifying expert.

8. Nor does the present situation raise the concerns addressed in N.Y. State 698 (1998), which concluded that it would be improper for a lawyer to accept referral of a medical malpractice case on a contingent fee basis from a "medicolegal consulting service" that would also be paid on a contingent basis. That opinion noted the potential influence of the consultant on the lawyer, possibly compromising the lawyer's professional independence, and also recognized the risk that the combination of the contingent legal fee and contingent consulting fee could result in an excessive fee. An excessive fee would violate Rule 1.5(a) ("lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee").

9. The present situation, unlike that in N.Y. State 698, does not create risk of confusion as to the respective responsibilities of the lawyer and the non-testifying expert. The New York lawyer is separately engaged by the client, and the attorney-client relationship is defined by the engagement letter between the client and the New York lawyer.

10. The concerns discussed in N.Y. State 727 (2000) also are not implicated in the present case. That opinion involved separate contingent fees charged by a lawyer and by an accounting firm that would refer cases to the lawyer. In effect, the lawyer there was splitting the lawyer's contingent fee with the accounting firm, which is improper.

CONCLUSION:

11. There is no ethical barrier to a lawyer entering into a contingent fee arrangement with a client where the client already has retained a non-testifying expert to work on the same case on a contingent fee basis.

(49-10)

OPINION 876 (09/09/2011)

TOPIC: Conflicts of interest when lawyers are associated with two or more firms

DIGEST: Conflicts of interest will be imputed to all lawyers in all firms with which a lawyer is associated as a partner, associate or of counsel, whether or not a screen is established.

RULES: 1.7, 1.9, 1.10(a) & (e)

QUESTION:

1. May lawyers associated as partners, associates or of counsel avoid the imputation of conflicts by creating a screen and limiting the practice of one of the firms?

FACTS:

2. The ABC law firm and the MNO law firm are separate law firms located in different cities over 200 miles apart. ABC and MNO do not share office space and have no common partners or associates. However, two partners of the ABC law firm and two partners of the MNO law firm intend to form a third law firm, the XYZ law firm. (Other partners of the ABC firm and the MNO firm will continue practicing with their respective firms but will not join the XYZ law firm.) The sole purpose of the XYZ law firm will be to write title opinions for mineral estates associated with real property. The XYZ firm will limit itself to that practice.

3. In an effort to avoid imputing any conflicts of interest from any of the three firms to any other firm, the common members of ABC, MNO and XYZ will enter into agreements prohibiting them from disclosing any proprietary, trade secret, confidential or privileged information of the XYZ law firm to anyone outside the firm. The XYZ firm plans to obtain the informed consent of the XYZ firm's clients to this arrangement.

4. The XYZ law firm will not have a separate physical office. Instead, the XYZ firm will maintain its files electronically and make them available only to the attorneys at the XYZ law firm. In addition, the XYZ firm's files will be maintained physically in file cabinets located at each of the ABC and MNO law firms, but those files will be separated from the general files of the ABC and MNO law firms, and locks on the file cabinets will prohibit non-XYZ attorneys from gaining access to the XYZ firm's files.

5. The essence of the question before us is whether screening is sufficient to avoid the imputation of conflicts of interest from one law firm to another. We conclude that it is not.

OPINION:

6. Effective April 1, 2009, the New York Rules of Professional Conduct (the "Rules") replaced the New York Code of Professional Responsibility (the "Code"). However, the Rules and the Code are similar or identical in substance regarding all relevant issues raised by this inquiry. Consequently, although the opinions and cases we cite in this opinion were decided under the Code, each would be decided in the same manner under the Rules because there are no substantive differences between the

applicable Rules and the former Code provisions. Thus, our analysis and our answer under the Rules is the same as it would have been under the Code.

General Principles of Imputation

7. New York's general rule governing imputation of conflicts of interest is Rule 1.10(a), which is nearly identical to former DR 5-105(D). Rule 1.10(a) provides:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

8. For decades, both this Committee and various New York courts have consistently stated that where a lawyer is "associated" with more than one law firm within the meaning of the imputation rule, all of the law firms with whom that lawyer is associated are treated as one law firm for purposes of conflicts of interest. Accordingly, under Rule 1.10(a), all conflicts in each firm are imputed to all lawyers in all of the firms associated with a common lawyer. *See, e.g.,* N.Y. State 807 (2007) (lawyer working part-time at two firms); N.Y. State 794 (2006) (lawyer working at law firm and law school clinic); N.Y. State 793 (2006) (lawyer with "of counsel" relationship with two firms at the same time); N.Y. State 715 (1999) (contract lawyer for two firms); N.Y. State 388 (1975) (sole practitioner and member of partnership); N.Y. City 2000-4 (2000) (affiliated law firms); *Cinema 5, Ltd. v. Cinerama, Inc.,* 528 F. 2d 1384 (2d Cir. 1976) (partner in two law firms).

9. Because multiple law firms that are associated with a common lawyer (or lawyers) are treated as if they were one firm for conflicts purposes, it follows that all law firms with a common lawyer must also be treated as a single unit for purposes of checking for conflicts under the Rules. In that regard, Rule 1.10(e), which includes language similar to former DR 5-105(E), requires law firms to implement and maintain a system for checking for conflicts of interest. As explained in Comment [9] to Rule 1.10: "Under paragraph (e), every law firm, no matter how large or small (including sole practitioners), is responsible for creating, implementing and maintaining a system to check proposed engagements against current and previous engagements and against new parties in pending matters."

Will Screening Avoid Imputation?

10. The opinions we have cited have not specifically addressed the issue of screening. The terms "screened" and "screening" are defined in Rule 1.0(t) as follows:

> (t) "Screened" or "screening" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.

11. Here, the XYZ law firm will attempt to screen its files and activities so that only the lawyers who make up the XYZ law firm will have access to the XYZ firm's client files, while the lawyers at the ABC and MNO firms will not. We may assume, without deciding, that these procedures would be "reasonably adequate under the circumstances to protect information that the isolated lawyer or the [XYZ] firm is obligated to protect under these Rules or other law," and would thus fall within the defi-

nition of "screening" in Rule 1.0(t). But that is irrelevant because a screen cannot avoid the imputation of conflicts between and among all three firms pursuant to Rule 1.10(a). The screen fails on at least two grounds.

12. First, in promulgating the new Rules, the Appellate Divisions rejected the recommendation of the New York State Bar Association that screening be permitted in appropriate circumstances as a substitute for client consent. *Compare* Proposed Rule 1.10(c) and Proposed Comments [5D] through [5H] of Rule 1.10 (Feb. 1, 2008) *with* Rule 1.10 as adopted effective April 1, 2009.[11]

13. Second, the proposed screening by the XYZ law firm does not permit ABC law firm or MNO law firm to fulfill its obligation under Rule 1.10(e) to implement "a system by which proposed engagements are checked against current and previous engagements" in the circumstances specified in Rule 1.10(e)(1)-(4). Thus, law firms ABC and MNO will be unable to determine whether either firm has a conflict under (*inter alia*) Rules 1.7(a) and 1.9(a)-(b), or whether any conflict arising under Rule 1.7(a) is nonconsentable under Rule 1.7(b)(1)-(3). Moreover, if either the ABC and/or the MNO firm could somehow determine (despite the XYZ screen) that it had a conflict of interest under Rule 1.7 or Rule 1.9, the firm would lack the information necessary to obtain "informed consent" to the conflict from each affected client.

14. The fact that the XYZ law firm intends to limit its practice to a discrete area of the law does not avoid these infirmities. Rule 1.10(a) and (e) do not depend on whether a law firm's practice areas are broad or narrow, diverse or discrete, isolated or integrated. Conflicts are imputed among all law firms that are associated with a common lawyer or lawyers, and those firms must check for conflicts of interest. The proposed screening measures do not avoid imputation of conflicts of interest and yet do not permit law firms ABC and MNO to check for conflicts with XYZ's current and previous engagements.

Can the Imputed Conflicts Be Waived?

15. Finally, we consider the effect of Rule 1.10(d), which allows an imputation to be waived under certain circumstances. Specifically, Rule 1.10(d) provides: "A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7." One of those stated conditions is Rule 1.7(b)(4), which requires that "each affected client gives informed consent" to the conflict. Here, that condition cannot be satisfied because the screening measures will prevent law firms ABC and MNO from learning the names of the XYZ firm's clients and the general nature of their matters. Lacking that information, law firms ABC and MNO will be unable to obtain informed consent to any conflicts that XYZ's practice may create. Thus, Rule 1.10(d) does not permit a waiver of the imputed conflicts at issue here.

11 The Proposed N.Y. Rules of Professional Conduct (February 1, 2008) are available on the State Bar's website at http://www.nysba.org/AM/Template.cfm?Section=Committee_on_Standards_of_Attorney_Conduct_Home&Template=/CM/ContentDisplay.cfm&ContentID=4786.

CONCLUSION:

16. When two law firms are both associated with lawyers at a third firm, the conflicts of each firm are imputed to the lawyers in all three firms as if they were a single law firm. Screening, no matter how elaborate, cannot avoid that imputation. Therefore, the three law firms must conduct interrelated conflict checks as if they were one firm. The screening measures proposed here would prevent two of the law firms (ABC and MNO) from checking for conflicts and would likewise deprive those two firms of the information necessary to obtain informed consent from clients to waive the imputation of any conflicts that might exist. Limiting the practice of the firm that will be screened does not change the analysis. Accordingly, lawyers associated as partners, associates or of counsel cannot avoid the imputation of conflicts by creating a screen or by limiting the practice of one of the firms.

(4-11)

OPINION 877 (09/12/2011)

TOPIC: Permissible information on a law firm website.

DIGEST: A lawyer may accurately list, on his firm's web site, his former positions in other firms. The web site may also accurately quote bona fide professional ratings or comments from any ratings publication if the ratings or comments are factually supportable when published, and the lawyer obtains and confirms in writing the client's informed consent to any testimonial or endorsement with respect to a matter still pending.

RULES: 7.1(a), (b), (d) & (e); 7.5(a) & (b).

QUESTIONS:

1. A lawyer has asked two questions about what information he may post on his firm's web site:

   A. May he list, in his web site biography, his former partnership positions in other firms?

   B. May he, on the web site, quote favorable comments about his work that were made in a publication that rates lawyers and law firms?

OPINION:

Question A: May a lawyer's web site biography list his former partnership positions in other firms?

2. Rule 7.5(a) expressly provides that a lawyer may use "internet web sites" that do not violate any statute or court rule and are in accordance with Rule 7.1. Within Rule 7.1, subparagraph (a)(1) prohibits a law firm from using or disseminating advertisements that are "false, deceptive or misleading." Rule 7.1(b)(1) expressly provides that advertisements may include (among other things) information as to "public offices and teaching positions held." Rule 7.1(b)(1) does not explicitly authorize inclusion of other kinds of experience (such as former partnership positions in other firms), but in the analogous context of professional announcement cards, Rule 7.5(a)(2) more broadly authorizes such cards to state "biographical data" that is in accordance with Rule 7.1.

3. We believe that the biographical data authorized for inclusion in professional announcement cards is authorized for inclusion on law firm internet web sites as well. Lawyer advertising serves legitimate purposes of attracting and assisting potential clients, so long as such advertising is not false, deceptive or misleading. See Rule 7.1, cmt. [3]. Accurate biographical data, such as identification of former partnership positions in other firms, can be useful in carrying out those legitimate purposes.

4. Of course, references to such former partnership positions would be prohibited if they were false, deceptive or misleading. For example, it would be impermissible for the reference to former partnership positions to imply that there is a continuing relationship with the former firm, or that the lawyer's current firm is a successor firm to the lawyer's former firm, if that is not a fact, and it would be impermissible for the biographical data to imply that the former partnership position lasted longer or ended for a different reason than was actually the case.

Question B: May Mr. Doe, on his web site, quote favorable comments about his work that were made in a publication that rates lawyers and law firms?

5. A lawyer's web site may include accurate quotations from a publication about the lawyer's work if the lawyer's web site and the quotations comply with all applicable requirements of Rules 7.1 and 7.5. Under Rule 7.1(a)(1), an advertisement may not contain statements or claims that are false, deceptive or misleading. This means not only that the web site must quote the publication accurately, but also that the quotations themselves must not be false, deceptive or misleading.

6. The Rules also contain more specific requirements relevant to quotations. For example, if a quotation is a paid endorsement, the lawyer must disclose that fact. *See* Rule 7.1(c)(1) (lawyer advertisement shall not "include a paid endorsement . . . about a lawyer or law firm without disclosing that the person is being compensated therefor").[12] If the quoted statements describe or characterize the "quality" of the lawyer's work, Rule 7.1(d)(4) and (e)(2)-(3) require that the statements "can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated," and require that the statements be accompanied by the specific disclaimer that "prior results do not guarantee a similar outcome." *See* N.Y. State 834 (2009) (an advertisement that contains a client testimonial requires the disclaimer concerning results set out in Rule 7.1(e)(3)). If the comments from the publication contain "a testimonial or endorsement from a client with respect to a matter still pending," then under Rule 7.1(e)(4) – which the Appellate Divisions added to the New York Rules of Professional Conduct effective April 15, 2011 – the lawyer must also obtain the client's "informed consent confirmed in writing."

7. If the quotation is from a publication that rates lawyers and law firms, however, then Rule 7.1(b)(1) may temper the requirement that the statements "can be factually supported." The last clause of Rule 7.1(b)(1) provides that an otherwise compliant advertisement may include information as to "bona fide professional ratings." We do not opine as to whether the ratings in any particular publications qualify as bona fide, but for a rating to be bona fide and nondeceptive, it should at least be unbiased, nondiscriminatory and based on some defensible method. Those standards are further spelled out in Comment [13] to Rule 7.1. If the quotations from the rating publication comply with all applicable restrictions on advertising and lawyer web sites, it is permissible to include them.

CONCLUSION:

8. A lawyer may accurately list, in his web site biography, his former partnership positions in other firms. His web site may also accurately quote bona fide professional ratings, or comments from any ratings publication, if the comments were capable of factual support when published, the required disclaimer about prior results is included, and the lawyer obtains and confirms in writing the client's informed consent to any testimonial or endorsement with respect to a matter still pending.

(23-10)

12 Until April 15, 2011, the quoted provision was numbered Rule 7.1(c)(2). On April 15, 2011, the New York Appellate Divisions amended Rule 7.1(c) by deleting some provisions, amending some provisions, and renumbering various subparagraphs.

OPINION 878 (09/21/2011)

TOPIC: Lawyers as mediators

DIGEST: When a lawyer serves as a mediator, under some circumstances the lawyer must reveal his or her status as lawyer and explain the import of that status to participants in the mediation.

RULES: 2.4

QUESTION:

1. When a lawyer serves as a volunteer mediator under the auspices of a community mediation service, is the lawyer permitted or required to reveal his or her status as a lawyer to the parties in mediation?

OPINION:

2. Mediators working in certain programs of "community dispute resolution" are expected to take ethical guidance from the Standards of Conduct for New York State Community Dispute Resolution Center Mediators. Those Standards are interpreted by the Mediator Ethics Advisory Committee ("MEAC"), which issues advisory ethics opinions. In MEAC Opinion # 2010-02, MEAC apparently concluded that the Standards do not require disclosure by a lawyer-mediator of his or her status as a lawyer, and perhaps even discourage such disclosure.

3. This Committee is not authorized to second-guess or comment on MEAC Opinion # 2010-02 and has no jurisdiction to interpret the Standards of Conduct for New York State Community Dispute Resolution Center Mediators. We are charged only with construing the New York Rules of Professional Conduct (the "Rules"), which are binding on all New York lawyers, including lawyers serving as mediators.

4. One Rule of Professional Conduct – Rule 2.4 ("Lawyer Serving as Third-Party Neutral") – specifically governs lawyers who serve as mediators. Rule 2.4 was added to our ethical standards effective April 1, 2009 – it had no equivalent in the former Code of Professional Responsibility. Rule 2.4(a) provides as follows:

> (a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a ***mediator*** or in such other capacity as will enable the lawyer to assist the parties to resolve the matter. [Emphasis added.]

Thus, Rule 2.4 by its express terms applies to a lawyer who is serving as a mediator.

5. Rule 2.4(b), which is the operative part of Rule 2.4 for our purposes, provides as follows:

> (b) ***A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them.*** When the lawyer knows or reasonably should

> know that a party does not understand the lawyer's role in the matter, ***the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.*** [Emphasis added.]

6. While Rule 2.4(b) does not explicitly require a lawyer-mediator to reveal her status as a lawyer, Rule 2.4(b) makes plain that the lawyer-mediator is ethically obligated to avoid any party's confusion or misunderstanding regarding the lawyer's limited role in the mediation process. The precise content of the required conversation, and the exact information the lawyer-mediator will have to disclose to a party about the lawyer's role, may vary from one mediation to another. However, Comment [3] to Rule 2.4 makes clear some of the important differences between lawyers as mediators and nonlawyers as mediators. Comment [3] provides as follows:

> [3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as a third-party neutral and as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

7. When a lawyer-mediator follows the mandate of Rule 2.4(b) by explaining to a confused or uninformed party "the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client," the explanation will usually need to include a disclosure that the mediator is a lawyer. Similarly, if the lawyer-mediator considers it "appropriate" under Comment [3] to explain the "important differences" between the lawyer's roles as mediator and as a client representative, as well as "the inapplicability of the attorney-client evidentiary privilege," these explanations likewise will usually need to include disclosure that the mediator is a lawyer. Certainly nothing in Rule 2.4 or any other Rule prohibits a lawyer-mediator from disclosing her status as a lawyer.

8. Indeed, long before the Courts added Rule 2.4 to New York's ethics rules, this Committee addressed the role of a lawyer as mediator. In N.Y. State 678 (1996), while considering whether a lawyer serving as a divorce mediator is providing legal services, we said: "Participants in divorce mediation cannot be kept unaware of a mediator's professional qualification as a lawyer. They are entitled to know the mediator's professional qualifications, and it would be deceptive for a mediator who is a lawyer to withhold that fact."

9. Thus, unless all mediating parties are represented by counsel in the mediated matter, a lawyer-mediator must explain whatever needs to be explained to assure there is no confusion about the lawyer-mediator's role and the difference between a lawyer's role on behalf of a client and a mediator's

role as a neutral. If this explanation requires revealing that the lawyer is a lawyer – as we think it most often will – then the lawyer is ethically obliged to do so. If the lawyer reveals that she is a lawyer, then she should also explain the significance of that fact. And if the mediator discloses his or her status as a lawyer to any party, then the mediator should disclose his or her status as a lawyer to all parties.

CONCLUSION:

10. A lawyer-mediator's obligations under Rule 2.4(b) will in certain circumstances require the lawyer to reveal to all parties that he or she is a lawyer and to explain the significance of that fact.

(16-11)

OPINION 879 (09/27/2011)

TOPIC: No-contact rule as applied to lawyer acting *pro se* and lawyer as represented party.

DIGEST: Lawyers, whether representing themselves or being represented by their own counsel, are subject to the "no-contact rule," Rule 4.2.

RULES: 4.2(a) & (b), 8.4(c)

QUESTIONS:

1. This opinion addresses two closely related questions:

   A. May a lawyer who is representing himself or herself communicate with another party if the lawyer knows that the other party is represented by counsel?

   B. Would the answer be the same if the lawyer were represented by his or her own counsel in the matter?

OPINION:

2. Communications with persons represented by counsel are governed by Rule 4.2 ("Communication with Person Represented by Counsel") of the New York Rules of Professional Conduct (the "Rules"). Rule 4.2, sometimes called the "no-contact" rule or "anti-contact" rule, provides, in its entirety (with emphasis added) as follows:

> (a) ***In representing a client***, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.
>
> (b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

3. The introductory phrase in Rule 4.2(a) – "In representing a client" – is essentially a restatement of the introductory language contained in DR 7-104 of the former New York Lawyer's Code of Professional Responsibility (the "Code"), which began: "During the course of the representation of a client . . . ." There is no material difference. But the introductory phrase is problematic. If a lawyer is representing himself in a matter, the text of Rule 4.2 does not provide a clear basis for deciding whether a lawyer who communicates with a represented party to the matter is "representing a client" (himself) or is acting purely as a party (who happens to be a lawyer in his professional life). More troubling, a lawyer who is not representing himself but has instead retained his own counsel in a matter plainly is not "representing a client" when communicating with a represented party.

4. In the Code, the application of the no-contact rule to a lawyer who was a party to a litigation matter or transaction was addressed by EC 7-18, which stated, in relevant part:

> A lawyer who is a party or who is otherwise personally involved in a legal matter or transaction, ***whether appearing*** **pro se** ***or represented by counsel,*** may communicate with a represented person on the subject matter of the representation ***pursuant to the provisions of DR 7-104(A) and (B)***. [Emphasis added.]

5. EC 7-18 thus expressly supported the view that the no-contact rule, in all its aspects, applied both to a lawyer representing himself in a legal matter and to a lawyer who was involved in a matter as a party represented by counsel. Thus, under EC 7-18, neither a *pro se* lawyer nor a represented lawyer could communicate on the subject of the representation with another party the lawyer knew to be represented by counsel unless the lawyer (a) had the prior consent of the other party's counsel or was authorized by law to do so under DR 7-104(A), or (b) gave reasonable advance notice to the represented party's counsel under DR 7-104(B).

6. The view that DR 7-104 applied to a lawyer engaged in self-representation or participating in a matter as a represented party was further supported by our observation in N.Y. State 160 (1970) that DR 7-104(A) – then newly adopted in New York – was "substantially similar to former Canon 9" of the Canons of Professional Ethics, which the ABA originally adopted in 1908.[13] Canon 9 stated as follows:

> A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should only deal with his counsel. . . . [14]

7. Thus, Canon 9 of the Canons of Professional Ethics lacked any qualifying introductory phrase similar to that of Rule 4.2 and DR 7-104. Canon 9's application did not depend on whether a lawyer was representing a client or not. Instead, Canon 9 focused on the professional *status* of the lawyer (*i.e.,* the simple fact that the lawyer was a lawyer) rather than on the lawyer's *role* in a particular matter (*i.e.,* representing a client). Canon 9 thus prohibited a lawyer from attempting to communicate with a party represented by counsel whether the lawyer was representing a client or representing himself. The substantial similarity between old Canon 9 and DR 7-104(A) that we noted in N.Y. State 160 made it clear that under the Code – despite the introductory phrase in DR 7-104(A) about "the representation of a client" – the no-contact rule applied with full force to a lawyer/party whether the lawyer was representing himself or was being represented by counsel in a matter.

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13 Canon 9 of the old Canons of Professional Ethics is totally unrelated to and must not be confused with Canon 9 of the Code of Professional Responsibility ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety"). In the Canons of Professional Ethics, each numbered standard was called a "Canon." In the Code of Professional Responsibility, the Canons were instead broad organizing principles, and only the Disciplinary Rules set forth binding standards. The Canons in the Canons of Professional Ethics were essentially equivalent to the Disciplinary Rules, not to the Code's axiomatic Canons.

14 The remaining portion of Canon 9 stated: "It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party *not* represented by counsel, and he should not undertake to advise him as to the law." (Emphasis added.) This language is substantially similar to DR 7-104(A)(2) ("During the course of the representation of a client a lawyer shall not . . . [g]ive advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are . . . in conflict with the interests of the lawyer's client"). Thus, both subparagraphs of DR 7-104(A) were based closely on old Canon 9, which reinforces our view that DR 7-104(A) and its successors – including Rule 4.2 – should be interpreted in light of Canon 9.

8. Accordingly, under the Code, neither a represented lawyer nor a *pro se* lawyer could communicate with a counterparty that the lawyer knew to be represented by counsel unless the lawyer either (a) was authorized by law or obtained the "prior consent" of the counterparty's counsel, per DR 7-104(A), or (b) gave "reasonable advance notice" to the counterparty's counsel of his intention to communicate with the counterparty, per DR 7-104(B). The minor change in wording between the introductory phrases of Rule 4.2(a) and its predecessor, DR 7-104 ("In representing a client" vs. "During the course of the representation of a client") did not change the scope of the no-contact rule or its applicability to lawyers as *pro se* or represented parties.

9. When the New York State Bar Association proposed the new Rules of Professional Conduct in 2008, the version of Rule 4.2(b) proposed by the State Bar would have omitted the requirement that a lawyer give "reasonable advance notice" to a represented party's counsel before the lawyer could cause a client to communicate directly with that represented party. As explained by the Reporter's Notes, the proposed omission of the "reasonable advance notice" requirement reflected the belief "that direct client-to-client communications are often helpful in resolving disputes, and that the 'reasonable advance notice' requirement . . . creates an unnecessary obstacle that might impede such communications."[15] However, the Administrative Board of the Courts rejected the proposed deletion and returned Rule 4.2(b) to the substance of former DR 7-104(B), including the requirement of reasonable advance notice.

10. Our understanding of the introductory phrase in Rule 4.2 also seems fully consistent with Comment [1] to Rule 4.2, which explains that Rule 4.2 "contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by *other lawyers who are participating in the matter*, interference by those lawyers with the client-lawyer relationship, and uncounseled disclosure of information relating to the representation." (Emphasis added.) Those policy reasons apply with equal force whether a lawyer is

15 See N.Y. State Bar Ass'n, Proposed Rules of Professional Conduct at 164 (Feb. 1, 2008).

"participating in the matter" while representing himself *pro se,* while represented by his own counsel, or while "representing a client."[16]

11. In short, DR 7-104(A) traced its origins directly to Canon 9 of the old Canons of Professional Ethics; Rule 4.2 traces its origins directly to DR 7-104; and the Administrative Board of the Courts evidently intended that Rule 4.2 should preserve the operative substance of DR 7-104. We find no indication in the legislative history of New York Rule 4.2 that the drafters or the Courts intended to change its application to lawyers as parties, whether those lawyers were representing themselves or represented by other counsel. We conclude that Rule 4.2 should be applied in a manner consistent with DR 7-104 and the policies underlying DR 7-104, which equally underlie Rule 4.2.

12. Thus, all lawyers – whether they are *pro se* parties or represented parties or representatives of other parties in a matter – must (unless authorized by law) secure the "prior consent" of opposing counsel under Rule 4.2(a) or give "reasonable advance notice" to opposing counsel under Rule 4.2(b) before communicating with a counterparty known to be represented by counsel. Under this interpretation of Rule 4.2, the usual rights of nonlawyer parties to engage in direct communications are outweighed by the lawyer's professional obligations to the system of justice and the goal of protecting represented parties. Our view reflects the fact that lawyers, by virtue of their professional status, have a unique responsibility to the system of justice that requires them to subordinate their personal interest in having direct communications with represented individuals unless the exacting conditions stated in Rule 4.2 are satisfied.

13. Our conclusion is consistent with the opinions of most courts and ethics committees that have addressed this issue. The cases have overwhelmingly held that a lawyer engaged in self-representation is bound by the no-contact rule, reasoning that the policies served by the rule require the lawyer

16 In considering the significance of the introductory phrase in Rule 4.2, it is useful to look at Rule 4.1, which uses the same introductory phrase as Rule 4.2 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person"). Another rule that prohibits false statements is Rule 8.4(c) ("A lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation"). However, Rule 8.4(c) has no introductory phrase about "representing a client" and thus applies even when the lawyer is not representing a client – and, indeed, even when the lawyer is not practicing law. Why do Rules 4.1 and 4.2 include introductory language about representing a client while Rule 8.4(c) does not? The introductory phrases in Rules 4.1 and 4.2 can best be understood in light of their common history. Both rules were derived from principles first expressed in the ABA's 1908 Canons of Professional Ethics, where their application was not limited to the representation of a client.

Decades later, when the 1908 Canons were superseded by the Code of Professional Responsibility, both the rule prohibiting dishonest conduct in litigation and the rule prohibiting communications with represented parties were placed under a newly crafted Canon 7, which provided: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." The rules organized under Canon 7 generally explained ways in which a lawyer's zeal in representing a client should be tempered by the lawyer's professional obligations to the system of justice. Seen in this context, the introductory phrases about representing clients merely reflected the essential admonition of Canon 7 that a lawyer should act within the bounds of the law *even* when representing a client – and even when representing the client zealously. The introductory phrases were not intended to limit application of the rules, but rather reflected the tension between zealous representation and the bounds of the law that was the organizing principle of Canon 7.

When the adoption of the new Rules of Professional Conduct eliminated the organizational function of old Canon 7 in the Code of Professional Responsibility, the introductory phrases left over from Canon 7 could have been deleted. Their retention created the ambiguity that gives rise to the issue before us now. *See, e.g., Matter of Haley*, 126 P.3d 1262, 1271-72 (Wash. 2006) (concluding that Rule 4.2(a) prohibits a lawyer who is representing himself from contacting another party the lawyer knows to be represented by counsel, but applying this interpretation "prospectively only" because Rule 4.2(a) is "impermissibly vague" on this point). Our opinion today resolves that ambiguity by making clear that lawyers who are involved in a matter as parties are subject to the no-contact rule.

to be treated as a lawyer rather than as a nonlawyer party. For example, in *In re Schaefer*, 25 P.3d 191, 199 (Nev. 2001), the court said: "The lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se. *See also Runsvold v. Idaho State Bar*, 925 P.2d 1118 (Idaho 1996) (the phrase "in representing a client" applies when an attorney is acting *pro se* "because this interpretation better effectuates the purpose" of Rule 4.2); *In re Segall*, 509 N.E.2d 988 (Ill. 1987) ("an attorney who is himself a party to the litigation represents himself when he contacts an opposing party"); *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241 (Tex. Ct. App. 1999) ("we hold that an attorney's designation of counsel of record does not . . . preclude the application of Rule 4.02(a) to his actions in contacting an opposing party"); *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994) ("A party, having employed counsel to act as an intermediary between himself and opposing counsel, does not lose the protection of the rule merely because opposing counsel is also a party to the litigation"); *In re Haley*, 126 P.3d 1262 (Wash. 2006) (Rule 4.2 "prohibits a lawyer who is representing his own interests in a matter from contacting another party whom he knows to be represented by counsel").

14. Ethics opinions have likewise generally concluded that a lawyer engaged in self-representation is bound by the no-contact rule. *See, e.g.,* D.C. Opinion 258 (1995); Hawaii Opinion 44 (2003); Illinois Opinion 96-09 (1997); Rhode Island Opinion 2002-04 (2002). *See generally* Stephen J. Langs, Note, *Legal Ethics: The Question of Ex Parte Communications and Pro Se Lawyers Under Model Rule 4.2—Hey, Can We Talk?,* 19 W. New Eng. L. Rev. 421 (1997).

15. Contrary authority is sparse. In New York, we are aware of only one ethics opinion, N.Y. City 81-8 (1981), that refused to apply the no-contact rule to a lawyer representing himself. That opinion, however, was decided before EC 7-18 was adopted, and the opinion was effectively overruled by N.Y. City 2011-1 (2011), which determined that a lawyer representing herself may not contact a former client to discuss the previous representation without obtaining the prior consent of successor counsel. Another contrary authority is the official "Discussion" following California Rule 2-100, which states that the no-contact rule does not apply to a self-represented lawyer because such a lawyer "has independent rights as a party which should not be abrogated because of his or her professional status." But California is alone in taking that position and we do not agree with it.

16. Regarding case law, we know of only one case disagreeing with our view. That case, *Pinsky v. Statewide Grievance Committee*, 578 A.2d 1075 (Conn. 1990), held that a lawyer acting on his own behalf is not "representing a client" and is therefore not subject to Rule 4.2(a). But *Pinsky* has not been followed elsewhere and was expressly rejected by the Supreme Court of North Dakota in *In re Disciplinary Action Against Lucas,* 789 N.W.2d 73 (N.D. 2010). The *Lucas* court, which reviewed the current state of the law, explained as follows:

> . . . Most courts have rejected *Pinsky*, reasoning "the policies underlying [Rule 4.2] are better served by extending the restriction to lawyers acting pro se." *In re Haley*, 156 Wash.2d 324, 126 P.3d 1262, 1267 (2006) (discussing prior authority); see also *Runsvold v. Idaho State Bar*, 129 Idaho 419, 925 P.2d 1118, 1120 (1996) ("We thus construe the phrase of Rule 4.2, 'in representing a client' to include the situation in which an attorney is acting pro se because this interpretation better effectuates the pur-

> pose of Rule 4.2."). We join the majority of courts in rejecting the rationale of the court in *Pinsky*.
>
> We conclude that the reasoning of courts in *In re Haley* and *Runsvold* is more persuasive than *Pinsky*. . . . We therefore adopt the hearing panel's conclusion that Rule 4.2 applies to attorneys representing themselves.

17. If a lawyer is discharged, the no-contact rule is similarly applicable to a lawyer's communications with the former client on the lawyer's own behalf once the client has engaged successor counsel. *See* N.Y. City 2011-1 (2011) (Rule 4.2 prohibits a lawyer from contacting a former client to discuss matters concerning the prior representation absent prior consent of successor counsel); Illinois Opinion 96-09 (discharged lawyer seeking fees from former client must comply with Rule 4.2); Rhode Island Opinion 2002-04 (after successor counsel writes to original lawyer asking for file and encloses signed request from client, original lawyer may not contact former client without successor counsel's permission).

18. Even when a lawyer is permitted to communicate with a counterparty (*e.g.,* with the prior consent of opposing counsel or authorized by law to do so), the lawyer should keep in mind the broad goals underlying the no-contact rule, whose main purpose is to protect the represented party. *See* Rule 4.2, cmt. [1]. Thus, when communicating with a represented counterparty, a lawyer (a) must avoid overreaching and abusive, harassing, or unfair conduct toward the represented person, (b) must not undermine the counterparty's relationship with his or her counsel, and (c) must not delve into privileged communications or protected information. *See* Rule 4.2, cmts. [11] and [12].

19. Finally, the lawyer should be mindful that, as a member of the Bar, whether or not performing legal services and whether represented by another lawyer, representing himself, or representing a client, a lawyer dealing with a counterparty must not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." Rule 8.4(c).

CONCLUSION:

20. When a lawyer is representing himself *pro se* or is being represented by his own counsel with respect to a matter, the lawyer's direct communications with a counterparty are governed by the no-contact rule, Rule 4.2. Unless authorized by law, the lawyer must not engage in direct communications with a party the lawyer knows to be represented by counsel without securing the prior consent of the represented party's counsel under Rule 4.2(a) or providing opposing counsel with reasonable advance notice under Rule 4.2(b).

(71-09)

OPINION 880 (10/06/2011)

TOPIC: Prohibition of contingent fees in criminal matters; violations of the Vehicle and Traffic Law; refund of legal fees

DIGEST: Prohibition of contingent fees in criminal matters is inapplicable to simple traffic infractions which are expressly deemed noncriminal; violations of the Vehicle and Traffic Law which constitute misdemeanors or felonies are subject to the prohibition on contingent fees. In agreements to provide legal services for such violations and in advertising related thereto, it must be clear that contingent fees are not available with respect to misdemeanor or felony charges. In criminal matters, an agreement to refund a fee paid in advance upon the occurrence of a certain outcome may be deemed a prohibited contingent fee

RULES: 1.5(d)(1) and (c); 7.1(a)

QUESTION:

1. May a lawyer offer to refund all legal fees paid by a client in connection with proceedings for violations of the Vehicle and Traffic Law if the charges are not dismissed or reduced?

OPINION:

2. Rule 1.5(d) of the Rules of Professional Conduct states:

> "A lawyer shall not enter into an arrangement for, charge or collect:
>
> (1) a contingent fee for representing a defendant in a criminal matter . . . ."

3. The question posed requires us to interpret the terms "contingent fee" and "criminal matter" within the meaning of Rule 1.5(d).

4. As to the meaning of "contingent fee," the question is whether that term includes a fee received by a lawyer on an understanding that the client may be entitled to a refund of the fee if the charges are not dismissed or reduced. Of course in some circumstances, refund of fees is clearly contemplated by the rules. *See* Rule 1.16(e) (obligating lawyer to refund "any part of a fee paid in advance that has not been earned"). We believe that when entitlement to a refund depends on the outcome of the matter, then the arrangement must comply with the rules on contingency fees. To trigger those rules, it is not necessary that the stated contingency occur prior to payment of the fee. The common understanding of a contingent fee envisions payment at the conclusion of a matter. However, fees for criminal defense work are typically paid in advance. To construe the term to apply only to fees paid subsequent to the contingency would render the traditional prohibition too easily evaded and virtually meaningless in many cases.

5. Interpreting the term "criminal matter," we first turn to the New York State Vehicle and Traffic Law ("VTL") for guidance. The VTL proscribes a wide variety of conduct including traffic infractions, misdemeanors and felonies. *See*, *e.g.*, VTL § 1193 (providing that driving while ability impaired is a traffic infraction or misdemeanor, and driving while intoxicated is a misdemeanor or felony, depending

on factors including prior record). Simple "traffic infractions" (including most tickets for speeding) are expressly designated as noncriminal. VTL § 155 ("A traffic infraction is not a crime and the punishment imposed therefor shall not be deemed for any purpose a penal or criminal punishment").

6. Although the VTL applies throughout the State, local regulations provide for considerable variation in the type of conduct proscribed as well as the manner in which violations are prosecuted. Noncriminal traffic infractions are most commonly addressed by the local city, town or village courts, but in New York City, Buffalo, Rochester and the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown in Suffolk County, they are heard by the Traffic Violations Bureau ("TVB") of the State's Department of Motor Vehicles. Violations heard by the TVB are purely civil administrative matters without the involvement of any local city, town or village court or the public prosecutor. Some local courts hearing simple traffic infractions are designated as "criminal courts" and may impose short periods of incarceration. In many local courts, plea bargains are usually negotiated by the issuing officer; however, where the issuing officer is a State Trooper, the plea is negotiated with a representative from the District Attorney's office who, if the negotiations fail, will proceed to trial.

7. The policy underlying Rule 1.5(d) reflects the profession's aversion to allowing defense counsel to have a financial interest in the outcome of a criminal case. *See* Former Code of Professional Responsibility DR 2-106(C)(1) (prohibiting a "contingent fee for representing a defendant in a criminal case"); *see also*, *e.g.*, District of Columbia Opinion 262 (1995) (allowing contingent fee in coram nobis proceeding after defendant had been released, and reviewing various policy arguments underlying the traditional prohibition); Charles W. Wolfram, *Modern Legal Ethics*, § 9.4.1, at 526-28 (1986); Standards Relating to the Prosecution and Defense Function: The Defense Function § 3.3(e) (ABA 1971); Geoffrey C. Hazard, Jr. & Susan P. Koniak, *The Law and Ethics of Lawyering* at 508 (1990); Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. Crim. L. & Criminology at 498 (1991); Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 Colum. L. Rev. 595 (April, 1993).

8. When a matter is essentially civil, albeit having some relation to the penal law or prior criminal proceedings, the authorities have long recognized that the ban on contingent fees is inapplicable. Thus it has been deemed permissible to agree that a lawyer's fee for representing the accused in defense of certain criminal charges will be satisfied by his or her contingent fee for representing that same client as the plaintiff in a related civil action seeking damages for false arrest. Illinois Opinion 84-9 (1985); *see also*, *e.g.*, Indiana Opinion 4 (1991); N.Y. City 1986-3 (fee for defense of ancillary criminal case may be tied to success in negligence action).

9. Similarly, the ban on contingent fees in criminal matters has been held inapplicable to related administrative or civil proceedings. *See*, *e.g.*, Connecticut Inf. Opinion 91-1 (1991) (license revocation proceeding following client's arrest for drunk driving); Kansas Opinion 96-10 (1997) (driver's license revocation proceeding); Pennsylvania Opinion 92-183 (1993) (habeas corpus petition to have client transferred to a different prison); Nassau County Opinion 90-12 (civil action for forfeiture of proceeds of crime); Michigan Inf. Opinion RI-269 (1996) (seizure of property by government); Virginia Opinion 1748 (2000) (civil forfeiture proceeding).

10. In light of the foregoing, we believe that when the VTL defines the initial charge as a noncriminal traffic infraction, the proceedings should not be deemed a "criminal matter" within the meaning of Rule 1.5(d). This result should obtain regardless of whether the venue is denominated a

"criminal court," whether the District Attorney's office is involved in the proceedings, or whether the penalty may involve a period of incarceration. When the initial charge constitutes a misdemeanor or a felony, however, the proceedings should be deemed a "criminal matter" within the proscription of the Rule. In such cases, a contingent fee or refund is impermissible even if the lawyer may, or ultimately does, obtain a reduction to noncriminal charges.

11. We are aware of one recent ethics opinion which would apply the traditional ban to so-called "quasi-criminal matters" including traffic tickets. In New Jersey Opinion 717 (2010), the New Jersey Advisory Committee on Professional Ethics determined that its version of the rule should be interpreted to apply to "quasi-criminal matters in municipal court, including motor vehicle cases." In so holding, the Advisory Committee observed the procedural and jurisdictional similarities between clearly criminal matters and those before its municipal courts in hearing "non-indictable and motor vehicle offenses." The question before us concerns noncriminal violations charged under the New York VTL and the procedures for resolving such charges. In that context, for the reasons discussed above, we reach a different result. Moreover, we note that the Advisory Committee recognized that the potential conflict addressed by the prohibition on contingency fees "is not present in many municipal court matters and the [rule against contingency fees in criminal cases] may be fairly criticized as overbroad. Accordingly, the Committee has invited the Supreme Court, in its administrative capacity, to evaluate [that rule] and consider whether a revision would be appropriate." N.J. Opinion 717.

12. Rule 1.5(c) states: "A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law." But contingency fee arrangements must meet certain standards. For example, when the fee is contingent, Rule 1.5(c) further requires that the fee agreement be in writing and "clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party."

13. Rule 7.1(a) provides: "A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: (1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule."

14. Together, Rules 1.5(c) and 7.1(a) require that in contingent-fee agreements to provide representation in connection with violations of the VTL, and in advertising relating thereto, it must be clear that contingent fees (or, as in the question posed, "refunds") are not available with respect to misdemeanor or felony charges.

CONCLUSION:

15. The prohibition on contingent fees in criminal matters is inapplicable to initial charges of simple traffic infractions which are expressly deemed noncriminal under the Vehicle and Traffic Law. Charged violations of the VTL which constitute misdemeanors or felonies are, however, subject to the prohibition. In agreements to provide legal services for violations of the VTL and in advertising related thereto, it must be clear that contingent fees are not available with respect to misdemeanor or felony charges. In a criminal matter, an agreement to refund a fee paid in advance depending on the outcome may be deemed a prohibited contingent fee.

(24-11)

OPINION 881 (10/06/2011)

TOPIC: Spouses sharing office facilities.

DIGEST: A sole practitioner may not use the address and telephone number of her spouse's law firm as contact information if the telephone is answered with the name of the spouse's firm unless steps are taken to avoid the misleading impression that the sole practitioner is part of the spouse's firm. However, the sole practitioner's occasional use of the conference room and telephone lines at her spouse's firm does not, by itself, render her "associated in" her spouse's law firm for purposes of conflicts of interest.

RULES: 1.0(h), 1.10(a), 7.1(a), 7.5(b)

QUESTION:

1. The inquirer is a sole practitioner in a small community. She practices law from home but occasionally uses the conference room and telephone lines at her spouse's law firm for convenience. She raises two questions:

2. A. May a sole practitioner use the address and telephone number of her spouse's law firm as her own contact information, on her letterhead and elsewhere, if the telephone is answered with the name of the spouse's firm?

   B. Will the sole practitioner's occasional use of her spouse's conference room and telephone lines cause her to be "associated with" her spouse's law firm for purposes of imputation of conflicts of interest?

OPINION

Question A: May the Sole Practitioner Use the Address and Telephone Number of Her Spouse's Law Firm?

3. In the New York Rules of Professional Conduct (the "Rules"), Rule 7.1(a) prohibits a lawyer from engaging in misleading public communications about the lawyer for the purpose of seeking retention by prospective clients, and Rule 7.5(b) prohibits a lawyer from practicing under a misleading firm name. We are told that the telephone at the spouse's firm is answered with the name of the spouse's firm. Thus, a client or prospective client calling the sole practitioner would be greeted with the name of the spouse's firm, not the name of the sole practitioner. If the firm's switchboard operator or the firm's automated answering message fails to clarify that the sole practitioner is not associated with the firm, but instead forwards the call to the sole practitioner, or takes a message for her, or simply states that the sole practitioner is unavailable, then the caller would likely be misled into believing that the sole practitioner is part of the spouse's firm. And if the sole practitioner's name is added to the name of the spouse's firm when the telephone is answered, that might violate Rule 7.5(c), which provides that lawyers "shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners."

4. The use of the firm address by itself would not necessarily create the same misleading perception, but it would be improper for the sole practitioner to use both the address and telephone number of the spouse's firm as if they were the inquiring lawyer's own when, in truth, they are not. We conclude that the inquirer's use of the spouse's phone number as contact information, without clarification, is misleading to clients and others. The spousal relationship in a small community could only compound the confusion, especially if the inquirer and the inquirer's spouse use the same last name. As a better practice, the inquirer should consider using a separate telephone number (rather than the spouse's telephone number) to avoid confusion.

5. If the sole practitioner lists the telephone number and address of her spouse's firm on her letterhead, that could present another issue for the inquirer. Rule 7.5(a), whose predecessor in the Code was DR 2-102(A), provides as follows:

> (a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1 . . . .

6. In N.Y. State 546 (1982), we addressed the circumstances under which a law firm could list a "branch office" address for an office that was staffed only occasionally. Applying DR 2-101(A) and DR 2-102(A), we said:

> [W]e believe that a law firm listing an office on its letterhead must do more than staff that office from time to time unless that limitation on staffing is made clear. There is, we believe, an implied representation from such listing that the firm has made arrangements to respond in a timely fashion to all inquiries addressed to that office, to provide legal services from that office as the need may arise, and hold meetings there. If the firm has not made such arrangements, it cannot list its branch office without some appropriate disclaimer indicating the limited hours of its operation.

7. By listing the address and telephone number of her spouse's law firm on her letterhead, the sole practitioner is making an implied representation that she has made arrangements for her spouse's firm "to respond in a timely fashion to all inquiries [to the sole practitioner] addressed to that office," and that she herself will "provide legal services from that office as the need may arise" and "hold meetings there." We do not know whether the sole practitioner has made those arrangements and commitments. If she has, then she may use her spouse's office address and telephone number as her own, provided that the sole practitioner also arranges for the person or machine that answers the telephone at the spouse's law firm to clarify that the sole practitioner is not associated with the firm (or arranges for the phone to be answered with a neutral phrase such as "law offices" without any names, or takes other steps to avoid the misleading impression that the sole practitioner is part of the spouse's firm).

8. If the sole practitioner has not made such arrangements and commitments, however, then putting her spouse's law firm address and telephone number on her own letterhead would violate Rule 7.5(a) without some appropriate disclaimer indicating the limited availability of that office (*e.g.,* saying "By appointment only" or listing specific hours when she is available at that address). Without such a disclaimer, listing the spouse's law office address would be misleading, and thus would not be "in accordance with Rule 7.1," which prohibits false, deceptive or misleading communications.

Question B: Is the Sole Practitioner "Associated With" Her Spouse's Law Firm for Purposes of Conflict Imputation?

9. Rule 1.10(a), New York's basic rule on the imputation of conflicts of interest, provides as follows:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

10. Whether a particular arrangement between lawyers, be it one for office sharing or some other form of coordination, makes those lawyers "associated in" a single "firm" for conflicts purposes is a fact-intensive inquiry. Rule 1.0(h), in the Terminology section of the New York Rules of Professional Conduct, provides that a "firm" or "law firm" "includes, *but is not limited to*, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law . . . ." (Emphasis added).

11. Comment [2] to Rule 1.0 elaborates by providing, in relevant part, as follows:

> [2] Whether two or more lawyers constitute a firm . . . will depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. For example, a group of lawyers could be regarded as a firm for purposes of determining whether a conflict of interest exists but not for application of the advertising rules.

12. We do not believe that the sole practitioner's occasional use of her spouse's telephone lines or conference space by themselves render the inquirer "associated in" the spouse's firm for purposes of the conflicts imputation rule, Rule 1.10(a). *See* N.Y. State 715 (1999) (noting that "lawyers who share office space but are not in the same firm have been deemed to be 'associated' in a firm for purposes of the conflicts rules and vicarious disqualification rules," but also setting forth guidelines for avoiding the conflicts problem). However, our conclusion would be different if they "present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm," because in that case, per Comment [2], "they should be regarded as a firm for purposes of the Rules."

CONCLUSION

13. A lawyer who occasionally uses the conference room and telephone lines at her spouse's law firm may not use the address and telephone number of the spouse's law firm as contact information if the telephone is answered with the name of the spouse's firm, unless steps are taken to avoid the misleading impression that the sole practitioner is part of the spouse's firm. The sole practitioner's occa-

sional use of her spouse's telephone lines or conference space does not, by itself, render the inquirer "associated in" the spouse's firm for purposes of the rule on imputation of conflicts.

(25-10)

OPINION 882 (10/14/2011)

TOPIC: Lawyer's participation in residential real estate transaction that includes both a "seller's concession" and an equivalent "gross-up" in the sales price

DIGEST: If the sales price in a residential real estate transaction has been "grossed-up" in exchange for a "seller's concession," all transaction documents containing the grossed-up sales price must disclose that the sales price has been increased by a sum equal to the seller's concession.

RULES: 8.4(c).

QUESTION:

1. May a lawyer ethically participate in a residential real estate transaction if the sales contract, the HUD-1 Settlement Statement, the transfer tax return, and any other documents that contain the sales price all disclose both that the amount of the sales price has been increased ("grossed-up") and that the amount of the increase equals the amount of a "seller's concession"?

FACTS:

2. Seller's attorney has been presented with a contract for the sale of a single-family home for $306,000, with a mortgage contingency clause for $290,700, representing 95% financing. The contract also contains a provision for a "seller's concession" (*i.e.,* a reduction in the sales price)[17] of $6,000. The seller's concession on its face requires the seller to pay $6,000 of buyer's closing costs.

3. In reality, however, the seller will not pay the buyer's closing costs. Rather, the sales contract expressly states that the sales price has been increased ("grossed-up") by $6,000, a sum equal to the seller's concession regarding the buyer's closing costs. The contract thus clearly indicates that the net price the seller agreed to receive was $300,000. Similar disclosures, which show both the seller's concession and the equivalent gross-up in the sales price, are set forth in the HUD-1 Settlement Statement, the Real Property Transfer Tax Return, the Real Property Transfer Report and all other documents stating the sales price in connection with the sale of the real property. The inquiring lawyer wants to know whether it is ethical for a New York lawyer to participate in the transaction under these circumstances.

OPINION:

4. In N.Y. State 817 (2007) this Committee opined that a lawyer's participation in a residential real estate transaction that includes both a "seller's concession" and a "grossed up" (increased) sales price is ethically prohibited unless the gross-up is disclosed in the transaction documents. That opin-

17 'The existing federal government policy regarding seller's concessions is found in U.S. Department of Housing and Urban Development ("HUD") Handbook 4155.1, § 2.A.3 (available online *at* http://www.fhaoutreach.gov/FHAHandbook/prod/infomap.asp?address=4155-1.2.A.3), and in HUD Handbook 4155.2, § 4.8 (available online at http://www.fhaoutreach.gov/FHAHandbook/prod/infomap.asp?address=4155-2.4.8). HUD apparently has not adopted any provisions addressing the "gross-up" of the sales price in response to a seller's concession; the HUD regulations discussing sellers' concessions are silent as to gross-ups.

ion did not hold that a seller's concession or gross up was improper. Rather, the opinion held that full disclosure of the gross-up in the transaction documents was necessary to avoid a misrepresentation regarding the amount of the purchase price.

5. In essence, we concluded in N.Y. State 817 that it is a misrepresentation under DR 1-102(A)(4) (the predecessor to Rule 8.4(c)) for the transaction documents in a residential real estate transaction either to contain an untrue statement of a material fact or to omit a material fact where the untrue statement or the material omission makes the statements contained in the transaction documents materially misleading.

6. A statement may be literally true with respect to the facts stated, but may fail to include other facts necessary to prevent a false implication, and a "failure to disclose is generally considered as much a misrepresentation as a false affirmative statement." *U.S. Express, Inc. v. Intercargo Ins. Co.,* 841 F. Supp. 1328, 1337 (E.D.N.Y. 1994). An assertion need not be fraudulent to be a misrepresentation. Disclosing a seller's concession without disclosing a matching gross-up in the sales price produces a half-truth, which is a form of misrepresentation within the meaning of Rule 8.4(c).

7. Our opinion in N.Y. State 817, at ¶ 14, makes this conclusion abundantly clear. We stated as follows:

> [A] lawyer may not ethically participate in such a "gross-up" of the actual purchase price and concomitant seller's concession unless there is neither deception nor misrepresentation at work in a transaction and its predictable consequences. At a minimum this means that the gross-up (and not merely the grossed-up purchase price) must be disclosed in the transaction documents. We are persuaded that merely reporting "a seller's concession" may imply either that the seller has agreed to reduce the purchase price he or she would otherwise have obtained or that the reported sales price is the actual price of the property, less certain costs the seller has agreed to pay. If neither of these is the case, then reporting a concession, without more, is misleading under DR 1-102 [now Rule 8.4].

8. In reaching this conclusion we were aware of New Jersey Opinion 710 (2006) and its December 22, 2006 clarification.[18] *See* N.Y. State 817 nn. 4 & 8. We are also aware that after we issued N.Y. State 817, a further clarification of New Jersey Opinion 710 was released.[19] Nothing contained in New Jersey Opinion 710 or the two subsequent clarifications is inconsistent with N.Y. State 817 or with this opinion.

9. We have been advised that, in the circumstances addressed in our opinion here, the mortgagee bank is generally furnished with copies of the following documents: (i) the contract of sale with its riders and addenda (if any), (ii) the HUD-1 Settlement Statement, (iii) the closing statement, (iv) the mortgage, (v) the note, (vi) a mortgage title policy, and (vii) the deed. We assume that the real property will be assessed based upon the $306,000 "disclosed" sales price, not the $300,000 actual price,

18 The December 22, 2006 clarification of N.J. Op. 710 (2006) is available at 187 N.J.L.J 42 (2007) and at http://www.judiciary.state.nj.us/notices/2006/n061222a.htm.

19 The further clarification of N.J. Advisory Op. 710 after we issued N.Y. State 817 is available at 193 N.J. 419, 939 A. 2d 794 (2008).

unless the documents make clear to the assessor that the true sales price was $300,000. *See* RP-5217 Real Property Transfer Report Instructions ¶ 13 (requiring that the seller's concession be deducted to reach the actual or full sales price).

10. The factual pattern described in this opinion is unlike the circumstance where the seller actually bears an economic cost equivalent to the concession. For example, if a building inspection discloses a defect in the structure (*e.g.,* a leaky roof) that will require the buyer to expend $6,000 in remediation costs, the seller may reduce the sales price by $6,000. Thus, the initially agreed sales price of $300,000 would be reduced to $294,000 and would not be grossed-up by a like amount. This is a distinction with a difference. In the situation we address, in contrast, the "gross-up" in the sales price to offset the seller's supposed concession could well be characterized as a subterfuge. It does not change the economic result of the transaction for the seller. As stated in *LaSalle Bank, N.A. v. Shearon,* 23 Misc. 2d 959, 964-65, 881 N.Y.S. 599, 603 (Richmond Cty. Sup. Ct. 2009):

> The term *seller's concession* implies that at the time of closing the seller is conceding a certain amount of the purchase price to enable the purchaser to complete the purchase. Using the facts presented in this case, a seller could concede or reduce an amount of the purchase price in order to pay for a portion of the purchase price and/or the closing expenses. But a *seller's concession*, as it is utilized in this transaction, is a misnomer with no foundation in logic or mathematics because the seller concedes nothing to the purchasers. In this case, the sellers inflated the price of their home from $335,000 to $355,100 to allow the Shearons [the buyers] to borrow additional funds to close the transaction. The sellers conceded nothing other than to act as coconspirators to circumvent the Banking Law restrictions on the closing costs to mortgage ratios and to manipulate the public records of the true sales prices and market data.

11. The problem is not the seller's concession in the abstract. Many seller's concessions are legitimate. The problem here is the matching "gross up" of the sales price, which effectively wipes out the seller's concession. If a buyer has to pay $6,000 to get a $6,000 discount, then the true sales price has not changed. Thus, a gross up, if not expressly disclosed as such, is a misrepresentation and is proscribed by Rule 8.4(c). Consequently, if a lawyer participates in a real estate transaction in which the lawyer knows (or should know)[20] that the transaction documents containing the grossed-up sales price do not expressly disclose that the sales price was increased by the same amount as the seller's concession, the lawyer violates Rules 8.4(c). The fact that the practice may be widespread does not authorize an attorney to participate in the misrepresentation. The Rule is equally applicable to the buyer's attorney, the seller's attorney, and the lender's attorney.

Even where the seller's concession and matching gross-up are suggested by a mortgage broker, a loan officer, or some other employee at the mortgage bank, the lawyer is not relieved from making the necessary disclosures. Disclosure may be even more important in that situation because the lender's representative – the very person who might be expected to detect a misrepresentation (the supposedly

20 Rule 1.0(k) provides as follows:

> "Knowingly," "known," "know," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

A lawyer "should know" a fact when it can be readily inferred from the circumstances.

increased sales price that is fully offset by an unexplained seller's concession) – is encouraging the misrepresentation. No function other than to misrepresent the purchase price can be ascribed to a gross–up equal to an unexplained seller's concession. A lawyer may not participate in that misrepresentation no matter who suggested it.

12. Essentially, the inquiry poses a simple question: are the Rules of Professional Conduct violated when a seller, buyer, lender, and their attorneys engage in the device of a seller's concession accompanied by a like increase in the purchase price that create a misrepresentation? We conclude that the Rules are violated. And the violation is not without consequences. The misrepresentation in the sales price (treating the grossed-up price as the true sales price) may mislead tax assessors, real estate appraisers, and mortgage investors. However, if all transaction documents disclose that the gross up is an increase in price equivalent to the seller's concession, then there is no misrepresentation – and no ethical violation – because everyone later in the chain of mortgage, title, or interest has the information at hand to understand the true sales price.

13. Applying these principles to the facts we have been given, we conclude that an attorney may ethically participate in a real estate transaction where the sales price is grossed-up by an amount equal to a corresponding seller's concession if the amount of the gross-up and the amount of the seller's concession are expressly and meaningfully disclosed in all documents that state the sales price, including but not limited to the contract of sale, the HUD-1 Settlement Statement, and all other documents that the attorneys prepare, review or approve.

14. A seller's concession is not *per se* inappropriate. The vice of the seller's concession here is the misrepresentation resulting from lack of disclosure that the buyer agreed to the grossed-up sales price solely in exchange for the seller's "concession." The misrepresentation would be canceled by meaningful express disclosure of the true nature of the transaction. Thus, where all documents that refer to the sales price also expressly state that the sales price has been increased by a sum equivalent to the seller's concession, the lawyer's ethical duty has been satisfied. For example, a lawyer could ethically participate in a residential real estate transaction where the sales contract, the HUD-1 Settlement Statement, the transfer tax return and any other documents that contain the sales price each contain the following statement (or a substantially similar statement): "The sales price has been increased by a sum equal to the seller's concession."

15. We are aware that when the transaction documents accurately disclose the connection between the gross-up of the sales price and the seller's concession, some banks or other lenders may be unwilling or unable to approve the amount of mortgage money a buyer needs. That does not change our opinion. Under Rule 8.4(c), lawyers may not engage in conduct involving misrepresentation. Whether lenders wish to participate in transactions where the transaction documents meaningfully disclose the connection between the gross-up and the seller's concession is a matter for the lenders and their regulators. Whether lawyers may participate in such transactions when the documents do not meaningfully disclose the connection between the gross-up and the seller's concession is a matter for the Rules of Professional Conduct.

CONCLUSION

16. We conclude that Rule 8.4(c) does not permit lawyers to participate in residential real estate transactions involving a grossed-up sales price that was exchanged for an equivalent seller's conces-

sion unless all documents stating the grossed-up sales price also disclose that the sales price has been increased by the amount of the seller's concession. Conversely, when a residential real estate transaction involves both a seller's concession and a grossed-up sales price, but each document stating the grossed-up sales price also discloses that the sales price has been increased by a sum equal to the seller's concession, there is no misrepresentation, and therefore no ethical violation.

DISSENT:

17. A minority of the Committee disagrees with the conclusion in this opinion that a disclosure of more than the fact of the seller's concession is necessary. The minority believes that the existence of the federal guidelines cited in footnote 17, which permit, within certain defined limits, seller's concessions that provide a benefit to buyers in connection with their financing without altering the required loan-to-value ratio, strongly indicates that the industry as a whole is familiar with the practice of financing a buyer's closing costs. There is no evidence that tax assessors, real estate appraisers or mortgage investors are misled where a seller's concession – inherently a reduction in the amount the seller receives – is disclosed in the various transaction documents. It makes no economic or ethical difference, in the minority's view, whether such a concession is agreed upon as part of the initial price discussion or as part of a later "gross-up" of the sales price.

(43-09)

OPINION 883 (10/27/2011)

TOPIC: Attorney advertisement; fictitious law firm

DIGEST: An attorney advertisement may include the portrayal of a fictitious law firm so long as it is not misleading as to the association of lawyers in the advertiser's firm.

RULES: 7.1(c).

QUESTION:

1. May an attorney advertisement include the portrayal of a fictitious law firm, such as the portrayal of an argument against fictitious opposing counsel?

OPINION:

2. Rule 7.1(c)(2) of the New York Rules of Professional Conduct (the "Rules") states that an attorney advertisement may not "include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case."

3. Strictly read, the rule would appear to bar portrayal of a fictitious law firm in any form, including, for example, an advertisement depicting the advertising lawyer opposing a fictitious adversary firm or in other situations where the depiction was not misleading as to the advertiser's practice. The word "otherwise" in the final clause of the rule, however, suggests a narrower reading: that portrayals of a fictitious law firm are prohibited only if they imply that lawyers are associated in a law firm with the advertising lawyer, or are part of the advertising law firm, if that is not the case. We believe this narrower reading best corresponds with the purpose of the rule, which is to bar advertising techniques that are misleading.

4. For example, a comment to the rule on advertising explains that the prohibition of certain attorney advertising techniques hinges on whether the result is misleading to the viewer. That Comment states, "Lawyers may therefore use advertising techniques intended to attract attention, such as music, sound effects, graphics and the like, *so long as those techniques do not render the advertisement false, deceptive or misleading*." Rule 7.1, Cmt. [4] (emphasis added). The portrayal of a fictitious law firm is not by its nature misleading – it may be used as a humorous attention-getting device, for example. Rule 7.1(c)(2) read as a whole indicates a limiting principle to the prohibition, which is that a portrayal of a fictitious law firm is barred only when it implies that the advertising lawyer is associated in a law firm with other lawyers when that is not the case.

5. This narrower reading is supported by an interpretation that the Attorney General offered, and the United States Court of Appeals for the Second Circuit accepted, in the context of a challenge to the rule. Rule 7.1(c)(2) was among those challenged in *Alexander* v. *Cahill*, 598 F.3d 79 (2nd Cir. 2010), on the ground that it unconstitutionally prohibited non-misleading speech. In that case, an attorney, his law firm, and a consumer rights non-profit organization argued that the current rules regarding attorney advertising infringed their First Amendment rights by prohibiting "truthful, non-misleading communications that the state has no legitimate interest in regulating." *Id*. at 86. The Sec-

ond Circuit agreed, affirming, with one exception, the District Court's conclusion that the content-based restrictions in the disputed provisions of the Rules impermissibly regulated commercial speech protected by the First Amendment. *Id.* at 89. The one exception was Rule 7.1(c)(2), the rule at issue in this opinion. In considering that rule, however, the court noted that the only categories of commercial speech "clearly exclude[d] from protection are speech that is false, deceptive, or misleading, and speech that concerns unlawful activities." *Id*. at 89 (citation omitted). The court accepted a narrowing interpretation that the State offered, apparently in order to avoid the constitutional question. The court wrote:

> The provision prohibiting advertisements including fictitious firms is susceptible to more than one interpretation. But we need not decide whether it would be constitutional to prohibit dramatizations in which an advertising law firm portrays itself arguing against a fictitious opposing counsel. At oral argument, the Attorney General, representing the Defendants, suggested a narrower interpretation of this regulation. He asked that we construe this legislation as applying only to situations in which lawyers from different firms give the misleading impression that they are from the same firm (i.e., "The Dream Team"). (Oral Arg. ~ 12:38:25) We accept this interpretation. So read, this portion of §1200.50(c)(3) addresses only attorney advertising techniques that are actually misleading (as to the existence or membership of a firm), and such advertising is not entitled to First Amendment protection. *See Florida Bar*, 515 U.S. at 623-24, 115 S.Ct. 2371. Accordingly, and subject to the above-mentioned construction, we reverse the District Court's invalidation of that portion of § 1200.50(c)(3) that prohibits advertisements that include fictitious firms.

Id. at 90.

6. In response to the *Cahill* decision, the Appellate Divisions of the New York Supreme Court amended the Rules, but left the text of what became Rule 7.1(c)(2) unchanged. Amendment of Rule, New York Rules of Professional Conduct, 33 N.Y. St. Reg. 92 (May 18, 2011) (to be codified at N.Y. Comp. Codes R. & Regs. tit. 22, § 1200 (2011)). The narrow interpretation of the rule accepted by the Second Circuit is thus not explicitly stated in its text. Nevertheless, in view of the final clause of the rule and the narrowing interpretation that the State offered in the face of a constitutional challenge, we believe that the language of the rule should be read in context to apply only where portrayal of the fictitious firm would be misleading as to the advertiser's practice. *Cf. Ward* v. *Rock Against Racism*, 491 U.S. 781, 795-796 (1989) (adopting New York City's "narrowing construction" of a noise ordinance so as to avoid unconstitutionality).

7. We note that any portrayal of a fictitious law firm must comply with other rules, which will reduce the risk of a portrayal of a fictitious firm misleading viewers or listeners. In particular, Rule 7.1(c)(3) states that an attorney advertisement shall not "use actors to portray a judge, the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same." In light of this disclosure requirement, where a fictionalized law firm is portrayed using actors or fictionalized events or scenes, viewers are unlikely to be misled as to the existence of a real law firm in an advertisement. The bar on portrayals of fictionalized law firms would, however, itself prevent the kind of "portrayal" of a law firm cited by the Attorney General in its argument to the Second Circuit – an advertisement that described a team of lawyers from different firms by an overar-

ching description such as "The Dream Team" in such a way as to suggest that the lawyers were associated in a single firm.

CONCLUSION:

8. An attorney advertisement may include the portrayal of a fictitious law firm so long as the advertisement is not misleading as to the association of lawyers in the advertiser's law firm.

(30-11)

OPINION 884 (11/14/2011)

TOPIC: Communication in criminal matter with a witness who is the subject of a separate criminal indictment, in which he is represented by counsel.

DIGEST: Under Rule 4.2, a lawyer may not communicate about the subject of a criminal representation with a party the lawyer knows to be represented by another lawyer in the matter without the consent of the other lawyer. A non-party witness in a criminal matter is not protected by Rule 4.2. Consequently, a lawyer for a party may communicate with such witness without the consent of counsel who represents the witness in a related matter. This, however, does not prevent the witness' lawyer from advising his client not to speak with anyone about the facts of the case outside the presence of his lawyer. The conclusion of this opinion does not extend to civil matters.

RULES: Rule 1.0(k), Rule 4.2(a), Rule 3.4(a)(2), Rule 4.4, DR 7-104

QUESTION:

[1] May counsel for the defendant in a criminal case ("Defendant") interview the complaining witness ("Witness"), who is the subject of a separate criminal indictment, in which he is represented by counsel, without the consent of such counsel?

OPINION:

[2] Defendant has been charged with burglary and robbery. He allegedly entered the Witness's apartment holding a gun, robbed the Witness at gunpoint and took money from Witness. Witness is cooperating in the prosecution of the Defendant. Because the police who investigated the crime found drugs in the apartment of the Witness, they arrested Witness, who is represented by counsel in connection with the drug possession matter. Conviction of the Witness for drug possession would be a violation of his probation in a prior drug case. The prosecutor has informed Defendant's lawyer that Defendant's actions in the robbery may have been related to a former drug exchange between the Defendant and the Witness.

[3] Rule 4.2(a) of the New York Rules of Professional Conduct (the "Rules") states:

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

This rule, like DR 7-104, its predecessor in the former Code of Professional Responsibility (the "Prior Code"), is often called the "no-contact" rule.

[4] The purpose of the no-contact rule is explained in Comment [1] to the Rule:

> "This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those

> lawyers with the client-lawyer relationship, and uncounseled disclosure of information relating to the representation."

[5] In applying the facts of this hypothetical to Rule 4.2, two issues are raised – whether the Witness is a party to the matter, and whether the Witness is represented "in the matter."

[6] Although, by its terms, Rule 4.2 applies to a "party," Comment [2] to the Rule states that the Rule applies to communication with any person who is represented by counsel concerning the matter to which the communication relates. If the Comment were dispositive, the fact that Witness is not a co-defendant in the matter would be irrelevant as long as Witness's counsel represents Witness in the robbery matter, as well as the drug possession matter. However, the Comments are not dispositive. The comments were adopted by the New York State Bar Association to provide guidance for attorneys in complying with the Rule. They have not been adopted by the Appellate Divisions. Where a conflict exists between a Rule and a Comment, the Rule controls.

[7] The history of this provision in the former Code is instructive. The former Code had both a Disciplinary Rule – DR 7-104(A) – and an Ethical Consideration – EC 7-18 – which addressed contact with third parties. The disciplinary rule, like Rule 4.2, prohibited a lawyer from communicating with a "party" the lawyer knew to be represented by a lawyer in the matter. EC 7-18, on the other hand, was broader, applying to any person the lawyer knew to be represented in the matter by a lawyer. The rationale for the Ethical Consideration was set forth in its first sentence: "The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel." In 1999, a committee of the New York State Bar Association recommended that the term "party" in the Disciplinary Rule be changed to "person," following a similar change in the ABA Model Rules of Professional Conduct. Although the amendments adopted by the Administrative Board initially used the term "person" in DR 7-104(A), shortly thereafter, the Administrative Board issued an order changing "person" back to "party." *See* Simon's New York Code of Professional Responsibility Annotated (2007) at 1170. According to Professor Simon, the change was apparently made at the urging of prosecutors, who feared that the word "person" in the no-contact rule would require them, among other things, to obtain the consent of counsel to interview every non-party witness who was represented by counsel.

[8] The argument that "party" means an actual party to a transaction – at least in a criminal case – is supported by *Grievance Committee for the Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995), in which the Second Circuit held that a criminal defense lawyer did not violate DR 7-104(A)(1) by interviewing a witness in a drug conspiracy matter even though the lawyer knew the witness was represented by counsel with respect to charges in a related matter. The court held that the related matter was not the same "matter," and the witness therefore was not a "party" in the same "matter." *See United States v. Santiago-Lugo*, 162 F.R.D. 11, 12 (D.P.R. 1995)(interpreting "party" in Rule 4.2 of the ABA Model Rules and holding that the word "party" should be interpreted restrictively.

[9] Although counsel for the Defendant may interview the complaining witness without the consent of the Witness' counsel, during such interview Defendant's counsel may not violate Rules 3.4(a)(1) or (2) or 8.4(b) or (d).

[10] This Committee has treated the application of the no-contact rule more broadly than the courts where the issue arose in a non-criminal context. While recognizing the holdings in various court cases applicable to prosecutors, we have declined to follow that rule in civil matters. For example, in N.Y. State 735 (2001), we stated "we do not understand that the decision to retain the term 'party' was intended to cut back on the long-standing, universal understanding concerning the scope" of the "no contact" rule in noncriminal cases." (emphasis added) See also N.Y. State 785 (2005)(The 'no contact' rule will bar unconsented communication with an insurance adjuster if the insurance company is known to be separately represented by counsel with respect to the matter.) In N.Y. State 463 (1977), we opined that a lawyer for the putative father in a paternity proceeding instituted by the Commissioner of Social Services was free to communicate with the mother, since the mother "could hardly be deemed a party," although we also considered it important that the mother was not represented by counsel. However, since the hypothetical discussed here involves a criminal proceeding, we need not address, in this opinion, whether Rule 4.2 applies to persons connected with civil proceedings who are not "parties."

[11] Although the history of Rule 4.2 indicates that the Administrative Board was concerned with the right of prosecutors to interview potential witnesses, we see no basis for reaching a different conclusion where the lawyer who wishes to have an unconsented communication with a potential witness in a criminal case represents the defendant rather than the People.

[12] We do not believe a prosecutor may avoid the application of the no-contact rule by dividing the same matter into separate matters, so that only one defendant is a "party" to a particular matter. However, in this case, the matters, although related, seem distinct, and the complaining witness is only a witness and not a co-conspirator.

[13] If Rule 4.2 applied to all "persons," rather than to "parties," then the question for counsel for the Defendant would be whether he "knows" that the Witness is represented in the robbery matter. The term "know" is defined in Rule 1.0(k). Although it is defined as denoting actual knowledge of the fact in question, it states that a person's knowledge may be inferred from circumstances. Since there is a relationship between the robbery proceeding and the Witness' drug possession proceeding, it might be logical to conclude that the Witness' lawyer in the drug possession proceeding also represents him as a witness in the robbery proceeding. Thus, any questions the Defendant's lawyer might ask would be about the subject matter of the representation. However, given our conclusion with respect to the meaning of the term "party," we need not reach those questions. Rule 4.2 by its terms is not applicable, and Defendant's lawyer need not obtain the permission of Witness' lawyer. Nevertheless, Defendant's lawyer should be mindful of Rule 4.4 (Respect for Rights of Third Persons) ("In representing a client, a lawyer shall not use methods of obtaining evidence that violate the legal rights of such a person.")

[14] Even though Rule 4.2 does not require the consent of the Witness' lawyer, this does not prevent the Witness' lawyer from advising his client not to speak with anyone about the facts of the case outside the presence of his lawyer. A lawyer may not advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness in the a matter. Rule 3.4(a)(2). But the Witness may insist on his right to the presence of counsel. *See* N.Y. State 463 ("Where the lawyer's intended informant refuses to divulge information unless and until he obtains

legal advice, if the informant's interests are either presently or potentially adverse to those of the lawyer or his client, the lawyer must desist.")

CONCLUSION:

[15] Under Rule 4.2, a lawyer may not communicate about the subject of a criminal representation with a party the lawyer knows to be represented by another lawyer in the matter without the consent of the other lawyer. A non-party witness in such matter is not protected by Rule 4.2. Consequently, a lawyer for a party may communicate with the witness without the consent of counsel who represents the witness in a related matter, provided that during such interview the lawyer does not violate Rules 3.4(a)(1) or (2) or 8.4(b) or (d). This, however, does not prevent the witness' lawyer from advising his client not to speak with anyone about the facts of the case outside the presence of his lawyer. The conclusion of this opinion does not extend to civil matters.

(33-10)

OPINION 885 (11/14/2011)

TOPIC: Business relationship with non-attorney.

DIGEST: An attorney may not reduce fees as part of an arrangement to accept referrals from a non-attorney who provides services to clients seeking property tax reductions; an attorney may not be retained by a non-lawyer company to provide legal services to a client.

RULES: 5.4, 5.5, 5.8, 7.1, 7.3, and 8.4.

FACTS:

1. The inquirer handles tax certiorari proceedings in Supreme Court for the reduction of property assessments and is paid on a contingency basis, ordinarily receiving one-third of any tax refund clients receive. The inquirer has been approached by a non-attorney who owns a company that represents residential homeowners in Small Claims Assessment Review proceedings and who, in exchange for a referral fee, would refer commercial clients to the attorney. The non-lawyer would perform some services for the clients, including a preliminary valuation of the property.

QUESTIONS:

2. Is it ethically permissible for an attorney who receives referrals of potential clients from a non-lawyer to reduce the attorney's customary contingency fee, refunding the balance to the client with the understanding that the client would owe an amount to the non-attorney?

3. Alternatively, may the attorney be retained by the non-attorney's company, billing the company an hourly fee and returning any tax refund directly to the client?

4. May the attorney accept referrals of clients from the non-lawyer if the inquirer knows that the non-lawyer seeks new clients via direct solicitation?

OPINION:

5. **Is it ethically permissible for an attorney who receives referrals of potential clients from a non-lawyer to reduce the attorney's customary contingency fee, refunding the balance to the client with the understanding that the client would owe an amount to the non-attorney?**

6. Under the facts presented, the lawyer cannot agree to the arrangement with the non-lawyer company as the lawyer either would be impermissibly splitting fees with a non-attorney or entering into a cooperative business arrangement with a non-lawyer who is not a member of one of the professions with which attorneys can create such partnerships.

7. The New York Rules of Professional Conduct provide that an attorney may enter into a cooperative business arrangement with a non-lawyer only where the profession of the non-legal professional is included in a list jointly maintained by the Appellate Divisions. Rule 5.8(a). Tax reduction services are not such a profession. *See* N.Y. Admin. Code, tit. 22, § § 1205.3, 1205.5 (non-legal professions eligible to form cooperative business arrangements with lawyers).

8. Rule 5.4 provides that lawyers may not share legal fees with non-lawyers except in limited circumstances. Rule 5.4(b) prohibits lawyers from forming partnerships with non-lawyers "if any of the activities of the partnership consist of the practice of law." Rule 5.5 prohibits lawyers from aiding a non-lawyer in the unauthorized practice of law. *See* Suffolk County Op. 96-2 (1996) (opining that a referral arrangement between an attorney and a non-lawyer tax reduction firm was unethical because it involved the attorney in aiding a non-lawyer in the unauthorized practice of law). The attorney seeks to reduce the attorney's own fee, knowing that the amount of the reduction would be owed to the non-attorney company. Although the non-attorney company would perform some unspecified services (including perhaps a preliminary valuation of the property), there appears to be no relation between the funds to be received by the non-lawyer company and the value of the services actually performed for the client. In essence, the non-attorney company would find the clients and refer them to the lawyer, taking a fee from the tax reduction. *See* N.Y. State 705 (1997), at 3. The proposed arrangement would involve improper fee-splitting.

9. **May an attorney be retained by the non-attorney's company, billing the company an hourly fee and returning any tax refund directly to the client?**

10. The lawyer may not be retained by the non-attorney company to provide services to the property owner, as the furnishing of counsel and the rendering of legal services by non-attorneys is prohibited by statute. N.Y. Judic. L. § 495(d).[21]

11. **May the attorney accept referrals of clients from the non-lawyer if the inquirer knows that the non-lawyer seeks new clients via direct solicitation?**

12. Assuming that a referral from the non-attorney company is permissible and does not involve the splitting of fees or the payment of a referral fee, *see* Rule 7.2, a separate concern arises in that the company seeks new clients via direct solicitation.

13. An attorney may not solicit a client in person, by telephone, or by real-time computer interaction. Rule 7.3(a). While an attorney may solicit clients via advertising, there are restrictions on such advertising. Rule 7.1. "Solicitation means any advertisement initiated by or on behalf of a lawyer or

21 New York Judiciary Law §495 ("Corporations and voluntary associations not to practice law ") provides, in relevant part, that:

1. No corporation or voluntary association shall (a) practice or appear as an attorney-at-law for any person in any court in this state or before any judicial body, nor

(b) make it a business to practice as an attorney-at-law, for any person, in any of said courts, nor

(c) hold itself out to the public as being entitled to practice law, or to render legal services or advice, nor

(d) furnish attorneys or counsel, nor

(e) render legal services of any kind in actions or proceedings of any nature or in any other way or manner, nor

(f) assume in any other manner to be entitled to practice law, nor

(g) assume, use or advertise the title of lawyer or attorney, attorney-at-law, or equivalent terms in any language in such manner as to convey the impression that it is entitled to practice law or to furnish legal advice, services or counsel, nor

(h) advertise that either alone or together with or by or through any person whether or not a duly and regularly admitted attorney-at-law, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel.

law firm . . . the primary purpose of which is the retention of the lawyer or law firm, and significant motive for which is pecuniary gain." Rule 7.3(b).

14. Non-attorneys are not subject to the New York Rules of Professional Conduct, but a lawyer cannot circumvent either the solicitation or the advertising rules through the indirect use of the non-lawyer's communications. *See* Rule 8.4(a) ("A lawyer or law firm shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or *do so through the acts of another* . . ." (Emphasis added.) For example, if the lawyer had control over the non-attorney or control over the solicitation or advertising, the lawyer might be said to be accomplishing through indirect means what the lawyer could not accomplish directly. The level of control the attorney has depends on many factors, including the amount of business the attorney conducts with the non-attorney and any other connections between the two.

CONCLUSION:

15. An attorney may not reduce fees as part of an arrangement to accept referrals from a non-attorney who provides services to clients seeking property tax reductions. The lawyer may not be retained by the non-attorney company to provide services to the property owner as the furnishing of counsel and the rendering of legal services by non-attorneys is prohibited by statute. If the relationship were permitted, the advertising (including direct solicitation) made by the non-lawyer would not be attributable to the attorney unless the attorney uses the non-lawyer to circumvent applicable rules on advertising (including the rules governing solicitation).

(44-10)

OPINION 886 (11/15/2011)

TOPIC: Ancillary business organizations; conflict of interest

DIGEST: A lawyer with a substantial investment in a closely held real estate brokerage firm is precluded from representing a party to a real estate transaction in which the brokerage firm is acting as broker

RULES: 1.7, 5.7

QUESTION:

1. May an attorney with a substantial passive investment in a closely held nonlegal business entity that offers real estate brokerage, asset management and property management services represent a buyer, seller or lender in a transaction in which that nonlegal entity is serving as a broker?

OPINION:

2. The inquirer seeks to establish a closely held nonlegal entity to provide brokerage, asset management and property management services to investors with a focus largely on multi-family apartment assets. The inquirer contemplates a substantial and significant investment in the nonlegal entity but does not contemplate taking an active role in the management or operation of the entity. Inquirer intends to offer legal services to clients of the entity, and particularly services in purchase, sale and lease transactions in which the affiliated nonlegal entity is serving as a broker. The inquirer's firm would be one of several law firms from which clients of the nonlegal entity would be free to choose. The legal services would be offered only after full written disclosure of the inquirer's interest in the nonlegal entity.

3. A lawyer or a law firm may provide nonlegal services, themselves or through a separate entity, to clients or other persons. New York Rules of Professional Conduct (the "Rules") 5.7; *see* N.Y. State 752 (2002), N.Y. State 753 (2002) and N.Y. State 755 (2002). Whether the nonlegal services provided by the lawyer or law firm, or a separate entity in which they have an interest, are subject to the Rules depends upon whether such services are separate and distinct from any legal services that the lawyer or law firm may provide and, if so, whether the client "could [not] reasonably believe that such nonlegal services are the subject of a client-lawyer relationship." *Id.* The client will be presumed to believe that such nonlegal services are the subject of a client-lawyer relationship unless (i) the lawyer or law firm has advised the client in writing that such services are not legal services and that the protections associated with a client-attorney relationship do not obtain or (ii) the lawyer's or law firm's interest in the separate entity providing such services is *de minimis*. *Id.*

4. In all instances, however, the lawyer's services *qua* lawyer are subject to the Rules. In N.Y. State 752, we opined specifically that the application of the personal interest conflict rule found in DR 5-101(A), a precursor of Rule 1.7, to a lawyer seeking to serve in the dual roles of lawyer and broker, *inter alia*, survived the adoption of DR 1-106, the direct predecessor of Rule 5.7. We here reaffirm our opinion in N.Y. State 752 and hold further that, in our opinion, Rule 1.7 applies with undiminished force in circumstances where a lawyer's conflicting personal interest arises from a separate, nonlegal business or activity permitted by Rule 5.7.

5. Thus, absent informed consent, a lawyer may not provide legal representation to a person or entity if a substantial risk exists that the lawyer's personal interests arising from a permitted separate, nonlegal activity will affect the lawyer's professional judgment on behalf of that person or entity. Rule 1.7. Informed consent is dependent upon, *inter alia,* the lawyer's reasonable belief that the lawyer will be able to provide competent and diligent representation. *Id.*

6. As noted in N.Y. State 752, however, we have opined on a number of occasions over an extended period of time that, because of the strong financial interest of a lawyer who serves as a broker in the outcome of the brokerage effort, the roles of broker and lawyer in the same transaction are incompatible and not subject to consent by the client. N.Y. State 752 and Opinions cited therein. That a lawyer's or law firm's participation in a separate brokerage business is limited largely or wholly to that of investor, with little or no management or operational activity, does not alter that result. It is the personal financial interest arising from the investment that creates the personal interest conflict that is the subject of Rule 1.7.

CONCLUSION:

7. For the reasons stated, a lawyer with a substantial passive investment in a separate, closely held nonlegal entity that offers real estate brokerage, asset management and property management services may not represent a buyer, seller or lender in a transaction in which such separate nonlegal entity is serving as a broker.

(40-10)

OPINION 887 (11/15/2011)

TOPIC: Non-lawyer marketers; bonus compensation to non-lawyer based on new business

DIGEST: A lawyer or law firm may have a non-lawyer marketer who engages in only that advertising and solicitation in which the lawyer or law firm could engage. The lawyer or law firm may have a profit-sharing plan that pays bonus compensation to the non-lawyer marketer based on overall profits of the firm or on a percentage of the employee's base salary. However, the bonus compensation may not be based on referrals of particular matters and may not be based on the profitability of the firm or the department for which the employee markets if such profits are substantially related to the employee's marketing efforts.

RULES: Rule 1.0(a), 5.3(b), 5.4(a), 5.4(a)(3), 7.1, 7.2, 7.3(a)(1), 7.3(b), 8.4(a), 8.4(a(3).

QUESTION:

[1] May a law firm hire a non-attorney marketer to market to potential corporate or union clients the firm's pre-paid legal services plans and its services as a provider of pre-paid legal services? May a law firm marketer be paid more than a salary, *e.g.,* a success fee for signing up pre-paid legal services plan sponsors?

OPINION:

[2] A lawyer may disseminate an advertisement[22] about the lawyer or his/her law firm and the lawyer's or law firm's services, including newspaper advertisements, letters and brochures. *See generally* Rule 7.1 of the N.Y. Rules of Professional Conduct (the "Rules") and the comments thereto.

[3] The lawyer's ability to engage in in-person solicitation,[23] however, is far more limited. Rule 7.3(a)(1) of the New York Rules of Professional Conduct (the "Rules") prohibits a lawyer from engaging in solicitation "by in-person or telephone contact, or by real-time or interactive computer-accessed communication" unless the recipient is a close friend, relative, former client or existing client of the lawyer."

[4] Clearly, a lawyer may hire an employee ("Marketer") to engage in advertising and solicitation activities in which lawyers themselves could ethically engage. *See* Rule 7.2, cmt [1](a lawyer may "compensate employees, agents and vendors who are engaged to provide marketing or client development services"). Thus a Marketer, like a lawyer in the firm, could develop print or web-based marketing materials and could solicit business in person or by telephone from the law firm's existing and former clients. *See* also the definitions of advertisement and solicitation, each of which includes a communication made on behalf of a lawyer or law firm.

22 An advertisement is any public or private communication made by or on behalf of a lawyer or law firm about the lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers. Rule 1.0(a).

23 Solicitation means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client. *See* Rule 7.3(b).

[5] A Marketer, however, is not permitted to engage in any activities that would be prohibited to the lawyer. *See* Rule 8.4(a) ("A lawyer or law firm shall not violate or attempt to violate the Rules of Professional Conduct through the acts of another"). Moreover, a lawyer is liable for compliance by his or her employees with the requirements of the Rules of Professional Conduct. *See* Rule 5.3(b)("A lawyer shall be responsible for the conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer [under the circumstances specified in the Rule].")

[6] Consequently, if the Marketer would merely prepare written advertising materials for distribution to prospective clients or to the public, there would be no ethical issues, provided that they complied with Rule 7.1, including labeling it "attorney advertising", and the requirement for having it preapproved by the firm. This is so even if the written materials were directly addressed to particular persons. *See Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988) (letter targeted to clients that lawyer knew could use the lawyer's services.)

[7] However, the law firm could not authorize the Marketer to meet with or call prospective clients who are acquaintances of the Marketer in order to promote the firm's services, because doing so would violate Rule 7.3(a)(1) unless the prospects were close friends, clients or former clients of the law firm.

Employee Compensation Arrangements

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

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

[9 Rule 5.4 (a)(3) is a limited exception to the prohibition against a lawyer or law firm sharing legal fees with a non-lawyer. However, it does not supersede Rule 7.2, which prohibits a lawyer from compensating a person to recommend the lawyer's employment or rewarding that person for a recommendation resulting in employment.

[10] In N.Y. State 733 (2000), we held that a lawyer may not pay a non-lawyer employee a percentage of fees attributable to matters referred by the employee as compensation for the referral. Although that opinion interpreted former DR 3-102(A)(3) under the Code of Professional Responsibility, the former disciplinary rule is the same as Rule 8.4(a)(3) except for punctuation, and we would reach the same result under the Rules.

[11] Rule 5.4(a)(3) clearly allows a lawyer to pay a bonus to a non-lawyer employee, including an employee engaged in marketing, that is not based on referrals of particular clients or matters, but rather is based on the profitability of the entire firm or a department within the firm. Although Comment 1B interprets this prohibition as prohibiting the profit-sharing arrangement from being based on

the fee resulting from a single case, it does not rule out the success of marketing efforts from being a factor in the amount of the bonus. Nevertheless, if the profits of the firm or the employee's department are directly related to the success of the employee's marketing efforts, it is difficult to see how a law firm could pay a marketing employee a bonus based on the profits of the firm or the department for which the employee engages in marketing without the bonus being considered a direct sharing of legal fees. This, of course, would depend on the size of the department and the extent to which the profits of the department are based on clients resulting from the employee's marketing efforts. Such determinations are necessarily fact-specific. Accordingly, they are not amenable to general rules. Where profits of the firm or the department are not directly correlated with the employee's marketing efforts, a bonus plan based on a percentage of the employee's salary or a percentage of the overall profits of the firm would pass muster under the Rule.

CONCLUSION:

[12] A lawyer or law firm may have a non-lawyer marketer who engages in only that advertising and solicitation in which the lawyer or law firm could engage. The lawyer or law firm may have a profit-sharing plan that pays bonus compensation to the non-lawyer marketer based on the overall profits of the firm or on a percentage of the employee's base salary. However, the bonus compensation may not be based on referrals of particular matters and may not be based on the profitability of the firm or the department for which the employee markets if such profits are substantially related to the employee's marketing efforts.

(9-11)

OPINION 888 (11/15/2011)

TOPIC: Links on a lawyer's web site to other businesses.

DIGEST: A lawyer may include links to other businesses on the lawyer's web site provided neither the link nor the linked material involves misrepresentation or causes confusion.

RULES: 5.8(a), 7.1, 8.4

QUESTION:

1. Under what circumstances may a lawyer's web site include links to the web sites of other businesses?

OPINION:

2. The inquiring lawyer wishes to establish a law firm web site. He asks whether the web site may include links to the web sites of other businesses, particularly banks and real estate companies.

3. Whether or not a link on an attorney website is ethically permissible depends on the purpose of the link, the nature of the site to which a link is made, and the nature of the relationship between the attorney and the owner of the web site to which the link is made.

4. A web link need not be the subject of any agreement between the law firm and the site to which the link is made. Links can be made with or without the consent of the owner of the website to which the link is made. In fact, the owner of a website need not even be aware that the link has been made, much less give consent for the link.

5. A law firm web site may include informational links to third party web sites. Such links are not ethically barred if the lawyer ensures that neither the inclusion of the link nor the material to which the link is made will create confusion or misrepresentation. For example, a link to an official government web site that created the impression that the law firm had some government connection would be impermissible where the implied connection does not exist. NY Rule of Professional Conduct 8.4(c). The same is true for links to private web sites if the link is likely to create confusion or misrepresentation. In some circumstances, an appropriate disclaimer would be necessary.

6. No categorical ethical bar prohibits lawyers and third parties from agreeing to link to each other's web sites, but greater care must be exercised with reciprocal links. A reciprocal link (without revenue generated for the law firm and without any financial relationship between the entities) is permitted under similar conditions as an informational link.

7. Reciprocal links that constitute advertising must comply with all the requirements of Rule 7.1, including the mandate that advertising not include false, deceptive, or misleading claims. In addition, the home pages of the web sites with the reciprocal links may need to be labeled as attorney advertising. Rule 7.1(f).

8. If the link is part of a cooperative business arrangement between the lawyer and a non-legal professional, the lawyer must comply with Rule 5.8(a). A "cooperative business arrangement" is:

> a contractual relationship between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other nonlegal professional services . . .

See 22 NYCRR 1205.2. Rule 5.8(a) specifically limits the non-legal professionals with whom a lawyer may contract. *See* 22 N.Y.C.R.R. § 1205.3 (list promulgated by the Appellate Divisions of professionals with whom lawyers may contract), § 1205.5. The rules permit contractual business relationships between lawyers and five other professions (public accountancy, land surveying, social work, architecture and professional engineering) but neither realtors nor bankers. Under Rule 5.8(a), a reciprocal exclusive referral agreement may include joint advertising and sharing of office space, but may not include sharing of any legal fees.

CONCLUSION:

9. A law firm web site can include informational links to other web sites, including those of banks and real estate companies. Neither the linked material nor the linkage itself may involve misrepresentation or create confusion. Reciprocal links are not inherently unethical. A simple reciprocal link (without revenue generated for the law firm and without any financial relationship between the entities) is permitted under similar conditions as an informational link.

(3-10)

OPINION 889 (11/15/2011)

TOPIC: Sharing legal fees and forming partnership with non-lawyer.

DIGEST: A lawyer who principally practices in a jurisdiction that allows partnership with a non-lawyer, and who is also admitted in New York, may ordinarily conduct New York litigation even if in a partnership that includes a non-lawyer who would benefit from the resulting fees; although the New York rules generally prohibit such arrangements, in this case the governing ethical provisions would be those of the other jurisdiction.

RULES: 5.4(a) & (b), 8.5(a) & (b)

FACTS:

[1] The inquirer is a lawyer admitted to practice in both New York and the District of Columbia. The lawyer's practice is based in the District of Columbia and the majority of his revenue is derived from cases and matters within that jurisdiction.

[2] The lawyer desires to form a District of Columbia partnership with a non-lawyer, a technical expert, who will assist the lawyer with prosecuting certain class action claims, at least one of which would be brought in the State of New York. For the purposes of this opinion, it is assumed that the District of Columbia permits lawyers to form a partnership with non-lawyers, and to share legal fees and profits as between them, if they comply with certain rules. *See* D.C. Opinion 322 (2004); D.C. Rule 5.4.

QUESTIONS:

[3] When the lawyer earns legal fees resulting from litigation commenced and prosecuted in New York, may he share those fees with his District of Columbia partnership, which would include a non-lawyer who has worked on that litigation? If the lawyer may not share the fees directly, may the firm hire the non-lawyer as an employee, to be compensated through a profit-sharing arrangement triggered by increases over the firm's current average profit?

OPINION:

[4] New York Rule 5.4(a) provides that, with exceptions not here pertinent, a lawyer or law firm shall not share legal fees with a non-lawyer. New York Rule 5.4(b) provides that "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." While it is clear that the New York rules of legal ethics prohibit such a partnership and such fee sharing, the nuanced question here is whether a lawyer admitted in New York runs afoul of our ethics rules by litigating in New York as part of a partnership in the District of Columbia that is, and ethically may be, structured in the way the New York rules generally prohibit.

[5] Under New York Rule 8.5(a) a New York admitted lawyer is subject to the disciplinary authority of New York regardless where the conduct occurs, but we must determine whether the ethics rules to be applied are those of New York or those of the District of Columbia. To make this determination we look to the New York choice of law rules contained in New York Rule 8.5.

[6] Under New York Rule 8.5(b)(1), for "conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise." Thus, the New York Rules of Professional Conduct apply to conduct in connection with proceedings in a New York court unless the rules of that court provide otherwise.

[7] Forming a District of Columbia partnership with a non-lawyer in the District of Columbia does not become subject to New York Rule 5.4 just because the partnership may undertake some New York litigation work. As we read the inquiry, there is no suggestion that undertaking the New York litigation would substantially shift the firm's focus. We assume that the firm, even if it undertook the New York litigation, would continue to be centered on cases and revenue within the District of Columbia. Under those circumstances, we believe that formation of the partnership cannot be said to be "conduct in connection with" the New York litigation. The same is true of distributing profits, including those generated from occasional legal fees in New York, according to the general terms of the District of Columbia partnership agreement.

[8] Under New York Rule 8.5(b)(2)(ii), for conduct not in connection with a proceeding in court, the rules to be applied shall be "the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct." The inquirer principally practices in the District of Columbia. Unless the formation of the partnership or the division of compensation arising from New York litigation clearly have their predominant effect in New York, those matters are subject only to the District of Columbia ethics rules.

[9] Forming the District of Columbia partnership does not clearly have its predominant effect in New York just because the partnership may undertake some New

York litigation work. Under the circumstances presented, neither does it clearly have a predominant effect in New York for the partnership to distribute its fees according to the general terms of the partnership agreement, even though this may include occasional fees from New York litigation.

[10] Accordingly, while the proposed distribution of legal fees may have to comply with relevant ethical rules in the District of Columbia, it is not subject to New York Rule 5.4. A contrary result, applying the New York Rules more broadly than their intended reach, could result in undue burdens for lawyers admitted in New York, but legitimately practicing in the District of Columbia through a partnership that includes a non-lawyer, who wish to participate in the occasional New York litigation matter.

[11] Our conclusion as to choice of law is premised on the particular facts of the inquiry. These include that the lawyer and the law firm, now and in the foreseeable future, have their principal place of business in the District of Columbia and that the bulk of their revenue is derived from matters unrelated to the State of New York. Different facts could lead to a different result. For example, if a major portion of the revenue of the lawyer or the law firm were derived from the practice of law in the State on New York, then, depending on the particular facts, Rule 8.5 could make applicable the prohibitions

of New York Rule 5.4. Certainly if the partnership were created for the very purpose of litigation in New York, establishing it in the District of Columbia would be ineffective to circumvent the New York rules on fee sharing.

[12] Other jurisdictions have reached varying conclusions as to the choice of law that governs such situations. *Compare* Philadelphia Opinion 2010-7 (opining that a Pennsylvania lawyer could share fees with a non-Pennsylvania lawyer in the District of Columbia even though the DC firm had a non-lawyer partner) *with* ABA 91-360 (opining that lawyer practicing in a jurisdiction forbidding partnerships with non-lawyers would be subject to that prohibition even if a member of a DC firm), *followed in* Virginia Opinion 1584 (1994). It should be noted, however, that the ABA and Virginia opinions were based on codes without choice of law provisions similar to the current Rule 8.5 in New York.[24] We believe that the Philadelphia opinion is the more instructive precedent, and for the reasons stated above, we believe the New York choice of law rules support a similar conclusion.

[13] Alternatively, we are asked to address whether the lawyer could employ the non-lawyer technical expert, with the expert receiving compensation based upon a profit-sharing model based on increases from the firm's current average profit. In N. Y. State 733 (2000), we addressed whether a lawyer may share legal fees with non-lawyer employees. Under DR 3-102 [now Rule 5.4(a)], we held that "a lawyer may compensate non-lawyer employees based on profit sharing but may not tie remuneration to the success of specific efforts by employees to solicit business for lawyers or law firms." We specifically stated that any permissible profit sharing between lawyer and non-lawyers "may not be used to circumvent the specific prohibition on fee sharing reflected in Judiciary Law §491 and DR 2-103(B)." *See also* Rule 5.4, Cmt. [1B].

[14] As posed to this Committee by the inquirer, the profit-sharing with the non-lawyer employee would be based upon total profits above a significant minimum threshold. Although the non-lawyer would not be paid a percentage of fees from a given case, the non-lawyer's compensation under this profit-sharing model would correspond roughly to the amount by which his involvement increases the profit of the firm.

[15] We do not reach the question whether this proposed profit-sharing model would comport with the standards that would generally apply in New York. On the facts of this inquiry, and following the same analysis as set forth above with respect to partnership, we believe the propriety of the profit-sharing arrangements would be governed by the ethics rules of the District of Columbia. If the facts were different – for example, if New York litigation represented a significantly greater portion of the firm's caseload or revenues – then it would be necessary to consider whether the profit-sharing model would be consistent with New York ethical rules.

CONCLUSION:

[16] A lawyer who principally practices in another jurisdiction but is also admitted in New York may conduct occasional New York litigation, even if a non-lawyer would benefit from the resulting

24 The ABA opinion was issued at a time when ABA Rule 8.5 was limited to jurisdiction of the disciplinary authority without provision for choice of law. Amendments adopted by the ABA in 1993 broadened the rules to include choice of law provisions as are found in New York Rule 8.5(b) upon which we base our conclusion. At the time of the Virginia opinion, the applicable conflicts rule, Virginia DR 1-102(B), was limited in scope.

fees (either as a member of the lawyer's partnership in that other jurisdiction or as its employee compensated through a profit-sharing arrangement), if the arrangements comply with the ethics rules of that other jurisdiction.

(38-11)

OPINION 890 (11/17/2011)

TOPIC: Disqualification of spouses practicing in different firms from appearing on opposite sides of a litigation.

DIGEST: Conflicts of spouses representing clients on opposite sides of the same litigation under Rule 1.10(h) are not automatically imputed to other lawyers in the disqualified lawyers' firms, but imputation may arise in the particular circumstances of any given case. At least in civil matters, even if the conflict is imputed to other lawyers in the spouses' firms, the resulting conflict may, depending on the facts of the particular case, be waived by the client or clients with their informed consent. If substitute counsel from outside the firm is engaged, th.e originally retained lawyer may share confidential information with the substitute counsel as long as the affected client gives his or her informed consent or the disclosure is impliedly authorized to serve the best interests of the client under Rule 1.6.

RULES: 1.0(j), 1.6(a), 1.7(b)(1), 1.10(a) & (h).

FACTS:

1. The inquirer and his wife are lawyers working in a small city. The inquirer is the managing attorney of a legal services office and his wife is in private practice at a local firm. Recently, a client engaged the inquirer's wife to bring an eviction. The respondent in that proceeding sought the assistance of the inquirer's office.

QUESTIONS:

2. Is the prohibition in Rule 1.10(h) that, absent a valid consent, precludes husband and wife from personally representing opposing parties in litigation imputed to other lawyers in their respective firms?

3. If the conflict is imputed, can consent cure the conflict, and, if so, is consent of one or both clients needed?

4. If the inquirer chooses to recommend that the client engage instead volunteer outside counsel, can the inquirer share with the outside counsel information derived from the legal services office's intake interview?

OPINION:

5. The inquirer recognizes that he cannot personally represent the client in litigation against an adversary represented by his wife. His concern is well founded. Under the terms of Rule 1.10(h), the prohibition on lawyers representing clients in any matter where the adversary is represented by the lawyer's spouse is subject to consent by the lawyer's client "after full disclosure" and only if "the lawyer concludes that the lawyer can adequately represent the interests of the client." While worded differently, this inquiry is the same as that set forth in Rule 1.7(b)(1), the general concurrent conflict rule: whether "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation" to the affected client or clients. Because both husband and wife are subject to the same prohibition, for both lawyers to remain on the case, both would have to conclude that they

could adequately represent the interests of their clients, and both clients would have to consent. In the Committee's view, it would be a rare case in which spouses could reasonably conclude that they could adequately represent the interests of their respective clients in appearing personally as lead counsel on opposite sides of a litigation.

6. The prohibition set forth in Rule 1.10(h) is not, however, automatically imputed to other lawyers in the law offices of the husband and wife. Rule 1.10(a) provides for automatic imputation where the conflict arises under Rules 1.7, 1.8 or 1.9, but does not list conflicts arising under Rule 1.10(h). This Committee has previously observed that, under essentially identical provisions of the former New York Code of Professional Responsibility, even in cases involving criminal prosecutions, "disqualification of the district attorney's spouse in a particular case does not result in automatic disqualification of other lawyers in the spouse's firm under DR 5-105(D) [now Rule 1.10(a)]." N.Y. State 654 (1993); *accord* N.Y. State 660 (same as to lawyers in close dating relationship).

7. Nevertheless, the conflict may be imputed under the facts and circumstances of a given case, where the policies underlying the primary disqualification are also implicated by participation of other lawyers in the firm. N.Y. State 654 (1993); N.Y. State 638 (1992); N.Y. State 632 (1992). In N.Y. State 654, we enumerated certain factors that should be considered in determining whether a conflict was imputed in a given case:

> Relevant facts would include the size of the spouse's firm, the spouse's position in the firm, whether the spouse will derive direct or indirect financial or other benefit as a result of the defendant's employment of the firm, and whether the spouse played any role in the defendant's seeking representation by the firm.

In that opinion, we concluded that the conflict that prevented the spouse of a district attorney from representing a criminal defendant was imputed to the spouse's firm, and that consent of the criminal defendant would not cure the conflict. We rested heavily on the fact that the case was a criminal matter and the concern that the public might perceive favoritism in the district attorney's handling of the matter: "Since the firm of the district attorney's spouse is quite small, the public would be likely to see the potential for abuse whether the defendant were represented by the district attorney's spouse's partner or associate, or by the district attorney's spouse." N.Y. State 654.

8. This opinion, by contrast, involves a civil landlord-tenant case that does not implicate the public interests present in a criminal matter. In these circumstances, whether a colleague in the inquirer's office or a colleague in the wife's law firm, or both, could proceed with the representation in the eviction matter would depend primarily on whether, under all the facts, "there is a significant risk that the [litigating] lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own . . . personal interests" occasioned by that lawyer's relationship with one or the other spouse. Rule 1.7(a)(2). This is an objective test based on the particular circumstances: the lawyers involved, "acting reasonably," must "determine whether . . . the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation." Rule 1.7, Cmt. [2]. The answer may depend on, among other things, whether both spouses withdraw from the affected representation or only one of them does. In the latter case in particular – where a colleague is litigating directly against one of the spouses – we believe it is quite likely, if the respective law offices

are relatively small, that a significant risk of an adverse effect on the litigating lawyer's professional judgment would arise.

9. Even if there is such a significant risk, however, that conflict can be cured by consent of the affected clients as long as the lawyer involved reasonably believes that, notwithstanding that risk, he or she will in fact be able to provide competent and diligent representation to the affected client. Rule 1.7(b)(1). Any consent will often be conditioned on effective screening of the disqualified spouse from all contact with the matter.

10. Whether consent needs to be obtained from one client or both also depends on the circumstances. For example, a colleague in the inquirer's office, where the inquirer is managing attorney, might well conclude that he or she must obtain consent of the respondent in the eviction matter. Yet perhaps the colleague in the wife's firm, given facts such as the size of that office and the lawyer's role in it, might reach a different conclusion. It would always be most prudent for all the various lawyers involved to obtain consent from their clients, but whether that is *required* depends on the analysis above.

11. Information derived from the intake interview is confidential whether or not the lawyer assumes representation of the prospective client. *See* Rule 1.18(b). If the representation were taken over by a colleague in the inquirer's legal services office, the inquirer could discuss information from the intake interview with that colleague. *See* Rule 1.6 Cmt. [5] ("lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers"). If outside counsel is retained to take over a representation, however, confidential information may be disclosed to the new lawyer only, under Rule 1.6(a)(1), with the "informed consent" of the respondent as that term is defined by Rule 1.0(j), or, under Rule 1.6(a)(2), if the disclosure is impliedly authorized to advance the best interests of the client and reasonable under the circumstances or customary in the professional community.[25] Assuming that the client is aware that the inquirer has undertaken to find replacement counsel, briefing new counsel is likely to be both reasonable and customary unless the information derived from the intake interview was adverse to the interests of the client.

CONCLUSION:

12. Conflicts under Rule 1.10(h) are not automatically imputed to other lawyers in the disqualified lawyers' firms, but imputation may arise in the particular circumstances of any given case. Even if the conflict is imputed to other lawyers in the spouses' firms, the resulting conflict may, depending on the facts of the particular case, be waived by the client or clients with their informed consent. If substitute counsel is engaged, the originally retained lawyer may share confidential information with the substitute counsel as long as the affected client gives his or her informed consent or the disclosure is impliedly authorized under rule 1.6(a)(2).

(40-11)

25 This is not a case in which the lawyer's contact with a prospective or former client is so remote as to call into question whether disclosure to serve the client's best interests could ever be reasonable or customary. To the contrary, the inquirer's involvement with the respondent is ongoing. Without trying to formulate general rules, we conclude on the present facts – where a lawyer has obtained confidential information from a prospective client and has undertaken, with permission, to hand the matter over to new counsel identified by the lawyer – that the lawyer may be impliedly authorized to disclose information to the new lawyer if doing so meets the tests set forth in Rule 1.6(a)(2).

OPINION 891 (11/17/2011)

TOPIC: Conflict of Interest; Referrals by attorney to a title abstract company or title company agent in which the attorney has a financial interest.

DIGEST: An attorney may refer a client to a title abstract company or title company agent in which the attorney has a financial interest in the limited case where the Company or Agent does only ministerial tasks. The attorney's personal interest conflict arising from the financial interest may preclude the attorney from representing that client in the same transaction that the title abstract company or title company agent is providing services in.

RULES: DR 1-106; 5-104(A); Rule 1.7; 1.8; 5.7

QUESTIONS:

1. May an attorney refer work to a title abstract company or title company agent in which the attorney has a financial interest? (A "title abstract company" and a "title company agent" being hereinafter collectively referred to as a "title company".)

2. May an attorney represent a client in a transaction where the title company in which the attorney has a financial interest is providing services to that client?

OPINION:

3. Both of the above questions were answered under the Code of Professional Responsibility by opinions of this Committee. See N.Y. State 595, 621, 738, 752, 753 and 755. The answers and reasoning set forth in those opinions are still valid under the NY Rules of Professional Conduct which replaced the Code of Professional Responsibility effective April 1st, 2009.

4. N.Y. State 595 held that an attorney could refer clients to an abstract company in which the attorney has an interest and continue to represent the client in the transaction, provided that the abstract company performs only ministerial tasks. If the abstract company were to perform non-ministerial tasks (such as title insurance or recommendations for title insurance), the resulting personal interest conflicts with the attorney's duty to the client in the transaction and is a non-consentable conflict.

5. N.Y. State 621 confirmed the result in N.Y. State 595 and distinguished N.Y. State 576 which allowed an attorney to refer a client in a transaction to a title company that paid a commission to the attorney, provided that, among other things, the attorney passed the commission on to the client and where exceptions to title were not negotiable.

6. N. Y. State 738 applied the prohibition where the attorney's spouse holds a financial interest.

7. N. Y. State 752 made clear that notwithstanding the adoption of DR 1-106 the prohibitions regarding title companies remained valid.

8. N. Y. State 753 reiterated that a lawyer's interest in a title abstract company providing insurance or making an insurance recommendation could not, even with client consent, represent the buyer, seller or lender in the transaction unless the abstract company performs only ministerial tasks.

9. Rule 5.7 is substantially the same as DR 1-106 and accordingly the same reasoning applies regarding the permissibility of referrals to title companies.

CONCLUSION:

11. An attorney may refer a client to a title company in which the attorney has a financial interest provided that the attorney may not represent the client in the transaction in which that title company will provide title services to the client unless the services are purely ministerial or if, among other things, the attorney passes the commission on to the client and where exceptions to title are not negotiable.

(27-11)

OPINION 892 (11/28/2011)

TOPIC: Lawyer's participation in residential real estate transaction that includes both a "seller's concession" and an equivalent "gross-up" in the sale price.

DIGEST: The fact that the sales price in a residential real estate transaction has been "grossed-up" must be expressly disclosed in the transaction documents containing the sales price in addition to the amount of the "seller's concession."

RULES: 8.4(c)

FACTS:

1. Seller's attorney presented a contract for the sale of a single family home to the mortgagee bank with provisions stating that "At the closing of title Seller shall pay $25,000.00 towards Purchasers' closing costs and points" and "Purchaser and Seller hereby and herewith acknowledge and understand that the sales price has been increased by the sum of $25,000.00 to allow and provide for the aforesaid Seller's Concession."

2. Although seller's attorney has been using substantially similar language without objection by lenders for numerous residential real estate transactions, the lender in this instance advised the seller's attorney that the "Contract states price increased due to Seller concession; increase for this reason is not allowed."

QUESTION:

3. May a lawyer ethically participate in a residential real estate transaction where the lender objects to the disclosure in the sales contract and the HUD-1 Settlement Statement showing that the amount of the sales price has been increased ("grossed-up") in an amount equivalent to the amount of the seller's concession?

OPINION:

4. Rule 8.4(c) prohibits a lawyer from engaging in conduct involving misconduct. Under the facts of this inquiry the failure to disclose the increase or "gross-up" of the purchase price would constitute misrepresentation. In N.Y. State 817 (2007) this Committee opined that a lawyer's participation in a residential real estate transaction that includes a "seller's concession" and a "grossed up" or increased sales price is ethically prohibited, unless the gross-up is disclosed in the transaction documents. That opinion did not hold that a seller's concession or gross up was improper. Rather, the opinion held a full disclosure of the gross-up in the transaction documents was necessary to avoid a misrepresentation regarding the amount of the purchase price.

5. In N.Y. State 882 (2011) we affirmed what we said in N.Y. State 817 and clarified in which documents the disclosure of the gross up was required to be made:

> The problem is not the seller's concession in the abstract. Many seller's concessions are legitimate. The problem here is the matching "gross up" of the selling price, which effec-

> tively wipes out the seller's concession. If a buyer has to pay $6,000 in order to get a $6,000 discount, then the true selling price has not changed. Thus, a gross up, if not expressly disclosed as such, is a misrepresentation and is proscribed by Rule 8.4(c). Consequently, if a lawyer participates in a real estate transaction in which the lawyer knows (or should know) that the transaction documents containing the grossed-up sales price do not expressly disclose that the sales price was increased by the same amount as the seller's concession, the lawyer violates Rules 8.4(c). The fact that the practice may be widespread does not authorize an attorney to participate in the misrepresentation. The Rule is equally applicable to the buyer's attorney, the seller's attorney, and the lender's attorney.

N.Y. State 882 ¶ 10.

Here because the mortgagee bank rejected the disclosure required by our ethical opinions, the attorneys for the buyer, seller and lender not only had reason to know that the documents with the deletion would contain a misrepresentation, they each had actual knowledge.[26]

6. N.Y. State 882 addressed the issue raised by the current inquiry.

> Even if the seller's concession and matching gross-up were suggested by a mortgage broker, a loan officer, or some other employee at the mortgage bank, the lawyer is not relieved from making the necessary disclosures. Disclosure may be even more important in that situation because the lender's representative – the very person who might be expected to detect a misrepresentation (the supposedly increased sales price that is fully offset by an unexplained seller's concession) – is encouraging the misrepresentation. No function other than to misrepresent the purchase price can be ascribed to a gross–up equal to an unexplained seller's concession. A lawyer may not participate in that misrepresentation no matter who suggested it.

Id. ¶ 11.

7. Under these circumstances, where the lender objects to the disclosure of the gross-up of the purchase price, none of the lawyers may ethically participate in the transaction. Their best course would be to advise the lender the "gross-up" is ethically prohibited unless disclosed in the documents that recite the purchase price and that if the lender will not agree to the disclosure, the lawyers for the buyer, seller and lender may not participate in the transaction.

CONCLUSION:

8. A lawyer may not ethically participate in a residential real estate transaction where the lender objects to the disclosure of the fact that there has been a gross-up of the purchase price equivalent to amount of the seller's concession.
(12-11)

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26 Rule 1.0(k) provides as follows:

> "Knowingly," "known," "know," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

A lawyer "should know" a fact when it can be readily inferred from the circumstances.

OPINION 893 (12/01/2011)

TOPIC: Assistant District Attorney accepting appointment as foreclosure referee.

DIGEST: A full-time prosecutor may accept appointment to referee foreclosure panels, and may oversee foreclosure proceedings, provided there is no conflict.

RULES: 1.7, 1.12

QUESTION:

1. May a full-time Assistant District Attorney seek and accept appointment to a court-appointed referee foreclosure panel?

OPINION:

2. New York law permits courts to appoint referees from court-appointed referee panels to exercise a number of powers in connection with a foreclosure. N.Y. Civ. Prac. L & R. § 4301. Referees compute the value of foreclosed property and sell it at public auction. N.Y. Civ. Prac. L. & R. §1351(1). The statutory fee is $50 to compute the value of the property and $500 to sell the property, although the court can authorize a higher fee for property with a sales price that exceeds $50,000. N.Y. Civ. Prac. L & R. §8003(b).

3. Applicants to be referees complete a short form that includes the applicant's education and experience, prior court appointments, and the appointment requested. The Office of Court Administration does not conduct screening of those seeking appointment, and appointment of referees is left to the discretion of individual judges. Rules of the Unified Court System, pt. 36 Appointments; NYS Office of Court Administration, Report of the Commission on Fiduciary Appointments (Dec. 2001).

4. No per se rule in the New York Rules of Professional Conduct prohibits the Assistant District Attorney from accepting an appointment to a referee panel. We caution, however, that apart from the Rules of Professional Conduct, there could be other provisions – such as in county law or the ethics rules for a particular District Attorney's office – that could prohibit an Assistant District Attorney from accepting an appointment as a referee. This committee does not opine on questions of law, regulation or agency policy.

5. Moreover, although no per se provision in the Rules of Professional Conduct prohibits the Assistant District Attorney from accepting an appointment as a referee, the rules governing conflicts of interest may prohibit an Assistant District Attorney, in particular situations, from accepting appointment to the panel generally or overseeing a particular foreclosure:

> Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . .
>
> > (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

Rule 1.7(a); *see also* Rule 1.7(b) (setting forth an exception based on informed consent and other factors).

6. An Assistant District Attorney should avoid situations in which his or her interests in being a referee would create a conflict under Rule 1.7(a)(2). For example, given the discretion of a judge to make a referee appointment, the attorney should consider whether it is appropriate to accept a referee assignment from a judge before whom the attorney frequently appears or is currently appearing in the role of prosecutor, or to seek appointment to a panel that would routinely result in assignments from such a judge.

7. While it usually will be ethical for an attorney to accept an appointment to a referee panel, the Assistant District Attorney must also consider whether there may be a conflict under Rule 1.7(a)(2) with respect to an appointment to oversee any particular foreclosure. An attorney should not serve as a referee in a matter where one of the parties to the foreclosure is currently being prosecuted or is likely to be prosecuted by the District Attorney's office in which the Assistant District Attorney serves. The Assistant District Attorney should also consider whether it would be appropriate to serve as a referee in a proceeding in which he or she has previously participated in a criminal matter in which any party to the foreclosure was involved. Whether serving as a referee in such a situation would constitute a conflict under Rule 1.7(a)(2) might depend on the length of time that had passed since the criminal proceeding, the extent of the Assistant District Attorney's involvement in that matter, and the extent of the party's involvement in that matter (*e.g.,* as a defendant, witness, juror, or complainant). Where the foreclosure involves law enforcement personnel with whom the Assistant District Attorney works as a prosecutor, the attorney should weigh whether these professional relationships might affect his or her professional judgment. *See* N.Y. State 544 (1982); N.Y. State 800 (1986).

8. We note also that should an Assistant District Attorney accept an appointment as a referee in a matter, he or she might thereafter be subject to various provisions of Rule 1.12, such as restrictions on subsequent employment, because a referee is an "adjudicative officer" and a "third-party neutral," which are two of the categories of lawyers covered by that Rule. *See* Rule 1.12, Cmt. [1]. The question before us is whether an Assistant District Attorney may accept appointment as a referee, not what restrictions may apply to him or her after accepting such appointment. But we urge an Assistant District Attorney in this situation to study Rule 1.12 carefully if and when he or she accepts an appointment as a referee.

CONCLUSION:

9. A full-time prosecutor may accept appointment to a referee foreclosure panel and may oversee foreclosure proceedings, provided there is no conflict under the Rules of Professional Conduct.

(18-11)

OPINION 894 (12/01/2011)

TOPIC: Communication with represented party; service of process

DIGEST: When authorized by statute, an attorney may personally serve process on a represented party and ask certain related questions, but may not go beyond service of process to communicate on the subject of the representation without the consent of such party's lawyer.

RULES: 1.0(l), 4.2

FACTS:

1. An attorney for a landlord, to commence a summary eviction proceeding, serves a petition and notice of petition. The tenant appears by counsel and challenges the service. Landlord's attorney wishes to effect new service by personally serving the notice and petition directly upon the tenant.

QUESTION:

2. May an attorney personally serve process on a party known to be represented?

OPINION:

3. The New York Rules of Professional Conduct provide:

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

Rule 4.2(a).

4. Clearly the tenant is represented by a lawyer in the matter. The validity of the original service of process is irrelevant to this issue. *See* Rule 1.0(l)(defining "matter" to include a claim or controversy as well as a proceeding). Landlord's attorney therefore may not "communicate or cause another to communicate" with the tenant about the subject of the representation without the prior consent of the tenant's lawyer unless landlord's attorney is authorized to do so by law.

5. The purpose of Rule 4.2 is to promote the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible over-reaching by other lawyers who represent clients in the matter. *See* Rule 4.2, Cmt. [1]. Although the rule is popularly known as the "no-contact" rule, by its terms the rule prohibits contact without the opposing lawyer's consent only if (a) such contact involves communication, (b) the communication is about the subject of the representation, and (c) the communication is not authorized by law.

6. Rule 4.2 is not limited to oral communication. A letter mailed or handed to the represented tenant by the lawyer or the lawyer's agent, if it argued the landlord's position or offered a settlement of the matter, clearly would constitute a prohibited communication. Whether legal process that com-

mences a court action also constitutes "communication about the subject of the representation" is a question we need not decide, because another clause of the Rule is sufficient to answer the inquiry.

7. Rule 4.2 allows a lawyer to communicate with an unrepresented person when "authorized to do so by law." The Real Property Actions and Proceedings Law provides for process to be personally served upon the respondent in the proceeding, without reference to whether the respondent is represented. "Service of the notice of petition and petition shall be made by personally delivering them to the respondent," or alternatively, by specified forms of mail to the respondent in addition to either delivering the papers to a person of suitable age and discretion at the property sought to be recovered, or else leaving the papers in a specified manner at the property. RPAPL § 735(1).

8. Under the Civil Practice Law and Rules, authorization to serve process and other papers is very broad and does not exclude lawyers. "Except where otherwise prescribed by law or order of court, papers may be served by any person not a party of the age of eighteen years or over." CPLR 2103. Articles 8 and 8-A of the New York General Business Law contain requirements with respect to process servers. Both specifically exempt attorneys from the definition of process servers who are required to maintain records (which clearly would not be necessary if attorneys could not personally serve process). GBL §§ 89-t, 89-bb. Although many lawyers use professional process servers, the CPLR does not require them to do so.[27] And if it would violate the Rule for the lawyer personally to effect service, then it would be equally violative for the lawyer to "cause another," such as a process server, to do so. There is no violation in either case, because service directly upon a respondent, even if represented, is authorized by law.

9. May a lawyer, when serving process on a represented person, engage in conversation with that person? It is permissible, whether or not advisable, to discuss matters wholly unrelated to the representation. Some more related communications are common in the course of serving process. For example, the server may have occasion to ask the prospective recipient whether he or she is the person named in the papers, or to ask the recipient to sign an acknowledgment of receipt of service.

10. We doubt that asking the tenant to confirm his or her identity, or to sign an acknowledgment of receipt, would be a communication "about the subject of the representation" within the meaning of Rule 4.2. In any event, we believe that communications such as these would fall within the legal authorization for making service directly upon the respondent. The CPLR anticipates that a person serving process may have occasion to engage in some such types of communication. *See* CPLR 306 (d) & (e) (allowing proof of service by means including "a signed acknowledgment of receipt of a summons and complaint" or a "writing admitting service by the person to be served").

11. However, a statute providing for service directly upon parties (including represented ones) does not constitute a general authorization of communication with such persons during the course of service. A lawyer serving process on a represented person must be careful not to exceed the scope of

27 In fact there can be legitimate reasons, not involving circumvention of Rule 4.2, for a lawyer personally to effect service. For example, the lawyer may wish to save the cost of a professional server or to be assured that service is timely and valid.

the authorization in any way that would violate the no-contact rule.[28] Conversation on the subject matter of the representation, if not included within the authorization for service of process, remains prohibited.

CONCLUSION:

12. An attorney may personally serve process on a represented party as authorized by statute. In the course of making service, the attorney may ask the represented party if he or she is the person named in the papers, and may request the represented party to sign an acknowledgment of receipt of process. The attorney may not, however, without the consent of that person's lawyer, go beyond service of process to elicit or participate in communications with that person about the subject of the representation.

(36-11)

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28 We note the approach to this issue that has been taken by another State. In Florida, the analogue to our Rule 4.2 states no exception for communications authorized by law, so there is reason for it to include an explicit but limited exception for service of process:

> "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney."

Fla. Rule 4-4.2(a).

OPINION 895 (12/06/2011)

TOPIC: Spousal conflicts of interest.

DIGEST: Absent informed consent confirmed in writing, a sole practitioner may not represent a client in a matter where the opposing party is represented by a lawyer in a five-lawyer firm in which her spouse is the senior partner. The lawyer in her spouse's firm representing the opposing party may also have a conflict, which would be imputed to all lawyers in the spouse's firm unless it can be and is cured by informed consent, confirmed in writing.

RULES: 1.0(h) & (j), 1.6(c), 1.7, 1.10(a), (d) & (h)

QUESTION:

1. A sole practitioner practices law from home in a small community, but occasionally uses the conference room and telephone lines in her spouse's law firm. The spouse's firm is a five-lawyer firm at which her spouse is the senior partner. May the sole practitioner and a lawyer from the spouse's firm (but not the spouse) serve as opposing counsel in a case in which the sole practitioner's client is a minor?

OPINION:

2. On April 1, 2009, the New York Rules of Professional Conduct (the "Rules") replaced the New York Code of Professional Responsibility (the "Code") but, as we show below, there is no substantive difference in the provisions governing the answers to these inquiries.

A. Does a conflict arise from the spousal relationship?

3. The essence of the question is whether a lawyer may represent a client if the opposing counsel is an attorney in the law firm where her spouse is the senior partner.

4. To analyze conflicts arising from a spousal relationship, we start with Rule 1.10(h), which provides as follows:

> A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer ***unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client***. [Emphasis added.]

5. Thus, under Rule 1.10(h), a conflict of interest arises when spouses represent opposing parties in a matter. However, the facts indicate that the sole practitioner's spouse is not representing the opposing party, but rather another lawyer in the spouse's five-lawyer firm. Therefore, Rule 1.10(h) itself does not apply.

6. However, Rule 1.10(h) is essentially a more specific version of Rule 1.7(a)(2), the general rule on concurrent conflicts arising from a lawyer's personal interests. Under Rule 1.7(a)(2), unless a law-

yer complies with Rule 1.7(b), "a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Rule 1.7(b)(1) allows a client to waive a conflict of interest if the lawyer reasonably concludes that she can competently and diligently represent the client, but Rule 1.7(b)(4) adds that consent must be both "informed" and "confirmed in writing." These conditions for waiver also apply to a conflict arising under Rule 1.10(h). *See* Rule 1.10(d) ("A disqualification prescribed by this Rule may be waived by the affected client . . . under the conditions stated in Rule 1.7.").

B. Is the conflict imputed to other lawyers in the spouse's firm?

7. Rule 1.10(a) imputes one lawyer's conflict of interest under Rule 1.7, Rule 1.8, or Rule 1.9 to all lawyers "associated in" the same firm, but Rule 1.10(a) does not explicitly impute a disqualification arising under Rule 1.10(h). "Unlike disqualifications under most other . . . Rules, disqualifications under DR 9-101(D) are not imputed to the rest of the disqualified lawyer's firm." ROY D. SIMON, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 1450 (ed. 2008). (Rule 1.10(h) is identical to former DR 9-101(D).) Rule 1.10(h) applies only when the spouses personally represent opposing sides. Here, the lawyer's spouse does not personally represent the opposing party – a partner in the spouse's firm does. Yet this does not end our analysis, because we must also consider whether the sole practitioner or the opposing counsel in her spouse's firm – or both – have a conflict under Rule 1.7(a)(2). If the lawyer in the spouse's firm has a conflict under Rule 1.7(a)(2), then pursuant to Rule 1.10(a) that conflict would be imputed to all other lawyers in the spouse's firm.

8. This Committee considered an issue similar to the one here in N.Y. State 654 (1993). That opinion addressed whether a district attorney could prosecute a defendant represented not by the D.A.'s spouse but by the other lawyer at the two-lawyer firm where the D.A.'s spouse worked. Despite the heightened emphasis on fairness and the appearance of fairness in criminal cases, this Committee stated that under DR 5-105(D) (predecessor to Rule 1.10(a)), "disqualification of the district attorney's spouse in a particular case does not result in automatic disqualification of other lawyers in the spouse's firm." But the Committee qualified this general statement by noting that "whether others in the firm are disqualified will turn on the particular facts and circumstances, including the basis of the primary disqualification and the underlying policies and interests to be served." The Committee listed several relevant factors for the attorney to consider, including (i) "the size of the spouse's firm," (ii) "the spouse's position in the firm," (iii) "whether the spouse will derive direct or indirect financial or other benefit as a result of the [representation]," and (iv) "whether the spouse played any role in the [client's] seeking representation by the firm."

9. Applying these factors to the district attorney's inquiry in N.Y. State 654, this Committee concluded that the spouse's entire firm was disqualified by imputation. Our determination was based largely on the size of the firm. Because the spouse was a partner in a two-partner firm, this Committee noted that "the public would be likely to see the potential for abuse whether the defendant were represented by the district attorney's spouse's partner or associate, or by the district attorney's spouse."

10. N.Y. State 654 shows that our analysis does not end simply because Rule 1.10(h) does not explicitly impute the conflict of interest to the spouse's entire firm. In accordance with Rule 1.7(a)(2),

the inquiring sole practitioner here must ask whether a reasonable lawyer would conclude that there is a "significant risk" that the professional judgment of a lawyer in the inquirer's position (*i.e.,* married to the senior partner of the opposing law firm) would be "adversely affected by the [inquiring] lawyer's financial, business, property or other personal interests." As in N.Y. State 654, factors relevant to assessing the risk of an adverse effect on the inquiring lawyer's professional judgment include the size of the spouse's firm, the spouse's position in the firm, whether the spouse would share in fees earned from the representation, and the spouse's involvement in the representation of party opposing the inquirer.

11. Here, the firm at which the inquirer's spouse works has only five lawyers. The inquirer's spouse is the senior partner in the firm, and therefore would presumably share in the fees generated in the matter in which the inquirer is adverse counsel. Moreover, as the senior partner, the spouse may well have a supervisory role in the matter. Accordingly, a favorable result for the sole practitioner's client would most likely be an unfavorable result for her spouse. Thus, a conflict arises under Rule 1.7(a)(2). (If the sole practitioner's spouse was personally working on the case, then the sole practitioner and her spouse would be representing opposing parties, which would trigger Rule 1.10(h) – but the facts indicate that the spouse is not working on the case.)

12. Because there is a conflict under Rule 1.7(a)(2), the sole practitioner may represent her minor client only if she complies with Rule 1.7(b). Specifically, the sole practitioner may represent the minor client only if she reasonably believes that she can provide competent and diligent representation and her client gives informed consent, confirmed in writing. See Rule 1.7(b)(1) and (4). (Another condition, set out in Rule 1.7(b)(2), is that the representation is not prohibited by law. That condition explicitly turns on a question of law on which we have no authority to offer an opinion, but we will assume for purposes of this opinion that the condition is met because very few representations are prohibited by law.)

13. To ensure that the client's consent under Rule 1.7(b)(4) is "informed," the inquirer must adequately explain to her client "the material risks of the proposed course of conduct and reasonably available alternatives." Rule 1.0(j) (defining "informed consent"). Comment [11] to Rule 1.7 suggests some of the material risks when closely-related lawyers are representing opposing clients in the same matter. Even though the inquiring lawyer and the spouse are not both representing clients in the same matter, we think the concerns in Comment [11] apply. Comment [11] provides, in relevant part, as follows:

> When lawyers representing different clients in the same matter or in substantially related matters are closely related, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers, before the lawyer agrees to undertake the representation. . . .

14. We assume that the lawyer in the spouse's firm who is representing the opposing party is aware of this entire situation *(i.e.,* knows that the senior partner is married to the sole practitioner). Therefore, the lawyer in the spouse's firm who is representing the opposing party has a mirror-image conflict under Rule 1.7(a)(2). Because the sole practitioner's spouse is a senior partner in that law-

yer's firm, a reasonable lawyer would conclude that there is a significant risk of an adverse effect on the lawyer's professional judgment. For example, the sole practitioner's spouse may not want the lawyer opposing her to be too aggressive against the sole practitioner, or may want the sole practitioner to win a large money judgment and a corresponding large fee to add to the family coffers. Many different scenarios are possible. Thus, a conflict arises under Rule 1.7(a)(2), and Rule 1.7(b)(1) and (b)(4) require that the lawyer opposing the sole practitioner's client must take appropriate action to deal with his conflict of interest. Specifically, the lawyer in the spouse's firm may not undertake or continue to represent the opposing party here unless he reasonably believes that he can competently and diligently represent the interests of his client and, if so, the client gives informed consent, confirmed in writing.

C. May a minor consent to a conflict?

15. The requirement that the sole practitioner obtain her minor client's informed consent raises the issue of whether a minor acting alone can give informed consent. This issue has been addressed in a number of opinions. In three opinions decided under the old Code of Professional Responsibility – N.Y. State 256 (1972), N.Y. State 274 (1972), and N.Y. State 790 n.4 (2005) – this Committee determined that a minor by himself or herself could not consent to a conflict. Nothing in the Rules of Professional Conduct changes this conclusion.

16. However, those opinions did not address the ability of a *representative* of a minor (such as a parent, guardian *ad litem,* custodian, guardian, committee, trustee or court) to give the necessary consent. The ability of a minor's representative raises questions of law beyond the jurisdiction of the Committee to decide. *See, e.g*. General Obligations Law §2-102 (defining the term "minor") and §§3-101 *et seq*. (addressing the effect of status as a minor). Other provisions relating to minors are found in the Penal Law, Family Court Act, Surrogate's Court Procedure Act, Social Service Law, Estate, Powers and Trusts Law and Domestic Relations Law. The sole practitioner should examine those sources.

D. Do the shared office facilities create a conflict?

17. Independent of the spousal relationship between the lawyers, there is also a question whether the sole practitioner's occasional use of the conference room and telephone lines in her spouse's firm means that they are deemed to be in the same "firm" for purposes of the Rules. In N.Y. State 715 (1999), which addressed temporary lawyers, we said: that "lawyers who share office space but are not in the same firm have been deemed to be 'associated' in a firm for purposes of the conflicts rules and vicarious disqualification rules. *See also* Rule 1.0, cmt. [2] (stating that whether two lawyers constitute a "firm" will "depend on the specific facts," and giving some examples). If the inquirer's use of the spouse's office facilities makes the inquirer "associated in" the same "firm" as the spouse within the meaning of Rules 1.0(h) and 1.10(a), then the sole practitioner would be disqualified from representing the minor to the same extent as a partner or associate in the spouse's firm. *See* N.Y. State 437 (1976); N.Y. State 609 (1990).

18. Based upon the facts in the instant matter, however, we do not believe that the sole practitioner's occasional use of the spouse's conference room and telephones rises to the level of at which the sole practitioner is "associated in" her spouse's firm for conflicts purposes (but that could change

if the office sharing relationship expands or becomes more than occasional). *See* N.Y. State 609 (1990).

19. Nevertheless, the office sharing arrangement is relevant to another aspect of conflict of interest analysis. As we have noted above, the sole practitioner has a conflict of interest under Rule 1.7(a)(2) because the opposing counsel works at her spouse's firm, so she must obtain informed consent under Rule 1.7(b)(4) before agreeing to represent the minor client. As part of obtaining informed consent, the sole practitioner should disclose to her minor client (or the minor client's representative) the facts regarding her occasional use of the office facilities at the opposing firm. Those facts – including the risks to the client's confidential information – are part of the "information adequate for the person to make an informed decision" as to whether to retain or continue using the lawyer, and part of an adequate explanation of "the material risks of the proposed course of conduct and reasonably available alternatives," both of which are elements in the definition of "informed consent." *See* Rule 1.0(j) (defining "informed consent"). Needless to say, the sole practitioner should also take every reasonable measure to protect her client's confidences when using the conference room or telephone lines at her spouse's firm. *Cf.* Rule 1.6(c) (requiring lawyer to "exercise reasonable care" to prevent others from disclosing a client's confidential information except as permitted by Rule 1.6).

20. Since we conclude that the sole practitioner and her spouse are not part of the same "firm" based on the sole practitioner's occasion use of her spouse's office facilities, we need not decide whether the sole practitioner and her spouse's firm would have a conflict of interest under Rule 1.7(b)(3), which provides that a conflict is waivable only if "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal."

CONCLUSION:

21. Absent informed consent, confirmed in writing, a lawyer may not represent a client in a matter in which the opposing party is represented by a lawyer in a five-lawyer law firm where her spouse is the senior partner. The lawyer in her spouse's firm who is representing the opposing party may also have a conflict, which would be imputed to all lawyers in the spouse's firm unless it can be and is cured by informed consent, confirmed in writing.

(25-10a)

OPINION 896 (12/12/2011)

TOPIC: Providing lien search services to clients.

DIGEST: A law firm may subcontract lien search work to a third party but may not bill the client more than the costs incurred by the law firm. A law firm may provide lien search services to a client through the law firm's own employees, but if the lien search services are "not distinct" from the legal services, then the law firm must comply with the Rules of Professional Conduct regarding both the legal and nonlegal services. A law firm may provide lien searches to a client through a lien search firm affiliated with the law firm, but the law firm must comply with the Rules regarding both the legal and nonlegal services unless the law firm has advised its client in writing that the services are not legal services and lack the protection of a client-lawyer relationship. Even then, the law firm must comply with Rule 1.7 because the law firm's financial interest in providing the nonlegal services through an affiliated entity creates a conflict.

RULES: 1.5(d), 1.7(a)-(b), 1.8(a), and 5.7(a)-(b).

BACKGROUND:

1. This opinion concerns lien search services. Lien searches are used to determine whether a title owner's interest in property is encumbered, to what extent it is encumbered, and – in the case of multiple encumbrances – the priority of the encumbrances. For example, a mortgage lender will conduct a lien search of real property records to determine if there are outstanding senior mortgage liens, tax liens, mechanic's liens or judgment liens affecting the property. A judgment creditor will conduct a UCC lien search to determine if personal property owned by the judgment debtor has been pledged to secured creditors who will have priority in the collateral. A car dealer will conduct a lien search of the Department of Motor Vehicles to assure that his new car customer has paid off the loan on the trade-in vehicle.

2. A lien search is a ministerial function and does not constitute the practice of law. Lien searches thus may be performed by nonlawyers. Lien search companies, like title abstract companies, examine the public record to identify encumbrances affecting real and personal property and provide their search results to lenders, title insurance companies, judgment creditors, and other interested parties. Lien search companies do not sell insurance.

3. Some lawyers and law firms undertake to perform lien searches for clients through their own employees, without engaging a third party lien search firm. Other law firms contract with a third party to perform lien searches. Sometimes the third party is independent of the law firm, but other times the third party is owned by or is otherwise affiliated with the law firm. Law firms that contract for third parties to perform lien searches sometimes pay the third party and then bill the client for those services, and other times instruct the third party to bill the client directly.

QUESTIONS:

4. This opinion addresses three related questions:

A. May a law firm subcontract lien search work to an unaffiliated third party and bill the client more than the law firm pays the third party for those services?

B. May a law firm provide lien search services to a client through the law firm's own employees and bill the client for such services?

C. May a law firm provide lien searches to a client through a lien search company owned in whole or in part by lawyers in the law firm, and bill the client for such services?

OPINION:

Question A: Providing Lien Searches Through an Independent Third Party

5. A law firm may subcontract with an independent (*i.e.,* unaffiliated) third party to perform lien searches, and may bill clients for the cost of such services. However, a law firm may not pass on the expense of a third party lien search to clients under the pretense that the law firm itself performed the services. The law firm must accurately disclose both the fact that third party provided the services and the terms under which such services were provided.

6. Further, a law firm may not charge the client more than the third party search firm's charges unless the law firm incurs additional costs. Rule 1.5 of the New York Rules of Professional Conduct (the "Rules") addresses fees and expenses charged by lawyers. Rule 1.5(b) requires a lawyer to communicate to a client the scope of the representation and the basis or rate of the fees and expenses for which the client will be responsible. Rule 1.5(d)(3) provides that a lawyer "shall not enter into an arrangement for, charge or collect . . . a fee based on fraudulent billing." Comment [1A] to Rule 1.5 says that billing is fraudulent if it is "knowingly and intentionally based on false or inaccurate information." Comment [1A] also says that "where the client has agreed to pay the lawyer's cost of in-house services, such as for photocopying or telephone calls, it would be fraudulent knowingly and intentionally to charge a client more than the actual costs incurred." *Accord,* ABA 93-379 (1993) ("A lawyer may not charge a client more than her disbursements for services provided by third parties like court reporters, travel agents or expert witnesses, except to the extent that the lawyer incurs costs additional to the direct cost of the third-party services").

Question B: Providing Lien Searches Through the Law Firm's Own Employees

7. If the law firm itself provides lien search services through its own employees, the applicable rule is Rule 5.7 ("Responsibilities Regarding Nonlegal Services"), which covers a law firm's provision of both legal and nonlegal services. Rule 5.7(a) provides, in pertinent part:

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

8. Thus, if the legal and nonlegal services provided by the law firm are "not distinct" from each other – as when a law firm renders both legal services and lien search services related to the same transaction – the Rules of Professional Conduct apply both to the legal services and the nonlegal ser-

vices. For example, the mandates of Rule 1.5 with respect to fees (see above), as well as the mandates of Rules 1.7 and 1.8 covering conflicts of interest, apply both to the legal services and the lien search services when those services are not distinct from each other.

9. Regarding conflicts, Comment [5] to Rule 5.7 notes that "the lawyer may have a financial interest in the nonlegal services that would constitute a conflict of interest under Rule 1.7(a)(2), which governs conflicts between a client and a lawyer's personal interests." In addition, Comment [5A] to Rule 5.7 notes that if the legal representation involves exercising judgment about whether to recommend nonlegal services and which provider to recommend, or if the representation involves overseeing the provision of the nonlegal services, then a conflict with the lawyer's own interests under Rule 1.7(a)(2) is likely to arise on that ground as well.

10. Under Rule 1.7(a)(2), a lawyer may not represent a client if "a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or other personal interests" unless the lawyer complies with Rule 1.7(b). To comply with Rule 1.7(b), the lawyer must reasonably believe that the lawyer can provide competent and diligent legal representation despite the conflict, and the lawyer must obtain the client's informed consent, confirmed in writing. In obtaining the client's informed consent under Rule 1.7(b), the lawyer should disclose the advantages and risks of obtaining legal and nonlegal services from the same provider in a matter, including the effect of the lawyer's financial interest in providing the nonlegal services. For example, if the payment of legal fees is contingent upon closing the transaction, the lawyer may have an incentive not to perform an exhaustive lien search or not to reveal information that might prevent the closing from occurring.

11. A lawyer or law firm providing both legal and lien search services in the same matter must also comply with Rule 1.8(a), which governs business transactions between lawyers and their clients. See Rule 5.7, cmt. [5A]. As Comment [6] to Rule 5.7 explains, when a law firm provides both legal and nonlegal services to a client in the same matter (or in substantially related matters), Rule 1.8(a) requires that: (i) the nonlegal services be provided on terms that are "fair and reasonable" to the client, (ii) the terms on which the nonlegal services will be provided are fully disclosed to the client in writing in understandable form, (iii) the client is advised to seek the advice of independent counsel about the lawyer's provision of the nonlegal services, and (iv) the client gives informed consent, in a writing signed by the client, to the terms of the transaction in which the nonlegal services are provided and to the lawyer's inherent conflict of interest. If the lawyer provides nonlegal services on terms generally available to the public in the marketplace, Rule 1.8(a)'s "fair and reasonable" requirement is ordinarily met. But if the lawyer charges above-market prices for the nonlegal services, then the "fair and reasonable" requirement of Rule 1.8(a) might not be met. In addition, Comment [7] to Rule 5.7 notes that "in the context of providing legal and nonlegal services in the same transaction, Rule 1.8(a) requires a full disclosure of the nature and extent of the lawyer's financial interest or stake in the provision of the nonlegal services."

Question C: Providing Lien Searches Through an Affiliated Third Party

12. When a lawyer or law firm refers a client to a company owned in whole or in part by the lawyer or law firm, Rule 5.7(a)(3) and (4) are relevant. They provide as follows:

> (3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.
>
> (4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is *de minimis*.

13. Thus, Rule 5.7(a)(3) provides that the law firm is subject to the Rules with respect to the lien search services if the person receiving those services could reasonably believe that they are the subject of a client-lawyer relationship. If the law firm's interest in the affiliated entity is more than *de minimis*, Rule 5.7(a)(4) establishes a presumption that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship *unless* the law firm advises the client in writing that the services are not legal services and lack the protection of an attorney-client relationship. Even if the law firm has informed the client in writing that the lien search services are not subject to the Rules of Professional Conduct and lack the protection of an attorney-client relationship, Rule 5.7(b) reminds the affiliated law firm not to allow the nonlegal entity to undermine the lawyer's independent professional judgment and not to compromise the lawyer's own duty of confidentiality. Rule 5.7(b) states:

> Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under Rule 1.6(a) and Rule 1.6(c) with respect to the confidential information of a client receiving legal services.

14. Providing lien search services to a client through a lien search company owned in whole or in part by the law firm or by lawyers in the firm also raises the same conflict of interest concerns under Rule 1.7(a)(2) that we discussed above in answering Question B. However, if the lawyer or law firm has advised the client in writing pursuant to Rule 5.7(a)(4) that the lien search services are not legal services and lack the protection of an attorney-client relationship, then referring a client to a lien search company wholly or partly owned by the lawyer or law firm does not constitute a business transaction with a client and Rule 1.8(a) does not apply. *See* N.Y. State 755 (2002) ("A lawyer owning or operating a separately incorporated or distinct non-legal business who adequately informs the client that the non-legal business is not subject to the protections of the attorney-client relationship . . . may refer clients to the non-legal business without complying with" the rule governing business transactions between lawyer and client).

CONCLUSION:

15. A law firm may subcontract lien search work to a third party but may not bill the client more than the law firm pays the third party for those services, except to the extent that the law firm incurs additional costs.

16. A law firm may provide lien search services to a client through the law firm's own employees, but if the lien search services are "not distinct" from the legal services the law firm is providing to the client, then the law firm must comply with the Rules of Professional Conduct – including Rule 1.5 (governing fees and expenses), Rule 1.7 (governing conflict of interest), and Rule 1.8(a) (governing business transactions with clients) – with respect to both the legal and nonlegal services.

17. A law firm may provide lien searches to a client through a lien search firm owned in whole or in part by the law firm or its lawyers, and bill the client at cost for such services, but the law firm must comply with the Rules of Professional Conduct with respect to both the legal and nonlegal services unless the law firm has advised the client in writing that the lien search services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the lien search services. Even then, the law firm must obtain the client's informed consent pursuant to Rule 1.7(b) because the law firm's financial interest in providing the nonlegal services through an affiliated entity creates a personal conflict of interest.

(41-10)

OPINION 897 (12/13/2011)

TOPIC: Marketing of legal services by use of a "deal of the day" or "group coupon" website.

DIGEST: Lawyer may market legal services on a "deal of the day" or "group coupon" website provided that the advertising is not misleading or deceptive and makes clear that no lawyer-client relationship will be formed until the lawyer can check for conflicts and competence to provide the services. If the lawyer is unable to provide the offered service due to a conflict or competence issue, the lawyer must give the coupon buyer a full refund. If the coupon buyer terminates the representation, the buyer is entitled to a refund subject to the lawyer's *quantum meruit* claim.

RULES: 1.1, 1.5, 1.10(e), 1.16(e), 7.1, 7.2(a), 7.3

FACTS:

1. A number of websites offer subscribers a "deal of the day" or "group coupon" which enables the subscribers to purchase specified goods or services at a discount. For example, such a website might invite consumers to purchase a coupon which can later be exchanged for a described good or service, such as a spa treatment or a restaurant meal. The consumer buys the coupon from the website for an amount which can be significantly less than the regular price for the item in question.

2. The website negotiates the discount with participating vendors, who agree to provide the described good or service in exchange for the coupon or voucher which was purchased at a discount price. The coupon offer may involve a number of conditions or restrictions. Many times the offer is valid only if a certain minimum number of subscribers buy the coupon. Generally the coupon is valid for a specified limited time period after which it expires and is of no further value.

3. The website collects the cost of the coupon via credit card from the consumers who purchase it. Upon the close of the "deal of the day," the website deducts a percentage of the gross receipts as its compensation and pays the balance to the participating vendor.

QUESTION:

4. May an attorney market legal services by participating in a "daily deal" or "group coupon" website?

OPINION:

5. A recent ethics opinion from South Carolina approves of lawyers' use of such websites, subject to various limitations and conditions. *See* South Carolina Opinion 11-05.

6. Although not all legal services are suited to this kind of discount marketing, at least some might be. For example, a participating lawyer might offer the preparation of a simple will, for which the lawyer normally charges $500, for $250.[29] Indeed, a lawyer could permissibly publish an equiva-

29 It has long been established that a lawyer may properly offer a particular legal service at a specified price, so long as the lawyer actually performs the service for that price. *Bates v. State Bar of Arizona*, 433 U.S. 350 at 372-73, 378-79 (1977).

lent discount coupon advertisement in the newspaper, *see* N.Y. State 563 (1984), subject to the rules governing advertising.[30]

7. The use of such a website as a means of marketing legal services raises a number of issues. These include:

A. Whether the arrangement is an improper payment for a referral, Rule 7.2(a);

B. Whether the amount received by the lawyer could, under certain circumstances, result in a prohibited excessive fee, Rule 1.5;

C. Whether any statements made by or on behalf of the lawyer are false or misleading or otherwise violative of the rules regarding lawyer advertising, Rule 7.1; and

D. Whether the logistical arrangement of payment in advance for a legal service, before the lawyer has had the opportunity to check for conflicts or determine whether the lawyer is competent to perform the service and whether the client needs the service, constitutes a premature and improper formation of a lawyer-client relationship, Rule 1.1, Rule 1.10(e).

Is the money retained by the website an improper payment for a referral?

8. Rule 7.2(a) provides: "A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client," with two exceptions that do not apply here.

9. Comment 1 to Rule 7.2 notes that Rule 7.2(a) "does not prohibit a lawyer from paying for advertising and communications permitted by these Rules . . . ."

10. The question then arises whether the money retained by the website is merely an appropriate payment for a novel form of advertising or is a compensation for the referral of a client.

11. South Carolina Op. 11-05 concluded that the money retained by the website was the payment for "the reasonable cost of advertisements."

12. We note that the website has no individual contact with the coupon buyers other than collecting the cost of the coupon. The website has not taken any action to refer a potential client to a particular lawyer – instead it has carried a particular lawyer's advertising message to interested consumers and has charged a fee for that service.

13. We are not privy to the percentage amount retained by these various websites, but assuming that it is a reasonable payment for this form of advertising, we conclude that there is no violation of

30 For example, N.Y. State 563 makes clear that an offer of a discount from a customary fee would be misleading if the customary fee were not "readily ascertainable."

Rule 7.2.[31] This conclusion rests on the facts and assumptions stated here. Different arrangements between the lawyer and the website could lead to the opposite conclusion, i.e., that the lawyer is paying for a referral in violation of Rule 7.2.

Excessive Fee

14. Some coupon buyers may not, for various reasons, receive all or any of the legal services to which the coupons entitle them. Rule 1.5 prohibits excessive legal fees as an ethical matter, and fee arrangements are also subject to other rules as a matter of law. Applying these rules requires consideration of the various reasons that the legal services may not be delivered.

15. As described above, the lawyer's portion of the gross amount of the website's coupon sales receipts is paid to the lawyer shortly after the offer closes and before the individual buyers receive services. In some cases, when the buyer comes to receive the service, the lawyer may determine that he or she is unable to render the described services, either because of a conflict of interest or because the lawyer is not able to deliver competent services that are appropriate for the client. In such a case, the lawyer cannot provide what the coupon buyer purchased, and must give the buyer a full refund.[32]

16. In other cases, the coupon buyer, having changed his or her mind about going forward with the representation, may discharge the lawyer. If that occurs, rules of ethics and law require the lawyer to give a full refund, subject to any *quantum meruit* claim for services rendered prior to the termination of the representation. *See* Rule 1.16(e) (providing that upon termination of representation, lawyer must promptly refund any part of a fee paid in advance that has not been earned); N.Y. State 599 (1989) (citing case law for proposition that a client "may always discharge his attorney, with or without cause, and in the absence of a contract providing otherwise an attorney discharged without cause is entitled to be compensated in quantum meruit").

17. Some buyers might purchase the coupon from the website and then never seek the discounted services from the lawyer. Other buyers might wait too long to use the coupon, which has a stated expiration date, and try to use it after that date. In either case, the lawyer is entitled to treat the advance payment received as an earned retainer for being available to perform the offered service in the given time frame.

Compliance With Rules Regulating Advertising

18. Like all lawyer advertising, the "daily deal" advertisement must not be false, deceptive or misleading, Rule 7.1(a)(1). The lawyer must comply with Rule 7.1(j), requiring the availability to the public of a written statement describing the scope of the service advertised for a fixed fee. Having offered a particular service for a fixed fee, the lawyer must provide the service for the advertised fee if

31 A useful comparison might be to an arrangement where the lawyer publishes an advertisement on, for example, a directory website. Clicking on the ad follows a link to the lawyer's website. Instead of paying a flat fee for the placement of the ad, the website's compensation (and the lawyer's cost of advertising) is determined by how many times the lawyer's ad is clicked. In this arrangement the lawyer is still paying the cost of advertising, but the calculation of the cost is different from the traditional arrangement customary in newspaper or television advertising.

32 In reaching this conclusion we have assumed that the original advertisement on the website did not include any contrary provision regarding refunds.

the coupon purchaser seeks that service within the specified time frame, Rule 1.7(*l*). The offered discount must not be illusory, but must represent an actual discount from an established fee for the named service. Otherwise the advertisement would be misleading. *See* N.Y. State 563 at n. 2. The advertisement must include the words "Attorney Advertising" on the web page and in the subject line of any related email, as required by Rule 7.1(f). If the specific language of the advertisement makes it "targeted," then the advertisement is a solicitation and must comply with Rule 7.3 as well.

Premature and Improper Formation of Lawyer-Client Relationship

19. Purchase of the coupon entitles the consumer to the described legal service. The danger is that the arrangement could be taken to establish a lawyer-client relationship before the lawyer has had any opportunity to check for conflicts, determine whether the described legal services are appropriate for the consumer, and whether the lawyer is competent to provide those services.

20. South Carolina Ethics Advisory Opinion 11-05 confronted this issue and concluded that the problem could be avoided with proper logistical arrangements and disclosures. We agree.

21. To avoid the premature and improper formation of a lawyer-client relationship, the lawyer's advertisement on a "deal of the day" website must make clear that the offer made on the website is subject to a number of conditions. These would include that before such a relationship is formed, the lawyer will check for conflicts and determine that the lawyer is competent to provide legal services that are appropriate to the consumer. If the lawyer determines that the lawyer-client relationship is untenable for these reasons, the lawyer must give the coupon buyer a full refund. This arrangement should be disclosed as part of the coupon offer on the website, along with any other information needed to avoid making the offer misleading in any way.

22. If the lawyer-client relationship is formed, the lawyer must promptly describe the scope of the services to be performed and the fee arrangement as required by Rule 1.5(b).

CONCLUSION:

23. A lawyer may properly market legal services on a "deal of the day" or "group coupon" website, provided that the advertisement is not false, deceptive or misleading, and that the advertisement clearly discloses that a lawyer-client relationship will not be created until after the lawyer has checked for conflicts and determined whether the lawyer is competent to perform a service appropriate to the client. If the offered service cannot be performed due to conflicts or competence reasons, the lawyer must give the coupon buyer a full refund. The website advertisement must comply with all of the Rules governing attorney advertising, and if the advertisement is targeted, it must also comply with Rule 7.3 regarding solicitation.

(26-11)

OPINION 898 (12/19/2011)

TOPIC: Legal advice to unrepresented person

DIGEST: A lawyer does not give legal advice to an unrepresented person in violation of Rule 4.3 merely by including in a letter a legally mandated notice regarding expiration of the statute of limitations on the subject claim.

RULES: Rule 4.3

BACKGROUND:

1. The debt collection industry, including law firms engaged in the collection of consumer debt, have come under greater regulation and scrutiny since Congress enacted the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 *et seq*., in 1978. Many states and various local legislative bodies have followed with legislation modeled upon the FDCPA and, in certain instances, have expanded the obligations imposed upon collection law firms. In particular, the New York City Council has added obligations upon lawyers engaged in the collection of consumer debt within New York City. In this opinion we address New York City's requirement that lawyers who correspond with an alleged consumer debtor regarding a debt that is beyond the statute of limitations must include a notice that the legal time limit for suing upon the debt has expired.

2. New York City Administrative Code Section 20-490 requires every "debt collection agency" that deals with the consumer public to be licensed by the New York City Department of Consumer Affairs. Under Code Section 20-489(a), a lawyer comes within the definition of a debt collection agency if the lawyer "regularly engages in activities traditionally performed by debt collectors, including, but not limited to, contacting a debtor through the mail or via telephone with the purpose of collecting a debt."

3. Section 20-493.2(b) provides that a debt collection agency shall not "[c]ontact a consumer about or seek to collect a debt on which the statute of limitations for initiating legal action has expired unless such agency first provides the consumer such information about the consumer's legal rights as the [Commissioner of Consumer Affairs] prescribes by rule." The Commissioner has promulgated a rule providing that a debt collection agency (which, as seen above, may include a lawyer) is required to include the following statement in a communication when the agency is seeking to collect upon a debt beyond the statute of limitations:

> WE ARE REQUIRED BY LAW TO GIVE YOU THE FOLLOWING INFORMATION ABOUT THIS DEBT. The legal time limit (statute of limitations) for suing you to collect this debt has expired. However, if somebody sues you anyway to try to make you pay this debt, court rules REQUIRE YOU to tell the court that the statute of limitations has expired to prevent the creditor from obtaining a judgment. Even though the statute of limitations has expired, you may CHOOSE to make payments. However, BE AWARE: if you make a payment, the creditor's right to sue you to make you pay the entire debt may START AGAIN.

6 R.C.N.Y. § 2-191(a) (emphasis in original). If a lawyer were ethically barred from giving this notice, or other mandated notices,[33] it could impede the lawyer's ability to engage in debt collection work.

QUESTION:

4. May a lawyer ethically engage in debt collection activities in compliance with the Commissioner's rule requiring communications to include the above-quoted notice?

OPINION:

5. Under the New York Rules of Professional Conduct, communications between a lawyer and a person unrepresented by counsel are governed by Rule 4.3, which in relevant part provides: "The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client."

6. When a lawyer's client is a creditor seeking to collect a debt, it should be clear that the interests of the debtor "are or have a reasonable possibility of being in conflict with the interests of the client" (the creditor) within the meaning of Rule 4.3. In addition, we assume for the purposes of this opinion that the debtor is unrepresented. Accordingly, the predicates of Rule 4.3 have apparently been met, and the lawyer is prohibited from giving the debtor "legal advice" within the meaning of the Rule, other than the advice to secure counsel.

7. The term "legal advice" is not defined by the Rules. Whether a particular communication constitutes legal advice may depend not only on the words used but also on the context of their use. *See* Rule 4.3, Cmt. [2] (whether a lawyer is giving impermissible advice may depend in part on "the setting in which the behavior and comments occur"). When the broadest possible reading of the term "legal advice" would not serve the Rule's purpose, then a more common-sense reading may be appropriate.[34]

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33 For instance, every summons issued to a defendant on a consumer debt collection case requires the summons to include specified language to the unrepresented party. The language required in the New York City Civil Court on consumer credit transactions is as follows:

> THIS IS A COURT PAPER - A SUMMONS. DON'T THROW IT AWAY!! TALK TO A LAWYER RIGHT AWAY!! PART OF YOUR PAY MAY BE TAKEN FROM YOU (GARNISHEED). IF YOU DO NOT SEE A LAWYER, YOUR PROPERTY CAN BE TAKEN AND YOUR CREDIT RATING CAN BE HURT!! YOU MAY HAVE TO PAY OTHER COSTS TOO!! IF YOU CAN NOT PAY FOR YOUR OWN LAWYER BRING THESE PAPERS TO THIS COURT RIGHT AWAY!!

22 NYCRR §208.6(d) (emphasis in original).

34 *See*, *e.g.*, Rule 4.3, Cmt. [2] (stating that in "negotiating the terms of a transaction or settling a dispute with an unrepresented person," if the lawyer has complied with other requirements of the Rule, the lawyer may explain "the lawyer's view of the underlying legal obligations"); N.Y. State 728 (2000) ("Although the disciplinary rule, by its terms, forbids a lawyer from giving any advice to a party whose interests conflict with those of the lawyer's client, other than the advice to secure counsel, the rule has been understood to allow a lawyer, additionally, to give certain non-controvertible information about the law to enable the other party to understand the need for independent counsel").

8. Taking into account the purpose of Rule 4.3 and the setting in which the mandated notice is given, we believe that merely providing that mandated notice to the debtor would not constitute giving legal advice within the meaning of the Rule.

9. The basis for the rule against giving legal advice to unrepresented parties is "the possibility that the lawyer will compromise the unrepresented person's interests." Rule 4.3, Cmt. [2]. In this case, the notice is designed not to compromise but rather to serve those interests. It is not the lawyer who has made that assessment of the debtor's interests; rather, the assessment was made in the course of a legislative and administrative process. Nor does the mandate allow the lawyer to vary the form of the notice in any way that could serve the debtor's interests less effectively. The exact words of the notice are prescribed.

10. Moreover, it is in the nature of giving legal advice that a lawyer exercises professional judgment to apply legal principles to particular facts, and to impart some particular advice rather than some other possible advice so as to help guide decisions of the recipient.[35] None of those features are present here. Far from exercising professional judgment or choosing between different possible forms of advice, the lawyer is doing no more than complying with the explicit requirements of a rule that applies to every debt collection agency. The nature of a mandated notice and the purpose of this particular notice lead us to conclude that a lawyer who gives it is not giving impermissible legal advice.[36]

CONCLUSION:

11. A lawyer's compliance with the New York City Rule requiring a specified notice as part of a communication to collect a debt beyond the statute of limitations does not constitute giving legal advice to an unrepresented person as prohibited by Rule 4.3.

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35 As expressed in EC 3-5 of our former Code of Professional Responsibility: "The essence of the professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client . . . ."

36 *Cf.* Pennsylvania Inf. Opinion 93-139 (opining that lawyer representing a party in a divorce proceeding could ethically send an unrepresented party a letter and concurring affidavit because these materials in part reflected standard notices required by civil procedure rules, and to the extent the papers went beyond that, they constituted merely a recitation of the applicable legal principles and did not constitute legal advice).

OPINION 899 (12/21/2011)

TOPIC: Solicitation; answering legal questions on the Internet

DIGEST: A lawyer may provide general answers to legal questions from laymen on real-time or interactive Internet sites such as chat rooms, but the lawyer may not engage in "solicitation" in violation of Rule 7.3. If a person initiates a request on the site to retain the lawyer, the lawyer may respond with a private written proposal outside the site so that those who did not request it cannot see it.

RULES: 1.0(a) & (c), 7.1(a), (q) & (r), 7.3(a) & (b)

QUESTIONS:

1. May a lawyer answer legal questions in chat rooms or on other social media sites on the Internet?

2. If so, may the lawyer also offer his or her legal services in the course of answering questions?

OPINION:

3. A lawyer asks whether he may visit real-time interactive internet or social media sites on which individuals post legal questions and, if so, whether he may answer questions and advise individuals of his availability as a lawyer. For example, if a layperson in an Internet chat room asks how long a person can wait to sue a lawyer for legal malpractice, may the lawyer respond by saying, "The statute of limitations in New York is three years"? May the lawyer also say, "Please call me at the following number as soon as possible for a free evaluation of your case"?

General principles of advertising and solicitation by lawyers

4. Rule 7.1 of the New York Rules of Professional Conduct (the "Rules") governs attorney advertisements, and Rule 7.3 governs a special form of advertising called "solicitation." We begin our analysis with the definitions of "advertisement" and "solicitation."

5. An "advertisement" is defined under Rule 1.0(a) as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers."

6. "Solicitation" is defined in Rule 7.3(b) as follows:

> For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

7. Thus, Rule 7.3(a) excludes from solicitation a response in writing to a specific request of a potential client.

8. In general, Rule 7.1(a)(1) regulates the content of an advertisement by prohibiting any lawyer advertisement that "contains statements or claims that are false, deceptive or misleading." Rule 7.3(a)(1) regulates the manner of advertising by expressly prohibiting a lawyer from engaging in solicitation "by in-person or telephone contact or ***by real-time or interactive computer-accessed communication*** unless the recipient is a close friend, relative, former client or existing client . . ." (Emphasis added.)

9. The term "computer-accessed communication," which is used in Rule 7.3(a)(1), is defined in Rule 1.0(c) as follows:

> "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

10. Comment [9] to Rule 7.3 sets forth the rationale for prohibiting solicitation by in-person or telephone contact or by real-time or interactive computer-accessed communication:

> [I]n-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and are regulated in the same manner. . . .

11. Comment [9] also explains that "[o]rdinary email and web sites are not considered to be real-time and interactive communications," but "[i]nstant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication." Thus, the lawyer must not engage in solicitation in those forums. With that background in place, we turn to the specific questions before us.

Question 1: May the lawyer answer legal questions in chat rooms?

12. The first question is whether the lawyer may answer legal questions posted by laymen in chat rooms or on other social media sites on the Internet. Answering questions on the Internet is analogous to writing for publication on legal topics. As set forth in Rule 7.1(r), a lawyer may write for publication on legal topics without affecting the right to accept employment, as long as the lawyer does not undertake to give individual advice.[37] Comment [9] to Rule 7.1 echoes Rule 7.1(r) by cautioning that, in the course of educating members of the public to recognize their legal problems a lawyer "should

37 We add that a lawyer who gives individual advice in a chat room or on a public social media site might also be establishing an attorney-client relationship without undertaking the conflict check required by Rule 1.10(e) and would be revealing privileged legal advice in a public place in violation of Rule 1.6(a).

carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised." Comment [9] adds that talks and writings by a lawyer aimed at the public "should caution them not to attempt to solve individual problems" on the basis of the information conveyed by the lawyer. A lawyer who adheres to those guidelines may answer legal questions posted by laymen on the Internet.

13. Comment [9] to Rule 7.1 also says that lawyers "should encourage and participate in educational and public relations programs concerning the legal system, with particular reference to legal problems that frequently arise." A lawyer's participation in an educational program "is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients." If a communication is not advertising, then it also cannot be solicitation – see Rule 7.3, cmt. [1]. But Comment [9] to Rule 7.1 also notes that an educational program "might be considered advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm." In that case, the communications would have to comply with Rules 7.1 and 7.3. *See, e.g.,* N.Y. State 830 (2009) (a lawyer may ethically contact lay organizations to inform them that he or she is available to speak on legal topics, but "must adhere to advertising and solicitation requirements under the Rules where the communication is made expressly to encourage participants to retain the lawyer or law firm"). We therefore turn to Question 2.

Question 2: May the lawyer offer his or her legal services in chat rooms?

14. The second question is whether the lawyer may offer his or her legal services in the course of answering legal questions on the Internet. As already noted, Rule 7.3(a) prohibits solicitation in chat rooms and other similar types of conversational computer-accessed sites because they are considered to be "real-time" or "interactive" communications. However, the definition of "solicitation" in Rule 7.3(b) expressly excludes "a proposal or other writing prepared and delivered in responds to a ***specific request*** of a prospective client." (Emphasis added.)

15. Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites cannot be construed as a "specific request" to retain the lawyer. Thus, encouraging a layperson to retain the lawyer in response to such a question is prohibited by Rule 7.3(a)(1). On the other hand, if a lawyer's primary purpose in answering a question is not to encourage his own retention but rather is to educate the public by providing general answers to legal questions, then Rule 7.3(a)(l) does not prohibit the lawyer's responses.

16. Moreover, Rule 7.1(q) generally allows a lawyer to accept employment resulting from educational activities. Rule 7.1(q) provides as follows:

> (q) A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

17. Thus, if a potential client initiates a specific request to retain the lawyer during the course of permissible real-time cyberspace communications, then the lawyer's response to that person does not constitute impermissible solicitation. Yet because the lawyer's response in a chat room or interactive

social media site would constitute a solicitation to everyone on the site who did not specifically request the lawyer's services, the lawyer may not post a response that encourages everyone on the site to retain the lawyer. Therefore, if the person making the request includes contact information, the lawyer may respond only to that person.

18. If the person making the request does not include contact information, however, then the lawyer's response must be in two stages. The first stage is to ask the layperson to communicate directly with the lawyer off the site, by email, phone, or otherwise. For example, if the person whose question the lawyer answered in a chat room says, "Can you represent me in my case?" the lawyer may post a response such as, "My communications on this site are for the purpose of educating the general public about legal issues. If you are seeking an individual consultation, please visit my website at *www.jones.com*." Alternatively, the lawyer may provide an office phone number, email address, and/or mailing address, without giving any information about the lawyer's services. If the person who requested the lawyer's services then uses one of these methods to contact the lawyer directly outside the real-time or interactive site, then the lawyer will not violate the restrictions on solicitation by preparing and delivering a proposal or other writing that responds to the specific request made by that prospective client. (Because advertising includes both public and private communications for the purpose of seeking retention, these communications must comply with Rule 7.1.)

19. However, the lawyer may not post a proposal offering his or her legal services on the real-time interactive Internet or social media site, because posting that information would be a real-time and interactive computer-accessed solicitation to people who did not request it, in violation of Rule 7.3(a)(1).

20. This Committee cannot answer questions of law. Accordingly, we cannot determine whether private responses to a layperson's specific request on a real-time or interactive computer-accessed site would violate § 479 of the New York Judiciary Law, which prohibits solicitation by attorneys. Nor can we determine whether § 479 or the Rules regulating advertising and solicitation are constitutional in light of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and its progeny.

CONCLUSION:

21. A lawyer may provide general answers (not individual advice) in response to legal questions from laypersons on real-time or interactive social sites on the Internet, but the lawyer may not engage in "solicitation" absent compliance with Rule 7.3. If a person initiates a request on the site to retain the lawyer, the lawyer may respond with a private written proposal outside the site so that persons who did not request the proposal cannot see it.

(20-11)

OPINION 900 (12/28/2011)

TOPIC: Assistant County Attorney as mediator in Child Permanency Mediation

DIGEST: An Assistant County Attorney ("ACA") may agree to serve as a paid or unpaid mediator in Child Permanency Mediations in which the County Department of Social Services ("DSS") is represented by another ACA, but the mediator should disclose and explain his connection to the County Attorney's Office. An ACA who is representing DSS in the mediation may have a personal conflict of interest, and that conflict will be imputed to all ACAs in the same office unless the conflict can be and is cured by DSS's informed consent, confirmed in writing. If the County Attorney's Office begins or continues working on a matter in which the inquiring ACA is serving or has finished serving as the mediator, then the office must timely and effectively screen the mediator and consider whether the circumstances give rise to any appearance of impropriety.

RULES: 1.0(e), (h), (j) & (*l*), 1.7(a), 1.10(a), 1.11(d), 1.12(b), (d) & (d), 2.4(a) & (b)

FACTS:

1. While inquiring counsel ("Inquirer") was a paid employee of a Community Dispute Resolution Program ("CDRC"), he was trained as a Permanency Mediator for the New York State Unified Court System's Child Welfare Court Improvement Project ("CIP"). Inquirer then applied to be on the roster of Permanency Mediators for a county. After Inquirer filed his application to be on the roster but before his application was accepted, Inquirer became an Assistant County Attorney ("ACA") for the County Department of Law. After Inquirer became an ACA, his application to be a Permanency Mediator was accepted and he is now on the roster in the same county where he serves as an ACA.

2. Inquirer's inquiry states, by way of background, that (a) mediators must disclose to all mediation participants any relationship to any party that may impact the mediator's appearance of neutrality, and (b) if any participant objects to a mediator on such grounds, the mediator will not facilitate the case. Inquirer does not cite authority for these assertions, but we will accept them as true for purposes of this opinion.

3. Permanency cases may be referred to mediation by various individuals, including employees of DSS. In addition, DSS employees may be parties to the mediation process. DSS itself, as an agency, always has an interest in the outcome of the permanency mediation process and may choose to be a party to a permanency mediation. Inquirer personally does not represent the county Department of Social Services ("DSS") in any matters in his capacity as an ACA, but another ACA does represent DSS in various matters, including permanency mediations.

4. Mediators are usually paid at the rate of $75 per hour. In some cases roster mediators are asked to mediate in the course of their employment. In that case the hourly rate is paid to the employer, with no financial benefit inuring to the mediator. However, Inquirer also mediates other cases either on a volunteer basis or in the course of Inquirer's employment with the mediation program, and neither Inquirer nor his employer are paid for such cases.

QUESTIONS:

5. *Question A.* May Inquirer, who is employed as an Assistant County Attorney, ethically mediate a case, either on a paid or unpaid basis, if another Assistant County Attorney from the same county represents DSS in the mediation?

6. *Question B.* If Inquirer serves as the mediator in a matter in which another Assistant County Attorney represents the Department of Social Services, will Inquirer create a conflict of interest for the Assistant County Attorney representing DSS in the mediation and, by imputation, for other attorneys in the County Attorney's Office?

7. *Question C.* If Inquirer is currently serving as a mediator (or has completed service as a mediator) in a matter in which the County Attorney's Office represents DSS, must Inquirer be screened from other lawyers at the County Attorney's Office?

OPINION:

Additional background regarding Permanency Mediation

8. The Child Welfare Court Improvement Project, a federally-funded initiative, supports the New York State Family Court's mandate to promote the safety, permanence and well-being of abused and neglected children. Recognizing the integral role courts play in charting the course for children who are the subject proceedings for abuse, neglect, foster care, termination of parental rights and adoption, CIP provides resources and technical assistance to enhance and promote innovation in court operations and practices, especially alternative dispute resolution.

9. As part of the New York State Unified Court System's Community Dispute Resolution Centers Program ("CDRCP"), the Unified Court System partners with local non-profit organizations known as "CDRCs" to provide mediation, arbitration, and other dispute resolution options as an alternative to court. CDRCs serve as neutrals in (among other things) landlord/tenant disputes, consumer/merchant disputes, and – most relevant to this inquiry – Child Permanency Mediation ("CPM"). CPM mediates child protective proceedings where the Family Court has placed children in foster care due to alleged parental abuse or neglect. *See, e.g.,* Cynthia A. Savage, *Recommendations Regarding Establishment of a Mediation Clinic*, 11 Cardozo J. Conflict Resol. 511, 546 (2010). Children and families referred to CPM are usually at a stage in the Family Court proceeding when a decision must be reached about the child's permanent home. "CPM" provides a forum where parents, attorneys, social service agency staff, and other interested parties can focus on resolving problems that pose barriers to permanency for the child. It is always conducted under the auspices of a court – there is no such thing as a "private" CPM.

10. We addressed child protective proceedings in N.Y. State 800 ¶ 3 (2006), where we said: "The local child protective service investigates allegations and the county attorneys present ('prosecute') the case in the Family Court. Family offense cases by their nature pose a great risk of criminal charges being brought." DSS and the parents are thus always adverse to one another in a Family Court child protective proceeding. In John M. Zenir, *Litigating Neglect Cases in Nassau Family Court*, 60 Nassau Lawyer No. 9, at 11 (May 2011), the author stresses the adversarial nature of these proceedings, and the consequent necessity for "aggressive advocacy."

11. The parents in permanency proceedings may be represented or unrepresented.[38] In the Child Permanency Mediations contemplated here, the parents are typically either unrepresented or represented by an appointed lawyer. The parents have allegedly committed abuse and/or neglect and are attempting to mediate a determination as to the permanent placement of their child. In that volatile context, Inquirer could be selected to serve as a neutral, and DSS or its employees could be represented at the mediation by an Assistant County Attorney who works in the same office as Inquirer. Against that background, we turn to Inquirer's three questions.

Question A: May Inquirer facilitate if another ACA represents DSS in the mediation?

12. The first question is whether Inquirer may ethically mediate a case, either on a paid or unpaid basis, if another Assistant County Attorney from the same county is representing DSS in the mediation. The provision in the New York Rules of Professional Conduct (the "Rules") most relevant to our analysis is Rule 2.4 ("Lawyer Serving as Third-Party Neutral"), which expressly addresses lawyers serving as mediators and other neutrals.

13. Before applying Rule 2.4, we pause briefly to consider whether Inquirer, as a lawyer in the County Attorney's Office, is deemed to represent not only the County itself but also the County's DSS. Inquirer has told us that he does not personally represent DSS in any matters, but that another ACA in the County Attorney's Office does. The identity of a government lawyer's client is a question of law – see N.Y. City 1999-6 – but for purposes of this opinion, we will accept Inquirer's statement that he does not represent DSS. We will also assume that Inquirer, when acting as a mediator, will not be representing DSS (or any other client) in the mediation. Rather, he will be serving only as a third-party neutral. Rule 2.4(a) defines a "third party neutral" as one who "assists two or more persons ***who are not clients of the lawyer*** to reach a resolution of a dispute or other matter that has arisen between them." (Emphasis added.) Rule 2.4 thus specifically contemplates that lawyers serving as third-party neutrals do not represent the parties. As noted in SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 198-199 (West 2009), Rule 2.4(a) makes clear that a "third-party neutral" is not representing the parties.[39]

14. Nothing in Rule 2.4 (or any other Rule) prohibits an ACA from serving as a mediator, whether in a Child Permanency Mediation or any other type of mediation, paid or unpaid, even though another lawyer in the County Attorney's Office represents a party. But Rule 2.4(b) does impose special obligations on lawyer/mediators. Rule 2.4(b) provides as follows:

> A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall

38 Zenir, *supra*, reports that in Nassau County Family Court, "the overwhelming majority of respondents . . . usually parents or other custodial parties, are represented by assigned counsel, either by attorneys employed by the Legal Aid Society of Nassau County or by 18-B Attorneys . . . because they are indigent." However, N.Y. City 2009-2 n. 2 cited informal surveys revealing that approximately 75% of litigants in New York City Family Court appeared without a lawyer for critical types of cases, including those involving domestic violence, child custody, guardianship, visitation, support, and paternity.

39 Under Rule 1.7(a)(1), a lawyer generally "shall not *represent a client* if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests." (Emphasis added.) Rule 1.7 will not apply to Inquirer because Inquirer will not "represent a client" in the mediation.

> explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

15. The import of Rule 2.4(b) is examined in Comment [3] to Rule 2.4, which says:

> Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. . . . Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as a third-party neutral and as a client representative. . . . The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

16. Thus, while Rule 2.4 does not prohibit Inquirer from serving as a mediator when another ACA is participating in a Child Permanency Mediation, Rule 2.4(b) does require certain disclosures to unrepresented parties. At a minimum, Inquirer "shall inform unrepresented parties" that he "is not representing them." Further, when Inquirer knows (or reasonably should know) that a party does not understand the lawyer's role in the matter, Inquirer "shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client." In nearly all instances where parents are unrepresented by counsel and inexperienced in mediation and other legal matters, Inquirer "reasonably should know" that the parents do not understand Inquirer's role, and Inquirer therefore should explain that difference.

17. In addition, if another ACA is participating in the mediation as counsel for DSS, Inquirer should disclose that (i) Inquirer is an Assistant County Attorney, (ii) another ACA from the same office will be participating in the mediation, and (iii) the parents have the right to object to Inquirer serving as facilitator. These disclosures may enable participants who object to Inquirer on those grounds to have a different mediator assigned to the case.

18. Our answer to Question A is the same whether Inquirer is a paid mediator or an unpaid mediator. Rule 2.4 makes no distinction between paid mediators and volunteer mediators. Nor would payment trigger an analysis under Rule 1.7(a)(2), which provides that a lawyer generally "shall not represent a client if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Rule 1.7 does not apply to Inquirer because a mediator does not "represent a client" in the mediation. As noted in Rule 2.4(a), the parties to a mediation "are not clients of the lawyer."

19. We do not know whether any court rules, mediation rules, or other guidelines outside the Rules of Professional Conduct would prohibit Inquirer from facilitating a case in which another lawyer from the County Attorney's Office represents a party or is otherwise participating in the mediation, or whether any such rules or guidelines would require more extensive disclosures by Inquirer than we have suggested. However, Comment [2] to Rule 2.4 expressly notes that a lawyer (as opposed to a nonlawyer) who serves as a third-party neutral – especially under court auspices – may be subject to rules and codes outside the Rules of Professional Conduct. Comment [2] says, in relevant part, as follows:

> [T]he lawyer may be subject to court rules or other law that applies either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as . . . the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

If any such rules, standards, or guidelines apply to Inquirer, we express no opinion on them because our jurisdiction is limited to interpreting the New York Rules of Professional Conduct. We therefore strongly suggest that Inquirer determine whether he is subject to any such authorities outside the Rules of Professional Conduct, that he also study the ethics codes and policies that govern the County Attorney's Office in which he works, and that he consult with the County Attorney (if he has not done so already) before agreeing to serve as a mediator in any matter.

Question B: Will Inquirer create a conflict of interest for the ACA representing DSS?

20. The second question is whether Inquirer's service as the mediator in a matter in which another Assistant County Attorney represents DSS will create a conflict of interest for the ACA representing DSS, and (by imputation) for all other ACAs in the same office. At this point, Rule 1.7(a)(2) becomes relevant – not for Inquirer (who, as in Question B, does not "represent a client") but for the ACA who represents DSS in the mediation. Rule 1.7(a)(2) applies to a lawyer representing a client if "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." A determination under Rule 1.7(a)(2) depends on all the facts and circumstances, but we believe that the presence of a fellow ACA as mediator will ordinarily create a "significant risk" of an adverse impact on the professional judgment of any ACA who represents DSS in that mediation. For example, the ACA representing DSS may want to please Inquirer by reaching a settlement even if the settlement is not in the best interests of DSS.

21. Furthermore, under Rule 1.10(a), the conflict of any one ACA will be imputed to all other ACAs in the same County Attorney's Office. Rule 1.10(a) provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 . . . ." (The County Attorney's Office is a "firm" because Rule 1.0(h) defines "firm" to include "a government law office . . . .") Thus, every ACA in the County Attorney's Office will typically have the same conflict, and the conflict cannot be cured by substituting one ACA for another to represent DSS in the mediation.

22. However, a conflict arising under Rule 1.7(a)(2) can usually be cured by complying with Rule 1.7(b), which provides as follows:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> >
> > (2) the representation is not prohibited by law;

> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

23. Accordingly, any individual ACA who represents DSS in a mediation facilitated by Inquirer will have to determine as a threshold matter whether she "reasonably believes" that she can "provide competent and diligent representation" to DSS (a question dependent on all of the facts and circumstances of the particular mediation), and whether the representation of DSS when another ACA is serving as the mediator is "not prohibited by law" (a question beyond this Committee's jurisdiction). If the tests under Rule 1.7(b)(1) and (b)(2) are satisfied, then the ACA may proceed to represent DSS despite the conflict if the ACA obtains DSS's "informed consent" as defined in Rule 1.0(j), and that consent is "confirmed in writing" as defined in Rule 1.0(e). (Rule 1.7(b)(3) is irrelevant here because Inquirer is not representing any client, and the County Attorney's Office therefore is not representing clients on both sides of the same mediation.) If the ACA obtains the requisite informed consent, confirmed in writing, then the conflict will be cured and will not be imputed to other ACAs under Rule 1.10(a).

24. If the ACA fails either or both tests (*i.e.,* if the ACA does not reasonably believe she can competently and diligently represent DSS and/or if the representation is prohibited by law), then the ACA cannot proceed and consent from DSS cannot cure the conflict. Moreover, the conflict will be imputed to all other ACAs in the same office. However, this scenario may never occur, because as soon as the County Attorney's Office recognizes the conflict, it is likely to object to the inquiring ACA's participation as the mediator, requiring his withdrawal. Once he withdraws as the mediator, the conflict will evaporate.

Question C: Must the County Attorney's Office screen Inquirer?

25. The third question is whether the County Attorney's Office must screen Inquirer from other ACAs in the County Attorney's Office if that office begins or continues to participate in the matter after Inquirer has begun serving as the mediator in the matter. The relevant rule is Rule 1.12 ("Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals"). Rule 1.12(b) provides as follows:

> (b) [U]nless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer ***participated personally and substantially*** as:
>
> (1) an arbitrator, ***mediator*** or other third-party neutral. . . . [Emphasis added.] [40]

26. Plainly, Inquirer will have "participated personally and substantially as . . . mediator" in any matter in which Inquirer is currently serving (or has finished serving) as the sole mediator. Thus, once Inquirer has begun serving as a mediator in a particular matter, Inquirer is personally barred from

40 Rule 1.12(e), which concerns "an arbitrator selected as a partisan of a party in a multimember arbitration panel," creates an exception to Rule 1.12(b) that makes the consent of all parties unnecessary, but a Child Permanency Mediation involves neither a "multimember" panel nor an "arbitration," so the exception in Rule 1.12(e) is irrelevant here.

working on that matter as a lawyer "unless all parties give informed consent, confirmed in writing . . . ." If the County Attorney's Office does not seek such consent or cannot obtain it (and we doubt that any party would consent to let the current mediator work on the same matter as a lawyer for a party), then other lawyers in Inquirer's firm (the County Attorney's Office) cannot work on that matter unless Inquirer is timely and effectively screened from the matter. The screening condition derives from Rule 1.12(d), which provides as follows:

> (d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> (1) the firm acts promptly and reasonably to:
>
> (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
>
> (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;
>
> (iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and
>
> (iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and
>
> (2) here are no other circumstances in the particular representation that create an appearance of impropriety.

27. The term "matter" is defined in Rule 1.0(*l*) to include "any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, ***mediation*** or any other representation involving a specific party or parties." (Emphasis added.) Thus, once Inquirer has commenced service as a mediator – whether or not the mediation is over – Inquirer must be effectively screened from any involvement with the ongoing Family Court case. Unless the County Attorney's Office effectively screens Inquirer from any participation in the Family Court matter from the moment he begins serving as the mediator in the Child Permanency Mediation, the parties and the public have no assurance that Inquirer has not (even inadvertently) shared the parents' confidential information with other ACAs, and that lack of assurance will usually (if not always) create an "appearance of impropriety" that should preclude the County Attorney's Office from representing DSS.

28. Furthermore, unless the County Attorney's Office screens Inquirer from participation in every Family Court matter that may ultimately result in a CPM in which Inquirer may serve as the facilitator, the public and the parties will have no assurance that Inquirer will not (intentionally or inadvertently) share DSS's confidential information with the parents during the mediation. This situation, too, will usually (if not always) create an "appearance of impropriety" that should preclude the

County Attorney's Office from representing DSS. We offer no opinion as to whether the so-called "rule of necessity" embodied in Rule 1.11(d)(1) would, by analogy, permit the County Attorney's Office to continue representing DSS despite this appearance of impropriety. Rule 1.11(d)(1) provides that "[e]xcept as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not: (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless ***under applicable law*** no one is, or ***by lawful delegation*** may be, authorized to act in the lawyer's stead in the matter . . . ." (Emphasis added.) Thus, the rule of necessity presents questions of law beyond our jurisdiction. We note, however, that Rule 1.12 does not contain any equivalent rule of necessity.

CONCLUSION:

29. An Assistant County Attorney ("ACA") may agree to serve as a paid or unpaid mediator in Child Permanency Mediations in which the County Department of Social Services ("DSS") is represented by another ACA, but when serving as a mediator the Inquirer should disclose and explain to all parties his connection to the County Attorney's Office. The ACA who is representing DSS in the mediation may have a personal conflict of interest, and that conflict will be imputed to all ACAs in the same office unless the conflict can be and is cured by DSS's informed consent, confirmed in writing. If the County Attorney's Office begins or continues working on a matter in which the inquiring ACA is serving or has finished serving as the mediator, then the office must timely and effectively screen Inquirer and must consider whether the circumstances give rise to any appearance of impropriety.

[Inquiry 22-11]

OPINION 901 (12/28/2011)

TOPIC: Simultaneous representation of corporation and individual director, officer, or shareholder

DIGEST: Simultaneously representing both a corporation and a director, officer or shareholder of that corporation can create conflicts, but if the conflicts are consentable, then the conflicts can be cured by obtaining informed consent from each affected client, confirmed in writing.

RULES: 1.0(f) & (j), 1.7(a) & (b), 1.9(a) & (c), 1.13(a), (d) & (e)

QUESTIONS:

1. *Question A.* May an attorney who has in the past provided personal legal services to an individual officer, director, or shareholder of a closely-held corporation in matters relating to the corporation thereafter undertake to represent the corporation?

2. *Question B.* May an attorney who currently represents a corporation also represent an officer, director, or shareholder of the corporation in matters unrelated to the corporation?

BACKGROUND:

3. The inquiring attorney ("Attorney") has represented a client ("Officer") over the course of a few years in various legal matters involving transactions. One representation related to Officer's interest as a minority shareholder and officer of a private, closely-held corporation, X Corp. Attorney's representation of Officer's interests in X Corp included negotiations concerning Officer's employment relation with and part ownership of X Corp. Those negotiations involved both the CEO of X Corp and the attorneys retained by the CEO to represent X Corp.

4. After the negotiations involving Officer and X Corp ended, Officer informed Attorney that Officer had been discussing with X Corp's CEO the possibility of X Corp using Attorney as its attorney on future matters, in place of X Corp's previous counsel. The CEO followed up with a direct contact to Attorney to request that he represent X Corp. Officer advised Attorney of Officer's understanding that A would not be able to continue representing Officer in any future matters related to Officer's interest in X Corp if X Corp became one of A's clients. However, Officer informed Attorney that Officer would like to continue using Attorney's legal services in the future for matters unrelated to the affairs of X Corp, such as the purchase of a summer home.

OPINION

Question A: If Officer is Attorney's former client, may Attorney begin representing X Corp?

5. The facts that have been presented to us describe the past and contemplated representations of Officer and X Corp in general terms, so we cannot apply the applicable New York Rules of Professional Conduct (the "Rules") with precision. Rather, our opinion sets out general principles that Attorney should consider in evaluating whether conflicts of interest exist and whether and how any such conflicts can be cured.

6. We begin by discussing conflicts with former clients. We assume that Attorney has completed all of his legal work for Officer and that Officer is only a former client of Attorney, not a current client, at the time X Corp asks Attorney to begin representing X Corp. The rule governing conflicts of interest with former clients is Rule 1.9(a), which provides as follows:

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

7. Since Attorney formerly represented Officer in negotiations with X Corp, Attorney could not represent X Corp in the same or a "substantially related" matter, without informed consent from Officer, confirmed in writing. The key term is "substantially related." When are two matters substantially related? Comment [3] to Rule 1.9 explains the concept as follows:

> [3] Matters are "substantially related" . . . if they involve the same transaction or legal dispute or ***if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.*** For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations. . . . [Emphasis added.]

8. Attorney should test each proposed engagement for X Corp against the principles in Comment [3]. If X Corp asks Attorney to represent it in a matter that is not substantially related to Attorney's prior legal work for Officer, Attorney may ethically undertake the new matter even if X Corp's interests are "materially adverse" to Officer's interests. But if X Corp asks Attorney to represent it in a matter that is substantially related to Attorney's prior legal work for Officer and materially adverse to Officer's interests, then Attorney may not ethically undertake the new matter on behalf of X Corp without obtaining informed consent, confirmed in writing, from Officer. According to Rule 1.0(j), the term "informed consent" requires, among other things, that the lawyer adequately explain to each person "the material risks of the proposed course of conduct and reasonably available alternatives." The requirements for confirming informed consent in writing are set forth in Rule 1.0(e).

9. If Officer gives informed consent (confirmed in writing) for Attorney to represent X Corp against him in a substantially related matter, that consent does not automatically allow him to use Officer's confidential against Officer.[41] Absent Officer's consent to use Officer's confidential information to Officer's disadvantage, Attorney must still take one more step – Attorney must determine

41 Consent to oppose the former client in a substantially related matter would be sought under Rule 1.9(a), but consent to use the former client's confidential information to the former client's disadvantage would be sought under Rule 1.6(a), which is incorporated by reference into Rule 1.9(c). Consent under Rule 1.9(a) does not imply consent under Rule 1.9(c), and vice versa. A lawyer who desires both to oppose a former client in a substantially related matter and to use the former client's confidential information to the former client's disadvantage must obtain consent under both provisions.

whether he has a conflict of interest under Rule 1.7(a), either because he cannot avoid using Officer's confidential information while representing X Corp or because Attorney's possession of Officer's confidential information would adversely affect Attorney's independent professional judgment in representing X Corp. *See* N.Y. City 2005-2 (addressing conflicts arising solely from possession of confidential information of another client). If Attorney has no such confidential information, then there is no conflict under Rule 1.7(a).[42] If Attorney does have such confidential information, then Attorney must determine whether he nevertheless "reasonably believes" that he can "provide competent and diligent representation" to X Corp within the meaning of Rule 1.7(b)(1) despite his continuing duty of confidentiality to Officer under Rule 1.9(c).

10. If Attorney does reasonably believe that he can provide competent and diligent representation to X Corp despite his continuing duty of confidentiality to Officer, then Attorney must obtain X Corp's informed consent, confirmed in writing. In obtaining X Corp's informed consent, however, Attorney must not disclose Officer's confidential information that is at the root of the conflict. If Attorney cannot disclose sufficient information to obtain X Corp's informed consent, or if Attorney believes that his continuing duty of confidentiality to Officer will prevent him from providing competent and diligent representation to X Corp, then the conflict is non-consentable.

Question B: If Officer is or becomes Attorney's current client, may Attorney concurrently represent both Officer and X Corp?

11. The second question is whether Attorney may concurrently represent both Officer and X Corp. The first sentence of Rule 1.13(d) –which had no equivalent in our former Code of Professional Responsibility – specifically addresses this situation, stating: "A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7." Therefore, Rule 1.13(d) directs us to analyze the second question under Rule 1.7, which provides as follows:

> Rule 1.7. Conflict of Interest: Current Clients
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
>
> (1) the representation will involve the lawyer in representing differing interests; or
>
> (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

42 The "substantially related" test assumes that Attorney acquired confidential information from the former client, see Rule 1.9, cmt. [3], but that assumption should not carry over to Rule 1.7(a). If Attorney did not in fact acquire any confidential information that he needs to use on X Corp's behalf against Officer, then no conflict arises under Rule 1.7(a) because Attorney's representation of X Corp against Officer will not be impaired in any way.

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

11. The term "differing interests" in Rule 1.7(a)(1) is broadly defined in Rule 1.0(f) to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."

12. To apply Rule 1.7, we need to evaluate whether Attorney's representation of X Corp would conflict with Attorney's continuing or renewed representation of Officer by creating "differing interests" under Rule 1.7(a)(1).[43] To make that evaluation, we need to know what legal work Attorney will be doing for Officer and what legal work Attorney will be doing for X Corp. The inquiry stated that Officer understands that Attorney cannot represent Officer in any future matters related to Officer's interest in X Corp, so we will assume that Attorney will not do so.

13. As Attorney's inquiry also gave the purchase of a summer home as an example of the kinds of legal work Officer might want Attorney to perform in the future, so we will assume that Attorney is engaged in representing Officer in buying a summer home at the time X Corp asks Attorney to take on a new matter for X Corp. We will further assume that X Corp has no interest of any kind in Officer's purchase of a summer home, and that Officer's purchase of a summer home therefore does not involve the Attorney in representing "differing interests" under Rule 1.7(a)(1). With all of those assumptions in place, we will analyze several hypothetical examples to illustrate different types of matters that Attorney might be asked to undertake for the X Corp.

14. *Hypothetical # 1.* As a first hypothetical, suppose X Corp asks Attorney to represent it in the defense of a personal injury claim in which Officer is not involved and has no interests, differing or otherwise. Because there are no "differing interests" between X Corp and Officer regarding the personal injury claim, a reasonable attorney could conclude that no conflict exists. If no conflict exists, then informed consent pursuant to Rule 1.7(b)(4) is not necessary.

15. *Hypothetical # 2.* As a second hypothetical – at the opposite extreme – suppose X Corp asks Attorney to represent X Corp in a dispute directly adverse to Officer (*e.g.,* asserting a claim against Officer for usurping a corporate opportunity, or defending X Corp against a breach of contract action

43 Attorney's representation of X Corp could also, in theory, create conflicts under Rule 1.7(a)(2), which prohibits a representation when a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." However, nothing in the facts suggests that such personal interest conflicts are more likely here than in any other context, so we will not address Rule 1.7(a)(2).

brought by Officer).[44] Representing X Corp in a suit by or against Officer obviously will "involve the lawyer in representing differing interests," so Rule 1.7(a)(1) prohibits Attorney from representing X Corp against Officer unless Attorney "reasonably believes" he can "provide competent and diligent representation" per Rule 1.7(b)(1) to "each affected client" (X Corp and Officer). The aim of Rule 1.7(b)(1) is to ensure that Attorney's loyalty to Officer does not impair his competence and diligence on behalf of X Corp, and that Attorney's loyalty to X Corp does not impair his competence and diligence on behalf of Officer. The "reasonably believes" test in Rule 1.7(b)(4) depends on all of the circumstances. For example, it might be easier to meet in a minor breach of contract suit than in a fraud suit. If Attorney satisfies the "reasonably believes" test, then he must obtain informed consent, confirmed in writing, from both Officer and X Corp, per to Rule 1.7(b)(4), before undertaking the representation of X Corp.[45]

16. *Hypothetical # 3.* As a third hypothetical, suppose X Corp were to ask Attorney to advise the corporation concerning its by-laws, corporate compliance manual, compensation system, management structure, or the like. Those matters would potentially affect the rights and obligations of Officer, who is a shareholder and officer of X Corp. In some situations, a reasonable lawyer could conclude that Attorney's simultaneous representation of Officer and X Corp "will involve the lawyer in representing differing interests," which would create a conflict under Rule 1.7(a)(1). For example, Attorney might be reluctant to give advice to X Corp that, if followed, could adversely affect Officer's compensation or power at X Corp. Accordingly, Attorney could not undertake such a representation without obtaining informed consent, confirmed in writing, from both Officer individually and X Corp as an entity.[46]

17. Finally, whether Officer is a current client or a former client, he continues to be an officer and shareholder of X Corp. Consequently, when Attorney is acting on behalf of X Corp, Attorney should take steps to avoid any misunderstanding by Officer (or other X Corp personnel) about Attorney's role. As stated by Rule 1.13(a), when the organization's interests "may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents."

CONCLUSION:

19. Simultaneously representing both a corporation and a director, officer or shareholder of that same corporation can create conflicts, but if the conflicts are consentable, then the conflicts can be cured by obtaining informed consent from each affected client, confirmed in writing. (79-09)

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44 We assume that Attorney is not representing Officer against X Corp. Nor could Attorney represent Officer and X Corp against each other in the same litigation matter even if both X Corp and client Officer gave their informed consent, because such a conflict would be non-consentable. Under Rule 1.7(b)(3), a lawyer may never handle both sides of the same litigation before a tribunal. That is a *per se* conflict and cannot be cured by consent.

45 In the facts here, Officer was the one who first suggested that X Corp retain Attorney as its counsel, which implies that Officer has already give his consent (express or implied) for Attorney to represent X Corp. However, Officer's consent was not necessarily *informed* consent. Each time Attorney A considers taking on a new matter for X Corp, he needs to make sure, per Rule 1.0(j), that Officer understands the material risks, advantages, and alternatives, and give Officer the opportunity to withhold consent in light of that explanation. Alternatively, Attorney may seek an advance waiver from Officer (and from X Corp) waiving conflicts before they arise, obviating the need to obtain a waiver for each new matter – *see* Rule 1.7, cmts. [22] and [22A] (headed "Consent to Future Conflict").

46 Whenever Rule 1.7 requires X Corp's consent to a conflict between X Corp and Officer, Rule 1.13(d) demands that "the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders." Thus, someone other than Officer will have to consent on behalf of X Corp, because Officer may consent to the conflict on his own behalf but not on behalf of the corporation.

2012

OPINION 902 (01/13/2012)

TOPIC: Payment for marketing services based on contacts developed.

DIGEST: A lawyer may not base compensation to a marketing firm on the number of potential or actual clients the firm introduces to the lawyer.

RULES: 7.2

FACTS:

1. The inquirer is a collection attorney who proposes to enter into a contract with a marketing firm. The firm would introduce the attorney to its network of doctors so that the attorney could seek collection work from those doctors. The attorney would prefer not to pay the firm a monthly fee, but rather to base the fee arrangements on "benchmarks and results."

QUESTIONS:

2. Can the attorney pay the marketing company a fixed fee each time the company makes an introduction and sets up a meeting with a doctor?

3. Can the attorney pay an additional fee to the marketing company if and when the doctor retains the attorney in a certain number of collection cases?

OPINION:

4. Lawyers may engage in marketing activities subject to various restrictions in the Rules of Professional Conduct. A lawyer who contracts with a firm to perform such services may not arrange for it to engage in activities that the lawyer would be ethically prohibited from undertaking directly.[1]

5. Here, the inquiring attorney would be contracting for advertising services governed by Rule 7.1. Moreover, those services could include forms of advertising targeted at specific recipients so as to constitute solicitation under Rule 7.3(b). In that case the attorney would also need to be mindful of the requirements of Rule 7.3, such as the limitations on solicitations made in person, by telephone, or by interactive computer-accessed communication.

6. Assuming that the services sought by the inquiring attorney would be compliant with the rules on advertising and solicitation, we turn to the questions posed, concerning permissible fee structures.

1 *See* Rule 8.4(a); Rule 7.3(b) (defining solicitation to include certain advertisements initiated by "or on behalf of" a lawyer); Rule 7.2, Cmt [1] (recognizing that a lawyer may compensate vendors engaged to provide marketing services, but citing Rule 5.3 for the duties of lawyers "with respect to the conduct of nonlawyers who prepare marketing materials for them"); N.Y. State 887 (2011); Florida Opinion 89-4.

7. Rule 7.2(a) provides: "A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client," except in two situations not relevant to this inquiry. Comment [1] to Rule 7.2 acknowledges that the rule allows a lawyer "to pay for advertising and communications permitted by these Rules," but states that lawyers "are not permitted to pay others for channeling professional work."

8. In several of our prior opinions we have applied this rule, or its virtually identical predecessor under the Code of Professional Responsibility, and have disapproved arrangements involving the exchange of money or other value for referrals.[2]

9. The proposed fee arrangements are inconsistent with the text of Rule 7.2(a) and with our prior opinions. Payment of a fee to the marketing firm for an introduction and meeting with a potential doctor client would be a payment to recommend or obtain employment by a prospective client. Paying the firm an additional fee if and when the doctor retains the attorney in a certain number of collection cases would violate the prohibition of rewards for having made a recommendation resulting in employment by a client.

CONCLUSION:

10. A lawyer who contracts with a marketing firm to introduce the lawyer to its network of doctors as prospective clients may not compensate the firm with a fee for each introduction and meeting with one of the doctors, nor with a fee if and when a doctor retains the attorney in a certain number of collection cases.

(44-11)

2 *See* N.Y. State 887 (2011) (employee marketer may not be paid bonus based on referrals of particular matters or based on profitability of firm if such profits are substantially related to employee's marketing efforts); N.Y. State 791 (2006) (lawyer may not participate in business networking organization that requires mutual referrals or charges dues and requires nonlawyer members to refer potential clients to lawyer members); N.Y. State 779 (2004) (improper for attorney to pay marketing organization for bundles of "leads" to potential clients); N.Y. State 565 (1984) ("any compensation in the form of a commission or percentage based upon the volume of business developed would be clearly improper[,] . . . would tend to give the marketing firm a pecuniary interest in the success of the solicitation, and may lead to the use of hard-sell tactics or other improprieties").

OPINION 903 (01/30/2012)

TOPIC: Revocation of consent to conflict

DIGEST: When a lawyer jointly represents two co-defendants pursuant to a validly obtained consent to the dual representation and to any future conflicts that might arise between the clients, and one of the clients later revokes consent, whether the lawyer may continue to represent the non-revoking client depends upon the circumstances, unless an advance agreement specifies what happens upon revocation of consent.

RULES: 1.7(a) & (b), 1.9(a) & (c), 1.10(a), 1.16(b), (d) & (e)

QUESTION:

1. When a lawyer jointly represents co-defendants in litigation pursuant to a validly obtained consent to the dual representation and to any future conflicts that might arise between the clients, and one client later revokes consent, may the lawyer continue to represent the non-revoking client?

BACKGROUND:

2. The inquiring lawyer ("Lawyer") has two clients named Alpha and Beta, who were both named as defendants in the same lawsuit. At the outset of the lawsuit, Alpha and Beta each gave their informed consent in writing for Lawyer to represent both of them in the litigation. At the time of the consent, Alpha and Beta had no differing interests and did not believe that any differing interests would develop later. Nevertheless, given the potential for conflicts between co-defendants, Alpha and Beta agreed to waive in advance any conflict that might eventually emerge between them. We assume for purposes of this opinion that the written consent executed by both Alpha and Beta complied with the definition of "informed consent" contained in Rule 1.0(j) and complied with the principles governing consent to future conflicts of interest, *see* Rule 1.7, cmts. [22]-[22A]. However, the consent did not address how the parties or Lawyer would proceed if either client later changed its mind and revoked consent.

3. Two years later, after substantial discovery in the litigation, Alpha determined that its interests differed significantly from Beta's interests, and Alpha revoked its consent to Lawyer's simultaneous representation of Beta. Lawyer is now uncertain whether he may continue representing Beta in the litigation without Alpha's consent.

OPINION:

4. Before we analyze the facts presented to us here, we note that an advance agreement can avoid many uncertainties surrounding a client's revocation of consent to a multiple representation. For example, an advance agreement could specify whether a lawyer may continue to represent either client after consent is revoked, and whether the lawyer may use or reveal confidential information obtained from the client who has revoked consent during the representation. Unfortunately, the consent at hand did not cover those matters. Accordingly, we must analyze the issues based solely on the New York Rules of Professional Conduct (the "Rules").

5. We do not question the validity of the initial waivers given by Alpha and Beta. We focus only on Lawyer's duties and responsibilities now that Alpha has revoked its consent to the dual representation. Of course, a client has the right to discharge its lawyer at any time for virtually any reason, and under Rule 1.16(b)(3) a lawyer must withdraw from a representation when discharged, unless the tribunal's permission for withdrawal is required and the tribunal denies permission to withdraw, in which case Rule 1.16(d) requires the lawyer to continue the representation. Thus, Alpha has the right to terminate Lawyer (subject to the tribunal's approval) – but Alpha does not have the right to terminate the attorney-client relationship between Lawyer and Beta. Whether Lawyer must cease representing Beta depends on the Rules of Professional Conduct.

A. Common representation and revocation

6. The basic rule governing concurrent conflicts between two or more clients is Rule 1.7(a)(1), which provides as follows:

> Rule 1.7 Conflict of Interest: Current Clients
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
>
> (1) the representation will involve the lawyer in representing differing interests . . . .
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

7. Here, even though Alpha and Beta had no "differing interests" at the outset of the litigation, Lawyer obtained informed consent from each of them, in writing, to their joint representation, including a waiver of any conflict of interest that might later develop between them. After discovery in the lawsuit revealed significant differing interests between Alpha and Beta, Alpha revoked its consent to the dual representation and revoked its advance conflict waiver. Lawyer apparently desires to withdraw from representing Alpha and continue representing Beta.

8. Comments [4] and [5] to Rule 1.7 address this situation as follows:

> [4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed

> consent of the client under the conditions of paragraph (b). *See* Rule 1.16(b)(1). ***Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client.*** *See* Rule 1.9; *see also* Comments [5], [29A].
>
> [5] Unforeseeable developments . . . might create conflicts in the midst of a representation. . . . ***Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict.*** The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rules 1.16(d) and (e). The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. *See* Rule 1.9(c). [Emphasis added.]

9. Comment [21] to Rule 1.7, which is directly on point here, focuses on a lawyer's ethical options and obligations when a client revokes a previously given consent:

> [21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. ***Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstance***s, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients, and whether material detriment to the other clients or the lawyer would result. [Emphasis added.]

10. Here, the "nature of the conflict" (a factor identified in Comment [21]) is a dual or "common" representation of co-defendants in litigation. Comment [29A] to Rule 1.7 explains what typically happens when a common representation fails due to conflicts: "Ordinarily, absent the informed consent of all clients, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. See Rule 1.9(a). . . "

B. The Effect of Rule 1.9

11. The cited rule, Rule 1.9(a), provides as follows:

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

12. Applying Rule 1.9(a) to the facts here, the Lawyer has formerly represented Alpha and is thus barred from thereafter representing another person (here, Beta) in the same matter if that other person's interests are "materially adverse" to the former client's interests, unless the former client gives informed consent, confirmed in writing. Because Alpha and Beta have developed differing interests, Lawyer's continued representation of Beta in the litigation would be materially adverse to Alpha. And because Alpha has revoked its consent to the dual representation, we infer that Alpha would not con-

sent to Lawyer's continued representation of Beta, which has become materially adverse to Alpha. We also assume that Beta wants the Lawyer's continued representation and does not plan to find a new attorney in the Lawyer's place.

13. Thus, when differing interests arise during a common representation and prohibit a lawyer from continuing to represent both clients absent the informed consent of both clients, Rule 1.9(a) will prohibit the lawyer from opposing either client in the same matter, and the lawyer therefore must ordinarily drop both clients. But where a client elects to revoke a consent previously given and relied upon in undertaking a conflicting or potentially conflicting representation, whether the revocation prevents the lawyer from continuing the other representation depends, as Comment [21] says, on the circumstances, including (i) "the nature of the conflict," (ii) "whether the client revoked consent because of a material change in circumstances," (iii) "the reasonable expectations of the other clients," and (iv) "whether material detriment to the other clients or the lawyer would result."

14. The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §122, comment *f* also directly addresses revocation. Comment *f* provides, in pertinent part, as follows:

> *f. Revocation of consent* . . . A client who has given informed consent to an otherwise conflicted representation may at any time revoke the consent. ***Revoking consent to the client's own representation, however, does not necessarily prevent the lawyer from continuing to represent other clients who had been jointly represented along with the revoking client. Whether the lawyer may continue the other representation depends on whether the client was justified in revoking the consent . . . and whether material detriment to the other client would result.*** . . .
>
> A material change in the factual basis on which the client originally gave informed consent can justify a client in withdrawing consent. . . . [T]he consent of a client to be represented concurrently with another normally presupposes that the client-clients will not develop seriously antagonistic positions. If such antagonism develops, it might warrant revoking consent. . . . If the conflict is subject to informed consent, the lawyer must thereupon obtain renewed informed consent of the clients, now adequately informed of the change of circumstances. If . . . the lawyer cannot obtain informed consent from the other client . . . the lawyer must withdraw from representing all affected clients adverse to any former client in the matter. . . . [Emphasis added; citations omitted.]

15. On the other hand, Comment *f* to the Restatement also says that if the revoking client lacks valid reasons for the revocation of consent, then whether the lawyer may continue representing a nonrevoking client "depends on whether material detriment to the other client or lawyer would result and, accordingly, whether the reasonable expectations of those persons would be defeated."

16. If Alpha gives informed consent pursuant to Rule 1.9(a) (confirmed in writing) for Lawyer to continue representing Beta in the litigation, that consent does not automatically allow Lawyer to use Alpha's confidential information to Alpha's disadvantage. *See* Rules 1.6(a)(1) and 1.9(c) (prohibiting use of confidential information to disadvantage of clients or former clients absent their informed consent). Absent Alpha's consent to use Alpha's confidential information to Alpha's disadvantage, Lawyer must determine whether he has a conflict of interest under Rule 1.7(a)(2), either because he

cannot avoid using Alpha's confidential information while representing Beta or because there is a significant risk that Lawyer's possession of Alpha's confidential information would adversely affect Lawyer's independent professional judgment in representing Beta. *See* N.Y. City 2005-2 (addressing conflicts arising solely from possession of confidential information of another client).

17. In sum, taking into account the Comments to Rule 1.7 and Comment *f* to the RESTATEMENT, when a lawyer is considering whether to continue to represent a non-revoking client after a co-client has revoked consent to a common representation, the lawyer should consider a wide variety of factors. We lack sufficient facts to evaluate all of these factors, but the inquiring Lawyer should do so carefully. Our views generally agree with D.C. Bar Op. 317 (2002) and N.C. State Bar Op. 2007-11 (2007).

CONCLUSION:

18. When a lawyer jointly represents two co-defendants pursuant to a validly obtained consent to the dual representation and to any future conflicts that might arise between the joint clients, and one of the clients later revokes consent, whether the lawyer may continue to represent the non-revoking client depends upon the circumstances, unless an advance agreement specifies what happens upon revocation of consent.

(5-10)

OPINION 904 (01/30/2012)

TOPIC: Communication with subject of investigation known to be represented by counsel.

DIGEST: Under New York Rule 4.2(a), a lawyer representing the victim of an alleged crime for purposes of seeking restitution may not communicate with the subject of a criminal investigation into the same facts if the victim's lawyer knows that the subject is represented by counsel with respect to the criminal investigation unless the victim's attorney has the prior consent of that counsel, is authorized by law to communicate with the subject directly, or the criminal defense attorney, upon inquiry, disavows representation with respect to the restitution claim.

RULES: 1.0(k) & (*l*), 4.2(a)

QUESTION:

1. When an attorney is seeking restitution for a client who is the victim of an alleged financial crime, may the attorney communicate with the subject of a criminal investigation into the same conduct, if the attorney knows that the subject is represented by counsel with respect to that criminal investigation, without the prior consent of that counsel?

OPINION:

2. The inquiring attorney is representing an investor (the "Investor") who lost money in a particular investment. The Investor believes that the investment manager (the "Subject") caused the loss by engaging in criminal conduct. The Investor complained to authorities, who commenced a criminal investigation of the Subject. The Subject has not yet been indicted or arrested, but public news reports indicate that the Subject is represented by legal counsel in the criminal investigation. The inquirer does not question these reports, so we assume the inquirer "knows" the Subject is represented by counsel – at least in the criminal investigation – within the meaning of Rule 1.0(k) (defining "knows" to denote actual knowledge, but adding that knowledge "may be inferred from circumstances").

3. The Investor has asked the inquiring attorney to contact the Subject directly – not through the Subject's counsel in the criminal matter – in an attempt, outside the criminal process, to secure restitution of the Investor's losses. May the Investor's lawyer communicate with the Subject outside the presence of and without the prior consent of the Subject's counsel?

A. Rule 4.2(a) (the "no-contact" rule)

4. The relevant provision in the New York Rules of Professional Conduct (the "Rules") is Rule 4.2 ("Communication with Person Represented by Counsel"), commonly called the "no-contact" rule. Rule 4.2(a) provides as follows:

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

5. Thus, under Rule 4.2(a), if a lawyer "knows" that a person is a represented "party" in the same "matter" on which the lawyer represents a client, then communicating with that person about that matter (*i.e.,* communicating about the "subject of the representation") is prohibited unless the lawyer either (i) has the prior consent of the represented party's counsel or (ii) the communication is authorized by law. Neither exception applies here.

B. Is the Subject known to be represented "in the matter"?

6. In applying Rule 4.2(a), the first question is whether the inquirer's direct communication with the Subject of the criminal investigation to discuss possible restitution would be about the same "matter" in which the Subject is represented by counsel. At a minimum, the Investor knows that the Subject is represented in the criminal investigation. If the question of civil restitution were deemed the same matter as the criminal investigation, then discussing that matter with the Subject would be prohibited by Rule 4.2(a).

7. The term "matter" is defined in Rule 1.0(*l*) as follows:

> "Matter" includes any litigation, judicial or administrative proceeding, case, ***claim***, application, request for a ruling or other determination, contract, controversy, ***investigation,*** charge, accusation, arrest, negotiation, arbitration, mediation or ***any other representation involving a specific party or parties.*** [Emphasis added.]

8. Thus, the term "matter" expressly includes an "investigation" and a "claim." Here, the prosecutor's criminal investigation and the inquiring attorney's civil claim for restitution are inextricably intertwined.[3] Yet they also differ in some ways because the criminal investigation involves parties, processes and issues peculiar to determinations of criminal responsibility. For example, the prosecutor is a party to the criminal but not the civil matter while the Investor is a party to the civil but not the criminal matter. Because the two matters are not the same, and for the reasons discussed in paragraph 12 below, the criminal investigation and the civil restitution claim should be considered two related matters rather than a single unitary matter.

9. Given that the civil and criminal matters are distinct, the next question is whether the Subject's attorney in the criminal investigation also represents him in the civil restitution matter. (The public news reports mentioned above apparently do not address that question, and even the discussions that gave rise to the attorney-client relationship between the Subject and his attorney may not have addressed it.) The inquiring attorney has strong reason to believe that – if the question were presented to the Subject and his attorney – the scope of the representation would include both the criminal matter and the civil restitution matter. As noted above, the civil and criminal aspects are closely related. Perhaps most important, the Subject's chosen approach to the civil restitution matter could, in various ways, substantially affect his prospects in the criminal matter. For example, if the Subject makes substantial restitution, he may be less likely to be prosecuted on criminal charges. On the other hand, if

3 The criminal investigation and the civil restitution claim are closely related in several ways. First, they arise out of the same facts and have one party in common (the Subject). Second, the Investor is both a claimant seeking civil restitution and the complaining witness whose report led to the criminal investigation. Third, the question of restitution to the Investor may arise in the potential criminal case as well as in any private discussions between the inquiring attorney and the Subject.

he is prosecuted despite making restitution, his conduct or words in the course of making restitution might be used against him in the criminal matter.

10. Given the close relationship between the matters and the strong possibility that the scope of representation by the criminal attorney also includes the civil restitution matter, the inquiring attorney may not ignore the no-contact rule or assume it to be inapplicable. Our prior opinions make clear that "when a lawyer has a reasonable basis to believe that a party may be represented by counsel, then the lawyer has a duty of inquiry to ascertain whether that party is in fact represented by counsel in connection with a particular matter. The necessary extent of such an inquiry will depend on the circumstances of a particular matter." N.Y. State 768 (2003) (*citing* N.Y. State 735 (2001), N.Y. State 728 (2000), and N.Y. State 663 (1994)). One of the precedents – N.Y. State 728 – is particularly apposite, given the similarity between its facts and those presented by the current inquiry.

11. When the lawyer not only has a reasonable basis to believe that the party is represented by counsel, but also has a way of ascertaining the name of that counsel, then ordinarily the inquiry must be to the other party's putative counsel rather than to the party directly.[4] That is the case here. The inquiring attorney should initially contact the Subject's criminal defense attorney, not the Subject. If the criminal defense attorney says he does not represent the Subject on the civil matter, then Rule 4.2 does not apply and the inquiring attorney may contact the Subject directly regarding the restitution matter. But if the criminal defense attorney says he does represent the Subject as to the question of civil restitution, then Rule 4.2 would apply. Our conclusion is supported by the policy underlying the no-contact rule, because the Subject could suffer significant harm in the criminal investigation if he were to make unguarded statements or admissions to the Investor's lawyer about the underlying facts.

12. The fact that the scope of criminal defense counsel's representation may or may not include the civil matter is one reason for our conclusion that the civil and criminal matters, while closely related, should be deemed two distinct matters for purposes of Rule 4.2. If they were considered the same matter, and yet the criminal attorney did not represent the subject as to civil restitution, then it might be impossible for the Investor's attorney to engage in any discussion with the Subject about civil restitution – even if desired by the Subject – because to comply with Rule 4.2(a) the inquiring attorney would have to seek "prior consent" from an attorney who lacked authority to provide it. Of course the Subject may not wish to have such discussions with the inquiring attorney, but the rules of legal ethics should leave that choice in the hands of the Subject and his counsel (if any) in the restitution matter.

C. Is the Subject a "party" within the meaning of Rule 4.2?

13. The remaining question in applying Rule 4.2(a) is whether the Subject of the criminal investigation is a "party," within the meaning of Rule 4.2, to the civil restitution matter about which the Investor's attorney seeks to communicate. In the narrowest sense, the term "party" means a plaintiff

4 *See* N.Y. County Lawyers 708 (1995) (where inquiring attorney knew that plaintiff had previously been represented by counsel in the matter, inquirer had an "independent duty" under the no-contact rule "to verify that plaintiff was no longer represented. It would not have been sufficient to rely on the word of plaintiff alone"); *Matter of Searer*, 950 F. Supp. 811 (W.D. Mich. 1996) (lawyer was disciplined for meeting with criminal defendant based on defendant's statement that his lawyer consented to the meeting when in fact his lawyer had not consented); N.Y. City 2009-1 ("while consent may be inferred from the conduct or acquiescence of the represented person's lawyer, a lawyer communicating with a represented person without securing the other lawyer's express consent runs the risk of violating the no-contact rule").

or defendant (or the equivalent) in pending litigation. But this Committee has never read the term "party" so narrowly. Rather, in civil matters, the definition of "party" as used in Rule 4.2 – and in the definition of "matter" in Rule 1.0(*l*) – is not limited to formal parties to litigation. In N.Y. State 735 (2001), which addressed "noncriminal matters," we stated that the no-contact rule "applies to one who retains counsel in connection with a dispute even prior to the filing of a lawsuit; and during a civil lawsuit it applies to represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties to the lawsuit."

14. In N.Y. State 607 (1990), we made clear that formal commencement of an adversarial proceeding in a civil matter is not necessary to trigger an attorney's ethical duties under Rule 4.2. There, the inquirer represented a party injured in a car accident. The inquirer wished to write a letter about the accident to the driver that collided with his client, but did not know if the driver was represented by counsel at that pre-litigation stage. We opined that the term "party" encompassed a potential litigant and that "the absence of a formal commencement of adversarial proceedings did not vitiate" the no-contact rule. The Third Department echoed this view and cited N.Y. State 607 in *McHugh ex rel. Kurtz v. Fitzgerald*, 719 N.Y.S.2d 785 (3d Dep't 2001), which stated that "commencement of the litigation is not the criteria for determining whether communication with an adverse party is in derogation of" the no-contact rule. Rather, the *McHugh* court expressly stated that a lawyer can violate the no-contact rule even where litigation has not commenced. In light of these authorities, we conclude that the Subject is a "party" to the restitution matter for purposes of Rule 4.2(a) whether or not formal litigation seeking restitution has commenced.

15. Our opinion does not address the conduct of prosecutors and criminal defense counsel and in particular does not decide who qualifies as a "party" in criminal matters. Our opinion addresses only lawyers representing clients in civil matters.

CONCLUSION:

16. An attorney representing the victim of an alleged crime for purposes of seeking restitution may not contact the subject of a criminal investigation into the same facts if the attorney for the victim knows that the subject is represented by counsel with respect to the criminal investigation unless (a) the attorney for the victim has the prior consent of that counsel; (b) the attorney is authorized by law to communicate with the subject directly; or (c) the criminal defense attorney, upon inquiry, disavows representation with respect to the restitution claim.

(73-09)

OPINION 905 (01/30/2012)

Modifies N.Y. State 503 (1979)

TOPIC: Paralegal or Legal Assistant Who Becomes Lawyer; Obligations of Lawyer and Hiring Firm

DIGEST: Rules 1.9 and 1.10 do not apply to a lawyer who acquired confidential information while acting solely as a paralegal or legal assistant. A law firm that hires a lawyer who acquired confidential information while acting as a paralegal or legal assistant has an obligation to make reasonable efforts to ensure that the lawyer does not reveal the confidential information. A law firm should instruct the newly hired lawyer not to divulge confidential information. The firm should also perform a conflicts check reasonable under the circumstances. If the lawyer acquired confidential information in a matter while working as a paralegal or legal assistant, the lawyer ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that the firm has a duty to protect.

RULES: Rule 1.6(c), Rule 1.9(b), Rule 1.10(a), (c), Rule 5.1(a), Rule 5.3(a), Comment 4 to Rule 1.10.

QUESTION:

1. What are a law firm's supervisory responsibilities upon hiring a newly-admitted lawyer who previously worked as a paralegal or legal assistant at a firm representing a party adverse to a client of the hiring law firm? Must the hiring law firm check for conflicts of interest and implement screening measures?

OPINION:

2. The inquirer is an attorney at a law firm ("Law Firm A"), which would like to hire a law school graduate who has passed the bar, but has not yet been admitted to practice. While in law school, this prospective lawyer worked as a paralegal at another law firm ("Law Firm B") and continues to work in that capacity.[5] While working at Law Firm B, the prospective lawyer may have gained confidential information in a matter ("Matter X") in which Law Firm B represents the plaintiff in an ongoing litigation against a client of Law Firm A. Law Firm A does not know the specific content of the confidential information, if any, but does know that the prospective lawyer's "contact in the case" was limited to an undefined "research project."

3. The inquirer notes that when the prospective lawyer begins to practice at Law Firm A, "he will have no contact with [Law Firm A's] client" in Matter X. He will work exclusively in the Law Firm A's Insurance Defense Practice Group "with little contact with the attorneys who practice with [the] client" in Matter X. Law Firm A's client in Matter X has contact only with the Health Care Practice

5 This Opinion addresses the obligations of a law firm that hires a paralegal or other similarly denominated person, such as a law assistant or law clerk. It does not address the hiring of a law school graduate who has passed the bar and is pursuing admission while at another firm, as that person's responsibilities and exposure to client confidences are typically greater than those of an ordinary paralegal or legal assistant.

Group. The firm's Insurance Defense Practice Group and its Health Care Practice Group "are completely independent practices with no cross over between attorneys."

4. The inquirer asks whether screening the prospective lawyer after he is admitted and joins the firm is a proper course of action. If not, the inquirer asks what steps should be taken to avoid violation of the New York Rules of Professional Conduct "and/or disqualification from the case."

5. The essence of this inquiry is whether the prospective lawyer would have a conflict of interest that will be imputed to other lawyers in Firm A under Rule 1.10 ("IMPUTATION OF CONFLICTS OF INTEREST") of the New York Rules of Professional Conduct. Rule 1.10(a) provides, among other things, that when a lawyer in a firm is prohibited from representing a client adverse to a former client under the dictates in Rule 1.9 ("DUTIES TO FORMER CLIENTS"), that conflict is imputed to all other lawyers in the firm. Rule 1.9(b) states that "[u]nless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same. . . matter in which a firm with which the lawyer formerly was *associated* had previously represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rule[ ] 1.6 . . . that is material to the matter." (emphasis added). Additionally, Rule 1.10 (c) provides that "[w]hen a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as . . . a matter in which the newly associated lawyer, or a firm with which that lawyer was *associated*, formerly *represented* a client whose interests are materially adverse to the . . . current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter." (emphasis added).

6. Assuming that, in the course of his work as a paralegal at Law Firm B, the prospective attorney acquired confidential information protected by Rule 1.6(a) that is material to the plaintiff in Matter X, a broad reading of Rules 1.9 and 1.10 would preclude Law Firm A from continuing to represent its client in Matter X if it hires the prospective lawyer and he is admitted to practice. *See* Michigan Formal Opinion RI-285 (1996) (interpreting provision similar to New York's Rule 1.9[b], opinion notes that "inquirer likely 'acquired protected information' in the former employment, whether the acquisition was as a lawyer or as a paralegal").

7. We interpret Rules 1.9 and 1.10 in a more limited manner. While the prospective lawyer was certainly employed by Law Firm B, he was not "associated" with that firm during his tenure as a paralegal. As used in Rules 1.9 and 1.10, the term "associated" denotes a more significant relationship, such as holding a position as partner, associate, or of counsel at the former law firm. While the prospective lawyer may have gained material confidential information pertaining to Matter X in his work as a paralegal or legal assistant while at Law Firm B, he did not obtain it while "associated" with Firm B as an attorney. Nor can it be said that the prospective attorney "formerly represented" the client in Matter X while working at Law Firm B as a paralegal. *See* Rule 1.10 (c). Therefore, Rules 1.9 and 1.10 do not govern this inquiry.

8. Comment 4 to Rule 1.10 supports this conclusion. It notes, in pertinent part, that "[t]he rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary."

9. While Rules 1.9 and 1.10 do not apply here, there are other provisions that guide our resolution of this inquiry. Rule 1.6 ("Confidentiality of Information"), the centerpiece of the Rules of Professional Conduct, addresses a lawyer's duty to maintain confidential information. Rule 1.6(c) requires that "[a] lawyer . . . exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client . . . ." *See* Rule 1.6, cmt. 16.

10. Rule 5.3 ("RESPONSIBILITY FOR CONDUCT OF NONLAWYERS") mandates that "[a] law firm . . . ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate." Rule 5.3(a). Comment 2 to Rule 5.3 acknowledges the reality that "[l]awyers generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals." These nonlawyers "act for the lawyer in rendition of the lawyer's professional services." Rule 5.3, cmt. 2. While these "nonlawyers . . . are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by or associated with the law firm is compatible with the professional obligations of the lawyers and firm." *Id.*; *see* N. Y. State 774(2004) (addressing supervisory duties of firm hiring paralegal or other nonlawyer). Furthermore, a lawyer may not order, direct, or permit a nonlawyer to engage in any conduct that, if engaged in by the lawyer, would subject the lawyer to discipline. Rule 5.3(b).

11. Based on Rules 1.6 and 5.3, Law Firm B, which currently employs the prospective lawyer, has an obligation to ensure that he preserves any confidential information he acquires regarding the plaintiff in Matter X. Law Firm A must similarly ensure that the plaintiff's confidential information is preserved. *Cf.* N.Y. State 774 (2004) (addressing duties of law firm hiring a paralegal or other nonlawyer and opining that law firm that "hires a nonlawyer who has previously worked at another law firm . . . must, as part of its supervisory responsibilities under [Rules 1.6 and 5.3], exercise adequate supervision to ensure that the nonlawyer does not reveal any confidences or secrets that the nonlawyer acquired while working at the other law firm."); N.Y. State 700 (1998) (opining, under a distinct set of facts, that an attorney "may not exploit the willingness of [a] former employee [of an adversary's law firm] to undermine the confidentiality rule."); N. Y. State 503 (1979) (a lawyer cannot undertake to cause another's employee to divulge confidential information); Rule 4.4(a) ("In representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [a third] person.").

12. Law Firm A also has an obligation to "make reasonable efforts to ensure that all lawyers in the firm conform to the [] Rules." Rule 5.1(a). Once the prospective lawyer is admitted to practice and hired by Law Firm A, it too has an independent obligation to ensure that he does not reveal any confidential information learned while employed at Firm B.

13. As to the scope of the "reasonable efforts" that must be undertaken by Law Firm A upon hiring the prospective lawyer, we are informed by our analysis in NY State 774, where we examined a law firm's supervisory responsibilities upon hiring a secretary, paralegal or other nonlawyer who previously worked at another law firm. Based on that Opinion, it is advisable that Law Firm A remind the prospective lawyer to preserve the confidentiality of information obtained concerning clients of Law Firm B. *See* N.Y. State 422 (1975)(opining that an "attorney may employ the terminating secretary who has confidential information as to pending adversarial matters, *provided* he cautions the sec-

retary not to divulge any confidential information and will not permit the secretary to do so."). Law Firm A should also instruct the prospective lawyer not to accept any work assignment involving a matter on which he worked while at Law Firm B, including Matter X. *See In re Columbia Valley Healthcare System, L.P.*, 320 S.W.3d 819 (Supreme Court of Texas 2010)

14. It is also advisable for Law Firm A, upon hiring the prospective lawyer, to perform a conflicts check reasonable under the circumstances. *Cf.* N.Y. State 720 (1999) (discussing required procedures for performing conflicts checks when hiring lateral attorney). If the prospective attorney played more than a ministerial role in the matter at Law Firm B, which appears to be the case in Matter X, screening of the prospective attorney may be required under Rule 5.1(a) to prevent the misuse of confidential information and to implement the "reasonable efforts" that must be undertaken under that provision to ensure that all lawyers conform to the Rules. *See* Rule 1.10, Comment 4 (a nonlawyer paralegal who has acquired confidential information "ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. *See* Rules 1.0(t), 5.3."); *In re Columbia Valley Healthcare System, L.P.*, 320 S.W.3d 819 (Supreme Court of Texas 2010) ("we conclude that a simple informal admonition to a nonlawyer employee not to work on a matter on which the employee previously worked for opposing counsel, even if repeated twice and with threat of termination, does not satisfy the 'other reasonable measures' a firm must take to properly shield an employee from the litigation. Instead the other reasonable measures must include, at a minimum, formal, institutionalized screening measures that render the possibility of the nonlawyer having contact with the file less likely"); *see also S.E.C. v. Ryan*, 747 F.Supp.2d 355, (N.D.N.Y. 2010) (in the face of an alleged conflict of interest caused by a firm's hiring of a paralegal who previously worked at the adverse party's firm, the court noted that screening "procedures are prudent under these circumstances and should remain in effect" and noted that "[e]ven a small law firm can erect appropriate and adequate isolation to protect the sharing of confidential information, as long as the firm exercises special care and vigilance").

15. In sum, the measures required to be taken by Law Firm A to preserve confidential information will vary depending on the circumstances. As noted generally in the Rules, "the degree of supervision required [by a law firm] is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter." Rule 5.1(c).

16. In N.Y. State 503, we recognized several of the principles enunciated above. In that Opinion, a lawyer was previously employed as a paralegal at another firm and gained confidential information regarding a client of his former firm. We concluded that the lawyer, who became an associate at a second firm, could not work on a matter involving the client of the former firm wherein the information he obtained as a paralegal might be of some relevance. In addition, we opined that the lawyer's conflict was imputed to all other lawyers at his firm, effectively disqualifying the entire firm from the proposed representation. We did not, however, address whether appropriate measures, such as screening, could avoid an imputed disqualification in these circumstances. We conclude today that if appropriate measures are taken to preserve the confidential information of the client of the former firm gained while the lawyer is a paralegal, imputed disqualification of the lawyer's entire firm under Rule 1.10(a) is not mandated.

17. If the prospective lawyer is admitted to practice and continues to work at Law Firm B before Law Firm A hires him, the resolution of this matter may be different. If the attorney, after being admitted to practice, acquires material confidential information about plaintiff while "associated" with Law Firm B, the newly admitted lawyer and Law Firm B would, of course, be subject to Rules 1.9 and 1.10. In these circumstances, screening could not prevent a conflict arising under Rule 1.9 or 1.10. *See* District of Columbia Opinion No. 227 (1992).

18. Under any scenario, whether a court will disqualify Law Firm A from representing its client in Matter X after it hires the prospective attorney is a question of law beyond the scope of this Committee's jurisdiction. *See, e.g.*, *Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc*., 129 A.D.2d 678, 514 N.Y.S.2d 440 (2d Dep't 1987) (defendants' attorneys, who had hired paralegal who had previously been employed by the plaintiff's counsel and had worked on the litigation pending between the parties and had interviewed the plaintiff's manager concerning the facts of this case, were properly disqualified); *Riddell Sports, Inc. v. Brooks*, 1994 U.S. Dist. LEXIS 2290 (S.D.N.Y. 1994) (Leisure, J.) (denying a motion to disqualify where a large firm had terminated a paralegal upon learning that the paralegal had worked on a case still pending between the firms, even though the paralegal had no role in that case at the firm).

CONCLUSION:

19. Rules 1.9 and 1.10 do not apply to a lawyer who acquired confidential information while acting solely as a paralegal or legal assistant. A law firm that hires a lawyer who acquired confidential information while acting as a paralegal or legal assistant has an obligation to make reasonable efforts to ensure that the lawyer does not reveal the confidential information. A law firm should instruct the newly hired lawyer not to divulge confidential information. The firm should also perform a conflicts check reasonable under the circumstances. If the lawyer acquired confidential information in a matter while working as a paralegal or legal assistant, the lawyer ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that the firm has a duty to protect.

(65-09)

OPINION 906 (01/31/2012)

TOPIC: Sharing of legal fees by an attorney with a non-profit organization that is not a law firm.

DIGEST: Sharing of legal fees by an attorney with a not-for-profit organization that is not a law firm is prohibited by Rule 5.4.

RULES: Rule 5.4.

QUESTION:

1. Can an attorney employed by a not-for-profit organization that is not a law firm share legal fees with the not-for-profit organization? The American Bar Association's ("ABA") Model Rules of Professional Conduct specifically allow this sort of fee sharing under Model Rule 5.4(a) (4). However, New York State did not adopt this standard.

OPINION:

2. When the proposed Rules of Professional Conduct were submitted by the New York State Bar Association ("NYSBA") to the Presiding Justices of the Appellate Division of the Supreme Court of the State of New York, on February 1, 2008, the Reporters' Notes accompanying proposed Rule 5.4, which included ABA Model Rule 5.4(a)(4), contained the following observation, at pp. 177-178:

> Rule 5.4(a)(4), which has no equivalent in the existing Disciplinary Rules, permits a lawyer to share court-awarded fees from a particular matter with a non-profit public-interest organization that procured the lawyer's employment in the matter. This is a change from existing DR 3-102 [22 N.Y.C.R.R. § 1200.17], which would prohibit such sharing. The reason for the change is to make it easier for lawyers to provide financial support to public-interest groups that sponsor or engage in litigation to advance the public interest. The change recognizes the importance of public-interest work and should increase financial support for groups that perform such work. Because the Rule is limited to court-awarded fees, and because fee sharing is permitted only with non-profit public-interest organizations, the potential for abuse is low. Furthermore, Rule 5.4(a)(4) does not permit such sharing where "prohibited by court rule or other law." Currently, section 491 of the Judiciary Law appears to prohibit such fee sharing, so the Rule probably would have no effect without an amendment of that statute. The NYSBA supports such an amendment to Judiciary Law § 491 and believes that an ethics rule should be in place in the event the Legislature enacts such an amendment. The NYSBA also believes that judicial approval of fee sharing with public-interest groups would remove a potential impediment to legislative action amending section 491.

3. The Administrative Board of the New York State Courts, when adopting the New York Rules of Professional Conduct to supersede the prior New York Code of Professional Responsibility, rejected the NYSBA's proposed Rule 5.4(a)(4). The Administrative Board included only Rule 5.4(a)(1)-(3). As summarized by Professor Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* (2009 ed.) (West), at p. 269:

> Section (a) is identical to DR 3-102. It states the basic rule that a lawyer may not divide legal fees with a non-lawyer. This basic rule is followed by three subdivisions, each stating an exception. The first two exceptions relate to deceased lawyers, and the third exception relates to retirement plans.

4. Thus, the exception contained in the Model Rule is not in effect in New York, having been explicitly rejected.

5. We do not address the situation in which the non-profit organization which employs the attorney is itself a "law firm." *See, e.g., Rodriguez v. City of New York*, 721 F. Supp.2d 148, 154 (E.D.N.Y. 2010) (Cogan, J.) ("[S]everal courts have found that where the legal fees awarded are to be deposited into a separate fund controlled exclusively by lawyers and used solely for legal work, the ethical concerns associated with fee splitting are no longer present. . . .") Neither do we address the question – because it is a question of law – as to whether there is a First Amendment right, which would trump the regulations at issue, to share legal fees with a non-profit organization which is not a law firm. *See, e.g.,* Roy D. Simon, Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 Yale L.J. 1069, 1126-1132 (1989).

CONCLUSION:

6. Sharing of legal fees by an attorney with a non-profit organization that is not a law firm is prohibited by Rule 5.4.

(25-11)

OPINION 907 (02/02/2012)

TOPIC: Protecting anonymity of client

DIGEST: An attorney may agree to make an anonymous donation on behalf of a client, and must protect the confidentiality of the identity of a client when asked by the client to do so, provided the request does not involve the lawyer in prohibited conduct.

RULES: 1.4, 1.6(a)(3), 1.6(b)(6), 1.15(a), (b), (c), 4.1, 8.4(a),(b), (c)

QUESTION:

1. May an attorney may make a charitable donation on behalf of a client and maintain the client's anonymity at the client's request, and may the attorney use the attorney's escrow account to make the donation?

FACTS:

2. The inquirer is an attorney whose client seeks to make an anonymous donation to a charity. The client would like to place the money in an escrow account under the attorney's control, and then have the attorney forward the payment of the donation to the recipient. The client has instructed the attorney not to reveal the client's identity so that the client may remain anonymous.

OPINION:

3. Rule 1.6 bars lawyers from revealing confidential information without client consent unless otherwise authorized by the Rule. "Confidential Information" is defined in Rule 1.6(a)(3) as follows:

> "Confidential information" consists of *information gained during or relating to the representation of a client, whatever its source*, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) *information that the client has requested be kept confidential*. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. (Emphasis added.)

4. The attorney has a duty under Rule 1.6(a) (3)(c) to follow the client's direction because the client's identity in making an anonymous donation is "information that the client has requested be kept confidential." The attorney *must* therefore maintain the confidentiality of the information unless authorized or required to disclose it.

5. That protecting the identity of a client who has not consented to disclosure is an attorney's duty has previously arisen before for this Committee, under the Code of Professional Responsibility in effect prior to April 1, 2009. In N.Y. State 645(1993), this Committee addressed the conflict between legally mandated disclosure obligations and the attorney's duty to protect a client's identity. Specifically, N.Y. State 645 "discusses the obligations of a lawyer who contemplates accepting a position that might involve the disclosure of certain information about the lawyer's clients — the name of

the client and, implicitly, the fact of the representation . . . .” The Committee applied DR 4-101(B) requiring an attorney to protect “confidences” and “secrets.”

6. The request for anonymity and the duty to protect information the client request to be kept confidential, does not alone allow the attorney to make the donation if it were unlawful to do so. The attorney must be careful not to mislead as to the identity of the donor, for example by identifying the donor as the lawyer’s trust account. Rule 4.1 bars attorneys from knowingly making a false statement of fact or law to a third person. Rule 8.4(b) prohibits engaging in “illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness, or fitness as a lawyer.” Rule 8.4(c) prohibits “conduct involving dishonesty, fraud, deceit, or misrepresentation.” The inquirer has not presented us with any specific reason to believe that unauthorized disclosure of the client’s identity could be legally mandated here, but it is not difficult to imagine that the donor’s identity may be required to ensure that the donation is lawful (e.g., is not from an improper foreign source, does not evade disclosure or donation limits, etc.). Rule 1.6(b)(6) permits lawyers to make disclosures when required to do so by law.[6]

7. Because circumstances may arise that require the attorney to make a disclosure of the client’s identity, the attorney should make sure that the client understands that the attorney may not be able to keep his identity secret and that the client still wants to go ahead with the donation knowing the risk. *See* Rule 1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”).

8. Whether the attorney may use his escrow account in connection with the proposed anonymous donation invokes Rules 1.15(a) and (b). Rule 1.15 provides for a trust account holding “funds belonging to another person incident to the lawyer’s practice of law . . .”. In view of the use of the word client in this question we assume that the making of the donation is incident to the practice of law. (If that were not the case, it may be necessary for the attorney to set up a separate account to receive the funds and make the donation. See Comment [5] to Rule 1.15.) In general, the attorney must receive the client’s funds into an attorney trust or escrow account and not commingle the funds with the attorney’s own funds or the funds of any other client. Rule 1.15(c) requires the attorney to provide the client a receipt and to maintain appropriate books and records. As discussed above, to avoid misleading the recipient, the lawyer must make sure that the recipient knows that the donation is anonymous, and not actually from the lawyer.

CONCLUSION:

9. A lawyer has a duty to maintain the confidentiality of a client’s identity at the request of the client, and provided the lawyer does not knowingly make any false statement and segregates the client

6 *See also, e.g.,* Association of the Bar of the City of New York, Reforming New York State’s Financial Disclosure Requirements For Attorney-Legislators: Report On Legislation By The Committee On State Affairs, The Committee On Government Ethics And The Committee On Professional Responsibility, dated January 2010, available at http://www.nycbar.org/pdf/report/uploads/20071850-ReformingNYSFinancialDisclosureRequirements.pdf. In pertinent part, the report stated that “[w]hile “information” may include the identity of a client, courts have found that revealing client identities does not breach ethical obligations because attorneys may be obligated or permitted by law to provide this information.” *Id.*, *citing U.S. v. Legal Services for New York City*, 100 F. Supp 2d 42, 47 (D.D.C. 2000). “Indeed,” the report continues, “Rule 1.6(b)(6) permits a lawyer to reveal information when required to comply with a law and courts have noted that such a legal obligation would override any claimed ethical duty of secrecy to a client.” *Id., citing U.S. v. Hunton & Williams*, 952 F. Supp. 843, 856 (D.D.C. 1997).

funds in a properly documented attorney escrow account, the lawyer may use the lawyer's escrow account for the purpose of making an anonymous charitable donation on behalf of the client, provided the lawyer has satisfied himself that the contemplated donation is not illegal or otherwise prohibited by law.

(15-11)

OPINION 908 (02/28/2012)

TOPIC: Advertising in internet directory

DIGEST: (a) It is permissible for an attorney to be listed on a local bar association website directory, if the attorney is a member of the association, and the information about the attorney contained in the listing complies with the requirements of Rule 7.1.

(b) It is permissible for an attorney to appear as a "featured attorney" on the home page of the website of a local bar association of which the attorney is a member, only if there is an appropriate disclaimer on the home page that the featured attorney is selected at random and is neither being endorsed nor recommended by the association over any other attorney.

RULES: 1.0(a); 7.1; 7.2; 7.3

FACTS:

1. A local bar association proposes to provide on its internet website a directory listing of its dues paying members, listing each attorney's name, address, phone number, e-mail, website link (if any), years of practice, areas of practice, picture and Google maps link. This listing will be accessible by members of the public. Before accessing these "profiles" a person will be required to accept a posted disclaimer noting that legal advice is not being given, that the list of attorneys may not be a complete list of all attorneys in the area, that the listing is not an endorsement of the searched attorney over another, that the listing is part of the membership fee of each attorney listed in alphabetical order, and does not mean that the attorney listed has had any special training.

2. The local bar association also proposes to provide a "Featured Attorney" spotlight, noting the picture of the attorney, years of practice, fields of practice with a link to the attorney's profile in the directory referred to above. The spotlight attorney will be selected at random and change each week so that over an extended period, each attorney member of the association will be featured in the spotlight. There will be an asterisk after the Featured Attorney referring to a disclaimer noting that legal advice is not being given, and that the association does not endorse the Featured Attorney over another. Each visitor to the website, before being able to access the directory of information on the Featured Attorney, will have to acknowledge understanding of the disclaimer by clicking on a Notice and OK acceptance box that will pop up before the visitor can proceed further.

QUESTION:

3. (a) May an attorney member of the local bar association grant permission to be listed in the profiles portion of the association's website?

4. (b) May an attorney member of the local bar association grant permission to be featured in the "Featured Attorney" spotlight portion of that association's website?

OPINION:

5. Rule 1.0(a) defines "advertisement" as "any public or private communication made by or on behalf of a lawyer or law firm about the lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers."

6. The listing by a lawyer in a directory or listing available to the public indicates that it is a communication the primary purpose of which is the retention of the lawyer by members of the public. We therefore view the listing as an "advertisement" since it is a public communication made by or on behalf of a lawyer the primary purpose of which is the retention of the lawyer.

7. While the Rules do not specifically authorize advertising in a directory, Rule 7.1(f) does exclude advertising in a directory from the requirement that it be labeled "Attorney Advertising". We conclude, therefore, that advertising in a directory (here a bar association list of attorneys) is permissible advertising as long as it complies with the relevant provisions of Rule 7.1. The profile listing on the website directory therefore is advertising that must otherwise comply with the requirements of Rule 7.1 but need not be labeled "Attorney Advertising".

8. Because the advertising is not directed to, or targeted at, a specific recipient or group of recipients, it is not a solicitation under Rule 7.3, and because the local bar association does not direct any specific member of the public to a specific attorney the listing of dues paying members is not a referral for payment subject to the provisions of Rule 7.2.

9. The featured attorney spotlight is different from the profile listing of all members. Since it does not appear in a directory, it has to be labeled "Attorney Advertising" as provided by Rule 7.1(f) in addition to complying with the other applicable requirements of Rule 7.1. The disclaimer with respect to non-endorsement of the Featured attorney should also state that the association is not recommending the Featured Attorney over any other attorney and that the selection by lot is a means of merely permitting each member to be displayed on the website home page. The appropriate disclaimer by the association on the page with the featured attorney spotlight, stating that the association was not endorsing or recommending the featured attorney over any other attorney and that the featured attorney is drawn by lot and changes every week as a means of merely permitting each member to be displayed on the association's website homepage, would remove Rule 7.2 considerations.

CONCLUSION:

10. (a) It is permissible for an attorney to be listed on a local bar association website directory if the attorney is a member of the association and the information about the attorney contained in the listing complies with the requirements of Rule 7.1.

(b) It is permissible for a member attorney to appear as a "featured attorney" on the home page of the website of the local bar association only if there is an appropriate disclaimer on the home page stating that the featured attorney is neither being endorsed nor recommended by the association over any other attorney and that the featured attorney is drawn by lot and changes every week so that every member of the association has a chance to appear as a featured attorney. (41-11)

OPINION 909 (02/28/2012)

TOPIC: Imputation of conflicts of member of town board

DIGEST: Where a member of a town board is barred from representing clients in certain matters in town Justice Court because the board has salary or budget control over the Court or the police department, other lawyers in the member's law firm are not disqualified unless there are particular facts that would likely give rise to public suspicions of improper influence or to a conflict of interest between the private client and the member's duties to the town.

RULES: 1.7(a)(2), 1.10, 8.4(d), 8.4(e).

QUESTION:

1. Where an associate in a law firm serves on a town board that has control over the budget of the town Justice Court, the salary of the town justice and the budget for the town police department, can other lawyers in the firm appear on civil and criminal matters in that Court?

OPINION:

2. This inquiry is largely governed by two lines of this Committee's prior opinions. One holds that lawyer-members of a local legislative body are not barred from appearing before a judge whose salary is set by the legislative body but may be barred from certain types of cases. That line of opinions does not address imputation of the proscription to other lawyers in the member's firm. The second line of opinions holds that lawyer-members are barred in the particular setting of criminal cases from appearing adverse to law enforcement authorities over whom the legislative body has budgetary control. We have addressed imputation in the latter situation and found that the prohibitions are not generally imputed, but may be in certain circumstances.

3. In the first line of opinions, of which N.Y. State 226 (1972) and N.Y. State 435 (1976) are representative, this Committee opined that a lawyer who served as member of city council or county legislature that set the salary of the town justice was not barred from appearing before the court:

> [T]he mere possibility that a judge may be influenced by the lure or fear of a councilman's vote on the salaries of judges of his court does not pose so evident a threat to the impartial administration of justice as to warrant barring the councilman from practicing law in his court . . . .

N.Y. State 226. The Committee's reasoning rested on DR 8-101, now Rule 8.4(e), which bars a lawyer who holds public office from using his or her public position to influence or attempt to influence a tribunal to act in favor of a client.

4. In those opinions, however, we noted certain limitations on this general proposition. The legislator or board member would be barred from appearing (i) before a judge who was appointed or subject to confirmation by the legislative body or board, (ii) in matters in which the town or county, or a town or county agency, was a contesting party, or (iii) in matters in which the interpretation or validity of a town or county ordinance or regulation was at issue. N.Y. State 226; N.Y. State 435. *Accord* Nas-

sau County 93-20 (City Council member could not "appear before the specific judge appointed by the Council, could not challenge acts of the City and could not oppose the City Attorney in court"). The opinions based these limitations both on DR 8-101 and on the rules dealing with conflicts of interest, principally DR 5-101, now Rule 1.7(a)(2) – that is, the conflict or apparent conflict between the lawyer's personal duty as a legislator or board member to advance the interests of the city or county and the lawyer's duty to his or her client to advance the client's interests in the particular matter. We did not address the extent to which these prohibitions would be imputed to the legislator's or board member's law firm (and neither did the Nassau County ethics opinion).

5. In the second line of opinions, this Committee held that a lawyer-legislator could not represent clients adverse to law enforcement authorities over which the legislature has budgetary control or influence. N.Y. State 692 (1997); N.Y. State 798 (2006).

> [I]f the lawyer/legislator would be adverse to law enforcement authorities (*e.g.*, because he or she would have to cross-examine them) or prosecutors over whom the legislature has budgetary control or influence, we believe that the lawyer/legislator should be disqualified because of the possibility that the law enforcement officers or prosecutors would exercise undue caution in handling the case.

N.Y. State 798 ¶ 3.

6. We addressed the imputation of this latter prohibition in N.Y. State 798. We concluded that the prohibition on appearing adverse to law enforcement authorities was not automatically imputed to other lawyers in the lawyer-legislator's firm. *Id*. ¶ 9. We reasoned that this prohibition derived from the bans on conduct prejudicial to the administration of justice then contained in DR 1-102(A)(5), and now contained in Rule 8.4(d), and rules relating to improper influence contained in DR 8-101(A), now Rule 8.5(e).[7] The automatic imputation rule in Rule 1.10 (then DR 5-105(D)) applies only to disqualification under Rules 1.7, 1.8 and 1.9, not to these other rules. N.Y. State 798 ¶¶ 9, 11.

7. We noted, however, that "[a] representation by another lawyer in the firm may involve facts and circumstances in which the lawyer/legislator's disqualification should be imputed to everyone in the firm." *Id*. ¶ 11.

> Because the purpose of disqualifying the lawyer/legislator is to avoid the public perception that the lawyer/legislator is misusing his or her influence over police and prosecutors, the circumstances in which others in the firm should be disqualified are those in which the public is likely to suspect that the lawyer/legislator's influence will still have an effect. This is most likely to occur where the lawyer/legislator is particularly prominent, e.g., a party leader, or where the case is particularly prominent, even if the lawyer/legislator is not personally working on the case.

Id. ¶ 12. *Cf*. N.Y. State 773 (2004) (partner or associate of a member of municipal board is not automatically barred from appearing before board, but may be barred depending on the particular facts

7 We also referred to the injunction in former Canon 9 that lawyers should avoid even the "appearance of impropriety." N.Y. State 789 ¶ 9. The disciplinary rules that appeared under that Canon in the former Code are now distributed in various Rules, principally Rules 1.11, 1.12(a) and 8.4(e)(1).

and circumstances); N.Y. State 632 (1992) (same as to lawyers in same firm with part-time judge who was barred from appearing before municipal zoning board of appeals or planning board).

8. Combining these two lines of opinions takes us a long way in answering this inquiry. First, neither the associate nor the firm is barred from appearing in town Justice Court by the mere fact that the town board has control over the budget of the Justice Court or the salary of the town justice. Second, while the associate is barred from representing clients adverse to the town police department, other lawyers in the firm generally will not be. The firm may, however, be barred in particular circumstances implicating the public perception of favoritism, as when the case or the associate are particularly prominent. Third, the associate may be barred from appearing in certain matters that our prior opinions have suggested raise particular concerns either with respect to public perceptions of favoritism or conflicts of interest, namely, appearing (i) before a judge who was appointed or subject to confirmation by the legislative body or board, (ii) in matters in which the town or county, or a town or county agency, is a contesting party, or (iii) in matters in which the interpretation or validity of a town or county ordinance or regulation is at issue.

9. Our prior opinions have not addressed the extent to which this last set of restrictions is imputed to the firm. The answer, as our reasoning in N.Y. State 798 suggests, depends on the source of the prohibition. If the prohibition arises out of the public perception of favoritism, the prohibition is not imputed automatically to the firm but may be in certain circumstances. If the prohibition arises out of the rules governing personal conflicts of interest, the prohibition is imputed to the firm. But conflicts under Rule 1.7 are generally waivable by the affected client with informed consent. *See* N.Y. State 773 (where certain prohibitions on practice of a municipal board member arise out of conflicts rules they are imputed to lawyers in the member's firm but "the private client may be able to give effective consent"); N.Y. State 692 (1997) (same). Thus, where the associate would be barred from representing a private client because of a conflict between his duties to advance the interests of the town and duty to advance the interests of the private client, that prohibition will generally be imputed to other lawyers in the firm, but also may be waivable with the informed consent of the client.[8] As these determinations are highly fact intensive, we do not in this opinion attempt to delineate how the rules would apply to any particular set of facts.

CONCLUSION:

10. Except where the facts and circumstances make it likely that the public will suspect undue influence, the partners and associates of a member of a town board may appear in town Justice Court, even though the board has control over the salaries and budget of that Court and of the police department that may be the adversary in certain matters. There may be particular cases, however, in which a representation would present the town board member with a conflict of interest that would prevent the member from representing the private client without the informed consent of the private client, and that prohibition will be imputed to the other lawyers in the member's firm. (50-11)

8 As indicated by its language, Rule 1.7(a)(2), like its predecessor, DR 5-101(A), is concerned with protecting the exercise of "the lawyer's professional judgment on behalf of a client," and not with protecting the lawyer's judgment in other roles the lawyer may undertake. Thus a conflict under that rule can generally be waived by the private client, as long as the lawyer can competently and diligently represent that client. N.Y. State 773 at n.3. As discussed in N.Y. State 773, the town board's own rules may affect whether the associate can take on representations that touch on matters that also come before the town board and whether, for example, the associate must recuse himself from certain votes.

OPINION 910 (03/14/2012)

TOPIC: Attorneys fees; likelihood of payment as basis for increasing hourly rate; seeking security interest and confession of judgment; amending fee agreement.

DIGEST: In a matrimonial matter, the likelihood of nonpayment of the legal fee does not alone justify charging a multiple of the Firm's normal hourly rates. The lawyer may obtain a confession of judgment from the client for legal fees already earned or take a security interest in property of the client to secure fees and expenses, under the conditions described in the opinion. The lawyer may request a client to amend a retainer agreement. Whether such amendment must meet the requirements for fee agreements under Rule 1.5 or for business transactions between the lawyer and client under Rule 1.8(i) depends on the circumstances.

RULES: 1.5(a), 1.5(b), 1.5(d), 1.8(i),

FACTS:

1. A law firm ("Firm") represents a client ("Client") who is the wife in a domestic relations matter. The Client has a balance due to the firm for services performed to date, and the Firm believes it is unlikely that the Client will be able to pay the balance until she receives a final judgment of support. The Firm has consulted an actuary, which determined that to compensate for the risk of non-payment, the Firm needs to charge the Client three times the original rate – $735 per hour rather than $245 per hour.

QUESTION:

2. May the Firm renegotiate its retainer arrangement with a matrimonial client as follows: (1) increase the hourly fee from $245 to $735, (2) have the client agree to file confessions of judgment with the appropriate court as the fees accumulate, and (3) secure the client's payment obligation with the client's share of the marital property?

OPINION:

3. This opinion first discusses whether each of the new terms would be appropriate in an original retainer agreement in a matrimonial matter and then discusses the issues surrounding renegotiation of an attorney's retainer agreement.

A. Charging three times the normal rate to compensate for the risk of non-payment

4. Rule 1.5 of the Rules of Professional Conduct (the "Rules") prohibits a lawyer from making an agreement for or charging an excessive or illegal fee. It provides that a fee is excessive when "a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive." It also sets forth a list of eight factors to be considered in determining whether the fee is excessive. These include the time and labor involved, the fee customarily charged in the locality for similar legal services, the experience, reputation and ability of the lawyer providing the services, the results obtained and whether the fee is fixed or contingent. They do not include the risk that the client will be unable to pay the fee.

5. To be sure, the list of factors is not exclusive. The Rule states that the factors to be considered include the listed factors. However, it is significant that ability to pay was not included in the listed factors (either in justifying a higher fee or in encouraging a lower fee).

6. Under Rule 1.5(a)(8), a lawyer may charge a larger fee if the fee is contingent rather than fixed. However, under Rule 1.5(d)(5), a lawyer may not charge a contingent fee in a domestic relations matter if the fee is contingent upon securing a divorce or is determined by reference to the amount of equitable distribution or property settlement. Even if there were no such prohibition, we believe a contingent fee under the Rules is one where the payment of which depends on a successful outcome of the matter, and not on the law firm's likely success in collection of the fee.

7. Therefore, the reasonableness of the hourly fee of $725 per hour depends on the factors set forth in Rule 1.5, particularly the fee customarily charged in the locality for similar legal services [Rule 1.5(a)(3)] and the experience, reputation and ability of the lawyer or lawyers performing the services [Rule 1.5(a)(7)].

8. One consideration in determining the reasonableness of the fee arrangement with the Client is the fact that New York law makes provision to assist the less monied spouse in a matrimonial case. Section 237 of the New York Domestic Relations Law provides that, in many matrimonial proceedings, the court has the discretion to direct either spouse to pay counsel fees directly to the attorney of the other spouse to enable the other spouse to carry on or defend the action. The court will consider the circumstances of the case and of the respective parties, including (1) the nature of the marital property involved; (2) any difficulties involved in identifying and evaluating the marital property; (3) the lawyer's services rendered and an estimate of the time involved; and (4) the applicant's financial status. There is a rebuttable presumption that counsel fees should be awarded to the less monied spouse. Section 237 allows an application for the award of fees and expenses at any time or times prior to final judgment, upon the filing of an affidavit with the court detailing the financial agreement between the party and the attorney, which includes the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, and any additional costs, disbursements or expenses. This Domestic Relations Law provision allows the court to determine the reasonableness of the fee arrangements.

9. In our opinion, the likelihood of nonpayment does not alone justify charging a multiple of the Firm's normal hourly rates. If the Client cannot pay the Firm's normal rates, he or she is unlikely to be able to pay three times those rates. However, if a security interest in the Client's share of the marital property and/or support payments will cover the attorneys' fees, and the lawyer has a lien or security interest in such property, then the lawyer will eventually collect the agreed-upon fee.

10. If the Client's share of the marital property or support payments is unlikely to cover the attorney's fee, and the tripling of the attorney's fee is thus an attempt to obtain a larger share of the recovery, we believe it is more likely to meet the requirements for an excessive fee.

11. Whether an hourly rate that is three times the lawyer's normal rate could ever be reasonable depends on a number of factors, including whether the lawyer's normal rate is significantly below the fee customarily charged in the locality for similar legal services and whether the lawyer has applied to

the court for an award of fees and expenses. Absent unusual factors, it seems likely that a three-fold increase in fees would produce a fee that is excessive.

B. Confession of Judgment and Security Interest in Client Property

Confessions of Judgment

12. A confession of judgment is a writing in which a debtor permits judgment against him or her to be entered by the creditor without the institution of legal proceedings. Under New York law, confessions of judgment may be for the purpose of paying a debt, or for securing a debt. *See* CPLR 3218. Although Rule 3218 of the CPLR authorizes a confession of judgment for amounts to become due, and authorizes confessions of judgment either as a payment device or as security, both ethics opinions and case make clear that a confession of judgment to secure attorneys fees may be taken only as a form of security and not of payment, and that it may be taken only to secure payment for services previously rendered. *See* N.Y. County 430 (1950) (confession of judgment against realty as security for fees and not as payment of the fee); N.Y. State 474 (1977) (without passing on the legal effect of an affidavit confessing judgment that was signed prior to performance of legal services, an attorney should not obtain such an affidavit until after having rendered services); *Katlowitz v. Halberstam*, 284 A.D.2d 306, 284 N.Y.S.2d 438 (2001) (an attorney's use of a confession for unearned and prospective fees is impermissible [citing N.Y. State 474]).

13. In N.Y. State 474, we stated that a confession of judgment was not unethical, as long as (1) the lawyer obtained it after having rendered the services, (2) the lawyer complied with the requirements of applicable law, including CPLR 3218, (3) the amount of the confession is commensurate with the value of the services rendered, and (4) the client clearly understands the character, effect and purpose of the confession of judgment. This includes the potential effect of a confession of judgment on the client's credit standing and employment opportunities. The opinion is based on EC 5-7 and DR 5-103(A) (1), the prohibitions on lawyers acquiring a proprietary interest in the client's cause of action, and the predecessors to Rule 1.8 (i).

14. Methods of securing payment of fees that involve court action, such as a confession of judgment, have been given special scrutiny because of the admonition in lawyer codes, formerly in EC 2-23 and now in Comment 9 to Rule 1.5, which provides, "A lawyer should seek to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject."

15. In addition, Rule 1.5(d)(5)(iii) contains specific provisions with respect to confessions of judgment or security interests in a matrimonial matter. It prohibits a lawyer from charging a fee in a domestic relations matter if, "(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer

agreement and approval from a tribunal after notice to the adversary." The requirements of this rule are similar to those of the applicable court rules.[9]

Security Interests

16. Rule 1.8(i) authorizes a lawyer to acquire a lien "authorized by law" to secure the lawyer's fee or expenses. As noted in Comment 16, this provision includes liens granted by statute, liens originating in common law and liens acquired by contract with the client. One such lien granted by statute is the "charging lien," granted by Section 475 of the Judiciary Law, which attaches to funds created by the attorney's efforts.[10] The question raised in this opinion involves a charging lien. However, while such a lien would appear to be authorized implicitly by Rule 1.8(i), as noted above, Rule 1.5(d)(5)(iii) prohibits a lawyer from entering into a retainer agreement containing a security interest or other lien without approval from a tribunal after notice to the adversary. If the proposed lien did not involve the property created by the attorney's efforts in the representation, but rather involved a contractual security interest in other property, then the acquisition of such lien would be a business or financial transaction with a client governed by the requirements of paragraph 1.8(a). *See* Rule 1.8, Cmt 16.

C. Amending a Fee Arrangement

17. The Rules stress the importance of fee agreements between the lawyer and client. Rule 1.5(b) provides:

> A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule.

See also 22 N.Y.C.R.R. Part 1215 (court rule requiring engagement letters).

18. The court rules governing matrimonial actions require that fee agreements in such actions be in writing, and signed by both the client and the attorney. *See* 22 NYCRR 1400.3 ("Part 1400.3"). In actions in Supreme Court, a copy of the signed agreement must be filed with the court within 15 days of execution, along with the statement of net worth. Part 1400.3 sets forth the information that must

9 Section 202.16 of the Uniform Rules of the Supreme Court and County Court – the rule governing matrimonial actions – contains a special procedure for obtaining a security interest in a matrimonial action. ("An attorney seeking to obtain an interest in any property of his or her client to secure payment of the attorney's fee shall make application to the court for approval of said interest on notice to the client and his or her adversary. The application may be granted only after the court reviews the finances of the parties and an application for attorney's fees.") Similarly, Section 1400.5 of the Joint Rules of the Supreme Court, Appellate Division, 22 NYCRR Section 1400.5, contains the procedure for obtaining a confession of judgment or security interest ("An attorney may obtain a confession of judgment or promissory note, take a lien on real property or otherwise obtain a security interest to secure his or her fee only where: (1) the retainer agreement provides for a security interest, (2) notice is given to the other spouse, (3) the court grants approval after submission of an application for counsel fees.") These rules are designed to ensure that the court is involved in approving a security interest or confession of judgment, with input from all relevant parties and due regard to the financial condition of the parties and whether a grant of legal fees from the spouse is appropriate.

10 Under Section 475, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in the client's favor, and the proceeds thereof in whatever hands they may come.

be included in the fee agreement, which includes (1) the hourly rate of each person whose time may be charged to the client; (2) whether and under what circumstances the attorney might seek a security interest from the client, which can be obtained only upon court approval and on notice to the adversary; and (3) under what circumstances the attorney might seek to withdraw from the case for nonpayment of fees, and the attorney's right to seek a charging lien from the court.

19. As a comment to Rule 1.8 states, ordinary fee arrangements between the lawyer and client reached at the inception of the client-lawyer relationship are governed by Rule 1.5. *See* Rule 1.8, Comment [4C]. Retainer agreements, like all contracts, may be amended with the agreement of the lawyer and client. However, such an amendment raises ethical concerns, because lawyer is often in a position to take unfair advantage of the client. The client may expect the lawyer to exercise professional judgment on his or her behalf, and may believe that any proposed amendment is designed to be in the client's best interest. Moreover, the client is dependent upon the continued participation of the lawyer to achieve the goals of the representation and often has considerable sunk costs at the time an amendment is proposed. Therefore, the client may feel undue pressure to accede to the lawyer's wishes. The Rules consider certain amendments to be normal fee negotiations between the lawyer and client, which are subject to Rule 1.5, while others are considered a "business transaction with a client" that are subject to Rule 1.8.[11]

20. A number of factors will determine whether the higher scrutiny of Rule 1.8 is warranted. Since the lawyer is the drafter of the contract and should be expected to anticipate most changes in the representation, the first consideration is whether there has been a material change in circumstances. A related factor is the length of time since the contract was entered into, which will affect the reasonableness of the lawyer's failure to anticipate the changed circumstances in the original contract. For example, if the representation was expected to be completed within a year, and the contract therefore did not make provision for the law firm's customary annual increases in billable rates, an amendment a year later would be tested under Rule 1.5, and not Rule 1.8.

21. The sophistication of the client must also be considered. If client is a frequent user of legal services, he or she may be in a much better position to determine the reasonableness of the proposed amendment. *See* N.Y. State 599 (1989) (retainer agreement with a client of limited education or experience).

22. Another factor is whether the amendment benefits the client. (New York case law often applies higher scrutiny to modifications of retainer agreements that "are beneficial to the attorney".) *See, e.g. Baye v. Grindlinger*, 78 A.D.2d 60, 432 N.Y.S.2d 624 (2d Dep't 1989), *Naiman v. N.Y. Univ. Hosps Ctr.*, 351 F. Supp.2d 257, 264 (S.D.N.Y. 2005). For example, where the client is no longer able to pay an agreed-upon hourly rate, and the contract is amended to provide for a contingent fee, such an amendment has been held to be subject to Rule 1.5 rather than Rule 1.8. ABA Formal Opin. 11-458 (2011).

11 Courts reviewing the reasonableness of fees may give extra scrutiny to amended fee arrangements where they believe the circumstances gave the client little choice but to agree. This extra scrutiny is different from the higher standards under Rule 1.8, although the outcome may be the same. *See, e.g. Baye v. Grindlinger*, 78 A.D.2d 60, 432 N.Y.S.2d 624 (2d Dep't 1989) (where amendment was on eve of trial, court requires attorney to show that the terms are fair and reasonable and fully understood by the client).

23. The circumstances in which the amendment is requested may also be significant. For example, a change requested on the eve of trial puts extraordinary pressure on the client to accede. *See Baye v. Grindlinger*, supra, N.Y. State 719 (1999) and cases cited therein (amendment after threat of withdrawal).

24. Yet another factor is whether the client has deliberately disregarded an agreement or obligation to the lawyer as to fees or expenses, or otherwise taken action that would authorize the lawyer to withdraw from the representation. *See* N.Y. State 783 (2005) (where the client deliberately disregards an agreement to pay legal fees, even though the retainer agreement is silent as to interest on delinquent charges, the lawyer may condition continued representation on the client's agreement to prospectively pay interest on past due balances for future services, in compliance with the predecessor to Rule 1.5). The opinion notes that amending the retainer to provide for interest is more beneficial to the client than withdrawal by the lawyer and does not suggest that the predecessor to Rule 1.8(i) is applicable. N.Y. State 598 (1988) (discusses when a failure to pay a legal fee is "deliberate").

25. Part 1400.3 requires that any changes in the lawyer's hourly rate or fees be incorporated into a written agreement constituting an amendment to the original agreement, which must be signed by the client before it may take effect. Thus, it clearly anticipates that the fee agreement may be amended.

26. Certain amendments to a retainer agreement are considered business transactions with the client. For example, Comment 16 to Rule 1.8 provides that, when a lawyer negotiates a contractual security interest in property other than that recovered through the lawyer's efforts in the litigation, the acquisition of the security interest is a business or financial transaction with a client that is governed by the requirements of Rule 1.8(a). *See* also ABA 11-458 (2011) (changes in existing fee arrangements that involve a lawyer's acquiring an interest in the client's business, real estate or other nonmonetary property normally will require compliance with Rule 1.8(a)), ABA 02-472 (the client must be afforded the protections of Rule 1.8(a) in the structuring of a secured obligation); N.Y. City 1988-7; N.Y. City 1988-4 (1987); Pa. Eth. Op. 91-08 (1991) (asking a client to sign a promissory note containing a confession of judgment invokes Rule 1.8).

27. If Section 1.8(a) is applicable, the following requirements apply:

> (1) the transaction must be fair and reasonable to the client and the terms of the transaction must be fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client must be advised in writing of the desirability of seeking, and be given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
>
> (3) the client must give informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

28. The lawyer has the burden of demonstrating that the terms of the amendment are fair and reasonable. Although Rule 1.8(a) requires that the client be given a reasonable opportunity to seek the advice of independent legal counsel in the negotiation of a business transaction with the lawyer, it is

not clear whether a client who cannot afford to pay Firm 1 will have a meaningful opportunity to employ a second law firm. However, since an amendment to a retainer agreement in a matrimonial action must be approved by the court on notice to the adversary, we believe that the interests of the client are subject to sufficient independent scrutiny.

29. In addition, it goes without saying that the lawyer must explain the lawyer's proposed modification of a fee arrangement, and advise the client that he or she need not agree to pay the modified fee to have the lawyer continue the representation. This disclosure is necessary to enable the client to make an informed decision about the client's ability and willingness to pay the modified fee for continued representation.

CONCLUSION:

30. The likelihood of nonpayment of the legal fee does not alone justify charging a multiple of the Firm's normal hourly rates. A law firm in a matrimonial matter may obtain one or more confessions of judgment from the client for legal fees already earned provided that the lawyer has explained the character of the confession of judgment and the effect on the client's credit standing, and the firm may obtain a statutory or contractual security interest in property of the client to secure legal fees and expenses. In either case, the confession of judgment or security interest must be provided for in a written retainer agreement signed by the client and must be approved by the tribunal after notice to the adversary. A lawyer may request a client to amend a retainer agreement. Whether such an amendment must meet the requirements for fee agreements under Rule 1.5 or for business transactions between the lawyer and client under Rule 1.8(i) depends on the circumstances in which the amendment is requested and the nature of the amendment. Any amendment of a retainer agreement in a matrimonial matter must comply with Rule 1.5(d)(5) and applicable court rule.

(17-11)

OPINION 911 (03/14/2012)

TOPIC: Sharing legal fees and undertaking employment with an out-of-state entity that includes non-lawyer owners and managers

DIGEST: A New York lawyer may not practice law principally in New York as an employee of an out-of-state entity that has non-lawyer owners or managers.

RULES: 5.4(a) & (d); 8.5(b)

QUESTION:

[1] Lawyers admitted to practice in New York ask whether they may enter into a business relationship with a United Kingdom ("UK") entity under the following circumstances. The UK entity would be formed as an Alternative Business Structure under the UK's Legal Services Act, which permits entities with non-lawyer supervisors and owners to render legal services. The entity would include UK non-lawyers in supervisory and ownership positions, raise capital in private equity financing, and have a professional management team. The New York lawyers would establish a New York office, where they would represent New York clients. They would be employees of the UK entity and would hold stock options and, in some cases, vested shares in the UK entity. Lawyers in the New York office would adhere to confidentiality rules and would not share confidences with UK non-lawyer managers. The entity would adhere to UK rules as well.

OPINION:

[2] The inquiry is governed by Rule 5.4(a), which forbids a lawyer from sharing fees with a non-lawyer, and Rule 5.4(d), which forbids a lawyer from practicing law for profit with an entity that includes a non-lawyer owner or member. These provisions would clearly be violated by the proposed arrangement.

[3] As we discussed in N.Y. State 889 (2011), these provisions would not necessarily apply to New York-admitted lawyers who principally practice law in another jurisdiction in which they are also licensed to practice. Rule 8.5(b) provides that the New York Rules govern the conduct of lawyers who are licensed only in New York, but that lawyers admitted in a second jurisdiction are generally subject to the rules of the particular jurisdiction in which they principally practice. Therefore, we concluded, a lawyer admitted in both New York and the District of Columbia but who maintains an office and principally practices in the District of Columbia would be governed by the more liberal provisions of the District of Columbia, even if the lawyer undertakes occasional litigation in New York.

[4] Under the proposed arrangement, in contrast, New York's Rules, including Rule 5.4, would govern the propriety of the arrangement with the UK entity. Even if the lawyers in question are also licensed in the UK, the predominant effect of their conduct, in practicing law from a New York office on behalf of New York clients, would be in New York.

CONCLUSION:

[5] A New York lawyer may not practice law principally in New York as an employee of an out-of-state entity that has non-lawyer owners or managers. (3-12)

OPINION 912 (03/15/2012)

TOPIC: Publishing criticism of other attorneys

DIGEST: The Rules of Professional Conduct do not prohibit a lawyer from hosting or participating in a blog dedicated to publishing factually accurate criticism of another lawyer's professional conduct.

RULES: 8.2, 8.3, 8.4

QUESTION:

1. May a lawyer host or participate in an internet blog established as a forum for lawyers to recount their experiences in dealing with an adversary whose past professional conduct is considered by them to have been unethical, harassing or abusive?

OPINION:

2. Although Rule 8.2 of the New York Rules of Professional Conduct (the "Rules") expressly addresses lawyer criticism of judges ("A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office"), there is no comparable provision that specifically addresses public criticism of a lawyer by a lawyer. Therefore, any ethical restraint on such expression would, under the Rules, necessarily derive from the more general provisions of Rule 8.4(c), prohibiting a lawyer from engaging in conduct "involving dishonesty, fraud, deceit or misrepresentations", or Rule 8.4 (d), prohibiting a lawyer from engaging in conduct that is "prejudicial to the administration of justice."

3. Assuming that the blog criticism is sufficiently accurate and in context not to run afoul of Rule 8.4(c), the question is whether there are any limitations arising from Rule 8.4(d) on a lawyer's factually sustainable public criticism of another lawyer. We believe there are none. Still, we add two observations:

4. First, the "Standards of Civility" adopted for the Uniform Court System provide: "Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony towards other counsel, parties or witnesses." 22 NYCRR part 1200, App. A, I(B). Although these standards are aspirational, and not intended as rules to be enforced by sanction or disciplinary action, they nonetheless elaborate a norm of acceptable behavior that excludes gratuitous vulgarity, disparagement and vituperation. We also urge the inquirer "to avoid petty criticisms, and to make critical statements only when motivated by a desire to improve the quality of . . . the legal system in general, and then to present his [or her] views only in a temperate, dignified manner." *Cf.* N.Y. City 1996-1 (holding a lawyer may write an article containing well-founded criticisms of a sitting judge for abusive and intemperate trial conduct, notwithstanding that New York State Commission on Judicial Conduct found no cause for pursuing an investigation into the same allegations of misconduct).

5. Second, Rule 8.3(a) imposes a reporting requirement upon a lawyer who "knows that another lawyer has committed a violation of the Rules . . . that raises a substantial question as to that lawyer's

honesty, trustworthiness or fitness as a lawyer." To the extent that the negative information to be published about an attorney's professional conduct is both significant and truthful, Rule 8.3(a) may require reporting such misconduct to a "tribunal or other authority empowered to investigate or act upon such violation."

CONCLUSION:

6. The Rules of Professional Conduct do not prohibit a lawyer from hosting or participating in a blog dedicated to publishing factually accurate criticism of another lawyer's professional conduct.

(57-11)

OPINION 913 (03/22/2012)

TOPIC: Acceptance of Securities as a Legal Fee

DIGEST: A lawyer may accept an equity interest in a client if the lawyer complies with the Rule of Professional Conduct governing business transactions with clients and the acceptance does not otherwise create a conflict for the lawyer or result in an excessive fee.

RULES: 1.5(a), 1.7(a), 1.7(b), 1.8(a)

QUESTION:

[1] The inquiring lawyer asks whether a lawyer may accept as compensation for legal services a hybrid fee combining a reduction in the lawyer's customary hourly time charges with an equity interest in the client or the client's company. Subject to the caveats below, we conclude that the Rules of Professional Conduct do not invariably proscribe such a fee arrangement.

OPINION:

[2] The Rules of Professional Conduct do not confine a lawyer to charging a legal fee based on an hourly rate or other time-based metric. The principal general limit on a lawyer's compensation for legal services is that, under Rule 1.5(a), a lawyer may not accept a fee the amount of which, upon review of the facts, would leave a reasonable lawyer "with a definite and firm conviction that the fee is excessive." Among the facts that Rule 1.5(a) identifies as relevant are the time, labor, and skill required; the novelty and difficulty of the services requested; the lawyer's inability, by reason of the representation, to represent other clients; the amount at stake and the results the lawyer achieves; the fee typically charged for comparable services in the locality where the lawyer practices; the time period in which the lawyer must complete the assignment; the lawyer's experience and reputation; and whether the fee is fixed or contingent. It follows from Rule 1.5(a) that any or all of these factors may properly influence the fee a lawyer charges for legal services. ABA 11-458.

[3] The inquiry poses the question whether Rule 1.5 alone governs when the lawyer's fee consists, in whole or in part, of an equity interest in the client or client's company. Whether a lawyer's acceptance of securities as a legal fee implicates issues under federal or state securities laws or other statutory regimes is a question beyond the scope of this Committee's charter. If a lawyer's acceptance of such consideration as a fee is legally permissible, then in our view it is necessary to go beyond Rule 1.5. The starting point for analysis is found in Rule 1.8(a), which provides:

A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

> (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

> (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

[4] Rule 1.8(a) invites a twofold inquiry. The first is whether the transaction itself is one in which the lawyer and client have differing interests *and* in which the client expects the lawyer to exercise the lawyer's independent professional judgment on the client's behalf. If the answers are yes, then, as a second step, the lawyer must assure that the terms are fair and reasonable to the client and fully disclosed in a writing that includes not only the deal's essential terms and the lawyer's role in shaping them, but also the desirability of the client seeking independent legal advice.

[5] The applicability of Rule 1.8(a) to fee arrangements in which a lawyer accepts an equity interest in the client is not self-evident. Every fee arrangement with a client is in a literal sense a business transaction with that client. At the outset of the representation, a prospective client and a lawyer obviously have "differing interests" in negotiating the lawyer's fee. But the second threshold condition of Rule 1.8(a) is less obvious. The language in the New York version of Rule 1.8(a), as in its predecessor DR 5-104, makes its application contingent on the client's expectation that the lawyer is exercising independent professional judgment on the prospective client's behalf in negotiating the lawyer's fee arrangement. For this reason, some authorities opined that Rule 1.8(a)'s predecessor in the Code of Professional Responsibility was not meant to apply to fee arrangements formed at the start of the representation, that is, before an attorney-client relationship formally exists. C. Wolfram, *Modern Legal Ethics* § 8.11.1 at 481-82 (1986) (fiduciary standard arises only after relationship is formed); N.Y. City 88-7 (1988) (establishing the attorney-client relationship is not a business transaction under Code).

[6] Nevertheless, we conclude that Rule 1.8(a) applies to negotiation of a fee in which a lawyer is to receive an equity interest in a client or the client's company. Comment [4C] accompanying Rule 1.8(a) says in relevant part:

> This Rule also does not apply to ordinary fee arrangements between client and lawyer reached at the inception of the client-lawyer relationship, which are governed by Rule 1.5. The requirements of the Rule ordinarily must be met, however, when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee. For example, the requirements of paragraph (a) must ordinarily be met if a lawyer agrees to take stock (or stock options) in the client in lieu of cash fees. Such an exchange creates a risk that the lawyer's judgment will be skewed in favor of closing a transaction to such an extent that the lawyer may fail to exercise professional judgment as to whether it is in the client's best interest for the transaction to close. This may occur where the client expects the lawyer to provide professional advice in structuring a securities-for-services exchange. If the lawyer is expected to play any role in advising the client regarding the securities-for-services

exchange, especially if the client lacks sophistication, the requirements of fairness, full disclosure and written consent set forth in paragraph (a) must be met.

[7] In the common situation involving the offer of an equity interest as a legal fee, of which the inquirer is an example, the client is a nascent venture lacking a public market and offering consideration of indeterminate value and liquidity in lieu of cash. In these instances, it is not at all unreasonable to suppose that the client looks to the lawyer for independent judgment. In contrast to the improbable scenario of a sophisticated public-company client offering its openly-traded stock for a fee, the more characteristic offeror is a cash-poor entrepreneur in quest of capital to launch a business. Acceptance of stock as a fee enables the entrepreneur to obtain legal advice for the venture and exhibits the lawyer's confidence in the client's chances. The client may be looking to the lawyer for independent judgment on forming the enterprise with an eye toward an eventual public offering. These are the circumstances in which Rule 1.8(a) plays an important role. *But see* Rule 1.8(a) Cmt. [4B] (the Rule does not apply to "standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others," for instance a lawyer obtaining a mortgage from a bank the lawyer represents on other matters).

[8] Neither the Model Rules of Professional Conduct nor the Rules as adopted in the majority of jurisdictions prefaces the application of Rule 1.8(a) as explicitly as does New York's to those circumstances in which the client expects the lawyer to exercise independent professional judgment on the client's behalf. Still, it matters that every recent opinion to consider the question has said that Rule 1.8(a) or its predecessor, with or without New York's preamble, applies to transactions in which a lawyer accepts an equity interest as part or all of a legal fee. *E.g.,* ABA 00-418; D.C. Opinion 300 (2000); N.Y. City 2000-3 (with some qualification and calling it the "prudent" course in all events); Pennsylvania Opinion 2001-100; Utah Opinion 98-13; *see* II RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126 cmt. A, at 323 (2000) (more restrictive rules "when a lawyer takes an interest in the client's business as payment of all or part of a legal fee"); I G. Hazard & W. Hodes, *The Law of Lawyering* § 12.5 at 12-15 (2005-2 Supp.) (both Rules 1.5 and 1.8 "are applicable when a lawyer contracts to receive all or part of her fee in the form of an interest in the client's venture"); MODEL RULES OF PROFESSIONAL CONDUCT 1.8, cmt. a.; *cf. Iowa Supreme Court Attorney Disciplinary Board* v. *Kaiser*, 736 N.W.2d 544, 2007 Iowa Sup. LEXIS 93 (2007) (suspending lawyer for acquiring equity interest in client without compliance with DR 5-104 as written in New York).

[9] A recent decision of the Appellate Division in the First Department supports this conclusion. In *Matter of Ioannou*¸ 2011 NY Slip Op 7942, 2011 N.Y. App Div. LEXIS 7792 (Nov. 10, 2011), the Court suspended a lawyer for three months for borrowing money from a former client without heed to the requirements of DR 5-104(a), of which Rule 1.8(a) is a copy. There, the lawyer had represented the client in obtaining a very favorable settlement of a personal injury action. A year later, the onetime client asked the lawyer for some advice about an aspect of the settlement. Two weeks after giving this advice, the lawyer solicited and obtained an interest-free loan from the onetime client. While stressing that DR 5-104(a) (and thus presumably Rule 1.8(a)) does not necessarily "apply to every transaction with a former client," the Court ruled that the "former client's relative lack of sophistication in business matters, the personal nature of the former professional relationship, the importance to the former client of the matter in which the [lawyer] represented him, and the fact that the former client had sought [the lawyer's] advice on a matter related to the former representation only about two weeks

before [the lawyer] proposed the transaction" created a reasonable expectation on the former client that the lawyer would be exercising independent professional judgment for the lender in the transaction. *See Schlanger* v. *Flaton*, 218 A.D.2d 597 (1st Dep't 1995) (granting summary judgment for client rescinding equity interests and shareholder agreements that lawyer obtained in violation of DR 5-104(A)).

[10] We therefore join other ethics committees and authorities in concluding that a lawyer who wishes to accept an equity interest in a client must comply with the provisions of Rule 1.8(a). This means that the terms of the transaction must be fair and reasonable to the client, fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client, with the client being advised of the desirability of seeking independent legal advice and given a reasonable chance to do so, and the client signing a writing that describes the transaction and the lawyer's role in the deal, including whether the lawyer was acting for the client in the matter.

[11] Whether particular terms are "fair and reasonable" to the client is a fact-specific inquiry for which general rules are of limited aid. If there is a market for the stock, be it public or private, the market may offer a fair and reasonable measure. In some instances, comparisons may offer guidance if other professionals are providing so-called "sweat equity." In the absence of some third-party yardstick, some of the criteria set forth by the Utah Ethics Committee, in its Opinion 98-13, may usefully influence the fairness and reasonableness of the transaction, among them the liquidity of the stock or the risks that the stock may remain illiquid for the foreseeable future; the present and anticipated value of the stock, including the value of any intellectual property that the enterprise may own or control and the risks of adverse regulatory or judicial rulings affecting those values; any restrictions placed on the securities by law or contract; the percentage ownership of the enterprise that the securities now or in the future (*e.g.,* if the currency is warrants or options) may represent; and, as a related matter, whether the lawyer's stake in the company is passive, the opportunities for control or participation in management, and the structural restrictions on such matters. To these must be added the factors, listed above, identified in Rule 1.5(a).

[12] Whether a transaction in securities may be deemed "fair and reasonable" under Rule 1.8(a) is analytically distinct from whether the fee may be "excessive" under Rule 1.5(a), *see* Rule 1.8(a) Cmt. [4F], though in the end the relevant considerations are substantially similar. Unless some obvious metric exists to assess the fairness and reasonableness of a securities transaction as a legal fee, the resolution of that issue is unlikely to be amenable to any fixed determination. We agree with the ABA that, "[f]or purposes of judging the fairness and reasonableness of the transaction and its terms," the controlling consideration should be "the circumstances reasonably ascertainable at the time of the transaction." ABA 00-418. The same is true of any assessment of whether the fee may be considered "excessive" under Rule 1.5(a). "An equity stake in a corporation that turns out to be successful might seem excessive in relation to the services rendered if the value is determined only after the success is achieved." N.Y. City 2000-3. "But to make the evaluation at that end point – and with the wisdom of hindsight – would not value the fee that the client agreed to pay or the lawyer accepted, because it would eliminate the risk that the lawyer undertook that the venture would fail and the securities, *i.e.*, the fee, would have little or no value." *Id.* For this reason, we believe that whether a fee is excessive under Rule 1.5(a) is an assessment about the value of the fee at the time the fee is set. *Accord* I RESTATEMENT § 34 cmt. c at 250; *id.* § 126 cmt a.

[13] Another separate but very important question is whether the business transaction involving the acceptance of an equity interest as a legal fee occasions a conflict of interest between the lawyer and the client. Rule 1.7(a) prohibits a lawyer from undertaking an engagement if "a reasonable lawyer would conclude" that there is a "significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Rule 1.7(b) qualifies this prohibition by allowing to proceed if the "lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation." *See* Rule 1.8(a) Cmt. [4D] (explaining reasons for concern about conflicts arising from equity interests). Rule 1.7(b) requires also that the lawyer obtain the client's informed consent, which may involve information beyond that required by Rule 1.8(a). *See* Rule 1.8(a), Cmt. [4E].

[14] Subject to this proviso, if the lawyer concludes that the lawyer may competently and diligently represent the client in the matter, then the lawyer may do so upon the client's fully informed consent. We believe that this informed consent requires disclosure of, among other things, the risks inherent in the representation of a client by a lawyer with a personal financial stake at risk, including the chance that the financial interests could affect the lawyer's judgment; the conflicts that could emerge from the possible tension between lawyer as counselor and lawyer as stockholder; and the risks that privileges could be in jeopardy unless the communications between the two concern confidential legal advice.[12]

CONCLUSION:

[15] In sum, a lawyer may accept an equity interest in a client or a client's company if the terms and conditions of the business transaction are fair and reasonable to the client, fully disclosed to the client in a writing the client may readily understand that advises the client of the desirability of seeking, and gives the client the reasonable chance to seek, independent professional counsel, and the client consents in a writing signed by the client that fully discloses the terms of the transaction and the lawyer's role in the matter.

(29-11A)

12 The foregoing analysis is intended to apply only to the negotiation of the fee arrangement at the outset of the representation. There may be other considerations that must be brought to bear in negotiations over the modification of a prior arrangement during the course of the representation. The current inquiry does not raise these issues. *See* N.Y. State 910 (2011).

OPINION 914 (03/23/2012)

TOPIC: Conflicts among members of a Legal Aid Conflicts Panel

DIGEST: Members of a panel of lawyers established to provide legal assistance to indigent clients when the Legal Aid Society has a conflict are not members of the same firm for purpose of conflict analysis as long as the panel members are independently engaged by, and independently render legal services to, their indigent clients.

RULES: 1.0(h), 1.6(a), (b), 1.7, 1.8(f), 10

FACTS:

1. The inquirer practices in a county that has an agreement with the Legal Aid Society to provide legal assistance to indigent clients in criminal and Family Court matters. The lawyer is a member of a Legal Aid Conflicts Panel, an entity formed to provide legal representation to indigents when the Legal Aid Society has a conflict preventing the Society from having one of its staff attorneys undertake the representation.

QUESTION:

2. Is a conflict that disqualifies a member of the Conflicts Panel imputed to, and thereby disqualify, all members of the Panel?

OPINION:

3. When acting as a "qualified legal assistance organization," the Legal Aid Society falls within the definition of "law firm" under the Rules of Professional Conduct. As a result, absent some exception, a conflict infecting any one attorney-employee of the Legal Aid Society is imputed to all others in the same office. Rules 1.0(h), 1.7, 1.10. To meet the needs of indigent clients when the Legal Aid Society has a conflict, the county has established a Legal Aid Conflicts Panel comprised of "supervising attorneys as well as additional contract attorneys." The contract attorneys are paid a set salary to handle all representations in particular courts.

4. The issue here is whether the Legal Aid Conflicts Panel constitutes a "law firm" under the Rules. Rule 1.0(h) defines "law firm" to include, but not to be limited to, "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization." We do not think that Legal Aid Conflicts Panels, as we understand their composition, share the characteristics of these other affiliations that prompt the Rules to treat the latter as one for conflicts purposes.

5. The characteristics of conventional law firms, government and corporate legal departments, qualified legal organizations, and the like are several. All the lawyers practicing together in such entities are ordinarily thought to represent the client(s) that each lawyer in the group represents. The client has an attorney-client relationship not just with an individual lawyer but with the partnership, office, or organization of which the individual lawyer is a part. Each lawyer in the firm owes the same

fiduciary duty to the entity's client(s) as any other lawyer. The sharing of a client's confidential information within the partnership, office, or organization is presumed. The lawyers typically work together in one or more common locations, in which client files are maintained. These factors, among others, are strong indicia that lawyers practicing together comprise a "law firm."

6. We understand Legal Aid Conflicts Panels to operate very differently. In N.Y. State 643 (1993), we addressed a series of questions about Legal Aid Conflicts Panels, including the propriety of establishing them, the rules on insuring them, and the maintenance of their files. In that instance, the county had a contract with the local bar association to provide counsel for indigent clients in conjunction with a qualified legal assistance organization. This joint project formed a Conflicts Panel to handle representations when the project had a conflict. We described our understanding of the Panels this way:

> In representing eligible clients referred to them, conflicts panel lawyers would represent their clients independently from the project and its lawyers. Conflicts panel lawyers would not discuss client confidences or secrets with the project's lawyers, *see* DR 4-101(B), although conflicts panel lawyers would convey anonymous statistical information about the referred matters to the project to satisfy the project's reporting requirements. *See* ABA 334 ¶ 3 (1974); EC 4-3. Neither the project nor its lawyers would exercise any supervision or control over the legal services provided by conflicts panel volunteers. *See* DR 5-107(B). The assigned conflicts panel lawyer would keep the file pertaining to the representation in the lawyer's own office so long as the matter is active; when the representation is completed, the file would be stored at the bar association headquarters.

7. Although the citations to the old Code of Professional Responsibility are now stale, the principles remain the same in the Rules of Professional Conduct. Conflicts Panel lawyers represent their clients independently from the Legal Aid Society and its lawyers. Conflicts Panel lawyers may not discuss client confidences or secrets with the Society's lawyers, *see* Rule 1.6(a), although Conflicts Panel lawyers may convey anonymous statistical information about the referred matters to the Society to satisfy the Society's reporting requirements. *See* ABA 334 ¶ 3 (1974); Rule 1.6(b)(6). Neither the Society nor its lawyers may exercise any supervision or control over the legal services provided by Conflicts Panel lawyers. *See* Rule 1.8(f). The assigned Conflicts Panel lawyer should keep the file pertaining to the representation in the lawyer's own office so long as the matter is active, and provide for secure storage thereafter.

8. Based on these circumstances, we concluded in N.Y. State 643 that, "so long as conflicts panel volunteers are independently engaged by, and independently render legal services to, their indigent clients, there is no reason to regard conflicts panel lawyers as being part of the same law firm either *with one another* or with the project itself for conflict of interest purposes." (Emphasis added.)

9. The only difference between the facts set out in N.Y. State 643 and those presented here is that the former referred to Panel members as "volunteers" – suggesting that they were not paid – whereas in the inquiry the Panel members are under a contract that pays them a salary. This difference does not matter as long as the Panel lawyers act independently of the Society (and the county) in keeping with Rule 1.8(f). The Rule provides that a lawyer may not accept compensation for representing a client

from one other than the client unless (a) the client consents, (b) there is no interference with the exercise of the lawyer's independent professional judgment on the client's behalf, and (c) the lawyer maintains the confidentiality of the client's confidential information. This same Rule governs the day-to-day workings of the Legal Aid Society employees, who are usually salaried employees representing indigent clients under government contract. We see no reason why paying the conflicts counsel should alter the analysis that they are independent contractors who do not become a "law firm" within the meaning of the Rules merely by serving on the Conflicts Panel.

CONCLUSION:

10. As long as members of a Legal Aid Conflicts Panel act as independent counsel to their assigned indigents, the Panel does not qualify as a "law firm" within the meaning of Rule 1.0(h), and hence a conflict disabling one member of the Panel would not be imputed to other Panel members for conflicts purposes.

(11-11)

OPINION 915 (03/27/2012)

TOPIC: Links to and from a Law Firm's Website

DIGEST: Assuming relevant advertising rules are adhered to, a law firm's website may link to the website of a nonlegal entity, and vice versa.

RULES: 1.0(a), 1.0 (c), 7.1

FACTS:

1. The inquirer is a member of a law firm that has formed a separate consulting entity that performs nonlegal services. He inquires whether the websites of the law firm and the separate consulting entity can link to each other.

QUESTIONS:

2. May a law firm's website contain links to a website of a nonlegal consulting entity formed by the law firm? May the nonlegal consulting entity's website contain links to the law firm's website?

OPINION:

3. As a general matter, it is ethically permissible for a lawyer to link the lawyer's website to a third party's website, and *vice versa.* It should be noted, however, that the New York Rules of Professional Conduct broadly define "advertisement" to include "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." *See* Rule 1.0(a). Furthermore, a subcategory of "communications," called a "computer-accessed communication," specifically includes weblinks. *See* Rule 1.0(c). Therefore, if the primary purpose of a particular link is to facilitate the retention of the services of a lawyer or law firm, the link and the related text are "advertisements" under the Rules.

4. An attorney is prohibited from participating in the use or dissemination of any advertisement that (1) contains statements or claims that are false, deceptive, or misleading, or (2) violates any Rule, including, but not limited to, the rules on lawyer advertising. *See* Rule 7.1. The relevant rules include, for example, a provision requiring that advertisements be pre-approved by the attorney and retained by the attorney for a specified period. Rule 7.1(k). In addition, assuming both links are advertisements, the home pages of the websites of the law firm and the nonlegal consulting entity must be labeled "Attorney Advertising." Rule 7.1(f); *see also* Rule 8.4(a) (a lawyer shall not violate the Rules "through the acts of another").

5. If a link's primary purpose is not to facilitate the retention of a lawyer or law firm, it would not be an "advertisement" under the Rules. *See* Rule 1.0(a), *supra*. This could be the case where, for example, the link on the nonlegal consulting entity's website is created primarily to provide biographical information concerning the entity's constituents, or to provide access to a document contained on the law firm's website.

6. It must be noted, however, that Rule 5.7 contains various rules relating to nonlegal services provided by lawyers. Rule 5.7(a)(1) and (2) apply if an attorney is providing both legal and nonlegal services to clients. Under Rule 5.7(a)(1), if the nonlegal services are "not distinct" from the legal services provided by the lawyer to the client, then the New York Rules of Professional Conduct ("Rules") apply to the provision of both legal and the nonlegal services. Under Rule 5.7(a)(2), if the nonlegal services and the legal services provided by the lawyer to the client are "distinct" from each other, then the Rules apply to the provision of legal and nonlegal services only "if the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship." In this case however, because the lawyer owns or controls the non-legal entity the test is not distinctness. Rule 5.7(a)(3), which applies when "a lawyer or law firm . . . is an owner, controlling party or agent of, or . . . is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person," states that the lawyer or law firm is subject to the Rules with respect to the nonlegal services "if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship." Since Rule 5.7(a)(4) creates the presumption that a person receiving nonlegal services "believes the services to be the subject of a lawyer-client relationship", here the advertising rules will apply, as an effective notice to a person receiving the services as contemplated by Rule 5.7(a)(4) cannot be given in the advertising context where the person is unknown.

7. If any of the above subdivisions to Rule 5.7 pertain to the provision of services by a nonlegal consulting entity, the Rules, including those pertaining to advertising, would apply to the website of the nonlegal consulting entity. *See* N.Y. State 832 (2009).

CONCLUSION:

8. A law firm's website may contain links to a website of a nonlegal consulting entity formed by the law firm. Furthermore, the nonlegal consulting entity's website may contain links to the law firm's website. If the particular link and the related text are "advertisements" under the Rules, the relevant advertising rules must be adhered to. Furthermore, if the provisions in Rule 5.7(a)(1), (2), or (3) pertain to the provision of nonlegal services, the Rules, including those pertaining to advertising, would apply to the website of the nonlegal consulting entity.

(37-11)

OPINION 916 (03/27/2012)

TOPIC: Lawyer's provision of free legal services when lawyer is also broker in a real estate transaction.

DIGEST: A lawyer may not offer free legal services as an add-on bonus to a party to a real estate transaction in which the lawyer is acting as broker, even if the lawyer advises the party that the party may retain separate counsel.

RULES: 1.7(a)

QUESTION:

1. The inquiring lawyer asks whether a lawyer may serve as a real estate broker in a transaction, and be paid for that service, while also offering free legal services on contract and other legal matters in the same transaction with the disclosure that the client is free, if the client so chooses, to retain a separate attorney to represent the client in the transaction. For the reasons set forth below, our answer is no.

OPINION:

2. In N.Y. State 752 (2003), we wrote:

> "In a number of opinions that this committee has issued over the years, we have opined that in certain circumstances a lawyer also engaged in a nonlegal business cannot provide both legal and nonlegal services in the same transaction even with the consent of the client. Brokerage businesses are a salient example. We held in N.Y. State 208 (1971), N.Y. State 291 (1973), N.Y. State 340 (1974), and N.Y. State 493 (1978), that a lawyer could not act as a lawyer in the same transaction in which the lawyer or his or her spouse acted as a real estate broker "because of the possible conflict between his client's and his own personal interest." N.Y. State 208 (1971). *Accord* N.Y. County 685 (1991); *see also* N.Y. State 694 (1997) (impermissible to participate in broker-run home buyer's program because of resulting strong interest in broker's success)."

3. The rationale of these opinions is that the broker's personal and financial interest in closing the transaction interferes with the lawyer's ability to render independent advice with respect to the transaction consistent with the principles now embodied in Rule of Professional Conduct 1.7(a). Otherwise put, the problem primarily stems not from the fee the lawyer receives from rendering purely legal advice, but from the separate and independent financial interest of the lawyer/broker arising from compensation for the non-legal services. In our judgment, that financial interest would create an influence that informed consent cannot relieve. We have reached similar conclusions with respect to insurance brokers and securities brokers. N.Y. State 536 (1981); N.Y. State 619 (1991). *See also* N.Y. State 595 (1988); N.Y. State 621 (1991); N.Y. State 738 (2001) (dual role of lawyer for real estate client and abstract title examiner impermissible because of possible need to negotiate exceptions to title).

4. Accordingly, an offer of free legal services on top of the non-legal services a lawyer proposes to render does not remedy the ill at the heart of our prior opinions. A client's natural attraction to the cost-saving involved in the lawyer's proposal only fortifies our concern. A lawyer rendering free legal services, whether *pro bono publico* or as an appendage to non-legal services the lawyer is also providing, owes the client a duty of rendering independent professional judgment. That duty does not allow the lawyer to represent the client when a reasonable lawyer would find a significant risk that the lawyer's professional judgment would be adversely affected by the lawyer's personal financial interests. The more likely a client is to want or need legal services free of charge, the more important is the protection of assuring the exercise of independent professional judgment unburdened by conflicting personal interests. Advising the client that the client could hire another lawyer – the functional equivalent of an effort at consent that we have found wanting in these circumstances – does not eliminate the problem animating our opinions.

CONCLUSION:

5. A lawyer may not offer to provide free legal services in a real estate transaction in which the lawyer is acting and being paid as the broker, even if the lawyer/broker advises that the client has the option to retain separate counsel.

(58-11)

OPINION 917 (03/27/2012)

TOPIC: Non-lawyer marketers; bonus compensation to non-lawyer based on number of clients.

DIGEST: A law firm may ethically pay a bonus to a nonlawyer employee engaged in marketing based on the number of clients obtained through advertising provided the amount paid is not calculated with respect to fees paid by the clients. The law firm may not pay a fee for the referral or recommendation of a specific client.

RULES: 5.4, 7.2, 7.3

QUESTION:

1. May a law firm ethically pay a bonus to a nonlawyer employee marketer based on either (1) the number of clients brought in, without regard to the fee paid or recovery awarded to the client, or (2) the actual number of clients over a certain minimum threshold.?

OPINION:

2. A lawyer or law firm may utilize a non-lawyer marketer to engage in advertising and solicitation in which the lawyer or law firm could engage. *See* Rule 7.2, Cmt [1] (a lawyer may "compensate employees, agents and vendors who are engaged to provide marketing or client development services"). Such marketer, however, may only engage in such advertising or solicitation that the lawyer or law firm itself could ethically engage. N.Y. State 887 (2011). Thus a marketer could prepare print or web-based marketing materials and advertisements and could solicit business in person or by telephone from the law firm's existing and former clients.

3. A marketer, however, may not engage in any activities that would be prohibited if undertaken by a lawyer. Rule 7.3 (a)(1) of the New York Rules of Professional Conduct provides that a "lawyer shall not engage in solicitation by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client." Thus the law firm could not authorize a nonlawyer employee to engage in in-person solicitation on its behalf, unless the person being solicited is a close friend, relative, former or existing client. See N.Y. State 887 ¶ 8.

4. Furthermore, Rule 7.2(a) provides a "lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client." Thus the law firm could not pay a bonus to an employee-marketer that is based on the referral or recommendation of specific clients. In N.Y. State 902 (2012), the Committee opined that a lawyer could not compensate a marketing firm to introduce the lawyer to its network of doctors and may not compensate the marketing firm for each introduction and meeting with one of the doctors. In addition, the law firm could not pay an additional fee to the marketer if the doctor retained the attorney in a fixed number of collection cases. Id. at ¶ 10.

5. If, however, the marketing by the nonlawyer employee is advertising and does not constitute solicitation, it would be permissible to pay the marketing employee based on the number of clients obtained so long as that payment does not relate to fees earned from those clients. Rule 5.4(a) prohib-

its a lawyer or law firm from sharing legal fees with a nonlawyer, with limited exceptions. A significant exception is that Rule 5.4(a)(3) permits a lawyer to "compensate a nonlawyer employee . . . based in whole or in part on a profit sharing plan." Comment [1B] explains:

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

6. In N.Y. State 887 (2011) the Committee opined that a lawyer or law firm may have a profit-sharing plan that pays bonus compensation to a non-lawyer marketer based on the overall profits of the firm or on a percentage of the employee's base salary. However, the bonus compensation may not be based on referrals of particular matters and may not be based on the profitability of the firm or the department for which the employee markets if such profits are substantially related to the employee's marketing efforts. Thus, the employee-marketer might be paid a bonus based solely on the number of clients obtained from the advertising, but that bonus could not be calculated with respect to the fees paid by those clients.

CONCLUSION:

7. A law firm may ethically pay a bonus to a nonlawyer employee engaged in marketing based on the number of clients obtained through advertising provided the amount paid is not calculated with respect to fees paid by the clients. The law firm may not pay a fee for the referral or recommendation of a specific client.

(59-11)

OPINION 918 (04/13/2012)

TOPIC: Solicitation; advertising; public education for laypersons.

DIGEST: A lawyer may ethically produce and post an internet video designed to educate lay individuals about a legal subject, and may distribute flyers to members of the public inviting them to view the video. However, the lawyer must adhere to advertising and solicitation requirements under the Rules if the video or the flyers encourage participants to retain the lawyer.

RULES: 1.0(a), 7.1, 7.3

FACTS:

1. The inquirer is a private practitioner who wishes to produce and post on the internet a video designed to educate lay individuals about what to do if they are sued in a collection matter. The video would be general in nature and not specific to any case. The inquirer plans to include her name and firm contact information at the end of the video, but the video will not urge viewers to contact her. Additionally, the inquirer would like to distribute flyers to members of the public, inviting them to view the video.

QUESTION:

2. May a lawyer ethically distribute flyers to members of the public inviting them to view the lawyer's internet video designed to educate lay individuals about a legal subject?

OPINION:

3. This Committee has explained that, under both the current Rules of Professional Conduct and the prior Code of Professional Responsibility,[13] lawyers may participate in legal seminars designed for non-lawyers. *See* N.Y. State 830 (2009) (opining under current Rules that a lawyer may contact a lay organization to inform it of the lawyer's availability as a public speaker on legal topics); N.Y. State 508 (1979) (opining under prior Code that law firm may organize a legal seminar designed for non-lawyers). Indeed, participation in such programs is not only permitted but encouraged: "The legal professional should help the public to recognize legal problems because such problems may not be self-revealing and might not be timely noticed. Therefore, lawyers should encourage and participate in educational and public-relations programs concerning the legal system, with particular reference to legal problems that frequently arise." Rule 7.1, Cmt. [9]. This Committee has also concluded that lawyers may promote these educational opportunities by mail. N.Y. State 508.

4. Advertisements and solicitations are subject to certain restrictions in the Rules. An "advertisement" is defined by Rule 1.0(a) as follows:

> "'Advertisement' means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of

13 The Code was substantially revised in 1978 in light of *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), which held that categorical prohibitions against attorney advertising violate the First Amendment.

> which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers."

5. The comments address application of the primary-purpose test to educational programs:

> "A lawyer's participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients. Such a program might be considered advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm."

Rule 7.1, Cmt. [9]. Accordingly, if a program goes beyond education to discuss the lawyer's skills or reputation, or give other reasons to hire that lawyer, then the lawyer may need to comply with the rules on advertising. But absent the inclusion of some such hiring pitch, a legal seminar will generally not be considered advertising as long as it is a *bona fide* educational program.

6. Rule 7.3(a)(1) prohibits a lawyer from engaging in solicitation by certain specified means including "by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client." Under the definition in Rule 7.3(b), some but not all advertisements constitute solicitations:

> "For purposes of this Rule, 'solicitation' means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client."

7. Applying the above opinions and Rules, as elucidated by the comments, to the present inquiry, we conclude that the inquirer's proposed course of action does not violate the Rules. The inquirer proposes a legal education program governed by the general principle that such programs are not only permitted but encouraged. The format of the presentation – a video published on the internet – does not change the analysis. *See* Rule 7.1, Cmt. [7] (recognizing dissemination of non-advertising legal information by another form of internet content – the blog); *see also* ABA 10-457 (noting that lawyer websites "can assist the public in understanding the law and in identifying when and how to obtain legal services") (footnote omitted).

8. The proposed video is a form of legal education for lay individuals that would not usually be categorized as advertising. The primary purpose of such communications is deemed to be one of educating the public rather than attracting clients. *See* Rule 7.1 Cmt. [9]. The inquirer's planned inclusion of her firm contact information at the end of the video is a reasonable and appropriate way of identifying the source of the educational program, and it does not, in and of itself, transform the video into an advertisement. *Cf.* Rule 7.1 Cmt. [7] (explaining that items such as legal pads containing law firm name and contact information do not constitute advertisements if their primary purpose is "general awareness and branding" rather than retention of law firm for a particular matter).

9. As long as the video does not go beyond a *bona fide* educational presentation, an inquiry into the existence of additional motivations for preparing that presentation is not required. But if the video contains statements or suggestions that the viewers should retain the preparer of the video to represent them, then it may appear that the primary purpose of the video is one of attracting clients. In that case, the video will be subject to Rule 7.1 and the other provisions in the Rules that govern advertising.

10. A similar analysis applies to the flyers (and to other forms of publicity such as mass mailings or emails). If the flyers serve merely to publicize a video which itself does not constitute advertising, then they too would be deemed to have a primarily educational purpose. If the flyers go beyond that to include reasons to hire the inquiring lawyer, then their primary purpose may be deemed one of attracting clients, in which case they would be subject to the advertising rules. If the video and the flyers do not constitute advertising, then they would also not implicate the rules governing solicitation.

11. If, on the other hand, the video includes reasons to hire the inquiring lawyer and constitutes advertising (or if the flyers themselves encourage the public to retain the preparer of the video), then use of the flyers would have to comply with the rules governing solicitation. For example, the flyers generally could not be distributed in person to members of the public. *See* Rule 7.3(a)(1).[14]

12. Additionally, "all communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law." Rule 7.1, Cmt [6].

CONCLUSION:

13. A lawyer, having produced and posted an internet video designed to educate lay individuals about a legal subject, may ethically distribute flyers to members of the public inviting them to view that video. However, the lawyer may be subject to the advertising and solicitation requirements under the Rules if the video or the flyers include statements or suggestions that the viewers should hire the creator of the video.

(8-12)

14 As the Committee lacks jurisdiction to determine matters of law, we do not opine on whether the inquirer's planned communications are permitted under the anti-solicitation provisions of Judiciary Law §479.

OPINION 919 (04/13/2012)

TOPIC: Dual Practice; Conflict of Interest

DIGEST: A lawyer may not act as an attorney for any party to a real estate transaction in which the lawyer is acting as a broker. A lawyer who is employed part time by a real estate office as a broker may be able to serve as a party's attorney even if a member of that real estate office is acting as a broker for one of the parties, but the lawyer must comply with Rule 1.7. If the lawyer will materially benefit from the closing based on his employment at the broker's office or is personally involved with the transaction at that office, then his representation of a party to the transaction is *per se* prohibited.

RULES: Rule 1.7(a) & (b)

FACTS:

1. The inquirer is a practicing attorney licensed in New York State. In addition, he is a "part-time associate broker with a small office of a nationally recognized real estate office." Neither the inquirer nor any of his family members have any ownership interest in the real estate company.

QUESTION:

2. The inquirer poses two related questions:

A. May a lawyer serve as a real estate broker for the buyer or seller and also serve as that party's attorney at the closing?

B. May a lawyer serve as a party's attorney at a real estate closing if the lawyer is asked to handle the closing by a member of the lawyer's real estate office who is serving as broker for one of the parties?

OPINION:

Question A: Serving as attorney and broker in the same transaction

3. The answer to the first question is no. A lawyer may not act as an attorney on behalf of any party to a real estate transaction in which the lawyer or the lawyer's spouse is acting as a broker, because the dual role creates a conflict between the interests of the client and the interests of the lawyer. *See, e.g.*, N.Y. State 493 (1978); N.Y. State 340 (1974); N.Y. State 291 (1973); N.Y. State 244 (1972); N.Y. State 208 (1971). The conflict is nonconsentable (*i.e.,* non-waivable), meaning that the prohibition cannot be overcome through disclosure and client consent. *See* N.Y. State 208.

4. "The rationale for these opinions is that a lawyer should not have a personal stake in the advice rendered, and a broker who is paid only if the transaction closes cannot be fully independent in advising the client as a lawyer." N.Y. State 753 (2002). We continue to adhere to that view under the New York Rules of Professional Conduct (the "Rules"). *See* Rule 1.7(a)(2), (b)(1); N.Y. State 845 (2010) (opining that "under Rule 1.7 it remains a nonconsentable conflict for an attorney to act as both a lawyer and broker in the same transaction").

5. We reached the same result in N.Y. State 244, where the real estate broker was not the lawyer personally but rather was the lawyer's spouse, because of the "intimate relationship, including financial" between husband and wife. *See also* N.Y. State 291 ("Even though the lawyer personally does not own or have an interest in the real estate agency but his spouse owns or has such interest, it would be improper . . . for the lawyer to receive a legal fee in such circumstances").

Question B: Attorney works for broker but is not serving as broker in the transaction

6. The answer to the second question is more complex, and we have not precisely addressed it before. In N.Y. State 340 (1974), we concluded that the *per se* prohibition against serving as lawyer and broker in the same transaction applied where the attorney's spouse was a salesperson, rather than an owner, in the brokerage agency. We reasoned that the "intimate relationship and economic interests of husband and wife are inseparable; the acts of one directly affecting the other." Thus, we opined that a lawyer could not represent a party to a real estate transaction in which the lawyer's spouse participated as a broker, even with the client's consent after full disclosure. We noted, however, that there would not be "any impropriety in the attorney representing customers of the brokerage firm which employs the spouse ***where the spouse has not participated in and will not benefit from the transaction***" (emphasis added).

7. Our analysis in N.Y. State 340 is relevant here, but the inquirer's scenario is slightly different. We analyze it under the current Rules. The most relevant provision is Rule 1.7(a)(2), which governs personal conflicts of interest. Unless a lawyer satisfies the elements of the exception in Rule 1.7(b), Rule 1.7(a)(2) prohibits a lawyer from representing a client "if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests."

8. Thus, if a reasonable lawyer would conclude that there is a significant risk that the inquirer's professional judgment in representing a client in a real estate transaction would be adversely affected by the inquirer's personal interest in maintaining a favorable employment relationship with the real estate office – or by any other personal interest arising out of the inquirer's employment at that office – then the inquirer may not represent that client unless permitted by the exception in Rule 1.7(b).

9. Under Rule 1.7(b), a lawyer who has a conflict under Rule 1.7(a) may nonetheless represent the client in the matter when certain conditions are met, including these:

> "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; . . . and
>
> "(4) each affected client gives informed consent, confirmed in writing."

10. Here, the inquirer has no ownership interest in the real estate company that is serving as a broker in the transaction at issue, but he is employed there. Consequently, the success of the real estate company in closing real estate transactions in which the inquirer represents a party may affect the inquirer's own economic interests. For example, the salary or bonus that the inquirer receives from the real estate office may increase based on an annual measure such as profitability or the number of closings completed. Furthermore, the legal advice that the inquirer provides to his client in a transaction

in which his employer is involved will almost certainly have a direct impact on the economic interests of the real estate company because the company will not receive a commission unless the sale closes.

11. These risks are magnified if the real estate company repeatedly refers matters to the inquirer. *See* N.Y. State 467 (1977) (noting that "the position of the lawyer who accepts repeated referrals may be somewhat more fraught with temptation to avoid the strictures of the Code than one who does not"). The inquirer is asking about matters that would be referred by brokers in his office, so this inquiry involves those magnified risks. The risks also increase as the size and importance of the transaction increases, because a larger deal results in a larger commission to the broker's office.

12. Thus, a lawyer may have a personal stake in the legal advice rendered to a client who is represented by a broker of the real estate company, and in some cases the lawyer may benefit materially from advising the client to close the transaction. If the lawyer will materially benefit from the closing, or is personally involved with the transaction at the broker's office, then the situation is analogous to that in N.Y. State 340. In such a case, the lawyer could not reasonably believe that he could be able to provide competent and diligent representation to his client, so a *per se* prohibition would apply. The fact that a lawyer personally (instead of his spouse) would benefit makes the conflict even more perilous than the conflict in N.Y. State 340.

13. Even if the lawyer himself will not materially benefit, the totality of the lawyer's personal interests might still pose a "significant risk" that his judgment in representing the client at the closing will be "adversely affected" within the meaning of Rule 1.7(a)(2). In this case, however, we know little about the inquirer's relationship with the real estate company, and we know nothing about the size or importance of the transactions at issue. We are not in a position to determine the level of risk.

14. The inquirer must determine, in light of all of the facts and circumstances, whether there is a significant risk that his professional judgment will be adversely affected by his own interests as an employee of the real estate company that is serving as broker for the inquirer's client in the transaction. If so, then the inquirer may not represent a client in that transaction unless the conditions in Rule 1.7(b) are satisfied. The threshold question under Rule 1.7(b)(1) is whether the inquirer reasonably believes that despite the conflict, he can provide competent and diligent legal representation to the client in the real estate matter. If so, then he must obtain the client's informed consent to the conflict, confirmed in writing, per Rule 1.7(b)(4). If he does not reasonably believe that he can provide competent and diligent legal representation to the client, or if the client refuses to consent, then the inquirer must decline the representation.

15. Thus there are three possibilities. If there is no significant risk that the inquirer's professional judgment in representing a client in a real estate transaction would be adversely affected by his personal interests, then Rule 1.7(a)(2) does not apply and the inquirer may accept the representation without obtaining the client's consent. If such a significant risk is present, then Rule 1.7(a)(2) does apply and the inquirer must comply with Rule 1.7(b). However, if the inquirer will materially benefit from the closing or is personally involved with the transaction at the real estate office, then there is a *per se* non-waivable conflict.

CONCLUSION:

16. A lawyer may not act as an attorney on behalf of any party to a real estate transaction in which the lawyer is acting as a broker. That conflict is nonconsentable.

17. A lawyer who is employed by a real estate office as a broker may be able to serve as a party's attorney at a closing even if another member of his real estate office is acting as a broker for one of the parties, provided that the lawyer is not involved with the sale of the property at the broker's office and will not materially benefit from the transaction based on his employment at that office. If the lawyer is involved as a broker or will materially benefit, then the representation is *per se* prohibited. If the lawyer will not materially benefit based on his employment at the broker's office but there is a significant risk that his personal interests will adversely affect his professional judgment on behalf of the client, the lawyer may not represent the client unless he complies with Rule 1.7(b).

(6-12)

OPINION 920 (04/26/2012)

TOPIC: Law Firm Name

DIGEST: A lawyer may not practice under a law firm name that consists only of the lawyer's initials.

RULES: 7.5(b)

FACTS:

1. The inquirer is the only lawyer and only employee of a new law firm. Since the lawyer believes that his last name is long [John Doesmith-Roesmith], he wishes to call the law firm by his initials [JDR Law].

QUESTION:

2. Can a lawyer ethically practice under a law firm name that consists only of the lawyer's initials?

OPINION:

3. Rule 7.5(b) of the New York Rules of Professional Conduct provides that a "lawyer in private practice shall not practice under a trade name. . ." This rule serves to protect the public from being deceived as to the identity, responsibility or status of those who use the firm name. *See* N.Y. State 732 (2000) (applying trade name prohibition in former Code of Professional Responsibility).

4. In N.Y. State 740 (2001) the Committee opined that "[u]sing a name that is not the legal name of one or more partners or former partners in the law firm constitutes the use of a trade name" within the meaning of the prohibition in the Code of Professional Responsibility. As the Committee noted in N.Y. State 869 (2011):

> "The prohibition against trade names is broad, permitting use of little beyond the names of lawyers presently or previously associated with the firm. As an indication of this breadth, other parts of Rule 7.5(b) create exceptions allowing a firm name to include the names of deceased or retired partners or requiring firms to add terms such as 'PC,' 'LLC,' or 'LLP' only in specified circumstances, suggesting that absent those circumstances, such names or terms might create impermissible trade names."

In N.Y. State 861 (2011) the Committee opined that the New York office of an out-of-state firm could not use the firm name XYZ Firm where X, Y, and Z were the first letters of the firm's practice areas even if the firm name was ethical in the other state.

5. Because the lawyer's initials do not constitute the lawyer's legal name, they would constitute a trade name, and therefore the lawyer is prohibited from practicing under that name. *Accord* Arizona Opinion 91-09 (1991).

6. We note, however, that language or a name that is impermissible as a trade name may be permissible as a firm "motto." *See In re von Wiegen*, 63 N.Y.2d 163, 176-77 (1984) (finding that "The Country Lawyer" used underneath the firm name was a permissible motto rather than an impermissible trade name); N.Y. State 636 (1992) (permitting the name "The Will Store" as a motto in conjunction with the name or names of one or more lawyer principals but not standing alone).

CONCLUSION:

7. A lawyer may not practice under a law firm name that consists only of the lawyer's initials.

(26-12)

OPINION 921 (04/26/2012)

TOPIC: Attorney advertising

DIGEST: An advertisement that an attorney can "stop" a foreclosure proceeding is prohibited as false, misleading and deceptive. If the advertisement were modified to make it accurate, it would have to be accompanied by a disclaimer that prior results do not guarantee a similar outcome.

RULE: 7.1

QUESTION:

1. May an attorney market his services to persons facing foreclosure of their homes with an advertisement that states, "We will stop your foreclosure"?

OPINION:

2. Rule 7.1(a) of the New York Rules of Professional Conduct provides: "A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that . . . contains statements or claims that are false, deceptive, or misleading . . . ."

3. Comment 3 to Rule 7.1 provides in pertinent part:

> "Truthful statements that are misleading are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication, considered as a whole, not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services, or about the results a lawyer can achieve, for which there is no reasonable factual foundation."

4. Here, the inquiring attorney justifies the representation that he can "stop" a foreclosure with reference to the Fair Debt Collection Practices Act. He maintains that, under the Act, he can make a motion that will "stop" the proceeding until the debt collector verifies the debt. "Then," continues the inquirer, "other motions can be filed in order to create leverage for the client to negotiate a successful loan modification."[15]

5. In N.Y. State 487 (1978), we addressed an advertisement in which a lawyer stated he had "[a specified number of] years' experience representing licensees, applicants, ABC Boards, SLA, Federal Alcohol Bureau, Judicial Review." We noted that "while it should be obvious to other members of the Bar that the lawyer in question means to say that he has represented licensees and applicants before the enumerated agencies, an unsophisticated reader of the proposed advertisement could reasonably assume that the lawyer had represented the agencies themselves." Accordingly, we counseled a modification of the advertisement to "cure this ambiguity," observing that "[t]he need for careful drafts-

15 This inquiry does not ask, and we do not opine, about the permissibility of any underlying litigation tactics. The inquiry concerns only the related advertising.

manship cannot be over emphasized. Even the slightest ambiguity may tend to mislead the uninformed."

6. In our view, the current inquiry presents an analogous situation. Perhaps an attorney experienced in this area of law might understand the inquiring lawyer to mean merely that he can delay the progress of a foreclosure action so as to allow time for other efforts. But a layperson, especially one who is unsophisticated or inexperienced in such matters, would likely interpret the statement quite differently. The layperson, rather than understanding that the advertisement refers merely to delaying the progress of the foreclosure action in order to achieve a negotiated settlement, may well believe that "stop" means "stop," and that the foreclosure proceeding, through the efforts of retained counsel, will simply cease and terminate.

7. This reasonable inference from the proposed advertisement – that the foreclosure proceeding will cease and terminate – is likely to give rise to the type of "false hope" that we have previously associated with false, deceptive and misleading advertisements. *See* N.Y. State 614 (1990) (applying former DR 2-101(A), the predecessor to Rule 7.1(a)(1), which contained similar prohibitory language) ("we hold improper those client endorsements describing prior results that are potentially misleading in the various ways described herein, e.g., statements of 'overblown assurances of client satisfaction', statements that create unjustified expectations or 'false hopes' or statements that fail to contain sufficient information, thus rendering the statement false, deceptive or misleading").

8. Thus, to be permissible, the proposed advertisement would have to be re-worded so that it would no longer be ambiguous and misleading. It would have to provide enough information about the proposed legal services and their role in foreclosure litigation so that the advertisement would not create the kind of false hopes discussed above. Finally, to the extent that the advertisement would be "reasonably likely to create an expectation about results the lawyer can achieve," it would have to be "accompanied by the following disclaimer: 'Prior results do not guarantee a similar outcome.'" Rule 7.1(d)(1) & (e)(3); N.Y. State 848 (2010) (holding that required disclosure must be made in exactly the language set forth in the Rule).

CONCLUSION:

9. A statement made in any attorney advertisement, without more, that the attorney can "stop" a foreclosure proceeding is prohibited under Rule 7.1.(a)(1) as false, misleading and deceptive. Even if the advertisement were modified so as not to give false hope that the attorney could guarantee a termination of the foreclosure proceeding, an accompanying Rule 7.1(e)(3) disclaimer would be required.

(22-12)

OPINION 922 (04/26/2012)

TOPIC: Conflicts arising from previous representation

DIGEST: Lawyer may represent prospective client in litigation that could involve impleading former clients if current litigation is not substantially related to the matters on which the lawyer represented those former clients. However, in the impleader action, lawyer may not be able to reveal or use certain information relating to the former clients.

RULES: Rule 1.6(a) & (b), 1.9(a) & (c)

FACTS:

1. The inquirer has represented a condominium homeowners' association (the "HOA") from time to time in various matters. Recently, the inquirer was asked to undertake the defense of the HOA in an action, brought against it by the city in which the condominium is located, for alleged nonpayment of the condominium's water bill. The inquirer anticipates that in defending the HOA, it will be appropriate to implead "certain unit owners," some of whom the inquirer represented in the acquisition of their units. The inquirer no longer represents any of the unit owners in any capacity. The inquirer asks whether, in these circumstances, the inquirer may ethically undertake the defense of the HOA in the water bill action.

QUESTION:

2. May a lawyer ethically defend a condominium homeowners' association in an action brought by the city for nonpayment of a bill even though the lawyer might have occasion to implead unit owners whom the lawyer represented when they acquired their units?

OPINION:

3. Rule 1.9(a) of the Rules of Professional Conduct precludes a lawyer who has formerly represented a person (the former client) in a matter from representing another person (the prospective client) in the same or a "substantially related" matter in which the prospective client's interests are "materially adverse" to the former client's interests unless the former client "gives informed consent, confirmed in writing." In other words, the former client's informed consent is required only when (a) the prospective and former clients' interests in the new matter are materially adverse, and (b) the matters are the same or substantially related.

4. In this inquiry, the inquirer proposes to represent the HOA (the prospective client) in the water bill action (the new matter) that may be adverse to one or more unit owners (the former clients) whom the inquirer previously represented in their acquisition of their units (the former matters). Would Rule 1.9(a) preclude representation of the prospective client?

5. The "material adversity" element of Rule 1.9(a) is clearly met. Impleading the former clients would create material adversity in the new matter because if a money judgment were rendered against the HOA, the impleader, if successful, would make the unit owners liable to the HOA for at least portions of that judgment.

6. Since the interests of the inquirer's prospective client in the water bill action are materially adverse to those of the inquirer's former clients, the question turns on whether the water bill action is "substantially related" to the former matters in which the lawyer previously represented any of the unit owners who might be impleaded in the new matter.

7. Matters are "substantially related" for purposes of this rule "if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Rule 1.9, Cmt. [3]. *A fortiori,* matters are also substantially related if the lawyer in question actually and knowingly obtained (and now possesses) confidential factual information that would materially advance the prospective client's position in the subsequent matter.

8. Without trying to list all the circumstances that could bear on the question of substantial relation, we note some examples.

a. The lawyer should consider whether it is likely that the construction or validity of any of the terms of the unit purchase and sale agreements would be put in issue in the present matter. If so, the presence of a transaction common to both matters would make them substantially related, and each former client's informed consent to the lawyer's representation of the HOA (confirmed in writing) would be required. *Cf.* Rule 1.9, Cmt. [1] ("a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of a former client").

b. The lawyer should consider the effect of confidential information that does not bear directly upon the merits of the water bill action but nevertheless could affect its outcome. If one of the former clients were likely to be an important witness in a trial of the new matter, and the lawyer had damaging information bearing on the credibility of that witness, such information could materially advance the position of the HOA in the water bill action. Similarly, information concerning a former client's financial status, health or other possible vulnerabilities could be relevant to ability to withstand protracted litigation. These kinds of confidential information would often not be so significant as to materially advance the prospective client's position – indeed, on the facts presented, this inquiry does not present any Rule 1.9(a) problem based on confidential information – but it is another area of potential conflict for the lawyer to consider.

9. These examples illustrate the fact-specific nature of analyzing whether matters are substantially related. The inquirer has indicated that the prior representations of unit owners and the contemplated representation of the HOA are "completely separate and unrelated." We lack sufficient facts to confirm that determination, but if the inquirer has taken into account the kinds of considerations discussed above, and has correctly concluded that the present and former matters are not substantially related, then the inquirer may represent the HOA in the water bill action without obtaining consent of the former clients.

10. Even in that situation, however, there could be certain constraints on the inquirer's representation of the HOA.[16] The inquirer may possess confidential information of the previously represented unit owners that is not significant enough to make the current and former matters substantially related but nevertheless might be of some use in the impleader matter. In that event, absent consent or some other exception to Rule 1.6, the inquirer would not be able in the new litigation to disclose the confidential information of the former clients or use it to their disadvantage. *See* Rules 1.9(c), 1.6(a) and 1.6(b). Moreover, while the inability to use such information does not automatically preclude undertaking the new representation, it may do so in certain circumstances.[17]

CONCLUSION:

11. A lawyer may represent a client in litigation that could involve impleading some of the lawyer's former clients if the current litigation is not substantially related to the matters on which the lawyer represented those former clients. Even if the lawyer may and does undertake the representation, however, the lawyer may not use confidential information of those former clients in the current litigation unless a specific exception to the confidentiality rules applies.

(32-11)

16 These constraints could also apply when the former and new matters are substantially related and the Rule 1.9(a) conflict is cured by consent, because consent to represent an adverse party in related new litigation does not automatically include consent to use confidential information. N.Y. State 903 ¶ 16 (2012); N.Y. State 901 ¶ 9 & n.1 (2011).

17 *See* N.Y. State 903 ¶ 16 (2012) (absent former client's consent to use confidential information, attorney must determine whether having that information creates Rule 1.7(a) conflict, either because the lawyer could not avoid using the confidential information or because of significant risk that having the information would adversely affect the lawyer's professional judgment); N.Y. State 901 ¶ 9 (2011) (same); N.Y. City 2005-02 (applying prior Code of Professional Responsibility) ("The fact that a lawyer possesses confidences or secrets that might be relevant to a matter the lawyer is handling for another client but the lawyer cannot use or disclose does not without more create a conflict of interest barring the dual representation").

OPINION 923 (05/18/2012)

TOPIC: Disclosure of information obtained from purported client

DIGEST: An individual whose purpose in communicating with an attorney is to defraud that attorney rather than to obtain legal services is not a client or prospective client entitled to confidentiality, and it would not violate any ethical rules for the attorney to disclose relevant information to investigators.

RULES: 1.6(a); 1.9(c); 1.18(a) & (b)

FACTS:

1. The inquirer is an attorney who received a client referral from a real estate agent. The would-be client held himself out to be a Japanese investor who was interested in purchasing a coop apartment.

2. The inquirer and the purported investor exchanged several emails discussing legal fees and details concerning the transaction. The purported investor suggested that he would send a check to be deposited into the inquirer's escrow account, from which the inquirer could close on the purchase and pay all required fees including the inquirer's own legal fee. The inquirer was skeptical about the proposed arrangement and did not enter into a retainer agreement with the investor. However, the inquirer says that the emails on their face "would lead one to believe that the investor would have a reasonable expectation that an attorney-client relationship may be formed."

3. The inquirer then received a letter from a third party enclosing a $300,000 check on behalf of the purported investor. The inquirer called that third party, and the conversation made the inquirer even more skeptical. The inquirer then called the bank on which the check was drawn. A bank employee told the inquirer that the check was fraudulent and asked for a copy of it, which the inquirer supplied. In another conversation, the inquirer told a bank employee the name of the third party, and the employee said the bank had received other fraudulent checks involving that person. The inquirer has since been told by another attorney that the name of the purported investor was used in a scam involving ads placed by brokers in the newspaper. Based on the available information, the inquirer has concluded that the check was counterfeit and sent to him as part of a fraudulent scheme.

4. The bank then asked for the original check, the cover letter, the envelope received by the inquirer, and any related correspondence, if the inquirer is "legally able" to provide it.

5. The inquirer asks whether it is permissible to provide the bank with (a) the original check; (b) the cover letter and envelope from the third party; and (c) the emails with the purported investor. The inquirer "would like to give all possible assistance so that this fraud can be properly investigated" but does not wish to "breach any . . . ethical obligations."

QUESTION:

6. May an attorney cooperate with a bank or law enforcement authorities by providing information obtained from someone purporting to be an investor seeking representation, when in fact the purported investor was trying to defraud the attorney rather than to obtain legal services?

OPINION:

The Scam

7. This inquiry relates to a scam that has become common in recent years. There are many variations, but a typical one is that a supposed client asks a lawyer to close a real estate transaction, and the client or a third party then sends the lawyer a check and instructs the lawyer to deposit the check and wire the funds (minus the lawyer's legal fees) to an overseas bank account (said to be the account of a participant in the real estate transaction). The lawyer complies with those instructions, but after the funds have been wired, the bank discovers that the check is counterfeit. Since the scam artists cannot be located, the lawyer is charged with the shortfall.

8. The FBI recently reported that its Internet Crime Complaint Center "continues to receive reports of counterfeit check schemes targeting U.S. law firms,"[18] and the prevalence of such schemes has also been noted in bar publications.[19]

9. As noted above, the inquirer has concluded that the check was counterfeit and sent to him as part of a fraudulent scheme rather than in any actual effort to obtain legal advice or other legal services. Given all the evidence before him, we cannot say that the inquirer's conclusion was unreasonable.

Confidentiality Rules

10. The New York Rules of Professional Conduct (the "Rules") afford protections of confidentiality to actual clients and also to prospective clients.

11. Under Rule 1.6(a), a lawyer may not knowingly reveal confidential information or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, subject to certain exceptions.

12. Rule 1.18(a) says that "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship is a 'prospective client.'" Rule 1.18(b) sets forth an attorney's duties of confidentiality to prospective clients: "Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client."

13. Rule 1.9(c) provides in relevant part as follows:

"A lawyer who has formerly represented a client in a matter . . . shall not thereafter:

18 FBI, "U.S. Law Firms Continue to be the Target of Counterfeit Check Scheme," New E-Scams & Warnings (Mar. 12, 2012) (available at http://www.fbi.gov/scams-safety/e-scams).

19 See, e.g., James McCauley, Virginia State Bar Ethics Counsel, "Internet Scams Target Lawyers," Virginia State Bar News (Mar. 28, 2011) (available at http://www.vsb.org/site/news/item/internet-scams-target-lawyers); State Bar of California Committee on Professional Responsibility and Conduct, "Internet Scams Targeting Attorneys," Ethics Hotliner (Jan. 2011) (listing six common characteristics of most such scams) (available at http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=z8N90vbh088=). These publications describe the scams in greater detail, offer lawyers advice on how to avoid them, and consider the ethical responsibilities of victimized lawyers.

> "(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
>
> "(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client."

14. The application of these rules depends on whether the information in question is confidential as defined in Rule 1.6(a):

> "'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. 'Confidential information' does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates."

Analysis

15. To determine whether and how the above confidentiality rules apply to the current inquiry, we first consider the nature of the information.

16. The communications with the third party would not appear to be protected as privileged communications between attorney and client. Moreover, if the communications, whether with the third party or with the purported investor, were made in furtherance of a criminal or fraudulent scheme, then they would appear not to be privileged for that reason as well.[20]

17. Privilege, however, is not the only way in which information becomes confidential under the Rules. As seen above, information gained during the representation of a client can also be confidential if "likely to be embarrassing or detrimental to the client if disclosed." In all likelihood it would be embarrassing and detrimental to the purported investor if there were disclosure of communications and documents indicating that he had engaged in a fraudulent scheme involving a counterfeit check. The remaining question, to which we now turn, has to do with the relationship between the inquiring attorney and the purported investor. There is a duty of confidentiality under Rule 1.6(a)[21] only if the purported investor was a client and the information in question was gained during his representation by the inquirer.

18. Whether an attorney-client relationship exists is not for us to say because it is not a question of ethics, though ethical consequences turn on it. As noted in material prefatory to the Rules, "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external

20 *See*, *e.g.*, *Clark v. United States*, 289 U.S. 1 (1933); *United States v. Jacobs*, 117 F.3d 82 (2d Cir. 1997); *Superintendent of Insurance v. Chase Manhattan Bank*, 43 A.D.2d 514 (3d Dept. 2007); *Ulico Casualty Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 A.D.3d 223 (1st Dept. 2003).

21 We analyze the import of Rule 1.18 separately. See paragraph 25 below.

to these Rules determine whether a client-lawyer relationship exists.. . . . Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." Rules, Scope ¶ [9]. We will review some relevant factors because they will shed light on our analysis, but we will then base that analysis on the inquirer's own determination of the crucial question of fact.

19. The inquiry mentions various facts relevant to whether an attorney-client relationship has been formed. The absence of a written retainer agreement would not preclude an attorney-client relationship, but the contents of the emails, and the reasonable expectations that they seem to reflect, would ordinarily be an important factor. *See*, *e.g.*, Restatement (Third) of the Law Governing Lawyers §14 & cmt. c (relationship does not require written contract but does require manifestation of "person's intent that the lawyer provide legal services for the person"). In this case, however, the emails may not be what they seem, so a different factor – having to do with the purported investor's intent – may override all the others.

20. If the purported investor's aim was perpetrate a scam on the inquiring attorney, then he was not making a bona fide attempt to obtain legal advice or other legal services. We believe that in that case, there would be no representation and consequently no duty of confidentiality under Rule 1.6. This view finds support in a number of sources.

21. The issue has been addressed in California. "Generally speaking, . . . assuming the scammer never in fact intended to form an attorney-client relationship, but rather acted to perpetrate a fraud on the attorney, it is possible that no attorney-client relationship even has been formed." State Bar of California Committee on Professional Responsibility and Conduct, Ethics Hotliner at 3 n. 8 (Jan. 2011).

22. The same issue has also arisen (though in a different context) in South Carolina. A law firm had fallen prey to a counterfeit check scheme similar to the one at issue here. The defrauded bank asserted claims against the firm, which then sought defense and indemnification from its professional liability insurer. The insurer argued that the policy did not apply because (*inter alia*) there had been no attorney-client relationship. The court agreed, finding a lack of evidence that the purported client ever sought the firm's assistance with a view to employing it professionally. Instead, the court said, the "only reasonable inference" was that scammer contacted the firm "and purported to seek representation . . . solely for the purpose of perpetuating a fraud." Because South Carolina law requires that both parties to an attorney-client relationship intend that legal advice be provided and received, the court concluded that "there was no attorney-client relationship formed."[22]

23. An informal analysis advanced by the ethics counsel of the Virginia State Bar, addressing scams like the one at issue here, is to a similar effect:

> "Some lawyers ask if it is ethical to report the scam after they have agreed to undertake representation, citing the duty to keep client information confidential. Although a for-

22 *Bradford & Bradford, P.A. v. Attorneys Liability Protection Society, Inc.*, 2010 WL 4225907, slip op. at 5 (U.S.D.C., D.S.C. 2010). *See also Lombardi, Walsh, Wakeman, Harrison, Amodeo & Davenport, P.C. v. American Guarantee and Liability Ins. Co.*, 85 A.D.3d 1291 (3d Dept. 2011) (on similar facts finding coverage by a policy, "[r]egardless of whether the imposter qualified as a 'client,'" because "the policy does not require an actual 'client'; the policy only requires that plaintiff 'render Legal Services for others' and the imposter fell within that broad category").

> mal opinion from the Standing Committee on Legal Ethics has not addressed this issue, the communications by and between the Internet scammer and lawyer are not protected as confidential. The initial uninvited e-mail communication from the scammer and the communications that follow are not for the purpose of obtaining any legal advice or legal representation. The scammer does not have any 'reasonable expectation of confidentiality' in the communications used to obtain the lawyer's money under false pretenses. Therefore, reporting such information to the appropriate law enforcement authorities is not a breach of the lawyer's duty of confidentiality."

James McCauley, Virginia State Bar News at 2-3 (Mar. 28, 2011); *cf.* Rule 1.18 (excluding from definition of prospective client those who communicate information unilaterally to a lawyer without reasonable expectation that lawyer is willing to discuss possibility of forming an attorney-client relationship).

24. As seen above, whether an attorney-client relationship arises in a given case can be a mixed question of fact and law. While this Committee does not independently opine on such questions or make the necessary findings of fact, we note the implications of the inquirer's own factual determination. The inquirer has concluded – reasonably, we believe – that the purported investor was not actually seeking legal services. It follows from that conclusion that no attorney-client relationship was formed. However, that does not end the inquiry as to whether the inquirer owes any duties of confidentiality. As noted above, confidentiality protections are not limited to actual clients – they also extend to prospective clients, defined in Rule 1.18(a) as persons who have "discuss[ed] with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter."

25. It follows from the inquirer's conclusion about the purposes of the consultation that the purported investor was not a "prospective client" within the meaning of Rule 1.18(a). If the purported client was not actually seeking legal services, then he did not, in reality, discuss with the inquirer the possibility of forming a client-lawyer relationship, but merely pretended to do so. If from the beginning, the purported investor's aim was to perpetrate a fraud on the inquirer rather than to obtain legal services, then the purported investor never became even a prospective client within the meaning of the Rules, much less an actual one, and is therefore not entitled to the protection of the confidentiality rules.

26. We note two important caveats. First, in the inquiry at hand there was abundant evidence to support the inquirer's conclusion that the purported investor was engaged in a scam, but in other cases the motive of a purported prospective client may not be so clear. A person who seems to communicate with a lawyer about the possibility of forming an attorney-client relationship is presumptively a "prospective client" and is therefore presumptively entitled to the protection of Rule 1.18. A lawyer should exercise diligence and great care before concluding that a purported prospective client is making a bogus inquiry and is therefore not entitled to the confidentiality enjoyed by genuine prospective clients. The presumption of confidentiality gives way only if and when the lawyer reasonably concludes that the purported client was not actually seeking legal services. Only then is it permissible to make such disclosures as the lawyer considers appropriate to the circumstances.

27. Second, even when a lawyer reasonably concludes at some point that a purported client is seeking to defraud the lawyer, that conclusion by itself may not be dispositive. If a person who con-

tacts a lawyer was, at the outset of the relationship, actually seeking legal services, then that person may be entitled to those confidentiality protections enjoyed by prospective clients, or, depending on how the relationship develops, the protections enjoyed by actual clients. The fact that the actual or prospective client, then or later, also may have sought to defraud the lawyer does not necessarily undercut those protections. In such a case, it would be necessary to analyze the exceptions to confidentiality to see if any of them would allow the lawyer to report the scheme.[23] For the present inquiry, we did not need to reach any question of possible exceptions, because the inquirer reasonably concluded that the motives of the purported investor were unmixed from the start and involved no desire to obtain legal services.

CONCLUSION:

28. A person who communicates with a lawyer seemingly for the purpose of forming a relationship to obtain legal services is presumptively a "prospective client" entitled to protections of confidentiality under the Rules. However, if the purported prospective client is actually seeking to defraud the lawyer rather than to obtain legal services, then the person is neither an actual nor a prospective client and is not entitled to those confidentiality protections. In that case, the inquiring attorney may report the scheme to affected banks or law enforcement authorities, and may supply information and documents to those investigating the scheme, without violating any duty of confidentiality that would be owed to persons genuinely seeking legal services.

(48-11)

23 *See*, *e.g.*, Rule 1.6(b)(2) (allowing a lawyer to disclose or use confidential information to extent lawyer reasonably believes necessary to prevent client from committing a crime).

OPINION 924 (05/21/2012)

TOPIC: Attorney as referee in mortgage foreclosure proceeding

DIGEST: An attorney may accept appointment as a referee in a mortgage foreclosure proceeding where a client of the attorney holds a judgment on the mortgaged property, provided that the attorney complies with obligations of disclosure, recusal, and the revelation or use of information relating to the client.

RULES: 1.6(a); 1.7; 1.8(b); 1.9; 22 NYCRR §§ 100.6(A), 100.3(E)(1).

FACTS:

1. The inquirer has been offered appointment as a referee in a mortgage foreclosure proceeding. A credit union client of the inquirer holds a judgment on the property being foreclosed. The inquirer did not represent the credit union in obtaining the judgment and does not now represent the credit union in connection with that judgment. Inquirer does represent the credit union in connection with mortgage loans made by the credit union. The credit union is not the holder of the mortgage being foreclosed in the proceeding in which the inquirer has been offered appointment as a referee.

QUESTION:

2. May the inquirer accept appointment as a referee in a mortgage foreclosure proceeding in which a client of the inquirer is a judgment creditor of record, but not the holder of the mortgage being foreclosed?

OPINION:

3. The inquirer's proposed service is subject to constraints on the use of client-related information and also to conflict-of-interest rules.

4. All lawyers, including those serving as referees, must comply with confidentiality requirements of the Rules of Professional Conduct (the Rules). One rule provides (subject to certain exceptions including informed consent by the client): "A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person . . . ." Rule 1.6(a). Another provides: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." Rule 1.8(b)[24]. *See also* Rule 1.9(c) (similar rules as to confidential information of former clients).

5. The inquirer may well possess confidential information of the credit union client, or other information relating to representation of that client. The rules quoted above would limit the inquirer's revelation or use of such information while serving as a referee, unless the credit union were to give informed consent. Limitations on the revelation or use of information would not automatically pre-

24 Although the heading of Rule 1.8 categorizes it as a conflict-of-interest rule, we are concerned with the portion relating to use of information and accordingly treat the rule here rather than in the following section on conflicts of interest.

clude service as a referee. However, if for some reason the inquirer determined that possessing such information and complying with the resulting restrictions would make it impossible to perform the duties of a referee fully and faithfully, then the inquirer would be bound to decline the appointment unless the credit union client consented to the necessary revelation or use of the information.

6. There are conflict-of-interest rules that limit a lawyer's ability to represent certain clients. *See* Rule 1.7(a) ("a lawyer shall not represent a client" under specified conditions); Rule 1.9(a) & (b). In serving as a referee in a foreclosure proceeding, the inquirer would not be representing a client, but rather would be performing duties on behalf of the appointing Court. Thus the provisions of Rules 1.7 and 1.9 dealing with conflicts of interest when representing a client are not applicable to the inquirer's proposed service as a referee.[25]

7. There is also a conflict provision, however, in the rules of judicial ethics. Those rules are found in Part 100 of the Rules of the Chief Administrative Judge, 22 NYCRR Part 100.[26] Their application is not limited to judges: "All other persons . . . who perform judicial functions within the judicial system shall comply with such rules in the performance of their judicial functions and otherwise shall so far as practical and appropriate use such rules as guides to their conduct." 22 NYCRR §100.6(A). It would seem that a person serving as a referee in a mortgage foreclosure proceeding is performing judicial functions and therefore subject to Part 100 in the performance of those functions.[27]

8. Section 100.3(E)(1) requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." This requirement is followed by a list of such circumstances. None of the listed circumstances appears to apply to the facts of this inquiry, but the list is not exhaustive. *See* §100.3(E)(1) ("including but not limited to" listed circumstances); Code of Judicial Conduct Canon 3(E)1, Cmt. [3.21] ("regardless whether any of the specific rules in Section 3E(1) apply").

9. Thus the inquirer, in determining whether he may accept the appointment in question, should determine whether his impartiality might reasonably be questioned. In making that determination, the inquirer will need to consider the scope of the appointment. For example, there may be some discretion for a referee to compute amounts, but less discretion for the referee in conducting a sale, and there may be more reason to question impartiality where there is discretion.

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25 There are also conflict-of-interest provisions that do not limit a lawyer's ability to represent certain clients but rather limit the lawyer's relations with existing clients. *See* Rule 1.8. However, except for Rule 1.8(b) as noted above, these provisions are not implicated by the facts submitted.

26 The Rules in Part 100 are available online at http://www.nycourts.gov/rules/chiefadmin/100.shtml#01. These rules of judicial ethics are similar (though not identical) to those in the New York State Bar Association Code of Judicial Conduct (adopted April 13, 1996), which does not have the force of law, and is available online at http://www.nysba.org/Content/NavigationMenu16/CodeofJudicialConduct/CJC.pdf. In 2011, the State Bar's House of Delegates recommended amendments to the judicial ethics rules, but those amendments are still pending before the Courts and will not take effect unless and until the Courts approve them.

27 *See* Advisory Committee on Judicial Ethics Opinion 10-50 (noting that court attorney referees "are subject to the Rules Governing Judicial Conduct in the performance of their judicial functions"); *cf.* ABA Model Code of Judicial Conduct, "Application" I (B) (defining "judge" within meaning of that Code as "anyone who is authorized to perform judicial functions, including an officer such as a justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative law judiciary").

10. Thus the inquirer should consider whether there is any dispute as to the amount of the mortgage debt that will be incorporated into the judgment of foreclosure and whether the referee will have any role in resolving that dispute. That is, does the reference include determining the unpaid mortgage principal, the default or penalty interest due to the mortgagee, and any additional expenses that the mortgagee may be entitled to recover and, if so, will the referee be performing a ministerial and undisputed calculation or will he be resolving disputed issues of fact? This issue is relevant because, to the extent that the amount of the mortgage debt (and therefore, the "upset price") is lowered, the possibility of surplus funds being secured at the foreclosure sale – funds that will be available to all judgment creditors on a pro rata basis – is increased.

11. Another related issue is the amount of the credit union judgment in relation to the likely amount of surplus funds and the number and amount of competing claims to those funds by lienors, taxing authorities, and other judgment creditors. For example, if the credit union judgment is nominal, if there are numerous substantial claims of other lienors and judgment creditors, if the delinquent real property taxes are substantial, and if the underlying mortgage debt is clearly greater than the market value of the property to be foreclosed, the likelihood of the credit union securing anything of value from the foreclosure sale would be remote. In that case it seems doubtful that any reasonable basis for questioning the impartiality of the referee would exist. Even when there is a greater chance of securing value from the sale, there may be little basis for questioning the referee's impartiality if the appointment involves only ministerial tasks of selling the property.

12. If the inquirer determines upon consideration of such factors that disqualification is not required, then he may accept the appointment, but he may still have a disclosure obligation. "A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." Code of Judicial Conduct Canon 3(E)1, Cmt. [3.22]. The inquirer should consider whether he needs to advise the Court or the parties to the proceeding that he has represented, and continues to represent, the credit union judgment creditor in matters unrelated to the judgment or the mortgage being foreclosed. Comment [3.22] refers to disclosure "on the record," but if there are no proceedings on the record then the disclosure might have to be made by some other means such as a letter to the judge or the parties as appropriate.

CONCLUSION:

13. An attorney may accept appointment as a referee in a mortgage foreclosure proceeding where a client of the attorney holds a judgment on the mortgaged property, provided that: (a) the attorney makes any necessary disclosures; (b) the circumstances are not such that his impartiality might reasonably be questioned; and (c) in acting as referee, absent client consent, the attorney does not reveal or use any confidential information of the client and does not use to the disadvantage of the client any information relating to the representation.

(10-12)

OPINION 925 (08/02/2012)

TOPIC: Conflicts of interest arising from business relationships between defense counsel and prosecutors and imputation of the conflict to partners of defense counsel.

DIGEST: Criminal defense counsel may continue representation of a client being prosecuted by a part-time assistant district attorney even if his law partner is in a business relationship with another part-time assistant district attorney of the same county.

RULES: 1.7(a)(2), 1.7(b), 1.10(a), 1.10(d)

FACTS:

[1] The attorney making this inquiry (the "Inquirer") works as a criminal defense lawyer and now is a partner in a firm (the "Firm") with two other lawyers. The Inquirer works in one office, and the other two partners work in the other office. The offices are in different counties. Before joining the Firm, the Inquirer represented a defendant (the "Client") in a criminal case brought in a third county (the "County"), and has continued the representation since joining the Firm.

[2] One of the Inquirer's partners (the "Partner") in the Firm has a business relationship with a part-time assistant district attorney (the "A.D.A.") working in the County where the charges are pending against the Client. Specifically, the Partner and the A.D.A. are members in two limited liability companies that operate a real estate business and restaurant venture. The Inquirer knows little about the business between the Partner and the A.D.A., such as whether it has more than one property, whether it has income or losses, whether it has obtained financing or commitments to build the restaurant, whether there are other investors are involved, who manages the investment, and so forth. The A.D.A. has a private law office in the same town and county as the Partner, but the A.D.A. does not practice criminal defense law anywhere. The Partner and the A.D.A. have separate law offices, do not share any office, and do not discuss criminal matters.

[3] After his business relationship with the A.D.A. arose, the Partner gave the County's District Attorney his assurance that the Partner would not practice criminal defense in the County. This assurance has been observed by the Firm's other partner as well. The Inquirer, upon learning of this assurance, wrote to the District Attorney to advise of her handling of the Client's case as well as her understanding that the Firm she joined was "unable to handle DWI and criminal cases, due to a potential conflict." Whether this understanding is correct is the issue that has been referred to us to address.

[4] A different assistant district attorney (the "Prosecutor") is prosecuting the Client, and raised a question at the Client's trial as to whether the Inquirer is prevented from representing the Client because of the potential conflict (the Partner's relationship with the A.D.A.) The trial court allowed the Inquirer to proceed to trial on behalf of the Client, and charges were dismissed that day for procedural reasons. The accusatory instrument has been re-filed, and the Inquirer represented the Client at arraignment, when the Prosecutor again raised the potential conflict.

[5] The Client has been informed of all the foregoing facts, and is prepared to give his consent to the representation. However the Prosecutor objects, believing that the District Attorney's office must also consent but is unable to consent to a "dual representation," citing N.Y. State 603 (1989), 482

(1978), and 143 (1970). The judge hearing the matter directed the Inquirer and Prosecutor to seek the view of this Committee as to whether there is a conflict of interest, and if so whether the Client may consent to the representation.

QUESTION:

[6] Does a business relationship between a lawyer's partner and a part-time assistant district attorney prevent the lawyer from representing a defendant on criminal charges brought by another prosecutor in the office of the part-time district attorney?

OPINION:

[7] The inquiry deals with conflicts of interest due to the "personal interest" of a lawyer,[28] as contained in Rule 1.7(a)(2):

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . .
>
> > (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

[8] This Rule serves to ensure that "[t]he lawyer's own financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client." Comment 10 to Rule 1.7. This Rule aims to prevent the risk that the lawyer will not "give a client detached advice," that a lawyer's personal relationship would "materially limit the lawyer's representation of the client" or would "affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest." *Id.* The risks also include "the risk that client confidences will be revealed" and that the lawyer's relationship will "interfere with both loyalty and professional judgment." Comment 11 to Rule 1.7.

[9] This inquiry presents a question of first impression for our Committee. We have addressed business relationships between criminal defense counsel and prosecutors in two of our prior opinions, but both examined the duties of the prosecuting lawyer, whereas here we examine the interests of the defense counsel.

[10] In N.Y. State 413 (1975), an assistant district attorney sought to enter into a business unrelated to the practice of law with an attorney who defends criminal defendants in a county where the assistant district attorney is employed. The nature of the business and extent of the relationship was not described in our opinion. We held that the assistant district attorney could not enter into a business relationship with a criminal defense attorney in the same jurisdiction because it violated two requirements of the former Code of Professional Responsibility (in effect before April 1, 2009). First, we stated that it violated Canon 5 and Ethical Consideration ("E.C.") 5-2, which provided that:

28 This case does not involve a "dual representation" of the kind covered by Rule 1.7(a)(1) because the Firm has only one "representation" (that of the Client). The Partner's business interest is a personal interest, not a competing representation. It also does not involve a law firm business between the assistant district attorney and a criminal defense attorney.

> A lawyer should not accept proffered employment if the lawyer's personal interests or desires will, *or there is a reasonable probability that they will,* affect adversely the advice to be given or services to be rendered the prospective client. After accepting the employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that *would tend* to make his or her judgment less protective of the interests of the client. (Italicized emphasis added.)

[11] E.C. 5-2, related to Canon 5's Disciplinary Rule ("D.R.") 5-101(A), was the forerunner of Rule 1.7(a) (2)). However, Rule 1.7(a)(2) does not contain an equivalent to the concept that a lawyer should decline a representation because of a "reasonable probability" that the lawyer's personal interests will affect the lawyer's advice or interests that "would tend" to make the lawyer's judgment less protective of the client.

[12] Importantly, we also noted that an assistant district attorney could not obtain consent to the conflict from his client because the "People" may not waive conflicts of interest. Even the assistant district attorney's agreement to remove himself from all cases which involved his business partner did not change the result.

[13] We also relied upon Canon 9, the former requirement of the Code of Professional Responsibility to avoid the "appearance of impropriety," specifically Ethical Considerations 9-2, 9-3, and 9-6. The Rules do not carry forward this "appearance of impropriety" concept.

[14] In N.Y. State 583 (1987), an assistant district attorney who was starting a business to advise prospective college students and their families with the college selection and admission process sought to rent office space for the business from an assistant public defender, and to employ the spouse of a criminal defense attorney practicing in the same jurisdiction as an employee in the business. Unlike the business relationship in N.Y. State 413, we declined to rule out these proposed arrangements, construing D.R. 5-101(A) (the predecessor to Rule 1.7(a)(2)).

[15] First, we concluded that the facts determine the outcome in each case, that is, "the nature and extent of the particular involvement, e.g., the size of the investment, both relatively and absolutely, the degree of influence, etc., will determine whether the relationship is barred." The lawyer's personal interests "could come into conflict with his or her duty to exercise professional judgment solely in the interests of his or her clients" because, "depending on the financial arrangements and other business and personal circumstances, a rented office situation might involve relatively little danger that professional judgment would be improperly influenced or, on the other hand, substantial danger." Accordingly, "we perceive[d] *no per se prohibition*" but at the same time we cautioned the lawyer to "avoid financial or other business or personal interests, including rentals that will or could reasonably affect the lawyer's exercise of professional judgment solely on behalf of his or her client."

[16] N.Y. State 583 is the better guide for our decision involving the criminal defense counsel and the Firm here. We construe Rule 1.7(a)(2) (and Rule 1.7(b)), the successor version of D.R. 5-101(A) and E.C. 5-2, but not the additional standard of "appearance of impropriety," which was not carried over from the Code to the Rules of Professional Conduct.

[17] We analyze the personal interest conflict from the point of view of the Partner because Rule 1.10 imputes the Rule 1.7(a)(2) "personal interest" of the Partner to the Inquirer and all attorneys

associated in a firm. We must assess whether there is "a *significant* risk" that the Partner's "professional judgment on behalf of a client *will* be adversely affected" by the Partner/A.D.A. business relationship. N.Y. State 583 teaches that this is a function of the magnitude or extent of that relationship and of its connection to the Partner's professional judgment on behalf the Client.

[18] As Prof. Roy D. Simon wrote, a "significant" risk is "more than a possibility but less than a certainty." Simon's N.Y. Rules of Professional Conduct at 271 (2012 ed.). Nevertheless, we consider the possibilities. Like the Inquirer, we do not know if the Partner's sense of loyalty to or solidarity with his business partner, the A.D.A., is great, or if their financial inter-dependence is significant. Even if it were, it is difficult on the information we have been supplied to conclude that the Partner's business relationship with the A.D.A. will motivate the Partner to alter or diminish his professional judgment for his Client, or leak confidential information, or give less than detached advice. It is significant here that the prosecution is handled by the Prosecutor, a different assistant district attorney, whose win or loss probably has little effect on the fortunes of the A.D.A. business partner. A bad outcome for the Client (a "win" for the Prosecutor) would not redound to the benefit of the A.D.A. business partner or benefit the A.D.A.'s real estate and restaurant business with the Partner. A good outcome for the Client (a "loss" for the Prosecutor) is not a loss by the A.D.A., and probably would not harm any interest of the A.D.A. business partner of the Partner. Accordingly, we cannot conclude on the limited facts supplied in the inquiry that there is a "significant" risk that there "will" be a breach of confidential information, from Partner to A.D.A. to Prosecutor, or any disloyalty to the Client by the Partner.

[19] We are not a fact-finding body, however, and it would alter our opinion if the court here were to be supplied additional facts that showed that, due to the business relationship with the A.D.A., there is a significant risk that the Partner will not "give a client detached advice;" that the relationship will "materially limit the lawyer's representation of the client" or "affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest;" "that client confidences will be revealed;" or that the lawyer's relationship will "interfere with both loyalty and professional judgment."

[20] It may or may not be significant that the Partner has given his assurance to the District Attorney that he will not take on criminal matters in that County, and that another partner in the Firm observes this assurance as well. Both the Prosecutor and the Inquirer have perceived this assurance to reflect a concern for a "potential" conflict of interest. An *actual* conflict of interest, however, is what is relevant, and that is determined by the language of Rule 1.7(a)(2), which, as we said above, is shown by the magnitude and extent of the business relationship and its impact on the Partner's professional judgment on behalf of the Client.

[21] Even if an actual personal conflict were established, it does not end the inquiry. The question would turn to whether the Inquirer and the Client could conclude that the representation may proceed. Rule 1.10 provides that the imputed conflict may be waived:

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

[22] Rule 1.7(b), in turn, permits waiver of the conflict of interest and consent to the representation under four conditions:

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

[23] We assume that the representation is not prohibited by law, and does not involve the assertion of a claim by one client of a lawyer or firm against another client. We turn, therefore, to conditions (1) and (4). We cannot rule out the possibility that both of these conditions may be satisfied.

[24] As to the first condition of Rule 1.7(b), the Partner may be able to reasonably conclude, on the facts we have been supplied, that the Partner would provide competent and diligent representation of the Client because (for the reasons stated above) we cannot say that there is a "significant risk" the outcome of the Client's case "will" bear on the Partner's business ventures with the A.D.A. and therefore diminish the competence or diligence of the Partner's representation.

[25] If the *Partner* could provide a competent and diligent representation, then likewise the *Inquirer* could do so. The Inquirer does not have any business relationship with the A.D.A. or any interest in the relationship between the Partner and the A.D.A. The Inquirer stands to gain or lose nothing depending upon the fortunes of the Partner's business venture with the A.D.A. In addition, the A.D.A. is not the assistant district attorney charging the Client, so it is difficult to imagine how even a bad outcome for the Client (a "win" for the Prosecutor) could have any impact on the fortunes of the A.D.A.'s real estate and restaurant business venture(s). There are additional factors present here. The Inquirer has represented the Client since before joining the Firm. The Inquirer has little information about and no interest in the Partner's business venture with the A.D.A. The Inquirer has an office and maintains client files in a different office and in a different county from the Prosecutor, the A.D.A., the Partner, and the business ventures. Overall, on these facts, we see enough to conclude that the Inquirer can reasonably believe that the Inquirer can provide competent and diligent representation to the Client.

[26] As to the fourth condition of Rule 1.7(b), informed consent by the Client may be possible on the facts presented. Rule 1.1(j) defines "Informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." As Comment 6 to Rule 1.7 points out, it is a flexible concept, depending upon the sophistication of the Client, the information to be supplied, and whether separate counsel should be recommended to advise the Client about the risks and benefits of giving consent. The Client sets the terms of the consent; if, as we believe, the Inquirer can reasonably conclude that the Inquirer will provide competent and diligent representation,

it makes even more sense to respect the consent of a Client to choose to be represented by the Inquirer, who is free of any relationship to the A.D.A. or Prosecutor.

[27] Finally, Rule 1.10(d) requires consent from all "affected clients," that is, those who are affected by the personal interest conflict. Here, unlike N.Y. State. 413, we analyze the duties of the Partner, Inquirer, and their Firm, which are criminal defense counsel. They represent the Client and the only client affected by the Partner's personal interest is the Client, not the "People." The Partner (and the Inquirer) have never represented the People. *Cf* N.Y. State 862 (2011) ("If the conflict arises under Rule 1.7(a)(2) because of the conflicted Assistant Public Defender's personal interests, then consent is required only from the inquirer's own assigned client, because no other client is affected.") Therefore, the fact that the District Attorney's office is unable to give consent on behalf of the "People" is of no consequence to the duties of the criminal defense counsel.

CONCLUSION:

[28] We conclude on the inquiry presented, limited to the facts supplied, that a lawyer may continue a criminal defense representation of a client after joining a firm which includes a partner who has a business relationship with a part-time assistant district attorney working in the same office where another part-time assistant district attorney is prosecuting the lawyer's client.

(23-12)

OPINION 926 (07/31/2012)

TOPIC: Union-sponsored legal fee reimbursement plan; conflicts of interest

DIGEST: A lawyer who belongs to a union (1) may be a lawyer on the panel of a union-sponsored plan that reimburses legal fees, and (2) may represent a fellow employee in a real estate transaction where the client will ask the plan to reimburse the employee for the lawyer's fees.

RULES: 1.0(j); 1.7(a) & (b); 1.8(f)

FACTS:

1. The inquirer is a practicing attorney licensed in New York State who is also an employee of a municipal corporation and member of its union. The union provides a benefit to its members in the form of reimbursement up to a maximum fixed amount for legal fees incurred by the member in connection with the purchase or sale of real estate. Reimbursement is made only if the member retains a lawyer from a panel of approved lawyers. The inquirer has applied to join the panel, but the union panel administrators asked the inquirer to obtain this Committee's opinion regarding any conflicts that might arise from the inquirer's service on the panel. The members of the panel have no control over admission to the panel; selection is made by a group including union and employer representatives.

QUESTION:

2. This inquiry presents two related questions:

A. May a lawyer who belongs to a union be a panel member of a legal fee reimbursement plan sponsored by the union for fellow employees?

B. May a lawyer who belongs to a union represent another union member (*i.e.*, a co-worker) in a real estate transaction covered by the reimbursement plan?

OPINION:

Question A: May the Inquirer Serve as a Panel Member?

3. This Committee has long recognized that payment of legal fees by third parties is a common practice. For example, in N.Y. State 825 (2008) we opined that no ethical bar exists to a lawyer providing legal services to a client referred and paid by an employee assistance plan.

4. Rule 1.8(f), however, sets three conditions on a lawyer's receipt of payment from a third party. First, the client must give informed consent; second, there must be no interference with the lawyer's independent professional judgment or with the lawyer-client relationship; third, the client's confidential information must be protected as required by Rule 1.6. In addition, while Rule 1.8(f) does not mention it, we recommend that the client's consent be confirmed in writing.

5. The reimbursement plan at issue here differs slightly from the plan at issue in Opinion 825. There the recommendation and fee arrangement were made at the outset of the lawyer-client relationship. Here, the client selects and pays a lawyer but is eligible for reimbursement only if that lawyer is on the approved panel. But this difference is not significant and only makes compliance with Rule 1.8(f) simpler. The likelihood of compromising confidential information or undermining professional independence is reduced in the reimbursement model presented here because the representation takes place and is concluded before the client applies for reimbursement. Consequently, the union may not even be aware of the attorney-client relationship during the representation, and will thus have little or no opportunity to interfere with the relationship or to ask for confidential information.

6. Nevertheless, Rule 1.8(f)(1)'s requirement of "informed consent" raises special concerns. The term "informed consent" is defined in Rule 1.0(j) as follows:

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

7. To obtain a client's informed consent in the context of the union-sponsored reimbursement plan before us here may require the lawyer to discuss the amount of fees, how the lawyer will charge for fees (e.g., flat, hourly, or percentage), the client's responsibility to pay the fees whether or not the plan approves reimbursement, and whether the lawyer will represent the client if any dispute arises with the union over the client's entitlement to reimbursement under the plan. The "material risks" would appear to be that the plan may for some reason decide not to reimburse the inquirer's fees (or may reimburse only part of them), and that the plan may take a long time to reimburse whatever portion of the fees it approves. The "reasonably available alternatives" would include hiring a lawyer outside the plan (with no chance for reimbursement) or not hiring a lawyer for the real estate deal at all.

8. The considerations in the preceding paragraph exist whether or not the lawyer providing services is a fellow employee and member of the union. Since the members of the panel have no say in the designation of new panel members, it is unnecessary to discuss any ethical implications that might arise if members of the panel had the right to exclude members.

Question B: May the Inquirer Represent a Fellow Employee and Union Member?

9. Rule 1.7(a)(2) governs personal conflicts of interest. Unless a lawyer satisfies the exceptions in Rule 1.7(b), Rule 1.7(a)(2) prohibits a lawyer from representing a client "if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." The facts necessary for a reasonable lawyer to determine whether there is (or is not) a significant risk of an adverse effect on the lawyer's professional judgment in representing a fellow employee in a real estate transaction are not presented in this inquiry. Such facts might include the inquirer's personal interest in maintaining a favorable employment relationship with the employer. For example, whether a "significant risk" exists might depend on (i) whether the client is in the lawyer's direct reporting structure (and, if so, whether the client is above or below the lawyer in rank), (ii) the likelihood that the lawyer will want the client's favorable recommendation for the lawyer's pro-

motion or advancement, and (iii) the strength of the lawyer's desire to maintain membership on the union approved panel. If these or any other personal interests arising out of the lawyer's employment for their mutual employer raise a significant risk of adversely affecting the lawyer's professional judgment on behalf of a fellow employee, then the inquirer must comply with the requirements in Rule 1.7(b).

10. Rule 1.7(b), permits a lawyer whose personal interests might affect the lawyer's professional judgment under Rule 1.7(a) to represent the client in the matter if the lawyer meets two main conditions:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; . . . and
>
> (4) each affected client gives informed consent, confirmed in writing.

11. While we lack sufficient facts to determine whether the inquirer "reasonably believes" she can provide "competent and diligent representation" to the fellow employee, or whether the employee has given informed consent, confirmed in writing, we have drawn attention to some issues the lawyer may wish to address before accepting or continuing to represent a fellow employee who intends to seek reimbursement for the lawyer's fees under the union-sponsored reimbursement plan. If, after exploring these and any other relevant personal interests, the lawyer concludes that there is no significant risk to the lawyer's independent professional judgment in representing a fellow employee in a real estate transaction, then Rule 1.7(a) (2) does not apply and the inquirer may accept the representation without obtaining the client's consent. If the lawyer concludes there is a significant risk, then the lawyer may not accept or continue the representation absent compliance with Rule 1.7(b).

CONCLUSION:

12. A lawyer who belongs to a union (1) may be a lawyer on the panel of a union-sponsored plan that reimburses legal fees, and (2) may represent a fellow employee in a real estate transaction where the client will ask the plan to reimburse the employee for the lawyer's fees.

(29-12)

OPINION 927 (08/02/2012)

TOPIC: Referrals by Non-Lawyer; Attorney Fees Paid by Third Party

DIGEST: Lawyer may not ethically enter into arrangement with a non-lawyer to accept referrals for a fixed monthly fee for each case referred where case has been obtained by telephonic solicitation.

RULES: 1.0(j),1.5(a) and (b), 1.8(f), 5.3(b), 5.4(a), 7.2(b), 7.3(a)(1), 8.4(a)

QUESTION:

[1] May a lawyer enter into an arrangement to (a) accept referrals of mortgage foreclosure cases from a non-lawyer who will pay the lawyer a monthly fee and (b) have the lawyer's legal fees paid by a third party that referred the client to the lawyer?

FACTS:

[2] A corporation (the "Corporation") that is not a law firm intends on a non-exclusive basis to refer clients to the lawyer which clients are in the process of having their residences in New York foreclosed. The legal services would include matters related to loan defaults, mortgage foreclosures and bankruptcies. The lawyer will bill the Corporation a flat fee of $300 each month for each referral regardless of how many or how few hours the lawyer must devote to the matter. The Corporation will pay the lawyer from funds paid to the Corporation each month by the Client. Upon conclusion of the matter the Corporation will retain the balance of the funds for its role in obtaining the Client. The Corporation has no obligation to refer any clients to the lawyer and the lawyer has no obligation to accept any client. Before accepting any client the lawyer will run a conflict check. The Corporation obtained the potential clients by checking public records and contacting the individuals by telephone. The clients enter into an agreement with the Corporation to pay something each month in excess of the amount paid to the lawyer. The lawyer is not advised how much in excess is paid by the client to the Corporation. The Corporation promises prospective clients that it has lawyers in the client's geographical area that are competent to handle the matter and refers their matter to such lawyer. The agreement is between the client and the Corporation, not between the client and the lawyer.

[3] The lawyer has not and will not pay the Corporation anything of value for the referrals.

APPLICABLE RULES:

[4] The answer to the question based upon the facts implicates a number of provisions of the Rules of Professional Conduct (the "Rules") including the following:

(a) Rule 1.5(a) prohibits a lawyer from charging an excessive or illegal fee.

(b) Rule 1.5(b) and 22 N.Y.C.R.R §1215.1 require a lawyer to furnish a client with an engagement letter or retainer agreement at the outset of the representation.

(c) Rule 1.8(f) prohibits third party payment of legal fees unless the client gives informed consent.

(d) Rule 5.3(b) makes a lawyer responsible for conduct of a non-lawyer associated with the lawyer that would be a violation of the Rules if engaged in by the lawyer.

(e) Rule 5.4(a) prohibits a lawyer from sharing a legal fee with a non-lawyer.

(f) Rule 7.2 (b) provides that a lawyer may be recommended, employed or paid by a legal aid office, a public defender office or a bar association sponsored lawyer referral service.

(g) Rule 7.3(a)(1) prohibits a lawyer from solicitation by in-person or telephone contact.

(h) Rule 8.4((a) prohibits a lawyer from violating a Rule through the acts of another.

OPINION:

Question of Law

[5] This inquiry raises a substantial question of law which is beyond the jurisdiction of this Committee to resolve. Would the Corporation by solicitation of clients from public records of current foreclosures and referring the matter to an attorney be engaged in actions in violation of Judiciary Law §479 (soliciting business on behalf of an attorney), §482 (employment by attorney of person to aid, assist or abet in the solicitation of business or the procurement through solicitation of a retainer to perform legal services) or §495(1)(d) (prohibiting corporations from furnishing attorneys)? Apart from the law, the proposed arrangement is ethically flawed in numerous respects and accordingly, a New York lawyer should not enter into the proposal.

Fee Not to be Excessive

[6] While flat or fixed fees are not prohibited by Rule 1.5(a) as such, Simon's New York Rules of Professional Conduct 111 (2012 ed.), the fee cannot be excessive. Rule 1.5(a); Restatement Third, The Law Governing Lawyers §34 (2000). This is so even though the parties agreed to the fee. Restatement Third, The Law Governing Lawyers §34, com. *a* (2000). Here there is to be a charge by the lawyer of $300 each month for the entire length of the matter whether or not legal services are performed that month. This is more akin to a monthly retainer which, depending upon the circumstances, may be permissible. N.Y. State 599 (1989). For the purposes of this opinion we need not distinguish between the classical or general retainer, advance refundable payment, minimum non-refundable payment or fixed fee. Whether or not the fee described in the proposed arrangement would be excessive cannot be determined based upon the facts given in this inquiry; but there is a rebuttable presumption that a flat or fixed fee unrelated to the service performed for a lengthy period at some point becomes excessive. Retainer or fixed fees agreed to by unsophisticated clients should be more closely scrutinized to ensure that they are no greater than is reasonable. On top of the fee charged by the lawyer, the Corporation here adds its monthly fee. The two combined are presumptively excessive for lack of a stated justification.

[7] As stated in N.Y. State 599 (1989), paralleling the Code (now the Rules) provisions are legal standards applicable to a lawyer's fee. "[A]s a matter of public policy, courts pay particular attention

to fee arrangements between attorneys and their clients. . . . An attorney has the burden of showing that a fee contract is fair, reasonable, and fully known and understood by the client. . . ." *Jacobson v. Sassower*, 66 N.Y.2d 991, 993 (1985). "A client may always discharge his attorney, with or without cause, and in the absence of a contract providing otherwise an attorney discharged without cause is entitled to be compensated in quantum meruit." *Id.* citing *Martin v. Camp*, 219 N.Y. 170 (1916); *see also,e.g.,Rubenstein v. Rubenstein*, 137 A.D.2d 514 (2d Dep't 1988) (fairness and reasonableness of fee); *J.M. Heinike Associates v. Liberty National Bank*, 142 A.D. 2d 929, 930 (4th Dep't 1988) (unconscionability of retaining prepaid fee following withdrawal from employment in absence of good cause). *Cf.*, Brickman & Cunningham, *Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law*, 57 Fordham L.Rev. 149 (1988).

Notice to Client

[8] Both the Rules [Rule 1.5(b)] and the law where the fees are expected to exceed $3,000 (22 N.Y.C.R.R. §1215.1) require that the lawyer at the commencement of the representation or a reasonable time thereafter advise the client the scope of the representation and the basis or rate of the fee unless the client has been regularly represented and the services are of the same general kind as previously rendered. Under the facts of the matter before us, this was not done. The proposed arrangement thus does not comply with the Rule and possibly the regulation.

Telephone Solicitation

[9] The Corporation's telephonic solicitation of the client if done by the lawyer would be in violation of Rule 7.3(a)(1) and its predecessor DR 2-103 (A) of the Code of Professional Responsibility (the "Code") prohibiting such solicitation. Because Rule 5.3(a) and its predecessor DR 1-104(D)(1) of the Code makes a lawyer responsible for conduct of a non-lawyer associated with the lawyer that would be a violation of the Rules if engaged in by the lawyer, the lawyer would be in violation of the Rules as the lawyer is associated with the Corporation in the proposed arrangement. N.Y. State 694 (1997); N.Y. State 828 (2009). We do not address First Amendment considerations discussed in *Ohralik v. Ohio State Bar Assn.,*436 U.S. 447 (1978) upholding a ban on in person solicitation, *Shapero v. Kentucky Bar Assn.,* 486 U.S. 466 (1988) permitting direct mail solicitation, *In re von Wiegen,* 63 N.Y. 2d 163 (1984) permitting direct mail solicitation or *Florida Bar v. Went for It, Inc.,* 515 U.S. 618 (1995) upholding a ban on mail solicitation to accident victims as these are questions of law beyond the jurisdiction of this Committee.

Division of Legal Fees

[10] It has long been established in New York that a lawyer may not share a legal fee with a non-lawyer. Rule 5.4(a) and its predecessors, DR 3-102 of the Code and Canon 34 of the Canons of Professional Ethics; N.Y. State 889 (2011); N.Y. State 906 (2012); N.Y. State 911 (2012). Here the fee paid by the client to the Corporation includes the lawyer's fee for legal services. In substance the lawyer is sharing a legal fee with a non-lawyer. This is no different than the lawyer billing the client and remitting a portion of the fee to the Corporation. The lawyer cannot do indirectly what the lawyer cannot do directly. Rule 8.4(a). N.Y. State 860 (2011). The arrangement would violate these Rules.

[11] Notwithstanding the foregoing, we recognize that it may be ethically possible for a client separately to engage the services of the lawyer and the non-lawyer at the same time and that the non-lawyer may be paid directly by the client and the lawyer also be paid directly by the client. *See Blumenberg v. Neubecker*, 12 N.Y.2d 456 (1963). Notably, *Blumenberg* centered around the anti-fee splitting with non-lawyers prohibition contained in Judiciary Law §491 and did not address the ethical issues of fee splitting with non-lawyers contained in Canons 34 of the Canons of Professional Ethics in effect at the time of the decision. The application of Judiciary Law §491 is a question of law beyond the jurisdiction of this Committee. Without reference to *Blumenberg* or to Judiciary Law §491 this Committee concluded in N.Y. State 875 (2011) that there "is no ethical barrier to a lawyer entering into a contingent fee arrangement with a client where the client already has retained a non-testifying expert to work on the same case on a contingent fee basis." That is not the case here. Here the client pays a single fee directly to the non-lawyer, a portion of which is then paid to the lawyer. What is happening is that the non-lawyer Corporation is acting as a referral agent for a fee. However, the Corporation is not one of the entities permitted to be a referral agent under Rule 7.2(b). N.Y. State 597 (1989). Accordingly, these Rules would be violated.

Third Party Payor of Legal Fees

[12] There is nothing *per se* ethically improper if a third party pays the lawyer's legal fee provided that the client is fully informed of the arrangement, including the amount to be paid to the lawyer, and the client gives informed consent as defined by Rule 1.0(j) and provided the third party does not interfere with the representation. Rule 1.8(f); N.Y. State 825 (2008); Restatement Third, The Law Governing Lawyers §134(1) and com. *c* (2000). In the arrangement described in the facts there is no indication that the client has fully been informed of the arrangement and has given informed consent. Thus, the arrangement would also violate these provisions of the Rules.

CONCLUSION:

[13] A lawyer may not ethically enter an arrangement with a non-lawyer to accept referrals for a fixed monthly fee for each case referred by the non-lawyer where the client has been obtained by the non-lawyer by telephonic solicitation and receives a fee from the client that includes the lawyer's fee.

(41-12)

OPINION 928 (08/09/2012)

TOPIC: Use of the term "Project" or "Law Center" in the name of a qualified legal assistance organization.

DIGEST: A qualified legal assistance organization can use the terms "Project" and "Law Center" in its name as long as, in the case of the term "Project," the term is associated with words indicating the organization's law-related activity.

RULES: 1.0(p), 7.5(b)

FACTS:

[1] The inquirer is interested in starting a non-profit legal services organization and has asked if the terms "Project" and "Law Center" could be used in its name.

QUESTION:

[2] The inquirer has asked two related questions:

> A: Can the word "Project" be used in the organization's name, even if the term "legal" or "law" is not?
>
> B: Does the use of the phrase "Law Center" comply with the Rules of Professional Conduct?

OPINION:

[3] This question is governed by Rule 7.5(b) of the New York Rules of Professional Conduct, which provides in part that:

> A lawyer in private practice shall not practice under a trade name [or] a name that is misleading as to the identity of the lawyer or lawyers practicing under such name. . . . Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein.

[4] Rule 1.0(p) states that the term "'[q]ualified legal assistance organization' means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof." The four types, each with its own requirements, include "a legal aid office or public defender office" operated or sponsored by, among others, a bona fide, non-profit community organization, and a "bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries." We will assume that the contemplated organization would comply with relevant aspects of Rule 7.2(b) and so would be a "qualified legal assistance organization." This opinion does not apply

to private law firms that are not "qualified legal assistance organizations," and they are governed by entirely different considerations.[29]

[5] In our view, a qualified legal assistance organization would be able to use the name "Project," provided that the name, like all the other terms set forth in Rule 7.5(b), were to indicate in some way the law-related nature of the group's activity (and provided the name was not otherwise misleading). In *Paskowski v. DiBenedetto*, 184 Misc. 2d 34, 38, 705 N.Y.S.2d 521, 524-25 (Fam. Ct. Rockland Co. 2000), the court found that the term "Domestic Violence Law Project" was "sufficiently similar to the listed terms to be covered by the reference in the Disciplinary Rule [DR 2-102(B), which was identical to current Rule 7.5(b)] to 'and the like.'" We agree. We do not think that the only permissible ways to indicate the law-related nature of the work are use of the terms "legal" or "law." One of the terms listed in the Rule is, for example, "defender office." But in our view a term such as "Poverty Project" would not, without more, be sufficiently similar to the terms listed in Rule 7.5(b) to qualify.

[6] The term "Law Center" can be used by a qualified legal assistance program, provided it is not otherwise misleading, as it is, in our view, similar to terms such as "Legal Clinic" or "Legal Service Office."

CONCLUSION:

[7] A qualified legal assistance organization may use the term "Project" or "Law Center" in its name, provided that the name is not otherwise misleading and provided, in the case of the term "Project," that the name otherwise indicates the law-related nature of the group's activity.

(42-12)

29 *See*, *e.g.*, N.Y. State 740 (2001) ("Using a name that is not the legal name of one or more partners or former partners in the law firm constitutes use of a trade name"); N.Y. State 732 (2000) (use of X Group was permissible, where X was the name of the attorney in the firm and the firm included a number of associates); N.Y. State 445 (1976) ("Community Law Office" would be unacceptably misleading for a private law office).

OPINION 929 (08/08/2012)

TOPIC: Designation of Patent Attorney on Business Card; Inactive Status and Designation of Specialty

DIGEST: An attorney whose registration/admission status before the United States Patent and Trademark Office is "inactive" may not use the designation patent attorney on his business card unless he notes that he is on administrative leave and as such is unable to prosecute matters for others before the USPTO.

RULES: Rule 7.1 a and b, 7.4(b), 7.5 (a), and 8.4(c)

FACTS:

[1] The Inquirer, who is admitted to practice in patent matters before the United States Patent and Trademark Office ("USPTO"), has accepted a position as a patent examiner for the USPTO. Once the Inquirer begins working as a patent examiner for the USPTO, the inquirer's name will remain on the official USPTO register, but his registration status will be changed to "on administrative leave."

[2] During the period of his employment with the USPTO, the Inquirer will not be able to represent, or prosecute patent applications, for others or otherwise engage in patent practice before the USPTO.

[3] The Inquirer has advised that as a federal government employee he is prohibited from practicing as an attorney for others before any federal agency.

QUESTION:

[4] May an attorney, who is admitted to practice before the USPTO continue to use the designation "Patent Attorney" on his business cards when his USPTO admission status changes to "administrative leave"?

OPINION

[5] According to Federal Law, an attorney who has fulfilled the requirements for admission to practice before the USPTO is deemed to be registered as a patent attorney. A patent attorney is able to represent applicants in the preparation and prosecution of patent applications and to practice before the USPTO in patent matters. See 37 C.F.R. §§ 11.5, 11.6 (a) (1).

[6] Rule 7.4 of the New York Rules of Professional Conduct (the "Rules") instructs lawyers who wish to identify themselves and their practices in terms of their respective specialties. According to Comment [2] of Rule 7.4, "Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office."

[7] Rule 7.4 (b) states as follows:

> (b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or substantially similar designation.

[8] Rule 7.5 addresses attorneys' use of professional cards and professional announcement cards, and permits an attorney to use such cards. Rule 7.5 provides:

> (a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following:
>
> > (1) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4.

[9] In the instant situation, the Inquirer has advised that while serving as a patent examiner for the USPTO, he will be an employee of the Federal Government. Federal Government employees may not accept private clients or represent clients other than their agency before the USPTO. See 18 U.S.C. § 205; 37 CFR § 11.10(d) and (e) (an employee of the USPTO is prohibited "from prosecuting or aiding in any manner in the prosecution of a patent application for another"). In the instant matter, the Inquirer may not represent others before the USPTO.

[10] In the instant scenario because the Inquirer is unable to represent others before the USPTO while employed by the USPTO, Rule 7.1 is instructive in determining what information the Inquirer may include on his business card.

[11] Rule 7.1 (b) states in part:

> (b) Subject to the provisions of paragraph (a), an advertisement may include information as to:
>
> > (1) legal and non-legal education, degrees and other scholastic distinctions, dates of admission to any bar; areas or the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications or law related matters authored by the lawyer; memberships in bar associations or others professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide professional ratings;"

[12] Rule 7.1(a) (1) and (2) prohibits a lawyer from using or disseminating any advertisement that "contains statements or claims that are false, deceptive or misleading; or violates a Rule."

[13] Comment [6] of Rule 7.1 states ". . . all communications by lawyers, whether subject to the special rules governing lawyer advertising or not are governed by the general rule that lawyers not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law."

[14] In addition the lawyer must comply with Rule 8.4(c), which provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

[15] Therefore, it would be misleading for the Inquirer, without further explanation, to maintain the designation "patent attorney" on his business card when the attorney is currently unable to represent others or prepare/prosecute patent applications for submission to and/or presented before the USPTO.

[16] The Inquirer may attempt to prevent any ethical issues from arising when including the patent attorney designation on his business cards by also inserting language that notes that he is currently on administrative leave and is unable to represent others in patent matters before the USPTO.

[17] This conclusion is consistent with prior opinions concerning information to be disclosed on attorneys' business cards.

[18] In N.Y. State 704 (1998), we concluded that business cards must fairly disclose jurisdictional limitations on practice of named attorneys. In that opinion, we also remarked on the purpose of the contents on letterhead and business cards and noted that "the contents of letterhead and business cards should enhance the public's ability to recognize the need for counsel and to choose the most appropriate counsel, and should not contain any statement or representation that is false, deceptive or misleading" and the "contents should not violate any statute or court rule."

[19] In N.Y. State 863 (2011) we concluded that a lawyer not admitted to practice in New York, who is engaged in immigration matters in New York, should "note on . . . her business cards that she is admitted to practice only in Texas and her practice in New York is limited solely to immigration matters."

[20] Similarly, in the present inquiry, once the attorney becomes administratively inactive and is unable to practice before the USPTO, it would be misleading to use the designation patent attorney on business cards because it implies that he is able to prosecute patent applications and/or otherwise represent others before the USPTO, when in fact, he is not.

CONCLUSION:

[21] It is misleading for an attorney employed as a patent examiner, whose registration status before the USPTO is administratively inactive, to use the designation patent attorney on his business cards during the leave period without inclusion of his status on the USPTO register. The attorney should include on his business card that he is on administrative leave and/or inactive status before the USPTO and is unable to prosecute patent applications and/or otherwise represent others before the USPTO.

(17-12)

OPINION 930 (08/08/2012)

TOPIC: Arrangement between Law Firm and Non-Legal Service Provider

DIGEST: A lawyer may not enter into a contractual arrangement with an insurance agency whereby the agency would offer its customers both legal and nonlegal services, even if the agency and lawyer are separately paid and do not share in each other's fees.

RULES: 1.7, 5.7, 5.8(a), 5.8(c), 7.1, 7.2, 7.3

QUESTION:

[1] The inquiring lawyer asks whether a lawyer may enter into an exclusive arrangement with an insurance agency whereby the agency would offer its clients a service requiring legal review, and, as part of the same offer, would recommend that its clients use the legal services of the inquiring lawyer.

BACKGROUND:

[2] Federal law – specifically the Employee Retirement Income Security Act, or "ERISA," 29 U.S.C. 1002, *et seq.* – requires administrators of benefit plans to provide plan participants in writing the most important facts they need to know about their retirement and health benefits. These facts include plan rules, financial information, and documents on the operation and management of the plan. Some of these facts must be automatically provided by plan administrators; others must be available on request. Among the documents that plan administrators must always supply all plan participants is a summary of the plan, widely called a Summary Plan Description, or "SPD." *See* http://www.dol.gov/dol/topic/health-plans/planinformation.htm.

[3] The inquirer concentrates in employment and labor law, including benefit plans that ERISA regulates. According to the inquirer, both insurance companies and insurance agents commonly charge a fee for preparing an SPD for their customers, the plan administrators. The inquirer proposes to enter into an arrangement whereby an insurance agency will offer the agency's services, together with the inquiring lawyer's services, to the agency's customers to prepare an SPD. The lawyer does not pay the insurance agency for this arrangement, nor does one share in the fees payable to the other.

[4] In a proposed communication with its customer plan administrators, the insurance agency would indicate that the agency will provide an SPD for a lump sum price that includes both the agency's documentation of the SPD plus the inquiring lawyer's review. Of the lump sum price, 87% would be paid directly to the lawyer by the client plan administrator pursuant to a written engagement letter between the plan administrator and the lawyer; the balance would be paid directly to the insurance agency. The proposed communication notes that other providers of this service charge a fee higher than the proposed lump sum while disclaiming liability for legal review of the SPD. The proposed communication also contains a flattering description of the inquiring lawyer's abilities in employee benefit matters.

[5] The inquiring lawyer states that the inquirer is prepared to conduct the legal review of the SPD for a flat or fixed fee. The lawyer estimates that such review will typically consume X number of hours, and that 87% of the lump sum price equates to X times the lawyer's customary hourly rate. The

lawyer (or the lawyer's firm) would be the exclusive legal service provider that the insurance agency would offer to its plan administrator customers under the arrangement for preparing SPDs.

OPINION:

[6] We conclude that Rule 5.8 of the New York Rules of Professional Conduct (the "Rules") prohibits the arrangement as the inquirer proposes to structure it, because the structure would constitute an improper multidisciplinary practice. The term "multidisciplinary practice" means a venture that offers both legal and non-legal services to the public. In April 2000, the New York State Bar Association Special Committee on the Law Governing Structure and Operation released the "MacCrate Report," officially titled *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers*. "On July 23, 2001, the Appellate Divisions adopted new rules on multidisciplinary practice, effective November 1, 2001." N.Y. 755 (2002). There were two new Disciplinary Rules: DR 1-106 and DR 1-107 of the Code of Professional Responsibility (which was then in effect in New York). Each new DR substantially implemented the recommendations of the MacCrate Report. DR 1-106 concerned ancillary non-legal businesses that a law firm owned or controlled; DR 1-107 concerned business relationships between law firms and third-party non-legal service providers. In 2009, when the Appellate Divisions adopted the format of the Model Rules of Professional Conduct, DR 1-106 and DR 1-107 became, respectively, Rules 5.7 and 5.8 of the Rules, with the language unchanged.

[7] The MacCrate Report, and the rules the Appellate Divisions adopted in its wake, embraced a more cautious view of multidisciplinary practice than some other jurisdictions. *See, e.g.,* D.C. Rule. 5.4(b) (permitting non-lawyer equity interests in law firms). New York's Rule 5.8(a) begins with a preamble on the core values of the legal profession, declaring that "[m]ulti-disciplinary practice between lawyers and non-lawyers is incompatible with the core values of the legal profession and, therefore, a strict division between services provided by lawyers and those provided by non-lawyers is essential to protect those values."

[8] The proposed arrangement here is a species of multidisciplinary practice, in this instance implicating Rule 5.8 as a business relationship between a lawyer and a third-party non-lawyer service provider. The proposed conduct consists of an exclusive contractual arrangement between a lawyer and non-legal professional service provider offering to the public, on a systematic and ongoing basis, both legal services (by the inquiring lawyer) and services by a non-legal professional service provider (an insurance agency). The proposed arrangement contemplates that the agency and the lawyer will regularly offer to the agency's clients the service of drafting SPDs and reviewing them for compatibility with ERISA and other applicable laws.

[9] Rule 5.8(a) says that a lawyer may form an ongoing business relationship with a non-lawyer service provider if each of three requirements set forth there is met. The first of these, set out in Rule 5.8(a)(1), provides that a lawyer or a law firm (with our emphasis)

> *may* enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services, notwithstanding the provisions of Rule 1.7(a) [requiring advance client consent], *provided that*:

> (1) the profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules; . . .

[10] We may aptly stop there, because the proposed arrangement does not satisfy the first of the three requirements of Rule 5.8(a), each of which the Rule mandates for systematic and ongoing cooperative arrangements offering both legal and non-legal services. Insurance agencies are not among the types of non-legal professional service providers firms listed pursuant to Section 1205.3. *See* 22 NYCRR §§ 1205.3, 1205.5; *see* N.Y. State 885 (2011) (lawyer may not enter into agreement with a tax reduction service). Accordingly, the proposed cooperative arrangement is impermissible under Rule 5.8(a)(1). There may be permissible ways for inquirer to structure a relationship with an insurance agency, *cf.* Rule 5.8(c) (rule on cooperative business arrangements does not apply to "relationships consisting solely of non-exclusive reciprocal referral arrangements"), but we address only the structure outlined in the inquiry before us.

[11] In so opining, we necessarily conclude that the language of rule 5.8(a) is mandatory, not permissive. Thus, only those non-legal professional service providers that the Appellate Divisions lists in § 1205 may be parties to an ongoing cooperative practice arrangement. In our view, the plain language of the Rule so indicates. The Rule says that a lawyer "may" enter into such an arrangement "provided" that the lawyer satisfies the three requirements in Rule 5.8(a), the first of which is appearance on the Appellate Divisions' list. We read this language to mean that a lawyer may not enter into such an arrangement unless each of the requirements is met. *See Webster's Unabridged Dictionary* 1450 (2^{d} ed. 1979) (defining "provided" as "on condition; this being understood; conceded, or established; if").

[12] Comment [5] accompanying Rule 5.8 supports this result. The Comment says, in relevant part:

> [5] To ensure that only appropriate professional services are involved, a contractual relationship for the provision of services is permitted under paragraph (a) ***only if*** the nonlegal party thereto is a professional or professional service firm meeting appropriate standards regarding ethics, education, training and licensing. The Appellate Divisions maintain a public list of eligible professions at 22 NYCRR § 1205.5. . . . [Emphasis added.]

On at least three prior occasions, we have expressly said as much, two of them within the past year. *See* N.Y. State 888 (2011) ("Rule 5.8(a) *specifically limits* the non-legal professionals with whom a lawyer may contract) (emphasis added); N.Y. State 885 (2011) ("attorney may enter into a cooperative business arrangement *only* where the profession of the non-legal professional is included in a list jointly maintained by the Appellate Divisions") (emphasis added); N.Y. 765 (2003) (DR 1-107(A), the forerunner of Rule 5.8(a), "*limits* the professions with which lawyers can so contract to those professions on a list designated by the Appellate Divisions") (emphasis added). Others uniformly agree. N.Y. County 733 (2004) ("Since financial advisors are not Designated Professionals [on the § 1205 list], an attorney may not enter into a contractual relationship with a financial advisor that would offer continuous and systematic services to the public.); Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 993 (2012 ed.) ("lawyers are permitted to enter into a full-fledged contrac-

tual relationship with nonlegal professionals *only if* the nonlegal professionals are on the special list of approved professions established and maintained by the Appellate Divisions") (emphasis added).

[13] In our view, these comments and opinions keep faith with the origins of Rule 5.8(a). In advancing the language of its forerunner DR 1-107(a), which the Appellate Divisions adopted not once but twice, the MacCrate Report said (footnotes omitted and emphasis added):

> . . . [T]he Committee is concerned that lawyers and law firms not be permitted to join alliances with non-lawyers whose standards of ethics and professionalism could dilute the lawyers duties to clients. . . . Accordingly, the determination whether lawyers should be permitted to enter into systematic and continuous inter-professional arrangements *is best determined on a profession-by-profession basis, taking into account the intrinsic nature of each profession and assuring that affiliation with it will not impair lawyer professional standards to any extent.*

[14] Based on these considerations, the MacCrate Report recommended that the courts retain control over the types of professions with which a lawyer may properly form an ongoing cooperative business arrangement. The Appellate Divisions' enactment of the MacCrate Report's recommendations evinces the courts' determination to maintain control over this form of multidisciplinary practice in New York.

[15] Thus, the plain language of Rule 5.8(a), the comments accompanying it, the prior views of this and other committees and commentators, and the history animating the Rule, potently support the conclusion that the intention of Rule 5.8(a) is to limit this type of multidisciplinary practice to combinations with professionals that the Appellate Divisions have blessed in § 1205.

[16] That the lawyer and the agency intend separately to bill for the services does not alter this conclusion. The focus of our attention is the arrangement between the lawyer and the non-lawyer service provider, and the continuing and systematic offer of their services to the public. The inquirer and the insurance agency are engaged in what amounts to a joint venture to provide a service for the public. This falls squarely within the ambit of multidisciplinary practice governed by Rule 5.8(a).

[17] Even if the arrangement were permissible, the proposed announcement of the arrangement, which promotes the inquiring lawyer's qualities and is directed to a specific group of recipients, could well be considered both lawyer advertising and solicitation, and hence subject to Rules 7.1 and 7.3. Without resolving the matter on this inquiry, we note, too, that the proposed arrangement could raise issues under Rule 7.2, which regulates payments for referrals. Although the inquirer is not compensating the agency for including the lawyer in its promotion, and is apparently prepared to accept a flat fee for the service being rendered to the agency's clients, a serious question could arise if the inquirer is providing a benefit to the agency – and therefore consideration for a referral – if the lawyer charges a higher rate to review SPDs to the firm clients that retain the firm outside the context of the insurance agency's promotion. That would be the functional equivalent of the discount that troubled this Committee in N.Y. State 885.

[18] Finally, the lawyer must consider the edicts of Rule 1.7(a)(2), as qualified by Rule 1.7(b), to determine whether the lawyer's personal and financial interest in the arrangement complicates the inquirer's representation of the insurance agency's clients. These same considerations animated the

MacCrate Report's recommendations ("[T]he current Code does not adequately deal with . . . the risk that the non-lawyer professional service firm may be the dominant participant in the alliance and may possess – and, by possessing, exert – economic influence of a kind not adequately anticipated or prevented by DR 5-101(A)," the forerunner of Rule 1.7(a)(2)) and prompted the Appellate Divisions to adopt Rule 5.8.

CONCLUSION

[19] A lawyer may not enter into and maintain a contractual arrangement with an insurance agency in which agency offers both legal and nonlegal services on an ongoing basis to the agency's customers.

(21-12)

OPINION 931 (09/07/2012)

TOPIC: Law firm names

DIGEST: Law firm of solo practitioner cannot include "and Associates" based on employment of paralegal

RULES: 7.5(b), 7.5(c), 8.4(c)

FACTS:

[1] A solo practitioner employs a paralegal. He would like to name his firm "Smith [assumed name] and Associates" because he feels it would give a more positive impression of his firm's capabilities, but seeks assurance that such name complies with professional ethics.

QUESTION:

[2] Would the law firm name "Smith and Associates" comply with the Rules of Professional Conduct where "Smith" is a solo practitioner, and Smith's law firm also employs a paralegal?

OPINION:

[3] Rule 7.5(b) provides that "a lawyer in private practice shall not practice under a trade name" or "a name that is misleading as to the identity of the lawyer or lawyers practicing under such name . . ."

[4] Rule 7.5(b) also provides that "A lawyer or law firm may not include the name of a nonlawyer in its firm name."

[5] Rule 7.5 (c) provides that "Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners."

[6] Comment 1 to Rule 7.5 states that "to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status."

[7] Rule 8.4(c) provides that "A lawyer or law firm shall not . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

[8] The inquirer asks whether he ethically can use the name "Smith and Associates" as the name of his law firm name where he does not have any partners and employs no other lawyers, and the "and Associates" aspect of the proposed name is based on the presence of a paralegal employed by the firm. Thus he asks whether the term "Associates" properly can refer to a paralegal.

[9] N.Y. State 869 (2011), which dealt in part with whether a solo practitioner could practice under a name containing the word "Firm," notes that law firm names are subject to more stringent requirements than general lawyer advertising, and that a law firm may not practice under a trade name or any other name that is misleading. The opinion explains that this requirement "serves to protect the public from being deceived as to the identity, responsibility or status of those who use the firm name."

[10] Use of the words "and Associates" does not comply with Rule 7.5(b) where the firm only has one lawyer. In that context, the term "and Associates" could only refer to a paralegal or other nonlawyer, since Smith is the only lawyer and Smith's firm employs a paralegal. The firm name "Smith and Associates" would give the false impression to the public, including potential clients, that Smith is practicing with other lawyer colleagues. This is particularly true where "associate" has a long-established meaning in the context of lawyers in private practice, as a lawyer admitted to practice and employed by the law firm, but is not a partner.

[11] On the present facts, the term "and Associates" is misleading, and violates Rule 8.4(c). Based on its literal meaning, it can deceive the public because it suggests that the firm includes at least three lawyers: Smith and two others.

[12] N.Y. State 732 (2000) authorizes the use of the word "group" in a law firm name using the name of a particular lawyer where that lawyer practices with other associates (presumably lawyers). Its reasoning assumes that a name suggesting that the firm's practice includes other associates is not misleading. By negative inference, using "and associates" in a law firm name where the firm consists of only one lawyer would be misleading.

[13] N.Y. State 286 (1973), similarly allows the use of the firm name "and associates" in a situation where "the associates" unquestionably refers to lawyers.

[14] Rule 7.5(c) also supports the negative answer to the inquiry because of its blanket prohibition against lawyers creating the impression that they are partners where that is not correct.

CONCLUSION:

[15] A solo practitioner whose law firm employs no other lawyers, but does employ a paralegal, may not ethically use the name "Smith and Associates" because that would risk misleading the public as to the number of lawyers at the firm.

(9-12)

OPINION 932 (09/07/2012)

TOPIC: Lawyers' business cards; recommendation of services.

DIGEST: A lawyer's photograph may be on the lawyer's business card. A lawyer may recommend other service providers provided that there is an appropriate disclaimer.

RULES: 7.5(a)(i); 5.4; 7.2; 7.1(c) (3)).

QUESTION:

[1] We have been asked if an attorney's business card may include a photograph of the attorney and whether the attorney may include on the back of the card, or on a separate sheet of paper, lists of other service providers such as a plumber, realtor, mortgage loan officer, or accountant, which may be useful to the attorney's clients during a real estate transaction and which are recommended by the attorney based on past personal experience with the provider.

OPINION:

[2] Rule 7.5(a)(i) provides a non-exclusive list of the content of a lawyer's professional or business card. It provides that the card may contain the following:

- The lawyer's name
- Identification that the person is a lawyer such as "J.D.", "Esq.", "Attorney-at-law" or "lawyer"
- Address or addresses
- Telephone Numbers
- The name of the lawyer's firm
- Any information permitted under Rule 7.4 relating to area of practice
- Name of members and associates of the firm.

[3] Nothing contained in the Rules prohibits the use of a photograph or "headshot" of a lawyer. However, a lawyer may not use an actor to portray a lawyer in the photograph without disclosing that fact. (Rule 7.1(c) (3). A lawyer may not include anything in the business card which would be false, misleading or deceptive. Rules 7.5(a) and 7.1(a).

[4] The rules clearly contemplate that lawyers may refer their clients to other service providers and that others may refer clients to lawyers. *See*, *e.g.,* Rules 5.4 and 7.2. The lawyer must be mindful that referrals are managed in such a way that the lawyer must always maintain professional independence in order that the client always receives the lawyer's best professional judgment free of any undue or inappropriate influence. Thus, exclusive reciprocal referral arrangements are prohibited. *See* Rule 7.2, Cmt. [4]. Furthermore, the lawyer must not have such an interest in a steady stream of refer-

rals that it undermines the lawyer's professional judgment for the client. Rule 7.2, Cmt. [4] and N.Y. State 765 (2003). Nonexclusive agreements are permissible provided that the client is informed of the agreement. To this end, the list of referrals, whether on the back of a business card or separate, should contain a disclaimer making it clear that the lawyer does not have an agreement with those on the list. While many formulations are possible, the following would be sufficient: *"Note: These professionals are not affiliated with the Law Offices of _____ and may not be appropriate choices in every matter."*

[5] We do not opine on the constitutionality of the advertising rules.

CONCLUSION:

[6] A lawyer's photograph may be on the lawyer's business card. A lawyer may recommend other service providers provided that there is an appropriate disclaimer.

7-12

OPINION 933 (09/07/2012)

TOPIC: Dual practice; real estate broker; law office.

DIGEST: A lawyer may conduct a law practice and a real estate brokerage business in the same office, and may advertise them together provided that the advertising is neither false nor misleading, but may not act as lawyer and broker in the same transaction.

CODE: Rules 1.6 (a) and (c) 5.7, 5.8, 7.1, 1.7(a),

QUESTIONS:

[1] May a lawyer ethically practice law and conduct a real estate brokerage business in the same premises?

[2] May a lawyer who is also engaged in a real estate brokerage business conduct a joint mailing of greeting cards, business cards, refrigerator magnets and the like to a combined list of law clients, brokerage clients, general business contacts and other names without differentiation of the source.

FACTS:

[3] Inquirer is an attorney practicing alone in his residence, from which he also conducts a real estate brokerage business in the form of a limited liability company of which inquirer is the sole member but not the sole employee. The brokerage entity does not pay any rent to the inquirer.

OPINION:

[4] In a departure from prior opinions and due to the decision of the United States Supreme Court in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), this committee opined in N.Y. State 493 (1978) (*i.e.,* under the Code of Professional Responsibility) that "a lawyer may conduct his law practice and a real estate brokerage business from the same office . . . ." In *Bates*, the Supreme Court held that lawyer advertising enjoys a First Amendment protection, thereby effectively eliminating many traditional prohibitions of lawyer advertising. Prior opinions of this Committee that a lawyer could not ethically conduct a law practice from the same office in which the lawyer or the lawyer's spouse conducted a real estate brokerage had been premised on the perceived impropriety of lawyer advertising. *Id.* In the light of *Bates*, this Committee overruled those prior opinions to the extent that they held to the contrary.

[5] Nothing in Rule 5.7 of the Rules of Professional Conduct, which governs the provision of non-legal services by a lawyer or law firm directly or through an entity that the lawyer or law firm owns or controls or with which the lawyer or law firm is otherwise affiliated, and which, therefore, governs the inquirer's situation, suggests a different conclusion.

[6] On the same basis, we see no ethical objection to inclusion in the same mailing envelope a greeting card, business card, refrigerator magnet or other token of that sort that indicates that the sender is both a lawyer and a licensed real estate broker, or two of whatever the lawyer may send, one from the lawyer as lawyer and one as proprietor of the brokerage, *provided* that the information is

truthful and is neither deceptive nor misleading. *See* Rule 7.1; N.Y. State 493, *supra*; New York State 487 (1978). *See also*, *Ibanez* v. *Florida Dep't of Business and Professional Regulation,* 512 U.S. 136 (1994).

[7] Three cautionary reminders are in order. First, while a lawyer may conduct a legal practice and a brokerage business from the same premises, a lawyer may not ethically serve both as lawyer for a party to a real estate transaction and also as broker in the same real estate transaction. Rule 1.7(a) states in pertinent part that "a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." In many circumstances, fully informed client consent may enable a lawyer to proceed with a representation, notwithstanding a personal conflict. This Committee has opined repeatedly, however, most recently in N.Y. State 919 (2012) and in N.Y. State 752 (2002) following the adoption of the rules addressing the responsibilities of lawyers and law firms providing non-legal services to clients or other persons (then DR 1-106 and now Rule 5.7), that the personal interest of a lawyer-real estate broker in the brokerage fee that will be generated by a closing of a real estate transaction so conflicts with the lawyer's responsibility to provide independent legal judgment with respect to that transaction as to preclude the dual roles and to make the conflict non-consentable by the client.

[8] Second, we note the provisions of Rule 5.7, which are applicable to brokerage services provided by a lawyer. If the brokerage services provided to a particular brokerage client are not distinct from legal services provided to that same client, albeit in different matters, or could be perceived by that client to be the subject of a client-lawyer relationship, those brokerage services will be subject to the Rules of Professional Conduct. Moreover, "it will be presumed that the person receiving [the brokerage] services believes" them to be the subject of a client-lawyer relationship "unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services . . . ." *Id*.

[9] Finally, paragraph b of Rule 5.7 enjoins a lawyer not to allow any non-lawyer with whom the lawyer is associated in a brokerage business to "direct or regulate" the lawyer's professional judgment in rendering legal services" or to cause the lawyer "to compromise [the lawyer's] duty under Rule 1.6(a) and (c) with respect to the confidential information of a client receiving legal services."

CONCLUSION:

[10] For the reasons stated, and subject to the cautions hereinabove set forth, the questions posed are answered in the affirmative.

(47-10)

OPINION 934 (09/07/2012)

TOPIC: Compensation of lawyer by law firm; third-party payments

DIGEST: A law firm may compensate a partner, associate or counsel by making a payment directly to the lawyer or to a professional services corporation as described in Article 15 of the New York General Business Law. A professional services corporation for the practice of law may not have non-lawyer shareholders. Consequently, a law firm may not pay a lawyer's compensation to a subchapter S corporation with non-lawyer shareholders. A law firm may make payments to a third party at the direction of the lawyer, as long as it does not treat such payment as payment for legal services. Thus, the firm may make payments to a Subchapter S corporation with non-lawyer shareholders, but neither the law firm nor the Subchapter S corporation may mischaracterize the payments as compensation for legal services.

RULES: Rules 1.0(h), 1.5(g), 5.4(a) and (d), 8.4(c).

QUESTION:

[1] May a lawyer who has withdrawn as a partner in a firm, and who remains of counsel to the firm, receive compensation for the lawyer's legal services by check from the firm to a subchapter S corporation[30] in which the lawyer's spouse is a shareholder?

DISCUSSION:

[2] Under Article 15 of the N.Y. Business Corporation Law, N.Y. Bus. Corp. Law § 1503, a New York lawyer, whether practicing as a sole practitioner or in a law firm, may practice law as a professional services corporation.[31] *See also* Rule 1.0(h)(defining "firm" or "law firm" to include a professional corporation).

[3] Under § 1503 of the Business Corporation Law, however, a non-lawyer may not own any interest in a professional services corporation authorized to practice law. Thus the subchapter S corporation in this inquiry is not a professional services corporation authorized to practice law. *See also* Rule 5.4(d)(lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if a nonlawyer owns any interest therein.)

30 A subchapter S corporation is a creature of the Internal Revenue Code. In general, S corporations do not pay any federal income taxes. Rather, the corporation's income or losses are divided among and passed through to its shareholders. The shareholders must then report the income or loss on their own individual income tax returns.

31 BCL § 1503 provides, in pertinent part, as follows:

> (a) Notwithstanding any other provision of law, one or more individuals duly authorized by law to render the same professional service within the state may organize, or cause to be organized, a professional service corporation for pecuniary profit under this article for the purpose of rendering the same professional service . . .
>
> (b) The certificate of incorporation of a professional service corporation . . . (ii) shall have attached thereto a certificate or certificates issued by the licensing authority certifying that each of the proposed shareholders, directors and officers is authorized by law to practice a profession which the corporation is being organized to practice . . . .

Similarly, BCL § 1507 limits the issuance of shares by a professional services corporation to those individuals who are authorized by law to practice the profession that the corporation is authorized to practice.

[4] The law firm in this case may have occasion to pay the "of counsel" lawyer either as compensation for legal services rendered or as a return of the lawyer's capital contribution. If the law firm is willing to make payments to a third party at the direction of an employee – for example to a creditor of the employee or, in this case, to the subchapter S corporation – such a payment would not be prohibited by the Rules. The Rules do not prohibit a law firm from making payments to third parties, as long as they are accounted for properly, and as long as the payment does not constitute an impermissible sharing of a legal fee.[32] Third party payments effectively are the same as payments by the firm to the lawyer with a second payment from the lawyer to the subchapter S corporation.

[5] The law firm's books and records may not mischaracterize the nature of the payments made – that is, as compensation to the *lawyer* (not the Subchapter S corporation) for services rendered or return of the *lawyer's* capital contribution. Similarly, the lawyer, as a shareholder of the subchapter S corporation, may not mischaracterize the nature of the payments to the subchapter S corporation as compensation for legal services. See Rule 8.4(c) (a lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation). A payment for legal services would need to be made to the lawyer or a professional services corporation authorized to practice law in which the lawyer practices.

CONCLUSION:

[8] A law firm may compensate a lawyer who is a partner, associate or counsel to the firm by making a payment directly to the lawyer or to a professional services corporation as described in Article 15 of the New York Business Corporation Law. Because a professional services corporation authorized to practice law may not have non-lawyer shareholders, the law firm may not treat as compensation a payment that it makes to a Subchapter S corporation in which a non-lawyer is a shareholder. The lawyer may direct the law firm to pay over the lawyer's compensation to a third party, including a Subchapter S corporation with non-lawyer shareholders, but neither the law firm nor the third party may mischaracterize such payment as a fee for legal services.

(1-12)

32 The opinions of this committee have long recognized that a law firm may employ outside service providers. See, e.g. N.Y. State 95 (accounting service/data processor). However, the subchapter S corporation cannot provide legal services because of its non-lawyer ownership. And a lawyer may not share legal fees with a nonlawyer, with certain exceptions not relevant here. *See* Rule 5.4(a) ("A lawyer or law firm shall not share legal fees with a nonlawyer . . ."). Moreover, a lawyer may not share legal fees with a lawyer outside the lawyer's own law firm, unless the relationship complies with Rule 1.5(g).

OPINION 935 (09/18/2012)

TOPIC: Public Defender; private practice

DIGEST: A Public Defender or Assistant Public Defender can represent private clients as part of a separate private practice in the same Criminal Court in which he or she appears in a public defender capacity.

RULES: 1.11

FACTS:

1. An appointed county Public Defender has a staff that includes part-time and full-time assistants. He has created a practice policy for both the part-time and full-time attorneys, including himself, that permits them to practice law privately in criminal or civil cases within and outside the county as long as no conflict of interest is involved. The full-time attorneys must do their private case work outside of normal business hours.

2. The Public Defender seeks guidance on whether his attorneys can represent private clients in the same Criminal Court in which they appear in their public defender capacity.

QUESTION:

3. May a Public Defender or Assistant Public Defender represent private clients as part of a separate private practice in the same Criminal Court in which he or she appears as a member of the Public Defender's Office?

OPINION:

4. No rule expressly prohibits a Public Defender or Assistant Public Defender from separately representing private clients. Indeed, in the past this Committee has issued opinions, under both the current Rules and the prior Code of Professional Responsibility, addressing specific questions involving scenarios where a public defender undertakes to represent a private client, and in none of those opinions did we suggest that there is any *per se* prohibition against a public defender separately representing private clients. *See, e.g.,* N.Y. State 862 (2011) (imputing conflict of interest in Public Defender Office to Assistant Public Defender acting in private practice capacity); N.Y. State 587 (1987) (concluding that it is proper for part-time Public Defender to represent, privately, individual found ineligible for Public Defender's assistance where individual unable to find other retained counsel and stating that "a part-time Public Defender may engage in private criminal defense work, at least when 'the client had never requested the services of the public defender's office'"); N.Y. State 518 (1980) (concluding that part-time Public Defender can represent private clients in litigation against county by which he is employed).

5. Other than Rule 3.8, which addresses the conduct of prosecutors and other government lawyers acting in a prosecutorial capacity, only Rule 1.11 establishes special obligations for former and current government officers and employees. The title of this rule refers to special conflicts of interest for former and current government officers and employees. Parts of the rule address how traditional

kinds of conflicts can arise for such lawyers. *See* Rule 1.11 (a)(1), (b), (c). This aspect of Rule 1.11 has no bearing on the inquirer's question because the inquirer has acknowledged that his attorneys will abide by conflict-of-interest rules in determining whether to accept a retained case.

6. Rule 1.11 also limits a former government lawyer's ability to represent a private client in a matter in which the lawyer participated substantially as a public officer or employee. *See* Rule 1.11(a)(2). This rule, although it literally applies to "former" government lawyers, would limit a Public Defender's ability to successively represent a client on a single matter first as a public employee and subsequently – for example, because of a change in financial circumstances of the client – as a private lawyer. Under the prior Code of Professional Responsibility, this Committee expressed the concern that "the office of Public Defender not be perceived as a feeder in building a private law practice," N.Y. State 587, and closely circumscribed the situations in which an individual who contacts a Public Defender Office for representation can end up represented privately by a lawyer in that office. *Compare* N.Y. State 165 (1970) (prohibiting private retainer of part-time Public Defender whose office had previously been contacted by client for assigned representation) with N.Y. State 587 (modifying N.Y. State 165 to allow for limited exceptions). But there is no suggestion here that the inquirer permits his lawyers to direct potential public defender clients to their private practice, or that any of those lawyers would otherwise represent clients in violation of Rule 1.11(a)(2). Accordingly, Rule 1.11(a)(2) does not control this inquiry.

7. Finally, Rule 1.11 also prohibits lawyers who hold public office from improperly using the influence that their office carries. Rule 1.11(f)(2) specifically prohibits lawyers who hold public office from using their public office "to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client." It is this rule that comes closest to bearing on Public Defenders' appearances in a private capacity in the same tribunal where they appear in a public capacity. It is difficult, however, to discern how Public Defenders acting in a private capacity would use their public position to influence a tribunal. In both private and public capacities, the lawyer who is also a Public Defender is typically seeking to accomplish the same legitimate purpose – effective client representation. There is nothing attendant to the Office of Public Defender that carries with it the power to exert influence over a tribunal in which the Public Defender appears other than by means of appropriate and effective advocacy. Accordingly, Rule 1.11(f) does not prohibit the inquirer's practice model.

8. Our position with respect to Public Defenders contrasts with our opinions on part-time prosecutors. We have long held that the rules against representation of differing interests prevent a part-time prosecutor from representing criminal defendants in New York State courts or in suing the governmental entity that employs them and that these conflicts are not waivable. N.Y. State 788 (2005); N.Y. State 657 (1993); N.Y. State 544 (1982); N.Y. State 218 (1971). In N.Y. State 544, we held that a part-time municipal attorney should not permit himself to represent an interest adverse to that of the locality. He should, therefore, not undertake a matter that would require him to appear before a judicial official of the locality or with respect to a violation of one of its ordinances. In that opinion, we explained that

> "A part-time local attorney may undertake a criminal defense without conflict of interest . . . if (1) his statutory or other responsibility to prosecute criminal proceedings on behalf of the locality does not require him, in any case, to prosecute any crimes or offenses designated as such by the Penal Law or any other law enacted by the Legisla-

> ture of the State of New York, (2) the defense does not require him to appear before a judicial or other official of the locality he publicly represents, (3) the local government unit by which he is employed, or a violation or a construction of one of its ordinances, is not involved, (4) the offense charged is unlike any of those which he prosecutes, and (5) the investigating officers and law enforcement personnel involved are not those with whom he associates as prosecutor."

Notably, we have treated Public Defenders differently than prosecutors and other municipal attorneys, reasoning that a Public Defenders' true clients are "indigents accused of crime rather than the county" for which they work. N.Y. State 518.

9. Of course, in carrying out the inquirer's practice model, the lawyers must, as noted above, comply with all relevant ethical considerations such as conflict-of-interest rules. Because shouldering a full-time Public Defender position and a separate private practice may be burdensome, special attention must be paid to Rule 1.3's requirement that a lawyer act with diligence and promptness in representing a client. *See* Rule 1.3(a). Such lawyer must give diligent and equal priority to both private and public clients. *See* N.Y. State 260 (1987) (Public Defender must "exercise great care not to permit his personal or professional interests to appear to influence his judgment with respect to the priority to be assigned as between his public defender and private matters.").

CONCLUSION:

10. A Public Defender or Assistant Public Defender can represent private clients as part of a separate private practice in the same Criminal Court in which he or she appears in a public defender capacity.

(45-11)

OPINION 936 (09/21/2012)

TOPIC: Designation of departing former name partner, who is taking an in-house counsel position, as "Special Counsel" on letterhead.

DIGEST: Whether a law firm may designate a departing name partner as "Special Counsel" after removing his name from the firm name depends on the level of his continuing involvement with the firm and its clients.

RULES: 1.10(a) & (e), 7.1(a), 7.5(a)

FACTS:

1. One of the founding name members of the inquiring lawyer's firm recently left to take a position as in-house counsel to a regional hospital center. The firm has changed its name by eliminating the name of the departing attorney. The firm would, however, like to list the departing attorney's name on the firm's letterhead. The inquirer states that the departing attorney's relationship to the firm remains "sufficiently robust and close to justify including him on the letterhead with an appropriate footnote."

2. Specifically, the inquirer states that the departing attorney will continue to do meaningful, substantive work through the firm, but only for certain firm clients with whom he had developed a close relationship during his tenure as a member of the firm, and only at their request for his involvement. The departing attorney will not provide legal services through the firm in any other cases. Thus, he will not provide legal services through the firm to clients with whom he did not develop a close relationship, and will not provide legal services to a firm client with whom he did develop a close relationship unless that client has requested his involvement.

3. When the departing attorney provides legal services through the firm, he will consult directly with the client and bill for his services through the firm. The firm will retain 10% of the amount billed for the departing attorney's time, and the remainder will be paid to the departing attorney. The departing attorney (1) will not have access to firm files for any clients other than those with whom he had a prior close relationship and who request his further involvement, (2) will not have an office at the firm, and (3) will not participate in firm management decisions.

4. The inquiry claims that an "Of Counsel" relationship "is a close, regular, personal relationship implying broader access to general firm files, general availability of the attorney to firm clients, and more involvement in day-to-day affairs of the firm than will be present here." Thus the firm will not designate the departing partner as being "Of Counsel," but instead proposes to designate him as "Special Counsel" with a further explanation.

QUESTION:

5. May the inquirer's firm designate the departing partner as "Special Counsel" on its letterhead and include one of the following two explanations in a footnote:

Alternative 1: [John Doe], Special Counsel (with a footnote stating, "Mr. [Doe] consults through the firm with certain clients with whom he worked closely while a member of the firm.")

Alternative 2: [John Doe], Special Counsel (with a footnote stating, "Mr. [Doe] consults through the firm with certain clients with whom he worked closely while a member of the firm. He is currently General Counsel for [Name of institution] Hospital Health Center.")

OPINION:

6. The New York Rules of Professional Conduct (Rules) do not explicitly address use of the term "Special Counsel," but do address use of the term "Of Counsel." Rule 7.5(a) provides in pertinent part:

> "A lawyer or law firm may use . . . letterheads . . . provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following: . . .
>
> > "(4) . . . A lawyer or law firm may be designated 'Of Counsel' on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate."

7. While Rule 7.5(a)(4) on its face broadly includes any "continuing relationship," this term has been interpreted to require a certain threshold level of involvement. "An of counsel relationship is one in which the of counsel lawyer is available to the firm for consultation and advice on a regular and continuing basis." N.Y. State 853 (2011) (citation and internal quotes omitted); N.Y. State 793 (2006); N.Y. City 1995-8 (noting that term "continuing relationship" has been characterized for purposes of this provision as a "close, regular, personal relationship" other than that of partner or associate).

8. Several variations of the term "Of Counsel," including "Special Counsel," have come into use by law firms.[33] The meanings of these various terms are similar and for practical purposes may be indistinguishable. One ethics committee has opined that while there may be "connotative differences evoked by these variants of the title 'counsel,' they all share the central, and defining, characteristic of the relationship that is denoted by the term 'of counsel,'" which is "a close, regular, personal relationship" which is neither that of a partner nor that of an associate. ABA 90-357. One treatise indicates that "counsel" and "of counsel" are terms that "should be considered synonymous," and 'special counsel' may also mean about the same thing, though sometimes it refers to a lawyer who is associated with the firm only for a particular type of matter." *Simon's New York Rules of Professional Conduct Annotated* 1205 (2012 ed.).

9. "Of counsel" and other designations of professional status must not be used in misleading ways. Rule 7.5(a) explicitly provides that use of such designations is subject to Rule 7.1. A provision in the latter rule prohibits a lawyer or law firm from disseminating advertising that contains statements or claims that are false, deceptive or misleading. Rule 7.1(a)(1).

33 "[A]lthough 'of counsel' appears to be the most frequently used among the various titles employing the term 'counsel,' it is by no means the only use of that term to indicate a relationship between a lawyer and a law firm. Other such titles include the single word 'counsel,' and the terms 'special counsel,' 'tax [or other specialty] counsel,' and 'senior counsel.'" ABA 90-357.

10. Rule 7.1 would apply to this inquiry only when letterhead is used in a communication that constitutes an "advertisement" as defined by Rule 1.0(a). But there are also more general rules governing use of misleading statements.[34] Although Rule 7.5(a) is written in the permissive terms of a safe harbor, we do not believe it serves to allow professional designations that would otherwise violate these more general rules just because the designations are not used in advertising. Ethics committees have set forth criteria for use of particular designations such as "of counsel" so as to avoid the risk of misleading the public.[35] There is no apparent reason to limit that purpose and those criteria to the context of advertising. *See* Rule 7.5, Cmt. [1] ("In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status").

11. The inquiry before us posits that the departing lawyer's ongoing new relationship to the firm "is sufficiently robust and close" to justify including him on the letterhead as a "Special Counsel," but not so extensive as to allow his designation as "Of Counsel." More particularly, the inquiry points to three factors claimed to be essential to an Of Counsel relationship. The inquiry argues that this terminology implies "[1] broader access to general firm files, [2] general availability of the attorney to firm clients, and [3] more involvement in day-to-day affairs of the firm than will be present here." We do not adopt this analysis, as it does not completely follow the established principles set forth above.[36]

12. What is essential is that the Of Counsel lawyer be available to the firm for consultation and advice on a regular and continuing basis. This standard is necessarily a matter of degree.

See N.Y. State 853 ¶¶ 8-9 (2011) (opining that lawyer who "minimizes" his participation in a firm would not qualify as Of Counsel if he works "full time" as in-house lawyer at a corporation). As applied to the current inquiry, the standard will turn in part on how many clients use the services of the departing lawyer, and to what extent.

13. If the departing lawyer is expected to, and ultimately does, represent a number of former clients in multiple matters on an ongoing basis, that might well justify designating him, on letterhead and otherwise, as Of Counsel (or if the firm wishes, Special Counsel, with or without an explanatory footnote). On the other hand, if the departing lawyer is expected to, and ultimately does, represent only a few former clients in a small number of matters or in very limited ways, then designation as Special Counsel could well be impermissibly misleading. *See* N.Y. State 853 (2011); N.Y. State 262 (1972) (if relationship only existed for one particular case, "of counsel" designation on letterhead would be misleading "even though the case might be of great importance and over an extended period of time"). To give an extreme example, it would be misleading for the departing lawyer to maintain a

34 *See* Rule 4.1 (in course of representing a client, lawyer shall not make a false statement of fact to a third person) & Cmt. [1] (a misleading statement or omission can constitute a misrepresentation); Rule 8.4(c) (lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

35 Such criteria protect against misleading marketing. "Otherwise, law firms could raise the price of their stock (so to speak) by listing a famous lawyer or retired judge or public official as 'of counsel' even though the 'of counsel' lawyer had little or nothing to do with the firm." *Simon's New York Rules of Professional Conduct Annotated* 1204 (2012 ed.).

36 The inquirer's analysis purports to distinguish between terms that are extremely close, if not identical, in meaning. We believe that a relationship close enough to justify a "Special Counsel" designation would generally also justify a designation that the lawyer is "Of Counsel." Moreover, we doubt that any fixed set of a few factors will answer the question whether a relationship is sufficiently close, regular and personal as to justify any form of "counsel" designation.

"counsel" designation if, during the first year of the arrangement, no clients at all used his services and his relationship with the firm were purely theoretical.[37]

14. Accordingly, the term "Special Counsel" is permissible only if the departing lawyer's actual practice includes the regular and continuing level of consultation and advice for the firm and its clients that is necessary to justify a "counsel" designation. This conclusion does not depend on compensation arrangements, *see* ABA 90-357, or on whether the firm explains the departing lawyer's relationship to the firm in a footnote. If the departing lawyer meets "counsel" standards, then the firm may use the "Special Counsel" designation and may explain his relationship in an accurate footnote if it wishes, but if he does not meet those standards, an explanatory footnote will not make such a designation permissible.

15. Finally, although the inquiry does not raise the question of imputed conflicts, we believe the issue merits discussion. When a lawyer would be prohibited from representing a client by virtue of certain kinds of conflicts, the prohibition also applies to other lawyers who are "associated in a firm" with the lawyer subject to the conflict.[38] The term "associated" is not defined in the Rules, and it does not apply to all lawyers who are in any way connected or related to the firm. N.Y. State 853 (2011). However, a lawyer with close enough connections to be Of Counsel to a firm is "associated" with that firm for purposes of the imputation rule. See N.Y. State 853 (2011); N.Y. State 793 (2006); N.Y. State 773 (1993); ABA 90-357; N.Y. City 1995-8; Restatement (Third), The Law Governing Lawyers § 123 cmt. c(ii).

16. Moreover, a lawyer who is held out to the public with the term "counsel" or one of its variants – whatever the level of the lawyer's actual involvement – is "associated" with the firm for purposes of the imputation rule. *See* N.Y. State 793 (2006) (recognizing imputation when lawyer holds self out as having Of Counsel relationship and thus "conveys to the public that the lawyer has a continuing relationship with a firm that is close and regular"); *cf.* N.Y. State 807 (2007) ("A law firm may not denominate a lawyer as an associate and then take the position that the lawyer is not an associate for the purpose of imputation of conflicts of interest"). Because variants of the "counsel" formulation are essentially synonymous for ethical purposes, calling the attorney "Special Counsel" as opposed to "Of Counsel" does not change the effect of the designation in imputing conflicts.

17. When two law firms are associated with the same lawyer, they are considered the same firm for conflicts purposes. The legal department of a corporation is considered a law firm, *see* Rule 1.0(h), and is therefore subject to this rule like any other firm. Accordingly, "the conflicts of the Firm and the legal department will generally be shared and must become part of both of their conflict-checking systems under Rule 1.10(e)." N.Y. State 853 (2011).

18. In some circumstances, conflicts that would personally disqualify an "of counsel" lawyer from undertaking or continuing a particular representation would not necessarily result in disqualification of the entire law firm from litigation. *See Hempstead Video, Inc. v. Incorporated Village of Val-*

37 We understand that the number of matters handled may vary over time, and we are not suggesting that a firm is required to reevaluate a "counsel" designation every week or month. The firm may rely on its long-term expectations, but may not indefinitely maintain a designation based on expectations not borne out in actual practice.

38 Rule 1.10(a) states: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein."

ley Stream, 409 F.3d 127 (2d Cir. 2005). In that opinion, after noting ethics opinions suggesting a *per se* rule imputing conflicts between law firms and their Of Counsel attorneys, the Second Circuit rejected such a *per se* rule for disqualification purposes. For those purposes it adopted a more flexible standard that had been applied in a different context by N.Y. State 715 (imputation of conflicts for contract lawyers "depends on the facts and circumstances of the employment"). This approach to disqualification has been followed in other cases as well.[39]

19. Judicial reluctance to disqualify an entire firm based on imputation of an Of Counsel lawyer's conflict of interest, however, is not inconsistent with our view that such a lawyer's conflicts are always imputed to an entire firm under Rule 1.10(a). Courts considering disqualification motions may have reason to consider whether a conflict violates the Rules, but they may also have reason to consider other factors such as delay, public confidence, increased expense, fairness to the parties, entitlement to choose counsel and the prospect of abusive disqualification motions. Given the availability of procedures for professional discipline, courts have found no need to deal with all ethical violations "in the very litigation in which they surface." *Board of Education v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979). Under this approach, while decisions on disqualification motions may benefit from "general guidance" offered by state disciplinary rules, "not every violation of a disciplinary rule will necessarily lead to disqualification" unless it "tends to taint the underlying trial." *Hempstead Video*, 590 F.2d at 132 (quoting *Nyquist*). Accordingly, under this approach, a conflict that does not warrant disqualification may nonetheless constitute a violation of the Rules.

20. Thus, an Of Counsel (or Special Counsel) relationship between a lawyer with a conflict and a firm may not always justify the firm's disqualification by imputation in litigation, but as a matter of legal ethics, imputation is required when the lawyer's conflict is one of the kinds specified in Rule 1.10(a). As a corollary, pursuant to Rule 1.10(e), a law firm that maintains a "counsel" relationship with a lawyer must check for conflicts with that lawyer and that lawyer's firm, and vice versa.

CONCLUSION:

21. If the departing lawyer's continuing work for the firm rises to the level that the lawyer is available to the firm for consultation and advice on a regular and continuing basis, then the lawyer may be designated as Special Counsel on letterhead. In that case, the lawyer would be "associated" with the firm for purposes of imputation of conflicts of interest.

(18-12)

39 *See Calandriello v. Calandriello*, 32 A.D.3d 450, 819 N.Y.S.2d 569 (2d Dep't 2006) (previous representation of defendant-husband by a matrimonial attorney now serving as "of counsel" to plaintiff-wife's firm would not justify disqualification of plaintiff wife's firm where, as "of counsel" to the plaintiff-wife's firm, the defendant-husband's prior attorney "did not perform any legal work for the firm or its clients, but merely had office space available to him in its New York office"); *Ciao-Di Restaurant Corporation v. Paxton 350, LLC*, 2008 WL 5582720 (Sup. Ct. N.Y. Co. 2008) (denying disqualification and adopting *Hempstead Video* rule).

OPINION 937 (10/03/2012)

TOPIC: Promotional gifts branded with a law firm's logo

DIGEST: A law firm may cooperate with a local hospital to include promotional gifts branded with the law firm's logo in a welcome package distributed to all patients.

RULES: 7.1,7.3(a)

FACTS:

1. The inquirer wants to cooperate with a local hospital to provide a promotional gift (i.e., calendar, pen, etc.), branded with the law firm logo, in a welcoming informational package given to all hospital patients.

QUESTION:

2. May a law firm provide a promotional gift with its logo in a welcoming informational package provided to all patients at a local hospital?

OPINION:

3. In our view, nothing in the New York Rules of Professional Conduct prevents the proposed distribution of branded promotional gifts to hospital patients. Such items are not "advertising" within the meaning of the Rules, so that many of the restrictions on advertising and solicitation (a form of advertising) do not apply. An "advertisement" is defined as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is the retention of the lawyer or law firm," other than communications to existing clients or other lawyers.[40]

4. As the State Bar's Comments to the Rules make clear, there are many communications that have the general aim of increasing a lawyer's business and yet are not deemed advertising. For example, topical newsletters intended to educate recipients about new developments in the law are generally not considered advertising. Rule 7.1 Cmt. [7]. Of particular significance here, the same is true of certain communications intended to raise brand awareness:

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

40 Rule 1.0(a). "Solicitation" is defined to include "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain," other than a proposal or other writing prepared and delivered in response to a specific request of a prospective client. Rule 7.3(b).

Rule 7.1, Cmt. [8]. In other words, when the intent of a communication is to educate recipients about legal developments or to raise general brand awareness, that intent will be considered its primary purpose. Thus, even if such communications are more fundamentally motivated by the aim of increasing a lawyer's business, they are not advertising within the meaning of the Rules.

5. With that understanding, it seems clear that the primary purpose of giving incoming hospital patients a calendar or pen marked only with the inquirer's name and contact information is to raise general awareness of the inquirer's firm. As a consequence, numerous rules that apply to advertising, such as the requirement that all advertisements include the principal law office address and telephone number of the lawyer or law firm being advertised, Rule 7.1(h), do not apply to the distribution of the promotional gifts at issue here. We note, however, that if the pen or calendar were marked with more than the firm logo – if for example they included slogans or more information about the firm – then the conclusion we reach here might change.

6. We recognize that the distribution of law-firm-branded materials to hospital patients might seem in tension with the policy expressed in Rule 7.3(a)(2)(iv), which provides that solicitation is barred when "the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer." But we think it unlikely that a mere branded pen or calendar would overwhelm the judgment of even a frail hospital patient or his or her family.

7. In any event, the proposed distribution of gifts would not violate the terms of Rule 7.3(a)(2)(iv). Indeed, this would be true even if the pen or calendar, by including more than the firm logo, were to constitute advertising. The fact that some recipients of the gifts might be expected to be in a frail physical, emotional or mental state does not mean that otherwise permissible distributions to the hospital-patient population as a whole would be barred. Distributions to any broad segment of the population would be expected to reach some persons who are covered by Rule 7.3(a)(2)(iv), but that does not mean that the entire distribution is prohibited. Of course under the actual inquiry, the items would be marked only with the firm logo. Because the proposed distribution of promotional gifts would therefore not constitute advertising, it also would not constitute solicitation and could not violate the rule against solicitation of frail recipients.

8. Nor would the proposed distribution violate Rule 7.3(a)(1), which bars in-person solicitation. Again supposing that the items were to include enough information so as to constitute advertising, their distribution, without any accompanying oral communication about the firm, would not be the kind of in-person contact barred by the rule.[41] And again returning to the actual inquiry, because there would be no advertising, there could be no violation of the rule against in-person solicitation.

CONCLUSION:

9. A law firm may cooperate with a local hospital to include promotional gifts branded with the law firm's logo in a welcome package distributed to all patients. (43-12)

41 In N.Y. State 659 (1994), this Committee opined that including a law firm advertisement in an "information package" that would be distributed by a car dealer to car buyers, without discussion, would not constitute in-person solicitation. We subsequently opined that even a lawyer's paid paralegal employee could deliver a solicitation to neighboring buildings provided the paralegal "simply [left] a name-change announcement at a residence . . . [and had] no personal contact with the recipients." N.Y. State 857 (2011).

OPINION 938 (10/09/2012)

TOPIC: Law firm ownership of business that provides nonlegal services and pays for "leads"

DIGEST: Law firm that owns an entity providing nonlegal SSDI services is not subject to legal ethics rules as to those services, and no ethical violation would arise from entity's purchase of leads to market those services, if the entity includes no lawyers, operates separately from the law firm, and disclaims the provision of legal services.

RULES: 5.7, 7.2(a)

FACTS:

1. The lawyers in inquiring attorney's law firm contemplate forming a separate entity (the "SSDI Entity") for the purpose of providing services to persons with respect to Social Security Disability Insurance claims ("SSDI services"). The inquirer states that while "lawyers can handle these cases, one does not have to be a lawyer to do so"[42] and notes that "Licensed Hearing Representative" is the term used to describe a nonlawyer authorized to handle such cases. The SSDI Entity would have a different name from the firm, would be housed in a different facility and would have its own letterhead, business cards, phone number and employees, including a nonlawyer Licensed Hearing Representative.

2. No employee of the SSDI Entity would be a lawyer.[43] The SSDI Entity would advise customers and potential customers, in writing, that the SSDI services "are not legal services and do not come within any attorney-client relationship."

QUESTION:

May the SSDI Entity, if established and owned by inquirer and his colleagues, purchase SSDI leads from a marketing organization? The organization, which advertises heavily on the internet, would forward to the SSDI Entity the information of people who respond to its website if the SSDI Entity agrees to pay for a certain number of leads in a certain geographic area each month.

OPINION:

3. Rule 7.2(a) of the New York Rules of Professional Conduct states that a lawyer "shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client" with exceptions not relevant here. The inquirer notes our opinion N.Y. State 779 (2004) in which we relied upon Disciplinary Rule 2-103(B), the predecessor to Rule 7.2(a), in concluding that it is improper for an attorney to pay money to a marketing organization in return for "leads" to potential clients. The inquirer recognizes that his law firm would not be permitted to pur-

42 The inquirer cites 42 U.S.C. 406 §206(a)(1): "The Commissioner of Social Security may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys . . . representing claimants before the Commissioner of Social Security . . . ."

43 Different questions would arise if a lawyer (whether one from the firm or one newly employed by the SSDI entity) were to participate in providing SSDI services, for example by meeting with customers or editing documents drafted by a Licensed Hearing Representative. This opinion does not address such scenarios.

chase leads for its law practice but seeks to clarify whether the SSDI Entity, because of its separate nature, could purchase leads without giving rise to an ethical violation by the lawyers in the firm.

4. Rule 5.7, entitled "Responsibilities Regarding Nonlegal Services", is the key Rule to consider. Rule 5.7(c) defines "nonlegal services" to mean "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." We assume, based on assertions in the inquiry, that nonlawyer Licensed Hearing Representatives are permitted by federal law to provide (and accordingly are not prohibited by New York law from providing) the contemplated services. Thus the services qualify as "nonlegal services" for purposes of the Rule.

5. Because there will be no "lawyer or law firm that provides" any SSDI services, Rules 5.7(a)(1) and 5.7(a)(2) do not apply. The relevant provision, Rule 5.7(a)(3), says:

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

6. The question, then, is whether recipients of the SSDI services could reasonably believe that those services are the subject of a client-lawyer relationship. We first consider the way the SSDI Entity will present itself to prospective and actual customers. Although the SSDI Entity will be affiliated with the law firm through common ownership, in its outwardly visible aspects it will be separate and distinct from that firm, it will intentionally eschew any reference to the affiliation between them, and it will explicitly disclaim any attorney-client relationship. Unless there are further relevant facts not mentioned in the inquiry (such as perceptible connections between the two entities, or forms of advertising tending to create an impression of legal services), there would be no apparent basis on which customers could reasonably believe they were receiving legal representation.

7. We must, however, consider another relevant provision. Rule 5.7(a)(4) states that for purposes of Rule 5.7(a)(3), "it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship" unless one of two conditions are met. One of those conditions, and the only one available to the inquirer, is that "the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services." Here, the inquirer proposes to do just that. The written disclaimer must be made at a time and in a manner "sufficient to ensure that the person understands the significance of the communication." Rule 5.7, Cmt. [3]. If it is, then the presumption set forth in Rule 5.7(a)(4) would not apply.

8. Because the law firm would not be subject to the Rules with respect to services provided by the SSDI Entity, Rule 7.2(a) would not preclude the purchase of leads as contemplated. However, the lawyers in the firm should be mindful that they always remain subject to some other Rules, such as those prohibiting lawyers from engaging in illegal or deceptive conduct, including when they engage in conduct incidental to ownership of the SSDI Entity. *See* Rule 5.7, Cmt. [4].

CONCLUSION:

9. Members of a law firm who establish and own an entity to provide nonlegal SSDI services are not subject to the Rules with respect to those services if the entity includes no lawyers, operates wholly separately from the law firm, and disclaims the provision of legal services. Under those circumstances, no ethical violation would arise if the entity purchases leads for the purpose of marketing the SSDI services.

(44-12)

OPINION 939 (10/16/2012)

TOPIC: Maintaining confidentiality of client information as between independent lawyers sharing office space and computer

DIGEST: Independent lawyers sharing office space may share computer for client-related information if they exercise reasonable care to assure that confidential information is not disclosed

RULES: 1.6(a) & (c)

FACTS:

1. Two private lawyers share space, but are not partners or otherwise practicing as one firm. They share one computer, as to which they have separate administrative passwords not known to each other. They maintain separate paper files.

QUESTION:

2. May private lawyers who share space also share a computer for confidential, client-related information where they have separate administrative passwords to the computer that are not known to each other?

OPINION:

3. Rule 1.6(a) of the Rules of Professional Conduct states: "A lawyer shall not knowingly reveal confidential information," with exceptions not relevant to the issue presented. Rule 1.6(c) provides, also subject to an exception not relevant here: "A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client . . . ."

4. A lawyer's duty of reasonable care is not limited to overseeing the conduct of others. The lawyer must also take reasonable care to avoid improper disclosure by the lawyer himself or herself.[44] In addition to whatever support for that broader duty may be found in the text of Rule 1.6, support from other sources has been cited by some ethics opinions. *See* A.B.A. 11-459 (citing Rule 1.1(a), which calls for a lawyer to provide competent representation to a client, and stating that "a lawyer must act competently to protect the confidentiality of clients' information"); N.Y. City 1994-11 (stating that a duty to preserve client confidences and secrets "inheres in the fiduciary relationship between lawyer and client").

5. When a lawyer uses a particular technology to store or transmit confidential information, the degree of care that is required may depend on factors such as the security of that technology and the

44 Rule 1.6, Cmt. [17] (when transmitting a communication relating to representation of a client, "the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients"); N.Y. State 842 ¶4 (2010) (a lawyer must "take reasonable care to affirmatively protect a client's confidential information"); N.Y. State 709 (1998) ("an attorney has a duty to use reasonable care to protect client confidences and secrets"); N.Y. County 733 (2004) (attorney "must diligently preserve the client's confidences"); N.Y. City 1994-11 (lawyer who possesses client confidences and secrets must take reasonable steps to secure the information against misuse or inappropriate disclosure).

sensitivity of the information. If the technology, taking into account legal as well as technological safeguards, does not provide a reasonable expectation that confidentiality will be protected; if circumstances put the lawyer on notice of a heightened risk that confidentiality may be compromised; or if the information is extraordinarily sensitive, then further security measures may be required. *See* Rule 1.6 Cmt. [17]; N.Y. State 842; N.Y. State 709; A.B.A. 11-459. The lawyer, upon considering such factors, must take reasonable precautions to ensure privacy.

6. The facts provided by the inquirer are insufficient to resolve whether the proposed shared computer can be used for client-related information without violating the duty of reasonable care to protect confidentiality. The fact that the lawyers have separate computer passwords is certainly an appropriate precaution. Whether it is sufficient would depend on further factors. Some password systems may be more resistant to unauthorized access than others. Protection of the password is also important; for example, a password kept on a piece of paper stuck to the computer and readily visible to any user does not provide much protection. On the other hand, if a robust password system provides a degree of protection similar to that of locked file cabinets, then its proper and consistent use may well constitute reasonable care. Admittedly there could be some risk of extraordinary efforts to hack into even a well-secured computer, or to steal it from the premises for more leisurely hacking, just as there could be a risk that file cabinets could be broken into or removed. The lawyer's obligation, however, is not to guarantee preservation of confidentiality at all costs; it is to protect confidentiality by taking reasonable care.

CONCLUSION:

7. Lawyers practicing as sole practitioners but sharing space may share a computer to store and process client confidential information, but only if, under the actual circumstances relating to the computer, including its software and passwords and their use, the lawyers take reasonable precautions to ensure that the privacy of the confidential information is protected.

(50-12)

OPINION 940 (10/16/2012)

TOPIC: Use of off-site backup tapes to store a client's confidential information; retention of files in original paper form

DIGEST: Lawyer may store confidential information on off-site backup tapes if lawyer takes reasonable care to ensure adequacy of systems to protect confidentiality. When records must be retained, nature of the records determines whether lawyer (i) must maintain originals, (ii) may discard originals and maintain electronic copies in particular formats, or (iii) may maintain electronic copies in any format.

RULES: 1.6(a) & (c), 1.15(d)

FACTS:

1. The inquiring attorney's firm scans all documents and makes them part of an electronic case management system. The electronic data is backed up daily on tapes, and the tapes are stored outside of the firm's office. Thus, in the event of a catastrophic loss to the office building or server, no more than a single day's data would be lost. The inquiry does not describe the entity that will handle the off-premise storage of the backup tapes, but it is presumably a commercial service provider rather than the firm itself.

QUESTIONS:

2. May an attorney use a tape backup system to store a client's confidential information away from the firm's premises?

3. When the New York Rules of Professional Conduct (the "Rules") obligate an attorney to maintain certain records, may the attorney satisfy that obligation by keeping electronic copies such as backup tapes, or is the attorney required to keep the paper originals?

OPINION:

A. Tape Backup Systems

4. The Rules address not only intentional disclosures of confidential information by a lawyer but also the exercise of reasonable care to avoid such disclosures by others. Rule 1.6(a) provides that, subject to certain exceptions, a lawyer "shall not knowingly reveal confidential information." Rule 1.6(c) provides that a lawyer "shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client," except for certain disclosures authorized by the rule. [45]

5. We previously addressed a related inquiry. The question in N.Y. State 842 (2010) was whether a lawyer could use internet server ("cloud") storage to store and back up confidential information. In

45 Some opinions also address whether a duty of reasonable care to protect confidential information applies to a lawyer's conduct in general. *See*, *e.g.*, N.Y. State 842 (2010) ¶4 (citing opinions); N.Y. State 709 (1998). We need not address that topic here, because the inquiring lawyer will be entrusting the tapes to others rather than maintaining them personally.

that opinion, the Committee opined that such use is permissible "provided that the lawyer takes reasonable care to ensure that the system is secure and that client confidentiality will be maintained." The opinion gave several examples of steps that a lawyer might take to exercise such care.

6. We believe the principles governing use of a "cloud" storage system would also govern use of backup tapes maintained away from the firm's premises. A lawyer may use such backup tapes to store client information if the lawyer exercises reasonable care to protect the confidentiality of that information.[46]

7. Opinion 842's examples of conduct bearing on reasonable care are also relevant to use of backup tapes. Thus, for example, it may be appropriate for the lawyer to:

> A. Ensure that the provider maintaining the backup tapes "has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information"; and
>
> B. Investigate the provider's "data storage security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances."

N.Y. State 842.

B. May a Lawyer Satisfy Retention Requirements With Electronic Copies?

8. In asking the second question, the inquirer references the ethical requirement that certain kinds of records be maintained "for seven years after the events that they record." This includes, for example, records of certain bank accounts, copies of retainer agreements, copies of bills to clients, copies of closing statements, and all checkbooks and bank statements. Rule 1.15(d)(1).

9. For most kinds of records listed in Rule 1.15(d)(1), it suffices under the terms of that Rule to keep "copies" of those records. However, for the records listed in Rule 1.15(d)(1)(viii) – namely, "checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips" – it is necessary to maintain the records in their original form for the required seven years. This does not mean, however, that a lawyer must use a bank that routinely returns paper copies of cancelled checks, or must pay an extra charge to obtain paper copies. In N.Y. State 758 (2002), we said:

> "If these items are returned to the lawyer in paper form by the lawyer's bank in the ordinary course of business, the lawyer should retain them in that form. However, the lawyer is not required to undertake extraordinary effort or incur extra expense to obtain these items in paper form."

10. Thus, lawyers need not obtain original cancelled checks just to satisfy the retention rule. Rather, lawyers must preserve cancelled checks and the other items listed in Rule 1.15(d)(1) in whatever form the law firm receives or initially maintains these items in the ordinary course of business. *See generally* Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated* 617-18 (2012 ed.).

46 Indeed, given proper safeguards, use of an off-site backup system may be not just permissible but advisable for those lawyers who choose to maintain their records in electronic form. The primary, on-site storage system may have vulnerabilities that a backup system could help mitigate. *See* Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated* 619 (2012 ed.) ("Disciplinary authorities are not likely to be sympathetic if records disappear because of a computer malfunction.").

11. For the documents that may be kept as copies, the Rule provides further guidance. Requirements of maintaining copies are satisfied by maintaining "original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection." Rule 1.15(d)(3). Whether a particular storage format meets this standard may not be obvious, in which case consultation with an information technology specialist may be appropriate. *See Simon's New York Rules of Professional Conduct Annotated* 619 (2012 ed.).

12. The answer to the inquirer's question thus depends on the kinds of record involved. It will not suffice to keep electronic copies of certain paper records like checkbooks, bank statements, and deposit slips when they are originally received or maintained by the law firm in paper form. Those must be kept in their original paper form. As to other kinds of records, for which Rule 1.15(d)(1) requires only the keeping of copies, those copies may be kept electronically, but only in a format that preserves an image that cannot be altered without detection, per Rule 1.15(d)(3).

13. A lawyer may also be ethically obligated to preserve various records other than those records subject to the seven-year retention requirement imposed by Rule 1.15. *See, e.g.,* N.Y. State 623 (1991) (opining that documents in closed files may be destroyed unless there are legal preservation requirements or "extraordinary circumstances manifesting a client's clear and present need"); N.Y. State 460 (1977) (opining that absent legal requirement to preserve records or specific instructions from client, retention period may be determined on basis of client's foreseeable need); N.Y. City 2010-1. Other obligations may be imposed by law or court rule. *See, e.g.,* N.Y. State 460 (1977); N.Y. City 2010-1; 22 NYCRR § 603.7 (1st Dep't rule requiring lawyers to preserve specified records in personal injury cases). Whether retention of electronic copies would satisfy these various obligations outside Rule 1.15 will again depend on the kind of record involved.

14. For example, it may be necessary to preserve the originals of documents such as wills, deeds, contracts, and promissory notes. *See* N.Y. City 2010-1. For other kinds of documents subject to preservation obligations, it may suffice to keep copies if "the legal effect or evidentiary value of such records is not thereby impaired," because, for example, the copies "may be introduced into evidence or otherwise used in place of the originals" if the need should arise. *See* N.Y. State 460 (1977); N.Y. County 624 (1974). In still other cases, there may an obligation to keep records based on foreseeable client need, yet that need would be only for the information in those records, and not for the records themselves. In such a case there would be no ethical constraints on the form in which electronic copies are kept.

CONCLUSION:

15. A lawyer may use off-site backup tapes to store confidential client information if the lawyer takes reasonable care to ensure that the storage system, and the arrangements for its use, adequately protect the confidentiality of such information.

16. For certain kinds of records, the Rules require that original paper documents be kept if the lawyer receives or initially maintains paper originals in the ordinary course of business. For certain other kinds of records, the Rules require retention but permit a lawyer to keep electronic copies in lieu of paper originals if the electronic copies are in a format that preserves an image not subject to alteration without detection. For yet other kinds of records that must be retained, the Rules permit electronic copies to be kept in lieu of paper originals without restriction. (4-12)

OPINION 941 (10/16/2012)

TOPIC: Conflict of interest involving an attorney's spouse

DIGEST: A lawyer on a county panel of the Attorneys for Children Program may serve as "attorney for the child" even though another party in the proceeding is represented by the lawyer's spouse (an Assistant Public Defender) or by another lawyer who works in the same office as the lawyer's spouse, unless (i) the circumstances create a conflict of interest under Rule 1.7(a)(2) or Rule 1.10(h), and (ii) the child has no legal representative who can and does consent to the conflict on the child's behalf.

RULES: 1.0(h), 1.7(a) & (b), 1.10(a), (d) & (h)

QUESTION:

1. May a lawyer on a county panel of the Attorneys for Children Program serve as attorney for the child in court proceedings if the petitioner or respondent is represented by the lawyer's spouse (who is an Assistant Public Defender) or by another lawyer who works in the same office as the lawyer's spouse?

BACKGROUND:

2. Under New York Law, children (minors) in many kinds of court proceedings (including juvenile delinquency matters, custody and visitation disputes, and child protective proceedings) are entitled to be represented by counsel in Family Court, Supreme Court, Surrogate's Court, and appellate courts. A governmental office entitled the Attorneys for Children Program ("AFC Program") maintains a list or "panel" of attorneys qualified to represent children, and assigns an attorney from the panel to children involved in the judicial system who qualify by law for an appointed attorney.

3. When an AFC Program panel member is assigned to a case, the panel member plays the role of "attorney for the child," and functions as the child's lawyer. An attorney for the child is generally responsible for representing and advocating the child's wishes in the proceeding, which may or not be in the "best interests" of the child.[47]

47 According to a Fourth Department publication entitled *Ethics for Attorneys for Children* (Aug. 2011):

> [T]he role of the attorney for the child is very different from that of a guardian ad litem. A guardian ad litem, who need not be an attorney, is appointed as an arm of the Court to protect the best interests of a person under a legal disability. In contrast, the role of the attorney for the child is to serve as a child's lawyer.

The publication is available at http://www.nycourts.gov/courts/ad4/AFC/AFC-ethics.pdf.

4. The AFC Program operates under the supervision of the Appellate Division in each judicial department, and is governed by §7.2 of the Rules of the Chief Judge. [48] That section, entitled "Function of the attorney for the child," provides that the attorney for the child "is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on . . . conflicts of interest . . . ."

5. The inquirer, Attorney X, is on the panel of the Attorneys for Children Program in a particular county. Attorney X's spouse is an Assistant Public Defender in the same county. When Attorney X represents a child in a proceeding, the petitioner or respondent is often represented by an attorney from the same Public Defender's Office in which Attorney X's spouse works. Attorney X does not directly oppose the petitioner or respondent in those proceedings, but rather represents the child.

OPINION:

Rule 1.10(h): Spouse v. Spouse

6. In the New York Rules of Professional Conduct (the "Rules"), only one provision directly addresses conflicts between spouses. Rule 1.10(h) provides:

> A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

7. If Attorney X is assigned to represent a child in a proceeding in which Attorney X's spouse is representing another party to the matter whose interests differ from the child's interests, then Attorney X must decline or withdraw from the representation of the child per Rule 1.16(b) (lawyer "shall withdraw" from representing a client if the lawyer "knows . . . that the representation will result in violation of these Rules or of law") unless, per Rule 1.10(h), the child (Attorney X's client) "consents to

48 22 N.Y.C.R.R. §7.2. Rule 7.2(c) and (d) help to understand the role of an attorney for the child. They provide as follows:

> (c) In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the attorney for the child must zealously defend the child.
>
> (d) In other types of proceedings, where the child is the subject, the attorney for the child must zealously advocate the child's position.
>
> (1) In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.
>
> (2) If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests.
>
> (3) When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client."[49]

8. However, a client who is a child may be incapable of consenting to the conflict under Rule 1.10(h). In a prior opinion involving a minor client, we cited three opinions decided under the old Code of Professional Responsibility – N.Y. State 256 (1972), N.Y. State 274 (1972), and N.Y. State 790 n.4 (2005) – in which "this Committee determined that a minor by himself or herself could not consent to a conflict," and we added that "[n]othing in the Rules of Professional Conduct changes this conclusion." N.Y. State 895 (2011) ¶15. Although a child acting alone lacks capacity to consent to a conflict, consent may be possible if the child has a separate law guardian or other representative who has power to consent on the child's behalf. Whether a representative does have such power is a question of law that we cannot answer. *See* N.Y. State 895 ¶ 16 (2011). (Nor do we know whether any of the children Attorney X will represent will have a law guardian or other legal representative.)

Rule 1.7(a)(2): Personal Interest Conflicts

9. Attorney X, even if not barred from the representation by Rule 1.10(h), must also consider another Rule when another party in the proceeding is represented by Attorney X's spouse or another Assistant Public Defender. Spousal conflicts may arise not only under Rule 1.10(h), but also under New York's more general rules on conflicts of interest. In particular, Rule 1.7(a)(2) provides that a lawyer generally may not represent a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the client would be adversely affected by the lawyer's own financial business, property or other personal interests. Even in such cases, however, the lawyer may represent the client if each of four conditions is met. Among these are the conditions that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client," and that "each affected client gives informed consent, confirmed in writing." Rule 1.7 (b).

10. We lack sufficient facts to determine whether there is a "significant risk" that the professional judgment of the attorney for the child will be thrown off course ("adversely affected") by the lawyer's "personal interests" in the success of the spouse's employer (here, the Public Defender). The fear, stated in the abstract, is that when an Assistant Public Defender represents another party, Attorney X will somehow pull punches or represent the child-client less diligently than if the spouse did not work at the Public Defender's Office. Whether that abstract fear would become a reality may depend on multiple factors such as (a) the position the spouse holds at the Public Defender's Office, (b) how secure the spouse's job is at that office, (c) the relationship between the spouse and the Assistant Public Defender involved in the case, (d) whether the interests of the child and of the party represented by the Assistant Public Defender are aligned or antagonistic, and (e) whether the case is attracting attention from the press or from politicians. Those are just illustrative factors, not an exhaustive list. When the Assistant Public Defender involved in the case is actually Attorney X's spouse, then – even if there were not differing interests creating a Rule 1.10(h) conflict – there would be a heightened likeli-

49 In contrast to Rules 1.7(b)(4), 1.9(a), and various other rules, Rule 1.10(h) does not expressly require that the client's consent be "confirmed in writing." However, in N.Y. State 895 (2011), we pointed out that a client's consent to a Rule 1.10(h) conflict must be confirmed in writing because Rule 1.10(d) says: "A disqualification prescribed by this Rule may be waived by the affected client . . . under the conditions stated in Rule 1.7." The conditions stated in Rule 1.7 include informed consent, confirmed in writing. In any event, confirming a client's consent to a conflict in writing is a wise policy because it impresses on the client the importance of that consent, and avoids later confusion about whether consent was given.

hood of a personal interest conflict.[50] Each matter will turn on its own circumstances, and Attorney X must exercise his or her own best judgment in identifying and weighing the relevant factors. *See, e.g.,* N.Y. State 895 ¶ 11 (2011) (applying various factors to analyze a potential conflict with a spouse's law firm).

Rule 1.10(a): Imputed Conflicts

11. If Rule 1.7(a)(2) disqualifies Attorney X from representing a child in a particular matter, then Rule 1.10(a) ordinarily imputes that conflict to every other lawyer who is associated in the same "firm." We must therefore determine whether the AFC Program is a "law firm" within the meaning of Rule 1.0(h), which provides as follows:

> (h) "Firm" or "law firm" includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

12. As we understand the AFC Program, it falls outside that definition. Nor are the attorneys on the panel of the AFC Program automatically deemed to belong to a single firm for conflict of interest purposes, such as sometimes happens when attorneys share offices in a way that gives each other access to the confidential information possessed by other attorneys in the office-sharing arrangement. *See, e.g.,* N.Y. City 80-63 (1980) (two firms that shared offices could not represent opposing parties in litigation because of the "strong likelihood" that the separate law firms could not maintain the confidences and secrets of their respective clients); N.Y. County 680 (1990) ("Even though lawyers who share office space are not partners, they may be treated as if they were partners for some purposes" if they share confidential information.)

13. Rather, the only connection between the attorneys on the panel, aside from a common purpose, is that they obtain assignments and seek reimbursement from the same administrator. This does not transform them into a law firm. *Compare Rosenblum v. Great Neck Teachers Ass'n Benefit Trust Fund,* 36 Misc. 3d 1203(A) (Nassau County Sup. Ct. 2012) ("organization that makes referrals to a panel of lawyers" falls outside the definition of "law firm" under Rule 1.0(h)) *with* N.Y. State 804 (2006) (independent private practitioners who formed a "qualified legal services corporation" to represent indigent clients, and who each received a pro rata share of the fees paid by the county to the corporation, constituted a "law firm" for conflicts purposes). Because the AFC Program is not a law firm within the meaning of the Rules, a conflict for Attorney X will not be imputed to other lawyers in the AFC program (but if Attorney X is associated with other lawyers in some firm, a Rule 1.7 conflict will be imputed to them).

50 "When lawyers representing different clients in the same matter or in substantially related matters are closely related, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers, before the lawyer agrees to undertake the representation. Thus, a lawyer who has a significant intimate or close family relationship with another lawyer ordinarily may not represent a client in a matter where that other lawyer is representing another party, unless each client gives informed consent, as defined in Rule 1.0(j)." Rule 1.7, Cmt. [11].

14. The Public Defender's Office, however, is a law firm, assuming it either is a "government law office" or comes within the definition of a qualified legal assistance organization under Rules 1.0(p) and 7.2(b)(1). *See* N.Y. State 862 (2011) (finding that Public Defender's Office was a firm). Thus its lawyers, unlike those of the AFC Program, are subject under Rule 1.10(a) to mutual imputation of personal-interest conflicts.[51]

15. We note – as we did in N.Y. State 895 at ¶ 14 – that an Assistant Public Defender who works in the same office as Attorney X's spouse may have a "mirror-image conflict under Rule 1.7(a)(2)." Whether such a conflict arises will depend on the kinds of factors discussed in paragraph 10 above. If it does arise, then under Rule 1.10(a), the conflict will be imputed to every lawyer "associated in" the Public Defender's Office who knowingly undertakes a representation despite the conflict. However, if the client of the Public Defender's Office has the capacity to give informed consent to a conflict, then that client's consent may cure the imputed conflict. *See* Rule 1.10(d) (clients may waive imputed conflicts "under the conditions stated in Rule 1.7"). But the consent of the Assistant Public Defender's client will not cure any conflict that Attorney X may have in representing the child-client.

16. Finally, we point out that whenever Attorney X is called upon to serve as attorney for a child, he should heed the mandate of Rule 1.14(a) by seeking, "as far as reasonably possible, [to] maintain a conventional relationship with the client."

CONCLUSION:

17. A lawyer on a county panel of the Attorneys for Children Program may serve as attorney for the child even though another party in the proceeding is represented either by the lawyer's spouse, who is an Assistant Public Defender, or by another lawyer who works in the same office as the lawyer's spouse, unless (i) the circumstances create a conflict under Rule 1.7(a)(2) or Rule 1.10(h), and (ii) the child has no legal representative who can and does consent to the conflict on the child's behalf.

(54-12)

51 Spousal conflicts under Rule 1.10(h), on the other hand, are not among those listed as requiring imputation under Rule 1.10(a).

OPINION 942 (11/02/2012)

TOPIC: Referrals of clients; notice to clients as to legal fees

DIGEST: Lawyer may not ethically enter into arrangement with a non-lawyer firm to accept referrals of clients whose legal fees, in an amount not disclosed to the client, would be taken from the fee paid by the client to the non-lawyer firm.

RULES: 1.5(a) & (b), 1.8(f), 5.4(a), 5.5(b), 7.2(a), 8.4(b)

QUESTION:

1. May a lawyer enter into an arrangement in which a non-lawyer firm, whose customers are hedge fund managers, refers some of those customers for legal services, and the non-lawyer firm will pay the lawyer an undisclosed portion of a flat fee that it collects from those customers?

FACTS:

2. A non-lawyer firm ("NL Firm") sells logo, website and marketing services to hedge fund managers. Along with these services, NL Firm sells template legal documents such as limited partnership agreements to provide fund managers with a cost effective "do it yourself" option. The customers pay NL Firm a flat fee for these services and templates. NL Firm states in its materials that it is not a law firm and that the customer should consult a lawyer.

3. NL also proposes to offer to its customers, for a higher flat fee, an option that would include, in addition to the above services and templates, a referral to an outside attorney with expertise in hedge funds and securities law. The outside attorney would provide the client with "standard hedge fund legal services." The attorney would provide an engagement letter to the client. However, the attorney's fee for legal services would be paid by the NL firm, out of the flat fee it receives from its customer, on the basis of a separate agreement between NL Firm and the lawyer. The engagement letter would not state the amount of the fee to be paid by NL Firm to the lawyer, and it appears that the client would not otherwise be so advised.

OPINION:

4. As a preliminary matter, the inquiry raises some questions of law. Would NL Firm, by selling templates of legal documents to its customers, be engaged in the unauthorized practice of law? *See* Judiciary Law §§ 478, 484. Would NL Firm, by its arrangements with the inquiring attorney, be improperly involved in legal practice? *See* Judiciary Law § 495(1) (d), (e) & (h) (no corporation shall furnish attorneys, render legal services, nor advertise that either alone or with an admitted attorney, it has an office for the practice of law or the furnishing of counsel). Would NL Firm be engaged in unlawful solicitation of business on behalf of an attorney? *See* Judiciary Law § 479 (unlawful to solicit legal business, or to solicit a retainer authorizing an attorney to perform or render legal services). All such questions of law are beyond the jurisdiction of this Committee to resolve.

5. We note, however, that the answers to these legal questions may have consequences under the Rules of Professional Conduct (the "Rules"). If the sale of legal templates constitutes unauthorized

practice of law, then under Rule 5.5(b), the lawyer would be prohibited from aiding NL Firm in such unauthorized practice. More generally, the lawyer's involvement with NL Firm could be unethical if the proposed arrangements were to violate any of the Judiciary Law provisions cited above. *See* Rule 8.4(b) (a lawyer shall not "engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer").

6. Whatever may be the answers to the above legal questions, the proposed arrangement violates the ethical requirement that a lawyer communicate fee information to a client. Rule 1.5(b) requires, subject to an exception not applicable here, as follows:

> A lawyer shall communicate to a client . . . the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule.

The information must be in writing when the fee to be charged is expected to be $3,000 or more. *See* 22 N.Y.C.R.R. §§ 1215.1, 1215.2.

7. Under the proposed arrangement, the written engagement letter would be silent as to the legal fee. The lawyer could provide fee information other than in writing if the legal fee were expected to be less than $3,000, but it appears from the inquiry that information about the legal fee will not be provided to the client even orally. The proposed arrangement would thus violate Rule 1.5(b).

8. There are other ethical rules that could also be violated by the proposed arrangement, but the inquiry does not provide enough information to make that determination. One of these is Rule 5.4(a), which provides, subject to exceptions inapplicable here, that a lawyer "shall not share legal fees with a nonlawyer." NL Firm charges a lower amount to those customers who do not seek legal services, and a higher amount to those who do. The difference between the lower and higher amounts is, in effect, what the customer is paying for the legal services. The inquiry does not reveal how that enhancement of the customer's fee relates to the fee paid by NL Firm to the attorney. If the increased amount paid by the customer were more than the amount paid to the lawyer, then NL Firm would be retaining part of what the customer is paying for legal services, which would violate Rule 5.4(a).[52]

9. Also relevant is the rule against payment for referrals. Rule 7.2(a) provides, subject to certain exceptions: "A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client."[53] It would violate this rule if the inquiring lawyer would be giving something of value to NL Firm in exchange for client referrals. For example, if the lawyer had a

52 On the other hand, if the increased amount paid by the customer were *less* than the amount paid to the lawyer, then NL Firm would be paying part of the legal fee from its own assets. This possibility underlines the importance of considering Rule 1.8(f), which we discuss in paragraph 10.

53 The exceptions to Rule 7.2(a) are inapplicable here. One of them allows payment of usual and reasonable fees charged by a qualified legal assistance organization, Rule 7.2(a)(2), but NL Firm is not such an organization. More broadly, various restrictions discussed in this opinion may not apply to certain other kinds of organizations specified in the Rules, but again, NL Firm does not fit within any of these categories. *See* Rule 7.2(b) (allowing lawyer to be recommended and paid, and cooperate with, certain legal aid or public defender offices, a military legal assistance office, certain lawyer referral services, and certain bona fide organizations with legal services plans for their members or beneficiaries).

standard fee for "standard hedge fund legal services," and if it were to charge NL Firm less than that standard fee, then the discount would appear to be an impermissible payment for referrals. The inquiry does not include enough information to determine whether the lawyer would be in violation of this rule.

10. Given the NL Firm's role in providing the fee to the lawyer, another relevant rule is the one governing payment of legal fees by third parties. A third party may pay legal fees, but only if the client gives informed consent, the third party does not interfere with the lawyer's independent professional judgment or with the client-lawyer relationship, and the client's confidential information is appropriately protected. Rule 1.8(f). Informed consent can occur only after the lawyer has adequately explained the risks and provided enough information for the client to make an informed decision. Rule 1.0(j). That standard may not be satisfied here, given the apparent limits to the planned disclosure to the client, who will not be told even the amount of the fixed legal fee to be paid by NL Firm.

11. Finally, we note that as always, a lawyer's fee cannot be excessive. Rule 1.5(a). It appears that NL Firm is to pay a fixed amount for a standard set of legal services. A flat rate fee is not necessarily excessive, but neither is it necessarily reasonable. *See* Simon's New York Rules of Professional Conduct Annotated 111 (2012 ed.). Whether or not the fee described in the proposed arrangement would be excessive cannot be determined based upon the facts given in this inquiry.

CONCLUSION:

12. A lawyer may not ethically enter into an arrangement with a non-lawyer firm to accept referrals of clients whose legal fees, in an amount not disclosed to the client, would be taken from the fee paid by the client to the non-lawyer firm.

(24-12)

OPINION 943 (11/02/2012)

TOPIC: Law firm business card of non-attorney; title of non-attorney law school graduate

DIGEST: The law firm business card of a firm employee who is a law school graduate but is not admitted to practice may not list the employee's J.D. degree or use the title "legal project manager" without making clear that the individual is not admitted to practice law.

RULES: 5.3, 7.1(a), 8.4(c)

FACTS:

1. The inquirer is a New York law firm that employs a law school graduate who is not admitted to practice law in any jurisdiction and who works as an "account/project manager" and client liaison for a major client of the firm. The firm would like to order business cards for her but wants the information on the card to comply with all applicable ethical requirements. The firm proposes to include the following information on this employee's business card:

> [Employee's name], J.D., M.I.P.
>
> Legal Project Manager

The "M.I.P." is a master of laws degree relating to intellectual property.

QUESTION:

2. May the law firm business card of a firm employee who is not admitted to practice law list the employee's law degrees or use the title "Legal Project Manager?"

OPINION:

3. This committee has previously concluded that a lawyer is responsible for ensuring that the content of business cards of the lawyer's non-attorney employees meet the same standards as those applicable to lawyer advertising. N.Y. State 640 (1992). That opinion was based on the Code of Professional Responsibility, but the current Rules of Professional Conduct (the "Rules") include provisions that support a similar conclusion.[54] An ethical responsibility for such oversight applies not only to individual lawyers, but also to the entire law firm that employs the non-attorney employees.[55]

4. A paramount concern of the rules on advertising is the prohibition against the use of statements that are "false, deceptive or misleading," and even beyond the context of advertising, it is pro-

54 *See* Rule 5.3(a) (providing that a lawyer with direct supervisory authority over a nonlawyer "shall adequately supervise the work of the nonlawyer"); Rule 5.3(b) (providing that a lawyer is responsible for conduct of an employed nonlawyer that would violate Rules if the lawyer has supervisory authority over the nonlawyer and either timely knew of the conduct but failed to take reasonable remedial action or should have known of the conduct so that such action could have been timely taken).

55 *See* Rule 5.3(a) (providing that a law firm "shall ensure that the work of nonlawyers who work for the firm is adequately supervised" as appropriate); N.Y. State 704 (1997) (stating that cited Code provisions "apply with the same force to the law firm as to its individual attorneys").

hibited for a lawyer or law firm to engage in any conduct involving dishonesty or deceit. Rule 7.1(a)(1); Rule 8.4(c).

5. In N.Y. State 640 (1992), focusing on the potential to mislead, we considered which of several proposed titles for a paralegal could be used on a law firm business card. We approved the use of the title "Senior Paralegal" because it "unambiguously conveys that the employee is a paralegal." We rejected certain other titles as being likely to confuse the public. For example, we found the title "Paralegal Coordinator" ambiguous, in that it could refer to an attorney coordinating the firm's paralegals, and thus impermissible unless the business card made clear that the employee did not practice law.

6. In N.Y. State 704 (1997), we considered whether a lawyer not admitted in New York (but admitted in other jurisdictions) could be listed as a lawyer on the letterhead or business card of a law firm's New York office. We concluded that such a listing needed to disclose the jurisdictional limitations of the lawyer. "The governing principle is that the principal office address on the letterhead implies that each attorney whose name is shown on the letterhead has been admitted to practice in the jurisdiction in which that address is located. If the implication is untrue, then it should be clarified with language sufficient to the task in order to avoid misleading the reader." *Id.*

7. The holdings of Opinions 704 and 640 govern this inquiry. Just as listing a lawyer on law firm letterhead with a New York principal address may imply that the lawyer is admitted to practice in New York, listing "J.D." next to an employee's name on a law firm business card may imply to the public that the employee is an attorney. Similarly, use of the title "Legal Project Manager" on a law firm business card – like use of the title "Paralegal Coordinator" – may lead others to that same incorrect conclusion. Thus, the proposed title and degree information may be listed on a law firm business card (or its equivalent, including a digital "vCard") only if the card expressly discloses that the employee is not admitted to practice law.

CONCLUSION:

8. The law firm business card of a firm employee who is a law school graduate but does not practice law and is not admitted to practice law may not list the employee's law degrees or use the title "Legal Project Manager" without expressly indicating that the individual is not admitted to practice law.

(58-12)

OPINION 944 (11/08/2012)

TOPIC: Joint venture between PLLCs

DIGEST: On the facts given, it is permissible for two PLLCs to create a joint venture functioning as a law firm.

RULES: Rule 1.0(h), Rule 7.1(a), Rule 7.5(a), Rule 7.5(d)

QUESTION:

1. Inquiring counsel inquires as follows:

> May two solo practitioners, each of whom has practiced as a professional Limited Liability Corporation (*e.g.,* "John Smith, Attorney At Law, PLLC") form a law firm without a partnership by creating a joint venture of their PLLCs for the purpose of collaborating on cases and sharing profits, using the firm name "Smith and Jones," to be followed by the notation "A Joint Venture of John Smith, Attorney At Law, PLLC and Jane Jones, Attorney At Law, PLLC"?

OPINION:

2. In N.Y. State 861 (2011), this Committee determined, *inter alia*, that "[t]he New York office of a law firm operating as a PLLC may have as one of its owners another PLLC . . . ."

3. Thus, the fact that two PLLCs would be the "owners" or participants in the contemplated entity is permissible.

4. In Florida Opinion 93-6, the Florida State Bar Association Committee on Professional Ethics, while expressing caution that a joint venture arrangement not be utilized to evade fee splitting restrictions or other regulatory purposes, opined:

> Initially it must be noted that neither the Rules Regulating The Florida Bar nor opinions issued by the Professional Ethics Committee of The Florida Bar contemplate joint venture arrangements between law firms. This does not mean, however, that an attorney is ethically precluded from practicing simultaneously in two bona fide law firms. See Florida Ethics Opinion 76-7; ABA Informal Opinions 83-1499 and 1253.

5. In South Carolina Opinion 05-102, the South Carolina Bar Ethics Advisory Committee determined that a Georgia law firm and a South Carolina attorney entering into a joint venture would not be a prohibited legal referral service precisely because the advertising that it would be doing was being performed as a joint venture.

6. In Pennsylvania Opinion 90-21, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, in an informal opinion, approved the formation of a similar joint venture to that being proposed here, and specifically opined:

> Your letterhead must reflect the true nature of the relationship between the two firms. Reading the first sentence of Rule 7.5(a) with Rule 7.1(a), I believe that each firm must disclose that it is practicing in a joint venture with the other, and Rule 7.5(d) mandates that the true nature of the relationship be disclosed.

7. What the Pennsylvania Bar opinion mandated is precisely what the inquiring attorney here proposes.

8. New York Rule of Professional Conduct 1.0(h) provides:

> "Firm" or "law firm" includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

9. As observed in Simon's New York Rules of Professional Conduct Annotated (2012 ed.) (West), in Rule 1.0(h), "firm" or "law firm" is "defined a bit more broadly than it was in the Definitions section of the old Code," and "is not meant to be exhaustive." Simon continues, "[T]he word 'firm,' has a chameleon quality and changes with the context."

10. As further observed therein (at p. 29):

> Rule 1.10(a), the main rule regarding imputation of conflicts, imputes conflicts arising under Rules 1.7, 1.8, and 1.9 to all lawyers who [are] "associated in a firm." Thus, the definition of "firm" is crucial for conflicts of interest analysis.

11. In Pennsylvania Opinion 2005-90, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, after reaching the same conclusion as Florida Opinion 93-6, *supra*, and South Carolina Opinion 05-102, *supra*, regarding the permissibility of practice via the same sort of joint venture proposed by the current inquiring counsel, determined:

> Although your inquiry does not recite the legal structure of the "joint venture", nothing in your inquiry overcomes the conclusion that the joint venture will constitute a "firm" as defined in Rule 1.0(c).

12. In the instant situation, the inquiry acknowledges that the two solo practitioners would be "forming a law firm" by entering into this joint venture, with all of the attendant consequences.

CONCLUSION:

13. The proposal is answered in the affirmative, with the caveat noted above, and solely insofar as the New York Rules of Professional Conduct are concerned. This Committee does not address legal issues, including those regarding the effect which the proposed mode of organization might have upon the member PLLCs or the individual attorneys.

(59-12)

OPINION 945 (11/07/2012)

TOPIC: Disclosure of client wrongdoing.

DIGEST: A lawyer may not disclose that the client has been reading the opposing party's client-lawyer e-mails, although not communicating the e-mails or their contents to the lawyer, unless (1) the lawyer knows that the client is committing a crime or fraud and no other remedial measures will prevent harm to the opposing party, or (2) governing judicial decisions or other law require disclosure.

RULES: 1.6, 3.3, 4.4(b), 8.4(d).

QUESTION:

1. A lawyer represents a client in a matrimonial litigation. The client has disclosed that the client has access to, and has been reading, the spouse's e-mails, including e-mails with counsel. Although the client has not provided the spouse's lawyer-client e-mails or disclosed their contents to the lawyer, the client may be using knowledge of their contents in making decisions about the litigation. Must the lawyer disclose the client's conduct?

OPINION:

2. A lawyer's knowledge that the client is reading the spouse's client-lawyer e-mails is "confidential information" subject to the lawyer's confidentiality duty under Rule 1.6(a). The lawyer should admonish the client to refrain from this conduct. However, absent an exception to the general duty to preserve a client's confidential information, the lawyer may not disclose the client's conduct to the court or opposing counsel.

3. One arguable source of a disclosure obligation in this situation is Rule 4.4(b), which requires a lawyer who "receives" an "inadvertently sent" document to notify the sender. By its terms, this rule is not applicable, however, since the lawyer has not "received" the e-mails from the opposing party or counsel or from anyone else. Further, even if the lawyer had received the e-mails from the lawyer's client, it is uncertain whether the rule would apply. At least in the view of the ABA ethics committee, the rule would be inapplicable because the e-mails, although wrongly obtained by the lawyer's client, have not been "inadvertently sent." *See* ABA Formal Op. 11-460 (2011); ABA Formal Op. 06-440 (2006). The Comment accompanying Rule 4.4(b) is consistent with the ABA's interpretation. *See* Rule 4.4(b), Cmt. [2] ("this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongly obtained by the sending person").

4. It might also be argued that notification is required by Rule 8.4(d), which forbids a lawyer from engaging "in conduct that is prejudicial to the administration of justice." N.Y. City 1989-1 supports this argument. The opinion considered the obligations of a lawyer whose client intercepted written communications between her spouse and her spouse's counsel and provided the communications to her lawyer. The opinion concluded that even if the lawyer did not intend to use the communications, the lawyer "must disclose (or call upon his client to disclose) his possession of the documents and return the documents or provide copies." The opinion reasoned that the receipt of the information, which is likely to be privileged and in any event was obtained outside normal discovery procedures,

gives the lawyer and his client "an advantage that, however slight, they are not entitled to have," and that retaining that advantage without the opposing party's awareness would be prejudicial to the administration of justice.

5. Opinion 1989-1 must be distinguished from the inquiry we address here, however, because the inquirer has not received the e-mails and is not in a position to use them. Although the client may have engaged in conduct prejudicial to the administration of justice, the lawyer has not done so. Additionally, this Committee has doubts whether Opinion 1989-1, if correct at the time it was issued, remains correct. *Compare* Arizona Op. 01-04 (2001) (where client wrongly procures former employer's privileged or confidential documents from a current employee, the ethics rules "prohibit the lawyer from notifying the ex-employer or its counsel of the documents' receipt without first obtaining client consent"). The New York judiciary's adoption of Rule 4.4(b), effective 2009, appears to reflect a judgment that the handling of improperly obtained documents should be left to case law and other law. That is the import of the accompanying Comment, quoted above.

6. One must also consider whether the inquirer has a disclosure obligation under Rules 3.3(b) & (c). Rule 3.3(b) provides that "[a] lawyer who represents a client before a tribunal and who knows that a person . . . has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(c) provides that this duty applies even if compliance requires disclosure of confidential information. The purpose of Rule 3.3(b) is "to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process." Rule 3.3, Cmt. [12].

7. Rule 3.3(b) is inapplicable unless the lawyer knows that the client's conduct in question is "criminal or fraudulent." Because this Committee interprets only the Rules of Professional Conduct and not other law, we do not express an opinion whether the client's conduct in reading the spouse's lawyer-client e-mail communications rises to the level of a crime or fraud. If it does, the lawyer's duty is to "take reasonable remedial measures," which do not necessarily include disclosure of client confidences. Since the lawyer has not gained access to the e-mails or their contents, it may be a sufficient remedial measure for the lawyer to persuade the client to cease the misconduct. If that is enough to avert harm to the client's spouse, then the rule would not require disclosure. However, disclosure must be made to the court or opposing counsel if the client's conduct is "criminal or fraudulent" and no other measures provide an adequate remedy.

8. Finally, Rule 1.6(b)(6) permits a lawyer to reveal confidential information "to the extent the lawyer reasonably believes necessary . . . when permitted or required under these Rules or to comply with other law or court order." Under this provision, when the law governing potential disclosure is unclear, a lawyer need not risk violating a legal or ethical obligation, but may disclose client confidences to the extent the lawyer reasonably believes it is necessary to do so to comply with the relevant law, even if the legal obligation is not free from doubt. *See* ABA 11-460 (2011).

9. Judicial decisions, without reference to the disciplinary rules, have found that lawyers have a notification obligation in some circumstances where clients wrongly procure the opposing party's documents. *See, e.g.*, *Parnes v. Parnes*, 80 A.D.3d 948, 915 N.Y.S.2d 345 (3d Dep't 2011) (where the wife in a divorce action wrongly downloaded her husband's e-mails and provided them to her attorney, the intermediate appellate court observed: "we certainly do not condone the failure of plaintiff's

counsel to promptly notify defendant's counsel that she had obtained the e-mails or her tactic of surprising defendant at his deposition by questioning him regarding those privileged documents"); *Lipin v. Bender*, 193 A.D.2d 424, 597 N.Y.S.2d 340 (1993), *aff'd*, 664 N.E.2d 1300 (N.Y. 1994) (where the plaintiff in an employment action removed and copied the opposing lawyer's internal memos while the lawyers were out of the room and provided the copies to her own lawyer, the plaintiff's lawyer should either have returned the documents or sought direction from the court rather than attempting to exploit the documents in settlement discussions); *Forward v. Foschi*, 27 Misc. 3d 1224A, 911 N.Y.S.2d 392, 2010 N.Y. Misc. LEXIS 1066 (N.Y. Sup. Ct., May 18, 2010) ("when he realized . . . his client had turned over to him communications between [the opposing party] and her attorneys, [the lawyer] should have disclosed his receipt of such communications and attempted to mitigate the circumstances, especially, if, as he asserts, the communications were of little value"). These decisions may be intended to impose obligations, pursuant to the courts' supervisory authority, that are independent of the ethics rules and that go beyond the disclosure obligations of Rule 3.3(b) and other rules. The extent of any court-established disclosure obligations and whether they apply to the inquirer's situation is a question of law that this Committee lacks jurisdiction to answer. If the inquirer reasonably believes that disclosure is necessary to comply with applicable judicial decisions, such disclosure is permitted by Rule 1.6(b)(6).

CONCLUSION:

10. A lawyer may not disclose that the client has been reading the opposing party's client-lawyer e-mails, although not communicating the e-mails or their contents to the lawyer, unless (1) the lawyer knows that the client is committing a crime or fraud and no remedial measures other than disclosure will prevent harm to the opposing party, or (2) governing judicial decisions or other law require disclosure.

(57-12)

OPINION 946 (11/07/2012)

TOPIC: Payments from lawyer's trust account to third parties at direction of client.

DIGEST: The Rules of Professional Conduct do not prevent a lawyer from distributing settlement proceeds to a third person at the request of the lawyer's client.

RULES: 1.0(e); 1.2(a); 1.15 (c)(4)

FACTS:

In this inquiry, a lawyer has settled a personal injury action on behalf of his client and after paying all fees, disbursements, liens and expenses, plans to distribute to the client the net proceeds which the client is entitled to receive. However, the client is incarcerated, does not have a checking account and is not able to open one. The lawyer proposes to issue the net proceeds by check payable to the client or the third party ("John Client or Mary Friend").

QUESTION:

1. May a lawyer distribute settlement proceeds from a personal injury action to a person other than the client who is the party to the action, at the request of the client?

OPINION:

2. Rule 1.15 (c)(4) requires a lawyer to "promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive."

3. The focus of this subsection of the Rule is at its opening phrase. The Rule requires prompt action by the lawyer. Failure to act promptly has been a factor in several disciplinary matters under DR 9-102(c)(4), the predecessor to Rule 1.15(c)(4). (see, *Matter of Jebb,* 46 A.D. 3d 167 (4th Dept. 2007)*; Matter of King,* 36 A.D.3d (4th Dept. 2006)).

4. The inquiry is then answered by the next phrase which directs the lawyer to "pay or deliver to the client or third person as requested by the client or third person . . . ." The request has been made by the client to make the proceeds check payable to the client or a third person. Thus Rule 1.15 (c)(4) does not prevent the distribution to "John Client or Mary Friend". The lawyer should advise the client that when the funds are paid to the third party that person will have full control over the funds.

5. The inquiry raises the concern whether the closing language of Rule 1.15(c)(4), "entitled to receive the funds", restricts the lawyer's ability to follow the client's instruction. Under Rule 1.2(a), a lawyer "shall abide by a client's decisions regarding the objectives of the representation . . . ." If a client instructs the lawyer to deliver funds to a third party, then that third person is entitled to receive to funds within the meaning of Rule 1.15(c)(4).

6. In NY State 717 (1999) we construed the phrase, "entitled to receive the funds", to include medical providers who have valid assignments or liens against proceeds but exclude other unsecured

provider creditors about whom the client has objected. This opinion implies that if the client had authorized payment to an unsecured provider, that payment would fall within the permissive language of Rule 1.15(c)(4).

7. This opinion, of course, is based on the clear authorization from the client to the lawyer directing payment to the third party. While not ethically required, it might be prudent for the lawyer receiving these instructions to follow the guidance of Rule 1.0(e) and have that authorization "confirmed in writing".

CONCLUSION:

8. Upon receiving clear instruction from a client to distribute settlement proceeds to the client or a named third person, a lawyer may follow the request of the client to distribute the funds in a certain manner.

(43-11)

OPINION 947 (11/14/2012)

TOPIC: Purchase of mailing list names for use in connection with offer to receive email educational newsletter.

DIGEST: It is ethically permissible for an attorney or law firm to purchase a list of names to whom emails from the firm will be sent offering each recipient the opportunity to join the law firm's email newsletter distribution system, which offers information about current legal topics and invitations to attend educational seminars provided by the firm, provided there is no solicitation for utilization of the firm's legal services.

RULES: 7.1, 7.1 (comments 1, 7 and 9); 7.2, 7.2 (comment 1); 7.3.

FACTS:

1. The inquiring law firm proposes to purchase a list of names for the purpose of sending emails to those on the list, offering them an opportunity to "opt in" to the firm's email newsletter distribution system, through which the recipient would receive information about current legal topics and invitations to seminars provided by the firm. There will be no solicitation for utilization of the firm's legal services in the e-mails or at the seminars.

QUESTION:

2. Is it ethically permissible for an attorney or law firm to purchase a list of names to whom emails will be sent, offering each recipient the opportunity to join the law firm's email newsletter distribution system, which offers information about current legal topics and invitations to attend educational seminars provided by the firm, provided there is no solicitation for utilization of the firm's legal services?

OPINION:

3. The public's need for legal services is met only if people recognize their legal problems, appreciate the importance of seeking assistance, and have available the services of competent legal counsel. Attorneys are, therefore, encouraged "to educate people to recognize their problems to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." Rule 7.1 Comment 1. In addition, attorneys are urged to "participate in educational and public relations programs concerning the legal system with particular reference to legal problems that frequently arise." Rule 7.1 Comment 9.

4. Thus, the maintenance of a program to educate the public such as that proposed by the inquiring attorney is a laudable exercise, and as long as the information disseminated is not "primarily about the lawyer or law firm (for example, the lawyer or law firm's cases, personnel, clients or achievements)" the program and its elements (*e.g.* email newsletters and seminars) are not considered advertising. Rule 7.1 Comment 9. "A lawyer's participation in an educational program is ordinarily not considered advertising because its primary purpose is to educate and inform rather than to attract clients." Rule 7.1 Comment 9. See also, N.Y. State 830 (2009).

5. Because educational newsletters and seminars from law firms are not "advertisements" under Rule 7.1(a), and because a solicitation is by definition a subset of advertisements under Rule 7.3(b), the offering of a subscription to such newsletters and/or seminars is therefore not a solicitation and thus is not subject to Rule 7.3.

6. We find no Rule that prohibits a lawyer or firm from purchasing a list of names and addresses for the purpose of offering the lawyer's or firm's newsletter and/or educational seminars. Comment 1 to Rule 7.2 (which prohibits payment for referrals of clients) provides that the Rule "does not prohibit a lawyer from paying for advertising and communications permitted by these Rules, including the costs of print directory listings, online directory listings, newspaper ads, television and radio airtime, domain name registrations, sponsorship fees, banner ads and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public relations personnel, marketing personnel and website designers."

CONCLUSION:

7. It is ethically permissible for an attorney or law firm to purchase a list of names to whom emails from the firm will be sent, offering each recipient the opportunity to join the law firm's email newsletter distribution, which offers information about current legal topics and invitations to attend educational seminars provided by the firm, provided there is no solicitation for utilization of the firm's legal services.

(49-12)

OPINION 948 (12/03/2012)

TOPIC: Firm names; advertising

DIGEST: Law firm name may not include a lawyer's initials conjoined with an abbreviation of the lawyer's surname. Firm name may not include the phrase "The Business Dispute Clinic," but use of the phrase as a motto separate from the firm name may be permissible.

RULES: 7.1, 7.5(b)

FACTS:

1. An individual lawyer who is growing her practice seeks to change her firm's name. The lawyer's surname is hyphenated, as in "Ann Bonnie-Doe" (not her real name), and she seeks to use the name "AbDoe Law, The Business Dispute Clinic."

QUESTION:

2. May a lawyer ethically practice under a firm name that consists of a combination of (a) the lawyer's first initial, and the first initial and second name of a hyphenated surname, all conjoined, plus (b) the word "Law," plus (c) the motto "The Business Dispute Clinic"?

OPINION:

3. Rule 7.5(b) contains (subject to exceptions not applicable here) three prohibitions on firm names:

> "A lawyer in private practice shall not practice under [1] a trade name, [2] a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or [3] a firm name containing names other than those of one or more of the lawyers in the firm . . . ."

While "trade name" is not defined by the Rules, there are opinions that provide guidance. "The prohibition against trade names is broad, permitting use of little beyond the names of lawyers presently or previously associated with the firm." N.Y. State 869 (2011) (firm name may not include practice area); *see* N.Y. State 920 (2012) (firm name may not consist only of lawyer's initials); N.Y. State 861 (2011) (firm name may not include initials of practice areas); N.Y. State 740 (2001) (arbitrary letter may not be used as or appended to firm name, because trade names are prohibited even if not misleading as to identity of lawyers in the firm); N.Y. County 677 (1990) (firm name may not include first name of one partner and contraction of surname of another partner, as such a name would violate requirement that lawyers practice only under names of lawyers in the firm).

4. Some variations on names may deviate so slightly from the original as not to offend Rule 7.5(b). *See* N.Y State 872 (2011) (permissible to use English translation of foreign first name in informal communications, and on business cards and website, if not misleading and if compliant with statutes and court rules). Here, the first portion of the proposed firm name –the conjoined and abbreviated form AbDoe – deviates more substantially from the lawyer's actual name, and in that respect is simi-

lar to firm names found impermissible in opinions cited above. A firm name starting with AbDoe would therefore constitute a prohibited trade name.

5. The last portion of the proposed firm name – the phrase "The Business Dispute Clinic" – is also impermissible. Rule 7.5(b) permits a firm name to include the term "legal clinic" if the name of a participating lawyer or firm is incorporated therein, and it allows certain other similar terms to be used by a qualified legal assistance organization. The inquiring lawyer's firm, however, is not such an organization, and in any event, the provisions in question do not authorize the use of other terms such as "The Business Dispute Clinic."

6. However, advertising that includes "The Business Dispute Clinic" as a motto *in addition to* a proper firm name may be permissible. When a lawyer used the phrase "The Country Lawyer" as a motto in advertising, following his name, the Court of Appeals held that the phrase was neither a trade name nor deceptive. *In re Von Wiegen*, 63 N.Y.2d 163, 176-77 (1984). Under Rule 7.1(a)(1), however, advertising may not be misleading. Accordingly, the motto would be impermissible if, for example, the firm lacked competence or willingness to address business disputes.

CONCLUSION:

7. A law firm name may not include a variant on the lawyer's name that is created by conjoining the lawyer's initials with an abbreviation of the lawyer's surname. Nor may the firm name include the phrase "The Business Dispute Clinic," although use of such a phrase as a motto accompanying a proper firm name may be permissible advertising if not misleading.

(38-12)

OPINION 949 (12/17/2012)

TOPIC: Obligations of standby counsel

DIGEST: The ethical responsibilities of "standby counsel" vary depending on the degree to which standby counsel assumes representational obligations. If standby counsel remains on the sidelines, the *pro se* party should be treated like a prospective client. If the *pro se* party invites standby counsel's participation on a limited basis, standby counsel may limit the scope of representation. If the *pro se* party makes demands on standby counsel that are irrelevant to the case and beyond the scope of matters for which counsel has assumed responsibility, standby counsel should reiterate the scope of representation and explain which requests and demands are beyond that scope.

RULES: 1.2, 1.3, 1.4(a), 1.14, 1.18, 3.1, 3.2, 3.3

FACTS:

1. The inquirer is a private practitioner appointed by a New York State Supreme Court Justice to represent in a pending retention hearing a patient currently subject to involuntary civil commitment in a state mental hygiene facility.[56] The patient was confined following his acquittal of a crime by reason of mental disease or defect. *See* Penal Law §40.15. The inquirer describes him as an intelligent, litigious individual who has brought many actions against the state and has filed numerous complaints against actors in the court system, including the inquirer. The patient has a history of frequently compiling lengthy legal documents and demands.

2. The patient requested that the inquirer be relieved as counsel, but the court denied that request. Then the court granted the patient's request to proceed *pro se*, but appointed the inquirer as "standby counsel." Since the court has not defined his role as standby counsel, the inquirer seeks general guidance from us as to the scope and limits of his ethical obligations. He has also voiced specific concern about assisting the *pro se* party in bringing demands or claims that have no merit. The inquirer wishes to act diligently and professionally, but he does not want his practice to be overwhelmed by the demands of this case.

QUESTION:

3. What are the ethical obligations of standby counsel?

OPINION:

A The Role of Standby Counsel

4. The Supreme Court, while recognizing a criminal defendant's right to self-representation, has cautioned that this right does not excuse compliance with "relevant rules of procedural and substantive law." *Faretta v. California,* 422 U.S. 806, 834 n.46 (1975). The Court indicated that "a State may – even over objection by the accused – appoint a 'standby counsel' to aid the accused if and when the

56 A retention hearing is a hearing to determine whether a person who has been involuntarily committed to a state mental hygiene facility should be retained in the facility. *See* Mental Hyg. Law §9.33.

accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Id.*; *accord People v. Sawyer,* 57 N.Y.2d 12, 22 (1982).

5. The role of standby counsel as expressed in case law may seem to vary somewhat from jurisdiction to jurisdiction.[57] However, that apparent variation may in part reflect that standby counsel can have different roles in different circumstances. As the discussion in *Faretta* makes evident, those roles can range from inactivated bystander (if the *pro se* party does not request help) to full-fledged counsel (if self-representation is terminated). Indeed, the relevant ABA Criminal Justice Standard sets out two different standby models, one active and one conditioned on a *pro se* party's invitation:

> "When standby counsel is appointed to provide assistance to the pro se accused only when requested, the trial judge should ensure that counsel not actively participate in the conduct of the defense unless requested by the accused or directed to do so by the court. When standby counsel is appointed to actively assist the pro se accused, the trial judge should ensure that the accused is permitted to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case."

ABA Standards for Criminal Justice: Special Functions of the Trial Judge, Standard 6-3.7[c] (1999).

6. A criminal defendant has a right to representation and a right to proceed *pro se*, but has no right to "hybrid representation" in which the defendant proceeds *pro se* and is simultaneously represented by an attorney. *See People v. Mirenda,* 57 N.Y.2d 261 (1982). If, however, a trial court chooses to appoint standby counsel, the court is typically afforded broad discretion to set forth the parameters of the standby counsel's obligations. *See People v. Ivery,* 80 A.D.3d 874 (2d Dept. 2011) (trial court permissibly defined role of standby counsel as giving "legal advice as to how to frame motions and frame questions" and giving procedural advice); *People v. Golden,* 270 A.D.2d 136 (1st Dept. 2000) (trial court permitted to impose limitations on role of standby counsel). However the trial court exercises that discretion, it should notify lawyers and the *pro se* party of their roles and responsibilities. *See* ABA Criminal Justice Standard 6-3.7(b) (trial judge "should clearly notify both the defendant and standby counsel of their respective roles and duties").

7. Within the parameters set by the trial court, it is often up to the *pro se* party to determine the degree to which to "activate" standby counsel. *See, e.g., People v. Hilts,* 46 A.D.3d 947 (3d Dept. 2007) (standby counsel to assist *pro se* party only when requested). Counsel, however, has some say in the matter – courts have recognized that standby counsel may refuse to run errands or perform legal research as an assistant to the *pro se* party. *See, e.g., State v. Silva,* 27 P.3d 663 (Wash. Ct. App. 2001) (citing authorities in which "the role contemplated is one in which counsel acts as an advisor to the accused when requested, but does not in any respect act as an errand runner"); *State v. Fernandez,* 758 A.2d 842 (Conn. 2000) ("standby counsel serves as a legal resource to pro se defendants," but "does not . . . have any obligation to perform legal research for the defendant").

57 *See, e.g., United States v. Schmidt,* 105 F.3d 82, 90 (2d Cir. 1997) ("a standby counsel's duties are considerably more limited than the obligations of retained or appointed counsel"); *United States v. McDermott,* 64 F.3d 1448, 1453 (10th Cir. 1995) (standby counsel may "consult, make some objections, help with the admission and admissibility of exhibits, and make some motions"); *United States v. Mullen,* 32 F.3d 891, 894 (4th Cir. 1994) (court appointed standby counsel to sit in first row to be available for consultation, and not to offer advice unless asked).

8. As the above discussion illustrates, questions about the role of standby counsel in a given jurisdiction and in a given case are, to a great extent, questions of law rather than ethics. The answers to such questions must take into account broad judicial discretion, the *pro se* party's reasonable preferences, and standby counsel's willingness to perform services. This Committee does not answer legal questions, but it is within our purview to opine on the ethical duties attached to the different incarnations of standby counsel.[58] With the above legal background in place, we turn to an analysis of those ethical duties.

B. Standby Counsel and the Rules of Professional Conduct

9. While the Rules of Professional Conduct do not expressly address the ethical obligations of standby counsel, the Rules as a whole are best read to support the conclusion that the ethical duties of standby counsel vary significantly depending on the role that standby counsel assumes, or is assigned or asked to perform, in a given case.

The "inactive" end of the standby spectrum

10. When the *pro se* party does not involve counsel in the case and the court does not independently assign other duties to counsel, then the lawyer-client relationship remains inchoate and does not trigger the full panoply of ethical duties. The ABA, in addressing the obligations of a lawyer appointed to represent someone who declines representation, has commented that some ethical rules "defining the lawyer's obligations to a client . . . make sense only after a client has accepted the client-lawyer relationship." ABA 07-448. Specifically addressing the situation in which a *pro se* party does not accept representation by standby counsel, the ABA concluded that "[t]here is no client-lawyer relationship unless and until the defendant accepts representation." *Id.* This Committee agrees.

11. In our view, a *pro se* party who has not yet activated standby counsel is the functional equivalent of a "prospective client" to whom counsel owes some, but limited, ethical duties. Under Rule 1.18(b), even when no client-lawyer relationship ensues, "a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client." Thus, even in the minimal version of standby representation, a *pro se* party's confidential information is subject to protection.

12. Additionally, even though a full lawyer-client relationship has not begun in this situation, it would be untenable for a standby lawyer, who can be called upon at any moment to play a more active role, to represent simultaneously a party whose interests differ from those of the *pro se* party. Accordingly, the concurrent conflict-of-interest standards of Rule 1.7 apply even to "inactive" standby counsel.

13. At the inactive extreme of standby representation, Rule 3.3 ("Conduct Before a Tribunal") is typically not triggered because (i) standby counsel is not the one taking action in the proceedings and (ii) a client-lawyer relationship has not been formed. *See* Rule 3.3, Cmt. [1] ("This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal."). Of course, as dis-

58 Moreover, to give standby counsel clear guidance, a court may wish to make explicit its view of counsel's ethical obligations to the tribunal.

cussed in ¶17 below, once standby counsel takes actions in the proceedings, those actions will be governed by Rule 3.3.

14. Rules 1.2(d) and 1.4(a)(5), which are not limited to conduct before a tribunal, apply even at the passive end of the standby spectrum. Rule 1.2(d) states that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent," but it permits a lawyer to "discuss the legal consequences of any proposed course of conduct with a client." Rule 1.4(a)(5) indicates that a lawyer shall "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law."

The middle of the standby spectrum

15. In the middle of the representational spectrum are situations in which standby counsel assumes specific responsibilities on behalf of the *pro se* party. The *pro se* party's activation of counsel consummates a client lawyer relationship. *See* ABA 07-488 (when *pro se* party "turns to appointed counsel and seeks advice or representation, the defendant may be found to have consented to and thereby to have created a client-lawyer relationship under the Rules").

16. In these situations, Rule 1.2(c) best defines the scope of standby counsel's representation. That rule provides that a lawyer "may limit the scope of representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel." This rule requires that standby counsel communicate to the *pro se* party his understanding of the specific duties he is assuming so that the *pro se* party understands the scope of the standby representation. Because standby counsel's duties may evolve during the course of the litigation, it is important that standby counsel explain any changes in the scope of his involvement to the client (and to the court, if required) as the litigation progresses.

17. As standby counsel assumes representational responsibilities, the obligations of Rule 3.3 will be triggered as to those aspects of the litigation in which standby counsel is involved.[59] Similarly, while a *pro se* party is generally entitled to direct his own litigation, standby counsel may not advance or assist in advancing non-meritorious claims, or claims that are designed merely to harass another or to delay the proceedings. *See* Rule 3.1 ("Non-Meritorious Claims and Contentions"); Rule 3.2 ("Delay of Litigation"). If, however, standby counsel's assistance or participation is limited to a specific issue, counsel does not assume responsibility for those aspects of the litigation in which he or she remains completely uninvolved.

The "full representation" end of the standby spectrum

18. Of course, when standby counsel steps in to assume full representation or to take on so many representational responsibilities as to be standby counsel in name only, the full panoply of ethical obligations contained in the Rules apply to counsel's conduct.

59 Although the current inquiry relates to a civil retention proceeding, the appointment of standby counsel most commonly occurs in the context of a criminal proceeding. In that situation, "[t]he lawyer's ethical duties under paragraphs (a) and (b) [of Rule 3.3] may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases." Rule 3.3, Cmt. [7].

19. The inquirer has affirmed his desire to act diligently and professionally but has expressed his concern that the demands of the *pro se* party may overwhelm his practice. Rule 1.3(a) provides that a lawyer "shall act with reasonable diligence and promptness in representing a client," and Comment [1] to that rule explains that a lawyer must "act with commitment and dedication to the interests of the client and in advocacy upon the client's behalf." But, as discussed above, the lawyer-client relationship between standby counsel is typically either limited in scope or provisional. Counsel's obligations under the Rules track the scope of his representational involvement. *See* Rule 1.2, Cmt. [7] ("Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). Thus, if the *pro se* party has invoked standby counsel's participation only on specific issues, standby counsel is not responsible for involving himself in any of the *pro se* party's legal affairs that are unrelated to the case or outside the defined scope of standby counsel's involvement. And, as noted, Rule 3.2 prohibits standby counsel from assisting the *pro se* party in advancing frivolous or vexatious claims. Moreover, a lawyer's obligation to comply with client requests for information applies only to "reasonable" requests. Rule 1.4(a)(4). Thus, if a *pro se* party asks standby counsel to review prolix documents, or makes demands that are irrelevant to the matters for which counsel has assumed responsibility, standby counsel need simply reiterate the scope of his representation and explain which requests and demands are beyond that scope.

20. Given the history and circumstances of the particular *pro se* party to which the inquirer has been assigned as standby counsel, the inquirer should be continually alert to the relevance of Rule 1.14 ("Client with Diminished Capacity"). Rule 1.14(a) provides that a lawyer shall, "as far as reasonably possible, maintain a conventional relationship with" a client with diminished capacity, but Rule 1.14(b) authorizes counsel to take "reasonably necessary protective action" when the lawyer reasonably believes that the client (1) has diminished capacity, (2) is at risk of substantial harm unless action is taken, and (3) cannot adequately act in his or her interest. "In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interest, and the goals of minimizing intrusion into the client's decision-making autonomy and maximizing respect for the client's family and social connections." Rule 1.14, Cmt. [5].

CONCLUSION:

21. The ethical responsibilities of standby counsel vary depending on the degree to which standby counsel assumes representational obligations: when standby counsel remains on the sidelines, the *pro se* party should be treated in the same manner as a prospective client under Rule 1.18; when the *pro se* party invites standby counsel's participation on a limited basis, standby counsel can limit the scope of representation pursuant to Rule 1.2(c); and if a *pro se* party makes lengthy demands on standby counsel that are irrelevant to the case or relate to matters for which counsel has not assumed responsibility, standby counsel should reiterate the scope of his representation and explain which requests and demands are beyond that scope.

(30-12)

OPINION 950 (12/17/2012)

TOPIC: Saving law firm mail in paper or electronic form

DIGEST: Law firm that retains electronic copies of mail may destroy the original paper mail, except when it finds that particular items must be retained in paper form, if it follows reliable procedures to identify and retain those particular items.

RULES: 1.6, 1.15(d)

FACTS:

1. The inquirer is a legal services agency that provides services to members of a union. The Agency is located within the headquarters of the Union.

2. Mail received by either the Agency or the Union is received and processed by a third party vendor. The Agency has confidentiality agreements with the personnel of the Vendor who receive and process mail.

3. The Agency proposes to have the Vendor scan all mail and email it to the appropriate attorneys or other legal service personnel. Also, in some cases, the original "hard copy" of the mail would "automatically" be sent to the addressee. According to the inquiry, this would include documents "for which an original is required," such as "motions, deeds, all client original signature documents, checks, transcripts, title documents [and] all escrow account statements and related documents."

4. In other cases, the Vendor would retain the hard copy of the mail for one month. During that time, lawyers or other legal staff who receive the emailed scan of the mail may click on the item and thereby cause the Vendor to deliver the hard copy of that mail item to the addressee. After one month, if no legal staff has requested retention, the Vendor would destroy the hard copy of the mail in a secure manner, but the scanned copy would be maintained on a secure server indefinitely.

QUESTIONS:

5. May the Agency ethically implement a plan to destroy the hard copy originals of certain items of mail, and retain only electronic copies, when legal staff has not requested that the hard copies of those particular items be delivered so as to allow retention?

OPINION:

6. Before considering the question asked, we note briefly the issue of confidentiality. "A fundamental principle in the client-lawyer relationship" is that, in the absence of the client's informed consent or except as permitted or required by the Rules of Professional Conduct (the "Rules"), "the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source." Rule 1.6, Cmt. [2]. The attorney not only has an obligation to refrain from revealing such information, but also must exercise reasonable care to prevent its disclosure or use by "the lawyer's employees, associates, and others whose services are utilized by the lawyer." Rule 1.6(c); *see*

also Rule 5.3(b) (specifying when a lawyer is responsible for conduct of an associated nonlawyer that would be a violation of the Rules if engaged in by a lawyer).

7. The employees of the Vendor will have access to confidential client information. We have not been given the details of the Agency's confidentiality agreements with personnel of the Vendor. We may point out, however, that those agreements, and the Agency's oversight over the Vendor's adherence to them, must be sufficient to constitute reasonable care in protecting confidential information.

8. The inquiry also does not provide details about the servers on which electronic copies of mail will be kept, and in particular does not indicate whether those servers would be maintained by the Vendor or the Agency. In any event, the Agency must exercise "reasonable care to ensure that the system is secure and that client confidentiality will be maintained," N.Y. State 842 (2010), and some of our opinions provide guidance as to how such care might be exercised.[60]

9. We now turn to the question about destroying hard copies of mail items. In a recent opinion, we discussed ethical requirements to retain documents in their original form. N.Y. State 940 (2012). That opinion was not focused on items of mail; it related to records in general, and we think its principles apply in the more specific context presented here.

Items that must be retained in their original form

10. The inquirer has recognized that certain mail items need to be retained in their original hard copy form. This includes certain items specifically listed in the Rules, such as bank statements, when those items were received as paper copies in the first place. Rule 1.15(d)(1)(viii). It includes other kinds of documents as well, such as promissory notes and deeds. See N.Y. State 940 ¶¶ 9 – 10 & 13 – 14 (2012) (noting that whether records must be maintained in their original form will depend on the kind of record involved, and giving examples of documents in this category).

11. The proposed system includes two mechanisms for ensuring that mail is retained in hard copy when necessary. First, the Vendor would "automatically" send relevant legal staff hard copies of mail "for which an original is required." Second, if the Vendor fails to identify such a document, there would be another opportunity to do so when the relevant legal staff reviews the email with the scanned document.

12. The adequacy of these two mechanisms would depend on the details of their design and implementation. It is unclear from the inquiry how the Vendor will identify mail for which an original is required. To the extent possible, the Agency should have a clear and reliable protocol that the Vendor can readily apply, but the inquiry does not describe any such protocol.

60 For example, the opinion cited above states in the context of internet server ("cloud") storage that reasonable care to protect a client's confidential information against unauthorized disclosure may include consideration of the following steps: "Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information"; "Investigating the online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances"; and "Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored." N.Y. State 842 ¶9 (2010); *see also* N.Y. State 709 (1998).

13. The inquiry also does not provide full details about the thirty-day opportunity for review by legal staff. It does not indicate, for example, whether there would be any mechanism for extension of the period, or review by another lawyer, when an assigned lawyer is on vacation or fully occupied with some other matter. In the absence of more information about the two mechanisms and their reliability, we cannot opine on the proposed system's adequacy.

Items for which at least copies must be retained

14. As to some other mail items, there will be no ethical requirement to maintain the items in their original paper form, but the inquirer will be ethically required to retain at least copies. N.Y. State 940 ¶¶ 11 – 14 (2012). The proposed system, which includes a plan to keep electronic copies of all mail on a secure server indefinitely, should satisfy this requirement. In some cases, however, there may be constraints on the kind of electronic storage used.[61]

CONCLUSION:

15. A system for retaining hard copies of mail when necessary, and keeping only electronic copies in other cases, may be permissible if the firm implements a reliable method for identifying those items that it is ethically required to be maintained in hard copy.

(56-12)

61 For example, in particular cases, the electronic copies might have to meet standards for future admissibility in evidence, *see* N.Y. State 940 ¶14. And when the item is one listed in Rule 1.15(d), copies must be maintained in a "medium that preserves an image of the document that cannot be altered without detection." Rule 1.15(d)(3).

OPINION 951 (12/17/2012)

TOPIC: Offering letter writing services through website.

DIGEST: A lawyer may not offer a web-based letter writing service on a broad range of topics unless it is clear that no legal services are rendered and the lawyer prominently disclaims the existence of a client-lawyer relationship on the website.

RULES: 5.7(a) & (c).

FACTS:

1. The inquiring lawyer contemplates offering an online letter drafting service; the lawyer would charge a flat fee for the preparation of letters in the following categories: Fund-raising, Commercial/ Business, Personal, Acceptance, College, Commendation, Condolence, Congratulations, Cover, Demand, E-mail, Introductory, Letters of intent, Marketing, Notification, Promotional, Reference, Rejection, Resignation, Request, Response, Resume, Application, Sales, Sympathy and Thank-you letters. The draft letters would be prepared by a lawyer and delivered to the client by electronic mail for execution and mailing. The lawyer proposes adding a disclaimer to the website that would advise that he is not dispensing legal advice, no legal representation exists, no attorney-client relationship is formed and the attorney is being hired only for his skills as a writer.

QUESTION:

2. May a lawyer offer a letter-writing service which does not dispense legal advice through a website he owns? May the website advertise the fact that the letters are written by an attorney?

OPINION:

3. Rule 5.7, entitled "Responsibilities Regarding Nonlegal Services" defines "nonlegal services" to "mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." Clearly letters on many of the topics raised by the Inquirer are non-legal, such as Condolence, Sympathy and Thank-you letters. However, the context and content of other letters may address legal rights and responsibilities. For example, a demand letter may be necessary to declare a default under a contract, a letter of intent may create legal obligations or a resignation may have to be addressed in a certain manner to be effective. Therefore whether the letter writing services qualify as "nonlegal services" for purposes of the Rule will require an examination of each request for a letter.

4. Our concern here is that the inquirer proposes to identify himself as an attorney, and that the letters, including those that could be written by a non-lawyer, will be written by an attorney.

5. Section (a)(1) of Rule 5.7 states that the Rules of Professional Conduct apply if the lawyer or law firm provides nonlegal services to a person that *are not distinct* from legal services being provided by the lawyer or firm. This test requires an examination of the subject of each letter and its context to determine whether the writing constitutes "nonlegal services" that are "distinct from legal services"

6. Comment [1] to Rule 5.7 places the onus on the lawyer to be clear about the nature of the services and the lawyer's role. It is likely that a client of the letter writing service, knowing that the writer is a lawyer, may expect legal advice.

7. In N.Y. State 832 (2009) we addressed an inquiry involving the sale of shelf corporations (a non-legal service); in paragraph 10 we stated that "[e]ven if the attorney merely identifies himself as a lawyer when selling shelf corporations but does not promise or provide legal services, the risk of confusion is great and purchasers could reasonably believe that they had an attorney-client relationship with the seller." In N.Y. State 557 (1984) we noted that "[w]hile there are many services that may properly be undertaken by lawyers and non-lawyers alike, especially in the fields of taxation and tax planning, when such services are performed by a lawyer who holds himself out as a lawyer, they constitute the practice of law and the lawyer, in performing them is governed by the Code."

8. Rule 5.7 (a)(2) and (a)(3) provide that the Rules apply even if the nonlegal services are distinct if the person receiving the services could reasonably believe that the services are the subject of a client lawyer relationship.

9. Rule 5.7 (a)(4) states that for these purposes "it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlawyer services. . . ."

10. Here, the inquirer proposes to advise users of the service that no legal advice is being dispensed, that the lawyer is not acting in a representative capacity, that no attorney-client relationship is formed and that the attorney is being hired only for his skill as a writer. Thus, the presumptions under (a)(2) and (3) may be rebutted effectively if the services are clearly non-legal services.

11. However, this analysis does not address the delivery of services which are arguably legal in nature, such as the acceptance letter, the letter of intent, a demand or resignation. Where those examples could raise questions of the legal effect of the document, N.Y. State 832 would control this analysis. As stated in that Opinion: "even if the lawyer provides the disclaimer specified in Rule 5.7(a)(4), it would not be effective if the lawyer actually provided legal advice or other legal services to the customer of the nonlegal business."

12. We believe that a lawyer may offer the services proposed in this inquiry but by identifying him or her as a lawyer, the inquirer creates a substantial risk of confusion in the mind of the client about the legal effect of many of these letters. This likelihood is great enough that the safe harbor provided by (a)(4) would not be effective. Whether the writing of each letter is a legal or non-legal service will require a close look at the circumstances of each letter.

CONCLUSION:

13. A lawyer may not provide letter-writing services unless it is clear that the subject matter of the letters do not implicate legal rights, no legal services are rendered and the lawyer prominently disclaims the existence of a client-lawyer relationship on the website. (51-12)

OPINION 952 (12/17/2012)

TOPIC: Concurrent representation of lender and buyer in residential real estate closing; payment of buyer's legal fees by lender

DIGEST: Lawyer may not represent both lender and buyer in residential real estate transaction if part of a series of such transactions in which lawyer regularly represents that lender and lender regularly pays the buyer's legal fees.

RULES: 1.7(a), 1.7(b), 1.8(f)

FACTS:

1. A lawyer regularly represents a certain lender in residential real estate transactions. In each transaction, the lawyer charges the lender a fee of $450 for closing services. The lawyer also typically offers to represent the buyer (the borrower of the mortgage loan) on written consent of both clients, charging the buyer a fee of $275 for that service. The lender has proposed, as a promotion, to provide legal representation to potential borrowers as to closing services in such transactions for a $25 fee. The lender would run newspaper and radio advertisements to promote that offer, and the advertisements would not mention the lawyer or the lawyer's law firm by name. The buyer would pay the lender $25 toward the legal fee, and the lender would add $250 of its own and give the total of $275 – the usual fee for representing the buyer – to the lawyer. The lender would also pay the lawyer's $450 fee for representing the lender.

QUESTION:

2. On the above facts, may the lawyer ethically represent both the lender and the buyer and accept payment from the lender for the $275 in legal fees the lawyer otherwise would have charged the buyer, with the buyer having paid only $25 to the lender for such services?

OPINION:

3. The first question is whether it would violate ethical rules for the lawyer to represent both the lender and the buyer in connection with the closing of the residential real estate transactions at issue.

4. Rule 1.7(a)(1) of the New York Rules of Professional Conduct provides that "a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests." Rule 1.7(a)(2) precludes representation where "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests."

5. Rule 1.7(b) provides, however, that notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if four conditions are met. Two of the conditions are that the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and that "each affected client gives informed con-

sent, confirmed in writing." (The other two conditions would not be at issue in the context of this inquiry.) The quoted provisions of Rule 1.7 include defined terms.[62]

6. In a typical residential real estate transaction, the interests of the lender and the buyer, who also is the borrower from the lender, overlap in important ways. Both are interested in obtaining good title and protecting the buyer's interests as against the seller. Moreover, the terms of a loan may not be effectively negotiable in the setting of a residential real estate transaction. Thus, representation of the buyer and the lender may often be less problematic than representation of those two parties in the setting of a highly negotiable commercial real estate deal.

7. To say that interests overlap, however, is not to say that they coincide. The lawyer who represents a residential buyer and lender is representing differing interests if only because the buyer is executing a note and a mortgage in favor of the bank. Moreover, while the scope of negotiation between buyer and lender may be limited, those parties may have different interests as to issues to be negotiated between buyer and seller. The buyer may have a greater interest in the way such issues are resolved, while the lender's interest may be simply to close the transaction. We have long seen representation of buyer and lender as raising a conflict, even if sometimes a consentable one. *See, e.g.,* N.Y. State 753 (2002) (lawyer may not represent buyer and lender when negotiation may be needed, but otherwise dual representation may be permissible upon fully disclosing risks and obtaining knowing consent) (citing opinions).

8. On the facts of this case, we believe that a conflict would arise for a second reason as well. The inquiring lawyer regularly represents the lender and may well be eager to maintain that relationship and income stream. The lawyer would thus have a personal business interest in advancing the lender's cause, which would seem to create a significant risk that the lawyer's professional judgment on behalf of the buyer would be adversely affected by that personal business interest. *See* N.Y. State 867 at n.2 (2011) (similar consideration when representing lender and seller).

9. It appears that the proposed joint representation would, therefore, give rise to a conflict of interest both under Rule 1.7(a)(1), because of the prospect of representing different interests, and under Rule 1.7(a)(2), given the risk that the lawyer's personal interests would cause him to favor one client over another.

10. The next question is whether this concurrent conflict of interest may be waived with informed consent under Rule 1.7(b). Under one condition of the waiver provision quoted in paragraph 5 above:

> "Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), notwithstanding client consent, such a representation is prohibited if, in the circumstances, the lawyer cannot reasonably

62 Rule 1.0(f) defines "differing interests" to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client . . . ." Rule 1.0(q) defines "reasonable lawyer" in this context as "a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation." Rule 1.0(r) provides that a lawyer "reasonably believes" some matter when "the lawyer believes the matter in question" and "the circumstances are such that the belief is reasonable."

> conclude that the lawyer will be able to provide competent and diligent representation."

Rule 1.7, Cmt. [15]. Here, waiver is available only if the lawyer reasonably believes that he or she could competently and diligently represent both lender and buyer concurrently.

11. Some of our precedents have recognized the possibility of representing a mortgagor and mortgagee, in appropriate circumstances, on consent of both. N.Y. State 438 (1976) (under prior Code of Professional Responsibility, attorney for lender could "represent both the mortgagee and the mortgagor only if the requirements of DR 5-105(C) are met"); N.Y. State 199 (1971) (under Code, consentable "only if it is obvious that [the lawyer] can adequately represent the interest of each"); *see also* ABA Inf. 643 (1963). These opinions, however, reveal little about what would constitute appropriate circumstances in which a lawyer could reasonably expect to represent both lender and buyer adequately.

12. One of our precedents, after noting generally that a lawyer may "sometimes" represent more than one party to a real estate transaction, goes on to consider the case of two lawyers at the same firm representing lender and seller. On the question of consentability, the opinion notes:

> "The typical seller in a residential real estate transaction is relatively unsophisticated when compared to the institutional lender who, by its size, power, and business potential to the law firm, may have an inherently stronger relationship with the lawyer. This imbalance could interfere with the lawyer's ability to provide competent and diligent representation to each affected client, implicating Rule 1.7(b)(1)."

N.Y. State 867 ¶10 (2011) (citation and footnote omitted).

13. The typical buyer in a residential real estate transaction, like the typical seller, would likely be relatively unsophisticated when compared to the institutional lender. This consideration is a factor weighing against the consentability of the conflict in representing lender and buyer, just as it weighed against the consentability of representing lender and seller in N.Y. State 867.

14. The current inquiry presents even stronger factors against consentability. It would be an understatement to say that the lender carries a greater "business potential" for the inquiring lawyer. It is clear from the inquiry that the inquiring lawyer intends to represent the lender on a regular basis, and hopes to gain far more in fees from that lender than from any individual buyer. Even in an individual transaction, the inquiring lawyer's fee for services to the lender is substantially larger than the fee for services to the buyer. Moreover, the lender proposes to pay not only its own fee, but also most of the fee for the services to the buyer, and it proposes to tout this arrangement in a promotional campaign so as to attract buyers in larger numbers. Each of these features could only increase the lender's importance as a client to the inquiring lawyer.

15. Given the proposed arrangements, a lawyer could not reasonably believe that he or she could competently and diligently represent both the lender and the buyer in the transaction. The conflict is therefore nonconsentable.[63]

16. The inquiry also addresses the permissibility of the proposed arrangements for payment of the lawyer's fees. Rule 1.8(f) governs the circumstances in which lawyer who represents a client may accept compensation from a third party. Such arrangements are permissible only if they meet certain conditions including informed consent and freedom from interference with the lawyer's independent professional judgment. The proposed arrangement could raise questions under this rule for reasons similar to those that lead to our conclusion of a nonconsentable conflict. Additional questions yet may arise from the proposal to have the buyer pay the legal fee not to the lawyer, but rather to the lender, which will "provide" representation. *See* N.Y. Jud. Law § 495 (corporations may not furnish attorneys or counsel or render legal services). We need not reach any of these questions, however, in light of our conclusion that under the circumstances of the inquiry, the lawyer may not represent both buyer and lender.

CONCLUSION:

17. In a series of residential real estate transactions involving the same lender, which generates business by paying most of the buyers' legal fees as well as its own, it would be a nonconsentable conflict of interest for a lawyer, who regularly represents the lender in these transactions, also to represent the buyers.

(28-12)

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63 Another ethics committee, having occasion to consider a similar question under the prior Code of Professional Responsibility, reached a similar conclusion:

> "The differing interests of a purchaser and a lender in the same real estate transaction typically cannot be adequately represented by the same attorney. As in situations where an attorney acts as both a real estate broker and an attorney, an inherent conflict of interest arises when the attorney's fee depends upon the closing of the transaction. An attorney representing a lender and a purchaser cannot best serve the interest of the purchaser if the attorney's judgment is tainted by his incentive to earn a fee from the lender, which is often contingent on closing.. . . . It is also readily apparent that the lender and the purchaser may sometimes have significantly differing interests in the details and structure of the transaction. As a result, the lawyer's loyalty will be divided, affecting his independent judgment on behalf of the purchaser client or lender client . . . ."

Nassau County 98-10 (citations omitted). The committee found that the differing interests of the two clients "cannot be readily reconciled" and that in a typical real estate transaction, the conflict is not consentable. We do not reach that general question, but address only the facts presented by this inquiry.

2013

OPINION 953 (01/11/2013)

TOPIC: Bar Association soliciting members for contributions and members making such contributions to pay for portraits of retiring but still serving judges, which will hang in the courthouse to honor such judges.

DIGEST: It is permissible for a Bar Association to solicit contributions and for its members to make contributions for the purpose of defraying the costs of commissioning portraits of retiring judges who will still serve on the bench, where the portraits are a means of honoring the judges and the actual gift is made to the court, not to an individual judge.

RULES OF PROFESSIONAL CONDUCT: 3.5(a) and 8.4

CODE OF JUDICIAL CONDUCT: § 100.4(D)(5)

QUESTION:

1. The inquiring attorney is a member of a local bar association. The bar association wishes to honor a retiring Supreme Court Justice by commissioning a portrait of the Justice which would hang in the courthouse. Despite retirement, the retiring Justice would be likely to continue to serve through certification. The Bar Association would like to solicit its members for contributions to defray the costs of the portrait. May the members properly make such contributions?

FACTS:

2. As described above, the bar association would like to ask its members to contribute to the costs of commissioning and hanging portraits of retiring but still serving Supreme Court Justices as a way of honoring the Justices for their service. The portraits would be a gift to the court, not to any individual judge. Each member would determine whether and how much to contribute, with anticipated donations being in the range of $50 to $150. Contributing members would be recognized by announcement in an Association newsletter and/or at a Bar Association function.

OPINION:

3. Rule 3.5(a)(1) of the New York Rules of Professional Conduct (the "Rules") states:

> A lawyer shall not: (1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal ***when the recipient is prohibited from accepting the gift or loan*** . . . [Emphasis added.]

4. Rule 8.4(d) & (f) state:

A lawyer or law firm shall not:

(d) engage in conduct that is prejudicial to the administration of justice;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of ***applicable rules of judicial conduct*** or other law. . . . [Emphasis added.]

5. The starting point of our analysis, therefore, is to ask what restrictions on accepting gifts are placed on judges by the Code of Judicial Conduct. Section 100.4 (D)(5) of the Rules of the Chief Administrative Judge (often referred to as the "Code of Judicial Conduct") provides:

(5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept, a gift, bequest, favor or loan from anyone except:

(a) a gift ***incident to a public testimonial***, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under section 100.3(E);

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and if its value exceeds $150.00, the judge reports it in the same manner as the judge reports compensation in Section 100.4(H).

6. First, we note that under the facts described in the inquiry, no tangible gift at all is being made to any judge. An Association member who contributes to the Association to defray expenses for a portrait is making a gift to the Association, not to any individual judge. The Association, in turn, donates the portrait to the courthouse, thus making a tangible gift to the court. That gift is in honor of a retiring judge, but is not made to the judge. All the retiring judge receives is the honor of having the portrait painted and hung in the courthouse. We doubt that such an honor is a "thing of value" within the meaning of Rule 3.5(a)(1). If the portrait is not a "thing of value" to the judge, then contributing funds to help pay for the portrait does not violate Rule 3.5(a)(1).

7. An examination of a series of Advisory Opinions issued by the New York Advisory Committee on Judicial Ethics leads to the conclusion that a retiring Judge would not violate the Code of Judicial Conduct by accepting such an honor. NY Jud. Adv. Op. 06-67 points out that a judge may not solicit gifts, but here there is no solicitation by or on behalf of the retiring Justice.

8. NY Jud. Adv. Op. 91-50 opines that the Code of Judicial Conduct does not prohibit a judge from accepting a gift of "nominal" value, made as a token of appreciation from a high school student for the judge's efforts in explaining the law to the student during the course of an extended school sponsored visit to the court.

9. NY Jud. Adv. Op. 06-171 concludes that a judge may properly accept a free membership from a bar association, citing the exception in §100.4 D)(5)(a) for "a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice." Here, the hanging of the judge's portrait in the courthouse, if it is a gift to the judge, is "nominal" within the meaning of NY Jud. Adv. Op. 91-50, and it is "incident to a public testimonial" within the meaning of §100.4 D)(5)(a).

10. NY Jud. Adv. Op. 93-42 approves of a town justice accepting a recording system from the district attorney for use in the courtroom. Here, as in that situation, the gift is to the court and not to the judge personally.

11. The Preamble to Part 100 of the Rules of the Chief Administrative Judge states that "[t]he rules governing judicial conduct are rules of reason." That statement, combined with (and illustrated by) the reasoning of the cited opinions from the Commission on Judicial Conduct, leads us to conclude that hanging a retiring judge's portrait in the courthouse would not implicate any improper conduct by the judge being honored with the portrait. Therefore, a lawyer could properly make a contribution to the Bar Association for purposes of defraying the expenses of the portrait without violating Rule 3.5(a)(1).

12. Furthermore, we believe that a gift made to the court rather than to the individual judge, "in connection with a public testimonial," could not reasonably be expected to influence a judge or interfere with the administration of justice. Accordingly, we conclude there is no impropriety in the Association soliciting the described contributions from its members and no ethical violation by a lawyer who makes such a contribution.

CONCLUSION:

13. Lawyers who belong to a Bar Association may contribute to the Association for the purpose of defraying the costs of commissioning portraits of retiring judges who will still serve on the bench, where the portraits are a means of honoring the judges and the actual gift (the portrait) is made to the court, not to an individual judge.

(53-12)

OPINION 954 (01/11/2013)

TOPIC: Law firm succession planning, fee-sharing, offering services to other lawyers.

DIGEST: A firm's offering of succession/contingent planning services to other lawyers is neither an "advertisement" nor "solicitation" under the Rules. One attorney's agreement to refer a matter to another attorney in the event of becoming unable to practice, would not create an association between the two attorneys for purposes of the fee-sharing rule either at the time such agreement is executed or triggered, unless and until the amount of work being transitioned to the second attorney becomes significant. An attorney's successful efforts to cultivate a client relationship are not "services" under the fee-sharing Rule and thus not a legitimate basis for dividing fees proportionately.

RULES: 1.0(a) and (h), 1.5(g), 7.3(b).

FACTS:

1. A law firm proposes to offer the following service to solo practitioner "Planning Attorneys": assist them in implementing a contingency, continuity and succession "Plan" in which the planning attorney contracts with an "Assisting Attorney" to perform certain functions for the Planning Attorney in the event of the Planning Attorney's inability to practice.

2. The firm further proposes to target communications regarding the services at attorneys likely to be interested in the planning services.

QUESTION:

3. The inquiring firm asks whether each proposed communication would be regulated as an "advertisement" under the Rules, and if so, whether it would be regulated as a "solicitation." If a solicitation, the firm also asks whether it would nevertheless be permissible in certain alternative forms such as in-person, phone or mail.

4. The firm also asks whether the execution of a Plan would thereby create an association between the Planning and Assistant Attorneys so that Rule 1.5(g) is not implicated, or, if not, whether such association would arise if/when the Planning Attorney becomes unable to practice and the Assisting Attorney steps in to assist the client.

5. Finally, the firm asks whether an attorney's successful efforts to "cultivate" a client relationship qualify as "services" under Rule 1.5(g)(1) and are thus a legitimate basis for dividing fees so that the "proportion" takes into account such cultivation efforts.

OPINION:

6. Rule 1.0(a), the definition of "advertisement", states that it "does not include communications to existing clients or *other lawyers*." (Emphasis added). Because the contemplated communications would be solely to other lawyers, they would not constitute "advertisements." Rule 7.3(b) states that a "solicitation" is "any advertisement" that meets certain criteria; in other words, it is a communication

that not only meets the criteria for being an "advertisement" but also certain additional criteria." By definition, a communication that is not an advertisement is not a solicitation." Rule 7.3, Cmt. [1].

7. Because Rule 1.5(g) provides that "A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm" the following question arises: would the Planning and Assisting Attorney become "associated in a law firm" for purposes of Rule 1.5(g), upon execution of a Plan or, if not, would they later become "associated in a law firm" when the Assisting Attorney, pursuant to the Plan, takes over a client matter for the Planning Attorney? We conclude that neither scenario, on its own, would give rise to association for purposes of Rule 1.5(g).

8. As we noted in N.Y. State 715 (1999), the term "associated" is not defined. N.Y. City 2007-2 opined that "the touchstones for determining association" for conflict imputation purposes are the nature of the relationship, and, significantly, access to client confidential information. It seems clear that neither a referral, nor an agreement to refer, on its own gives rise to association because such acts do not create a level of affiliation or information access that could reasonably be construed as a "law firm" under Rule 1.0(h). However, if the Planning Attorney and Assisting Attorney were to hold themselves out to the public as a "firm" or were to share each other's client files generally (whether electronically or in paper form), they would more likely be construed as associated for the purpose of Rule 1.5(g). So if the Planning Attorney's inability to practice were to trigger in the Plan a comprehensive merger of the Planning Attorney's firm and the Assisting Attorney's firm, then the two attorneys would become "associated" for purposes of the Rule. Overall, the more time the Assisting Attorney is called upon to assist the Planning Attorney, and the greater the volume of work the Assisting Attorney receives from the Planning Attorney, the higher the likelihood that the two attorneys will become "associated" for purposes of Rule 1.5(g).

9. Finally, regarding an attorney's efforts to "cultivate" a relationship, we conclude that such efforts do not qualify as "services performed by" such lawyer for the purpose of determining a proportional division of fees. It seems clear that the intent of Rule 1.5(g)(1) is, in the event fee-sharing lawyers decide to qualify for fee-sharing through a proportional division, that the division be based on services performed *for the client's benefit*.

10. We note a Kansas Supreme Court case on the issue of fee-sharing, in which that court, construing Model Code of Professional Responsibility Disciplinary Rule 2-107(A), stated that "We are convinced that merely to recommend another lawyer or to refer a case to another lawyer and to do nothing further in the handling of the case cannot be construed as performing a legal service. . . The service and responsibility referred to in DR 2-107 before a lawyer is entitled to a division of fees, must relate to actual participation in or handling of the case. The rule would be meaningless if this were not so." *Palmer v. Breyfogle*, 535 P.2d 955, 967 (Kan. 1975).

CONCLUSION:

11. A firm's offering of succession/contingent planning services to other lawyers is neither an "advertisement" nor "solicitation" under the Rules. A Planning Attorney's agreement to refer a matter to an Assisting Attorney in the event of becoming unable to practice, would not create an association between the two attorneys for purposes of Rule 1.5(g) either at the time the Plan is ex*ecuted or triggered*, unless and until the firms truly merged. One attorney's efforts to "cultivate" a relationship lead-

ing to retaining a client are not "services" under Rule 1.5(g)(1) and thus not a legitimate basis for dividing fees proportionately.

(67-12)

OPINION 955 (01/14/2013)

TOPIC: Of counsel relationship with out-of-state lawyer; reference on letterhead and website

DIGEST: A law firm may have an "of counsel" relationship with a non-New York lawyer admitted in another jurisdiction and must disclose any jurisdictional limitations on the ability of any lawyer associated with the firm to practice law in this State. The form of such disclosure may be either "not admitted in New York", or "admitted only in XX State."

RULES: 5.1; 7.1; 7.5(a) (4); 7.5(d)

FACTS:

1. The inquiring law firm has its main presence in New York State and maintains a smaller office in another state. The out-of-state office is managed by a lawyer admitted in that state and not admitted in New York who has an "of counsel" relationship with the firm. The firm's existing website discloses the admitting jurisdictions of all lawyers in the firm in the positive (e.g., "Admitted in New York", or "Admitted in XX").

QUESTION:

2. May a New York law firm have an "of counsel" relationship with a lawyer who is not admitted in New York?

3. If so, how should the relationship and the jurisdictional limitations be disclosed on the letterhead and websites of the law firm?

OPINION:

4. The fundamental responsibility imposed on all lawyers when engaging in public communication about the nature of their practice is found in Rule 7.1, mandating that lawyers refrain from making, or participating in the use of, any statements that are false, deceptive or misleading. Letterheads (primarily governed by Rule 7.5) and websites used by lawyers must comply with this Rule. Information that may be set forth is enumerated in Rule 7.1(b); this list is "suggestive of the type of information that may but need not in all cases be included." N.Y. State 704 (1998).

5. A New York law firm may consist of a sole practitioner and may have more than one office. N.Y. State 814 (2007). A lawyer or law firm may also have partners based in offices outside New York. Opinion 814 reminds lawyers of the obligation contained in Rule 5.1(a); the New York based lawyer must adequately supervise the work of all lawyers in the firm and make sure procedures are in place to insure the practice is conducted in a professional and ethical manner.

6. The range of relationships among lawyers practicing under a firm is broad and has grown in variety over the years. The Rules do not discuss each of the possibilities but do contain a limitation on the use of the "of counsel" designation. Rule 7.5(a)(4) states in part, "A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate." Whether the relationship meets the "continuing relation-

ship" test is fact-specific and no additional information is provided in this inquiry. Thus, as long as the inquiring firm is satisfied that the "continuing relationship" test is met, it may have an "of counsel" relationship with a lawyer.

7. Our prior opinions have recognized that a New York law firm may include lawyers not admitted to practice in New York. In N.Y. State 704, we held that a law firm with New York and non-New York lawyers could practice in New York without violating New York ethical obligations. N.Y. State 814 also permitted a partnership with a lawyer admitted in another jurisdiction. That Opinion also stated, "[n]othing in the Code, however, states that partnership is the only permissible professional relationship between a New York lawyer and an out-of-state lawyer or firm." Also, in N.Y. State. 864 (2011), we recognized that a New York lawyer could affiliate and share fees with a lawyer not admitted in New York. Based on these Opinions the answer to the first question is yes; a New York law firm may have an "of counsel" relationship with a lawyer not admitted in New York.

8. The second question raised by this inquiry is also addressed by Opinion 814. Beginning again with the fundamental principle – that none of the information or lack of it, be false, deceptive or misleading – the New York firm's letterhead and website does not need to disclose the precise nature of the relationship of the out-of-state lawyer to the New York firm. However Rule 7.5(d) does prohibit a relationship "among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions." As noted in Opinion 814, this Rule "does not state expressly, however, how such limitations shall be expressed."

9. This inquiry posits that the New York firm has its main office in New York and a much smaller one in XX State. Thus it would be sufficiently clear to use either statement of limitation, "admitted only in XX" or "not admitted in New York" N.Y. Opinion 434 (1976). To comply with Rule 7.5(d), it is important to use such limiting terminology as "not admitted" or "admitted only". Either phrasing is sufficient to convey the jurisdictional limitations on the lawyers in, or associated with the New York firm.

CONCLUSION:

10. A law firm may have an "of counsel" relationship with a lawyer admitted only in a jurisdiction other than New York but does not need to disclose the precise nature of that relationship on its letterhead or websites.

11. The law firm must disclose any jurisdictional limitations on the ability of any lawyer associated with the firm to practice law in New York State. The form of such disclosure may be either "not admitted in New York", or "admitted only in XX State."

(11-12)

OPINION 956 (01/14/2013)

TOPIC: Communication with unrepresented party; taking deposition of unrepresented party; deceptive and/or fraudulent conduct at client's request.

DIGEST: It would be misleading for a lawyer to depose an unrepresented party to a lawsuit, who is not aware of the lawsuit without disclosing that the lawyer's client's interests are adverse to the unrepresented party. The lawyer cannot provide advice to the unrepresented party but is required to tell the party to obtain counsel.

RULES: 1.0(i), 1.2(d), 1.4 (a), 1.16(c), 4.2, 4.3, 8.4(a)(c)(d)

FACTS:

1. The inquirer is an attorney who commenced a lawsuit on behalf of his client. The lawsuit names two parties as defendants, Party A and Party B. Party A has been served with the lawsuit; Party B has not been served, nor is Party B aware of the pending lawsuit.

2. The client has asked the inquirer to depose Party B before serving the complaint. In order to facilitate this, the client will bring Party B to the inquirer's office. The inquirer believes that since Party B is unaware of the lawsuit Party B may testify to Party B's disadvantage.

3. The inquirer asks whether it is ethically permissible to take Party B's deposition when in fact Party B is not aware that Party B is a named defendant to the lawsuit.

4. The inquirer also asks whether taking the deposition under the circumstances suggested by his client would render Party B's testimony inadmissible.

QUESTION:

5. Do the New York Rules of Professional Conduct (the "Rules") prohibit an attorney from deposing, at his client's request, a party who is unaware that the party is a named defendant in a pending lawsuit?

OPINION:

6. The question of whether the lawyer is permitted to conduct a deposition under the above described circumstances requires a two-step analysis: 1) whether the communications between the inquirer and the party to be deposed could lead to a misunderstanding and 2) whether the interests of Party B, the prospective deponent, are adverse to the client. As part of that analysis, the Rules' prohibition against a lawyer's engaging in conduct that involves "dishonesty, fraud, deceit or misrepresentation" must also be considered.

7. This Committee does not opine on questions of law, and therefore will not opine on whether any deposition testimony taken of Party B would be admissible in court.

8. Apparently, in order to gain some sort of advantage the client has asked the inquirer to depose Party B without disclosing to Party B the existence of a pending lawsuit against Party B. Clearly the conduct requested by the inquirer's client could lead to a misunderstanding on Party B's part about the purpose of the deposition.

9. The Rules contemplate the possibility that lawyers may have communications with persons with interests adverse to their clients, both those represented by counsel as well as unrepresented persons.

10. Rule 4.3 sets forth the rule for lawyers communicating with unrepresented persons and provides as follows:

> "In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client."

11. Comment [1] of Rule 4.3 further states:

> "An unrepresented person might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client, and where necessary, explain that the client has interests opposed to those of the unrepresented person."

12. In this instance, in accordance with Rule 4.3, the lawyer must explain the lawyer's role to the unrepresented person. Specifically, that the lawyer represents the client and that Party B's interests are adverse to the client's interests. Further, because the inquirer also knows that Party B's interests are adverse to the client the lawyer should advise the unrepresented Party B to obtain independent counsel.

13. This conclusion is consistent with prior ethics opinions concerning what information a lawyer may communicate to an unrepresented party. In some cases, in order to be sure that the unrepresented party understands the need for counsel, lawyers have been directed "to give non-controvertible information about the law to enable the other party to understand the need for independent counsel." N.Y. State 728 (2000). *See also* N.Y. State 477 (1977), N.Y. City Bar Op. 2009-02 (2009).

14. In the above analysis we have assumed that Party B is unrepresented. If in fact, Party B is represented by counsel, and the inquirer is aware of the representation, then Rule 4.2 would dictate the inquirer's communications with her.

15. Rule 4.2(a) states:

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

16. As such, if the inquirer knows that Party B is represented by a lawyer, then the inquirer is prohibited from communicating with Party B, including taking her deposition, without her lawyer's consent.

17. The inquiry, however, adds another dimension to the attorney's obligation because the inquirer's client seems to be asking the inquirer to depose Party B under false pretenses and the inquirer must also be mindful to avoid engaging in deceptive or fraudulent conduct.

18. The inquirer has indicated that the client will ask Party B to come to the inquirer lawyer's office under the false pretense that Party B will be assisting the client when in fact such assistance will be provided at Party B's expense as the client obtains information to build a case in support of the client and against Party B.

19. Pursuant to Rule 8.4(c) of the Rules of Professional Conduct, a lawyer is prohibited from engaging in conduct that involves "dishonesty, fraud, deceit or misrepresentation." Accordingly, the proposed conduct without the above-mentioned disclosure would be prohibited by Rule 8.4(c) as it involves deceit and misrepresentation.

20. Further, the inquirer's actions in conducting such a deposition under the suggested pretense would also violate Rule 8.4(a) if the lawyer knowingly aids or assists his client in violating or attempting to violate the Rules. Specifically Rule 8.4(a) provides that a lawyer shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through acts of another."

21. Rule 1.4(a)(5) states: "A lawyer shall consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law."

22. We are not privy to what the client would tell Party B to bring Party B to the inquirer's office to be deposed or even if the client would tell Party B about the proposed deposition. Whether or not the proposed conduct rises to the level of fraud is a question of fact beyond the scope of this committee; however, we believe it is prudent to alert the inquirer to the definition of fraud in Rule 1.0(i) and the prohibition against assisting a client in conduct the lawyer knows is fraudulent.

23. Rule 1.2 (d) of the New York Rules of Professional Conduct (the "Rules") states that:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

24. The lawyer must advise his client that the proposed conduct, without the aforementioned disclosure, would be in violation of the Rules. The inquirer should advise the client that the inquirer will

have to disclose to Party B, as stated above, the lawyer's role in the matter and will need to advise Party B to retain counsel.

25. If the client persists in demanding that the lawyer proceed with a proposed course of conduct that is fraudulent, the inquirer must exercise his right to withdraw from representing the client pursuant to Rule 1.16(c)(13), which provides that "a lawyer may withdraw from representing a client when the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules." *See also* Rule 1.16(b)(1) (requiring withdrawal when lawyer knows or reasonably should know that the representation will result in a violation of the Rules or of law).

CONCLUSION:

26. It would be misleading for the inquirer to depose Party B, an unrepresented party, without disclosing that the lawyer is not neutral and that Party B's interests are adverse to the inquirer's client. In addition, because Party B's interests are adverse to the interests of the inquirer's client, the inquirer would be required to inform Party B of the right to obtain counsel. The Rules also require that the inquirer advise his client that taking the deposition without the above disclosures to Party B would be prohibited by the Rules.

(45-12)

OPINION 957 (01/14/2013)

TOPIC: Nonprofit organization offering legal services and seeking grants to subsidize the legal services programs

DIGEST: A lawyer for a bona fide nonprofit organization may furnish legal services to beneficiaries of the organization as part of the organization's programs as long as the agency is complying with Judiciary Law § 495. However, the lawyer must obtain each client's consent for him to be compensated by the agency, the lawyer must not permit the organization to direct, regulate, or otherwise interfere with the lawyer's independent professional judgment in rendering legal services for clients, and the lawyer must protect the clients' confidential information. As long as the programs satisfy these criteria, the lawyer may assist the agency in seeking grants to support the agency's legal services programs.

RULES: 1.8(f), 5.4(c) & (d), 5.5(b), and 7.2(b)

FACTS:

1. The inquiring attorney is a salaried employee of a bona fide nonprofit credit counseling agency that is not a law firm. He has inquired whether he may ethically participate in two legal services programs that his employer would like to offer: (1) filing for bankruptcy protection for clients who are unable to do so outside of the agency because of their financial situation, and (2) advising seniors concerning whether they should join supplemental needs pooled income trusts previously established by a separate 501(c)(3) agency under the applicable provisions of the New York State Social Services Law by entering into "joinder" agreements.

2. The credit counseling agency presently advises debtors on whether they will benefit from payment plans with the debtors' creditors. The agency would like to add legal services to enhance the agency's role in providing financial solutions, primarily to assist the elderly or others in need of social security assistance. Since this market is underserved, the agency intends to assist individuals with Representative Payee services as well as to form a bill pay service for those who are incapable of handling their own finances or who lack assistance of others. The agency has not established any fee arrangement for the proposed services. However, in light of the agency's mission, the agency plans to keep fees to a minimum so that it can serve those who cannot afford private representation but are not sufficiently indigent to qualify for free legal aid. The agency plans to seek grant funding opportunities to assist it in subsidizing the legal services programs.

3. If the proposed programs are implemented, the inquiring lawyer will furnish legal services to the agency's clients. Each client for whom legal services are provided will sign an engagement letter that specifies that the agency itself will not give legal advice or represent clients and that the client-lawyer relationship is only between the client and the attorney. The agency's board of directors will adopt a policy prohibiting the agency from controlling the lawyer's representation of clients.

QUESTIONS:

4. May a lawyer employed by a nonprofit credit counseling agency assist the agency in offering legal services programs?

5. May a lawyer employed by a nonprofit credit counseling agency assist the agency in seeking grants to support the agency's legal services programs?

OPINION:

Legal Services Offered by a Nonprofit Organization

6. Rule 5.4(d) prohibits a lawyer from practicing with or in the form of an entity authorized to practice law *for profit* if a nonlawyer owns any interest in the entity, is a member, corporate director or officer of the entity, or has the right to direct or control the professional judgment of the lawyer. However, Rule 5.4(d) does not extend to nonprofit organizations.

7. New York Judiciary Law § 495 prohibits corporations from practicing law, but New York Judiciary Law § 495(7) carves out exceptions for (1) organizations that offer prepaid legal services, (2) nonprofit organizations that furnish legal services as an "incidental activity" in furtherance of some other "primary purpose," and (3) organizations whose primary purpose is to furnish legal services to indigent persons. Judiciary Law § 496 requires organizations exempt under § 495(7) to report and annually update the following information to the Appellate Division: a statement describing the nature and purposes of the organization, composition of the governing body, type of legal services offered, and names and addresses of any attorneys employed by the organization.

8. Therefore, nonprofit organizations authorized to practice law under Judiciary Law §§ 495(7) and 496 and organizations that offer prepaid legal services and furnish legal services to the indigent are not subject to Rule 5.4(d)'s prohibition against lawyers working at an entity where a nonlawyer is "a member, corporate director or officer thereof."

9. The credit counseling agency is a nonprofit organization operated primarily to provide financial counseling to those in need of assistance. Its services include credit counseling, budget planning, debt management plans, bankruptcy counseling and advocacy of pooled income trusts established by others. In furtherance of these activities, the agency proposes to furnish legal services to help clients seek bankruptcy protection and to review joinder agreements that will enable seniors to join existing pooled income trusts. If the agency's legal services constitute "incidental activities" in furtherance of some other "primary purpose," the agency is exempt from the prohibitions of Judiciary Law § 495 by virtue of subdivision (7). In *Paskowski v. DiBenedetto*, 184 Misc.2d 34, 705 N.Y.S.2d 521 (Family Court, Rockland County, 2000), the court held that a legal services program established by a nonprofit community organization to provide emergency housing and outreach programs to victims of domestic violence is exempt under Judiciary Law § 495(7) because it offers legal counseling to those who use the shelter's services.

10. Similarly, the credit counseling agency that employs the inquiring attorney wishes to offer legal solutions that follow from their other services: representation of a client in a bankruptcy proceeding and in reviewing and advising the client concerning the joinder agreements that they must sign to join existing pooled income supplemental needs trusts. This Committee does not render opinions on questions of law such as the interpretation and application of Judiciary Law § 495, but for purposes of this opinion we will assume that the agency that employs the inquiring attorney is not violating § 495. If the agency is violating § 495, then the inquiring attorney may not assist the agency in offering or providing legal services because he would be assisting a nonlawyer (the agency) in the

unauthorized practice of law, in violation of Rule 5.5(b) ("A lawyer shall not aid a nonlawyer in the unauthorized practice of law").

11. Even if a nonprofit organization is in compliance with Judiciary Law § 495, however, lawyers working for the organization are still required to comply with the applicable Rules of Professional Conduct. Three rules are especially relevant here. Rule 1.8(f) provides that a lawyer shall not accept compensation (or anything else of value) from a third party for representing a client unless "(1) the client gives informed consent; (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and (3) the client's confidential information is protected as required by Rule 1.6." Rule 5.4(c) prohibits a lawyer from permitting a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services. And Rule 7.2(b)(4) permits a lawyer to be employed or paid by a "bona fide" organization to furnish legal services to others, so long as (*inter alia*) there is no interference with the lawyer's exercise of independent professional judgment.

12. The Code predecessors of Rule 1.6 and 5.4(c) were applied in N.Y. City 1997-2, which concluded that a lawyer employed by a social services agency to represent clients must provide independent and competent representation and preserve client confidences in accordance with the ethics rules, without allowing it to direct or regulate the lawyer's independent professional judgment. We agree with that aspect of Opinion 1997-2.

Seeking Grant Funding Opportunities

13. The agency proposes to seek grant funding opportunities to assist it in paying for the legal services programs. As noted above, Rule 1.8(f) prohibits a lawyer from accepting compensation for representing a client from one other than the client unless the client gives informed consent, there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship, and the client's confidential information is protected as required by Rule 1.6. Rule 1.8(f) does not prohibit the agency from seeking grants to support the proposed legal services programs as long as the grants are not tied to any particular client's legal services, the grantors do not interfere with the lawyer's exercise of professional judgment, and neither the lawyer nor the agency reveal client confidential information in the grant applications or in any communications regarding how the grant money is being used.

CONCLUSION:

14. A lawyer for a bona fide nonprofit organization may furnish legal services to beneficiaries of the organization as part of the organization's programs as long as the agency is complying with Judiciary Law § 495. However, the lawyer must obtain each client's consent for him to be compensated by the agency, the lawyer must not permit the organization to direct, regulate, or otherwise interfere with the lawyer's independent professional judgment in rendering legal services for clients, and the lawyer must protect the clients' confidential information. As long as the programs satisfy these criteria, the lawyer may assist the agency in seeking grants to support the agency's legal services programs.

(47-12)

OPINION 958 (02/04/2013)

TOPIC: Lawyer's Acceptance of a Finder's Fee for Introducing Clients to Other Clients

DIGEST: A lawyer may accept a finder's fee for introducing clients and prospective clients to prospective investors, whether clients or not, provided that, in doing so, the lawyer complies with the Rules of Professional Conduct, including those governing protection of confidential information, avoidance of conflicts, business transactions with clients, competent advice on the applicability of privileges in the course of performing the non-legal services, and adherence to the rules on excessive fees.

RULES: 1.0(j), 1.1(a), 1.4(a), 1.4(b), 1.5(a), 1.5(b), 1.5(c), 1.5(e), 1.6(a), 1.7(a), 1.7(b), 1.8(a), 1.9(a), 1.18(b), 5.7(a), 5.7(c)

QUESTION:

1. The inquiring lawyer asks whether a lawyer may accept a "finder's fee" for introducing potential investors (including existing, former or prospective clients) to a client or prospective client seeking capital for a start-up business.

FACTS:

2. It is not uncommon for lawyers to introduce current, former, and prospective clients to each other in the ordinary course of business, for both general and specific purposes, in intimate gatherings and large ones. Such networking is part of the commerce of the law, and yet important ethical issues hover over the practice. Asking for separate compensation for the practice sharpens these issues.

OPINION:

3. We start with Rule 5.7, which governs a lawyer's responsibilities regarding non-legal services. Rule 5.7(c) says that, for purposes of the Rule, "nonlegal services" shall mean those services "that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." We do not opine either on the legality of match-making exercises – investment advisors and brokers who engage in similar activities are usually subject to regulatory systems – or on what constitutes the unauthorized practice of law. Nevertheless, common experience teaches that the act of introducing one client to another for a purely business purpose is not a "legal service" in the classic understanding of that phrase, but instead a "nonlegal service" that lawyers commonly perform, and that nonlawyers do so too, without fear of sanction for want of a law license. Subject to the caveats below, we conclude that the Rules of Professional Conduct permit such an arrangement.

4. Rule 5.7(a) says that, when a lawyer provides non-legal services to clients or other persons, then the lawyer is subject to the Rules of Professional Conduct if (1) the non-legal services are not "distinct" from the legal services the lawyer otherwise provides to the client or prospective client, or (2), even if distinct, the recipient of the services "could reasonably believe that the nonlegal services are subject to the attorney-client relationship." Rule 5.7(a) (1)-(2); *see* N.Y. State 860 (2011). The main difference between the two is that, if the non-legal services are distinct from the legal services but susceptive of client confusion about the existence of an attorney-client relationship, then the law-

yer must explain in writing that the services are not legal services and hence not subject to the protections attaching to an attorney-client relationship. Rule 5.7(a) (4). The latter is true whether or not the lawyer intends to perform the non-legal services through the lawyer's firm, as appears to be the inquirer's situation, or through a separate entity that the lawyer owns or controls. *Id.*; *see* Rule 5.7(a)(3).

5. The inquiring lawyer intends to offer legal services to start-up enterprises seeking venture capital which the lawyer hopes to represent. The introductions for which the lawyer would be paid a finder's fee are therefore part and parcel of the lawyer's business plan. This is not uncommon. "Providing legal representation to a client who wishes to buy or sell a business entity may naturally lend itself to assistance by the law firm in helping to locate a seller or a buyer for the client. Through social, business, or professional connections, a lawyer may know of a potential buyer or seller to introduce to a law firm client. Assistance by a law firm in locating a buyer or seller of a business entity for a law firm client is a service related to the lawyer's representation of the client." Ohio 2003-1 (2003).

6. In such circumstances, the lawyer is providing both legal and non-legal services to clients and prospective clients, but services inextricably intertwined with the lawyer's legal practice. The lawyer hopes that, by matching a client to a prospective investor, the introduction will lead to a transaction in which the lawyer will earn a legal fee. This factor, together with the fact that the lawyer intends to act through the lawyer's firm and presumably law office, relieves us of the need to tarry on the question whether the non-legal services are "distinct" or not. The match-making services are clearly not distinct, and so the Rules of Professional Conduct fully apply to the activities. In our view, at least five of those Rules are of special importance to the inquirer's proposed course of action.

7. The first is the duty of confidentiality owed to clients, former clients, and prospective clients under, respectively, Rules 1.6(a), 1.9(a), and 1.18(b). In introducing a current, former, or prospective client to another client, the lawyer presumably must disclose confidential information about each that the lawyer is ordinarily bound to protect. The lawyer may not do so without the informed consent of the party who owns the information. This tutorial must start with the client in search of investors, and then, separately, must be repeated to any prospective, existing or former client the lawyer intends to approach. The lawyer must take care to explain to all the full ramifications of disclosing this information to another party, *see* Rule 1.0(j) (defining "informed consent"); Rule 1.4(b) (requiring a lawyer to explain a matter to the extent reasonable to allow the client to make an informed decision), and must exercise independent professional judgment on the protections, if any, needed to safeguard the information, *see* Rule 1.1(a) (lawyer must represent a client competently). Although not typically required for the disclosure of confidential information, a writing explaining the implications may advisably be included in the other written disclosures likely to be required in these circumstances.

8. The more acute considerations arise under a second set of Rules, those governing conflicts of interests. In its Opinion 98-03, the Illinois State Bar Association articulated the conflicts confronting a patent lawyer who, in that inquiry, proposed to pair client-inventors with client-investors/promoters. The Committee noted that the "firm's choices of individual investors to match with particular promoters could be influenced by the firm's own interest in maximizing its return on a transaction. Further, once a suggested match is made the firm will probably be involved in negotiating the ultimate business arrangement and drafting the necessary documents, which would involve the firm in representing

two clients whose interests are adverse. Finally, if the firm will have a financial stake in the transaction as its fee for services [*i.e.,* the finder's fee], the firm's interests could conflict with one or both clients." While warning that "it will not be possible for a lawyer to 'reasonably' believe that" every multiple representation is appropriate, the Committee nevertheless concluded that a lawyer could proceed if the lawyer met, among other things, the requirements of Rule 1.7(a).

9. The conflicts concerns will vary with the circumstances, all the permutations of which are beyond the scope of this opinion to address. One obvious possibility is that the lawyer enters into the finder's fee arrangement with the client seeking capital (say, Client A), which is the only client the lawyer intends to represent in any ensuing transaction. In this instance, the first step is to obtain the consent of both Client A and the proposed investor (Client B), confirmed in writing, if Client B is an existing client or a former or prospective client from which consent is required under the applicable Rule. This consent must make clear that the lawyer's duty of loyalty in the transaction is owed only to Client A, accompanied by such disclosures as may be necessary to obtain informed consent, among them the extent of the lawyer's relationships with Clients A and B, and terms and conditions of the lawyer's interest in the finder's fee, including whether payment of the fee is contingent upon closing of a transaction.

10. If the lawyer obtains informed consent from each, then the principal concern is Rule 1.7(a)(2). That Rule asks whether a "reasonable lawyer would conclude" that a "significant risk" exists that the lawyer's "own financial, business, property or other personal interests" – namely, the payment of the finder's fee – will adversely affect the lawyer's independent professional judgment. If, for example, the payment of a finder's fee is contingent upon the consummation of a transaction, this creates a personal and financial interest for the lawyer to close the deal apart from the payment of the lawyer's legal fee. Depending on the relationship between the amounts of the two fees at stake, the finder's fee could create a risk that the lawyer, in negotiating the transaction for Client A, will sacrifice independent professional judgment on the client's behalf in protecting Client A's legal interests in the deal. This scenario does not materially differ from a fee arrangement, permissible under the Rules in civil matters, providing for a success fee or premium in the event the transaction is successfully completed, one at times payable in equity or as a percentage of the transaction price. If a reasonable lawyer would conclude that, as in the success fee or premium scenario, no such significant risk exists that the lawyer will elevate personal interests over professional ones, then the lawyer may undertake the representation subject to the other requirements set forth below.

11. A considerably more problematic possibility is that the lawyer proposes to introduce the capital-seeking Client A to another of the lawyer's clients, Client B, and to represent both Clients A and B in the transaction. In this scenario, the lawyer not only has a personal interest conflict, but a competing and ongoing loyalty conflict as well. The amount of the fee, the payer of the fee, and the circumstances in which the fee is payable are all among the factors relevant to whether a reasonable lawyer would conclude that a single lawyer could competently and diligently represent each party. In negotiating a transaction the successful conclusion of which determines whether the lawyer will receive the finder's fee, for instance, it may well be that the lawyer's personal financial interest in consummating any transaction may unduly influence the lawyer's professional duty to discharge independent judgment on behalf of both clients. In a predecessor to its Opinion 98-03, the Illinois State Bar Association expressed grave doubt that a lawyer could ever reasonably conclude that these various competing interests could be reconciled. Illinois Opinion 94-21. We share this skepticism, and also have serious

questions about the prudence of such a course of action, but we do not foreclose the possibility that highly sophisticated clients, particularly those accustomed to negotiating the major deal terms between principals in which the lawyer's role is akin to a scrivener, could provide informed consent to an arrangement in which a lawyer entitled to a finder's fee could represent each party in drafting the documents effecting the transaction. *Cf.* N.Y. State 438 (1976) (allowing joint representation of lender and borrower with their informed consent if a disinterested lawyer would believe the lawyer can competently represent both); N.Y. County 615 (1973) (allowing representation, with informed consent, of buyer and seller who had already agreed upon the principal terms and conditions of sale); N.Y. State 162 (1970) (allowing lawyer to represent both buyer and seller with their consent if their interests are not actually or potentially differing); N.Y. State 38 (1966) (representation of buyer and seller "should be practiced sparingly and only when it is clear that neither party will suffer any disadvantage from it"); Connecticut Inf. Opinion 91-14 (1991) (lawyer may draft sales contract between two longstanding clients when each side agrees and lawyer does not negotiate material terms). *But see* Florida Opinion 97-2 (1997) (unwaivable conflict to represent both sides in closing of a transaction); Maine Opinion 106 (1990) (under prior rules, not "obvious" that lawyer could represent both sides in a transaction).

12. In addition to the concurrent client conflict issues, a third Rule of importance here is Rule 1.8(a), for we consider the agreement between the lawyer and the client for a finder's fee to be a business transaction with the client to which the regulations of that Rule fully apply. Rule 1.8(a) requires a twofold inquiry. The first is whether the transaction itself is one in which the lawyer and client have differing interests *and* in which the client expects the lawyer to exercise the lawyer's independent professional judgment on the client's behalf. Here, the answers to those questions are likely to be evident: the lawyer and client plainly have differing interests in the size and payment terms of the finder's fee, and, because both contemplate that the lawyer will represent the client in the transaction to which the fee appends, the client is likely to expect that the lawyer will be mindful of the client's interests in addressing the terms of the finder's fee. Consequently, under Rule 1.8(a), the lawyer must assure that the terms are fair and reasonable to the client and fully disclosed in a writing that includes not only the deal's essential terms and the lawyer's role in shaping them, but also the desirability of the client seeking independent legal advice on the finder's fee arrangement. N.Y. State 913 (2012)

13. A fourth concern is that, because the match-making activity of the lawyer, though a non-legal service, is plainly not "distinct" from the lawyer's legal services, the provisions of Rule 5.7(a)(4) do not apply. These provisions require a written instrument to the client explaining that the protection of the lawyer-client relationship does not exist with respect to the rendition of non-legal services. Nevertheless, no assurance exists that a court would grant the protections of the attorney-client relationship to the purely non-legal activity of introducing one client to another solely for business purposes. Rules 1.1(a) and 1.4(a) & (b) require a lawyer to represent a client competently and to advise the client of considerations relevant to the client's decision-making about the representation. These Rules mandate that the lawyer alert the client to the risks that the lawyer's prospecting activities and attendant discussions may not enjoy the full protections of the attorney-client relationship. Such disclosure may well accompany the writing that Rule 1.8(a) requires in connection with business transactions with a client.

14. A fifth Rule that the finder's fee arrangement implicates is Rule 1.5(a) governing legal fees. Whether a finder's fee transaction may be deemed "fair and reasonable" under Rule 1.8(a) is analyti-

cally distinct from whether the fee may be "excessive" under Rule 1.5(a), though in the end the relevant considerations are substantially similar. We recognize that a fee for a non-legal service such as introducing clients to each other is not the intended object of Rule 1.5(a), but at least when those non-legal services are manifestly not distinct from the lawyer's legal services, we conclude that the lawyer's overall compensation for a particular transaction should fall within the scope of Rule 1.5(a). The principal general limit on a lawyer's compensation in that Rule is that a lawyer may not accept a fee the amount of which, upon review of the facts, would leave a reasonable lawyer "with a definite and firm conviction that the fee is excessive." Among the facts that Rule 1.5(a) identifies as relevant are the time, labor, and skill required; the novelty and difficulty of the services requested; the lawyer's inability, by reason of the representation, to represent other clients; the amount at stake and the results the lawyer achieves; the fee typically charged for comparable services in the locality where the lawyer practices; the time period in which the lawyer must complete the assignment; the lawyer's experience and reputation; and whether the fee is fixed or contingent. In considering whether a lawyer's fee in a transaction is excessive, the lawyer must take account of the totality of the transaction, including the finder's fee, in assessing whether the lawyer's compensation in the matter is excessive.

15. We reach these conclusions with little aid from opinions in other jurisdictions. Apart from the Illinois opinions cited above, which address a situation closest to the inquiry before us and reach a similar result, Opinion 2003-1 of the Ohio Supreme Court's Board of Commissioners and Discipline focused on a fact pattern akin to ours. There, the issue, among others, was whether a lawyer who introduces either a buyer or a seller of a business to a client may represent that client in the deal and be paid a fee based on a percentage of the transaction price, to our mind a proxy for a finder's fee. With some of the caveats we listed above, the Board concluded that the arrangement was permissible as long as the fee was payable by the initial client – that is, the lawyer could make the arrangement with a buyer/client or a seller/client, but could not receive such a fee from, for example, an investment/buyer group while also representing the seller in the same transaction. In this latter instance, under the now-abandoned "obviousness" standard of DR 5-105(C), the Board, which considered the relationship with the investment/buyer group as indistinguishable from a lawyer-client relationship, joined with other jurisdictions cited above that, no matter informed consent, a lawyer may not properly represent both the buyer and the seller in the same transaction.

16. Our research has uncovered other jurisdictions that proscribe the receipt of a "finder's fee" in situations very different from those before us. In each of these opinions, the committees addressed whether a lawyer may receive a fee from a non-lawyer third party for referring clients to that party to perform non-legal services. Thus, in South Dakota Opinion 96-6 (1996), the committee opined that a lawyer could not receive a fee for referring the lawyer's clients to an asset management firm. In Iowa Opinion 98-6 (1998), the committee held that a lawyer could not receive a fee from an investment advisory firm for referring clients to that firm. In North Carolina Opinions 2000-3 and 2006-2, the committee believed that a lawyer could not receive a fee for referring clients to a financing company. In Florida Opinion 70-13, the committee said that a lawyer could not accept fees from a bank for encouraging clients to deposit money there. To be sure, these opinions raise the concern we outline above concerning the impact of the lawyer's personal financial interest in a transaction on the lawyer's independent professional judgment, but to be paid by a non-client to refer clients for such services is not comparable to the receipt by a lawyer of a fee from a client to perform a service for that client closely related to the lawyer's rendition of legal services for that client. *Cf.* N.Y. State 845

(2010) (lawyer/broker may share broker's commission with lawyer who referred matter provided lawyer/broker does not represent party to transaction).

17. In the wake of the adoption of Rule 5.7 expressly permitting a lawyer to perform both legal and non-legal services, this Committee has consistently opined that "Rule 1.7 applies with undiminished force in circumstances where a lawyer's conflicting personal interest arises from a separate, nonlegal business or activity permitted by Rule 5.7." N.Y. State 886 (2011); *accord* N.Y. State 891 (2011). Nothing in this opinion is intended to alter that conviction; indeed, we stress that a lawyer entering into a finder's fee arrangement must fully comply with the dictates of Rule 1.7 as we elaborate above. In so concluding, we are fully mindful of earlier opinions of this Committee, many of them described in our Opinion 752 (2002), that categorically prohibit a lawyer from performing certain non-legal services and legal services for the same client in the same matter. As we said there:

> In a number of opinions that this committee has issued over the years, we have opined that in certain circumstances a lawyer also engaged in a nonlegal business cannot provide both legal and nonlegal services in the same transaction even with the consent of the client. Brokerage businesses are a salient example. We held in N.Y. State 208 (1971), N.Y. State 291 (1973), N.Y. State 340 (1974), and N.Y. State 493 (1978), that a lawyer could not act as a lawyer in the same transaction in which the lawyer or his or her spouse acted as a real estate broker "because of the possible conflict between his client's and his own personal interest." N.Y. State 208 (1971). *Accord* N.Y. County 685 (1991); *see also* N.Y. State 694 (1997) (impermissible to participate in broker-run home buyer's program because of resulting strong interest in broker's success). The rationale is that the broker's interest in closing the transaction interferes with the lawyer's ability to render independent advice with respect to the transaction. We have reached similar conclusions with respect to insurance brokers and securities brokers. N.Y. State 536 (1981). . . . N.Y. State 619 (1991). *See also* N.Y. State 595 (1988), N.Y. State 621 (1991), N.Y. State 738 (2001) (dual role of lawyer for real estate client and abstract title examiner impermissible because of possible need to negotiate exceptions to title).

18. We remain committed to this view. As Opinion 752 recognized, however, certain non-legal services rendered in connection with legal services do not merit such categorical treatment, such as those discussed in N.Y. State 687 (1997) (lawyer-broker can sell insurance to a client where advice about the purchase of insurance products is "merely tangential" to the legal representation); N.Y. State 711 (1998) (same); *see also* NY State 832 (2009) (activity incidental to the rendition of legal services). The non-legal services that we have previously deemed incompatible with the simultaneous rendition of legal services even with informed consent – the real estate broker, the insurance broker, abstract title examiner – are incontestably "distinct" from the provision of legal services, and activities to which the Rules of Professional Conduct do not neatly conform. Such is not the case here. The current inquiry does not require us to determine whether informed consent is curative of a lawyer performing *every* conceivable non-legal service that is *not* "distinct" from the legal services the lawyer plans to render in the same transaction. Here, we address only the matter before us. We do not believe that, under Rule 1.7, a client's payment of a finder's fee to a lawyer representing that client in a transaction – a transaction brought about by the lawyer's introductions to the client in the course of rendering legal services – invariably creates such an insurmountable personal financial conflict that

informed consent, together with the other limitations we have set forth, can never allow the lawyer to proceed with the arrangement. Accordingly, we conclude that, in the context of non-legal services that plainly are *not* meaningfully distinct from the legal services the lawyer renders in the same transaction, but instead are incidental to the rendition of those legal services, a lawyer may permissibly accept a fee for introducing a client or prospective client to someone interested in making an investment in that person's (or entity's) business venture.

CONCLUSION:

19. A lawyer may accept a finder's fee for introducing current, former or prospective clients to prospective investors, whether current, former or prospective clients or not, provided that, in doing so, the lawyer complies with the Rules of Professional Conduct, including those governing protection of confidential information, avoidance of conflicts, business transactions with clients, competent advice on the applicability of privileges in the course of performing the non-legal services, and the limits on excessive fees.

(29B-11)

OPINION 959 (02/21/2013)

TOPIC: Contacting formerly represented party to determine if he or she has new counsel.

DIGEST: A lawyer who knows that an adverse party's lawyer has withdrawn from the representation or resigned from the bar may contact the adverse party to determine if he or she has retained new counsel or plans to represent himself or herself.

RULES: 4.2, 4.3

FACTS:

1. The inquiring lawyer represents a client in a litigated matter. The inquirer states that he knows that an adverse party's lawyer has withdrawn from the representation and has withdrawn from the bar as a result of a pending investigation.

QUESTION:

2. May a lawyer who knows that an adverse party's lawyer has withdrawn from the representation contact the adverse party to determine if he or she has retained new counsel or plans to act pro se?

OPINION:

3. Rule 4.2 of the Rules of Professional Conduct, also known as the "no contact" rule, prohibits a lawyer from communicating about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, without the prior consent of the other lawyer. Rule 4.3, on the other hand, allows a lawyer to communicate on behalf of a client with a person who is not represented by counsel, as long as the lawyer does not state or imply that the lawyer is disinterested and, if the unrepresented person has interests that could reasonably be in conflict with the interests of the lawyer's client, the lawyer does not give legal advice to the unrepresented person, other than the advice to secure counsel.

4. Rule 4.2 does not authorize contact with the opposing party if the lawyer "knows" that the opposing party is represented by counsel. In N.Y. State 663 (1994) we discussed when the lawyer "knows" that a client who previously was represented by counsel, or a client who states that he is represented by counsel, is no longer so represented. In that case, the actions of the opposing party and his putative counsel cast doubt on the existence of an attorney-client relationship. Consequently, we suggested that the lawyer must undertake a "complete and thorough inquiry" to determine the ultimate fact of existing or continuing representation, which might include contacting the putative lawyer to determine the status of the representation. Where the lawyer knows that the opposing party's counsel has resigned from the representation or is no longer a member of the bar, the lawyer has reason to believe that the opposing party is not represented by counsel. Rule 4.3 thus authorizes the lawyer to communicate with the opposing party to ascertain whether he or she has obtained new counsel, or plans to represent himself or herself. Consistent with Rule 4.3, in any such communication with the opposing party, the lawyer should take care not to give legal advice.

CONCLUSION:

5. A lawyer who knows that an adverse party's lawyer has withdrawn from the representation or resigned from the bar may contact the adverse party to determine if he or she has retained new counsel or plans to represent himself or herself.

(69-12)

OPINION 960 (02/26/2013)

TOPIC: Conflict of Interest; Prospective Clients

DIGEST: Lawyer may ethically represent a client seeking payment of fees for repair services rendered to a prior prospective client, who had earlier sought advice from the lawyer regarding the damage that was subsequently repaired by the client, unless the lawyer learned confidential information from the prospective client that would be significantly harmful to the prospective client.

RULES: 1.6, 1.9, 1.18

QUESTION:

1. After a homeowner has consulted with a lawyer about potential claims against the seller of a home that turned out to need substantial repairs, but the homeowner has not retained the lawyer, may the lawyer represent a contractor in an action against the homeowner to recover the unpaid balance for the repair services?

FACTS:

2. A homeowner (the "homeowner") visited an attorney who is a sole practitioner to discuss potential claims against the person who sold the homeowner his home. The homeowner told the attorney that, after the closing, the homeowner discovered substantial structural damage throughout the home, which required repairs by a contractor. The homeowner did not discuss anything concerning the contractor who performed the repair work. The attorney advised the homeowner concerning potential claims against the seller of the home, but the homeowner never retained the attorney and never contacted the attorney again. The attorney did not bill for the homeowner's visit.

3. Over a year later, the attorney was approached by a contractor (the "contractor"). During the initial interview, the attorney learned that this was the contractor who had repaired the structural damage at the homeowner's residence. The contractor told the attorney that the homeowner did not fully pay the contractor. The contractor desires to retain the attorney and file a lawsuit against the homeowner for the balance due.

APPLICABLE RULES:

4. Our analysis begins with Rule 1.18(c) of the New York Rules of Professional Conduct (the "Rules"), which prohibits a lawyer who possesses *confidential information* learned during a consultation with a prospective client from representing a party with interests *materially adverse* to those of a prospective client in the *same or a substantially related matter* if the attorney received information from the prospective client that could be *significantly harmful* to that person in the matter, unless either (i) the attorney obtains informed consent from both parties (*i.e.,* both the new client and the former prospective client), confirmed in writing, or (ii) adequate screening procedures are implemented pursuant to Rule 1.18(d).

OPINION:

Confidential Information

5. The protection afforded to prospective clients under Rule 1.18(c) is contingent upon the lawyer's receipt of confidential information. N.Y. City 2006-2. Under Rule 1.18(b), a lawyer may not use or reveal a prospective client's information unless Rule 1.6 or other Rules permit the lawyer's use or disclosure or the information has become generally known. Rule 1.18(b); Rule 1.9(c); Restatement Third The Law Governing Lawyers, § 15(1) (a) (2000); Simon's New York Rules of Professional Conduct Annotated 688 (2012 ed.). Rule 1.6(a) protects "information gained during or relating to the representation of a client, whatever its source," "including information that is protected by the attorney-client privilege and information that could reasonably lead to the discovery of confidential information". *See also* Rule 1.6, Cmt. [4A] which states that information relates to the representation "if it has any possible relevance to the representation", N.Y. State 723 (1999) (indicating that a lawyer may not be disqualified due to possession of general information concerning a former client's "financial exposure, corporate or financial structure, workplace rules, settlement policies, and the like, . . .unless there are peculiar aspects of the current representation making such information particularly relevant"). Furthermore, information is not generally known just "because others come to learn that information." N.Y. City 2005-3.

6. In the consultation with the homeowner, the lawyer likely obtained confidential information protected by Rule 1.6, and thus Rule 1.18(b), because the homeowner disclosed information regarding the nature and extent of internal damage to the residence and the homeowner's personal knowledge thereof. Information regarding the homeowner's knowledge of the damage to the residence and the extent thereof could be relevant in an action to recover fees for repair of such damage, particularly in determining the nature of the services rendered and the value thereof.

Materially Adverse

7. The homeowner and the contractor's interests are materially adverse because the contractor seeks recovery directly from the homeowner for the balance due for repairing the residence. *See* N.Y. State 761 (2003).

Substantially Related

8. Matters are "'substantially related' if they involve the same transaction or legal dispute or, if under the circumstances a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Rule 1.9, Cmt. [3]. This includes "knowledge of specific facts gained in a prior representation that are relevant to the matter in question," Rule 1.9, Cmt. [3]; N.Y. State 628 (1992), and confidential information "that would be useful against the former client in the present representation." Simon's New York Rules of Professional Conduct Annotated 419 (2012 ed.). We have recognized that even where different facts are implicated, the matters are substantially related where both matters involve the same issues. N.Y. State 761 (2003); N.Y. State 723 (1999). As stated in N.Y. State 723 (1999), there likely is a substantial relationship between matters "where the issue in controversy in the second matter arose out of a transaction in which the lawyer represented the former client," and where the lawyer obtained confidential information "that should be used against the former client in the current representation." Conversely, we have

stated that where there is no likely use of previously obtained confidential information in the new matter, no substantial relationship exists. N.Y. State 628 (1992) (finding no substantial relationship between matters regarding a theft in a restaurant parking lot and a slip and fall in the restaurant because confidential information learned regarding former client's financial exposure or corporate structure not relevant in the subsequent matter).

9. The facts presented do not enable the Committee to determine whether any confidences received from the homeowner are relevant to the contractor's claim for non-payment or to any potential counterclaim by the homeowner against the contractor.

Significantly Harmful

10. Even if confidential information is obtained and it is only somewhat harmful, the information does not disqualify the lawyer from representation against the prospective client. Simon's New York Rules of Professional Conduct Annotated 690 (2012 ed.). This additional qualification is distinct from the automatic prohibition under Rule 1.9 regarding actual former clients. N.Y. City 2006-2 (stating that "[t]he 'significantly harmful' test sets the bar lower than in the case of a lawyer opposing a former client"). Thus, if the information imparted to the lawyer by the homeowner would not be significantly harmful to the homeowner, the lawyer could undertake the matter for the contractor.

Written Informed Consent or Screening Mechanisms

11. The prohibition under Rule 1.18 regarding prospective clients is not absolute. The lawyer or firm may be able to represent a subsequent client if the lawyer (i) obtains informed written consent from both the prospective client and the subsequent client, or (ii) establishes adequate screening mechanisms. Rule 1.18(d). However, there can be no screening here as the lawyer is a sole practitioner.

12. To waive the conflict under Rule 1.18, the lawyer must satisfy the requirements for "informed consent" and "confirmed in writing," as defined by Rule 1.0(j) and Rule 1.0(e), respectively. To the extent such consents are obtained, the lawyer may represent the contractor in an action against the homeowner.

CONCLUSION:

13. A lawyer may ethically represent a contractor seeking payment due from a homeowner who previously sought the lawyer's advice regarding potential claims against a third party for damage that the contractor subsequently repaired, unless the information imparted to the lawyer by the homeowner would be significantly harmful to the homeowner in the contemplated action by the contractor and informed written consent is not obtained from both the homeowner and the contractor.

(65-12)

OPINION 961 (03/13/2013)

TOPIC: Can a retiring attorney sell a law practice and retain the right to receive a portion of fees for legal services that will be provided after the sale date?

DIGEST: A retiring lawyer may sell his or her law practice contingent upon receipt of a percentage of legal fees collected by the purchaser for services provided after the sale where the payment is in proportion to the services performed by the selling lawyer prior to the sale or fairly represents the value of the "goodwill" of the retiring lawyer. A provision requiring payment of fees for business that the selling lawyer refers to the buying lawyer after the sale is not permitted.

RULES: 1.5(g); 1.5(h); 1.17; 5.4; 7.2.

QUESTIONS:

1. May a retiring lawyer sell his or her law practice contingent on receiving a percentage of the legal fees earned for legal services provided after the date of sale with respect to each of the following categories of client matters:

    a. Existing clients with pending actions and a retainer agreement that provides for a contingent fee upon amounts collected;

    b. Existing clients with claims contemplated in future years after the date of sale of the law practice and a retainer agreement that provides for a contingent fee upon amounts collected;

    c. New clients who retain the purchasing attorney after the date of the sale, where the new client is a separate entity but has common principals with existing clients of the selling attorney as of the date of sale and a retainer agreement that provides for a contingent fee upon amounts collected; and

    d. New clients who retain the purchasing attorney after the date of the sale, with no common principals with selling attorney's existing clients, but where the new client is referred to the selling attorney by other attorneys and in turn referred by the selling attorney to the purchasing attorney?

OPINION:

2. This inquiry requires us to address a tension between two rules in New York's Rules of Professional Conduct (the "Rules"): Rules 1.5(g) (Fees and Division of Fees) and 1.17 (Sale of Law Practice). Rule 1.5(g) provides, in relevant part, that "[a] lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation."[1] Rule 1.17 (a) provides that "[a] lawyer retiring from the

1 The remaining requirements of Rule 1.5(g) are: "(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and (3) the total fee is not excessive."

private practice of law . . . may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice." The tension arises from the phrase "including goodwill" in Rule 1.17(a). "Goodwill" is the intangible asset of an enterprise that arises from the reputation of a business and its relations with its customers.[2] In a law firm context, goodwill reflects, among other things, "the likelihood that satisfied existing clients will use the firm again when new matters arise" and "the likelihood that new clients will come to the lawyer or firm because of the firm's reputation." Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* ("*Simon's*") 764 (2013 ed.).

3. By its nature, the inclusion of "goodwill" in a sale of a law practice entails a payment on account of legal fees that the buyer is expected to receive in the future. There is no question that the parties to the sale could attempt to assign a present value to that flow of fees and include that value in a lump-sum purchase price. That kind of indirect link between legal fees to be earned by a lawyer and the payment to another lawyer is not prohibited by Rule 1.5(g). But it can be very difficult to assign a present value to an on-going book of business of a law practice, and even more difficult to estimate what value will flow from new business that may come to the law practice on account of the reputation and contacts built up by the selling lawyer over time. And young lawyers who are the typical buyers of law practices often do not have access to capital to provide upfront payments for goodwill in any case. The question presented is the extent to which lawyers can structure the payment for the law practice as a payout over time measured by the actual fees earned by the practice after the sale.

4. We conclude that Rule 1.17 must be viewed as an exception to Rule 1.5(g) – that is, that the payment for "goodwill" that is explicitly permitted by Rule 1.17 permits a payment that is made in the future after the fees that reflect "goodwill" are earned. We reach this conclusion for several reasons. First, we think that Rule 1.17 should be viewed as the more specific of the two rules – targeted as it is to a particular setting in which lawyers might wish to share fees – and thus subject to the interpretive principle favoring the more specific rule over the more general. Second, a lump-sum payment for goodwill is intended to be economically identical to the present value of the actual fees earned over time. The rules should be as transparent and rational as possible, so in the absence of a strong reason to the contrary, parties to a sale of a law practice should be able to use a method of payment that is the economic equivalent of one that is clearly permitted.

5. Third, we note that Rule 1.5 itself contemplates payments of fees over time in the closely analogous setting of a lawyer who leaves or retires from a law firm and receives a payment for his or her interest in the firm in the form of a separation agreement or retirement package. Rule 1.5(h) states, without qualification, "Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement." Likewise, Rule 5.4(a)(1) permits law firms to agree with lawyers in the firm to share legal fees with the estate of a lawyer in the firm, or with anyone else, "over a reasonable period of time after the lawyer's death." If a lawyer leaving a law firm, or the lawyer's estate, may receive a portion of future fees earned on account of the goodwill of the firm that the lawyer helped to build up, we see little reason why a lawyer retiring from a solo practice should be barred from structuring a payment similarly. Comment [1] to Rule 1.17 fortifies this anal-

2 Collins Dictionary ("an intangible asset taken into account in assessing the value of an enterprise and reflecting its commercial reputation, customer connections, etc."); Oxford Dictionary (US English) ("the established reputation of a business regarded as a quantifiable asset, e.g., as represented by the excess of the price paid at a takeover for a company over its fair market value"); Dictionary.com ("an intangible, saleable asset arising from the reputation of a business and its relations with its customers, distinct from the value of its stock and other tangible assets").

ogy. It states, "Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice, *as may withdrawing partners of law firms.*" (Emphasis added.) Indeed, equalizing the treatment of retiring members of law firms and retiring sole practitioners was the principal purpose of the Rule permitting sales of law firms.[3] One of the impetuses for adopting Rule 1.17 was the previous practice of "quickie partnerships," whereby a solo practitioner would take on a junior partner for a short period before retiring under a retirement package that provided for an extended payout.[4]

6. Fourth, we note that the possibility that "goodwill" could be measured either by a lump sum payment or by a payout of a portion of future fees was well recognized in ethics opinions predating the adoption of versions of Rule 1.17 around the country. *See*, *e.g.*, ABA 266 (1945) (barring sale of "good will" "whether by payment of a lump sum or by an agreement to pay a stated percentage of the future receipts, gross or net, from his clients"); N.J. Opinion 48 (1964) (advising that a sale of "good will" was prohibited whether measured by a lump sum approximating the selling lawyer's net income for one year or by paying one third of all net profits from pending cases and any other work for former clients of the retiring lawyer for three years). There is thus good reason to conclude that when Rule 1.17 was adopted, it embodied an understanding that the sale of goodwill that was to be permitted could be accomplished by either means.

7. We recognize that there are counter-arguments to these points. One could conclude that the express exception for fees paid as part of a separation or retirement agreement, when there is not one for sale of a law practice, means that fees may not be shared in the latter context. We are not persuaded by that counter-argument, however, because, as noted above, we perceive no reason for making that distinction, particularly in light of the policy underlying the Rule to equalize the treatment of retirements from law firms and sales of law practices.

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3 The initial report of the Special Committee to Review the Code of Professional Responsibility, proposing adoption of what became Rule 1.17, stated that the amendment was

> "designed principally to address the disparate treatment of sole practitioners and members of law firms with respect to the 'good will' of their respective law practices. Under existing legal and ethical principles, retiring members of law firms and estates of deceased law firm members have been able to receive benefits, including an allotment for that lawyer's share of the firm's good will, while sole practitioners and their estates cannot obtain the same benefit. The proposed amendments will eliminate this inequality . . . ."

NYSBA Special Comm. to Review the Code of Prof. Resp., *Proposed Amendments to the New York Lawyer's Code of Professional Responsibility* 1 (Sept. 26, 1995). *See also* American Bar Association, Report to the House of Delegates 8A for the ABA 1990 Midyear Meeting at 4 (Feb. 1990) ("ABA 1990 Report") ("The rule also puts sole practitioners in a financial position equal to members of firms regarding the value of the 'good will' of the practice."); American Bar Association Center for Prof. Resp., *The Development of the ABA Model Rules of Professional Conduct, 1982-2005: A Legislative History* 368 (2006)(the rule was intended to "put[] sole practitioners in a financial position equal to members of firms regarding the value of the 'good will' of the practice").

4 *Simon's*, *supra*, at 761 ("Once the partnership was formed, the retiring lawyer could ethically introduce his new young partner to all of the clients, and could enter into a partnership agreement under which the retiring lawyer would receive a generous portion of future fees."); Dennis A. Rendleman, "The Evolving Ethics of Selling a Law Practice," 29 GP Solo no. 4 (July/Aug. 2012) (*available at* http://www.americanbar.org/publications/gp_solo/2012/july_august/evolving_ethics_selling_law_practice.html) ("Thereafter, Old Practitioner might become 'of counsel' or withdraw from practice entirely, while the name remains a part of the firm and a continuing financial benefit flows to Old Practitioner."). *See also* ABA 1990 Report at 4 ("In order to ensure that unfinished client matters would be taken care of and to avoid losing compensation for the 'good will' of the law practice, some solo practitioners entered into 'quickie' partnerships prior to leaving the practice. Often, clients do not benefit from such hastily assembled arrangements.").

8. We also recognize that the purposes of the prohibition on fee sharing are implicated, at least in part, by any provision for fee sharing after sale. For example, one purpose of the prohibition is to limit the risk of outside influences on a lawyer's independent judgment. A lawyer with an economic interest in a matter who is not sufficiently involved in the work and does not take responsibility for it may press the lawyer handling the matter to cut corners or settle too early. *E.g.*, *Simon's* at 165 (noting risk that even under Rule 1.5(g), a referring lawyer might "pressur[e] the working lawyer to settle or to go to trial or to skimp on costs and expenses to avoid reducing the ultimate fee"). But these policies have often been tempered by other considerations, as demonstrated by the exceptions for retirement plans, separation agreements and agreements for sharing fees with the estate of a lawyer in a law firm.[5]

9. We are also aware that Comment [11] to Rule 1.17 states, "Lawyers participating in the sale or purchase of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client." That could be taken to refer to the rule on division of fees, Rule 1.5(g). But we note that the Comment then lists several "[e]xamples" of such Rules – Rules 1.1 (competence), 1.7 (conflicts), and 1.6 and 1.9 (confidentiality) – but not Rule 1.5(g). We note that other states have expressly referred to that Rule in their comments to their analogous rule. *E.g*., Florida Bar Rule 4-1.17 Comment (concluding that the fee-division rule will not apply to fees from matters pending at time of sale but must be satisfied with respect to fees from matters that arise subsequent to the sale).

10. We note as well that ethics opinions in two other states with broadly similar rules concluded that payments for goodwill may not be formulated as payments of a portion of future fees unless the requirements of the fee-splitting rule are satisfied. Iowa Opinion 96-05 (1996) (structuring payment for purchase of law practice as a percent of revenues from services rendered by purchasing attorney held improper under Iowa analogue of Rule 1.5(g)); Philadelphia. Opinion 96-1 & Supp. Opinion 96-1 (purchaser may pay seller a percentage of revenue over a five-year period *if* requirements of Pennsylvania analogue of Rule 1.5(g), requiring notice to clients of fee splitting, are satisfied). Neither opinion contains an analysis of the issue. *But see* Kansas Opinion 93-14 (concluding, in the absence of a rule analogous to Rule 1.17, that Kansas rule permitting referral fees permits selling lawyer to receive a portion of future fees even if selling lawyer does not work on the matter).[6]

11. While we approve in concept that goodwill in a sale of a law practice under Rule 1.17 may be measured by future fees as actually earned, we believe that there are necessarily limits to such arrangements. The extent of fee sharing must bear a reasonable and bona fide relationship to the value of the "goodwill" involved. Even the most well-known lawyer's reputation and connections fade over time. Any provision for fee sharing must therefore be limited in amount and in time. The parties might agree, for example, that the selling lawyer will receive 20% of the seller's net income for three

5 Rule 5.4(a)(3) provides an additional exception, permitting sharing of fees with nonlawyer employees pursuant to compensation or retirement agreements based in whole or in part on a profit-sharing arrangement.

6 Our Committee has once before considered whether a retiring lawyer could receive a stream of fees from future business. We concluded that the lawyer could not do so, but in that case the lawyer was moving to the judiciary and we based our conclusion entirely on the Code of Judicial Conduct. We said that the arrangement "would provide an inducement to the judge to assist the acquiring firm in retaining the favor of former clients" in violation of Canons prohibiting the appearance of impropriety and certain financial and business transactions with lawyers likely to come before the court. N.Y. State 699 (1997). We did not mention the rule against fee splitting.

years. If that is a reasonable estimate of the value of the "goodwill" of the practice, then Rule 1.17 permits it.

12. Turning to the types of provisions suggested by the inquirer, we have no hesitation in concluding that a portion of the fees earned from matters pending at the time of the sale (beyond those fees attributable to the work the selling lawyer did on the matter before the sale),[7] and (b) new matters for the seller's existing clients, can fairly be said to reflect the selling lawyer's reputation and client connections. Provision (c) would require fee sharing as to matters for entity clients that retain the purchasing lawyer after the date of the sale where the entity is controlled by "common principals" of existing clients. Because the relevant question is the effect of the selling lawyer's reputation on the minds of the persons making the decision which lawyer to retain, these nominally "new" clients should be treated like new matters for existing clients that are the subject of scenario (b).

13. Provision (d) would require fee sharing with respect to new clients who have been referred by the selling lawyer. While the fact that a new client may have approached the selling lawyer after the sale may be due to the lawyer's reputation, we are concerned that permitting sharing of fees if the selling lawyer refers the business to the buying lawyer implicates the different set of policies barring payments for referrals under Rule 7.2. A retired lawyer should not be given a monetary incentive to refer new business to the buying lawyer in particular without consideration of which lawyers would be the best for the job. *Restatement (Third) of the Law Governing Lawyers* § 10 Comment d (2000). Put another way, we do not see a payment for business referred after the sale as simply a convenient method of measuring the value of the goodwill of the practice, but rather more as a payment for the new service of making the referral, and such a payment is barred.

14. One further point to address, although we do not definitively decide it, is whether a retired lawyer could receive fees from matters handled by the buying lawyer not as payment for work done prior to the sale under the first clause of Rule 1.5(g)(1), and not as payment for "goodwill" under Rule 1.17(a), but by assuming joint responsibility for the representation in a signed writing to the client under the second clause of Rule 1.5(g)(1).[8] A Comment to this Rule says, "'Joint responsibility' for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. *See* Rule 5.1 [referring to the obligations of partners and other lawyers in a firm to supervise other lawyers in the firm]." Rule 1.5, Cmt. [7]. The question is whether a retired lawyer can ever take "joint responsibility" for a matter.

15. The Comment's citation of Rule 5.1, and its reference to "ethical responsibility . . . as if the lawyers were associated in a partnership," suggest that the selling lawyer would need to supervise, at least to some extent, the work of the buying lawyer. *But see* N.Y. County 715 (1996) (concluding, prior to adoption of Comment [7], that the joint responsibility required by the predecessor rule "is financial and does not create an ethical obligation of the referring lawyer to supervise the activities of the receiving lawyer"); *Aiello v. Adar*, 750 N.Y.S.2d 457 (Sup. Ct. Bronx Cty. 2002) ("the rule does not create an ethical obligation to supervise the receiving attorney's work"). There is at least a ques-

7 Fees for work done prior to the sale are not for goodwill, but simply for services delivered by the selling lawyer. That sharing of fees is expressly permitted by Rule 1.5(g).

8 Note that when proceeding under either portion of Rule 1.5(g)(1), the lawyer must disclose to the client that a division of fees will be made, including the share that each lawyer will receive; the client must have agreed to the division of fees in an agreement confirmed in writing; and the total fee must not be excessive. Rule 1.5(g)(2), (3).

tion whether such supervision would be consistent with retirement for purposes of Rule 1.17. The term "retirement" contemplates that the attorney will completely cease practicing law for compensation. Nassau County 2-12 (2012).[9] But we do not resolve this issue in response to the present inquiry, because the inquirer (presumably as would be the case for many retiring lawyers) does not seek to take joint responsibility for the work of the buying lawyer. We do not foreclose the possibility that, under some factual circumstances, a retiring lawyer could meet those requirements. *See* Rule 5.1(c) ("the degree of supervision required is that which is reasonable under the circumstances").

CONCLUSION:

16. Under Rule 1.17, a retiring lawyer selling a law practice may collect fees (above the fees in proportion to the services performed by the selling lawyer before the sale), as described in provisions (a) to (c) raised by the inquirer, if those fees fairly reflect the value of the selling lawyer's "goodwill." The retiring lawyer may not condition future referrals on payment of a portion of the fees earned from the referred matters (provision (d)).

(64-12)

9 In the context of lawyers' biennial registration requirements, 22 N.Y.C.R.R. § 118.1(g) defines "retired" as follows: "An attorney is 'retired' from the practice of law when, other than the performance of legal services without compensation, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law." In turn, the regulation defines "practice of law" as "the giving of legal advice or counsel to, or providing legal representation for, a particular body or individual in a particular situation in either the public or private sector in the State of New York or elsewhere."

OPINION 962 (03/18/2013)

TOPIC: Payments to a witness for travel expenses and attorney's fees

DIGEST: A lawyer may arrange a client's payment of reasonable travel expenses and legal fees of a witness if such payment is not prohibited by law and is not contingent on the witness's testimony or the outcome of the case.

RULE: 3.4(b)

FACTS:

1. The inquirer represents the proponent of a will who seeks the testimony of a witness to authenticate that will. Although the witness lives within the state, the witness resides several hours from the courthouse of the county where the probate proceeding is pending. In addition, the witness has requested that her counsel be present during the testimony.

QUESTIONS:

2. May the lawyer for the proponent of a will ethically arrange the client's payment of travel expenses (air fare and hotel accommodations) for an in-state witness who has been asked to testify on behalf of the proponent?

3. May the lawyer for the proponent of a will ethically arrange for the client's payment of the legal fees of the in-state witness who has requested that her attorney be present for the examination?

OPINION:

A. Payment of travel expenses

4. The Surrogate's Court Procedure Act §1404(5) states that the testator's estate shall ordinarily pay for the costs of the initial production and examination of the first two attesting witnesses within the state and, if necessary, a witness without the state who is closest to the county in which the probate proceeding is pending.

5. The Civil Practice Law and Rules ("CPLR") contains provisions on witness compensation. CPLR §8001(a) ("Any person whose attendance is compelled by a subpoena, whether or not actual testimony is taken, shall receive for each day's attendance fifteen dollars for attendance fees and twenty-three cents as travel expenses for each mile to the place of attendance from the place where he or she was served, and return. There shall be no mileage fee for travel wholly within a city."); CPLR §8001(b), (c) (additional fees in certain circumstances); CPLR §2303 ("Any person subpoenaed shall be paid or tendered in advance authorized traveling expenses and one day's witness fee.").

6. Rule 3.4 of the New York Rules of Professional Conduct (the "Rules") is instructive in this matter. It states in part as follows:

> "A lawyer shall not: . . .

> "(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:
>
> > "(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or
> >
> > "(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses."

7. Comment [3] to Rule 3.4 states that the above-quoted proscription "applies generally to any inducement to a witness that is prohibited by law. It is not improper to pay a witness's reasonable expenses or to compensate an expert witness on terms permitted by law. However, any fee contingent upon the content of a witness' testimony or the outcome of the case is prohibited."

8. Prior opinions set forth the rationale underlying the predecessor to Rule 3.4(b), which was "to prevent compensation that would have a tendency to lead to the 'production of fraudulent evidence and to the giving of falsely colored testimony as well as to [the prevention of] outright perjury.'" N.Y. State 668 (1994) (citing N.Y. State 547 (1982)), *cited in Caldwell v. Cablevision Sys. Corp.,* __ N.Y.3d __, 2013 WL 451322 (2013). "We must attempt to draw the line between compensation that enhances the truth seeking process by easing the burden of testifying witnesses, and compensation that serves to hinder the truth seeking process because it tends to 'influence' witnesses to 'remember' things in a way favorable to the side paying them." N.Y. State 668 (1994).

9. Rule 3.4 proscribes witness inducements that are "prohibited by law." While we do not opine on legal questions, we note case law indicating that "the fee set forth in CPLR 8001(a) is a minimum fee," *Caldwell v. Cablevision Sys. Corp.,* __ N.Y.3d __, 2013 WL 451322 (2013) (citing commentary that "payment of more than the $15 daily fee is not precluded under either the law or code of ethics," but holding that in some circumstances high fees may warrant a jury charge); *In re Feinberg*, 2012 WL 4748323 (Sur. Ct. Queens Co. 2012) ("Although a witness need not be paid more than the statutory attendance fee and mileage, there is nothing that expressly prohibits voluntary payments in excess thereof").

10. The only other prohibition in Rule 3.4(b) applies to payments contingent upon testimony or outcome. *See* N.Y. State 714 (1999) ("What is reasonable, and therefore permitted, should first be considered in terms of what is expressly forbidden under the [predecessor rule], namely, the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case."). No such contingency is intended or explicit under the terms of the inquiry made to us, nor do we think that any implicit contingency may be inferred from the terms of that inquiry.

11. The ABA ethics committee concluded that under Model Rule 3.4, a lawyer is permitted to "compensate a non-expert witness for time spent in attending a deposition or trial or in meeting with the lawyer preparatory to such testimony, provided that the payment is not conditioned on the content of the testimony and provided further that the payment does not violate the law of the jurisdiction." ABA 96-402. The opinion also indicates that the lawyer should explain the basis of compensation,

stating that such compensation would not violate the Model Rules "[a]s long as it is made clear to the witness that the payment is not being made for the substance or efficacy of the witness's testimony, and is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony," *id*., or to reimburse "travel expenses, including lodging when an overnight stay is required," *id*. n.3. Finally, the "amount of such compensation must be reasonable, so as to avoid affecting, even unintentionally, the content of a witness's testimony." *Id*.; *see Caldwell v. Cablevision Sys. Corp.,* __ N.Y.3d __, 2013 WL 451322 (2013) (although statutory fee "is only the minimum that must be paid to a subpoenaed fact witness, that does not mean that an attorney may pay a witness whatever fee is demanded, however exorbitant it might be").

12. We agree with the implication of ABA 96-402 that reasonable payment for travel expenses can, consistently with the policy of the rule, ease the burden of testifying witnesses without tending to influence their testimony. Such amounts should be considered "reasonable related expenses" within the meaning of Rule 3.4(b)(1). Accordingly, a lawyer's payment of such expenses on behalf of a client, though in excess of statutory fees, is not improper.

13. Although we cannot provide a bright line amount that on its face would be deemed to be an unreasonable payment to the witness, we can find some guidance: "As long as the reimbursement does not exceed the witness's actual out-of-pocket expenses and does not fall outside the standard types of expenses (*e.g.*, travel, lodging, meals), it should generally be considered reasonable." Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 892 (2013 ed.); *cf. Caldwell v. Cablevision Sys. Corp.,* 86 A.D.3d at 52 (as to distinction between paying for lost time and paying for testimony, noting that payments that "are unreasonably high or disproportionate to the value of the time actually spent testifying can give rise to an inference that the payment was actually a fee for testifying, which carries with it the possibility that the witness will be unconsciously inclined to give testimony favorable to the party who has paid him or her"), *aff'd*, *Caldwell v. Cablevision Sys. Corp.,* __ N.Y.3d __, 2013 WL 451322 (2013).

B. Payment of legal fees

14. The witness has requested that her counsel be present during her examination. In order to determine whether the inquirer may arrange payment of the witness's legal fees, we again must consider whether, under Rule 3.4(b) and its policies, such payment should be considered compensation for reasonable expenses related to attending, testifying, preparing to testify or otherwise assisting counsel.

15. Another ethics committee, interpreting the predecessor to Rule 3.4, has addressed the question whether a lawyer could advance legal fees to a witness for purposes of an informal interview of that witness. The opinion pointed out that there are "a number of reasons why a witness may wish to be represented by counsel in an interview or in formal discovery proceedings," and saw "little risk that the presence of counsel to a witness will interfere with or hinder the truth seeking process." N.Y. County 729 (2000). In particular, the committee opined that the payment of counsel fees could not reasonably be expected to influence the witness's testimony, because such a payment "is of no use to the witness outside of the litigation." The opinion concluded that the legal fees were (in the words of the predecessor rule) "[e]xpenses reasonably incurred in attending or testifying," and that the lawyer could properly advance such expenses. *Id*.

16. We believe that although N.Y. County 729 was interpreting a predecessor rule, its reasoning and result are equally applicable to the very similar text and policies of Rule 3.4(b). Reasonable payment for legal fees should, like payment of travel expenses, ease the burden of testifying witnesses without tending to influence their testimony. Accordingly, reasonable legal fees may be "reasonable related expenses," payment of which is permitted by Rule 3.4(b)(1).

CONCLUSION:

It is ethically permissible for an attorney, on behalf of the proponent of a will, to pay a witness's reasonable expenses related to testimony, including reasonable travel expenses such as air fare and accommodations, and also the witness's reasonable legal fees, as long as such payments are not contingent upon the witness's testimony or the outcome of the matter.

(70-12)

OPINION 963 (03/19/2013)

TOPIC: Duty to report false evidence offered by, and apparent criminal conduct by, actual or prospective client

DIGEST: A civil legal services attorney is not required to report to a tribunal (a) inaccuracies in an application filled out by an actual or prospective client and contained in the record of an administrative tribunal, or (b) the actual or prospective client's apparent criminal failure to register his current address as a sex offender.

RULES: Rules 1.6(a), (b)(2); 1.9(c); 1.18; 3.3(a), (b)

FACTS:

1. A person contacted a civil legal services agency for representation on an unspecified administrative law matter and met with an employee of the legal services agency. The person gave the legal services agency a written consent to view the administrative record.

2. The legal services agency supplied the administrative tribunal with the person's written authorization for the legal services agency to review the administrative record, and the inquiring attorney reviewed the administrative record.

3. The administrative record contains the person's signed written application. The application contains the following statement:

> "You declare under penalty of perjury that all the information on this summary is true and correct to the best of your knowledge. Anyone who knowingly gives a false or misleading statement about a material fact in an application . . . commits a crime and may be sent to prison or may face other penalties, or both."

4. On the application, the person admitted having been convicted of a felony, and gave an address at which he stated he had resided for ten years.

5. During a telephone conversation between the inquiring attorney and the person, the person revealed that he had served time in the New York State prison system for rape. However, the legal services attorney was unable to find the person's name in the New York State Department of Corrections and Community Supervision ("DOCCS") information database. The attorney then conducted an internet search for the person's name, which showed that the person is also known by a name different from the one on his application. The newly discovered name yielded a hit on both the DOCCS site and the New York State sex offender registry. The latter indicated that the person is a level-three sex offender (indicating a high risk of repeat offense and a threat to public safety), with ongoing reporting responsibilities. The person's photo on the sex offender website, dated approximately one year ago, has been positively identified by the legal services agency employee who initially met with the person.

6. The address given to the legal services agency by the person is in a different county than the address contained in the sex offender registry (which the website says is up to date.) An offender is

required to report a new address within ten days of moving, check in every ninety days, and report his whereabouts to local law enforcement after any move. Failure to report is a felony.

7. After the person failed to appear at the legal services agency for two appointments and failed to return telephone calls, the agency determined not to represent him going forward, and it never filed an appearance on behalf of the person before the administrative tribunal. However, the administrative matter remains pending.

QUESTION:

8. Does the legal services attorney have an ethical obligation to report to the administrative tribunal the conflicting information about the name and address of the person who sought representation?

9. Does the legal services attorney have an ethical obligation to alert local police or the sex offender registry as to the whereabouts of the person who sought representation?

OPINION:

10. The duties of an attorney to a particular person may vary depending on whether the attorney formed an attorney-client relationship with the person. The person who sought representation from the legal services agency was at least a "prospective client," defined in Rule 1.18(a) of the New York Rules of Professional Conduct (the "Rules") as a "person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." The person may eventually have become a client. Whether the prospective client relationship blossomed into a full-fledged attorney-client relationship is a matter of substantive New York contract law, *see, Toussaint v. James*, 2003 WL 21738974, at *8 (S.D.N.Y. 2003); *Gottlieb, Rackman & Reisman, P.C. v. Marusya, Inc.*, 2004 WL 3188074, at *1 (Civ. Ct. N.Y. Co. 2004); Rules Scope ¶ [9] ("principles of substantive law external to these Rules determine whether an client-lawyer relationship exists"). This Committee does not have jurisdiction to opine on questions of substantive law.

11. If an actual attorney-client relationship developed, then the person is now a former client because the legal services agency has declined to represent him any further. An attorney owes a duty of confidentiality to a former client under Rule 1.9(c), which in turn cites to Rule 1.6. Rule 1.6(a) prohibits the attorney from knowingly revealing confidential information unless a countervailing obligation or exception requires or permits the disclosure. Rule 1.6(a) defines confidential information as follows:

> "'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. . . ."

12. The information learned about the person in question here was "gained during or relating to the representation" and would "likely be embarrassing or detrimental to the client if disclosed." It is therefore "confidential information" under Rule 1.6(a).

13. Even if the interactions never blossomed into an attorney-client relationship, the person in question was nevertheless a "prospective client" within the meaning of Rule 1.18(a) because the person contacted the legal services agency seeking representation, met with an agency employee to discuss the possible representation, and spoke about it with the inquiring attorney by telephone. (Rule 1.18(e) excludes certain categories of people from the definition of prospective clients, but those exceptions are not relevant here.) Accordingly, the inquiring attorney owes some degree of confidentiality to the person because Rule 1.18(b) provides as follows:

> "Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client."

14. The inquiry raises interesting questions about the duty of confidentiality to a prospective client where no actual attorney-client relationship develops, including whether the inquiring attorney is permitted to disclose the person's other name to the administrative tribunal, or is permitted to alert local police or the sex offender registry as to the person's current address. But we do not address those questions because the inquiring attorney has not asked us whether he is *permitted* to disclose that information – he has asked only whether he is *mandated* to disclose that information. We therefore analyze the questions of mandatory disclosure, and do not reach questions relating to permissive disclosure. As we now explain, the inquiring attorney has no mandatory disclosure duty.

A. Is there a duty to disclose to the administrative tribunal?

15. The only provisions in the New York Rules of Professional Conduct that require a lawyer to disclose confidential information are found in Rule 3.3 ("Conduct Before a Tribunal"). The relevant sections provide as follows:

> "(a) A lawyer shall not knowingly:
>
> > "(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . .
> >
> > "(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. . . .
>
> "(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
>
> "(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."

16. For purposes of this inquiry, we assume that the information given by the actual or prospective client to the administrative tribunal, as to his true name and address history, was false.

17. Rule 3.3(a)(1) does not apply here. It applies to a false statement of material fact or law previously made to the tribunal "by the lawyer." Here, the false statements were made not by the lawyer, but rather by the client or prospective client. Rule 3.3(a)(1) therefore does not require the inquiring attorney to correct the false statements.

18. Rule 3.3(a)(3) likewise does not apply. The main thrust of Rule 3.3(a)(3) is to prohibit an attorney, in conduct before a tribunal, from offering or using evidence that the lawyer knows to be false. Here, although the lawyer made some preliminary inquiries as to the administrative matter, he never filed an appearance in that matter. Because the lawyer did not and will not represent the person before the tribunal, he did not and will not "offer or use" the false information on the person's application.

19. At first glance, the second sentence of Rule 3.3(a)(3), taken in isolation, might appear to apply. It says that "[i]f . . . the lawyer's client . . . has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." But this sentence cannot be read in isolation. It must be read together with the opening clause of Rule 3.3(a)(3), and it clarifies that a lawyer's duties under the rule apply even when the lawyer has offered the false evidence through a client or witness, and even when the lawyer learns of the falsity subsequent to the admission of that evidence. Here, the lawyer has not offered false evidence in any of these ways. It would not make sense to require a lawyer to take reasonable remedial measures regarding proceedings before a tribunal in which the lawyer has never appeared on behalf of the client.

20. There is a second reason that Rule 3.3(a)(3) may not apply. This provision is triggered when a client has offered material "evidence" which the lawyer comes to learn is false. The term "evidence" presumably refers to documents and testimony submitted to a tribunal to persuade it to reach a decision on the merits. In some contexts, therefore, an "application" may not constitute evidence, within the meaning of this Rule, unless and until it were offered to the tribunal as part of formal proceedings. We do not opine on this in the present context, however, as the inquiry does not reveal the nature of the application or the administrative proceeding.

21. Rule 3.3(a)(1) and (3) therefore place no obligation upon the attorney.

22. Similarly, Rule 3.3(b) requires corrective action by an attorney who learns of a client's intended or past criminal or fraudulent conduct even where the attorney has had no active role in the misconduct, but only if the lawyer "represents a client before [the] tribunal." Here, the legal services agency has declined to represent (or to continue to represent) the person, and it never filed a notice of appearance. Because the inquiring attorney has not represented the client before the administrative tribunal, Rule 3.3(b) is inapplicable as well.

B. Does the attorney have a duty to disclose to the police or the sex offenders registry?

23. The inquiring attorney has learned that the client has apparently committed the felony of failing to report a new address within ten days of moving, as is required of sex offenders. Rule 1.6(b)(2) permits an attorney to reveal or use confidential information to the extent that the lawyer reasonably believes necessary to prevent the client from committing a crime, but as explained by this Committee in N.Y. State 866 at ¶26 (2011):

> "Rule 1.6(b)(2) does not permit disclosure of confidential information concerning a completed or past crime; it applies only to confidential information necessary to prevent a continuing or otherwise future crime."

24. Whether the alleged crime is a continuing or future crime is a question of law, *see*, *e.g.*, *Willette v. Fischer*, 508 F.3d 117 (2d Cir. 2007) (rejecting State's contention that "the change-of-address violation was a 'continuing violation, with each day potentially giving rise to a new charge'"). We do not opine on such legal questions. N.Y. State 866 at ¶26 (2011) ("Whether the [client] has committed a crime . . . , and whether that crime is a continuing one, are questions of law beyond the jurisdiction of this Committee.").

25. In any event, Rule 1.6(b)(2) is strictly permissive – it does not *require* a lawyer to disclose anything. Thus, the inquiring attorney has no duty to disclose address information to the police or to the sex offender registry.[10]

CONCLUSION:

26. The attorney has no mandatory disclosure obligations.

(36-12)

10 This reasoning also applies to the actual or prospective client's false statements on the application to the tribunal. Even if submission or use of that false application were to constitute a crime, neither Rule 1.6(b)(2) nor any other Rule *requires* a lawyer to disclose a client's intention to commit a crime, much less the client's commission of a past crime.

OPINION 964 (04/04/2013)

TOPIC: Virtual law office; office address; advertising, business cards and letterhead

DIGEST: Advertising for legal services may not identify a mail drop as the sole address, and must include the street address of the lawyer's principal office; a lawyer's business cards and letterhead may use a mail drop as the sole address, provided they are not being used as advertising and use of the address is not misleading.

RULES: 1.0(a); 7.1(h); 7.5(a); 8.4(c)

FACTS:

1. Inquirer conducts a general practice, with an emphasis on immigration law, primarily on-line or by other electronic means of communication. Inquirer meets with clients and others only by appointment, usually by telephone or Skype or at the client's or other person's location and only rarely at her home, where her files, communications tools and desk are located. Inquirer does not wish to receive mail or drop-in clients or third parties at her home. She plans to use a commercial mailbox service address as her mail address and would prefer not to identify her home address in any advertising she may undertake or on her business cards and letterhead, using instead only her mailbox address.

QUESTIONS:

2. May a lawyer use a commercial mailbox service address as the only office address listed in advertisements, omitting the address of her physical office?

3. May a lawyer use a commercial mailbox service address as the only office address listed on business cards and letterhead, omitting the address of her physical office?

OPINION:

A. May lawyer advertising include a mailbox service address instead of an office address?

4. Rule 7.1(h) provides, in pertinent part, that "[a]ll advertisements shall include . . . the principal law office address . . . of the lawyer or law firm whose services are being offered." This seems unambiguously to require a physical office address. Moreover, this understanding of the requirement is consistent with prior interpretation and the history of the Rule.

5. In 2002, when the Code of Professional Responsibility was in force, this Committee construed the term "office address" in DR 2-101(k), the precursor of Rule 7.1(h), to mean a physical street address at which the principal office of the lawyer or firm is located. The Committee noted that this was the accepted meaning of the term prior to advent of the Internet, and reasoned that the requirement of an office address continued to serve several useful purposes that would not be similarly served by electronic addresses.[11]

11 These purposes included facilitation of "a prospective client's ability to make an intelligent selection of a lawyer"; of contact by the lawyer's "clients, adversaries and other interested parties"; of a client's ability to find and meet with the lawyer "at a known physical location"; and of "the personal service or delivery of legal papers and other correspondence where that mode of delivery is elected." N.Y. State 756 (2002).

The Committee concluded that advertising for legal services "may not list a website or email address as the sole address, but must also include the street address of the lawyer's office." N.Y. State 756 (2002).

6. In the advertising rules adopted by the Appellate Divisions in 2007, DR 2-101(k) was carried forward as DR 2-101(h) with the modification of "office address" to read "principal law office address," as the corresponding Rule 7.1(h) reads today. We think this 2007 modification served to underscore the intent of the Appellate Divisions that all lawyer advertisements were to disclose the address of an office where the lawyers were present and available for contact, and where personal service or delivery of legal papers could be effected.

7. That the same language was carried forward in *haec verba* in the Rules of Professional Conduct adopted by the Appellate Divisions in 2008, effective April 1, 2009, despite the fact that the requirement was not in the rules proposed by the New York State Bar Association, reinforces our view that the Appellate Divisions intended no change in the prior mandate, and that the current Rule 7.1(h) still requires that advertising include the street address of a principal law office.

B. May business cards and letterheads include a mailbox service address instead of an office address?

8. Lawyers are explicitly *permitted* to use business card and letterheads giving "addresses," which of course includes the traditional kind of office street address. Rule 7.5(a)(1) (business cards); Rule 7.5(a)(4) (letterhead). The inquiry poses the question whether lawyers are *required* to include such office addresses on any cards and letterheads that they may use.

9. Rule 7.5 provides that a lawyer or law firm may use "professional cards" (*i.e.,* business cards) and letterheads "provided the same do not violate any statute or court rule and are in accordance with Rule 7.1" on advertising. As noted above, Rule 7.1(h) requires that advertisements include the physical address of the lawyer's principal office. We see no exception from the mandate of Rule 7.1(h) for advertisements that are in the form of business cards or letterhead. If a business card or letterhead were to constitute an advertisement, it would be required to include the lawyer's principal office address.

10. "Advertisement" is defined as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm," though not including "communications to existing clients or other lawyers." Rule 1.0(a). "Not all communications made by lawyers about the lawyer or the law firm's services are advertising." Rule 7.1, Cmt. [6].

11. When a business or professional card or letterhead is used in the ordinary course of professional practice or social intercourse without primary intent to secure retention – *e.g.,* simply to identify the lawyer – it does not constitute advertising.[12]

12 *See* N.Y. State 936 (2012) (applying Rule 7.1 to letterhead only when the letterhead is used in a communication that constitutes an advertisement); *cf.* Rule 7.1, Cmt. [8] (communications for marketing or branding are not necessarily advertisements, and items like legal pads or coffee mugs printed with firm contact information are not advertisements within rule "if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter"); N.Y. State 937 (2012) (communications intended to raise general brand awareness are not advertising even if there is an underlying motivation to increase a lawyer's business).

12. In that circumstance, Rule 7.1(h) imposes no burden on the lawyer to include her principal law office address or, for that matter, any address. *See* N.Y. State 936 (2012). Nor would Rule 7.5 impose any such requirement, because as noted above, its provisions are entirely permissive as to the use of professional cards and letterhead that give addresses; in contrast to Rule 7.1(h), they do not require the inclusion of a lawyer's or law firm's principal law office address or any address.

13. Of course it is also possible that a lawyer could design or use cards or letterhead in atypical ways. If such cards or letterhead were given or sent to someone other than an existing client or another lawyer, and primarily in furtherance of an effort to secure retention of the lawyer or law firm, then the card or letterhead would constitute advertising.[13] In that case, Rule 7.1(h) would require it to include a principal law office street address.[14]

14. To say that the more customary uses of cards and letterhead do not constitute advertising does not end the inquiry, because there are ethical constraints other than those that apply to advertising. A lawyer may not use a mailbox service address (or any other content of a card or letterhead) to mislead.[15] For example, a mailing address that is in a community other than the one in which the lawyer's physical office is located, or that appears to be a physical address when it is in fact only a mail drop, could be misleading if not adequately explained.[16] If use of a business card or letterhead were to constitute "conduct involving dishonesty, fraud, deceit or misrepresentation," it would be prohibited under Rule 8.4(c).

CONCLUSION:

15. Advertising for legal services may not identify a mail drop as the sole address, but must also include the street address of the lawyer's principal office.

16. A lawyer's business or professional cards and letterhead may use a mail drop as the sole address, provided they are not being used as advertising and use of the mail address is not misleading.

(2-13)

13 *Cf.* N.Y. State 937 (2012) (cautioning that if promotional items "were marked with more than the firm logo – if for example they included slogans or more information about the firm" – then they could constitute advertising subject to Rule 7.1).

14 Alternatively, the letterhead might not itself constitute advertising but could appear on a letter with advertising in its text. In that case as well, the advertisement (though not necessarily the letterhead) would be required to include the lawyer's office address.

15 While Rule 7.1(a)'s proscription of misleading statements in advertising may not apply to traditional business and professional cards that are not advertisements, "there are also other more general rules governing use of misleading statements." N.Y. State 936, *supra* (citing Rules 4.1 and 8.4(c)).

16 *See* N.Y. State 881 (2011) (opining that listing spouse's law firm address on letterhead, without appropriate arrangements or disclaimers, would be misleading); N.Y. State 546 (1982) (opining that letterhead may list a branch office open only several days per month, if accompanied by appropriate disclaimer indicating limited hours, but noting that it would be deceptive and misleading "to list a 'mail drop' as a branch office . . . without some appropriate explanation").

OPINION 965 (04/10/2013)

TOPIC: Conflicts of interest

DIGEST: A Town attorney who has given a Town building inspector legal advice about issuance of a certificate of occupancy for a building may, ordinarily, appear for the Town Zoning Board of Appeals in an Article 78 proceeding involving issuance of a building permit for that building. If there were unusual circumstances that would involve the attorney in representing differing interests, then the attorney could not represent the Board absent appropriate client consent.

RULES: 1.7; 1.13(a), (d)

FACTS:

1. The inquirer was retained by a Town to provide services as Town Attorney. In that capacity, the inquirer provided legal advice to the Town building inspector concerning issuance of a certificate of occupancy for a building to be constructed by Property Owner A pursuant to a building permit issued by the Town. Property Owner B, a neighbor of Property Owner A, had objected to issuance of the building permit to Property Owner A and appealed that issuance to the Town Zoning Board of Appeals, which denied the appeal. Property Owner B has commenced an Article 78 proceeding against the Zoning Board of Appeals. The Zoning Board of Appeals wants the inquiring attorney to appear for it in the Article 78 proceeding.

QUESTION:

2. May an attorney appear for a Town Zoning Board of Appeals in an Article 78 proceeding involving issuance of a building permit, although the attorney has given a Town building inspector legal advice concerning issuance of a certificate of occupancy for the building in question?

OPINION:

3. A lawyer for a governmental organization, like a lawyer for a private organization, represents the organization as an entity and does not thereby automatically represent any of its constituent individuals. *See* New York Rules of Professional Conduct ("Rules"), Rule 1.13(a) & Cmt. [9]. However, the lawyer may be engaged to represent one or more such constituents as well, subject to the provisions of Rule 1.7 on conflicts of interest. *See* Rule 1.13(d).

4. Thus, a lawyer providing services to constituents of a governmental entity does not necessarily represent those constituents in their own right, but rather may be providing the services solely in the course of representing the entity. In particular, a Town attorney may provide legal services to constituents like a building inspector and a Zoning Board of Appeals,[17] but such services may nonethe-

17 "The zoning board of appeals is an agency of the town and the assistant town attorneys are generally obliged to act in a manner consistent with the broad scope of the duties impressed upon the office of the town attorney. Those duties include rendering legal advice to the town's zoning board of appeals." N.Y. State 501 (1979) (citing 21 Op. State Compt. 322 (1965) (duties of town attorney include acting as legal advisor to all town officers) and 1973 Atty. Gen. (Inf.) 208 (interpreting Town Law§ 20[2] to require town attorney to render legal advice to all town boards)).

less be rendered in the course of representing the town rather than those constituents.[18] Whether in a given case the attorney for an entity represents only that entity or also some of its constituents "can depend on the circumstances and may be a question of fact," and it will ultimately depend on legal considerations beyond the scope of the Rules. Rules Scope ¶ 9; *see* Rule 1.13, Cmt. [9] (referring specifically to government entities). Such matters are not within our jurisdiction, and we do not opine on them.

5. Rule 1.7(a)(1) provides that except when allowed by appropriate client consent, "a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests . . . ."

6. Insofar as the lawyer provides services to various constituents in the course of representing the Town as an entity, there will be no representation of differing interests, but only a representation of the interests of the Town. A lawyer may represent a single client in multiple matters without risk of representing differing interests. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 266 (2013 ed.) (Rule 1.7(a)(1) can create conflicts for any lawyer or law firm "that has more than one client").

7. We also consider the situation that would arise if the inquirer's proposed appearance in the Article 78 proceeding were to involve a representation of the Zoning Board of Appeals in its own right. In that case, there could theoretically be representation of differing interests, but that is not to say that such differing interests would actually exist.

8. When we previously considered such a situation, we found the existence of differing interests unlikely. We opined that "the duties owed to the town board by the office of the town attorney, as well as the preeminent authority of that board, usually will be of no ethical relevance to the assistant's service as counsel to the zoning board of appeals; and, under normal circumstances, there would be no impropriety in an assistant town attorney accepting assignment to act as counsel to the zoning board of appeals." N.Y. State 501 (1979). That opinion was decided under the prior Code of Professional Responsibility, but we perceive no difference in the current Rules of Professional Conduct that would lead to a different result.

9. On the other hand, if in fact there were differing interests, then the attorney could not represent the Zoning Board of Appeals absent appropriate client consent under Rule 1.7(b). Situations in which differing interests could arise are conceivable. Indeed, N.Y. State 501 concerned an Article 78 proceeding brought against a zoning board of appeals not by a property owner but by the Town Board. We noted that when "the relationship between the two boards has become antagonistic to the point where one seeks to institute suit against the other, the theoretical harmony of their relationship must give way to the reality of their conflicting interests," and we concluded that "counsel fully independent from the office of the town attorney should be retained to represent the zoning board of appeals."

18 *See* 21 Op. State Compt. 322 (1965) (duties of a town attorney include acting as legal advisor to all town officers "in their official capacities"); *cf.* N.Y. City 2004-03 ("unless circumstances indicate otherwise, a government lawyer representing an official named solely in his or her official capacity would still, in effect, be representing the client agency alone, and, unless circumstances indicated otherwise, the government lawyer would deal with the named official as a constituent of the agency rather than as someone personally represented by the government lawyer").

See also Rule 1.7(b)(3) (conflict may not be cured by client consent when attorney represents two clients before a tribunal where one is asserting a claim against the other).

10. The current inquiry, however, does not involve any proceeding brought by the Town against the Zoning Board of Appeals. Nor is there any other respect in which the facts of the inquiry contain any suggestion of differing interests that could take this situation out of the ordinary rule.

CONCLUSION:

11. Under the facts of the inquiry, an attorney who gave legal advice to the Town Building Inspector as to issuance of the certificate of occupancy for a building may appear for the Town Zoning Board of Appeals in an Article 78 proceeding involving issuance of a building permit for that building.

(72-12)

OPINION 966 (05/21/2013)

TOPIC: Private practice of law by town court clerk

DIGEST: A town clerk wishing to represent a private client in a matter pending in another town court may be limited by law and court rules, but is not automatically prohibited from such representation by the rules of legal ethics even if the client also has a matter pending before the clerk's court. If the clerk has substantive responsibilities for the pending matter and is thus in a position to influence the tribunal, then the representation may be prohibited by Rule 1.11(f)(2) unless the clerk informs the judge of the relationship so that the judge may take appropriate action. If the clerk does not participate in the pending matter or has solely ministerial duties, then the clerk would be able to represent the client, if not barred by any personal-interest conflict, but may not use the clerk's public office to try to influence either of the town courts in favor of the client.

RULES: 1.7(a), 1.11(d), 1.11(f)

FACTS:

1. The inquiring lawyer, a court clerk in a town court ("Town Court A"), would like to represent a client who has a matter pending in another town court ("Town Court B"), when the same individual has a matter pending in Town Court A. The court clerk does not represent the client in the matter pending in Town Court A.

QUESTION:

2. May a lawyer who is a court clerk in Town Court A represent a client who has a matter pending in Town Court B, when the same individual has a matter pending in Town Court A?

OPINION:

3. There may be legal provisions governing government officers, and court rules, that govern conflicts of interest of court clerks arising from outside activities.[19] The Committee provides guidance only on the application of the Rules of Professional Conduct (the "Rules"). The application of legal provisions and rules of court is beyond the Committee's jurisdiction, and we do not address those regulatory schemes. Rather, we assume for purposes of this opinion that all relevant court rules allow the lawyer/clerk to represent private clients as contemplated, and that the representation is not prohibited by law, such as local government ethics codes. We also assume that the client's matters in Town Court A and Town Court B are not related.

4. As an ethical matter, a lawyer in the position of the inquirer must, when engaging in private practice, avoid any impermissible conflicts with the lawyer's duties as a court clerk. We consider the Rules that delineate such conflicts.

19 *See* Rule 1.11, Cmt. [1] (lawyer currently serving as a public officer or employee "may be subject to statutes and government regulations regarding conflicts of interest"). For example, the Chief Judge has adopted "Rules Governing Conduct of Nonjudicial Court Employees," 22 N.Y.C.R.R. §§ 50.1 - 50.6. *See*, *e.g.*, *id.* §50.1 ("Code of ethics for nonjudicial employees of the Unified Court System"); § 50.6(a) (practice of law by full-time employees); §50.6(d) (practice of law by part-time employees). However, we do not address the applicability or import of those provisions in the circumstances of this inquiry.

5. We believe the Rule most likely to be implicated is Rule 1.11(f)(2), which provides: "A lawyer who holds public office shall not . . . use the public position to influence, or attempt to influence, a tribunal to act in favor of . . . a client." While the term "public office" is not defined, we believe, based on the Rule's text and underlying principles, that it would apply to court clerks. *Cf.* Rule 1.11, Cmt. [4] (applying to situation in which lawyer represents a government agency and another client successively):

> "A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service."

Although the comment relates to a government employee who at times represents the government as well as a private client, the same concerns would apply where the lawyer does not represent the government, but is a court clerk who might be in a position to assist a private client. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 610 (2013 ed.) (stating that Rule 1.11(f) covers lawyers who are not serving as lawyers during their government service).

6. The applicability of Rule 1.11(f)(2) does not mean that in all cases, the inquirer would be precluded from representing the private client in Town Court B. If the inquirer's duties as a court clerk would not include any duties in connection with the client's matter before Town Court A (and if the inquirer did not seek in any way other than the performance of assigned duties to influence Town Court A), then the Rule would not prohibit representation of the private client in the matter before Town Court B.

7. Moreover, that representation may be permissible even if the inquirer had very limited duties in connection with the client's matter before Town Court A. If the inquiring clerk's duties are solely ministerial, such as assigning docket numbers to cases, then we believe the clerk would generally not be in a position to influence the tribunal in Town Court A to act in favor of the client represented by the clerk in Town Court B.

8. However, if the clerk's responsibilities include providing research or advice, or otherwise assisting the judge handling the matter, then the clerk may well be in a position to influence the tribunal, implicating Rule 1.11(f)(2).[20] In such a circumstance, we believe the representation of the client before Town Court B would be prohibited unless the clerk were to inform the judge in Town Court A before whom the client's matter is pending of the clerk's proposed relationship with the client, so that the judge may take appropriate action, including ensuring that the clerk does not participate in the case and is not in a position to exert any influence.

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20 Moreover, if the clerk's personal involvement were "substantial," another provision could be implicated. Under Rule 1.11(d)(2), a lawyer currently serving as public officer or employee may not negotiate for private employment with any person who is involved as a party in a matter in which the lawyer is participating personally and substantially, except as may otherwise be expressly provided by law. If negotiating to be retained constitutes negotiating "for private employment" under this Rule – a question we need not reach in light of our analysis above – then this Rule would be relevant as well.

9. We note two further restrictions that would apply even when the inquirer's representation of the client in Town Court B would be permissible under the analysis above. First, Rule 1.11(f)(2) would prohibit the clerk not only from using his or her public office to try to influence Town Court A, but also from using it to try to influence Town Court B.

10. Second, Rule 1.7(a)(2), which governs personal-interest conflicts, applies to lawyers in government.[21] Although the facts as submitted do not suggest such a conflict, the inquirer should be mindful of this rule. The inquirer could not represent the client in Town Court B, except with that client's informed consent, when a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the client would be adversely affected by the lawyer's own financial, business, property or other personal interests, including, in this case, the lawyer's government employment.

CONCLUSION:

11. The lawyer's ability to represent private clients may be limited by law or court rules, such as the Chief Judge's Rules Governing Conduct of Nonjudicial Court Employees. We do not opine on the applicability or import of any such restrictions.

12. No ethical rule invariably prohibits a town court clerk who is a lawyer from accepting a private client in a matter pending in another town court, even if the client also has a matter pending before the clerk's court. The clerk may represent the client if the clerk does not participate in that matter pending before the clerk's court, or participates in ways that are solely ministerial. If the clerk has substantive responsibilities for such matters and is thus in a position to influence the tribunal, then the clerk may not represent the private client unless he or she informs the judge of the relationship with the client, so that the judge may take appropriate action, including ensuring that the clerk does not participate in the case and is not in a position to exert any influence. In any event, the clerk may not represent the client if barred by a personal-interest conflict, and may not use his or her public office to try to influence either town court to act in favor of the client.

(40-12)

21 *See* Rule 1.11, Cmt. [1] ("A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7.").

OPINION 967 (06/05/2013)

TOPIC: Lawyer advertising

DIGEST: A blog written by an attorney, the primary purpose of which is not retention of the attorney, is not an advertisement.

RULES: 1.0(a) & (c), 7.1(k)

FACTS:

1. The inquirer is a columnist who is also an attorney licensed in New York. The inquirer has become an employee of a corporation that promotes work-life balance. In that capacity the inquirer will write a blog that will be titled "The [Inquirer's Name] Esq. Blog." The blog will not address legal topics but will include posts about work-life balance.[22]

QUESTION:

2. Is the inquirer's blog an advertisement and thus subject to the retention and preservation requirements of the attorney advertising rules?

OPINION:

3. Rule 7.1 of the New York Rules of Professional Conduct contains extensive requirements relating to advertising by attorneys. Rule 7.1(k) provides: "Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved" at specified times.

4. Rule 1.0(c) defines "computer-accessed communication" as "any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto." A blog disseminated over the internet is clearly a "computer-accessed communication" as defined in Rule 1.0(c).

5. However, the restrictions in Rule 7.1 apply only to "advertisements" as defined in the Rules, and in particular, Rule 7.1(k) applies only to those computer-accessed communications that constitute or contain such advertisements. Rule 1.0(a) broadly defines "advertisement" as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." In this instance there is no question that the blog is a public communication made by a lawyer. Another element of the definition is that the communication be "about that lawyer."[23] It seems reasonable to assume that some of the

22 For purposes of this opinion we have slightly changed the facts of the inquiry.

23 Alternatively, if the correct reading of Rule 1.0(a) is that communications otherwise within the definition are advertisements if they are made by a lawyer or law firm "about that lawyer['s] or law firm's services," then there would be an additional reason, beyond those in the body of this opinion, to conclude that the blog is not an advertisement.

posts will be about the blog's author, so we assume for purposes of this inquiry that this test is also met. The remaining question is whether the primary purpose of the blog "is for the retention of the lawyer."

6. The Comments to Rule 7.1 indicate that not all communications by and relating to a lawyer constitute an advertisement. For example, marketing and branding items such as pencils or legal pads with a firm name do not constitute advertisements if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter. Cmt. [8]. Sponsorship of cultural or sporting events, with dissemination of information about the lawyer limited to specified narrow categories, is also not considered advertising. Cmt. [10]. In an opinion on whether a lawyer could offer a prize to join the lawyer's social network, this Committee noted:

> "To fall within the definition of 'advertisement,' the communication offering the prize must be for the 'primary purpose' of the inquirer's retention. The fact that business development might be the inquirer's ultimate goal in offering the prize would not trigger the Rules on advertising any more than it would trigger those Rules if, for example, the inquirer were to join a local Chamber of Commerce, Kiwanis Club, or bar association, or if the inquirer were to take other steps to expand the inquirer's personal social circle, with the aim of meeting potential new clients."

N.Y. State 873 (2011). Even when communications from lawyers contain information about the law, they are not necessarily advertising.[24]

7. Since the inquirer's blog will not discuss legal matters and it appears that the inquirer does not intend to solicit clients for a law practice, the blog will not be considered an advertisement even though its name indicates that the author is an attorney.

8. We note, however, that "all communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law." Rule 7.1, Cmt. [6].

CONCLUSION:

9. A blog written by an attorney that does not discuss legal topics and whose primary purpose is not the retention of the lawyer is not an advertisement, and would thus not be subject to the retention and preservation rules for lawyer advertising, even though the title of the blog makes clear that the author is an attorney.

(24-13)

24 For example, "[t]opical newsletters . . . or blogs intended to educate recipients about new developments in the law are generally not considered advertising." Rule 7.1, Cmt. [7]; *see also*, *e.g.*, N.Y. State 918 (2012) (educational legal video that does not encourage viewers to retain the law firm is not an advertisement because the primary purpose is not retention of the law firm); N.Y. State 899 (2011) (providing general answers to questions in a legal chat room, without more, does not constitute advertising).

OPINION 968 (06/10/2013)

TOPIC: Conflicts of interest for government lawyer; government lawyer pursuing personal claims against employer; government lawyer representing agency against claim that could also be asserted by the lawyer

DIGEST: A federal government lawyer subject to a mandatory furlough may bring a challenge to the furlough in an administrative tribunal if consistent with the lawyer's other ethical obligations. If the inquiring lawyer does so, however, the lawyer may not represent the agency in opposition to challenges to the furlough by other employees, unless permitted by a rule of necessity applicable if no other lawyer can defend the agency. If the inquiring lawyer does not pursue such a challenge, the lawyer may represent the agency in opposition to such challenges by others if the agency gives informed consent and the other requisites for conflict waiver are met. Other lawyers in the office may also defend the agency against such challenges if there is appropriate waiver of the conflict and those other lawyers do not pursue their own challenges.

RULES: 1.0(h); 1.1(c); 1.7; 1.10(a), (d); 1.11(d); 8.5

QUESTIONS:

1. May a lawyer who is employed by a Federal government agency and is subject to employment furloughs of up to 22 days resulting from "sequestration":

   a. exercise the lawyer's statutory right to challenge his or her own sequestration furlough before the Merit Systems Protection Board, an administrative tribunal established to hear appeals by Federal government employees from "adverse employment actions"; or

   b. represent the agency before the MSPB in actions brought by other agency employees, or otherwise advise the agency regarding implementation of the furlough?

OPINION:

2. The Committee has received several inquiries from civilian lawyers who are admitted in New York and are employed by Federal government agencies concerning possible conflicts arising out of potential employment furloughs resulting from the ongoing Federal government "sequestration." As a result of the sequestration (a Congressionally-mandated across-the-board budget cut), many Federal employees – including attorneys – may be subjected to employment furloughs of up to 22 days. Federal employees – again, including attorneys – have the statutory right to challenge such furloughs before the Merit Systems Protection Board ("MSPB").

3. The inquirers have raised questions concerning (i) whether the inquirers may pursue their own challenge before the MSPB against their employer, and (ii) whether the fact that the inquirers are themselves subject to sequestration furloughs would present a conflict of interest if the lawyers are asked to represent their agency in appeals of the furlough brought by other agency employees, or asked to advise the agency in implementation of the furlough. We understand that the challenges to the furlough will raise issues common to all or many persons affected by it, such as the adequacy of

notice under governing statutes and rules, and whether the furlough otherwise meets statutory and constitutional requirements for such job actions.

Choice of Ethics Rules

4. We address first whether New York's Rules of Professional Conduct apply at all. Each of the inquirers is admitted in New York but practices in the District of Columbia or Virginia. Each assumes that New York's ethics rules apply.

5. Rule 8.5(b) of the New York Rules of Professional Conduct is a choice-of-law rule for legal ethics. It provides that "[f]or conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice . . . , the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise." Rule 8.5(b)(1). For other conduct, the rules to be applied are New York's rules if the lawyer is admitted only in New York. Rule 8.5(b)(2)(i). If the lawyer is licensed to practice in New York and some other jurisdiction, the rules to be applied are those of the "admitting jurisdiction in which the lawyer principally practices," unless "the particular conduct clearly has its predominant effect in another" admitting jurisdiction, in which case the rules of that jurisdiction apply. Rule 8.5(b)(2)(ii).

6. As the inquirers are asking in part about conduct in connection with a proceeding before an administrative tribunal, the question arises whether such an administrative tribunal is a "court" within the meaning of Rule 8.5(b)(1). The Rules contain a definition of "tribunal," which includes both a "court" and an "administrative agency or other body acting in an adjudicative capacity." Rule 1.0(w). In adopting Rule 8.5, the New York Appellate Divisions declined to adopt a version of Rule 8.5 proposed by the New York State Bar Association that substituted the word "tribunal" for the word "court" in the prior version of this rule.[25] (The proposal would have adopted the usage in the ABA Model Rules of Professional Conduct.) Thus, while there may be policy reasons for treating administrative tribunals as courts, *see* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* ("*Simon's*") 1626 (2013 ed.) (noting desirability of a uniform rule for practice before a particular administrative tribunal), we do not believe we are free to read "court" in Rule 8.5(b)(1) to include administrative tribunals such as the MSPB.[26]

7. The rules to be applied, therefore, are not necessarily those of the jurisdiction in which the MSPB sits. Rule 8.5(b)(2) provides that if the lawyer is admitted in multiple jurisdictions including New York, then the conduct will be subject to the rules of either New York or one of the other admitting jurisdictions (depending on where the lawyer principally practices and possibly on the predominant effect of the conduct). If the lawyer is admitted only in New York, then New York's rules will

25 NYSBA Proposed Rules of Professional Conduct 240 (Feb. 1, 2008), *available at* http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports.

26 We do not need to address in this opinion the question of what would happen if the rules of an administrative tribunal presented ethical requirements that conflicted with New York's rules, because the MSPB rules do not appear to impose such conflicting obligations. The MSPB permits parties to be represented by anyone of their choosing subject to relatively general rules permitting another party to challenge an adverse representative on grounds of "conflict of interest" and permitting a judge to limit a representative's participation for conduct prejudicial to the administration of justice. 5 C.F.R. §§ 1201.31(b), 1201.43(d) (2012); *see also* Standards of Ethical Conduct for Employees of the Executive Branch, *id.* Part 2635 (2013) (general conflict of interest and other standards).

apply.[27] We are informed that at least one of the inquirers is admitted to practice only in New York.[28] We therefore will proceed to analyze the questions under New York's Rules of Professional Conduct.

MSPB Appeal Filed by Government Lawyer

8. One of the inquiries asks whether a government lawyer who is subject to a sequestration furlough as a government employee may file an MSPB appeal on his or her own behalf against the lawyer's employer. Rule 1.1(c)(2) provides that a lawyer "shall not intentionally . . . prejudice or damage the client during the course of the representation except as permitted or required by these Rules." We assume for purposes of this opinion that the inquirer's client is the agency that employs him or her.[29]

9. Professor Simon opines that the phrase "during the course of the representation" includes both a temporal aspect – making clear that the duty applies only to current clients – and also a substantive limitation – "that the duty not to prejudice or damage a client applies only in ways related to the 'representation'" and does not apply to lawyer conduct "*outside* the scope of the representation." Simon's, *supra*, at 73 (emphasis in original); *accord* Nassau County 05-1 (lawyer may give testimony against current client in matter unrelated to legal services being rendered). Even if this interpretation is accepted, it is unclear whether the action contemplated here – a claim by in-house counsel relating to the terms of his or her employment as counsel – is outside the scope of the representation of the agency, which presumably extends to all the work the lawyer does while employed by the agency.

10. While Rule 1.1(c)(2) is relatively unusual – it is not part of the ABA Model Rules of Professional Conduct – it captures part of the common law duty of loyalty. It is helpful to consider the courts' consideration of that common law right in delineating the scope of the Rule. Courts have gen-

27 This conclusion would also apply to representing the agency in connection with implementation of the furlough, which would not be conduct in connection with a proceeding in a court. We note that decisions by the MSPB are appealable to the U.S. Court of Appeals for the Federal Circuit, which is of course a "court" within the meaning of Rule 8.5(b)(1). So, if an MSPB decision were appealed to the Court of Appeals, conduct in connection with that appeal would be subject to "the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise." Rule 8.5(b)(1).

28 We express no view on whether the inquirers' practice is permitted under the rules governing unauthorized practice in Virginia and the District of Columbia. *Cf. Sperry* v. *Florida ex rel. Florida Bar*, 373 U.S. 379, 401 (1963) (allowing petitioner to practice federal patent law in a state in which he was not admitted to practice law because the Patent and Trademark Office had issued rules on practice before it and "[t]he rights conferred by the issuance of letters patent are federal rights").

29 We recognize that identification of a government lawyer's client is not always straightforward. *See* Rule 1.13, Cmt. [9] ("Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context."); Restatement (Third) of the Law Governing Lawyers §97, Cmt. c (2000) ("No universal definition of the client of a governmental lawyer is possible."); Roger Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 Geo. J. Legal Ethics 291, 296 (1991) (noting possibilities that government lawyer's client could be the public, the government as a whole, the branch of government in which the lawyer is employed, the particular agency or department in which the lawyer works, and the responsible officers who make decisions for the agency). We do not strive to address or resolve such issues in this opinion. *See* Rule 1.13, Cmt. [9] ("Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules."); N.Y. City 2004-03 ("Ultimately, the question of who is the government lawyer's client is a question of law and not of ethics, and one to which the government lawyer must give careful consideration in each case."). A prevailing approach, however, and the one we follow here, is that (apart from cases like Attorneys Generals' Offices or prosecution agencies), the employing agency is treated as the presumptive client. *See*, *e.g.*, N.Y. City 2004-03 (assuming generally "that the government agency is for practical purposes the 'client agency'"); Restatement §97, Cmt. c ("For many purposes, the preferable approach on the question presented is to regard the respective agencies as the clients . . ."); Cramton, *supra*, at 298 ("For day-to-day operating purposes, the government lawyer may properly view as his or her client the particular agency by which the lawyer is employed.").

erally allowed an in-house or government lawyer to assert his or her own statutory or contractual rights against the lawyer's employer where doing so would not violate a specific ethical duty.

11. In *Santa Clara County Counsel Attorneys Assn.* v. *Woodside*, 7 Cal. 4th 525, 869 P.2d 1142 (Cal. 1994), an association of attorneys in the office of the Santa Clara County Counsel's office sought a declaration from the Supreme Court of California that attorneys in the association would not violate their ethical obligations by bringing a lawsuit against the county counsel's office seeking to enforce statutory collective bargaining rights. Relying on ABA informal opinions concerning the right of in-house lawyers to participate in unions and union job actions, the court recognized a need for a "realistic accommodation between an attorney's professional obligations and the rights he or she may have as an employee." *Id.* at 551, 869 P.2d at 1157. Accordingly, the court found that:

> "[I]n determining whether an action taken by an attorney or employee association violates the attorney's ethical obligations, we look not to whether the action creates antagonism between the attorney/employee and the client/employer, since such antagonism in the labor relations context is unfortunately commonplace; rather, we seek to ascertain whether an attorney has permitted that antagonism to overstep the boundaries of the employer/employee bargaining relationship and has actually compromised client representation."

Id. at 552, 869 P.2d at 1157. The court distinguished cases in which lawyers had been barred from pursuing claims where prosecution of the lawsuit would make use of confidential information, *Balla* v. *Gambro*, 145 Ill. 2d 492, 584 N.E.2d 104 (1991), or where the lawyer's claims impaired the lawyer's ability to defend the client in closely related claims that were assigned to the lawyer, *Jones* v. *Flagship Int'l*, 793 F.2d 714 (5th Cir. 1987). Under this analysis, the California court held, "The only realistic accommodation between the enforcement of statutory guaranties under [California labor law] and the enforcement of the Attorneys' professional obligations . . . is to permit [the Attorneys' lawsuit], as would be permitted to other public employees, while at the same time holding the Attorneys to a professional standard that ensures that their *actual* representation of their client/employer is not compromised." *Id.* at 553, 869 P.2d at 1157 (emphasis in original).

12. A similar result was reached in a Minnesota case brought by a lawyer alleging retaliatory discharge. *Nordling* v. *Northern State Power Co.*, 478 N.W.2d 498 (Minn. 1991). While by the time the suit was brought the lawyer was no longer employed by the client, the court's analysis addressed the effect of permitting the suit on the client's usual right to fire a lawyer at any time – an aspect of the current-client relationship. The Minnesota Supreme Court held, "It seems to us . . . that in-house counsel should not be precluded from maintaining an action for breach of a contractual provision in an employee handbook, provided, however, that the essentials of the attorney-client relationship are not compromised." *Id.* at 502. The court analyzed the particular claim at issue and concluded that it did not "appear to implicate company confidences or secrets" and, while there was a loss of trust between the lawyer and his direct superior, "this is not a loss of trust that necessarily impairs Nordling's attorney-client relationships with the constituencies of the corporate organization." *Id.* at 502-3; *see also Verney* v. *Pennsylvania Turnpike Comm'n*, 903 F. Supp. 826, 832 (M.D. Pa. 1995) (upholding attorney's right to bring retaliatory discharge claim for filing gender discrimination lawsuit where action did not "'so interfere[] with [Plaintiff's] performance of [her] job that it renders [her] ineffective in the position for which [she] was employed'") (citation omitted); *Parker* v. *M&T Chemicals,*

Inc., 566 A.2d 215, 236 N.J. Super. 451 (App. Div. 1989) (upholding in-house attorney's right to sue former employer for damages under the New Jersey Whistleblowers Act where lawyer complained that he was mistreated and constructively discharged for refusing to join illegal scheme).

13. Ethics committees in this State have considered analogous questions and reached similar conclusions. In N.Y. State 578 (1986), this Committee concluded that lawyers may join a union as long as they comply with all disciplinary rules. "If a conflict arises between union membership and a lawyer's ethical obligations under the Code, the lawyer must withdraw from the union or from the representation, or, if it is obvious that he or she can adequately represent the client . . . must obtain the informed consent of the client to continue the representation."[30] This Committee relied on the ABA ethics opinions upon which the California Supreme Court later relied in concluding that, by analogy, lawyers could sue their current employer as long as the "*actual* representation of their client/employer was not compromised." *Accord* N.Y. City 79-55 (1980) (if at any time membership of a lawyer in a union affects or reasonably may affect his or her professional judgment, the lawyer must choose between continuing the union membership and continuing to represent the client affected, unless the informed consent of the client is obtained): N.Y. City 82-75 (1983) (ethical obligations of attorneys employed by Legal Aid Society when their union calls a strike).

14. Similarly, in N.Y. City 1994-1, the ethics committee of the Association of the Bar of the City of New York concluded that a lawyer might sue his former employer for racially discriminatory discharge, as long as care was exercised to avoid disclosing confidential information of the former client. The Committee relied on, *inter alia*, the wrongful discharge cases discussed above.[31]

15. Based on the foregoing, we conclude that a lawyer who is subject to a sequestration furlough would not violate Rule 1.1(c)(2) merely by exercising his or her statutory right to file an appeal of that furlough on the lawyer's own behalf, but should consider whether doing so would affect his or her representation of the employer-client in violation of any other ethical rules. However, it does not appear likely that the challenges to the furlough would, for example, implicate confidential information, because those challenges would likely be based on considerations of notice and due process common to many employees.

Representation of Agency in MSPB Appeals

16. We turn next to the question of whether a lawyer who is subject to a sequestration furlough may represent the lawyer's employer-client either in connection with MSPB appeals filed by other government employees within the lawyer's agency or in implementation of the furlough generally. Rule 1.7(a)(2) prohibits a lawyer from representing a client where "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." As Professor Simon wrote, a "significant" risk is "more than a possibility but less than a certainty." Simon's, *supra*, at 306.

30 The provisions of the former Code of Professional Responsibility referred to in the Committee's opinion were identical or similar to provisions of the current Rules of Professional Conduct. The text of Rule 1.1(c)(2) closely followed that of DR 7-101(A)(3). *See* Simon's, *supra*, at 73.

31 N.Y. City 1994-1 (citing *Parker* and *Nordling*). The committee raised a question whether a claim based on the common law, as opposed to statute or an employee handbook, would be permitted, citing the cases, among others, that the California Supreme Court had characterized as ones in which the attorney's suit would violate a separate ethics prohibition. We do not consider such issues here, because we understand that the furlough challenge would be based on statutory and constitutional claims.

17. Here, the risk is that a lawyer's personal interest as an employee subject to a sequestration furlough would alter the lawyer's professional judgment on behalf of the employer-client when asked to defend the same sequestration furlough or to implement the furlough. This is readily seen with respect to defending a challenge to the furlough: A good outcome for the employer client – that is, upholding the sequestration furlough, particularly as applied to employees at the lawyer's agency – would tend to harm the interests of the lawyer in the lawyer's capacity as an employee of the same agency. Conversely, a bad outcome for the employer-client – overturning the furlough – would tend to benefit the lawyer's personal and financial interests as an employee of the agency. We suspect that the same would be true for at least some of the advice that the lawyer may be asked to provide in connection with implementation of the furlough. The potential furlough could affect a substantial portion of the lawyer's annual income – up to 22 days, or approximately 8.5% of an employee's annual salary. Given this, we conclude that, in the usual case, there is a "significant risk" that a government lawyer's professional judgment on behalf of the lawyer's agency would be adversely affected by the lawyer's personal and financial interests in avoiding sequestration cuts as an employee of the same agency. *Cf.* N.Y. State 578 (1986) (State-employee lawyer who is covered by collective bargaining agreement has a conflict in representing the State in disciplinary proceedings against State employees under the agreement).[32]

18. This conflict is imputed to other lawyers in the same law office. Under Rule 1.10(a), "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein."

19. A "firm" is defined to include "a government law office." Rule 1.0(h). Despite that definition, there may possibly be circumstances in which a government law office is not subject to particular rules that apply to firms generally. Comment [3] to Rule 1.0 notes, "Whether lawyers in a government agency or department constitute a firm may depend upon the issue involved or be governed by other law." But in the context of this inquiry and the imputation rule, we are not aware of any governing law or other circumstances that would warrant reading "firm" any more narrowly than its definition. *Cf.* N.Y. State 900 ¶ 21 (2011) (a County Attorney's office is a "firm" under imputation rule). Our conclusion is reinforced by the Rule's history. Some jurisdictions have adopted versions or interpretations of imputation rules that do not apply to government law offices.[33] The New York State Bar Association endorsed that approach by proposing an amendment that would have made imputation under Rule 1.10(a) inapplicable to government law offices. NYSBA Proposed Rules of Professional Conduct 68 (Feb. 1, 2008) (proposing version of Rule 1.10(e) providing that "[t]he disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11"). That proposal, however, was not adopted by the courts.

32 This conclusion may vary with the facts of individual cases, however. Some employees may not view the furlough as a negative development, where, for example, they can replace the lost income from other sources or would welcome the opportunity to devote time to other activities. One inquirer, for example, states that he is indifferent to whether he is furloughed, because he would devote the time to paid service in the military reserve.

33 *E.g.*, ABA Model Rule 1.10(d); ABA Model Rule 1.11, Cmt. [2]; *Humphrey v. McLaren*, 402 N.W.2d 535 (Minn. 1987); *State v. Fitzpatrick*, 464 So. 2d 1185 (Fla. 1985); *Anderson v. Commissioner of Correction*, 15 A.3d 658 (Conn. App. Ct. 2011); ABA Formal 342 (1975) (construing broad imputation rule of DR 5-105 as not applicable to government law offices and citing policy reasons in support).

20. As applied to this inquiry, Rule 1.10 imputes a personal-interest conflict of a lawyer in the government law office to any other lawyer in that office who knows of the conflict. More particularly, it means that if any lawyer in the relevant government law office is subject to the furlough, all lawyers in that law office who know that fact would have a conflict in defending the agency against a challenge to the furlough by any employee of the agency.

21. The existence of a conflict under Rule 1.7(a), however, does not end the inquiry. Under Rule 1.7(b), a lawyer who has a conflict under Rule 1.7(a) may nevertheless represent a client in the matter when certain criteria are met, namely that:

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

22. We have held that a public agency can give informed consent, N.Y. State 629 (1992), and we will assume that there are no laws prohibiting the representation. The remaining questions are whether a lawyer subject to the furlough can reasonably conclude that he or she will be able to provide "competent and diligent representation" to the employer's agency, and whether the representation would "involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." Rule 1.7(b)(1), (3).

23. On the first question, we believe that a lawyer who has not challenged the furlough could well reach a reasonable conclusion that he or she could set aside the effect on himself or herself, and competently and diligently represent the agency in defending a challenge or advising on implementation of the furlough. This is particularly the case because of the nature of the issues likely to arise in the challenge cases, which go to statutory and constitutional issues and not questions of deeply personal choice or belief.

24. Where a lawyer does file his or her own appeal against the sequestration furlough, however, we doubt that the lawyer could reasonably reach the conclusion that he or she could competently and diligently defend the agency against a similar appeal by another employee, at least where, as is likely to be the case, the issues in the lawyer's own case and those of the defense are the same. It is not just that the lawyer could profit personally from losing the argument. As a matter of common experience, a litigant frequently has or acquires a deeply held belief in the justness of his or her cause, and the merits of the arguments advanced in support, so as to make it difficult to pursue the contrary position wholeheartedly. A recent opinion by the ethics committee of the District of Columbia Bar reaches the same conclusion under the identical language of D.C. Bar Rule 1.7(c)(2):

> "In our view, the reasonable belief requirement of Rule 1.7(c)(2) is a difficult obstacle to surmount if the lawyer is asked to defend the agency against a furlough complaint

> with allegations that are substantially similar to the allegations she has raised in her own furlough complaint against the agency. The level of difficulty increases with the similarity of the allegations in the complaints."

District of Columbia Opinion 365 (2013).[34]

25. We do not believe that this condition of nonconsentability extends to all lawyers in the agency, however. Rule 1.10(d) contains a specific provision for consent to imputed disqualification: "A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7." Thus, if the lawyer pursuing the appeal is Lawyer A and the lawyer to whom the conflict would be imputed is Lawyer B, the conflict imputed to Lawyer B can be waived under the conditions in Rule 1.7. Under our analysis above, Lawyer B (if not pursuing his or her own appeal) may reasonably conclude that he or she "will be able to provide competent and diligent representation to each affected client" within the meaning of Rule 1.7(b)(1), so that the conflict imputed to Lawyer B can be waived by the client agency. In other words, in deciding whether an imputed conflict (in the language of Rule 1.10(d), the "disqualification prescribed by this Rule") can be waived, it is necessary to apply the standards set forth in Rule 1.7(b) to the lawyer to whom the conflict is imputed.

26. In many kinds of cases, a conclusion that Lawyer A has a nonconsentable conflict will likewise apply to Lawyer B. For example, in a private law firm setting, if Lawyer A's nonconsentable conflict arises from the fact that Lawyer A cannot give enough information to one of Lawyer A's clients in order to obtain informed consent to take on representation of another client (*e.g.*, because the matter to be handled for the new client involves a still-secret hostile action to be taken against the other client), that condition would affect all lawyers in Lawyer A's firm. But where the nonconsentable nature of Lawyer A's conflict is personal to Lawyer A, the circumstances may well allow the client to consent to representation by Lawyer B.

27. To be clear, this is not to suggest that the conflict is not imputed in the first place. Nothing about Rule 1.10(d), which deals only with consent to waive an imputed conflict, alters the basic rule that all conflicts under Rules 1.7, 1.8 and 1.9 – whether derived from representation of another client or from personal circumstances of one lawyer in the law firm – are imputed to all lawyers in the firm under the standards set forth in Rule 1.10(a).

28. There is one form of nonconsentable conflict that presents a different problem, and that is the situation presented by Rule 1.7(b)(3), which bars a lawyer from representing clients on both sides of the same litigation or other proceeding before a tribunal. Lawyer A cannot appear on both sides of a litigation, but can Lawyer A appear adverse to Lawyer B from the same law firm in that litigation? We think that such a situation would be governed by different considerations because litigation involves the interests not just of the affected client or clients but also of the public and the judiciary. For example, where a matter is in litigation, the appearance of lawyers from the same firm may deprive the

34 Whether the lawyer could represent the agency in advising on implementation of the furlough would depend, as the D.C. Bar opinion concluded, on how close the questions on which advice is sought are to the lawyer's claims in the challenge to the furlough. The Philadelphia Bar Association ethics committee concluded that the conflict presented by the furlough is waivable, even if the lawyer might later file an appeal of his or her own, but did not expressly discuss the question of a lawyer defending the agency while at the same time pursuing an appeal. Phila. 2013-3.

judiciary and the public of the confidence that the adversary system, on which the development of the law depends, will function as it should. But we do not address that question with finality here, as the issue is not presented.[35]

29. Finally, we note that other provisions of the New York Rules of Professional Conduct, and our previous opinions, provide for a "rule of necessity," which allows lawyers – in particular, government lawyers – to engage in an otherwise impermissible representation in cases where there is no one else who can act. *See, e.g.*, Rule 1.11(d)(1) (permitting a government attorney to participate in a matter in which the lawyer "participated personally and substantially while in private practice or nongovernmental employment" in cases where "under applicable law no one is, or by lawful designation may be, authorized to act in the lawyer's stead in the matter"); N.Y. State 638 (1992) ("The rule of necessity thus recognizes that, as a matter of ethics, Lawyer should not be disciplined for undertaking a prosecution that the law requires and a court directs Lawyer to undertake, even if Lawyer personally and substantially participated in the matter while in private practice."); *cf*. N.Y. State 675 (1995) ("[I]n recognizing that a prosecuting attorney seeking reelection is not bound by the same limitations on his conduct as otherwise attach when he is not a candidate for reelection, we do so not for ethical reasons but under a notion of necessity in deference to the realities of the political elective process."). Ordinarily, if outside counsel, or counsel from another agency, could lawfully represent the agency, that would obviate the need to invoke any rule of necessity. N.Y. State 638 ("The disqualification created by DR 9-101(B)(3)(a) [now Rule 1.11(d)(1)] depends on the availability as a matter of law of a special prosecutor."). We have insufficient facts to determine whether a rule of necessity would apply to the inquiries before us.

CONCLUSION:

30. For the reasons stated, and subject to the qualifications set forth above, a lawyer who is employed by a government agency and is subject to employment furloughs resulting from "sequestration" may exercise his or her statutory right to appeal the sequestration furlough before the MSPB, so long as the dispute does not impermissibly affect his or her representation of the employing agency. A government lawyer who is subject to a sequestration furlough, or knows that another lawyer in the same government law office is subject to such a furlough, may only represent the employee's agency before the MSPB in actions brought by other agency employees if (i) the agency gives informed consent, confirmed in writing, prior to the lawyer engaging in such representation and (ii) the lawyer does not file his or her own appeal with the MSPB.

(16-13)

35 None of the inquirers proposes to represent the agency adverse to a lawyer from the same government agency. Rule 1.7(b)(3) by its terms only applies when lawyers are *representing clients* on both sides of the case. Here, the appealing lawyer would be the client, or would be proceeding *pro se*, and would not be representing a client (other than him- or herself). Even so, however, other lawyers in the office could have a personal conflict of interest that would prevent them from competently and diligently representing the agency (even with consent) against a colleague working in the same office.

OPINION 969 (06/12/2013)

TOPIC: Limiting an attorney's liability

DIGEST: A lawyer may ethically ask a client to indemnify the lawyer against potential malpractice or other claims by a third-party addressee of an opinion letter to the client.

RULES: 1.8(h)

FACTS:

1. A client has requested that an opinion letter to be written by the inquirer be addressed not only to the client but also to the client's lessee.

QUESTION:

2. May the attorney ethically request prospectively that the client indemnify the attorney against a lawsuit brought by the third-party lessee?

OPINION:

3. Rule 1.8(h)(1) of the New York Rules of Professional Conduct provides that a lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice." Comment [14] to this Rule notes: "Agreements prospectively limiting a lawyer's liability for malpractice are prohibited because they are likely to undermine competent and diligent representation." Thus, it is clear that the attorney could not prospectively enter into an agreement with the client that would require the client to indemnify the lawyer against a judgment in favor of the client, or otherwise hold the lawyer harmless for any liability to the client, arising from legal malpractice.

4. In the instant case, however, the lawyer seeks indemnity against any malpractice or other claims that might be brought by a non-client, that is, the client's lessee who is the third-party addressee on the opinion letter. The Rules contemplate that a lawyer at the request of a client may provide an opinion that will be provided to a third party: "A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client." Rule 2.3(a). As Comment [3] notes, a legal duty to the third party "may or may not arise," and that is a question of law. *See*, *e.g.*, *Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y. 2d 377, 605 N.E.2d 318, 590 N.Y.S.2d 831 (1992). Whether or not a legal duty to the third party arises, however, the third party, absent other facts, is not a client of the attorney.

5. Given that the prohibition of Rule 1.8(h) applies only to prospective agreements limiting liability to the lawyer's *client*, we conclude that a lawyer may prospectively request indemnity against potential malpractice or other claims that could be asserted by a third party. *See* Report of the ABA Business Law Section Task Force on Delivery of Document Review Reports to Third Parties, 67 Bus. Law. 99 (2011) ("While professional ethics rules normally prohibit lawyers from prospectively limiting their liability to clients, these prohibitions do not apply to non-clients."); Michigan Opinion RI-

258 (1996) (lawyer serving as guardian ad litem may negotiate for release of liability from families and other interested persons because the lawyer's duty is to the child only).

6. We note that the potential harm expressed in Comment [14] to Rule 1.8 does not arise where the client agrees to indemnify the lawyer against a malpractice judgment or other claims arising from harm to the third party. Such indemnification seems unlikely to undermine competent and diligent representation of the client, because the lawyer may not prospectively enter into an agreement limiting malpractice liability to such client.

CONCLUSION:

7. A lawyer may ethically ask a client to indemnify the lawyer against potential malpractice or other claims by a third-party addressee of an opinion letter to the client.

(66-12)

OPINION 970 (06/21/2013)

TOPIC: Disclosure of deceased client's file

DIGEST: If an executrix of a decedent's estate who seeks files possessed by the decedent's former attorney is legally entitled to the same access that the decedent had when alive, then the former attorney should ordinarily provide the executrix access to all those files. If, on the other hand, her status as executrix does not confer on her the same legal right as the decedent possessed, then the contents of a deceased client's file will generally not be disclosable to the executrix unless (1) the information disclosed is not "confidential information" or (2) the lawyer has grounds to conclude that release of the information is impliedly authorized.

RULES: 1.6(a), 1.9(c), 1.15(c), 1.16(e)

FACTS:

1. The inquirer represented a client who is now deceased. The executrix of the former client's estate has requested the client's file. The inquirer wants to know his obligations regarding this request.

QUESTION:

2. What are a lawyer's obligations regarding a request for a former client's file from the executrix or executor of that former client's estate?

OPINION:

This inquiry turns on a threshold legal question: does an executrix of an estate stand in the shoes of a decedent to such a degree that the executrix is entitled to access the decedent's confidential information?[36] Matters of law, however, are beyond the purview of this Committee. Accordingly, we do not

36 The answer to this legal question may be yes, no, or "it depends on the circumstances." In the context of litigation brought on behalf of an estate against an estate planning attorney, the Court of Appeals, recognizing the special legal relationship between a personal representative and a decedent, concluded that "privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney." *Estate of Schneider v. Finmann*, 15 N.Y.3d 306, 309 (2010). Moreover, there is considerable support for the proposition that, at least in certain circumstances, an executrix is authorized to waive the attorney-client privilege of the decedent. *See Mayorga v. Tate*, 302 A.D.2d 11, 11-12 (2d Dept. 2002) (concluding that an executor may waive the privilege "in the interest of the deceased client's estate"); *accord In re Colby*, 723 N.Y.S.2d 631 (N.Y. Co. Sur. Ct. 2001). There is, however, at least in older cases, some support for the view that an executor cannot waive a decedent's attorney-client privilege. *See, e.g.*, *Westover v. Aetna Life Ins. Co.*, 99 N.Y. 56 (1885) (presenting question of doctor-patient privilege, though opinion also addresses attorney-client privilege) ("An executor or administrator does not represent the deceased for the purpose of making such a waiver."); *Matter of Beiny*, 129 A.D.2d 126, 517 N.Y.S.2d 474, 479 (1st Dep't 1987) ("While it is questionable whether even a duly appointed executor would have had the power to waive the decedent's attorney-client privilege . . . , it is quite certain that one merely named as executor in an unprobated will would have had no authority whatsoever to do so."); *Matter of Alexander*, 130 N.Y.S.2d 648 (Sur. Ct. Suff. Co. 1954) ("it should be borne in mind that the power to waive the privilege arising out of the relationship of attorney and client ended with the death of the client so that no one can now waive it"); *cf.* CPLR §4504(c) (allowing personal representative to waive doctor-patient privilege of deceased client except as to "information which would tend to disgrace the memory of the decedent"). It is worth noting, additionally, that the duty of confidentiality is broader than the attorney-client privilege. *See* Comment [3] to Rule 1.6 ("The confidentiality duty applies not only to matters communicated in confidence to the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to representation, whatever its source.").

opine on this threshold question. Instead we consider the implications of the alternative answers under the Rules of Professional Conduct (the Rules).

3. In any circumstances in which the answer to the legal question is yes, this inquiry is straightforwardly controlled by N.Y. State 766 (2003), which concluded that a former client is presumptively entitled to access to all his files possessed by his former attorney. The opinion was influenced by *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelson,* 91 N.Y.2d 30, 34 (1997), which adopted the majority rule that upon termination of an attorney-client relationship, a client is "presumptively accord[ed] . . . full access to the entire attorney's file on a represented matter with narrow exceptions."[37]

4. N.Y. State 766 was based on two provisions in the Code of Professional Responsibility, DRs 9-102(c) and 2-110(A)(2), which are now comparably set forth in Rules 1.15(c)(4) and 1.16(e). Rule 1.15(c)(4) provides that "a lawyer shall . . . promptly pay or deliver to the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive." Rule 1.16(e), which addresses termination of representation, provides, in relevant part:

> "A lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including . . . delivering to the client all papers and property to which the client is entitled . . . ."

These provisions of the current Rules support our conclusion in N.Y. State 766 just as did the corresponding provisions of the prior Code.

5. Thus if, as a matter of law, an executrix stands in the shoes of a decedent for these purposes, then the executrix is presumptively entitled to access to the decedent's files possessed by the inquirer, subject only to the inquirer's ability, as to particular materials, to make a substantial showing of good cause to refuse client access.

6. If, on the other hand, an executrix's legal status does not confer on her a general right of access to the decedent's confidential information (and the rest of this opinion is based on that assumption), then the inquirer's professional responsibilities are more complicated. Rule 1.9(c)(2) addresses a lawyer's obligation to refrain from revealing confidential information of a former client.

7. Rule 1.9(c)(2) provides that "[a] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client." The protections of Rule 1.6, as applied through

37 Exceptions arise when the attorney can make "a substantial showing . . . of good cause to refuse client access." For example, the attorney "should not be required to disclose documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law," or "firm documents intended for internal law office review and use." 91 N.Y.2d at 37.

Rule 1.9(c)(2), are not limited to former clients who are still alive; those protections continue to apply as to a deceased former client.[38]

8. Rule 1.6 defines "confidential information" as consisting of

> "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested to be kept confidential. 'Confidential information' does not ordinarily include (i) a lawyer's knowledge of legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates."

A lawyer is, of course, permitted to provide those contents of a deceased client's file that do not fall within Rule 1.6's definition of confidential information. *See* D.C. Opinion 324 (2004) (attorney whose client is deceased may turn over information that is not a confidence or secret to client's spouse who is executor of client's estate).

9. As to confidential information, Rule 1.6(a)(2) allows for disclosure that is "impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community." Comment [5] to Rule 1.6 notes, for example, that in some situations, "a disclosure that facilitates a satisfactory conclusion to a matter" may be impliedly authorized. Indeed, we believe that implied authorization will comfortably cover many disclosures that an attorney would contemplate making to a former client's executor. *See* D.C. Opinion 324 (2004) ("In the ordinary case, release of information an executor requests would be authorized under" D.C.'s comparable Rule 1.6); Disciplinary Board of the Hawaii Opinion 38 (1999) (attorney disclosure to executor of former client's estate "is impliedly authorized in order to carry out the representation"); North Carolina Opinion 206 (1995) (a lawyer may reveal a client's confidential information to the personal representative of the client's estate, unless the disclosure would be contrary to the goals of the original representation or would be contrary to the client's instructions to the lawyer).

10. A lawyer in the inquirer's situation needs to consider whether the circumstances meet the standards for implied authorization, taking into account factors including what is known about the deceased client's wishes. For example, disclosure of information pertinent to the settlement of an estate may often be appropriate where the lawyer provided trusts and estates representation to the deceased client and such disclosure would facilitate the client's testamentary disposition in a way that

38 *See, e.g.,* D.C. Opinion 324 (2004); Philadelphia Opinion 2007-6 (following American College of Trust and Estate Counsel commentary on Rule 1.6 that in general, "the lawyer's duty of confidentiality continues after the death of a client"); South Carolina Opinion 05-09 (effect of Rule 1.6 "continues after the representation has ended . . . , and many, if not most, jurisdictions that have issued ethics opinions believe the rule extends after the death of the client"); *cf. Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (recognizing prevailing common-law rule that despite death of a client, material that had been protected by attorney-client privilege remains so unless subject to an exception) (citing cases including *People v. Modzelewski*, 203 A.D.2d 594 (2d Dept. 1994)); *Mayorga v. Tate*, 302 A.D.2d at 11-12 (asserting that "the attorney-client privilege . . . survives the death of the client for whose benefit the privilege exists" and citing cases); *People v. Vespucci*, 745 N.Y.S.2d 391 (Nassau Co. Ct. 2002) (surveying five approaches to issue of whether privilege survives, and finding support in New York law for two of the five approaches, both involving survival of the privilege, when privilege belonged to an deceased individual rather than an "expired corporation").

the client would have favored. *See* D.C. Opinion 324 (disclosure to executor permitted where release of information would further the interests of former client in settling estate).[39]

11. Even where the lawyer prepared the client's will, however, there may be confidential information in the client's file that would not facilitate the settling of the client's estate or for other reasons may not advance the best interests of the client. In that case the material must remain undisclosed. *See* Nassau County 03-4 (2003) (attorney who represented client who died before divorce action was commenced could not provide itemized billing to spouse-executor where information sought would reveal information that client wanted to keep secret); D.C. Opinion 324 (2004) (citing ethics opinions and concluding that an attorney "who reasonably believes that she knows what her client would have wanted, on the basis of either what the client told her or the best available evidence of what the client's instructions would have been, should carry out her client's wishes").

CONCLUSION:

12. When the executrix of an estate seeks files possessed by the decedent's former attorney, the ethical obligations of that attorney turn on the legal rights of the executrix. If the executrix is legally entitled to the same access that the decedent had when alive, then the former attorney should ordinarily provide the executrix access to all the files, except when there is good cause to refuse access to particular materials.

13. If, on the other hand, her status as executrix does not confer on her the same legal right of access as the decedent possessed, then the contents of a deceased client's file will generally not be disclosable to the executrix unless (1) the information disclosed is not "confidential information" or (2) the lawyer has grounds to conclude that release of the information is impliedly authorized under the Rules.

(8-13)

39 If an executor can waive a decedent's attorney-client privilege when it is "in the best interest of the deceased's estate," *Mayorga v. Tate,* 302 A.D.2d 11-12, the applicable waiver analysis in that situation will often be comparable to the analysis employed under the implied authorization doctrine.

OPINION 971 (06/26/2013)

Overrules N.Y. State 524

TOPIC: Solicitation; auction of legal services by charity

DIGEST: Subject to disclosure requirements and limitations, a lawyer may donate legal services to a charitable organization for auction as a fund-raising device.

RULES: 1.1(b), 1.2(c), 1.7, 1.9, 7.1, 7.2(a)

FACTS:

1. In N.Y. State 524 (1980), this Committee concluded that it is improper for a lawyer to donate legal services to a charitable organization for auction as a fund-raising device. The inquirer asks whether this remains the Committee's opinion under the New York Rules of Professional Conduct.

QUESTION:

2. May a lawyer donate legal services to a charitable organization for auction as a fund-raising device?

OPINION:

3. N.Y. State 524 concluded that a lawyer may not donate legal services to a charitable organization for a fund-raising auction. The principal reasoning was as follows:

> [A] lawyer who has committed his services to be auctioned is unable to exercise the professional judgment and discretion that must be brought to bear in deciding to accept a client. The Code specifies a number of factors relating to the client and the legal matter that a lawyer must consider prior to undertaking representation. . . . For example, and most obviously, a lawyer "should accept employment only in matters which he is or intends to become competent to handle." EC 6-1. In the context of a charitable auction, the lawyer has agreed to represent the successful bidder without knowing whether the employment will involve him in a matter beyond his competence.

Additionally, the Committee expressed concern that "[t]he practice of donating legal services to a charitable organization to be auctioned as a fundraising device may also be deemed improper under DR 2-103(B), which prohibits the lawyer from giving anything of value to a third party for recommending or obtaining the lawyer's employment." Finally, the Committee expressed a concern that "the offering of legal services as a fundraising device does not appear to be an appropriate means of publicizing the lawyer whose services are being offered," because the Committee believed that such devices "tend to confuse the process of intelligent selection of counsel with the objectives of the fund-raising organization."

4. Most other ethics committees that considered the question at around the same time reached a similar conclusion. *See, e.g.*, ABA Inf. 1250 (1972) (advertising the auction of the lawyer's services

by a charitable organization would contravene the spirit of the advertising and solicitation rules and be undignified); Kentucky Opinion E-239 (1981) (the auction does not facilitate an informed decision whether to retain the lawyer "but merely forces a particular person(s) to go to a particular lawyer"); New Jersey Opinion 319 (1975) ("this arrangement puts the charity in the position of recommending [the] attorney and then being remunerated by him for the introduction"); San Diego County Opinion 1974-19 (1974) ("An attorney may not offer free legal services to a charitable organization because such would be a solicitation of business."). *But see* California Opinion 1982-65 (auctioning legal services in a charitable fund raiser is not forbidden, and "the benefits that flow from an attorney's donation of legal services" outweigh "the remote likelihood of abuse of fundamental public policies," but the lawyer must comport with limitations established by the advertising, competence and conflict rules).

5. The language of the rules applicable to this inquiry has not meaningfully changed since 1980, when this Committee issued Opinion 524. The restriction on undertaking work for which the lawyer is unqualified is codified in Rule 1.1(b), which generally provides: "A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle . . . ." The earlier solicitation rule against compensating others for recommending the lawyer's services has been carried over into Rule 7.2(a), which provides, subject to exceptions inapplicable here, that: "A lawyer shall not compensate or give anything of value to recommend or obtain employment by a client . . . ."

6. Nonetheless, the courts' approach and, accordingly, this Committee's approach to interpreting rules on lawyers' advertising and solicitation has become less restrictive since 1980, particularly in light of evolving constitutional case law under the First Amendment recognizing the right of lawyers and other professionals to engage in commercial speech.[40] Where once this Committee interpreted advertising and solicitation rules sweepingly to prevent deceit and the other harms against which the rules protect, the Committee now interprets the rules more cautiously. Our objective is to effectuate the rules' language and purpose consistently with the public interest in access to information about lawyers' services, and lawyers' legitimate interest in marketing their services. *See, e.g.*, N.Y. State 897 (2011) (concluding that "[l]awyer may market legal services on a 'deal of the day' or 'group coupon' website provided that the advertising is not misleading or deceptive and makes clear that no lawyer-client relationship will be formed until the lawyer can check for conflicts and competence to provide the services").

7. Since the mid-1980s, perhaps influenced by the courts' evolving approach to lawyers' advertising and solicitation, many more ethics committees have concluded, contrary to Opinion 524, that subject to certain restrictions, lawyers may donate legal services to a charitable organization to be auctioned at a fund-raising promotion. *See, e.g.*, Florida Opinion 86-9 (1987); Hawaii Opinion 31 (1992); Indiana Opinion 4 of 2008 (identifying caveats, including that the lawyer must be competent, avoid conflicts, and ensure that the client is satisfied with the choice of counsel, and that the description of the attorney must not include laudatory remarks or claims of special expertise); Nebraska

40 *See, e.g.*, N.Y. State 933 (2012) (citing, among other sources, *Ibanez v. Florida Dep't of Business and Professional Regulation*, 512 U.S. 136 (1994), which struck down advertising restriction on lawyer-accountant); N.Y. State 757 (2002) (discussing implications of *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), which recognized a lawyer's First Amendment right to state on letterhead "certified civil trial specialist by the National Board of Trial Advocacy"); N.Y. State 637 (1992) (citing, among other cases, *von Wiegen v. Committee on Professional Standards*, 63 N.Y.2d 163, 481 N.Y.S.2d 40 (1984), holding that the blanket prohibition of mail solicitation of accident victims is unconstitutional).

Opinion 06-11 (2007) (rescinding earlier opinion, and reasoning that "the possibility of misleading information being communicated to the bidders could be adequately protected against by the attorney in the wording of the auction item that the services would only be in the lawyer's area of competence, that the attorney retains the right to decline the service for conflicts or other ethical problems in which case the price would be refunded by the attorney, and that communications regarding the auction not be false and misleading"); South Carolina Opinion 91-35 (1991) ("to avoid misleading the recipient of donated services, the donating lawyer must offer the services with certain express qualifications, clarifications, and reservations"). *But see* Nassau County Opinion 97-11 (1998); New Hampshire Opinion 1990-91/2 (1991) (finding that because of ethical concerns, lawyers should not donate their services to a charitable fund raiser even though the rules do not explicitly prohibit doing so); Ohio Opinion 2002-5 (concluding that donating legal services "is a giving of a thing of value which secures employment of the lawyer").

8. For example, Hawaii's ethics committee concluded:

> A lawyer may donate his or her legal services to a charitable cause or nonprofit corporation, to be auctioned to the highest bidder in fund-raising promotions, provided that:
>
> (a) only services for which the lawyer has the requisite competence are donated;
>
> (b) the legal services donated and the identity of the lawyer who will perform the services must be clearly designated at the auction (for example, "preparation of a will by John Doe, Esq.");
>
> (c) the lawyer retains the right to decline his or her provision of the donated services in the event of a conflict of interest or for similar cause, in which event the lawyer must take steps to ensure that any auction bid paid by the prospective client is promptly refunded by the charitable organization, nonprofit corporation, or by the lawyer; and
>
> (d) the lawyer takes steps to ensure that communications or advertisements regarding the auction (i) accurately describe the donated legal services and the identity of the lawyer who will perform the services, and (ii) are not false, fraudulent, misleading or deceptive.

Hawaii Opinion 31 (1992) (original emphasis).

9. Likewise, Florida's ethics committee concluded, among other things, that the lawyer (1) must comply with applicable advertising rules, including by "ensur[ing] that the charitable organization, in publicizing and conducting the auction, does not describe the offered legal service in a false or misleading manner," which the lawyer can accomplish by providing the description and requiring preapproval, and (2) "should have a guarantee from the charitable organization that the successful bidder's money will be refunded on request if the lawyer is prevented by any of the conflict rules from performing the auctioned service for that person." Florida Opinion 86-9 (1987).

10. On reexamining N.Y. State 524, we conclude for the following reasons that, consistent with the language and purposes of the Rules, a lawyer may properly donate legal services to a charitable

organization to be auctioned in exchange for a contribution to the organization. However, limitations and conditions apply, including those identified in the Hawaii and Florida bar opinions noted above.

11. First, as N.Y. State 524 correctly recognized, a lawyer will not necessarily be able to provide the requested legal services to the winner of the auction. A lawyer may not accept a representation that the lawyer cannot perform competently. Rule 1.1(b). Nor may a lawyer accept a representation if it would involve an impermissible conflict of interest. *See, e.g.*, Rules 1.7 and 1.9. In allowing his or her services to be auctioned, the lawyer must ensure that bidders are apprised of these limitations and any other applicable limitations in advance, so that prospective clients are not misled. The lawyer must also ensure that the charitable organization sponsoring the auction will offer to refund the bidder's contribution if for any reason the lawyer ultimately cannot provide the relevant legal services. But the fact that there are limitations does not mean that the lawyer cannot participate at all. *See, e.g.*, N.Y. State 897 (2011), cited above.

12. Second, we conclude on reflection that participating in a charitable fundraising auction does not violate Rule 7.2(a) by giving something of value to the charitable organization for the purpose of having it recommend the lawyer's services. The lawyer's purpose is to assist the organization's charitable fund-raising efforts, not to secure a referral. Indeed, it is fair to assume that lawyers will conclude that they have achieved their primary purpose if the winning bidder simply makes a donation without seeking to take advantage of the lawyer's uncompensated services.

13. Third, we do not believe that a charitable fund-raising auction of the lawyer's services will necessarily undermine the prospective client's ability to make an intelligent selection of counsel. However, the lawyer must ensure that sufficient information is provided, including about the areas of law in which the lawyer practices, to enable prospective bidders intelligently to decide whether to bid on the lawyer's services.

14. Fourth, the lawyer must comply with the advertising rules, as applicable,[41] including Rule 7.1(a)(1), which forbids any "false, deceptive or misleading" statements or claims in advertising the lawyer's services. Therefore, only accurate information about the lawyer should be provided to potential bidders. The scope of the services to be provided should be clearly described, *cf.* Rule 7.1(j), as should the limitations on the lawyer's ability to provide services.

15. Often the auctioned service may be a discrete one, such as the preparation of a simple will. However, if the lawyer were to offer a service of limited scope – e.g., a set number of hours of advice concerning estate planning – the representation would have to comport with Rule 1.2(c). That is, any limitation must be "reasonable under the circumstances," which means that the services may not be too limited to be useful to the client. If the lawyer proposes to donate a limited number of hours of

41 Rule 1.0(a) defines an "advertisement" as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." Promotional material concerning the lawyer's services, and distributed by the organization sponsoring the charitable auction, may constitute an "advertisement" under that definition. Although the lawyer's primary purpose in donating his or her services is not to secure a referral but to make a charitable contribution, the primary purpose of the promotional material describing the lawyer's services may be "for the retention of the lawyer," since that is the incentive that the organization offers to attract bids. And even if such materials are not deemed advertising, provisions in Rule 8.4 indicate that the lawyer should not assist the charitable organization in disseminating false or misleading information.

advice to be auctioned by the charitable organization, but to offer the client foreseeably needed additional services for a fee, the auction materials should indicate that as well.

CONCLUSION:

16. Subject to disclosure requirements and limitations as described in this opinion, a lawyer may donate legal services to a charitable organization for auction as a fund-raising device.

(4-13)

OPINION 972 (06/26/2013)

TOPIC: Listing in social media

DIGEST: Law firm may not list its services under heading of "Specialties" on a social media site, and lawyer may not do so unless certified as a specialist by an appropriate organization or governmental authority.

RULE: 7.4

FACTS:

1. The inquiring lawyer's firm has created a page on LinkedIn, a professional network social media site. A firm that lists itself on the site can, in the "About" segment of the listing, include a section labeled "Specialties." The firm can put items under that label but cannot change the label itself. However, the firm can, in the "About" segment, include other sections entitled "Skills and Expertise," "Overview," "Industry," and "Products & Services."

QUESTION:

2. When a lawyer or law firm provides certain kinds of legal services, and is listed on a social media site that includes a section labeled "Specialties," may the lawyer or law firm use that section to describe the kinds of services provided?

OPINION:

3. The New York Rules of Professional Conduct allow lawyers and law firms to make statements about their areas of practice, but the Rules also limit the wording of such statements:

> A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm *shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law*, except as provided in Rule 7.4(c).

Rule 7.4(a) (emphasis added). The exception in Rule 7.4(c) allows a lawyer to state the fact of certification as a specialist, along with a mandated disclaimer, if the lawyer is certified as a specialist in a particular area by a private organization approved for that purpose by the American Bar Association, or by the authority having jurisdiction over specialization under the laws of another state or territory.[42]

4. A lawyer or law firm listed on a social media site may, under Rule 7.4(a), identify one or more areas of law practice. But to list those areas under a heading of "Specialties" would constitute a claim that the lawyer or law firm "is a specialist or specializes in a particular field of law" and thus, absent certification as provided in Rule 7.4(c), would violate Rule 7.4(a). *See* N.Y. State 559 (1984) (under

42 Also, Rule 7.4(b) allows a lawyer admitted to patent practice before the United States Patent and Trademark Office to use a designation such as "Patent Attorney." This opinion does not address the particular circumstances of such patent attorneys.

the Rule's similar predecessor in Code of Professional Responsibility, it would be improper for lawyer to be listed in law school alumni directory cross-referenced by "legal specialty"). We do not in this opinion address whether the lawyer or law firm could, consistent with Rule 7.4(a), list practice areas under other headings such as "Products & Services" or "Skills and Expertise."

5. If a lawyer has been certified as a specialist in a particular area of law or law practice by an organization or authority as provided in Rule 7.4(c), then the lawyer may so state if the lawyer complies with that Rule's disclaimer provisions, which have undergone recent change.[43] However, Rule 7.4(c) does not provide that a law firm (as opposed to an individual lawyer) may claim recognition or certification as a specialist, and Rule 7.4(a) would therefore prohibit such a claim by a firm.

CONCLUSION:

6. A law firm may not list its services under the heading "Specialties" on a social media site. A lawyer may not list services under that heading unless the lawyer is certified in conformity with the provisions of Rule 7.4(c).

(22-13)

43 In *Hayes v. Grievance Comm. of the Eighth Jud. Dist.*, 672 F. 3d 158 (2d Cir. 2012), the Court struck down two parts of the Rule's required disclaimers. One part was the language that "certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law." Subsequently, by order dated June 25, 2012, the Appellate Divisions deleted that language from the required disclaimers. (The other part of the originally required disclaimers – that a certifying organization is not affiliated with a governmental authority, or alternatively that certification granted by another government is not recognized by any New York governmental authority – remains in place.) The *Hayes* court also held that Rule 7.4's requirement that disclaimers be "prominently made" was unconstitutionally void for vagueness as applied to the plaintiff. In a memorandum dated May 31, 2013, the Unified Court System requested comments from interested persons with respect to defining the term "prominently made." A lawyer asserting a specialty risks violation of Rule 7.4(c) if the social media site does not satisfy the requirement of "prominently" making the required disclaimer. *See* Rule 8.4(a) (violation of Rules "through the acts of another").

OPINION 973 (06/26/2013)

TOPIC: Conflicts in arguing ineffective assistance; imputation of conflicts within legal aid organization

DIGEST: Appellate lawyer in a legal aid organization may not represent a defendant on an appeal that will assert ineffective assistance by trial counsel employed in the same organization unless circumstances allow defendant's waiver of the appellate lawyer's conflict of interest.

RULES: 1.7(a); 1.10(a)

FACTS:

1. The inquirer is a member of the appeals unit of a legal aid organization. A lawyer in the trial unit of the same legal aid organization represented a certain defendant at trial, and the trial resulted in a conviction. The inquirer proposes to prosecute the defendant's criminal appeal even though ineffective assistance of trial counsel will be asserted as a basis of the appeal. It is presupposed that that there is at least a colorable basis for arguing ineffective assistance of counsel, and that such argument will reflect adversely on trial counsel.[44]

QUESTION:

2. May an appellate legal aid attorney prosecute the appeal of a criminal defendant who was represented at trial by another lawyer in the inquirer's legal aid organization, when the appeal will argue that the defendant was denied effective assistance of trial counsel?

OPINION:

3. The touchstones for our analysis are Rules 1.7 and 1.10 of the New York Rules of Professional Conduct. The answer to the inquiry will depend on whether the inquirer, under those Rules, is subject to a "personal-interest" conflict that precludes the inquirer's prosecution of the appeal. The basic standard for personal-interest conflicts is set forth in Rule 1.7(a):

> Except as provided in paragraph (b) [governing waiver], a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

4. On the facts of the inquiry, a personal-interest conflict could arise either directly or by imputation. A conflict could arise directly because the inquirer has an interest in the reputation of the legal aid organization that employs both the inquirer and the inquirer's allegedly ineffective colleague. Moreover, the inquirer presumably has an interest in collegiality within the office, and may not wish to alienate a colleague by attacking his work. The risk of an adverse effect on the inquirer's profes-

44 There may be circumstances in which the assertion of ineffective assistance of trial counsel would not reflect adversely on that counsel. An example might be a case in which trial counsel requests a continuance, claiming that more preparation is needed to represent the defendant effectively, and the judge denies that request. The analysis in this opinion is not intended to address such cases.

sional judgment would be magnified if the inquirer has a friendship or close professional relationship with trial counsel whose work would be criticized on appeal; if trial counsel has a high-level position within the legal aid organization or has a role in evaluating the inquirer's job performance; or if trial counsel had consulted the inquirer for advice during the trial. These kinds of considerations would be factors in applying the Rule 1.7(a)(2) standard directly to the inquirer. More detailed facts would be needed for a definitive application of that standard, but on the facts as presented, it seems not unlikely that a reasonable lawyer would perceive a significant risk that the lawyer's professional judgment on behalf of the appellant would be adversely affected.

5. However, even if the presence of a direct conflict could be denied on some fuller set of facts, there is no question about the existence of an imputed conflict. Clearly if *trial counsel* were prosecuting the appeal, a reasonable lawyer would perceive a significant risk that the lawyer's professional judgment on behalf of the appellant would be adversely affected by the lawyer's interest in his or her own reputation. *See* N.Y. State 533 (1981) ("Where a lawyer, as the basis for an appeal, must attack his own competence as trial counsel there is obviously a personal interest that is fundamentally at odds with the client's right to impartial and zealous representation – and the spectre of malpractice litigation strains such a relationship even further."). Thus it would present a personal-interest conflict for trial counsel to prosecute the appeal by asserting ineffective assistance at the trial level.

6. The inquirer, as a colleague of the trial counsel in the same legal aid organization, is burdened with the same conflict. Rule 1.10(a) provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein." A legal aid office is a "firm" as defined by the Rules.[45] Because the inquirer is associated in the same legal aid organization as the trial counsel whose conflict arises under Rule 1.7, that conflict would be imputed to the inquirer. *See*, *e.g.*, N.Y. State 862 ¶¶ 5-9 (2011); N.Y. State 592 (1988); N.Y. State 533 (1981); N.Y. State 462 (1977).

7. We turn to the question whether these conflicts may be waived by the client's informed consent. Both Rule 1.7(a) and Rule 1.10(d) allow for waiver by consent of the affected client(s) if the conditions of Rule 1.7(b) are met. Of particular relevance in the circumstances under consideration are the first and fourth of the conditions set forth in Rule 1.7(b). The first is that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." Rule 1.7(b)(1). The fourth condition is that "each affected client gives informed consent, confirmed in writing." Rule 1.7(b)(4). Since there is only one client in this case, only he or she is affected and, accordingly, only his or her consent would be required.

8. As noted above, *trial counsel* would have a direct conflict in prosecuting the appeal on the basis of ineffective assistance below, and in our view that conflict would not be readily waivable. Trial counsel's interest in a personal reputation for competence would typically be strong and at sharp odds with the appellate needs of the client. Accordingly, any belief by trial counsel that he or she could provide "competent and diligent representation" would be unlikely to be reasonable. Moreover, for client

45 *See* Rule 1.0(h) (defining "firm" to include "lawyers employed in a qualified legal assistance organization"); Rule 1.0(p) (defining "qualified legal assistance organization" to mean "an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof"); Rule 7.2(b)(1) (expressly listing "a legal aid office" when operated or sponsored by various specified entities).

consent to be informed, trial counsel would need to help the client understand issues surrounding the potential waiver, which would in turn put trial counsel in the further conflicted position of giving advice as to the quality of his or her own legal services at trial and ability to prosecute the appeal effectively. Trial counsel's conflict thus appears nonconsentable.[46]

9. The analysis proceeds differently, however, for the imputed conflict of the inquirer. Only the underlying conflict, and not the nonconsentability of that conflict, is imputed. In other words, whether the inquirer's imputed conflict is waivable is to be judged from the position of the inquirer, and not from the position of the trial counsel whose conflict gave rise to the imputation. *See* N.Y. State 968 ¶¶ 25-26 (2013). And because consentability of the imputed conflict is judged from the position of the inquirer, the analysis for the imputed conflict is the same as it would be for waivability of any direct conflict that may apply to the inquirer.

10. Thus, although trial counsel's conflict appears nonconsentable, there may be a greater prospect that the inquirer's conflict could be waived. The kinds of considerations that could interfere with the inquirer's professional judgment, see paragraph 4 above, may well be less distortive than those applicable to trial counsel. Just as they would be less sure to create a conflict in the first place, they would also, in the event of a conflict, tend to be more allowing of a reasonable belief in an ability to give the client competent and diligent representation. And the inquirer would be in a better position than trial counsel to provide the client with fair and complete advice as needed for any properly informed consent.

11. To say that the imputed conflict might be waivable, however, is not to say that waivability would be inevitable or even common. We note a few considerations bearing on this question. First, it requires a detailed factual analysis. We again refer to the kinds of considerations that factor into the existence of a conflict, see paragraph 4 above, because they also factor into consentability.

12. Second, there may be a widespread perception that waiver of such conflicts is typically inappropriate. Standards promulgated by the National Legal Aid and Defender Association, while not controlling, seem to reflect such a view. Those standards adopt a per se approach to the existence of a conflict:

> Each office shall have a written definition of situations which constitute a conflict of interest. . . . Those situations shall include . . .
>
> > b. When the defendant was represented by the trial division of that same defender agency and it is asserted by the client or appears arguable to the appellate attorney that trial counsel provided ineffective representation . . . .[47]

46 *Cf.* N.Y. State 865 (2011) (to permit lawyer who planned estate to undertake representation of executor with colorable malpractice claim would put place lawyer in "manifestly untenable position of having to counsel the executor on whether to sue himself (the lawyer)," and thus lawyer could not reasonably believe that the lawyer could provide competent and diligent representation to executor, and conflict would be unwaivable).

47 Nat'l Legal Aid and Defender Ass'n, *Standards and Evaluation Design for Appellate Defender Offices, II. Criteria for Assuring the Efficiency of the Legal Representation, E. Procedures for Handling Conflict of Interest Cases,* ¶1 (1980), found at http://www.nlada.org/Defender/Defender_Standards/Standards_For_Appellate_Defender_Offices?printable=yes

Furthermore, the standards could be taken to reflect a view that the conflict is unwaivable.[48] *See also* N.Y. State 533 (1981) (decided under Code of Professional Responsibility, and on similar facts finding preclusive conflict without discussing possibility of waiver).

13. Third, even if the inquirer deems the conflict waivable, the requirement of informed consent requires particular care in the context of a defendant whose alternatives to assigned appellate counsel may be limited.[49] We also note, without opining on, potential constitutional implications under the Sixth Amendment of the United States Constitution. *See* N.Y. State 605 (1989) (citing *Wheat* v. *United States*, 486 U.S. 153 (1988)).

CONCLUSION:

14. An appellate lawyer in a legal aid organization needs to consider conflicts of interest before undertaking to represent a defendant on an appeal that asserts ineffective assistance by trial counsel employed in the same organization. The pursuit of appellate claims that would reflect adversely on a colleague in the same organization would give rise to a personal-interest conflict at least by imputation and perhaps directly as well. The appellate lawyer may undertake the representation only when the circumstances allow, and the defendant makes, an effective waiver of the appellate lawyer's conflict.

(52-12)

Modifies N.Y. State 576 (1986)

48 *Id*. ¶ 1 (written definition to include conflicts "requiring the assignment of outside counsel"), ¶2 ("If a conflict of interest exists, it exists for the entire office, and assigning the case to another attorney within that entire agency will not cure the conflict.") & ¶3 ("As soon as a case is identified as meeting the definition of 'conflict of interest case' the case shall be immediately identified and assigned to counsel outside the defender office.").

49 The fact that appellant has been assigned counsel is not preclusive of voluntary consent, but the appellant's ability to exercise choice is among the factors to be taken into account. *See* N.Y. State 811 (2007) (citing N.Y. State 800 (2006) and N.Y. State 490 (1978)).

OPINION 974 (07/19/2013)

TOPIC: Lawyers as title insurance agents; reduction of legal fees; illegal fee arrangements; excessive fees

DIGEST: When the circumstances make it ethically permissible for a lawyer to represent a party in a real estate transaction and also receive payment to act as agent of a title abstract company, the lawyer must consider any relevant legal restrictions before reducing the legal fee to the transaction party. Reasonableness of legal fees must be determined under Rule 1.5(a) in light of all the facts and circumstances, and overlap in the services provided to the transaction party and the company does not automatically render fees excessive.

RULES: Rule 1.5(a)

FACTS:

1. The inquirer represents parties in real estate transactions. He sometimes has occasion to act also as a title insurance agent in those transactions, performing services for, and receiving payment from, a title abstract company.

2. There have been numerous ethics opinions relating to attorneys who also act as title insurance agents in real estate transactions, and the inquirer asks about the continuing validity of those opinions. He says that "a more recent Insurance Department Opinion, as well as the promulgation of a Model Title Insurance Disclosure Form by the Real Property Section of the New York State Bar Association has reintroduced confusion to the issue . . . ."

3. The inquirer, claiming a conflict between our prior opinions and the opinion of the Insurance Department, asks that we clarify the matter generally, and asks two questions in particular.

QUESTIONS:

4. May a lawyer who represents a party in a real estate transaction, and also acts as a title insurance agent, reduce the legal fee when the client uses that attorney's title agency to obtain insurance?

5. If not, will disclosure and the use of the Model Title Insurance Disclosure Form cure the problem?

OPINION:

6. This Committee has issued several opinions discussing circumstances in which lawyers connected to a title abstract company in a real estate transaction – by serving as its agent or having an ownership interest in the company – may also represent a party in the transaction.

7. In N.Y. State 351 (1974), we concluded that when the lawyer serves as agent for the title abstract company, the lawyer may also represent a party to the transaction,

> "provided it is clear that there is no conflict of interest between the client and the title company, that both parties consent after the attorney makes full disclosure to both, and

> his client is either given credit for the amount of any fees paid to the attorney by the title company or the client expressly consents to the retention of such fee."

This analysis was amplified in N.Y. State 576 (1986), which among other things indicated that particular conflicts between representing a party and acting as agent for the title abstract company may or may not be consentable, *id*. n.5; *see* N.Y. State 631 (1992). We have reached a more restrictive result when the lawyer has an ownership interest in the abstract company.[50] The current inquiry, however, does not present the circumstance of ownership.

8. Two other aspects of N.Y. State 576 are relevant here. First, we reaffirmed our view that, absent client consent, the lawyer should credit the client with any savings realized from the title company:

> "[I]f a lawyer has a relationship with one or more title insurance companies that enables the lawyer to achieve a reduction in total cost to the client for the appropriate legal services and any title insurance requested, while providing a reasonable fee to the lawyer and doing so without violating any legal or ethical constraint, we believe that the lawyer has a duty to afford the client the opportunity to realize the savings."

N.Y. State 576 (1986) (citations omitted).

9. Second, N.Y. State 576 went beyond the principle that a lawyer may not receive fees from the title abstract company unless there is disclosure and client consent. It held that overlap of services to the client and the title abstract company would result in an excessive and therefore impermissible fee:

> "Moreover, even with client consent, the lawyer is not entitled to receive amounts from the transaction that would in the aggregate constitute an excessive fee. DR 2-106(A). To the extent that the services for which the title insurance company is paying are duplicative of services the lawyer would render the client in any event, we believe that compensation to the lawyer from both for those same services would constitute an excessive fee."

We have since reiterated this principle. *See* N.Y. State 626 n.1 (1992).

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50 In particular, we have found that an ownership interest makes certain conflicts nonconsentable:

> "With respect to abstract title companies, in N.Y. State 595 (1988), N.Y. State 621 (1991) [with four members of the Committee dissenting], and N.Y. State 738 (2001), we held that a lawyer could, with consent after disclosure, refer real estate clients to a title abstract company in which the lawyer or his or her spouse had an ownership interest 'for purely ministerial abstract work,' but not where the abstract company provided the additional service of preparing a title report or serving as an agent for the title underwriter. The central rationale was that if the abstract company prepared a report showing exceptions in title and recommending whether a title insurance policy should be issued, the law firm for the party would be required 'to negotiate these issues . . . with itself.' N.Y. State 738 (2001). *See also* N.Y. State 731 (2000) (lawyer cannot pay employees to refer clients to lawyer-owned title company for non-ministerial tasks)."

N.Y. State 753 (2002). Those opinions were decided under the Code of Professional Responsibility, but we have reached the same conclusion under the Rules of Professional Conduct. *See* N.Y. State 891 (2011).

10. We were clear in prior opinions that our analyses addressed only ethical considerations, and not whether any legal rules would prohibit the various fee arrangements discussed.[51] Indeed, we recognized that actual fact patterns might well raise substantial legal issues.[52]

11. As noted by the inquirer, the Real Property Law Section of the New York State Bar Association has published an article including a "Model Title Insurance Disclosure Form." *See* NYSBA, "Title Insurance: Disclosure to and Consent by Client," 37 N.Y. Real Prop. L.J. 42 (Winter 2009). The model form was intended to "represent a good-faith effort on the part of [an ad hoc subcommittee] to draft a form that complies with the various ethics opinions issued by the Committee on Ethics of the New York State Bar Association." The article cited ten relevant opinions of this Committee and urged attorneys to be familiar with them. *Id*. at 42-43.

12. The Model Title Insurance Disclosure Form contains various disclosures relating to the cost of title insurance and to the attorney's relationship to the title insurance company. The form then states:

> "Our code of ethics prohibits us from being compensated twice for the same services if there is any duplication of services in the work we do for you and the title insurance company. Therefore, to the extent that there is any duplication of services, we are required to reduce our legal fee by the amount attributable to the same services for which we are also being compensated by the title insurance company. This reduction will be reflected as a credit on your statement for legal services rendered."

37 N.Y. Real Property L.J. at 43. This language was seemingly included to reflect what we have said in some of our prior opinions as cited above.

13. The article containing the model form included two caveats. First, it made clear that the model form may need to be revised "as may be appropriate for each transaction," *id*. at 42, which is an important caution given the variety of permutations, and resulting ethical implications, that can

51 *See*, *e.g.*, N.Y. State 667 (1994) (declining to opine whether proposed arrangement would violate any law such as RESPA prohibition on "kickbacks" and "unearned fees"); N.Y. State 626 n.1 (1992) (noting that "the Committee does not pass upon questions of law, and therefore we do not address any issues that might be raised by such circumstances under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, et seq., the New York Insurance Law, § 6409(d), or any other legal provision"); N.Y. State 595 (1998); N.Y. State 576 (1986) (expressing "no opinion on whether the division of premiums with an attorney acting as agent for the title insurer is in whole or in part an impermissible subterfuge or whether such a division otherwise violates either or both" of RESPA and Insurance Law §6409(d)).

52 For example, we assumed for purposes of one opinion that it is unlawful "for the lawyer to receive any compensation from the title insurer except for services rendered." In the same opinion, we considered various fee arrangements and said it seemed "apparent that at least some of the differences constitute an inducement to 'get the business' and not a real and substantial difference in legal services provided. . . . If the representation is one in which the client pays more under one arrangement than under another for the same services and the same title insurance, it is difficult to escape the conclusion that the difference is for originating business." N.Y. State 576.

arise.[53] Second, the article and the model form – like our opinions – were addressed to ethical issues rather than legal ones.[54]

14. As noted by the inquirer, one such legal issue was addressed by a New York State agency with responsibility for this area. In July 2009, the Office of the General Counsel of the New York State Insurance Department (which has since been incorporated into the newer Department of Financial Services) issued an opinion to the effect that "[a]n attorney who is also a title agent may not lawfully charge an applicant for title insurance a reduced legal fee as an inducement to use the attorney's title agency to obtain insurance, because such an inducement would violate N.Y. Ins. Law § 6409(d) . . . ." After quoting from the relevant statute, the opinion concludes:

> "Providing reduced legal fees to title insurance applicants who use the attorney's title agency to obtain insurance constitutes the giving by the agent/attorney of 'consideration or valuable thing as an inducement for . . . title insurance business,' in violation of Insurance Law § 6409(d). In addition, such fee reduction constitutes a special benefit not afforded to other applicants who choose not to obtain title insurance from that attorney's title agency. See Circular Letter No. 9 (2009)."

OGC Op. No. 09-07-08 (available at http://www.dfs.ny.gov/insurance/ogco2009/rg090708.htm).

15. The Committee, as noted above, opines as to ethical issues but not legal ones. We do not address the legal issues raised in Opinion 09-07-08, nor do we opine as to the opinion's soundness. But that is not to say that the opinion would be irrelevant to a lawyer considering ethical responsibilities in this area.

16. A lawyer considering payment arrangements in this area must take into account Insurance Law § 6409(d) and other relevant statutes, not only because they determine legal obligations, but also because they provide a backdrop against which ethical obligations must be assessed. *See* N.Y. State 576 (1986) (asserting duty to offer savings to client if lawyer can do so "without violating any legal or ethical constraint"); Rule 1.2(d) of the New York Rules of Professional Conduct (the "Rules") (prohibition of counseling or assisting a client to engage in conduct that the lawyer knows is illegal or fraudulent); Rule 8.4 (b) (prohibition of engaging in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer). In assessing the import of such statutes, a lawyer should, of course, consider all relevant materials, including agency materials such as Opinion 09-07-08. If that opinion is sound, it states a significant legal constraint for the lawyer to take into account.

53 For example, the same section of the form refers both to ministerial services (*e.g.*, "examining the title") and those that require the exercise of professional judgment (*e.g.*, "clearing underwriting objections"), a distinction that is significant under our prior opinions. *See*, *e.g.*, N.Y. State 753 (2002) (quoted in n.1 *supra*). Similarly, while the form does not distinguish between agencies that are owned by lawyers and those that are not, we have previously determined that, regardless of the client's informed consent, "[a] lawyer who owns a title abstract company and a mortgage brokerage is barred from acting as a lawyer in a transaction in which one or both of those companies is also acting in a variety of situations in which the lawyer's personal interest in a fee (or dividend) from the ancillary businesses compromises the independence of the lawyer's legal advice." *Id.*

54 "We note, however, that we do not examine what legal duties and restrictions are imposed upon an attorney/title agent. An attorney/agent should well consider the statutory restrictions and limitations of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 et seq. and Section 6409 of the New York Insurance Law before undertaking an attorney/agency relationship with a client." 37 N.Y. Real Prop. L.J. at 43.

17. If a lawyer determines that a particular fee arrangement is permitted by Insurance Law §6409(d) and other relevant statutes, there is still a question whether further restrictions may be imposed by the rules of legal ethics. We now turn to that topic. We will set forth reasons leading us to reexamine our earlier assumptions and reasoning with regard to excessiveness of aggregate fees in this situation. Based on that reexamination, we reach a conclusion on this point different from that of N.Y. State 576.

18. Although the ethics opinions previously cited were decided under the former Code of Professional Responsibility, its replacement by the Rules of Professional Conduct in April 2009 did not change the operative principles applied in those opinions. *Compare* DRs 1-106 (responsibility for non-legal services), 2-106 (fees), 5-101(A) (personal conflicts) and 5-105 (conflicts in multiple representation) *with* Rules 5.7, 1.5(a) and 1.7. Thus it is not the change from the Code to the Rules that leads us to reconsider N.Y. State 576.

19. We are mindful of the extent to which conditions in the residential real estate market, as well as the practices of those serving that market, have changed since Opinion 576 was issued. Looking back 25 years, we recall a time when many attorneys, particularly in upstate New York, did their own title searching and certified the property's title for their clients. Then, the use of title insurance was quite unusual. Today, nearly every transaction involves the use of title insurance. As the use of title insurance has become the norm, the respective responsibilities of the lawyer, examiner and insurer have become more pronounced even while the potential for duplication of effort has increased. Thus, the same time and effort may be expended from quite different perspectives to satisfy manifestly distinct responsibilities and professional obligations.

20. Further, fee structures for residential closings have changed. In years past, it was fairly common to see residential closings billed as a percentage of the purchase price or on the basis of the time expended. Today, lawyers are far more likely to bill as a flat fee, and it would seem difficult if not impossible to identify which part of a flat legal fee should be attributed to arguably duplicative work.

21. With these changes in mind, we consider Rule 1.5(a), which sets forth the ethical standard governing the size of legal fees:

> "A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:
>
> > "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> >
> > "(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> >
> > "(3) the fee customarily charged in the locality for similar legal services;
> >
> > "(4) the amount involved and the results obtained;

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

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

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

"(8) whether the fee is fixed or contingent."

22. We understand the facts of the inquiry to be that the lawyer performs services for both the transaction party and the title abstract company, and that the payment from the title abstract company is for services provided to it.[55] The Rule 1.5(a) standard is to be applied to the legal fee from the transaction party, and that legal fee does not include the amounts earned by the lawyer for services to the title abstract company.[56]

23. As noted, one of our conclusions in N.Y. State 576 was that the fee to the transaction party is excessive to the extent that the services for which the title abstract company is paying are duplicative of services the lawyer would render the transaction party client in any event. We now modify that conclusion. We do not see anything in Rule 1.5 to suggest that the receipt of a payment from the title abstract company, and some overlap in the work, *necessarily* renders excessive the fee charged to the transaction party.

24. Although there may be some overlap, we have already noted that the work for the two parties may be done to satisfy distinct responsibilities and professional obligations. Moreover, the listed factors listed in Rule 1.5(a) do not seem to rule out the legitimate possibility of payment from both parties despite overlapping services. Indeed, in certain circumstances, some of them could support that possibility. For example, if the fee to the transaction party were small when judged by the time spent on the matter by the attorney, and when judged by the customary charge in the locality, then that fee may well not be excessive even though the attorney also receives a payment from the title abstract company. *See* Rule 1.5(a)(1), (a)(3).

25. To be sure, overlap in the work for two parties can be relevant. The reasonableness of a fee depends in part on the time and labor required. When services to be provided to two parties require some of the same work, the time and labor required to provide services to one or both may be

55 Our prior opinions have assumed as much. One stated that there would be a clear violation of law (and ethics) when an attorney-agent "performs no significant additional services in return for his portion of the premium," and accordingly analyzed the ethical issues "on the assumption that the lawyer actually renders services to the title insurer and receives payment from the title insurer solely for such services." N.Y. State 576, *supra.*

56 N.Y. State 576 said that in the context of overlapping work for the transaction party and the title company, the lawyer may not receive amounts "from the transaction" that would "in the aggregate" constitute an excessive fee. In other words, the lawyer would add the amounts received from the transaction party and the title abstract company in determining whether the total fees were excessive. *See also* N.Y. State 667 (1994). However, the differing responsibilities and professional obligations undertaken lead us to analyze the reasonableness of the fee from the transaction party on its own, rather than as aggregated with the payment from the title abstract company. Of course if the lawyer serving as title insurance agent also provides legal services to the company, then the fee for those services would also be subject to Rule 1.5(a). *See* N.Y. State 576 (reviewing various bundles of services that lawyers sometimes provide to title companies). And if the lawyer's "nonlegal services" to the company were "not distinct" from the legal services, then the nonlegal services would be subject to Rule 5.7(a)(1) and the Rules generally, and the lawyer's total compensation from the company would be subject to Rule 1.5(a). *See* N.Y. State 958 ¶14 (2013).

reduced. But that factor would be taken into account on a case-by-case basis under Rule 1.5(a), rather than standing as an irrebuttable presumption of excessiveness.

26. In one circumstance there will be a brighter line. When the lawyer and client have agreed that legal work will be charged on an hourly basis, then the lawyer may charge only for the hours actually expended, and charging for hours separately billed to another party is impermissible. *See* ABA 93-379. Even in the context of hourly rates, however, it may be permissible to receive payment from each despite some overlap in the work, as long as the same hours are not billed to two different parties.

27. Thus, when the proper standard is applied, it is not impermissible *per se* for the lawyer to be paid by the transaction party and the title abstract company for partially duplicative services. Unless a reasonable lawyer, having reviewed the degree of overlap, the billing arrangements, locally customary fees and other relevant facts, would be left with a definite and firm conviction that any legal fees to the transaction party are excessive, then those fees may be charged consistently with Rule 1.5(a).[57]

CONCLUSION:

28. A lawyer who represents a party in a real estate transaction and also receives payment to act as an agent of the title abstract company in that transaction may not receive an excessive legal fee from the transaction party. Overlap between work performed for the transaction party and the company does not automatically render that fee excessive, and the lawyer should apply the standards of Rule 1.5(a) to determine the fee's reasonableness. Depending on all the circumstances, the lawyer's fee may be reasonable even if there is some duplication in the services provided.

29. A lawyer receiving payment for acting as agent to a title abstract company should consider any relevant legal restrictions before determining that it is permissible to make corresponding reductions in legal fees to the party to the transaction who is represented by that lawyer, with or without disclosures such as those reflected in the "Model Title Insurance Form." The Committee does not opine as to such legal questions, but their resolution may inform the lawyer's ethical obligations.

(2-12)

57 We leave for another day the question of the extent to which the lawyer must offer the client a credit for the amounts received from the title insurer. *See* N.Y. State 351 (1974) (identifying a requirement that when the attorney is paid by both parties, "his client is either given credit for the amount of any fees paid to the attorney by the title company or the client expressly consents to the retention of such fee"). As noted above, in N.Y. State 576, we treated this requirement as an aspect of the lawyer's fiduciary obligation to obtain the best deal possible for the client. But the conclusion that the lawyer is taking on additional responsibility in performing services for the title company suggests that that lawyer might be entitled to keep some or all of what he or she earns from the title insurer, because it compensates the lawyer for that undertaking. Our prior opinions state that the lawyer must obtain informed consent in all such cases, and Rule 1.8(f) requires a lawyer to obtain the client's informed consent in order to "accept . . . anything of value related to the lawyer's representation of the client." We do not today address the precise scope of that consent or what must be disclosed to obtain it. The current opinion is about whether, upon whatever informed consent is needed, it can ever be ethically permissible for the lawyer to retain payment from a title insurance company for overlapping services.

OPINION 975 (07/19/2013)

TOPIC: Imputation of conflicts among part-time, independently operating members of Public Defender Office

DIGEST: A county Public Defender Office is a firm for imputation purposes even if its lawyers work independently. A lawyer in such an office who is a part-time Assistant Public Defender in Family Court would be subject to an imputed conflict when another Assistant Public Defender has a conflict under Rule 1.7, 1.8 or 1.9. The lawyer could not appear in such matters unless the imputed conflict were waivable and properly waived, and the availability of waiver may be limited by various circumstances.

RULES: 1.0(h); 1.7; 1.10 (a), (d)

FACTS:

1. Inquiring counsel has been offered a position as a part-time Assistant Public Defender in a small upstate county to practice in Family Court. The Public Defender's office has three part-time criminal public defenders and two part-time Family Court public defenders. There is an attorney who as Public Defender is the administrator and maintains an office for himself and a secretary. All the Assistant Public Defenders maintain their own private offices. There is no overlap in the case assignments of the two kinds of Assistant Public Defender: the criminal Assistant Public Defenders do all the office's criminal work, and they do not appear in Family Court.

2. The Family Court public defenders each have a private practice. They do not share files with each other, either at the Public Defender's Office or in their separate private practices. One of them appears in Family Court on Monday, Wednesday and Friday, and the other appears in court on Tuesday and Thursday.

QUESTIONS:

3. If inquiring counsel accepts a position as part-time Assistant Public Defender practicing in Family Court, then may inquiring counsel appear in Family Court in the following situations?

   A. As the "conflict" Assistant Public Defender on cases in which the first (*i.e.*, the other) Assistant Public Defender has a conflict of interest;

   B. Appearing "against the first Assistant Public Defender" by representing the "opposing party" either (i) as an Assistant Public Defender or (ii) as retained (*i.e.*, private) counsel; or

   C. As an Attorney for the Child in matters in which another Assistant Public Defender appears.

4. If inquiring counsel accepts a position as part-time Assistant Public Defender practicing in Family Court, then may inquiring counsel accept assignments under County Law article 18-B to represent criminal defendants in the same county?

OPINION:

5. Counties in New York are authorized by statute to create an Office of Public Defender, or to contract with another county's Office of Public Defender. County Law §716 *et seq.* Public defenders represent not only indigent criminal defendants, County Law §717(1), but also persons in Family Court or Surrogates Court who are entitled to counsel but financially unable to obtain such counsel,[58] which can include persons in numerous kinds of Family Court proceedings.[59]

6. Answers to the various parts of the inquiry will depend on whether certain conflicts of interest would be imputed to the inquiring lawyer. The New York Rules of Professional Conduct provide: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 ["Conflict of Interest: Current Clients"], 1.8 ["Current Clients: Specific Conflict of Interest Rules"] or 1.9 ["Duties to Former Clients"], except as otherwise provided therein." Rule 1.10(a).

7. A public defender's office is a "firm" as defined in the Rules.[60] Accordingly, our prior opinions make clear that when one lawyer in a public defender's office has a conflict based on Rule 1.7, 1.8 or 1.9, that conflict is imputed to other lawyers in the same public defender's office. *See* N.Y. State 941 ¶14 (2012); N.Y. State 862 ¶¶ 5-9 (2011); *cf.* N.Y. State 973 (2013) ¶6 (2013) (legal aid office). This remains the rule even when the assistant public defenders work on a part-time basis, and even when the lawyers concerned work in different divisions of the office. N.Y. State 862 ¶8 (the phrase "associated" in Rule 1.10(a) "includes part-time attorneys as well as full-time attorneys," and "fact that the inquirer appears as a Public Defender only in Family Court rather than in the Criminal Courts does not change the result"; inquirer is still "associated" with the disqualified Assistant in same firm "even though his area of practice is different," because "Rule 1.10(a) imputes conflicts to all lawyers in a firm, in all practice areas, not just to lawyers in the same department or practice area").

8. The inquirer notes that – unlike in some public defenders' offices – the Assistant Public Defenders in the inquirer's small upstate county maintain their own private offices, without working in any common locations, and they do not share their Public Defender files with each other. In some respects, therefore, the inquirer's prospective office is similar to the kind of lawyer panel we addressed in N.Y. State 914 (2012). That opinion concerned a panel of lawyers established to provide

58 "The public defender shall also represent, without charge, in a proceeding in family court or surrogate's court in the county or counties where such public defender serves, any person entitled to counsel pursuant to [certain statutes], who is financially unable to obtain counsel. When representing such person, the public defender shall counsel and represent him at every stage of the proceedings, shall initiate such proceedings as in the judgment of the public defender are necessary to protect the rights of such person, and may prosecute any appeal when, in his judgment the facts and circumstances warrant such appeal." County Law §701(2).

59 The Public Defender represents, among others, persons entitled to counsel under Family Court Act §262, which includes parties in a "child protective proceeding (child neglect or abuse, termination of parental rights, and Article 10-A permanency hearings), the petitioner and the respondent in a family offense case, the parents involved in a custody proceeding, the respondent in a paternity case, the parent who opposes adoption in an adoption proceeding, and any person who faces possible incarceration for contempt of court," as well as "foster parents or other persons having physical or legal custody of the child in a child protective proceeding, and non-custodial parents or grandparents who receive notice pursuant to Social Services Law Section 384-a(2)." Merril Sobie, Practice Commentaries, New York Family Court Act §262 (McKinney's) (citations omitted).

60 *See* Rule 1.0(h) ("firm" includes "lawyers employed in a qualified legal assistance organization"); Rule 1.0(p) (''Qualified legal assistance organization' means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof."); Rule 7.2(b)(1)(iii) (applying to "a legal aid or public defender office . . . operated or sponsored by a governmental agency").

legal assistance to indigent clients when the Legal Aid Society has a conflict. The panel members did not work out of or store active files at a common location, did not have a common supervisor, and did not share client confidential information with the Legal Aid Society lawyers. We concluded that when members of that conflicts panel "act as independent counsel to their assigned indigents," they are not members of the same firm for imputation purposes. *Id.* ¶ 10.

9. The question that this Committee confronts, then, is whether the similarities of this small upstate Public Defender's Office to the legal aid conflicts panel are sufficient to remove this particular office from the rule articulated in N.Y. State 862, and instead bring it within the rule articulated in N.Y. State 914. In the Committee's opinion they are not, and the rule stated in N.Y. State 862 therefore applies.

10. While it is relevant that in actual practice the Assistants work independently, that factor is outweighed by others. The structure of the office and the central role of the Public Defender are prescribed by statutory provisions.[61] There is a single attorney who is the Public Defender and who is publicly listed with that title. The other attorneys in the office serve as Assistant Public Defenders and are publicly identified as such. The Public Defender appoints those assistants, and fixes their compensation, subject to authorization by the board of supervisors. It is the Public Defender who is statutorily charged with representing clients of the office. *See* County Law §701(2) (quoted in footnote 58 above). We accept the inquirer's representation that the defenders typically do not share assignments or files, but they could, consistent with the underlying statutory provisions, sometimes work together collaboratively.[62]

11. Taking into account all the circumstances, we do not believe that the similarities between the inquirer's prospective Public Defender's Office and a legal aid conflicts panel, or anything in N.Y. State 914, would take this office out of the usual rule that applies to public defenders' offices. The result could be different if the defenders were organized with a different structure, more like the legal aid conflicts panel considered in N.Y. State 914. *See*, *e.g.*, County Law §722(3)(a)(i) (counties required to adopt a plan for provision of counsel that may, as alternative to using a public defender, use a plan of a local bar association whereby "the services of private counsel are rotated and coordinated by an administrator"). But a Public Defender's Office like the one in the inquiry, organized in the manner prescribed by County Law §716, constitutes a firm within which conflicts are subject to imputation under Rule 1.10(a). In light of that principle, we address the four situations posed by the inquirer.

61 "The board or boards of supervisors may designate an attorney-at-law as public defender and shall fix his term and compensation. Subject to the approval of such board or boards, the public defender may appoint as many assistant attorneys, clerks, investigators, stenographers and other employees as he may deem necessary and as shall be authorized by such board or boards. The public defender shall fix the compensation of such aides and assistants within the amounts such board or boards may appropriate for such purposes." County Law §716.

62 For example, while Assistants are normally assigned to appear in court only on different days, if one gets sick, has a vacation scheduled, or otherwise cannot go to court one day, then it would be possible for another Assistant Public Defender to cover the court appearance. Similarly, whether or not routine, the statutory basis of the office would allow the Assistant Public Defenders to have conferences, or informally call one another to discuss issues they are confronting, as a mutual resource network. Presumably, all cases taken in would be included in the Public Defender's conflict checking system.

Appearance in Family Court as a "Conflict" Assistant Public Defender

12. We address first the inquirer's question whether it would be permissible to serve as a "conflict" Assistant Public Defender who would be assigned to handle cases in which the other Family Court Assistant Public Defender has a conflict of interest. If the other Assistant's conflict is based on Rule 1.7, 1.8 or 1.9, then for reasons discussed above, none of the other lawyers of the Public Defender's Office may "knowingly" represent the client who cannot be represented by the other Assistant.[63] The inquiring lawyer's knowledge of the conflict would be implicit in service as a "conflict" defender.

13. Thus when the other Family Court Assistant Public Defender has a conflict under Rule 1.7, 1.8 or 1.9, the conflict would be imputed to the inquiring lawyer, and the inquiring lawyer could serve as "conflict" defender only if the imputed conflict were properly waived. Rule 1.10(d) provides that imputed disqualifications may be waived by the affected client under the conditions stated in Rule 1.7. Even if the *other* Assistant's conflict is unwaivable under Rule 1.7(b), the *imputed* conflict may still be waived if the necessary conditions of waiver are satisfied as to the "conflict" defender. *See* N.Y. State 968 ¶¶ 25-26 (2013).

Appearance in Family Court against another Assistant Public Defender

14. The inquirer next asks whether it is permissible to appear "against" the other Family Court Assistant Public Defender on behalf of the party "opposing" that other Assistant Public Defender's client, either when inquiring counsel is acting as an Assistant Public Defender or as retained (private) counsel. Such a situation might happen, for example, when one parent opposes another parent in a litigated matter.

15. These two situations by their terms presuppose that the inquiring lawyer and the other Family Court Assistant Public Defender would be representing "differing interests" as defined by Rule 1.0(f). That in turn means that under Rule 1.7(a)(1), a single Assistant Public Defender proposing to represent both parties would have a conflict of interest. Rule 1.10(a) would impute that conflict to other Assistant Public Defenders for reasons discussed above.

16. Moreover, the inquiring lawyer would be subject to the imputed conflict whether acting as Assistant Public Defender or as retained counsel, because the inquiring lawyer remains "associated" with the Public Defender's Office even when not acting in that capacity.[64] A part-time Assistant Public Defender thus does not escape imputation when representing a client in the role of private practitioner. The inquiring lawyer could not appear in either capacity unless the conflict imputed to the inquiring lawyer were waivable and waived under the conditions stated in Rule 1.7(b).

63 Conflicts based on Rules other than 1.7, 1.8 or 1.9 are not imputed by the terms of Rule 1.10(a), although service as a "conflict" defender in such cases may require the inquiring lawyer to consider other provisions. *See*, *e.g.*, Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 532, 578 (2013 ed.) (discussing other Rules that "carry their own imputation provisions"); *id*. at 578 (pointing out that even when one lawyer has a kind of conflict not imputed to associated lawyers, an associated lawyer could still be subject to a direct conflict such as one based on personal interest); N.Y. State 890 (2011) (conflicts under Rule 1.10(h), relating to family members, are not "automatically" imputed to other lawyers in the firm, "but imputation may arise in the particular circumstances of any given case").

64 *See* N.Y. State 862 (2011) (imputation of an assistant public defender's conflict to another assistant public defender "in his private practice"); *cf*. N.Y. State 793 ¶15 & n.7 (citing authority for rule that where lawyer is of counsel to two firms, the firms are treated as one for conflicts purposes, so that conflict arising in one firm is imputed to lawyers in the other firm).

17. Such a conflict may well be unwaivable, especially since it involves two members of the same firm appearing for adverse parties in the same litigation.[65] In our view, however, that posture does not mean that the conflict is necessarily unwaivable in every circumstance. There is a *per se* rule that the conflict may not be waived for a *single* lawyer who represents both sides.[66] But as noted in paragraph 13 above, such unwaivability is not imputed by Rule 1.10(a). *See* N.Y. State 968 ¶¶ 25-26 (2013). Whether such an *imputed* conflict is waivable may require consideration of the interests not just of the opposing clients but also of the public and the judiciary, see *id*. ¶28, but we cannot say categorically that such a conflict is never waivable in any set of circumstances.

18. The conflict will not be waivable, however, unless the lawyers on both sides of the litigation (here, the inquiring lawyer and the other Assistant Public Defender) each reasonably believe that they can "provide competent and diligent representation" to their respective clients. Rule 1.7(b)(1). If the lawyers work in separate offices rather than in a common location, have little interaction, and do not share files, it may be more likely that both lawyers could reasonably form that belief. But each such conflict would have to be evaluated on its own facts and circumstances.

Appearance in Family Court as Attorney for the Child when another public defender also appears

19. The inquirer has also asked about the propriety of appearing as an attorney for a child concerned in a Family Court proceeding when another Assistant Public Defender is appearing for a party in such proceeding. Private attorneys may be appointed as attorneys for children,[67] and appointment is available in a wide variety of circumstances, *see* Family Court Act §249 (listing specific circumstances and providing that in other Family Court proceedings, the court may appoint an attorney to represent the child when in the judge's opinion it would serve statutory purposes and independent legal counsel is not available to the child).

20. The inquiry is cast in general terms. The question of whether there would be a conflict can be resolved only in the factual context of a particular matter. If the inquiring lawyer serving as attorney for the child and the Assistant Public Defender would not be representing differing interests, then there would be no conflict under Rule 1.7(a)(1). If they would be representing differing interests, then there would be a conflict under Rule 1.7(a)(1), and it would be imputed to both lawyers under Rule 1.10(a).

65 *See* Rule 1.7(b)(1) (conflict not waivable unless lawyer has reasonable belief in ability to provide competent and diligent representation to the affected client); Rule 1.7(b)(3) (conflict not waivable if it involves "assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal"); Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 557-58 (2013 ed.) (noting question as to whether different lawyers in same firm may represent both sides in the same suit, even with informed consent, and expressing doubt about propriety of doing so in light of Rules 1.7(b)(1) and 1.7(b)(3)).

66 Rule 1.7(b)(3). This rule refers to a "lawyer" rather than a "law firm" and thus does not, by its literal text, categorically prohibit different lawyers in the same firm from opposing each other in the same litigation or other proceeding before a tribunal.

67 "Under New York Law, children (minors) in many kinds of court proceedings . . . are entitled to be represented by counsel. . . . A governmental office entitled the Attorneys for Children Program ('AFC Program') maintains a list or 'panel' of attorneys qualified to represent children, and assigns an attorney from the panel to children involved in the judicial system who qualify by law for an appointed attorney." N.Y. State 941 ¶2 (2012) (footnotes omitted). Attorneys for children may also be assigned through agreements with legal aid societies or with individual attorneys. Family Court Act §243.

21. If such a conflict were imputed, then the inquiring lawyer could not serve as attorney for child unless the imputed conflict could be waived, and was in fact waived, under the standards of Rule 1.7(b) as applied through Rule 1.10(d). However, even if such a conflict were waivable, the inquiring lawyer's client would be a child and would be incapable by himself or herself of giving informed consent to satisfy Rule 1.7(b)(4). *See* N.Y. State 941 ¶8 (2012); N.Y. State 790 ¶8 (2005). The situation might be different if the child had another representative with authority to consent to a conflict, but whether a representative would have such authority is a question of law beyond the Committee's jurisdiction. *See* N.Y. State 895 ¶16 (2011) (raising but declining to answer that question with respect to representatives of the child "such as a parent, guardian *ad litem*, custodian, guardian, committee, trustee or court").

Appearance in criminal court as assigned counsel under County Law article 18-B

22. The inquirer's final question has to do with appointment to represent criminal defendants when the Public Defender's Office has a conflict.[68] This is the question that was addressed in N.Y. State 862 (2011), and we reach the same result that we did in that opinion.

23. Specifically, if the conflict in the public defender's office were based on Rule 1.7, 1.8 or 1.9, it would be imputed to the inquiring lawyer for reasons discussed above. The inquiring lawyer, knowing of the underlying conflict, could not accept the appointment unless the imputed conflict were waivable, and waived, under the standards of Rule 1.7(b) as applied via Rule 1.10(d).

CONCLUSION:

24. Even though the lawyers in a county's Public Defender Office work independently, the office constitutes a "firm" for purposes of imputing conflicts of interest under Rule 1.10(a).

25. A lawyer who is a part-time Family Court Assistant Public Defender in such an office would be subject to an imputed conflict if that lawyer were to appear in Family Court (i) as a "conflict" lawyer when another Assistant Public Defender has a conflict under Rule 1.7, 1.8 or 1.9; (ii) as an Assistant Public Defender or retained counsel "opposing" another Assistant Public Defender; or, (iii) depending on the circumstances, as an attorney for the child in a matter in which another Assistant Public Defender has appeared. The same principles of imputation under Rule 1.10(a) would also apply if a part-time Assistant Public Defender were to appear in criminal court as assigned counsel when another Assistant Public Defender has a conflict under Rule 1.7, 1.8 or 1.9.

26. In all such cases, the part-time Assistant Public Defender could not undertake the representation, even in private practice as retained counsel, unless the imputed conflict were waivable and properly waived. Whether a given conflict is waivable can be determined only by considering all the circumstances, and waivability may be less likely in various circumstances such as when the two Assistant Public Defenders seek to represent adverse parties in the same proceeding, or when the client is a child and thus incapable, acting alone, of providing informed consent.

(12-13)

68 "In many cases, counties that have chosen to establish a public defender in accordance with County Law Article 18-A rely on private attorneys under Article 18-B in cases in which the public defender is unable to represent an indigent litigant because of a conflict of interest with another client of the office (co-defendants in a criminal proceeding, for instance)." N.Y. State 811 (2007); *see* County Law §722.

OPINION 976 (07/25/2013)

TOPIC: Arrangement between law firm and nonlegal service provider

DIGEST: A law firm may not enter into an exclusive contractual agreement with a marketing company to provide clients with forensic mortgage analysis as well as legal services, to pay the company for referred clients, or to share legal fees with the company.

RULE: 1.7(a); 5.4(a); 5.5(b); 5.8, 7.2(a)

FACTS:

1. The inquiring law firm wishes to enter into an exclusive Services Agreement with an entity ("the Company") that it describes as "a national marketing company with a nationally marketed website that educates mortgagors on a unique cause of action where they can proactively bring an action in state court to contest the validity of their mortgage."

2. The Company's website would inform its New York viewers of the availability of this cause of action. For those interested in pursuing such relief, the Company would "enter into a contractual agreement with the individual mortgagor for the purpose of performing a forensic analysis on their mortgage and its chain of title" so as "to ascertain if an error exists." If the Company finds such an error, it would "inform the individual of [the inquiring law firm's] services." When such persons contact the inquiring firm, the firm would "attempt to become retained by them for the purpose of filing this particular action" in New York. The inquiring firm would charge such clients a contingent fee or "success fee" of twenty percent of the debt it reduces in a successful action to "invalidate a client's . . . mortgage and clear their title."

3. The Company would charge the inquiring firm a fixed monthly fee for marketing the law firm's services. It would also charge the law firm additional fees relating to individual clients that it has referred to the firm. These additional fees would be characterized either as a success fee or as a fee for the Company to file and collect on a lien on the client's house to ensure payment of legal fees. The inquiring firm has asked whether these additional fees – whichever way characterized – could properly be set as (a) "a determined percentage" of the law firm's fee, or (b) a fixed fee regardless of the size of the client's mortgage or debt reduction.

4. Thus the firm proposes a multi-faceted relationship with the Company. The Company would market to people in need of a specific legal service. The Company would conduct a "forensic" analysis of whether those people may have legal claims, and then would refer prospective claimants to the law firm. To secure the legal fee as well as its own fee, the Company may file liens against the firm's clients. The law firm would pay the Company both the fixed periodic "marketing fee" and also, in the particular matters undertaken, the "success" fee or a fee for lien services as described above. The arrangement is exclusive to the law firm; the Company would not offer legal services by any other provider.

QUESTION:

5. The inquiring law firm asks whether it can enter into compensation arrangements as described above. We will address that question, but we also perceive and analyze additional ethical concerns with the firm's proposal.

OPINION:

6. "The term 'multidisciplinary practice' means a venture that offers both legal and non-legal services to the public." N.Y. State 930 ¶6 (2012) (recounting history of multidisciplinary practice rules, including "MacCrate Report" of 2000, subsequent adoption of DR 1-106 and DR 1-107 in Code of Professional Responsibility, and their replacement by Rules 5.7 and 5.8 upon adoption of Rules of Professional Conduct in 2009).

7. One form of multidisciplinary practice occurs through contractual relationships between lawyers and nonlegal professionals. This form is authorized, but also limited, by Rule 5.8 of the New York Rules of Professional Conduct. That rule provides that a lawyer or law firm may – but only under certain conditions – "enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services." Rule 5.8(a). In the Joint Appellate Division Rules, such a relationship is termed a "cooperative business arrangement." *See* 22 NYCRR §1205.2 (definition).

8. The inquiry contemplates an exclusive contractual relationship between the inquiring law firm and the Company, which is a nonlegal professional service firm. The proposed relationship would be for the purpose of offering the public legal services, as well as services of the nonlegal professional service firm, on a systematic and ongoing basis. This form of multidisciplinary practice would thus be a cooperative business arrangement, and thus, to be permissible, it would have to satisfy Rule 5.8. *See* N.Y. State 930 ¶¶ 11-15 (2012) (concluding that language of rule 5.8(a) is mandatory, not permissive); Rule 5.8(c) (rule on cooperative business arrangements does not apply to relationships consisting solely of "non-exclusive" reciprocal referral agreements).

9. Rule 5.8(a) specifies three conditions that must be met for a law firm to enter into a cooperative business arrangement with a nonlegal professional service firm. The first of these is that the profession of the nonlegal professional service firm "is included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules." Rule 5.8(a)(1).

10. The proposed arrangement does not satisfy this first of the three requirements in Rule 5.8(a). Whether the Company is viewed as a marketing company or one that provides forensic mortgage analysis, it is not engaged in one of the nonlegal professions listed by the Appellate Divisions, which are currently limited to Architecture, Certified Public Accountancy, Professional Engineering, Land Surveying, and Certified Social Work. *See* 22 NYCRR §§ 1205.3 (process for establishing list of professions), 1205.5 (setting forth list); *cf., e.g.*, N.Y. State 930 ¶10 (1012) (lawyer may not enter into proposed cooperative business arrangement because listed professions do not include provision of insurance services); N.Y. State 885 ¶¶ 6-7 (2011) (lawyer may not enter into proposed cooperative business agreement because listed professions do not include provision of tax reduction services).

11. Thus, from the fact that the Company is not among the types of nonlegal professional service firms that have been approved for cooperative business arrangements, it follows that the proposed arrangement is impermissible. Although Rule 5.8(a) fully disposes of the inquiry, other features of the proposed arrangement also raise concerns meriting comment.

12. First, Rule 5.5(b) provides that a lawyer "shall not aid a nonlawyer in the unauthorized practice of law." Determining the boundaries of unauthorized practice is not within our charge, but we consider the Company's activities here – conducting forensic analyses of mortgage instruments and title, and identifying "errors" that would make the mortgage appropriate for the marketed "unique cause of action" – sufficiently near the borders of legal practice to advise the law firm to reflect on these matters.

13. Second, we note some statutory provisions that may be relevant. New York prohibits the corporate practice of law.[69] There are also statutory limits on the solicitation of legal business by employees of attorneys,[70] and on the solicitation of legal business by corporations.[71] These provisions (like the prohibition of aiding unauthorized practice) present questions of law on which the Committee does not opine.

14. Third, the proposed fee arrangements implicate the rule against paying for referrals. Rule 7.2(a) says that (except in circumstances not applicable here) a lawyer "shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client." This provision does not prohibit paying a fixed monthly fee to a company for advertising or marketing services, though the advertisements and other aspects of the arrangement must comply with other relevant Rules. Rule 7.2, Cmt. [1]; *see*, *e.g.*, Rule 7.1 (advertising); Rule 7.3 (solicitation); Rule 8.4(a) (a lawyer may not violate the Rules through the acts of another).

15. Here, however, the law firm would pay the Company not only the monthly marketing fee but also, for individual cases handled, either "success fees" or fees for services in connection with filing and collecting on liens. If any of the various fees would constitute payments to the Company for having recommended or obtained employment by a law firm client, then those payments would violate Rule 7.2(a). There could be a violation even if the fee were stated to be one for lien services,[72] and the

69 Judiciary Law §495(1) provides: "No corporation or voluntary association shall . . . (c) . . . render legal services or advice, nor (d) furnish attorneys or counsel, nor (e) render legal services of any kind in actions or proceedings of any nature or in any other way or manner, nor (f) assume in any other manner to be entitled to practice law, . . . nor (h) advertise that either alone or together with or by or through any person whether or not a duly and regularly admitted attorney-at-law, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel."

70 Judiciary Law §482 provides: "It shall be unlawful for an attorney to employ any person for the purpose of soliciting or aiding, assisting or abetting in the solicitation of legal business or the procurement through solicitation either directly or indirectly of a retainer, written or oral, or of any agreement authorizing the attorney to perform or render legal services."

71 Judiciary Law §495(2) provides: "No corporation or voluntary association shall . . . solicit any claim or demand for the purpose of . . . furnishing legal advice, services or counsel to, a person sued or about to be sued in any action or proceeding or against whom an action or proceeding has been or is about to be brought, or who may be affected by any action or proceeding which has been or may be instituted in any court or before any judicial body."

72 It might be permissible for the firm to pay the Company a fee for lien services if the fee were reasonably related to the value of the services provided, but otherwise that characterization of the fee could be problematic. *Cf.* N.Y. State 727 (2000) (when accounting firm that referred clients to law firm received fees from those clients for accounting services that clients had not sought, fee arrangement appeared to serve as impermissible pretext to avoid prior Code rule against payments for referrals).

violation would be plain if the law firm were to pay the Company a "success fee" for each referred client. *See* N.Y. State 902 (2012) (lawyer may not base marketing fee on number of actual or potential clients the marketer introduces to the lawyer); *cf.* N.Y. State 887 (2011) (improper to pay marketer a bonus based on particular referrals or profitability); N.Y. State 779 (2004) (improper for attorney to pay marketer for bundles of leads to potential clients).

16. Moreover, whatever the particulars of the inquiring firm's payments to the Company, other more general considerations suggest that the firm's participation would violate Rule 7.2(a). The law firm would be providing benefits to the Company not only through the marketing payments and per-client payments but also by its very participation in the ongoing program. It appears that a substantial part of the value that the Company would provide in return would consist in providing referrals. The Company will advise potential clients of its "unique" claim for relief, identify the law firm (and only the law firm) as engaged in the business of filing such a claim, and then refer potential claimants to the law firm upon the company's "forensic" inquiry into the claimants' qualifications to make the claim. The firm may legitimately provide benefits to the Company for marketing and lien services, but if the benefits are also to reward referrals, then it is difficult to harmonize the arrangement with Rule 7.2(a). *See* N.Y. State 799 (2006) (impermissible for lawyer to pay a website marketer a fee for recommending the lawyer based on the marketer's analysis of the client's problem).

17. Fourth, one of the options contemplated by the inquiry is that the law firm would pay the Company an amount based on a percentage of the firm's legal fee. Rule 5.4(a) provides that a "lawyer or law firm shall not share legal fees with a nonlawyer," except in circumstances outside the scope of the inquiry. The inquiring firm, recognizing this fee-sharing issue, asks whether it may be avoided by having the payment made not from the firm to the Company, but rather directly from the client to the Company, as to be provided by contract between those parties. If such a contractual arrangement is independent of the legal fee, then it may be consistent with Rule 5.4. *See*, *e.g.*, N.Y. State 875 (2011) (lawyer may handle case on contingent fee basis where the client has already retained a non-testifying expert to work on the same case on a contingent fee basis).

18. However, the situation would be different if the separate compensation agreement between the client and the Company were merely an attempt to circumvent the rule against fee-sharing. For example, the arrangement could constitute impermissible fee-sharing if the client's payment to the Company were insufficiently related to the value of the services provided by the Company, or if the law firm's fees were reduced to allow for the client's payment to the Company. *See* N.Y. State 885 ¶8 (2011) (finding improper fee-splitting where attorney reduced customary contingency fee "knowing that the amount of the reduction would be owed to the non-attorney company" that provided tax reduction services and referred clients to the attorney, and where there appeared to be "no relation between the funds to be received by the non-lawyer company and the value of the services actually performed for the client"); N.Y. State 727 (2000) (when accounting firm that referred clients to law firm received fees from those clients for accounting services that clients had not sought, fee arrangement "appear[ed] to constitute a portion of the contingency fee that would otherwise have been paid to the lawyer").

19. Finally, a participating lawyer in the inquiring firm would have to "consider the edicts of Rule 1.7(a)(2), as qualified by Rule 1.7(b), to determine whether the lawyer's personal and financial interest in the arrangement complicates the inquirer's representation of the [Company's] clients." N.Y.

State 930 ¶18 (2012); *see* N.Y. State 932 (2012) (even when referral arrangements are non-exclusive, "the lawyer must not have such an interest in a steady stream of referrals that it undermines the lawyer's professional judgment for the client").

CONCLUSION:

20. A lawyer or law firm may not maintain an exclusive contractual arrangement with a company that provides marketing services and forensic mortgage analysis so as to offer both legal and nonlegal services to the public on a regular basis; may not pay the company for referring clients; and may not share legal fees with the company.

(20-12)

OPINION 977 (08/01/2013)

TOPIC: Trial publicity in administrative proceeding; distributing via social media a petition and survey in support of client's pending case

DIGEST: A lawyer who represents a client in an administrative proceeding may distribute an online petition and survey in support of the client's case unless there is reason to believe that distributing those statements would have a substantial likelihood of materially prejudicing the adjudication.

RULE: 3.6

FACTS:

1. The inquiring lawyer is defending a client in a cancellation proceeding before the U.S. Trademark Trial and Appeal Board ("TTAB"). In the pending TTAB proceeding, a third-party petitioner has alleged that the client's registered mark is confusingly similar to the petitioner's registered mark and is seeking cancellation of the client's registration.

2. The client has created an online petition to garner opposition to cancellation. The petition presents the proceeding as a contest between a family business and a big corporation, and asks readers to sign in order to demonstrate that there is no likelihood of confusion between the petitioner's mark and the client's mark. The lawyer asks if there is any ethical prohibition of distributing a link to the client's online petition via social media (specifically, using Facebook and Twitter) if the lawyer will merely tell readers it is there but not ask them to sign it.

3. In addition, the lawyer asks if it is ethically permissible to post online a survey asking questions along the lines of the following: "Do you think Mark X is confusingly similar to Mark Y? Click here to express your opinion."

4. The lawyer does not indicate what he intends to do with the petition or the survey results (*e.g.*, whether he intends to try to present the results as evidence in the proceeding).

QUESTIONS:

5. If a client has set up an online petition in support of his case in a trademark cancellation proceeding, may the client's lawyer distribute a link to the petition via social media?

6. May a lawyer in a trademark cancellation proceeding post an online survey asking readers whether they find two trademarks confusingly similar?

OPINION:

7. Rule 3.6(a) of New York's Rules of Professional Conduct (the "Rules") provides that a lawyer who is participating (or has participated) in a criminal or civil matter "shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." This provision attempts to balance the public value of informed commentary

with a party's right to a fair proceeding.[73] We note that such provisions have been the subject of constitutional challenge,[74] but we are limited to interpreting the rules of legal ethics and do not undertake to assess their validity.

8. The prohibition in Rule 3.6(a) can be divided into a few components: (i) it applies to a lawyer who is participating in "a criminal or civil matter" in which there is or will be an adjudicative proceeding; (ii) it applies when the lawyer "make[s] an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication"; and (iii) it applies to statements "that the lawyer knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." We consider how each of these components applies to the communications proposed in the inquiry.

9. The first component is clearly satisfied. "Matter" is defined by Rule 1.0(*l*) to include "any . . . administrative proceeding." A trademark cancellation proceeding is an administrative and adjudicative proceeding.[75] The inquiring lawyer is therefore subject to Rule 3.6(a).

10. As to the second component we start by considering whether distributing a link to the petition would constitute making extrajudicial statements. The petition itself includes extrajudicial statements, as it is a document that is being distributed online and it characterizes the nature and merits of the dispute in particular ways. The fact that it was the client who created and posted the petition does not make the rule inapplicable. The lawyer, by distributing the link, is effectively disseminating the petition – and thus "mak[ing]" the statements it contains – over the internet as a means of public communication.

11. Whether the proposed survey meets this second component is less clear and may depend on a more detailed description of its contents. It may not make any "statement" subject to the Rule if it is limited to posing questions in neutral terms and giving readers the opportunity to express opinions. But if it includes leading questions, they could constitute implied statements subject to the Rule.

12. The final and central element of the prohibition is that the lawyer knows or reasonably should know that the statement "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

13. The rule provides some guidance on this final element by identifying certain kinds of statements that are presumptively permissible and other kinds that are presumptively impermissible. *See*

73 *See* Rule 3.6, Cmt. [1] (discussing "balance between protecting the right to a fair trial and safeguarding the right of free expression," and noting "vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves").

74 *See*, *e.g.*, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1063, 1075 (1991) (holding in criminal case that "'substantial likelihood of material prejudice' standard . . . satisfies the First Amendment" as "it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech"); *Hirschkop v. Snead*, 594 F.2d 356, 373-74 (4th Cir. 1979) (concluding that a rule limiting lawyers' speech on matters pending before administrative tribunals, more restrictive than Rule 3.6, was unconstitutional because overbroad, and noting lack of record evidence "that any administrative decision has been set aside because the comments of lawyers impaired the fairness of the proceedings").

75 *See* Trademark Trial and Appeal Board Manual of Procedure §102.02 (3d ed., rev. 2, June 2013) (describing proceedings within jurisdiction of TTAB, including cancellation proceedings); *id.* §102.03 (cancellation proceedings include pleadings, motions and trial). This TTAB Manual is available at http://www.uspto.gov/trademarks/process/appeal/Preface_TBMP.jsp.

Rule 3.6(b) (1) – (6) (listing kinds of statements "ordinarily" deemed likely to be prejudicial; Rule 3.6(c) (1) – (7) (listing kinds of information a lawyer may state, without elaboration, if the statement does not violate the basic prohibition in Rule 3.6(a)). As to the communications in question, however, the rule's presumptions do not apply. Neither the petition nor the survey would be within any of the presumptively permissible categories of information listed in Rule 3.6(c). Nor would either of those communications be presumptively prohibited, because Rule 3.6(b) applies only to certain statements that refer "to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration." A trademark cancellation proceeding is not triable to a jury.[76] For this inquiry, therefore, the rule's lists of categories give no presumptive answer to the question of likely prejudice.

14. However, the presumptions described above do not exhaust the content of Rule 3.6. Whether or not one of the presumptions applies, the governing standard remains the one found in Rule 3.6(a). We turn to some factors that bear on whether the communications would have a substantial likelihood of materially prejudicing the cancellation proceeding.

15. One factor is the nature of the adjudicative proceeding. Its relevance may be inferred from Rule 3.6(b), because as noted above, the presumptive prohibitions do not apply to civil matters not triable to a jury. Here is a more direct statement of this factor's importance:

> Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

Rule 3.6, Cmt. [6]. Indeed, it has been said that the concern about improperly influencing a fact-finder's decisions

> is largely irrelevant in matters to be decided by judges. Judicial officers are expected to be immune from the influences of inadmissible evidence and similar sources of information and from the potentially distorting effects of inflamed public opinion. Thus, media comments by a lawyer outside a nonjury proceeding will pose a significant and direct threat to the administration of justice . . . only in extreme situations.[77]

16. Another factor is the content of the extrajudicial statements. For example, statements on peripheral issues may carry little risk of prejudice. Statements may be more likely to be prejudicial if they address crucial issues committed to the finder of fact or are expressed in an inflammatory way.

17. The likelihood of prejudice will depend in part on the likelihood that the statements will come to the attention of the finder of fact. Thus the method of disseminating extrajudicial statements may

76 TTAB Manual, note 2 *supra*, §102.03 (decisions on merits of cases are rendered by panels of TTAB judges).

77 Restatement (Third) of The Law Governing Lawyers §109, cmt. b (2000). *But cf.*, *e.g.*, *United States v. Khan*, 538 F.Supp.2d. 929, 932-35 (S.D.N.Y. 2007) (interpreting analogous local rule against statements likely to "prejudice the due administration of justice" to prohibit not only lawyer's statements likely to taint jury pool but also those likely to threaten safety of witnesses).

be a relevant factor, and another related one is the statements' timing.[78] Other relevant factors may include the purpose with which the statements were made[79] and whether the information in the statements is otherwise available from public sources.[80] Having listed some of the factors relevant to likely prejudice (but without any claim that the list is comprehensive), we consider their application to the inquiry.

18. The nonjury nature of the TTAB proceeding is a consideration counting strongly against likely prejudice. On the other hand, while the inquiry does not fully describe the proposed communications, it appears at least that the statements in the petition, and implied ones in the survey if any, would directly address the merits of the dispute. The inquiry does not reveal the amount of time that would be expected to pass from the making of the statements until the trial.

19. A factor that may assume particular significance on these facts is motive. In this connection it is useful to distinguish between the mere making of the statements and their ultimate intended uses. The inquiry does not specify those uses.

20. It is possible that the lawyer's intent is to use the survey results as evidence that the two marks are not confusingly similar. If so, then the question arises whether such survey evidence would be permissible in a cancellation proceeding. If conducting the survey were an appropriate means of seeking competent evidence, then it would not have a substantial likelihood of "prejudicing" the proceeding. On the other hand, if the survey results would not constitute proper evidence, their dissemination could give rise to additional concerns. *Cf.* Rule 3.6(b)(5) (in jury or criminal context, statement ordinarily likely to be prejudicial if it relates to information the lawyer knows or reasonably should know is "likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial"). Similar questions would apply to possible intended use of the petition in evidence.

21. However, the petition was created by the client and there is no indication of intent to use is as evidence. In the absence of some other explanation, the inquiring lawyer should consider whether the client's goal is to disseminate the petition so broadly as to influence the finders of fact other than through the tribunal's processes. Of course in that instance it would be improper for the lawyer to participate in its dissemination.

78 *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1044 (1991) (citing case law and ABA source for proposition that timing of a statement is significant factor in the assessment of the possible threatened prejudice, and giving as problematic example a statement "which reaches the attention of the venire on the eve of *voir dire*"); Restatement (Third) of The Law Governing Lawyers §109, cmt. c (2000) ("statement made long before a jury is to be selected presents less risk than the same statement made in the heat of intense media publicity about an imminent or ongoing proceeding").

79 *See Gentile v. State Bar of Nevada*, 501 U.S. at 1064-65, 1080 (disciplinary authority considered purpose of statements in assessing likelihood of prejudice); *id*. at 1079 (minority finding it persuasive that lawyer admitted having called press conference to influence venire, because it was "difficult to believe that he went to such trouble, and took such a risk, if there was no substantial likelihood that he would succeed").

80 *See id*. at 1046 (minority portion of opinion noting that "[m]uch of the information provided by petitioner had been published in one form or another, obviating any potential for prejudice"); Restatement (Third) of The Law Governing Lawyers §109, cmt. c (2000) (if same information "is available to the media from other sources, the lawyer's out-of-court statement alone ordinarily will not cause prejudice," but this factor is not "controlling" and "the information must be both available and likely in the circumstances to be reported by the media"); *In re Sullivan*, 185 A.D.2d 440, 445 (3d Dept. 1992) (dismissing disciplinary charges against criminal defense lawyer whose "television interview was a mere drop in the ocean of publicity" surrounding the trial, when the matters discussed "had been otherwise publicized prior to the interview").

22. We have mentioned various relevant facts not contained in the inquiry, and their absence limits our ability to balance the above factors. Even without those facts, however, we can identify an outline of the analysis. The dominant factor in this case may be the nature of the adjudicative proceeding. The fact that the adjudication will be by an administrative tribunal like the TTAB counts heavily in favor of the inquiring lawyer being permitted to disseminate the proposed communications. There could be a different answer if the inquiring lawyer were aware of additional facts indicating that the client seeks to use the petition to exert improper influence, or that prejudice is otherwise likely. But in the absence of such additional facts, it seems unlikely that distribution of the petition or the survey would materially prejudice an adjudicative proceeding to be conducted by a panel of specialized trademark judges.

23. We have addressed only such constraints on the proposed communications as might be imposed by the rules of legal ethics. There could also be legal constraints, but issues of law are beyond the scope of this Committee. The inquiring lawyer may be well advised to review TTAB rules and other applicable laws and rules before distributing the petition or survey.

CONCLUSION:

24. A lawyer representing a client in a trademark cancellation proceeding may use social media to distribute a link to an online petition in support of the client's case, and may post an online survey, where there is no substantial likelihood that the petition or survey would materially prejudice the upcoming administrative adjudication. If the lawyer knew that the client were trying to use the petition to pressure the trademark judges, or the lawyer had other information indicating a likelihood of materially prejudicing the proceeding, then the lawyer should not participate in disseminating those statements. But in the absence of such information, such statements may fairly be considered unlikely to prejudice a proceeding conducted by a panel of administrative judges.

(14-13)

OPINION 978 (08/06/2013)

TOPIC: Counsel to closely held corporation

DIGEST: An attorney acting as general counsel to a closely held corporation 1) represents the entity and not its directors/sole shareholders and 2) must explain to the directors/shareholders that he does not represent them when he becomes aware that action to be taken on behalf of the entity may be divergent from their personal interests.

CODE: Rule 1.13(a) Rule 1.4(b)

BACKGROUND:

1. An attorney acts as general counsel for a closely held corporation in which its directors are also the sole shareholders. The attorney does not represent the directors/shareholders. Discussions are on-going within the corporation as to certain issues relevant to the corporation's by-laws and shareholder agreements the result of which will impact the corporation's ability to take advantage of a tax/property evaluation benefit. While the change will benefit the corporation, half of the directors will be personally disadvantaged by it. The lawyer is aware that the interests of the individuals will diverge from those of the entity and/or the other directors/shareholders when these issues are raised and the lawyer fears the board will deadlock and be unable to take advantage of the benefit.

QUESTION:

2. Is the lawyer required to raise the issues on behalf of the organization because of the relevance to the discussion or is the lawyer prohibited from raising the issues because the lawyer is aware of the divergent personal interests of the shareholder directors?

ANALYSIS:

3. As Rule 1.13(a) notes, "[w]hen a lawyer employed or retained by an organization is dealing with the organization's directors, . . . shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents." As Professor Simon notes, '[t]he essence of the rule is in the final clause, which says that a lawyer who is employed by an organization 'is the lawyer for the organization and not for any of its constituents.'" Simon's New York Rules of Professional Conduct Annotated 2013 Edition, p.633.

4. The question then becomes whether the lawyer must raise the issue with the client, the organization, or remain quiet because of the awareness of the divergent interests among the director/shareholders. Rule 1.4(b) requires that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." If knowledge of the issue is reasonably necessary to permit the client to make an informed decision, then it must be raised. At this juncture, Rule 1.13(a) will provide guidance to the lawyer. Now that the lawyer has made the decision that this is something he must raise with his client, the organization, and that it may be adverse to the personal interests of the directors/shareholders or presents a conflict between the interests of the directors/shareholders, the lawyer is required to explain to the director/shareholders that he

is the lawyer for the organization and not for any of them personally. Comment 2A to Rule 1.13(a) notes:

> There are times when the organization's interests may differ from those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent whose interest differs from that of the organization: (i) that a conflict or potential conflict of interest exists, (ii) that the lawyer does not represent the constituent in connection with the matter . . . , (iii) that the constituent may wish to obtain independent representation, and (iv) that any attorney-client privilege belongs to the organization and may be waived by the organization. . . .

CONCLUSION:

5. When a lawyer acting as general counsel to a closely held corporation becomes aware of an issue, the knowledge of which is necessary for the entity to make an informed decision and proposes a change that may be contrary to the personal interests of certain directors/shareholders, the lawyer must advise the entity of the issue and should consider, as appropriate, advising the directors/shareholders (1) the lawyer is the lawyer for the organization and not for the directors/shareholders, (2) that an actual or potential conflict of interest exists, (3) that the directors/shareholders may wish to retain counsel on their own behalf, and (4) that any attorney client privilege belongs to the organization and may be waived by the organization.

(71-12)

OPINION 979 (08/08/2013)

TOPIC: Lawyer-mediator group; payment for referrals

DIGEST: A group of lawyer-mediators, though not associated in a firm, may place joint advertisements and maintain a website that lists the varied experience and biographies of its members, allowing those seeking mediation services to contact a particular member of the group by visiting a website maintained by the group or calling a telephone number listed for the group as a whole.

RULES: 2.4; 5.7(a); 7.2(a)

FACTS:

1. The inquirer is a lawyer who, with another lawyer, has been organizing a group of lawyer-mediators with varied areas of experience. The group has a name, and a website that lists the names, areas of experience, and detailed biographies of each member. The group plans to place advertisements. Members of the group will pay its operating costs, including the price of the advertisements.

2. A legal assistant employed by the inquirer will answer calls to a telephone number listed on the website, but will not recommend specific members of the group to the caller. Instead, those seeking mediation services from the group will be expected to pick the appropriate lawyer-mediator based on the information about each member contained on the website. The inquirer has asked whether this arrangement would constitute a referral arrangement prohibited under the authority of N.Y. State 678 (1996).

QUESTION:

3. May a group of lawyer-mediators, though not associated in a firm, place joint advertisements, maintain a website that lists the varied experience and biographies of its members, and maintain a phone line available to callers seeking a particular lawyer-mediator?

OPINION:

4. The New York Rules of Professional Conduct generally do not allow lawyers to pay for referrals of clients. Subject only to certain exceptions not relevant to this inquiry, "A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client." Rule 7.2(a). However, this prohibition is not meant to keep "a lawyer from paying for advertising and communications permitted by the[] Rules, including the costs of print directory listings, online directory listings, newspaper ads, television and radio airtime, . . . and group advertising." Rule 7.2, Cmt. [1].

5. We consider two threshold questions as to the applicability of Rule 7.2. The first asks which of the Rules apply (and in particular whether Rule 7.2 applies) to the kind of mediation services contemplated by this inquiry. One that would clearly apply is the Rule specific to service as a third-party neu-

tral.[81] Some other Rules apply to lawyers at all times, irrespective of whether they are providing legal services.[82]

6. The applicability of other Rules, including Rule 7.2, presents a more complicated question that requires consideration of whether mediation services constitute legal services. A service that can lawfully be performed only by lawyers is clearly a legal service, but nonlawyers can lawfully serve as mediators. We nonetheless concluded in N.Y. State 678 (1996) that "lawyers who serve as mediators should be presumed to be rendering a legal service," and thus, at least presumptively, "are engaged in the practice of law."[83] If that conclusion is correct today, then mediation services by a lawyer are presumptively governed by the Rules. *See* Rule 5.7, Cmt. [4] (lawyer or law firm rendering legal services "is always subject to these Rules").

7. There is, however, controversy on this point. Some authorities have concluded that mediation services by a lawyer do not constitute the practice of law and are not subject to the full range of legal ethics rules.[84] Other authorities have endorsed the approach of N.Y. State 678.[85] And some have taken a middle position in which a lawyer-mediator may or may not be practicing law, and may or may not

81 Rule 2.4 ("Lawyer Serving as Third-Party Neutral") applies to lawyers serving as mediators and in other neutral capacities. Moreover, a lawyer who serves as a third-party neutral "may be subject to court rules or other law that applies either to third-party neutrals generally or to lawyers serving as third-party neutrals," as well as various codes of ethics. Rule 2.4, Cmt. [2]. We express no opinion on the applicability or import of any such constraints outside the Rules of Professional Conduct. *See, e.g.,* N.Y. State 900 ¶19 (2011).

82 Rule 5.7 determines when the Rules are generally applicable to lawyers who are providing "nonlegal services," but a comment to the rule explains that some Rules apply in all circumstances: "Although a lawyer may be exempt from the application of these Rules with respect to nonlegal services on the face of [Rule 5.7(a)], the scope of the exemption is not absolute. A lawyer who provides or who is involved in the provision of nonlegal services may be excused from compliance with only those Rules that are dependent upon the existence of a representation or client-lawyer relationship. Other Rules, such as those prohibiting lawyers from misusing the confidences or secrets of a former client (see Rule 1.9), requiring lawyers to report certain lawyer misconduct (see Rule 8.3), and prohibiting lawyers from engaging in illegal, dishonest, fraudulent or deceptive conduct (see Rule 8.4), apply to a lawyer irrespective of the existence of a representation, and thus govern a lawyer not covered by [Rule 5.7(a)]." Rule 5.7, Cmt. [4].

83 We reasoned in part: "Whether or not one conceives of the lawyer as 'representing' the participants in divorce mediation, the lawyer's role as a neutral mediator may include rendering advice about legal questions or preparing a separation agreement – services that would ordinarily seem to entail the practice of law when performed by lawyers." We did not treat this as a *per se* rule: "Presumably a lawyer who serves as a mediator outside of the law office, gives no legal advice or opinions, and does not draw up an agreement is not acting in any legal capacity and is not then governed by the lawyer's code. This would, however, be a rare case. More often the lawyer would offer impartial legal advice or explain the law to the participants." N.Y. State 678 (1996).

84 *E.g.*, Indiana Opinion 5 (1992) (because nonlawyers may act as mediators and nature of mediation is substantially different from practice of law, lawyer-mediator was not generally bound by legal ethics rules on trade names and solicitation); Kentucky Opinion KBA E-377 (1995) (corporation formed by attorney to provide mediation services not subject to legal ethics rule on trade names, though advertisement of mediation services which identifies any participant as a lawyer must comply with ethics rules on advertising). The case that such services are not the practice of law was arguably bolstered by New York's adoption of the Rule specifically governing a lawyer's service as a mediator. In relevant part the Rule provides: "A lawyer serves as a 'third-party neutral' when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them." Rule 2.4(a).

85 *E.g.*, Iowa Opinion 96-30 (1997) (alternative dispute resolution done by nonlawyers "has not been held to be the practice of law . . . [b]ut when done by a lawyer it becomes the practice of law" and lawyer working as a mediator would be bound by Iowa legal ethics code); Mississippi Opinion 241 (issued 1997, amended 2013) (mediation is a "law related" service which when provided by a lawyer becomes the practice of law and is subject to rules of legal ethics); New Jersey Opinion 711 (2007) (when mediation center advertised that lawyer-mediators would help parties understand legal rights and procedures, attorneys who accept referrals to mediate "are practicing law" by "accepting clients in a form of limited representation . . . for the sole purpose of serving as a third-party neutral, as contemplated by [New Jersey Rule 2.4]," and their conduct is governed by New Jersey legal ethics rules).

be generally subject to the rules of legal ethics, depending on the circumstances.[86] In any event, the current inquiry does not require, and we do not now undertake, a reconsideration of N.Y. State 678.[87]

8. The other threshold question has to do with the status of the group of lawyer-mediators. If they were to constitute a law firm, then its members would merely be making financial contributions toward advertising for that very firm. In that case the inquiry would implicate general restrictions on advertising but not the prohibition on paying others for referrals. *See* Rule 7.2, Cmt. [1] (stating that lawyers are not permitted "to pay others" for channeling professional work). On the facts as presented in the inquiry, however, the group of lawyer-mediators does not constitute a law firm as defined by Rule 1.0(h). Rule 7.2 is thus applicable (subject to considerations in the previous paragraph). We also note that joint advertisements must not misstate the relationship among members of the group. *See* Rule 7.1(c)(2) (advertisements shall not "imply that lawyers are associated in a law firm if that is not the case").

9. We turn to the application of Rule 7.2(a). Some of our prior opinions shed light on the boundary between referrals and group advertising. In one opinion applying the former Code of Professional Responsibility, the Committee concluded that

> a program in which an advertising agent runs generic ads for legal services and distributes prospective clients to participating lawyers who have been assigned the exclusive right to cases arising in particular geographical areas is more in the nature of a lawyer referral service than advertising by an individual lawyer. When a prospective client answers the advertisement, the purpose is to be given the name of a lawyer, rather than to contact a particular lawyer.

N.Y. State 597 (1989). The Committee found such an arrangement to violate certain provisions, then part of the Code, limiting lawyer referral services.

10. The Committee reached a different conclusion, however, as to an advertisement which "presents in a meaningful fashion" the names and other information of the lawyers or firms participating in the group advertisement "so that the potential client knows the identity of the lawyer to whom his call will be referred and there is no discretion in referrals on the part of the advertising agent." The Committee found such a listing permissible if otherwise compliant with the Code and court rules, and we noted that "such joint advertising may be the only way it is economically feasible for a practitioner with a small practice to afford certain forms of advertising." N.Y. State 597.

86 *E.g.*, Oregon Opinion 2005-101 (identifying certain rules of legal ethics that would apply if the mediation service "would involve the practice of law, such as by drafting settlement agreements"); Pennsylvania Opinion 96-167 (mediation appears to be among "nonlegal services" such that Rule 5.7 will determine applicability of other Rules, but "if an attorney-mediator advertises his/her services, he/she must comply with the advertising and solicitation rules").

87 If – contrary to N.Y. State 678 – mediation services by a lawyer do not constitute legal services subject to the full range of legal ethics rules, then Rule 7.2 would not apply, and the conduct proposed in the inquiry would not be prohibited by the Rules. The other possibility – following N.Y. State 678 – is that mediation services by a lawyer constitute legal services (either always or in particular cases), and Rule 7.2 applies. Even in that case, based on the analysis in the rest of this opinion, the proposed conduct would be permissible. In other words, the outcome would be the same either way and would not turn on whether we would reach the same conclusion if we were deciding N.Y. State 678 today.

11. We followed the reasoning of N.Y. State 597 in the context of a divorce mediation service that proposed running ads with an "800" number. Callers would be referred to a participating mediator based on the caller's geographic location. The Committee reiterated that this type of arrangement – in which a potential client calls to get the name of a provider of services rather than to contact a specified individual – would constitute a lawyer referral service. N.Y. State 678 (1996).

12. We believe that the lines drawn by these precedents with respect to certain provisions in the former Code apply equally to the prohibition of payments for referrals that is in the current Rules of Professional Conduct. The proposed conduct does not, like the arrangements that our prior opinions found to be referral services, contemplate that prospective clients will call a number and be given the name of a lawyer. Rather, the members of the inquirer's group will be listed on a website and perhaps other advertisements by name and areas of experience. The website will include a detailed member biography. This format is reasonably designed to encourage the consumer to select the member with the expertise appropriate to the consumer's needs, rather than to trigger a consumer to call for a referral. We rely also on the inquirer's assurance that a caller seeking a referral will not be supplied with the name of a lawyer-mediator, but rather will be directed back to the website to choose a member with appropriate qualifications. Accordingly, in the model proposed, the members of the group would be paying for joint advertising but would not be making payments for referrals as prohibited by Rule 7.2.

13. We note that the inquirer may need to consider various matters of legal ethics beyond Rule 7.2. For example, the inquirer may need to consider ethical constraints on advertising, claims of specialization, trade names and payment arrangements.[88] However, the inquiry neither focuses on these matters nor fully describes the facts surrounding them, and we do not opine as to the permissibility of the proposed conduct in these respects.

CONCLUSION:

14. A group of lawyer-mediators, though not associated in a firm, may place joint advertisements and maintain a website identifying the group's members and listing their varied experience, practice areas and biographies, so as to allow a party seeking mediation services to call a single telephone number or visit a single website to contact the lawyer-mediator of that party's choice. The members of the group may pay the group's operating costs as long as the advertising and payment arrangements comply with relevant Rules.

(28-13)

88 Limits on advertising, claims of specialization, and trade names are set forth in Rule 7.1, Rule 7.4, and Rule 7.5(b) respectively. As to payment by the lawyer-mediators for advertisements and other operating costs of the group, some arrangements could be problematic and require further analysis. For example, the inquiry mentions that the amount of each lawyer's payments may be determined as a percentage of fees earned by that lawyer on work brought in through the group's marketing. *See* Rule 1.5(g) (generally prohibiting division of legal fees with a lawyer not associated in same firm); Rule 5.4(a) (generally prohibiting sharing legal fees with a nonlawyer). If we had occasion to reach such issues, the threshold question would be the applicability to the proposed conduct of the Rules cited in this footnote, and that would require consideration of N.Y. State 678 in light of Rule 2.4. *See* paragraphs 6-7 *supra*.

OPINION 980 (09/04/2013)

TOPIC: Disclosure of confidential information to collect a fee; candor toward a tribunal

DIGEST: A lawyer, having learned in a prior proceeding that a then-client imparted material and false information about the client's finances to the tribunal, has a duty to take reasonable remedial measures that may still be available, including, if necessary, disclosure to that tribunal. Even if the correct information about the former client's finances is confidential, the lawyer may disclose it in the former client's bankruptcy proceeding if, but only to the extent that, the lawyer reasonably believes that disclosure is necessary to collect a fee that the former client owes to the lawyer.

RULES: 1.6; 3.3(a)-(c)

FACTS:

1. While the inquiring attorney was representing a client in a contested judicial proceeding in which the client's finances were at issue, the client disclosed confidential information to the attorney about the client's finances (including that the client was working "off the books"). The information was inconsistent with what the client was providing to the court. The attorney, according to the inquiry, did not "promote" this information in the judicial proceeding.

2. Subsequently, the client filed for protection from creditors, including the inquiring lawyer, who is owed a legal fee from the prior representation. The lawyer wishes to reveal the confidential information from the first proceeding in the bankruptcy proceeding so as to aid the lawyer's effort to be paid the legal fee.

QUESTION:

3. Having received confidential information from the client in one proceeding, may the inquiring lawyer disclose that information in a subsequent bankruptcy proceeding in an effort to collect an unpaid legal fee?

OPINION:

4. Ordinarily, under Rule 1.6(a) of the New York Rules of Professional Conduct (the Rules), a lawyer shall not "knowingly reveal confidential information" or "use such information to the disadvantage of a client or for the advantage of the lawyer." One of the exceptions to this proscription is Rule 1.6(a)(3), which says that a lawyer may do so if "the disclosure is permitted by paragraph (b)" of Rule 1.6. That paragraph, among other things, permits a lawyer to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to establish or collect a fee." Rule 1.6(b)(5)(ii).

5. We caution that Rule 1.6(b)(5)(ii) is no license for counsel to reveal any confidential information beyond what is "reasonably believe[d] necessary" to collect the fee. The Rules do not shed much light on these terms.[89] Nonetheless, these terms provide significant limits beyond which a lawyer may

89 A lawyer "reasonably believes" something when "the lawyer believes the matter in question and . . . the circumstances are such that the belief is reasonable." Rule 1.0(r). The Rules do not define "necessary," but *Webster's Unabridged Dictionary* at 1200 (2nd ed. 1983) says that the word means "unavoidable, essential, indispensable, needful."

not go in seeking to collect a fee. We have previously discussed those limits, and while some of the opinions were decided under the prior Code of Professional Responsibility, we believe they generally remain sound guides under the Rules.

6. First, a lawyer should not resort to disclosure to collect a fee except in appropriate circumstances.[90] Second, the lawyer should try to avoid the need for disclosure.[91] Third, disclosure must be truly necessary as part of some appropriate and not abusive process to collect the fee.[92] Fourth, disclosure may not be broader in scope or manner than the need that justifies it, and the lawyer should consider possible means to limit damage to the client.[93]

7. Bearing in mind these limits on the fee-collection exception, we now turn to its applicability. The exception, as set forth in Rule 1.6(b)(5)(ii) and quoted above, is not reserved for any particular kinds of proceedings. In particular, the fee-collection exception "has been applied to bankruptcy proceedings." D.C. Opinion 236 (1993) (citing examples and concluding that a "well-established but narrow exception to the general rule against revealing client confidences and secrets . . . permits the disclosure of such information in connection with actions to establish or collect fees in bankruptcy proceedings in limited circumstances").

8. Of course the limits on the exception also apply in bankruptcy proceedings.[94] Indeed, there is some authority as to how those limits may apply to particular uses of confidential information in the

90 *See* N.Y. State 684 (1996) (analogizing to rule allowing withdrawal when client "deliberately disregards" a fee obligation, which occurs when "'the failure is conscious rather than inadvertent, and is not *de minimis* in either amount or duration'"); Restatement (Third) of the Law Governing Lawyers §41 cmt. c (2000) [hereinafter Restatement] ("The lawyer's fee claim must be advanced in good faith and with a reasonable basis.").

91 *See* Rule 1.6, Cmt. [14] ("Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure."); N.Y. State 608 (1990) (noting Code principle that a lawyer should "zealously avoid," and "attempt amicably to resolve," fee controversies with clients, and concluding that lawyer may use a collection agent to collect a fee but only after all other reasonable efforts short of litigation have been exhausted).

92 *See* N.Y. State 684 (1996) (disclosure to a credit bureau would appear to aid collection process if at all "only by virtue of its *in terrorem* effect on the client," and where "the client's potential injury arising from the disclosure of the client secret is the very vehicle of collection, such disclosure cannot be viewed as the type that is 'necessary' for the collection"); Restatement §41 cmt. c (lawyer "may not disclose or threaten to disclose information to nonclients not involved in the suit in order to coerce the client into settling").

93 *See* Rule 1.6, Cmt. [14] ("a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose," and disclosure in adjudicative proceeding "should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable"); Restatement §65, cmt. d (describing requirements that use or disclosure of confidential information in compensation dispute be proportionate and restrained); *id.* §41, cmt. c ("lawyer should not disclose the information until after exploring whether the harm can be limited by partial disclosure, stipulation with the client, or a protective order").

94 "[T]he inquirer must have a good faith expectation of recovering more than a *de minimis* amount of the outstanding fee." D.C. Opinion 236 (1993). "[T]he proposed disclosure to the bankruptcy court must be as narrow as possible, providing only the minimal information necessary to establish or collect a fee. In addition, if possible, the inquirer should use protective orders, in camera proceedings, John Doe pleadings, and/or other appropriate mechanisms to protect the identity and interests of the client. *Id.*; *accord* Los Angeles County Opinion 452 (1988) (attorney may prosecute adversary proceeding to have a debt declared non-dischargeable but "as in any fee collection action, the attorney should avoid the disclosure of confidences and secrets to the extent feasible, and should obtain appropriate confidentiality orders for this purpose").

bankruptcy context.[95] However, because the inquiry does not specify the particular planned uses of confidential information, we leave to the inquiring attorney a careful consideration of whether disclosure is appropriate under the above principles, and if so, how to limit it to the minimum necessary.

9. The inquiring attorney should also consider whether the information from the client is not only confidential under the rules of ethics, but also subject to attorney-client privilege, and whether such privilege might affect the permissibility of the proposed disclosure.[96] However, questions of privilege are legal matters on which we do not opine.

10. We turn to a second question that was not part of the inquiry but is raised by its facts. The inquiring attorney says that the attorney did not "promote" the client's apparently false evidence about the client's finances during the first proceeding. Depending on when that first proceeding occurred, however, the lawyer may have had a greater duty to the tribunal than forbearing from relying on the false evidence. Specifically, the applicable rule may have obliged the attorney to disclose the confidential information to the first tribunal if the client declined to do so and lesser remedial measures were insufficient to cleanse the record of the untrue evidence.

11. The Rules of Professional Conduct became effective, replacing the former Code of Professional Responsibility, on April 1, 2009. On that day, a lawyer's duty in appearing before a tribunal materially changed. The relevant provision of the Code had required that a lawyer who learned that the lawyer's client had clearly perpetrated a fraud upon a tribunal "shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected . . . tribunal, *except when the information is protected as a confidence or secret*." DR 7-102(B)(1) (emphasis added).

12. In contrast, one of the new rules that took effect on April 1, 2009, sweeps more broadly. The duty to take remedial steps is triggered when "a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity." Rule 3.3(a)(3). The

95 One ethics committee, while opining that an "attorney may make a claim in the bankruptcy case, and may prosecute a dischargeability proceeding as to the claim," also opined that the attorney may not participate in the "collective collection effort of the bankruptcy process." In other words, "the attorney may not use confidential or secret information to challenge the right of his former client to a discharge, and may not disclose such information to the trustee or other creditors," or otherwise "assist [the] trustee or other creditors in recovering assets." Los Angeles County Opinion 452 (1988).

96 We have previously noted a question whether the court-adopted rules of legal ethics "can override the statutory protection to the attorney-client privilege afforded by CPLR § 4503(a)." N.Y. State 831 (2009). Even if they cannot, however, it is not clear that privilege would bar disclosure in the case at hand. We note that in certain proceedings seeking relief from creditors, the privilege typically belongs to the Trustee and not to the person seeking relief. Thus, the person with capacity to waive the privilege may reside in someone other than the lawyer's onetime client. Moreover, an exception to the privilege could apply. *See*, *e.g.*, Alexander, CPLR §4503 Practice Commentaries, C4503:5(b) (McKinney) (discussing, as an exception to the privilege, "the rule that permits a lawyer to reveal confidences in order to collect a fee from the client"); Restatement §83(1) ("attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding . . . to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer"); Restatement §82(a) (exception to privilege when client "consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud").

duty is also triggered whenever the lawyer knows of "fraudulent conduct related to the proceeding."[97] In either case, "the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(a)(3), (b). There is no longer any exception for confidences or secrets. *See* Rule 3.3(c) (duty applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6"); N.Y. State 837 ¶¶ 6-7 (2010).

13. The application of the new standards of Rule 3.3 depends on when the first proceeding occurred. In N.Y. State 831 (2009), we concluded that, notwithstanding the adoption of Rule 3.3, DR 2-107(a) remained in force as to a fraud committed by the client prior to April 1, 2009, regardless of when the lawyer came to know the falsity of the information. Here, the lawyer's duty to disclose the information to the tribunal depends on whether the client imparted the false information to the tribunal before or after April 1, 2009.

14. If the false information was imparted before that date, the lawyer had a duty to call upon the client to rectify the fraud. However, if the client declined to do so, the lawyer had no further duty to disclose the information to the tribunal if that information was protected as a confidence or secret. And the information was undoubtedly so protected, given its nature and the way the lawyer learned it. On the other hand, if the false information was material and was imparted to the tribunal on or after April 1, 2009, then the lawyer had a duty to take reasonable remedial measures, and if measures short of disclosure were insufficient, then the lawyer would have a duty of disclosure to the tribunal.

15. This leaves us with two remaining matters, each on the assumption that Rule 3.3, not DR 7-102(B), governs the lawyer's obligations. One is the issue of whether, even if the Rules of Professional Conduct would seem to require disclosure of the false information, such information might nevertheless be shielded from disclosure in the first proceeding by the attorney-client privilege.[98] As noted above, however, privilege issues are questions of law beyond our purview.

16. The other remaining issue is the duration of the lawyer's obligation to make a Rule 3.3(a) disclosure to a tribunal. Although the State Bar proposed that the duty continue only to the conclusion of the proceeding, the courts did not adopt that proposal. N.Y. State 837 ¶16 (2010). Thus it appears that the obligation to disclose "may continue even after the conclusion of the proceeding in which the false material was used." We nevertheless opined that the endpoint of the obligation "cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3." *Id*. (citations omitted); *accord* N.Y. City 2013-2 (opining that "for a measure to

97 Rule 3.3(b). Under the new rules, "fraudulent" conduct includes not only conduct that is fraudulent under applicable law, but also conduct that "has a purpose to deceive." Rule 1.0(i). This new definition apparently broadened the category of conduct constituting client frauds that could require remedial steps. *See* N.Y. State 831 (2009).

98 We have already noted issues as to whether privilege might bar disclosure otherwise permitted for the purpose of collecting a fee, see footnote 96 *supra*, and some of the same considerations (including possible applicability of the crime-fraud exception) apply to whether privilege might bar disclosure otherwise mandated by Rule 3.3. In any event, even if the privilege applied to the client communications in question, it may not extend to the context of disclosure under Rule 3.3. *See* Rule 1.6, Cmt. [3] (attorney-client privilege is part of evidence law and applies "when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client"); N.Y. State 837 ¶¶ 12-13 (2010) (noting that CPLR §4503's limit on remedial measures "extends only to the introduction of protected information into evidence"); Restatement §86(1) (privilege may be invoked "[w]hen an attempt is made to introduce in evidence or obtain discovery" of a privileged communication).

be remedial, it must have a reasonable prospect of protecting the integrity of the adjudicative process," and discussing how application of that standard requires consideration of law and court procedures applicable to correction of the false evidence in question).

CONCLUSION:

17. A lawyer who in one proceeding obtains confidential information about a client's financial affairs may disclose that information in a subsequent bankruptcy proceeding if, but only to the extent that, the lawyer reasonably believes that disclosure is necessary to collect a fee that the former client owes to the lawyer and disclosure is not barred by attorney-client privilege.

18. If a lawyer learns that a client has imparted false and material information to a tribunal since Rule 3.3 has been in effect, then the lawyer has a duty to take reasonable remedial measures that are still available, including, if necessary, disclosure to that tribunal, unless disclosure is barred by attorney-client privilege.

(48-12)

OPINION 981 (10/02/2013)

TOPIC: Payment to lawyer of referral fee for clients who sign up for a security system.

DIGEST: A lawyer may receive a referral fee under certain circumstances.

RULES: 1.7, 5.4

FACTS:

1. The inquirer, whose legal practice is predominantly residential real estate, has been approached by a company which provides home security services. The company has offered to pay a referral fee of $150.00 for each person who procures security services using a code on flyers placed in the lawyer's office. It is assumed that the attorney is not recommending these services and that the services are not substantially related to the legal services being provided by the attorney to the person who procures the services.

QUESTION:

2. Can the attorney accept a referral fee from the home security company?

DISCUSSION:

3. There are a number of opinions which discuss whether it is appropriate for a lawyer to receive a referral fee for referring a client to a service particular provider.[99] In each of these opinions the service provider was related in some way to the legal services being provided by the lawyer to the client.

4. Here, in contrast, the nature of the service provider (home security services) is not related to the legal services to be provided by the lawyer. These flyers would be available to anyone who passed through the lawyer's waiting room, including clients, delivery persons and individuals who might accompany clients to the lawyer's office. The lawyer is expressing no opinion regarding the quality or suitability of the services. He is merely providing space for the flyers for collection by anyone who might have an interest in a security system. Nothing in the Rules of Professional Conduct prohibits a lawyer from being compensated for providing passive space for advertisement by third parties.

5. However, should the lawyer recommend the services, or should the non-legal services be related to the legal services provided by the lawyer, the opinions in footnote 99 should be carefully considered before proceeding.

99 See for example: N.Y. State 667 (1994) where it was opined that a lawyer could receive an referral fee from a mortgage broker provided certain conditions were met; Nassau County 2001-10 where a real estate lawyer could receive a referral fee from a termite treatment company; N.Y. State 461 (2007) which permitted a lawyer to receive a portion of a commission from a fire adjuster; N.Y. State 845 (2010) which permitted a real estate broker to share her commission with lawyers who refer buyers or sellers to her; D.C. Opinion 361 (2011) permitted a referral fee; Arizona Opinions 95-10 (1995) and 06-02 (2006) both of which prohibited referral fees. All of the opinions turned on an analysis of Rule 1.7 (or its predecessor) to determine whether such a referral fee created a conflict of interest between the lawyer receiving compensation and the obligation of the lawyer to make a referral which was in the client's best interest.

CONCLUSION:

6. A lawyer may receive a referral fee from a home security firm which places flyers in the lawyer's office.

(5-13)

OPINION 982 (10/02/2013)

TOPIC: Obligation to disclose potential fraud on a tribunal

DIGEST: A lawyer who has not appeared before a tribunal has no duty and no right to disclose confidential information protected by Rule 1.6 even if necessary to correct a prior false statement by the lawyer, made to opposing counsel before any proceeding began, which may be later used as evidence before the tribunal.

RULES: 1.0(b), 1.0(q), 1.0(c), 1.6(a), 1.6(b)(2), 1.6(b)(3), 3.3(a), 3.3.(b),

FACTS:

1. The inquiring lawyer represented a client in an estate matter in which a will has yet to be offered for probate. The inquirer is not admitted in this State and so associated with a member of the New York bar to handle the matter.

2. Although the will has not been offered for probate, it is likely to be, and, in the inquirer's judgment, will result in a contested proceeding between two siblings. The inquirer represented one of the siblings – for ease of reference "AB" – who provided the inquirer with seemingly credible and material information which the lawyer in turn sent to counsel for the sibling, the adverse client to whom we refer as "CD." Upon review of the information, CD's counsel responded by strongly questioning the accuracy of the information. When the inquirer confronted AB with CD'S response, AB admitted in confidence that the information AB had provided to the inquirer was false. The inquirer urged AB to correct the information, citing the lawyer's own ethical obligations and AB's potential criminal liability. Despite these entreaties, AB refused to correct the information. Thereafter, the inquirer terminated the attorney-client relationship with AB, and notified opposing counsel of the withdrawal without reference to the inquirer's earlier provision of information to CD's lawyer that the inquirer now knows to be false. While we are not opining on the propriety of the resignation, there is every reason to believe it proper under Rule 1.16.

3. The inquirer states that no basis exists for a reasonable belief that CD's counsel is relying on the statement that the inquirer provided to CD which the inquirer now knows to be untrue, a belief apparently rooted in the tenacity of opposing counsel's rejection of the information. Nevertheless, the inquirer apprehends that some party to the probate proceeding, be it AB or CD, will submit the inquirer's statement to the tribunal. This prospect gives rise to the inquirer's interest in whether, in such a circumstance, a lawyer may or must reveal "confidential information" as defined in Rule 1.6 of the N.Y. Rules of Professional Conduct. For our purposes, we assume that the information AB imparted qualifies as such. We do not address purely legal questions such as the application of evidentiary privileges, in this instance, for example, whether AB provided the information in furtherance of a crime or fraud, thereby removing the information from the protection of the attorney-client privilege. These issues are for courts to decide.

4. The inquirer suggests two exceptions to Rule 1.6(a) that may permit but not require the lawyer to disclose the information. One is Rule 1.6(b)(2), which permits a lawyer to prevent a client "from committing a crime," and the other is Rule 1.6(b)(3), which allows a lawyer to "withdraw a written or oral opinion or representation previously given to the lawyer and reasonably believed by the lawyer

still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." The lawyer also asks whether Rule 3.3(a), which concerns a lawyer's candor to a tribunal, requires the lawyer to disclose the information.

QUESTION:

5. The inquiry before us asks that we determine whether a lawyer has an obligation to disclose a fraud on a tribunal when the lawyer is not appearing, and has never appeared, before that tribunal. We find no such language in the Rules of Professional Conduct and accordingly answer the inquiry in the negative.

ANALYSIS:

6. We begin with Rule 1.6(b)(2), which permits a lawyer to disclose confidential information to prevent a client from committing a crime. Whether AB's failure to correct the false information constitutes a crime at this stage of the matter, or even later, is also a legal issue beyond our jurisdiction to address. If the inquirer concludes that AB has already committed a crime, then Rule 1.6(b)(2) would not apply and thus would not allow the lawyer to disclose AB's confession. N.Y. State 674 (1994). This is true even though AB is now a former client. N.Y. City 1994-8 (1994). The inquirer's fear that AB may *later* commit a crime by submitting the false information to a tribunal – namely, the court overseeing the probate proceeding – is unduly speculative. The permissive disclosures in Rule 1.6(b) allow the revelation of confidential information only "to the extent that the lawyer reasonably believes necessary" under one or more of the enumerated circumstances. As of the date of the inquiry, the probate proceedings have not yet started. That AB and her new counsel may elect not to submit the information remains a possibility and calls into question the necessity of disclosure. Even if the lawyer were to conclude that the commission of a crime were imminent, the restricting language of Rule 1.6(b) cautions that disclosure should be to AB's current counsel, not to the opposing counsel or the court.

7. Whether Rule 1.6(b)(3) permits disclosure of the information depends on the reasonableness of the lawyer's belief that CD's lawyer continues to rely on the information the lawyer provided. That CD's lawyer "rejected" the information – that an adversary questioned its veracity – does not invariably mean that CD and her counsel are not relying on the information. Rule 1.0(b) defines "belief" to mean that "the person involved actually believes the fact in question to be true," which "may be inferred from the circumstances." Rule 1.0(q) defines "reasonable" to be "conduct of a reasonably prudent and competent lawyer." Rule 1.0(r)'s definition of "reasonable belief" combines these two concepts. "A mere suspicion or theoretical possibility that a third person is still relying is not enough – the lawyer must actually believe it." *Simon's Rules of Professional Conduct Annotated* 223 (2013). Without knowing the information or the content of the exchanges between counsel, we must accept the inquirer's unqualified statement that the lawyer does not reasonably believe that CD's counsel is still relying on the inquirer's statement. If that is so – if in light of all the facts and circumstances a lawyer does not reasonably believe that CD's counsel is so relying – then Rule 1.6(b)(3) provides no license for the lawyer to reveal the information.

8. This does not end the inquiry, for the lawyer asks also whether Rule 3.3(a) requires the lawyer to disclose the information if the probate proceeds and AB's successor counsel presents the court with lawyer's prior factual representation as a true statement. That Rule mandates disclosure, notwith-

standing the confidentiality restrictions of Rule 1.6, in certain circumstances. That a lawyer appearing before a tribunal must correct a client's false statement to the tribunal (after unsuccessfully trying to persuade the client to do so) is not at issue. The question, instead, is whether a lawyer who knows that a former client is using the lawyer's prior statements or work product to place false evidence before a court is required or permitted to disclose the information.

9. The requirement that a lawyer do so is not readily apparent in Rule 3.3. Rule 3.3(a), unlike Rule 3.3(b), does not limit its application to a "lawyer who represents a client before a tribunal," yet the mandate of disclosure in Rule 3.3(a) extends only to the knowing failure of a lawyer "to correct a false statement of material fact or law previously made to the tribunal by the lawyer." It is difficult to read this phrase to mean anything other than a statement that the lawyer personally makes to the tribunal, rather than a statement the lawyer previously made to an adverse counsel which another lawyer then places before the court. In contrast to some other jurisdictions, the New York Rules do not make the obligations of Rule 3.3 "ongoing," or cross-reference Rule 3.3 in Rules 1.6 and 1.9, *e.g.*, Indiana Opinion 2 (2003); Illinois Opinion 98-07 (1999), which would clarify the duties of former counsel in these circumstances. Absent such clarity, we cannot conclude, based on Rule 3.3 alone, that a lawyer who is not counsel appearing before the court has an obligation to correct information that another lawyer submits to a court. *See* Virginia Opinion 1777 (2003) (forbidding disclosure); *but see* ABA 93-376 (1993) (holding that "noisy withdrawal" does not relieve the lawyer of the duty of candor in Rule 3.3).

10. Practical concerns support this conclusion. Rule 1.16(a)(3) permits a client to discharge a lawyer at any time for any reason. For better or worse, Rule 1.6 does not allow a discharged lawyer to reveal confidential information to successor counsel without a client's consent. These Rules, taken together, mean that a client may discharge a lawyer precisely because the lawyer is unwilling to further a client's ill-advised and potentially fraudulent pursuits. The so-called "noisy withdrawal" provisions of Rule 1.6(b)(3) supply some leverage to the lawyer in these circumstances, but only upon a "reasonable" belief that reliance on a lawyer's prior statements persists. As we have said, if, as here, that condition is not met, then the avenue of permissive disclosure is closed. Upon withdrawal from a matter, the lawyer's interest in the representation ends except insofar as Rule 1.9 protects former clients from the disclosure of confidential information and the lawyer's involvement in matters adverse to the onetime client substantially related to the prior representation. To impose on the former lawyer the additional obligation to monitor the client's use of a lawyer's onetime statements to opposing counsel exceeds any duty that the language of the Rules imposes.

11. The inquiry does not require us to speculate on the lawyer's obligations if, despite having no duty to watch over the matter, the lawyer somehow learns that the lawyer's erstwhile client intends to use, or has used, the lawyer's statement before a tribunal. For now, we deal only with the question before us, which does not present those facts. Whether a lawyer may or must disclose information in such circumstances implicates a variety of Rules that are best left for consideration when the issue is presented.

CONCLUSION:

12. A lawyer who has not appeared before a tribunal has no duty and no right to disclose confidential information protected by Rule 1.6 even if necessary to correct a prior false statement by the lawyer, made to opposing counsel before any proceeding began, which may be later used as evidence before the tribunal. (73-12)

OPINION 983 (10/08/2013)

TOPIC: Legal fees; advance payment retainers

DIGEST: Lawyer may retain unearned portion of prior retainer on conclusion of matter, at client's request, as advance payment of fees for future legal services; such advance payment may be treated as client-owned funds depending on agreement with client.

RULES: 1.5; 1.15

FACTS:

1. The inquirer is a lawyer who settled a case he was handling for his client. He had been paid a retainer (the "first retainer") that was not exhausted, and he sought to return the balance. The client asked him to keep the balance in his escrow account, telling the lawyer she "might need [him] for something else."

QUESTION:

2. May the lawyer, at the client's request, keep the unearned portion of the first retainer in his escrow account, as an advance against unspecified legal services to be provided in the future?

OPINION:

3. The inquiry concerns advance payment retainers, which the Committee has previously addressed.[100] "An advance payment retainer is a sum provided by the client to the lawyer to cover payment of legal fees expected to be earned during the representation." N.Y. State 816 ¶3 (2007). The arrangement proposed by the inquiry is of this type – it is a deposit toward payment of fees for future legal services – even though there is not yet any agreement between client and lawyer as to what further legal services, if any, will actually be provided.[101] Any ultimately unearned portion of an advance payment retainer must be returned to the client.[102]

100 *See* N.Y. State 570 (1985), adhered to in N.Y. State 816 (2007). These opinions were decided under the prior Code of Professional Responsibility, but we see no reason that the current Rules of Professional Conduct (the Rules) would lead to different results.

101 There are variations in terms used to describe retainer agreements. Here we follow the usage of our prior opinions, but what we are calling an advance payment retainer or advance fee retainer is also sometimes called a "special," "specific" or "security" retainer. *See Grievance Administrator v. Cooper*, 06-36-GA (Mich. Att'y Disc. Bd. 2007). The term "special retainer" is also sometimes used to denote a broader category of arrangements, as distinguished from the "general retainers" described in paragraph 5 below. Special retainers in that broader sense can be further divided into "security retainers," which are advances intended to secure the client's payment of fees when earned for future legal services, and "advance fee retainers," which in this usage means "a present payment to a lawyer as compensation for the provision of specified legal services in the future," generally "intended to compensate the lawyer for all work to be done on a matter, regardless of the time required or the complexity of the assignment," and also known as "fixed" or "flat" fees. *See*, *e.g.*, *In re Hann*, 819 N.W.2d 498, 505-06 (N.D. 2012) (quoting D. Richmond, "Understanding Retainers and Flat Fees," 34 J. Legal Prof. 113 (2009)). Using this terminology, the present inquiry concerns a proposed security retainer.

102 *See* Rule 1.5(d)(4) ("A lawyer shall not enter into an arrangement for, charge or collect . . . a nonrefundable retainer fee," though a retainer agreement may include a reasonable and clear minimum fee clause); *id*., Cmt. [4] (lawyer "may require advance payment of a fee, but is obliged to return any unearned portion"); Rule 1.16(e) (upon termination of representation, lawyer shall take steps to avoid foreseeable prejudice to the rights of the client, including "promptly refunding any part of a fee paid in advance that has not been earned"); N.Y. State 816 ¶¶ 3-4, 8, 10 (2007); *In re Cooperman*, 83 N.Y.2d 465 (1994) (interpreting prior Code to prohibit nonrefundable advance payment retainers).

4. The inquiry raises a question about how an advance payment retainer may be handled from the time it is provided to the lawyer until it is either earned by the lawyer or returned to the client. Under our opinions, the parties may choose either of two options. One option is to treat advance payment of legal fees as client funds, in which case the lawyer must deposit the advance payment into an escrow account and may not retain interest earned on the funds.[103] Alternatively, the parties may "agree to treat advance payment of fees as the lawyer's own." N.Y. State 816 ¶5. Under this option,

> the lawyer may use the money as the lawyer chooses (except that the lawyer may not deposit it in a client trust account), subject only to the requirement that any unearned fee paid in advance be promptly refunded to the client upon termination of the employment. In [this] case, any interest earned on the advance payment of fees would belong to the lawyer.

N.Y. State 570 (citation omitted). By allowing both options, the New York ethics rule differs from rules in a number of other jurisdictions where the client necessarily continues to own the funds until earned, and thus the lawyer must keep the funds in an escrow account.[104]

5. An advance payment retainer, in either of these two variations, is to be distinguished from a "general retainer," which is not a payment for specific legal services. Rather, it is "a payment to the lawyer for being available to the client in the future and for being unavailable to the client's opponents," and it is "earned upon receipt."[105]

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103 *See* N.Y. State 816 ¶5, quoting N.Y. State 570; Rule 1.15(b)(1) & Cmt. [1] (money "that is the property of clients" or prospective clients must be kept in one or more trust accounts). Interest earned on the funds while in an escrow account must be remitted to the client unless the funds are deposited into an "interest on lawyer account" or "IOLA", which is an unsegregated interest-bearing account for the deposit of moneys "which, in the judgment of the attorney, are too small in amount or are reasonably expected to be held for too short a time to generate sufficient interest income to justify the expense of administering a segregated account for the benefit of the client or beneficial owner." Judiciary Law §497(1), (2). Under Judiciary Law §497(6)(c), interest on such accounts is remitted to the IOLA fund established by State Finance Law §97-v.

104 *See* N.Y. State 570 (1985) (noting that "majority of opinions by other ethics committees that have addressed the issue . . . would require that advance payments of legal fees be deposited in a client trust account and retained there until earned," and citing examples). Some jurisdictions have adopted explicit rules to this effect. *E.g.*, Arizona ER 1.15(c); Maine Rule 1.15(b)(1); *see* ABA Model Rule 1.15(c) (lawyer "shall deposit into a client trust account legal fees . . . that have been paid in advance, to be withdrawn by the lawyer only as fees are earned"). Some others have adopted such a rule as a matter of interpretation. *E.g.*, *In re Lochow*, 469 N.W.2d 91, 97-98 (Minn. 1991); *State v. Fellman*, 678 N.W.2d 491, 497 (Neb. 2004); *In re Dawson*, 8 P.3d 856, 859 (N.M. 2000); Oklahoma Opinion 317 (2002); Philadelphia Opinion 96-7. Other jurisdictions yet have adopted this rule only as a default. *E.g.*, *Att'y Grievance Comm'n of Maryland v. Stinson*, 50 A.3d 1222, 1226 n.4 (2012) (fees to be deposited into client trust account unless client "gives informed consent, confirmed in writing"); *In re Mance*, 980 A.2d 1196, 1201 (D.C. 2009) (advances of unearned fees to be treated as property of client "unless the client gives informed consent to a different arrangement"). *See generally* Kewalramani & Greenberger, "Advance Payment Retainers: Whose Property? What Account?," N.Y.L.J (Feb. 15, 2013); O'Shea, "Advance Fee Retainers: Should We Change the Rules?," N.Y. Prof. Resp. Report (July 2001) (arguing against amending Code to require that advance fee payments be held in trust until earned, and opining that N.Y. State 570 "has served for many years as clear and largely uncontroversial guidance for the New York Bar").

105 N.Y. State 570 n.1; *accord* N.Y. State 816 ¶3. According to one source:

> A general retainer is also known as a "true," "classic," or "availability" retainer, or as an "engagement fee." A true retainer fee is an amount a lawyer charges the client not for specific services but to ensure the lawyer's availability whenever the client may need legal services. Such a fee is a charge separate from fees incurred for services actually rendered. In other words: A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed. . . . A retainer purporting to be "both for availability and for services" has been called a "hybrid" and is usually treated as a special retainer or advance payment of fees.

Grievance Administrator v. Cooper, 06-36-GA (Mich. Att'y Disc. Bd. 2007) (footnotes and internal quotations omitted).

6. On the facts of the current inquiry, the first retainer was an advance payment retainer to pay for services in the matter that has now been concluded, and the funds in question are the unused balance of that first retainer. These funds are now intended to pay for unspecified legal services in the future, if and when the parties agree that such further services will be provided, rather than to secure the availability of the lawyer to the client. Thus these funds are being maintained as a further advance payment retainer.

7. The client has requested that the funds be kept in the lawyer's escrow account, and as seen above, the lawyer is free to agree to that request. The parties are thus agreeing that the funds will be treated not as belonging to the lawyer, but rather as belonging to the client unless and until earned by future provision of legal services. "[O]nce a lawyer agrees to treat a fee advance as client property, the lawyer is bound by that agreement and all of its consequences," including all ethical requirements "applicable to client funds and trust accounts." N.Y. State 570 (1985).

8. We note an additional question about the lawyer's ongoing duties during the period from completion of the first matter until such time as the parties may agree on the performance of further legal services. The inquiry does not specify whether the parties contemplate that their attorney-client relationship will continue during that period. It is possible that the lawyer could serve merely as an escrow agent for the funds without continuing as attorney for the person whose funds are being held. Even then, however, the lawyer would remain bound by certain ethical duties to that person. *See*, *e.g.*, Rule 1.9 (duties to former clients); Rule 1.15 (preserving identity of funds of others, fiduciary responsibility, and record keeping).

9. Alternatively, the attorney-client relationship may continue while the lawyer holds the advance payment retainer, in which case lawyer would continue to be bound by the full set of ethical duties owed to clients. The inquiry does not say that the lawyer has told the client that the representation has terminated. The parties have discussed the possible future provision of legal services. And the lawyer is agreeing to keep possession of the client's funds for that purpose. Each of these circumstances is a factor that may bear on whether the client reasonably views that the representation will continue.[106] However, whether there is an attorney-client relationship during the interim between past services and potential future ones is a legal rather than an ethical question. We have mentioned some relevant factors but it is not our province to opine whether the representation continues. *See*, *e.g.*, Rules Scope ¶[9] ("principles of substantive law external to these Rules determine whether an client-lawyer relationship exists"); N.Y. State 963 ¶10 (2013).

10. Of course the lawyer would be well advised to try to avoid misunderstandings as to either the treatment of the advance payment retainer or whether the representation is continuing. *See*, *e.g.*, N.Y. State 816 ¶9 (2007) ("imperative for a lawyer at the outset of the representation to discuss the advantages and disadvantages of advance payment retainers and to reach an agreement about the treatment of any such advances"). Moreover, to embody agreements with the client in writing, whether or not

106 "If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal." Rule 1.3, Cmt. [4]; *see* Restatement (Third) of the Law Governing Lawyers §14(1)(b) & cmt. e (2000) (relationship of client and lawyer arises when "a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person . . . and . . . the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services").

required,[107] may enhance clarity. *See*, *e.g.*, Rule 1.3, Cmt. [4] ("Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.").

CONCLUSION:

11. At the client's request, the lawyer may retain the unspent portion of the retainer on the conclusion of a matter as an advance payment of fees to be used for unspecified future legal services. Such advance payment retainers may be treated either as client-owned funds, to be kept in the lawyer's escrow account, or as lawyer-owned funds, subject to the lawyer's obligation to reimburse the client for any portion ultimately not earned in fees.

(6-13)

107 The Rules do not state that the terms of a representation must be written, and depending on the circumstances, a writing may or may not be required by law. *See* Rule 1.5(b) (lawyer "shall communicate" to client the scope of the representation and the basis or rate of fee and expenses); 22 N.Y.C.R.R. §§ 1215.1(a), 1215.2(a), (b) (written letter of engagement not required where "the fee to be charged is expected to be less than $3000," or "the attorney's services are of the same general kind as previously rendered to and paid for by the client").

OPINION 984 (10/08/2013)

TOPIC: Conduct that has no substantial purpose other than to cause needless expense

DIGEST: A lawyer's refusal to provide copies of publicly-available pleadings to adverse counsel does not violate Rule 3.2.

RULES: Rule 3.2

FACTS:

1. Inquirer is asked by adverse counsel in a case to provide copies of pleadings and other documents already filed which form the basis of a default judgment. Inquirer proposes to respond that he will not provide copies of documents that are available from the court file, although such documents are electronically stored on his computer and may not be available electronically from public sources. Such refusal will mean that adverse counsel will incur the cost of time and expense travelling to the court clerk in order to photocopy those documents.

QUESTION:

2. Would such a refusal violate Rule 3.2?

OPINION:

3. We assume without opining that the inquirer is not required by law or court rule to provide the documents in question. *See* Rule 3.3(a) (lawyer shall not intentionally violate any established rule of procedure or of evidence), Rule 8.4(b) (lawyer shall not engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer). If the lawyer were so required, refusal to provide the documents would constitute a violation of Rule 3.2.

4. New York Rule of Professional Conduct 3.2 states that "In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." Cmt. [1] to the Rule adds that "The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay or needless expense."

5. Rule 3.2 was introduced to New York on April 1st, 2009 when the Rules of Professional Conduct were promulgated by the courts to supercede and replace the old Code of Professional Responsibility. There was no predecessor version of Rule 3.2 in the old Code but it did include Disciplinary Rule 7-101(A)(1) "Representing a Client Zealously" which stated in pertinent part that "acceding to reasonable requests of opposing counsel which do not prejudice the rights of the client" was not a violation. Former Ethical Consideration 7-38 stated that a "lawyer should . . . acede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client." The quoted language from the former DR 7-101(A)(1) and EC 7-38 was not included by the Courts in the Rules of Professional Conduct, nor in the Comments to the Rules (the Comments were adopted by the New York Bar Association's House of Delegates). But it seems instructive that only the Ethical Consideration (not the Disciplinary

Rule) stated a lawyer "should" acede, because Ethical Considerations had an aspirational, rather than disciplinary, nature. This is our first opinion construing Rule 3.2.[108]

6. While providing the documents would save adverse counsel time and effort, the documents were presumably produced or obtained at the expense of adverse counsel's client, so even if no money were expended, there would be an implicit cost to sharing them. But even if there were no implicit cost, it does not seem likely that in promulgating Rule 3.2 the courts intended to create an ethical obligation to share information, documents or resources solely because the cost of sharing would be minimal. Otherwise, one side could be compelled to provide copies of the cases it has cited in pleadings or even to "lend" the assistance of salaried personnel. When Rule 3.2 states that a lawyer shall not "cause needless expense" we believe it means that a lawyer shall not take *affirmative steps* which result in "needless expense" but that mere refusal to cooperate, as here, does not constitute such an affirmative step. In short, declining to provide documents available at the court to adverse counsel does not constitute "causing" needless expense.

7. We add that while Rule 3.2 does not compel sharing the documents available from the court, we also see no prohibition in the Rules against acceding to such a request. *See* Rule 1.2(e) (lawyer may exercise professional judgment to acede to reasonable requests of opposing counsel when doing so will not prejudice the client's rights). The lawyer should also consider whether the circumstances of the request merit consultation with the client before deciding whether to acede. *See* Rule 1.4(a)(2) (lawyer shall "reasonably consult" with client regarding the means of accomplishing client's objectives).

CONCLUSION:

8. The proposed refusal would not violate Rule 3.2

(23-13)

108 Cf., N.Y. State 469 (1977) (lawyer may not interpose a general denial knowing that the client has no valid defense). We do not find any state or federal court decisions in New York that construe the Rule either. ABA Model Rule 3.2 reads differently, stating that "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

OPINION 985 (10/08/2013)

TOPIC: Former law clerk appearing before judge who employed clerk

DIGEST: A lawyer is permitted to appear, and assist others who appear, before a judge by whom the lawyer was employed, on matters unless the lawyer had substantial personal participation in the matter.

RULES: 1.12(b)(2)

FACTS:

1. The inquiring lawyer has served as a law clerk of a judge in the past. Now the lawyer has opportunities to advise and provide legal analysis to clients or other lawyers in matters before the judge for whom the lawyer had worked. None of the opportunities relate to any matters before the judge while the lawyer worked for the judge.

QUESTION:

2. May a lawyer who formerly served as a legal clerk, appear, or assist those who appear, before the judge who had employed the lawyer?

3. If prohibited from appearing before the judge for whom the lawyer worked, may the lawyer appear before judges of the same court for whom the lawyer did not work?

OPINION:

4. The only Rule of the New York Rules of Professional Conduct that addresses this matter is Rule 1.12. It states in relevant part, ". . . unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a law clerk to a judge . . ." Rule 1.12(b)(2).

5. In order to trigger the requirement for informed consent, the matter must be one in which the law clerk had substantial personal involvement. Thus absent written informed consent from the parties, confirmed in writing, a former law clerk is prohibited by this Rule from appearing before the judge in such a matter.[109] [110]

109 Whether the Judge has any obligations, or is required to consent to the former law clerk's appearance before the Judge, is a question under the Code of Judicial Conduct; this Committee expresses no opinion about the application or interpretation of the Code of Judicial Conduct.

110 What constitutes "substantial and personal involvement" has been discussed by this Committee in several opinions. For example, Opinion 748 (2001) sets forth factors which might require disqualification of a government prosecutor from representing a criminal defendant who was investigated and prosecuted while the lawyer was employed in the prosecutor's office. That Opinion states, "DR 9-101(B) (the predecessor to Rule 1.12 (b)) made clear that disqualification must be based on the lawyer's personal participation to a significant extent." The factors to be considered in analyzing whether the involvement of a lawyer was personal and substantial include serving more than a supervisory role, having responsibility for more than mere ministerial aspects of a matter, assisting in the research and writing of decisions on the merits and interaction with parties by which the clerk might have had access to confidential information.

6. In the present inquiry, the lawyer asks only whether it is permissible to appear or advise others who will appear before the judge for whom the lawyer worked in new matters, that is, those matters which had not been before the judge while the lawyer was employed by the judge.

7. The application of these principles is illustrated in the Second Department's decision, *In re Coleman,* 69 AD3d 846 (2010). There the court held that a lawyer who had served as supervising attorney in the law department supporting the Surrogate's Court was not disqualified from appearing in that court on matters which had been handled by the lawyer's former law department. The court held that the record did not support a finding that "the former government attorney was "personally involved to an important, material degree, in the investigati[on] or deliberative processes regarding the transactions or facts in question" (*In re Coleman,* at 849).

8. Given that the former law clerk is not prohibited by Rule 1.12 from appearing before the judge who employed the lawyer, the lawyer is permitted to appear before other judges of the same court as the judge for whom the lawyer worked.

CONCLUSION:

9. A lawyer is permitted to appear, and assist others who appear, before a judge by whom the lawyer was employed, on matters unless the lawyer had substantial personal participation in the matter.

(25-13)

OPINION 986 (10/25/2013)

TOPIC: Whether it is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.

DIGEST: It is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.

RULES: 1.7, 1.14

QUESTION:

1. May a lawyer who represents a mentally incapacitated adult in a Medicaid benefits proceeding also represent that person's sister in seeking to petition for a guardianship for him where the sister, against the client's wishes, has refused to remove her brother from a hospital and will not permit him to return to her home?

BACKGROUND:

2. A Legal Services lawyer was retained to represent a severely incapacitated man to appeal the denial of certain Medicaid services. He has been diagnosed with schizophrenia and mental retardation. A recent evaluation concluded that he is "unable to function autonomously, and he cannot make financial or health decisions on his own. He is significantly mentally retarded." The client is not able to make decisions during the representation and "does not understand what is involved in appealing the denial of Medicaid Services." The client was assisted by his sister in applying for Legal Aid Services.

3. The sister has cared for and lived with the client until recently, when the client accidentally set fire to the sister's home. The sister brought him to a hospital where he remains. The hospital wants to discharge the client and his expressed desire is to return to the sister's home. The sister is unwilling to accept the client back to her home.

4. The attorney states that there is no practical method of protecting the client's interests other than to have a guardian appointed. There is no other family. Social services agencies have extremely limited resources. The sister is willing to serve as the guardian, but the client is so incapacitated that he is not capable of consenting or objecting to the appointment of his sister as guardian.

5. The attorney asks whether he is permitted to represent the sister in a petition for guardianship over her brother.

OPINION:

6. The lawyer asks whether concurrent representation of client A with significant diminished capacity and another client (B) who seeks to become the guardian for client A is permissible when the stated wishes of client A are directly contrary to the position of Client B as the prospective guardian. To what extent is the lawyer bound by the arguably unreasonable and ill-considered stated desire of the incapacitated client in assessing whether such a conflict exists? What action is permissible by the lawyer?

7. Concurrent conflicts of interest are governed by Rule 1.7 of the Rules of Professional Conduct which prohibits a lawyer from representing clients with "differing interests." This includes "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest. Rule 1.0(f); See also Rule 1.7 Cmts. [1],[2],[8]. The lawyer is expected to be loyal, protect client confidences and provide independent judgment.

8. In the representation of Client A in the Medicaid appeal, the lawyer learned of the client's stated desire to return to his sister's home. Living arrangements are a fundamental interest of the client as contemplated by Rule 1.7. Unquestionably, if Client A did not have significant diminished capacity, the lawyer could not undertake to represent his sister in any proceeding where Client A's stated desires would be undermined, and in this case directly contrary to the client's wishes, by the lawyer's representation of another client. [111]

9. Thus, the question is whether the client's significantly diminished capacity alters the judgment as to whether the lawyer would be representing "differing interests" if he undertook representation of the sister in the guardianship proceeding. As explained below, it does not.

10. Rule 1.14 seeks to provide guidance to a lawyer in such circumstances. It acknowledges the difficulty of providing diligent and competent representation to clients who have diminished capacity precisely because the client is often incapable of understanding and making decisions about the matter. In such circumstances, even though the representation may be premised upon the goal of maximizing a client's autonomy and dignity, the lawyer may believe that advocating the client's stated position to be directly contrary to what the lawyer reasonably believes is the only viable choice for the client with significant diminished capacity. May the lawyer maintain a position contrary to the client's stated wishes when that client has significant diminished capacity?

111 In some circumstances, the concurrent conflict may be waived, but not in this case. Even if the lawyer reasonably believed that he could provide competent and diligent representation to both Clients A and B, Client A is not capable of providing informed consent to such a waiver. Rule 1.7 (b).

11. Rule 1.14 suggests a course of action for the attorney in such circumstances. [112] First, a lawyer must "as far as reasonably possible" maintain a normal lawyer-client relationship. The fact that a client suffers from mental illness or retardation does not diminish the lawyer's responsibility to treat the client attentively and with respect. Rule 1.14, Cmt. [2].

12. Second, Rule 1.14 permits a lawyer to take protective action when the lawyer reasonably believes that the client is at risk of physical, financial, or other harm unless such action is taken. Before considering what measures to undertake, lawyers must carefully evaluate each situation based on all of the facts and circumstances. "Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities on the lawyer." Roy D. Simon, Simon's Rules of Professional Conduct Annotated, 662 (2013). One of those responsibilities is to acknowledge that even clients with diminished capacity may have the ability to make decisions or reach conclusions about matters affecting their own well-being.

13. Any protective action taken by the lawyer should be limited to what is essential to carry out the representation. Thus, the lawyer may consult with family members, friends, other individuals, agencies or programs that have the ability to take action to protect the client. The Rule does not specify all of the potential protective actions that may be undertaken, but it makes clear that seeking the appointment of a guardian is the last resort, when no other protective action will protect the client's interests.

14. This opinion presumes that, before considering guardianship, the attorney has considered and exhausted other options. First, the lawyer has attempted to maintain a normal client-lawyer relationship as best as possible under the circumstances. A primary aspect of that relationship is to maintain communications with the client. The attorney has determined that the client's stated desire is to return to his sister's home. Even if the attorney reasonably believes this to be unwise, unreasonable, or otherwise ill advised, the client still deserves attention and respect.

15. Second, before deciding whether to take protective action with respect to the client, the lawyer has a reasoned basis, beyond what he believes to be the client's ill considered judgments, to conclude that the client cannot act in his own best interests and that protective action is necessary. The lawyer unsuccessfully attempted to communicate with the client, obtained information and assistance from the client's sister, and sought a medical evaluation.

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112 Rule 1.14 provides that:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
>
> (c) Information related to representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

16. It is not clear whether there are other individuals, community resources or social services agencies that may be of assistance to the client. Nor is it clear whether other options have been explored prior to seeking the appointment of a guardian. This includes an assessment as to whether or not referral to support groups or social services could provide protection to the client.

17. These alternatives should be exhausted prior to seeking the appointment of a guardian. The situation is particularly fraught for clients with limited financial means and social support networks. There are few social services available to assist such clients, thereby leaving the attorney in circumstances with few options to carry out representation as contemplated by Rule 1.14. Therefore, these circumstances require a lawyer to exercise careful judgment to adopt a course of action that best protects the client's interests.

18. The lawyer must recognize that seeking a guardianship is an extreme measure as it "deprives the person of so much and control over his or life." *In the Matter of the Guardianship of Dameris L.,* 38 Misc 3d 570 (Sur. Ct. NY Cty 2012) citing Rose Mary Bailly, PRACTICE COMMENTARIES, MCKINNEY'S CON LAW OF NY, Book 34A, MENTAL HYGIENE LAW § 81.01 at 79 (2006). It has been suggested that the lawyer should seek a guardian only if "serious harm is imminent, intervention is necessary, no other ameliorative development is foreseeable, and nonlawyers would be justified in seeking guardianship." Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 3 Utah L. Rev. 515, 566. (1997); See 62 Fordham L. Rev. 1073 (1993-1994)

19. Article 81 of the Mental Hygiene Law, allows for the judicial appointment of a legal guardian for one's personal needs, property management or both, when a person is incompetent to conduct his or her own affairs. N.Y. MENTAL HYGIENE LAW § 81.02(a); 81.06 et seq. The statute expects that the system is tailored to meet the individual's specific needs by taking into account the incapacitated person's wishes, and preferences. N.Y. State 746 (2001).

20. Assuming that the attorney has undertaken this thorough evaluation of the circumstances, and now reasonably believe that guardianship is the only alternative, that lawyer may seek out others to petition for the guardianship.

21. The guardianship process is initiated by a petition. The lawyer may seek out any available individual, social service agency or private organization to petition for guardianship. Article 81 specifies seven categories of persons who may file such a petition. § 81.06.

22. The court then is required to appoint a court evaluator who will recommend whether the alleged incapacitated person (AIP) requires counsel. The court evaluator will also make recommendations as to who should serve as guardian and make appropriate living arrangements. Any conflicts between the sister and AIP will be addressed by the court evaluator. *See e.g.,* MHL 81.09(c)(5)(xv). It is not apparent whether court evaluators are appointed in all matters as required by statute.

23. The court then considers all of the evidence and determines, by clear and convincing evidence, whether the person is likely to suffer harm because he or she is unable to provide for his or her personal needs and/or property management and cannot adequately understand and appreciate the nature and consequences of this inability. § 81.02 (b).

24. The guardian is to engage in the "least restrictive form of intervention, consistent with the concept that the needs of persons with incapacities are as diverse and complex as they are unique to the individual." NY Mental Hgy Law §81.01.

25. The attorney may suggest that the sister seek a petition for guardianship and may make suggestions as to individuals or agencies to assist her in completing the petition, but the lawyer may not represent her in petitioning for the guardianship. Her interests are contrary to that of the client. She has clearly stated, contrary to the client's desires, that she will not permit him to return to her home. Thus, the attorney would be in conflict with his client if he represents the sister and assists her in filing a petition seeking an objective contrary to the client's stated desire.

26. The lawyer's position in protecting the client's interests is complicated by perceived difficulties for lay persons in completing the petition for guardianship and the lack of social service and other resources to assist the family of incapacitated people. The sister may desire to file a petition for guardianship but may be ill-equipped to do so and there may be no assistance available to her. Consequently, it may be that the attorney is the only person who can reasonably seek the appointment of a guardian. In general, a lawyer should only act as petitioner in seeking the appointment of a guardian if there is no one else who reasonably can do so. Simon, Rules of Prof Conduct Annot. at 663, N.Y. State 746 (2001).

27. In general, the interests of the petitioner in a guardianship proceeding are in conflict with that of the client, notably where there will be a contested hearing and the petitioner will serve as a witness. However, where the client does not oppose the guardianship or is incapacitated and cannot express an opinion as to the guardianship, Rule 1.14 implicitly acknowledges that the lawyer may file the petition to seek a guardianship in circumstances where the guardianship will not be subject to a hearing and no one else is reasonably available to file the petition. We previously considered the issue of whether an attorney-in-fact could petition for guardianship for a client and concluded, under the then-existing Code of Professional Conduct, that it was permissible under circumstances such as those presented here where there is no other option and there will not be a contested hearing under Article 81. We considered whether the "dual role" of petitioner in a guardianship proceeding and as client representative was impermissible in these circumstances and concluded that, given other safeguards in the Article 81 proceedings, the dual role was not impermissible. N.Y. State 746 (2001). We affirm that opinion under the Rules of Professional Conduct.

28. Should the attorney file the petition for guardianship, and the court become aware that the sister may be the only person who can be appointed as the client's guardian, the lawyer should advise the court of the sister's position regarding the client's living arrangements. The court can then consider whether, in light of the potential conflict between the client and his sister, she is the appropriate guardian.

29. Thus, using the same reasoning, Connecticut has determined that in these circumstances should the lawyer petition for the appointment of a guardian, the lawyer does not need to withdraw from representation on the underlying Medicaid matter. In circumstances involving clients with disabilities, this is not a preferred course of action. *See* Connecticut Inf. Opinion 97-19 (1997).

30. Assuming that a guardian is appointed, the lawyer should consult with the client and the guardian as to the position to be asserted in the Medicaid matter. The guardian is the representative of the client. The rationale for the appointment of a guardian is to have someone who can make decisions for the incompetent client. Thus, after the appointment of the guardian, the lawyer generally must take direction from that guardian.

31. Finally, Rule 1.14 is often frustrating because it does not provide solutions to all problems in dealing with clients with diminished capacity. It does, however, provide "an intelligible frame of reference for the lawyer and those who might later judge his conduct." Geoffrey C. Hazard Jr. and W. William Hodes, THE LAW OF LAWYERING, § 1.14:101, p.439. (1990). See Connecticut Inf. Opinion 97-19.

CONCLUSION:

32. It is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.

9-13

OPINION 987 (10/25/2013)

TOPIC: Insurance company review of staff counsel's files.

DIGEST: Absent informed consent from the insured (staff counsel's client), staff counsel may not permit review of the confidential information in the client's file by non-attorney employees of the insurance company which employs the staff counsel.

RULES: 1.0(h); 1.6(a); 1.8(f)

FACTS:

1. An insurance company that employs staff counsel to represent the company's insureds conducts peer reviews of the staff counsels' files to both evaluate the attorneys' handling of files and to develop best practices to be followed by staff counsel attorneys of the insurance company. The panel conducting these reviews has until now been comprised solely of staff attorneys of the insurance company but the insurance company now proposes adding non-attorney members of the insurance company's claims department to the panel.

QUESTION:

2. Is it permissible to allow non-attorney members of the reviewing panel access to the insured's confidential information contained in the staff counsel's files?

OPINION:

3. Rule 1.6(a) provides that a lawyer "shall not knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

> (1) the client gives informed consent . . . ;
>
> (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
>
> (3) the disclosure is permitted by paragraph (b) [none of the provisions of which paragraph (b) are applicable to the facts of this opinion]."

4. Confidential Information is defined in Rule 1.6(a) as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."

5. Rule 1.0(h) defines "law firm" to include "the legal department of a corporation or other organization". The office of staff counsel therefore constitutes a law firm but the non-attorney members of the insurance company's claims department are not members or employees of the "law firm" of staff counsel and are not subject to supervision and control by the staff counsel. Therefore, the attorney

does not have the ability or authority to exercise reasonable care in their supervision to prevent their disclosure or use of confidential information in accordance with Rule 1.6(c).

6. Accordingly, any confidential information in the staff counsel's file cannot, without the client's informed consent, be revealed to the non-attorney members of the review panel. Informed consent is defined in Rule 1.4(j) as, "denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." Unless such consent is contained in the language of the applicable insurance policy, it is incumbent upon the staff counsel to obtain the client's informed consent to the disclosure of the information to the non-attorney members of the reviewing panel. Absent such consent, the confidential information must be redacted from the file before the file may be reviewed by the non-attorney members of the reviewing panel. See N.Y. State 716 (1999) (counsel assigned by insurance company to represent the insured cannot provide bills, which are deemed to contain confidential information, to independent auditors retained by the insurance company, without the insured's informed consent) and N.Y. State 721 (1999) (defense counsel may follow direction of insurance carrier to utilize a specified legal research service subject to certain conditions, but may not in doing so reveal client confidential information without the informed consent of the client).

7. Because the fees of the staff counsel are paid by the insurance company, the provisions of Rule 1.8(f) are also applicable. These provisions require that if the fees are to be paid by someone other than the client, the client must give informed consent (this is usually in the language of the policy), there be no interference with the lawyer's independent professional judgment or with the client-lawyer relationship and the client's confidential information is protected as required by Rule 1.6.

CONCLUSION:

8. Absent informed consent from the insured (staff counsel's client), staff counsel may not permit review of the confidential information in the client's file by non-attorney employees of the insurance company which employs the staff counsel.

19-13

OPINION 988 (10/25/2013)

TOPIC: Lawyer Advertising; Solicitation

DIGEST: A lawyer may forward a cover letter describing his practice accompanied by a third party brochure containing helpful information of general applicability and the lawyer's contact information to nonlawyer professionals, such as accountants and bankers, in the hope that these professionals will consider referring their clients to the lawyer if a need arises.

RULES: Rules 7.1, 7.2, 7.3, 7.4, 7.5.

FACTS:

1. The inquirers are practicing attorneys licensed in New York State who wish to market their services by sending brochures to local accountants and bankers with a cover letter stating that their practice includes estate planning, trusts and estates, and elder law. The brochures, which are purchased from a national publisher, are entitled "2013 Federal Tax Pocket Guide," and "2013 Personal Planning Guide," and include, among other things, various tax rate tables, estate tax planning techniques and tax laws. The brochures will have the inquirers' firm information printed on the cover.

2. The inquirers are not seeking to solicit the accountants and bankers to become clients. Rather, they hope that as these accountants and bankers meet with their own clients, they may recommend the inquirers if such clients are in need of legal services. The inquirers candidly admit that they are "[e]ssentially . . . hoping to gain these accountants and bankers as referral sources." In addition, the cover letter to the bankers will advise them to call the inquirers if they have general questions on which they can provide assistance, but they do not plan to charge the bankers for that assistance.

QUESTION:

3. May a lawyer forward a cover letter describing his practice accompanied by a third-party brochure containing helpful information of general applicability and the lawyer's contact information to nonlawyer professionals, in the hope that these nonlawyers will recommend the lawyer's services if the nonlawyer determines that a particular client is in need of the lawyer's services?

OPINION:

4. Rule 1.0(a) of the New York Rules of Professional Conduct ("Rules") provides that an "advertisement" includes "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." The cover letters the inquirers plan to send to various accountants and bankers are advertisements governed by various rules, including Rule 7.1 ("Advertising"), Rule 7.4 ("Identification of Practice and Specialty"), and Rule 7.5 ("Professional Notices, Letterheads, and Signs"). *See* N.Y. State 848 (2010) (concluding that law firm's contemplated educational newsletter was an attorney advertisement within the meaning of Rule 1.0(a) after considering three factors: "(i) the intent of the communication, (ii) the content of the communication and (iii) the targeted audience of the communication").

5. If the above rules are satisfied, the lawyers are permitted to mail cover letters describing their practice with third party brochures to nonlawyer professionals in the hope that these professionals will consider referring their clients to the lawyers if a need arises. Since a lawyer can ethically enter into a nonexclusive reciprocal referral agreement, a lawyer's mere forwarding of cover letters and brochures to nonlawyer professionals with whom the lawyer does not intend to enter into a reciprocal referral arrangement, in the hope that it may one day lead to a new client is, by analogy, also permitted by the Rules. [113]

6. Rule 7.3, entitled "Solicitation and Recommendation of Professional Employment," defines a "solicitation" as any "advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain." Rule 7.3(b). Rule 7.3(a) prohibits a lawyer from engaging in solicitation by in-person contact unless the recipient of the solicitation is a close friend, relative, former client or existing client. Rule 7.3(a) (1). Since the inquirers cannot personally solicit the prospective clients they are seeking, as they had no prior relationship with them, they may not do so through the acts of a third party, such as an accountant or banker. Rule 8.4(a) ("A lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."); *see* N.Y. State 887 (2011) (law firm could not authorize nonlawyer marketer to meet with or call prospective clients who are acquaintances of the marketer in order to promote the firm's services, because doing so would violate Rule 7.3(a)(1) unless the prospects were close friends, clients or former clients of the law firm); N.Y. State 885 (2011) ("Non-attorneys are not subject to the New York Rules of Professional Conduct, but a lawyer cannot circumvent either the solicitation or the advertising rules through the indirect use of the non-lawyer's communications.").

7. Thus, the inquirers could not expressly request that the accountants or bankers hand out the inquirers' brochures to their clients and ask their clients to contact the inquirers. However, there is no ethical prohibition for the accountant or banker to refer the client to the lawyer or hand the lawyer's brochure to the client when they perceive that their client needs legal advice, or in response to the client's request for a legal advice. *See* Rule 7.3, Cmt. [2] ("a communication made in response to an inquiry initiated by a potential client" does not constitute a solicitation).

8. However, Rule 7.2(a) prohibits a lawyer from compensating or giving anything of value to a person or organization to recommend or obtain employment by a client. To the extent the inquirers are offering to answer questions from bankers free of charge in exchange for the banker recommending the inquirers' services, such conduct violates Rule 7.2(a)'s prohibition. *See* N.Y. State 942 (2012) (Rule's prohibition is violated if the inquiring lawyer would be giving something of value to nonlawyer firm in exchange for client referrals, such as a reduced fee); N.Y. State 741 (2001) (attorney, who was required to pay substantial dues to organization in exchange for membership that entitled the attorney to referrals from the organization's members, and was required to make referrals to those

113 In N.Y. State 765 (2003), we noted that under former DR 1-107 and DR 2-103(B), a lawyer "may enter into a non-exclusive reciprocal referral agreement or understanding with a securities broker or insurance agent." In N.Y. State 870 (2011), we opined that the reasoning of N.Y. State 765 applied under current Rules 5.7 and 5.8 and that a lawyer could enter into a nonexclusive reciprocal referral arrangement with a debt reduction company.

members, would be transferring something "of value" in order to obtain referrals in violation of current Rule 7.2(a)).

9. Finally, Judiciary Law section 479 provides, in pertinent part, that it is unlawful to solicit legal business, or to solicit a retainer authorizing an attorney to perform or render legal services, on behalf of an attorney. Whether the inquirers' proposed conduct is in violation of this statute is a question of law beyond the jurisdiction of this Committee. *See* N.Y. State 942; N.Y. State 927 (2012).

CONCLUSION:

10. A lawyer may forward a cover letter describing his practice with a brochure to nonlawyer professionals, such as accountants and bankers, in the hopes that these professionals will consider referring their clients to the lawyer if a need arises.

7-13

OPINION 989 (10/25/2013)

TOPIC: Conflicting interests; former client

DIGEST: A law school legal clinic which previously represented a not-for-profit organization may thereafter represent an organization with similar objectives in applying to the Internal Revenue Service for not-for-profit status**,** since the matters for the proposed and former clients are not substantially related within the meaning of the Rules, the new representation would not involve use of confidential information of the former client, and the relevant interests of the clients are not materially adverse.

RULES: 1.6(a), 1.9

FACTS:

1. A law school legal clinic (the "Clinic") previously represented a not-for-profit organization (the "Former Client"). As a result of a dispute within the organization, a group of dissident organization members has formed a new organization (the "Proposed Client") that would perform the same kinds of functions as the Former Client, and has asked the Clinic to represent it in applying for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code (the "New Representation").

QUESTION:

2. May the Clinic undertake the New Representation, or would such representation constitute a conflict of interest?

OPINION:

3. Under the Rules of Professional Conduct (the "Rules"), a lawyer has ethical responsibilities to former clients as well as to current ones: "After termination of a client lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with these Rules." Rule 1.9, Cmt. [1].

4. In particular, Rule 1.9 (Duties to Former Clients) provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
>
> . . . .
>
> (c) A lawyer who has formerly represented a client in a matter . . . shall not thereafter:
>
> > (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

> (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

5. The term "substantially related" is explained in Comment 3 to Rule 1.9:

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

6. If the Clinic were to undertake an extensive or continuing relationship with the Proposed Client, that representation could include matters substantially related to the representation of the Former Client in which the two clients' interests were materially adverse. In that case, Rule 1.9(a) would preclude representation of the Proposed Client unless the Former Client gave informed consent, confirmed in writing.

7. For two reasons, however, we believe that the limited New Representation proposed in the inquiry would be unlikely to give rise to such a conflict.

8. First, on the facts presented, the New Representation does not seem "substantially related" to the representation of the Former Client within the meaning of Rule 1.9. The filing of an application for tax exemption would generally not implicate confidential information of the Former Client.[114] The information needed for such an application is, rather, information about the Proposed Client and its conformity with legal requirements for tax-exempt status.

9. Second, the facts presented do not suggest that the Proposed Client's interests in the IRS application would be materially adverse to the interests of the Former Client. While the Former Client may be concerned with competition from a new organization with similar goals, this kind of general enterprise competition is not enough to create a conflict of interest. *Cf.* Rule 1.7, Cmt. [6] ("simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients"). Just as representation of competing business enterprises is not automatically representation of "differing interests" under Rule 1.7(a), we believe that competition between not-for-profit organizations would not ordinarily make establishment of the newer organization materially adverse to the interests of the existing one under Rule 1.9(a).

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114 *See* Rule 1.6(a) ("'Confidential information' does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates."); Rule 1.6, Cmt. [4A] ("The accumulation of legal knowledge or legal research that a lawyer acquires through practice ordinarily is not client information protected by this Rule. However, in some circumstances, including where the client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer's research."); Rule 1.9, Cmt. [3] ("In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation. On the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.").

CONCLUSION:

10. Under Rule 1.9, the Clinic's representation of the Proposed Client would not be in a matter substantially related to its representation of the Former Client; it would not involve use of the Former Client's confidential information; and the relevant interests of the Former Client and Proposed Client are not materially adverse. The Clinic may thus undertake the New Representation, representing the Proposed Client in applying for not-for-profit status, without obtaining the Former Client's consent.

38-13

OPINION 990 (11/12/2013)

TOPIC: Representation of Conflicting Interests.

DIGEST: A lawyer who regularly represents both Client A and Client B may represent Client B in negotiating a loan agreement in which Client B would lend money to Client A in accordance with Rule 1.7. Whether the lawyer may properly request the clients to waive conflicts that might arise in the future if Client A defaults on the loan and Client B wishes the lawyer to sue Client A on its behalf, is subject to the conditions set forth in Rule 1.7(b) and on the sophistication and experience of the clients. If the consent complies with Rule 1.7(b) and both clients consented to such adverse representation, the lawyer would not have to withdraw from representing Client A in unrelated matters. If Client B is willing to make the loan to Client A only if the lawyer uses knowledge from the representation of Client A to help Client B determine the nature and value of Client A's collateral for the loan, the lawyer may disclose such information only if Client A gives informed consent to the disclosure. The lawyer may accept stock in Client B as all or part of the fee in the lending matter as long as the lawyer determines that the fee is not excessive for the work performed by the lawyer, the terms of the transaction are fair and reasonable to Client B, Client B is advised in writing of the desirability of seeking the advice of independent legal counsel and is given a reasonable chance to do so, and Client B signs a writing that describes the transaction and the lawyer's role in the deal, including whether the lawyer is acting for the client in the acquisition of the stock. It is unlikely that acceptance of stock in Client B would require the lawyer to withdraw from representing Client A in matters unrelated to the loan.

RULES: 1.0(f), 1.0(j), 1.5(a), 1.6, 1.6(b), 1.7, 1.7(b), 1.8(a), 1.8(b), 1.8(c)

FACTS:

1. A lawyer represents a sophisticated business client who is an individual. The existing representations are both transactional and litigation, and the lawyer represents both the client individually and entities wholly-owned by the client. (The client individually and the client's wholly-owned entities are hereafter called Client A.) Client A wishes to borrow money, and the lawyer has one or more other clients (hereinafter Client B) who may be willing to extend the loans.

QUESTION:

2. A. If Client B determines to lend money to Client A, may the lawyer represent Client B in the transaction and continue to represent Client A in other matters?

B. May the lawyer ask Client A to sign a waiver of future conflicts, so that if the loan transaction results in litigation between Client B and Client A, the lawyer may represent Client B?

C. If so, would the lawyer be required to withdraw from unrelated representation of Client A?

D. If Client B is only willing to make the loan to Client A in reliance upon the lawyer's personal familiarity with the nature and value of the underlying collateral, may the lawyer participate in the transaction and disclose such information?

E. If so, may the Lawyer receive, as all or part of the lawyer's fee, an equity interest in Client B?

F. Does such an ownership interest in the lender affect the lawyer's ability to continue to represent Client A in unrelated matters?

OPINION:

Representation of Differing Interests

3. The first question involves whether the Lawyer, who regularly represents both Client A and Client B, may represent Client B in negotiating a loan agreement in which Client B would lend money to Client A. We assume Client A would be represented by separate counsel. Rule 1.7 of the New York Rules of Professional Conduct (the "Rules") prohibits a lawyer from representing a client if a reasonable lawyer would conclude that the representation will involve the lawyer in representing differing interests, unless the clients give informed consent, where consent is permitted by Rule 1.7(b). The term "differing interests" is defined in Rule 1.0(f) and including "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest."

4. In order to be "differing," the interests need not arise in the same matter, and they need not arise in litigation. For example, Comment [7] to Rule 1.7 provides:

> "Differing interests can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client."

In this case, representing Client B in lending money to Client A clearly would involve the lawyer in representing differing interests, since the interests of Client A and Client B in the negotiation of the loan agreement would be adverse. What is in the best interests of the lender are not necessarily in the best interests of the borrower. See Rule 1.7, Cmt [6] (absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated"); N.Y. State 952 (2012) ("The lawyer who represents a residential buyer and lender is representing differing interests if only because the buyer is executing a note and a mortgage in favor of the bank.")

5. Rule 1.7(b) provides that, notwithstanding the existence of a concurrent conflict of interest, the lawyer may represent Client B in lending money to Client A if:

> "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing."

6. Whether the lawyer reasonably believes the lawyer can provide competent and diligent representation to each affected client is a factual determination that we cannot make. But in the facts presented here, we see nothing that would prevent the lawyer from reasonably reaching that conclusion. Similarly, the representation is not prohibited by any law. *Cf.,* Rule 1.7, Cmt. [16] (non-consentable conflicts). Moreover, the inquirer has presented no facts that would provide grounds for believing, at this stage of the relationship between Clients A and B, that the lending relationship will result in litigation or another proceeding before a tribunal. Consequently, if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to both Clients A and B, the lawyer may ask for consent to the conflict.

7. In N.Y. State 952 (2012) we found yet another possible conflict of interest. Because the lawyer regularly represented the lender and might well be eager to maintain that relationship and income stream, we found that the lawyer would have a personal business interest in advancing the lender's cause, which would create a significant risk that the lawyer's professional judgment on behalf of the borrower would be adversely affected by the personal business interest. *See* N.Y. State 867 at n. 2 (2011). Rule 1.7(a)(2) provides that a lawyer may not represent a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business, property or the personal interest, except as provided in paragraph 1.7(b) (quoted above). The lawyer must therefore decide whether a reasonable lawyer would conclude that such a personal conflict of interest exists, and, if so, whether the requirements for requesting client consent are met. If so, the lawyer may request such consent, after disclosing the nature of the relationship with Client A.

Future Conflict Waivers

8. The second question assumes that the clients will grant a waiver for the lawyer to represent Client B in negotiating the loan agreement and asks if the conflict waiver may also include a consent to represent Client B against Client A if the loan agreement should result in litigation.

9. As noted above, Rule 1.7(b) allows a lawyer to represent a client despite the existence of differing interests, as long as, among other things, the lawyer reasonably believes he or she will be able to provide competent and diligent representation to each affected client and each affected client gives informed consent, confirmed in writing. Whether each affected client can give informed consent to a future conflict depends on the extent to which the lawyer is able to explain adequately the material risks of the proposed course of conduct and reasonably available alternatives, and on the sophistication of the client. *See* Rule 1.0(j) (definition of informed consent) and Rule 1.7, Cmt [22].

10. Rule 1.7, Comment 22 states:

> "The more comprehensive the explanation and disclosure of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the understanding necessary to make the consent 'informed' and the waiver effective. . . . The lawyer should also disclose the measures that will be taken to protect the client

> should a conflict arise, including procedures such as screening that would be put in place."

Since Client A would be asked to consent to his lawyer's (or law firm's) suing him, it would be particularly important to make clear whether the lawyer who regularly represents Client A would be actively involved in any potential litigation.

11. Comment 22 warns that the effectiveness of advance conflict waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation and disclosures of the types of future represents that might arise, the greater the likelihood that the client will have the understanding necessary to make the consent "informed." *See also* Comment [22A], which discusses how to determine whether an advance waiver remains valid after the passage of time, when the circumstances may have greatly changed from those anticipated in the waiver. Whether Client A understands the material risks that the waiver entails depends on the sophistication of Client A. See, e.g. Rule 1.7, Cmt [22]:

> "[I]f the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, an advance waiver is more likely to be effective, particularly if, for example, the client is independently represented or advised by in-house or other counsel in giving consent."

See generally Simon's New York Rules of Professional Conduct Annotated (2012 ed), Annotations of Rule 1.7(b)(3) (hereinafter, *Simon*) ("The depth and content of the disclosure will depend largely on the sophistication of the client").

12. In the fact situation posited here, the requested conflict waiver would not be open-ended. The circumstances anticipated – that the lawyer would represent Client B in suing Client A for a default under the loan agreement (and in executing on the collateral for the loan) – is quite specific. *Compare* N.Y. City 2006-1 (authorizing a law firm to request that the client waive future conflicts of interest, and discussing requests for open-ended waivers, where the lawyer may not be able to give appropriate disclosure of the implications, advantages and risks involved, so that the client can make an informed decision whether to consent). The inquirer characterizes Client A as a sophisticated business client who is an individual. It is not clear whether Client A will be independently advised in connection with the waiver. Such independent advice would clearly make any waiver less subject to challenge.

The Downsides of Requesting Current and Future Waivers

13. The conflict of interest rules are derived from the lawyer's traditional duty of loyalty to the client. *See, e.g.* Preamble, par. 2 ("The touchstone of the client-lawyer relationship is the lawyer's obligation . . . to act with loyalty during the period of the representation"); Rule 1.7, Cmt. [1] ("Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client.") The lawyer who requests a conflict waiver from a client must consider the possibility that a client such as Client A may give consent to a conflict today but consider it to be the height of disloyalty tomorrow (or in several months) when the lawyer represents Client B in bringing suit against Client A. Such a client may challenge whether the conflict waiver was made with sufficient disclosure, and may seek fee forfeiture or professional discipline, or sue the lawyer for malpractice or breach of fiduciary duty. *See generally Simon*, supra.

14. As Comment 21 to Rule 1.7 points out, the client (in this case, Client A) can also revoke a valid consent at any time, at least with respect to continued representation of Client A. Whether such revocation would also prevent the lawyer from representing Client B depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of Client B, and whether material detriment to Client B would result. See N.Y. State 902 (whether the lawyer may continue to represent the non-revoking client depends upon the circumstances, unless an advance agreement specifies what happens upon revocation of consent.)

Suing a Current Client

15. The third question asks whether the lawyer may represent Client B in legal action against Client A if the lawyer still represents Client A. Rule 1.7(b)(3), in describing non-consentable conflicts, includes cases where the representation involves "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." However, in this case, the lawyer would not represent Clients A and B in the same litigation or other proceeding. Client A, we assume, would be represented by another law firm. Thus the conflict would not be non-consentable. The question would be the same as that discussed above with respect to Rule 1.7(b)(1) – whether the lawyer believes he or she can adequately represent Client B, explains the situation to both clients and obtains the informed consent of both. *See generally, Simon*, Annotations of Rule 1.7(b)(3). In addition, the lawyer would have to determine that the lawyer's independent professional judgment on behalf of Client A in the unrelated matters would not be affected.

Use of Client Confidential Information

16. The fourth question posits that Client B might only be willing to make the loan to Client A in reliance upon the lawyer's personal familiarity with the nature and value of Client A's collateral for the loan.

17. Rule 1.6(a) prohibits a lawyer from knowingly revealing confidential information of a client, or using such information to the disadvantage of the client or for the advantage of the lawyer or a third person, unless the client gives informed consent (as defined in Rule 1.0(j)) or the disclosure is permitted by Rule 1.6(b) (which is not applicable to this situation). Confidential information is defined in Rule 1.6 to include information gained during or relating to the representation of a client that the client has requested to be kept confidential or the disclosure of which is likely to be embarrassing or detrimental to the client.

18. We believe that information gained by the lawyer during the representation of Client A about the value of the potential collateral for the loan by Client B constitutes confidential information within the meaning of Rule 1.6. Consequently, the Lawyer could not use the information for the benefit of Client B without the informed consent of Client A. In accordance with Rule 1.0(j), this would involve the lawyer explaining to Client A the material risks of the authorizing the lawyer to disclose information about the collateral to Client B, as well as the reasonably available alternatives, and obtaining the agreement of Client A. Although use of the information might be detrimental to the client (if the lawyer possesses information indicating that the value of the collateral is less than it otherwise appears), we believe that a sophisticated client might well consent to the disclosure, and see no reason why the conflict is inherently non-consentable.

19. The inquirer will want to clearly spell out to both Client A and Client B the extent to which confidential information of Client A will be shared, and the extent to which the lawyer has continuing obligations to inform Client B of changes in the value of the collateral. *See Spector v. Mermelstein*, 361 F. Supp. 30 (S.D.N.Y. 1972), *aff'd in part and remanded,* 485 F.2d 474 (2d Cir. 1973) (defendant attorney breached his fiduciary duties to plaintiff client by failing to inform client fully of facts known to attorney which raised serious questions regarding the advisability of client's loaning money to a corporation which owned a Nevada gambling casino). *Cf.,* Rule 2.3 (When the layer knows or should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent).

Ownership Interest in a Client/Lender

20. The fifth question assumes that Client B might wish to compensate the lawyer by giving the lawyer an interest in the legal entity that makes the loan and asks whether such an ownership interest would affect the ability of the lawyer to represent Client B in the loan transaction or to represent Client A in other matters. It is not clear whether the entity that makes the loan is a public or private company, whether its shares have a recognized value, and whether the value of its shares will depend principally on the success of the loan to Client A.

21. There are three questions implicit in this question. First, could the lawyer personally make the loan to the client (i.e. is the ownership interest in the lender allowing the lawyer to do something that would otherwise not be permitted by the Rules)? *See* Rule 8.4 (A lawyer shall not violate the Rules of Professional Conduct through the acts of another). Second, would the ownership interest in the lending entity pass muster under the rule governing the reasonableness of legal fees and the rule governing business transactions with clients? Third, would the ownership interest affect the lawyer's judgment on behalf of either client?

22. We have held that there is no express prohibition against a lawyer lending a client funds in connection with a non-litigated matter, although a loan transaction between a lawyer and client is a business transaction that involves potential conflicts of interest. *See* N.Y. State 600 (1989). *Cf.,* Rule 1.8(e) (While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client except as set forth in the rule). Consequently, the lawyer should ensure that the client understands the potential conflict and the fact that, at some point in the future, the lawyer may need to withdraw from representing the client. We warned that, despite the fact that the lawyer-lender is extending a benefit to the client, the lawyer should exercise caution when considering personal involvement in client affairs.

23. The rules of business transactions with clients are currently found in Rule 1.8(a), which provides that a lawyer may not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise independent professional judgment for the protection of the client, unless:

> "(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction"

24. In N.Y. State 913 (2012), the Committee discussed the ethical issues that arise when a lawyer is paid with client stock. As we explained there, the starting point for determining whether a lawyer's compensation for legal services is appropriate is that, under Rule 1.5(a), the lawyer may not accept a fee the amount of which would leave a reasonable lawyer "with a definite and firm conviction that the fee is excessive." Rule 1.5(a) sets out the factors that should be used to determine excessiveness. However, we also concluded that Rule 1.8(a) (business transactions with a client) applies to negotiation of a fee in which a lawyer is to receive an equity interest in a client company, despite the clause in Rule 1.8(a) that makes the rule applicable only if the client expects the lawyer to exercise professional judgment on behalf of the client in the business transaction. In N.Y. State 913, we found that the common situation in which the lawyer will receive stock as a legal fee involves a "nascent venture" lacking a public market and offering consideration of indeterminate value and liquidity in lieu of cash, although our conclusion was not limited to this situation.

25. Accordingly, the lawyer may accept stock in Client B's corporation as long as the lawyer determines that the fee is not excessive for the work performed by the lawyer, the terms of the transaction are fair and reasonable to Client B, Client B is advised in writing of the desirability of seeking the advice of independent legal counsel and is given a reasonable chance to do so, and Client B signs a writing that describes the transaction and the lawyer's role in the deal, including whether the lawyer is acting for the client in the acquisition of the stock.

26. Finally, the lawyer must determine whether acceptance of stock in payment of all or part of the legal fee would negatively affect his judgment on behalf of either client – Client A if the amount of the fee from Client B would encourage the lawyer to violate the confidences of Client A, and Client B if the fact that the lawyer has an ownership interest in the lender causes him or her to elevate his own economic interests over those of Client B.

If Lawyer Accepts Ownership Interest in Lender Corporation, May Lawyer Continue to Represent the Borrower in Matters Unrelated to the Loan?

27. As noted above, Rule 1.7(a) prohibits a lawyer from representing a client if a reasonable lawyer would conclude that either (a) the representation will involve the lawyer in representing differing interests, or (b) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests. Mere ownership of stock in the lending corporation would not involve the lawyer in representing differing interests. Whether ownership of such stock would involve a significant risk that the lawyer's professional judgment on behalf of a Client A will be adversely affected depends on the value of the stock. The lawyer should also consider whether the relationship with Client B and the importance of lawyer's continuing representation of Client B would affect the lawyer's professional judgment on behalf of Client A.

CONCLUSION:

A. A lawyer who regularly represents both Client A and Client B may represent Client B in negotiating a loan agreement in which Client B would lend money to Client A, if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing."

B. Whether the lawyer may properly request Client A to waive conflicts that might arise in the future if Client A defaults on the loan and Client B wishes the lawyer to sue Client A on its behalf, is subject to the conditions set forth in Rule 1.7(b) and on the sophistication of the clients and their experience with legal representation.

C. If the consent complied with Rule 1.7(b) and both clients consented to such adverse representation, the lawyer would not have to withdraw from representing Client A in unrelated matters.

D. If Client B is willing to make the loan to Client A only if the lawyer uses knowledge from the representation of Client A to help Client B determine the nature and value of Client A's collateral for the loan, the lawyer may disclose such information only if Client A gives informed consent to the disclosure.

E. The lawyer may accept stock in Client B as all or part of the fee in the lending matter as long as the lawyer determines that the fee is not excessive for the work performed by the lawyer, the terms of the transaction are fair and reasonable to Client B, Client B is advised in writing of the desirability of seeking the advice of independent legal counsel and is given a reasonable chance to do so, and Client B signs a writing that describes the transaction and the lawyer's role in the deal, including whether the lawyer is acting for the client in the acquisition of the stock.

F. It is unlikely that acceptance of stock in Client B would require the lawyer to withdraw from representing Client A in matters unrelated to the loan.

17-13

OPINION 991 (11/12/2013)

TOPIC: Lawyer's disclosure of confidential information for personal advantage

DIGEST: A lawyer who handles foreclosure matters in mediation and at trial desires to provide leads on desirable properties to friends in the real estate business. The lawyer must not reveal confidential information to the disadvantage of a client or to the advantage of the lawyer or a third party unless the client gives informed consent. If a reasonable lawyer would perceive a significant risk that the lawyer's own financial, business, or other personal interests will adversely affect the lawyer's professional judgment on the client's behalf, then the lawyer may not continue the representation unless the conflict is consentable and the client gives informed consent, confirmed in writing. In any event, the lawyer may not use litigation tactics that have no substantial purpose other than delay.

RULES: 1.6(a); 1.7(a) & (b); 1.8(b); 1.9(c); 3.1(a) & (b); 3.2.

FACTS:

1. An associate (the "Associate") works at a law firm that represents various lenders (collectively "Lender") in foreclosure actions. The Associate's duties include such tasks as drafting motions for default judgment, reviewing applications from borrowers seeking loan modifications, and appearing at mediation conferences.

2. Some of the Associate's college friends want to form a real estate LLC (the "LLC"). The LLC would evaluate properties that are in the foreclosure process or that have already been foreclosed, and would purchase those that the LLC considers to be sound investments as rental properties. The purchases would be made either (a) in short sales (if the LLC buys a property after the summons and complaint but *before or during* the foreclosure proceedings) or (b) at foreclosure auctions (if the LLC buys a property *after* the foreclosure proceedings end).

3. The Associate's college friends have asked him to join their real estate LLC. If he agrees, they anticipate that he would use information acquired during his law practice to provide leads on properties facing foreclosure that may be sound investments as rental properties. (The Associate does not say that he would represent the LLC or perform any legal services for it, so we assume he will not.)

4. However, the Associate is concerned that his role at mediation conferences may conflict with his role in the LLC. A conflict could arise because it might be to the LLC's advantage (and therefore to his personal advantage) either to speed up or to slow down or delay foreclosure proceedings, which might be contrary to the Lender's interest in a particular foreclosure case. In particular, the LLC might sometimes prefer to buy a property at a short sale, before the foreclosure proceedings begin or while they are pending, but might at other times prefer to buy a property at auction, after the foreclosure proceedings conclude. The Lender, however, might desire the opposite of what the LLC wants.

5. The Associate is in a position to speed up or slow down foreclosure proceedings regarding a given property because of his role in mediation conferences. In New York State, all foreclosure proceedings are effectively stayed, practically if not formally, while an action is in the mediation part. While an action is in the mediation part, Lenders must participate in good faith in one or more conferences to determine whether a borrower meets eligibility guidelines for a loan modification. If a bor-

rower *does* meet the guidelines, then the pending or threatened foreclosure action will be settled via loan modification. If a borrower *does not* meet the guidelines (or if a borrower does not properly fill out and diligently update an application for a loan modification), then the action is released from the mediation part and the action can move forward toward foreclosure.

6. When the Associate attends a mediation conference on behalf of a Lender, his job (as he describes it) is either (a) to facilitate the loan modification process or (b) to argue that the borrower is ineligible for loan modification and that the action should be released from the mediation part so it can move toward foreclosure. The Associate independently decides which of these alternative courses to follow based on the totality of the facts and circumstances at the time of the conference.

7. If the Associate successfully facilitates the loan modification process and the case settles via loan modification, then neither a short sale nor a foreclosure auction will occur, and the LLC will have no opportunity to buy the property. But if the Associate stalls the mediation process, then the LLC may have an opportunity to buy the property at a short sale before a foreclosure auction occurs. Conversely, if the Associate persuades the mediator to release the matter from the mediation part and allow the case to continue toward foreclosure, the LLC may eventually have an opportunity to buy the property at a foreclosure auction.

QUESTIONS:

8. May a lawyer who currently represents a lender in foreclosure proceedings join a real estate LLC and provide leads to the LLC regarding properties in foreclosure that the lawyer believes will be sound investments as rental properties? If not, may the lawyer do so if he waits until he leaves his current firm and joins a different firm in a different practice area?

OPINION:

9. The inquiry raises three sets of issues: (i) confidentiality issues, (ii) conflict of interest issues, and (iii) issues regarding diligence and frivolous or dilatory litigation techniques. We will address these three sets of issues one at a time.

A. Confidentiality Issues: Rules 1.6(a), 1.8(b), and Rule 1.9(c).

10. The first set of issues concerns confidentiality. May the Associate disclose leads to the LLC based on information he acquires while representing Lenders in foreclosure proceedings? This question implicates Rules 1.6(a) and 1.8(b) while he is working at his current firm, and implicates Rule 1.9(c) if he waits until after he has moved to a different firm.

Rule 1.6(a) prohibits disclosure absent the client's informed consent

11. Rule 1.6(a), which is the most fundamental confidentiality rule, provides as follows (with emphasis added):

> (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the ***disadvantage of a client*** or for the ***advantage of the lawyer or a third person***, unless:

(1) ***the client gives informed consent***, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. ***"Confidential information" does not ordinarily*** include (i) a lawyer's legal knowledge or legal research or (ii) ***information that is generally known in the local community*** or in the trade, field or profession to which the information relates. [Emphasis added.]

12. The threshold question is whether information identifying properties that may be sound investments constitutes "confidential information" within the meaning of Rule 1.6(a). If so, then the Associate is prohibited from using the information to his own advantage, or for the advantage of third parties (such as his college friends or the LLC), or to the disadvantage of his client (the Lender). Whether information is confidential depends on multiple criteria.

13. The first of these multiple criteria is whether the information has been "gained during ***or*** relating to the representation of the client . . . ." (Emphasis added.) Here, information about whether properties would be sound investments is plainly "gained during" the representation of the Lender, and is information "relating to" the representation. Only one of these is necessary, see N.Y. State 866 (2011), but here we have both. Accordingly, we need to examine one by one the three categories of confidential information listed in Rule 1.6(a).

14. Regarding privilege, the identity of properties in foreclosure by itself is not "protected by the attorney-client privilege," but communications from the Lender to the attorney about particular properties would be privileged. For example, if the Lender has told the Associate that a particular property is in excellent condition or has attracted interest from a renovator, that communication is privileged.

15. Regarding detriment to the client, if the Lender's interests differ in any material way from the LLC's interests, then revealing confidential information about desirable investment properties to the LLC is "likely to be detrimental" to the Lender. In the context of confidentiality, we understand the term "likely" in Rule 1.6(a) to indicate a "significant risk" that revealing or using the information will harm the client. (This understanding borrows a concept from Rule 1.7(a)(2), which is quoted later in this opinion.) In other words, we think the phrase "likely to be detrimental" falls somewhere in between "probable" (meaning "more likely than not") and "possible" (meaning that it can't be completely ruled out). If there is a significant risk that revealing or using the information will disadvantage the client, then it is "likely to be detrimental" within the meaning of Rule 1.6(a). And the more sensitive the information to be disclosed, the more significant the risk, because the detriment to the client will increase as the sensitivity of the information increases.

16. Regarding client expectations, if the Lender has requested that information about the properties in foreclosure be kept confidential, then the information is presumptively confidential even if it is

not privileged and even if disclosing the information is not likely to be detrimental to the client. Moreover, if the Associate's law firm has assured the Lender that all such information will be kept confidential, then that is equivalent to the Lender's request that the information be kept confidential even if the Lender has not expressly made such a request.

17. The fact that foreclosure proceedings are a matter of public record does not make the information "generally known" (which would take it outside the purview of "confidential information"). Comment [4A] to Rule 1.6 says, in relevant part:

> Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. ***Information is not "generally known" simply because it is in the public domain or available in a public file.*** [Emphasis added.]

18. The emphasized sentence in the quoted language is significant because in 2011 it replaced the following two sentences that were originally in Comment [4A]:

> Information that is in the public domain is not protected unless the information is difficult or expensive to discover. For example, a public record is confidential information when it may be obtained only through great effort or by means of a Freedom of Information request or other process.

19. These two original sentences were criticized as inaccurate, and the New York State Bar Association therefore removed them from Comment [4A] in 2011 and substituted the single sentence in today's Comment [4A] (emphasized above). This legislative history strongly suggests that information in the public domain may be protected as confidential information even if the information is not "difficult or expensive to discover" and even if it could be obtained without "great effort" and without a Freedom of Information request or other formal process.

20. Here, we think the information in question cannot be "generally known." In our view, information is generally known only if it is known to a sizeable percentage of people in "the local community or in the trade, field or profession to which the information relates." Given that hundreds or thousands of homes are in foreclosure in any locale at any given time, we do not believe that the identity of particular properties that would make sound investments is "generally known" within the meaning of Rule 1.6(a).

21. If information about particular properties – such as which ones are in good repair and which ones have new appliances – is "confidential information" within the meaning of Rule 1.6(a), then the Associate cannot use or reveal that information unless one of the exceptions in Rule 1.6(a) applies. The Associate may not have any such information – we understand that lenders do not always inspect properties in foreclosure, and may not share the foreclosure report with their lawyers – but if the Associate does have confidential information about particular properties, then Rule 1.6(a) prohibits him from using for his own benefit, or for the benefit of his friends in the LLC, or to the client's detriment, regardless of who benefits.

22. The first exception to Rule 1.6 is the client's "informed consent, as defined in Rule 1.0(j)," which is in the Terminology section. Rule 1.0(j) provides as follows:

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

23. We lack sufficient facts to spell out all of the disclosures the Associate would need to make to obtain the Lender's informed consent to revealing the identity of a promising investment property, but at a minimum it would need to include both (a) whether the Associate believes the particular property would be a sound investment for rental purposes and, if so, why; and (b) whether the Associate plans to speed up or slow down the mediation process. Armed with that information, the Lender should be able to decide whether it would also be interested in buying the property or working out a loan modification. If so, the Lender will presumably deny consent for the Associate to disclose the information to the LLC.

24. The second exception to the duty of confidentiality arises when the disclosure (a) is "impliedly authorized to advance the best interests of the client" and (b) is either (i) "reasonable under the circumstances" or (ii) "customary in the professional community." We do not perceive any circumstances in which disclosing a promising investment property to the LLC would advance the Lender's interests. If such circumstances exist, the better practice would be for the Associate to disclose the relevant facts to the client and obtain the client's informed consent. The "impliedly authorized" exception is intended mainly for situations in which time is of the essence and it is impractical for the lawyer to wait for the client's informed consent (such as during settlement negotiations or trial), or for situations in which revealing information about a client with diminished capacity is "necessary to take protective action to safeguard the client's interests." *See* Rule 1.6, Cmt. [5] (giving examples of circumstances in which disclosure of confidential information is impliedly authorized). Nothing suggests that those situations apply here.

25. The third exception to the duty of confidentiality arises when "the disclosure is permitted by paragraph (b)," meaning that the facts fall within one of the six specified exceptions in Rule 1.6(b) (*e.g.,* the need "to prevent reasonably certain death or substantial bodily harm" or "to prevent the client from committing a crime)." We need not elaborate on these exceptions because none apply here.

Rule 1.8(b) prohibits disclosure absent the client's informed consent

26. Rule 1.8(b) provides as follows:

> (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

27. At first glance, Rule 1.8(b) appears to duplicate the prohibition in Rule 1.6(a) against using confidential information "to the disadvantage of a client." But Rule 1.8(b) – unlike Rule 1.6(a) – applies to *all* information "relating to representation of a client," whether or not the information is protected by the attorney-client privilege, whether or not disclosure would not be embarrassing or detrimental to the client, and whether or not the client has not requested that the information be held inviolate, and whether or not the information has become "generally known." Under Rule 1.8(b), a lawyer simply may not use information relating to the representation of a client unless either (i) "the client

gives informed consent" (discussed above) or (ii) disclosure is "permitted or required by these Rules" (an exception that does not apply here).

28. Thus, whenever disclosing the identity of a promising investment property would be disadvantageous to the Lender, the Associate may not do it absent the client's informed consent pursuant to Rule 1.0(j). As Comment [5] to Rule 1.8 says:

> [5] A lawyer's use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as . . . a business associate of the lawyer, at the expense of a client. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. . . .

Rule 1.9(c) prohibits disclosure absent the client's informed consent

29. The Associate also asks whether the answer will change if he waits until he has moved to a different firm working in a different practice area. It will not. Rule 1.8(b) does not apply to former clients, but Rule 1.6 does apply, via Rule 1.9(c), which provides as follows:

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

30. In other words, the duty of confidentiality in Rule 1.6 toward current clients carries over with full force to former clients. To the extent that the Associate is barred from using or revealing confidential information of his current clients while working at his current firm, he will be equally barred from using or revealing the same information after he has moved to a different law firm. Whether his new firm practices in the same area of law or a different area of law will make no difference.

31. In sum, we conclude that Rules 1.6(a), Rule 1.8(b), and 1.9(c) all prohibit the Associate from making the disclosures he proposes to make here unless the Lender gives informed consent.

B. Conflict Issues: Rule 1.7.

32. The second set of issues pertains to conflicts of interest between the Lender's interests and the lawyer's personal interests. Indeed, in his inquiry, the Associate expressly worries that his involvement in a business that buys properties upon which clients of his employer's law office are foreclosing "will create an ethical conflict subject to disciplinary action . . . ."

33. The Associate's concern is well founded. The applicable provision of the New York Rules of Professional Conduct is Rule 1.7(a)(2), which provides as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . .
>
> > (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

34. In the circumstances before us, a reasonable lawyer would conclude that there is a "significant risk" that the Associate's professional judgment on behalf of the Lender in foreclosure proceedings regarding each property will be adversely affected by (a) the Associate's own financial and business interests in the LLC, and by (b) the Associate's personal interests in maintaining good relationships with his friends who run the LLC. Thus, a concurrent conflict will arise with respect to each foreclosure proceeding in which the Associate represents the Lender.[115] In particular, the Lender has a legal duty to participate in the loan modification process in good faith, but the LLC is not involved in that process and has no good faith obligation. Some courts have sanctioned lenders for dragging out the loan modification process or for otherwise failing to negotiate a loan modification in good faith. *See, e.g., U.S. Bank v. Shinaba,* No. 381917/09 (Bronx Sup. Ct., July 31, 2013) (imposing sanctions on bank for "dilatory, and dishonest, conduct" that dragged out settlement conferences in a foreclosure action); *Citibank, N.A. v. Barclay,* No. 381649/09 (Bronx Sup. Ct., June 21, 2013) (same). These decisions underscore the conflict of interest that the Associate will face if the Lender desires to reach a loan modification agreement or otherwise move the foreclosure process along quickly, but the LLC wants to drag it out. (We address below the Associate's separate duty to avoid conduct whose purpose is to delay and prolong litigation.)

35. Because a concurrent conflict of interest exists, the Associate may not represent the Lender in any foreclosure proceeding unless he complies with Rule 1.7(b), which provides, in pertinent part, as follows:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; . . . and
> >
> > (4) each affected client gives informed consent, confirmed in writing.

36. Under Rule 1.7(b), the Associate may not be involved in the LLC unless he "reasonably believes" that he can "provide competent and diligent representation" to the Lender, and the Lender "gives informed consent, confirmed in writing." This standard will be difficult to meet because the Lender has many interests that may diverge from the LLC's interests. For example, the Lender may

115 As mentioned earlier, nothing in his inquiry indicates that he will be representing the LLC. As long as the Associate does not perform any legal services for the LLC, the Associate's involvement in the LLC will not involve him in representing "differing interests." and thus will not create a concurrent conflict under Rule 1.7(a)(1).

desire to establish or maintain a reputation for cooperation with the courts, for fairness to borrowers, or for efficiency in resolving foreclosure proceedings. The Lender will also desire to minimize legal fees and minimize the costs of taxes, insurance, and maintenance on properties in foreclosure. And the Lender will want to avoid sanctions for dilatory or frivolous litigation conduct. The LLC does not share these interests – its only interest is in purchasing sound investments for the LLC. Accordingly, it is unlikely that the Associate can provide competent and diligent representation to the Lender if he is personally involved in the LLC or has agreed to provide "leads" to the LLC. Thus, the conflict may well be non-consentable (non-waivable).

37. Even if a conflict regarding a particular property is consentable – and it usually will not be – the Associate must not continue representing the Lender in the matter without the Lender's informed consent. The disclosures needed to obtain the Lender's informed consent to disclose confidential information to the LLC (see above) should normally suffice to obtain the Lender's informed consent for conflict purposes – but Rule 1.7(b)(4) also requires that the client's consent be "confirmed in writing" – see Rule 1.0(e) (defining "Confirmed in writing"). Moreover, the Associate will have to obtain a separate consent with respect to each property on which he represents the Lender, because each property presents a new and different conflict of interest.

C. Dilatory Tactics in Litigation: Rules 3.1 and 3.2

38. The Associate says in his inquiry that he may have an incentive to frustrate the mediation process by "causing delays in forwarding applications that I receive from borrowers to my client." Deliberately causing such delays would implicate Rule 3.1 ("Non–Meritorious Claims and Contentions"). Rule 3.1(a) provides that a lawyer "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. . . ." Rule 3.1(b)) provides that a lawyer's conduct is "frivolous" for purposes of Rule 3.1 if the conduct "has ***no reasonable purpose other than to delay or prolong the resolution of litigation***, in violation of Rule 3.2 . . . ." [Emphasis added.]

39. Thus, the Associate may not advance frivolous claims or defenses, or engage in conduct whose main purpose is to "delay or prolong" the litigation.

40. Moreover, Rule 3.2 ("Delay of Litigation"), which is referred to in Rule 3.1(b)(2), provides that a lawyer representing a client, a lawyer "shall not use means that have no substantial purpose other than to ***delay or prolong*** the proceeding or to cause needless expense." (Emphasis added.) Comment [1] to Rule 3.2 explains the rule as follows (with emphasis added):

> [1] Dilatory practices bring the administration of justice into disrepute. Such tactics are prohibited if their only substantial purpose is to frustrate an opposing party's attempt to obtain rightful redress or repose. . . . The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay or needless expense. ***Seeking or realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.*** [Emphasis added.]

41. Seeking financial or other benefit for the lawyer's own *client* is not a legitimate reason for a lawyer to delay litigation, so seeking financial benefit for the *lawyer* (or a business in which the law-

yer is involved) is *a fortiori* not a legitimate justification for using delaying tactics. Thus, even if the Associate obtains the client's consent to disclose confidential information to the LLC pursuant to Rule 1.6(a), and even if the Associate obtains the client's valid consent to the concurrent conflict pursuant to Rule 1.7(b), the Associate still must not use dilatory litigation tactics, such as seeking unwarranted continuances or demanding unnecessary loan documentation, that have "no substantial purpose other than to delay or prolong the proceeding."

CONCLUSION:

42. A lawyer must not reveal confidential information to the disadvantage of the client or to the advantage of the lawyer or a third party (such as a business in which the lawyer is involved) unless the client gives informed consent. If a reasonable lawyer would perceive a significant risk that the lawyer's financial, business, or other personal interests will adversely affect the lawyer's professional judgment on the client's behalf, then the lawyer may not continue the representation unless the conflict is consentable and the client gives informed consent, confirmed in writing. In any event, the lawyer may not use litigation tactics that have no substantial purpose other than delay.

(21-13)

OPINION 992 (11/13/2013)

TOPIC: Permissible business structures and fee arrangements for a lawyer to work with a business person who seeks to establish a "Disability Office" to help persons with government benefit matters, most of which do not require representation by legal counsel.

DIGEST: A lawyer seeks to work with a nonlawyer who will establish a "Disability Office" in the local community to assist people with Social Security Supplemental Income, Social Security Disability Income, Medicaid Planning, and Guardianship matters. Some of these services may be performed by a nonlawyer pursuant to applicable regulations. The lawyer may not enter into a partnership or be employed by a nonlawyer to solicit third party clients, nor may the lawyer share legal fees with the business person. The lawyer may compensate the business person for marketing and may provide for other forms of compensation for the success of the firm. The lawyer may not enter into a business with a nonlawyer to handle matters where the lawyer is practicing law even if those services may be performed by a nonlawyer.

RULES: 5.4, 5.7, 5.8, 7.2 (a)

QUESTION:

1. The inquiring lawyer seeks to enter into an arrangement with a business person to provide legal services to assist clients in the community with government benefits programs (Social Security Supplemental Income, Social Security Disability, Medicaid Planning, Medicare and an occasional guardianship). He asks whether any of the following four proposals are consistent with the Rules of Professional Conduct:

    a. Businessman runs a "Disability Office" and employs attorneys. Attorney meets with clients and sets the fees. The fees are paid to the Office, and the percentage is then paid to the attorney.

    b. Businessman runs a "Disability Office" and enters into a legal services agreement with attorney's law firm, where attorney pays the Office certain percentage of the fees from each case.

    c. Attorney opens a separate law firm and employs the businessman as an Office and Marketing manager. Officer gets paid percentage of the overall business he brings in through his marketing efforts.

    d. Businessman employs attorney in nonlegal capacity to represent clients with the matters not requiring a legal license.

BACKGROUND:

2. The inquirer practices in the field of trusts and estates, guardianships and provides services to assist clients in Medicaid planning, Medicare, Social Security Supplemental Income (SSI), Social Security Disability Income (SSDI), and guardianships. He is of Russian descent, fluent in Russian,

and provides these services to the Russian immigrant community. There are few lawyers of his background in his community performing these services, which are in high demand.

3. By statute, nonlawyers may represent clients in Social Security and Medicaid cases through the hearing process. 42 U.S.C. 406 (a) (1); 20 C.F.R. §404.1705 (non-attorney representatives"), 18 N.Y.C.R.R. 358-3.9 (non-attorney authorized representatives for Medicaid and other hearings). Only attorneys may represent a client in the appeal of such cases, in guardianship proceedings or in providing legal advice in Medicaid planning. In SSI and SSDI matters, fees are contingent of up to 25 per cent of the overall award.

4. A businessman in the inquirer's community wants to establish a "Disability Office" to assist the community with its unmet needs to obtain Social Security Supplemental Income, Social Security Disability Income, Medicaid Planning, and Guardianships. This for-profit entity would market its services to assist clients in the community with government benefit programs, fair hearings and guardianships. The businessman (owner) would have no client contact and would not interfere with the attorney-client relationship.

5. The attorney seeks to enter into a structural relationship and fee arrangement with the businessman that is consistent with the Rules of Professional Conduct. The attorney proposes four structures and inquires whether any of them are permissible.

OPINION:

Structural Relationship

6. Rule 5.4 (d) provides that:

> "A lawyer shall not practice with or in the form of an entity authorized to practice law for profit if:
>
> (1) a nonlawyer owns any interest therein . . .
>
> (2) a nonlawyer is a member, corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation

7. The rule seeks to protect the independent professional judgment of a lawyer and uncompromised loyalty to the client. Despite longstanding debate as to whether it should be revised to permit Alternative Law Practice Structures,[116] New York Rule 5.4(d)(2) endures and is intended to regulate nonlawyer ownership of entities in which a lawyer engages in the practice of law for profit. See Roy D. Simon, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED, 1152-1157 (2013). So the proposal for the inquiring attorney working as an "employee" of the Disability Office is prohibited by Rule 5.4(d)(2).

116 NYSBA Task Force on Nonlawyer Ownership, www.nysba.org; ABA Commission on Ethics 20/20 Discussion Paper on Alternative Law Practice Structures, http://222.americanbar.org/Ethics2020; See District of Columbia Rules of Professional Conduct, Rule 5.4 (permitting forms of Alternative Law Practice), http://www.dcbar.org/for_lawyers/ethics/legal_ethics/rules_of_professional_condcut/amended_rules/rule_five/rule05_04.cfm.

8. Judiciary Law § 495 prohibits the practice of law by a corporation or voluntary association. Thus, the Disability Office may not engage in the practice of law. Moreover, Rule 5.4 (b) also prohibits a lawyer from forming a partnership with a non-lawyer if any of the activities of the partnership constitute the practice of law. Even if the business employed persons who are permitted by law to represent claimants in Social security and Medicaid hearings, it could not provide representation of clients in guardianships and Medicaid planning because legal advice on such matters constitutes the practice of law. In such circumstances, the lawyer may not form a partnership with a nonlawyer.

9. Rule 5.8 permits ongoing business relationships with a nonlawyer service provider, but only under limited circumstances that are not presented here. The first of these criteria is that the nonlawyer professional be one of those listed by the Appellate Division Rules §1205.3 (22 NYCRR §§1205.3) (limited to architects, certified public accountants, professional engineers, land surveyors, certified social workers). See N.Y. STATE 930 (2012); N.Y. STATE 885 (2011). Thus, neither Rule 5.4 (d) nor Rule 5.8 permits the first two business arrangements contemplated by the inquirer, wherein the attorney proposes to work directly for the business entity or have a legal services agreement with the business owner.

Fee Agreement

10. Even though the inquiring attorney may not enter into a business relationship as discussed above, the lawyer may enter into an agreement to compensate the business owner for marketing or other services. That agreement is subject to several rules.

11. First, it is long established that a lawyer may not share a legal fee with a nonlawyer. Rule 5.4 (a); N.Y. JUDICIARY LAW §491**.** Two of the proposed business structures are impermissible fee sharing agreements.

These are:

> Businessman runs a "Disability Office" and employs attorneys. Attorney meets with clients and sets the fees. The fees are paid to the Office, and the percentage is then paid to the attorney.
>
> Businessman runs a "Disability Office" and enters into a legal services agreement with attorney's law firm, where attorney pays the Office certain percentage of the fees from each case

12. Second, a lawyer may not pay a fee to a person or organization for referring or recommending employment by specific clients. Rule 7.2 (a); N.Y. STATE 887 (2011); N.Y. STATE 917 (2012).

13. However, a lawyer may pay for marketing and advertising. Comment [1] to Rule 7.2 provides that:

> A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services such as publicists, public relations personnel, marketing personnel and web site designers.

See also N.Y. STATE 860 (2011) (firm can pay for marketing or client development services).

14. In N.Y. STATE 887 (2011) we opined that a firm could pay a bonus to the marketer employee based on overall profits of the firm or on a percentage of the employee's salary. The firm may pay a bonus to the marketer based upon the number of clients referred, but not based on the fees paid by those clients. N.Y. STATE 917 (2012).

15. The firm may also enter into a profit sharing arrangement as part of a retirement plan so long as that agreement is not tied to profit from a particular case or cases. Rule 5.4 (a)(3) provides that "a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit sharing arrangement. Comment 1[B] clarifies that "such sharing of profits with a nonlawyer employee must be based on the total profitability of the law firm or a department within a law firm and may not be based on the fee resulting from a single case."

16. Thus, the third proposed business arrangement is permissible only if the business person receives a bonus based upon firm profitability or a percentage of his salary. Payment of a percentage of firm profits for a specific matter is tantamount to fee sharing and is not permitted. The proposed arrangement is prohibited because it contemplates that the attorney will open a firm, employ the businessman as an Office and Marketing manager, and pay him a percentage of the overall business he brings in through his marketing efforts.

Nonlawyer Practice

17. The final proposed structure contemplates that the businessman will hire the lawyer in a nonlegal capacity to represent clients for the matters not requiring a legal license.

18. As indicated above, regulations authorize persons other than attorneys to represent claimants in Social Security hearings. The governing regulations set forth specific criteria that qualify non-attorneys as representatives of clients in these cases. CFR § 404.1705 (b). The non-attorney is referred to as a "representative." N.Y. STATE 938 (2012). State regulations permit non–attorneys who are authorized by claimants to represent them in Medicaid hearings. These persons are referred to as "authorized representatives." Thus, the business may employ any such qualified person to represent claimants in such proceedings.

19. We have previously opined that SSDI services are "nonlegal services" defined in Rule 5.7 (c) as "those legal services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." NY STATE 938 (2012). It is not the unauthorized practice of law for non lawyers to advise clients as to SSDI. The same is true for nonlawyer representatives in Medicaid hearings.

20. However, a lawyer who provides such SSDI or Medicaid services, is by definition, engaged in the practice of law and provides the client with legal services. (NY STATE 938 (fn.2) notes that a lawyer providing such services was a different matter).

21. The governing SSDI regulations distinguish between attorney and non-attorney representation. Attorneys may represent claimants so long as they are in good standing before a court. CFR§ 404.1705 (a). Where an attorney is engaged, the client has a reasonable expectation that the attorney has the skills and qualifications beyond that of a non attorney representative, is governed by professional conduct rules, and is subject to civil liability for the representation. Consequently, that lawyer

may not circumvent the Rules of Professional Conduct and practice law by a designation that the attorney is employed in a "non-legal capacity" even if a non attorney may perform the same legal services. Cf., Rule 4.3.

CONCLUSION:

22. The lawyer may not be employed by a nonlawyer to represent third party clients, nor may the lawyer share legal fees with the business person. The lawyer may compensate the business person for marketing and may provide for other forms of compensation for the success of the firm. Alternatively, the lawyer may hire a business person and compensate him through a bonus or profit-sharing as part of a retirement plan. The lawyer may not enter into a business with a nonlawyer to handle matters where the lawyer is practicing law even if those services may be performed by a nonlawyer.

11-13

OPINION 993 (11/13/2013)

TOPIC: Misrepresentations as to purchase price in residential real estate contracts; disclosure of "gross-ups"

DIGEST: The requirement to disclose a "grossed up" real estate purchase price is triggered when the purchase price has in fact been grossed up in connection with a seller's concession.

RULE: 8.4(c)

FACTS:

1. A local bar association and a local association of realtors have jointly approved a new form to be used for residential real estate sales. This new "Contract of Sale for Residential Property" includes the following sentence: "The Purchase Price reflects an increase equal to the amount of the Seller's Concession."

2. This sentence (the "Disclosure Clause") was added to the form in an effort to comply with N.Y. State 882 (2011). That opinion followed the reasoning of N.Y. State 817 (2007). According to the inquiry, these two opinions require the Disclosure Clause to be included in all contracts that include a seller's concession.[117]

3. The inquirer reports that since adoption of the new form, attorneys and real estate personnel "have encountered continual problems with various lenders" such as "significant delays, requests for modifications of contracts, including strike out of the gross up text, and outright rejection of mortgage loan applications."

4. The inquiry says that these problems have arisen because, with the addition of the Disclosure Clause, mortgage lenders "consider the Seller's Concession to be an 'inducement to purchase.'" These mortgage lenders therefore "will only lend on the amount of the Purchase Price ***less*** the Seller's Concession, rather than based on the adjusted Purchase Price or the grossed up amount" (emphasis in inquiry).

5. The inquirer requests that the Committee reconsider N.Y. State 882 and modify it "by eliminating the requirement that all Seller's Concessions must be stated as an increase in the Purchase Price." The inquiry, and a memorandum submitted with it, set forth arguments in support of that request.

OPINION:

6. The inquiry is based on a misunderstanding of our prior opinions. Those opinions did not require that *all* transactions with a seller's concession be characterized as involving an increase or gross-up of the purchase price. N.Y. State 817 is clearly limited to situations in which there is, in fact,

117 The inquiry states (incorrectly) that N.Y. State 882 and N.Y. State 817 "assume that all Seller's Concessions are phantom gross ups," and it urges that contracts should not need to "characterize every Seller's Concession as an increase or gross up of the Purchase Price *as the Majority in Opinion 882 currently requires*" (emphasis added).

a gross-up of purchase price in connection with a seller's concession.[118] Our opinion in N.Y. State 882 is similarly limited, and its disclosure requirement does not apply to situations in which "the seller actually bears an economic cost equivalent to the concession."[119] In the most recent opinion in this line, we again adhered to the disclosure requirement in the context of a transaction in which "there has been a gross-up of the purchase price" in connection with a seller's concession. N.Y. State 892 ¶8 (2011).

7. Under our opinions, what the lawyer must disclose depends on the facts of the transaction. The relevant obligation is that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Rule 8.4(c). In some instances, as reflected in previous inquiries to this Committee, the parties may agree on a purchase price and thereafter agree to increase or gross up that price in connection with a seller's concession. The lawyer would be required to disclose such a gross-up. But when there has in fact been no gross-up, because the seller is actually bearing an economic cost reflected in the concession, the lawyer is under no obligation to assert that a gross-up has occurred. Indeed, it would be inappropriate for the lawyer to "disclose" something known to be inaccurate.

8. Thus, because the facts may vary from transaction to transaction, the lawyer's disclosure obligation may vary from transaction to transaction as well.[120] It appears that the Disclosure Clause quoted above is invariably included in the described Contract of Sale for Residential Property. That degree of uniformity is not required by the rules of legal ethics, nor is it appropriate if it results in misstatement of the facts in particular cases. The inquiry also mentions another form, adopted in one county, that takes a less uniform approach. In that county's alternate form, there is a checkbox next to the disclosure that "The Purchase Price has been increased by a sum equal to the Seller's Concession," and above that line is the instruction "Check if Applicable." We do not opine as to the best wording for forms, but we note that this alternate form allows a lawyer to make or not make the disclosure in question, depending on the known facts of the transaction.

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118 That opinion dealt with this situation: "Following written agreement between buyer and seller of real estate as to terms," the buyer requested that the agreed sales price be increased by 3% to cover closing costs, and that the increase be set off by a seller's concession, allowing the buyer to obtain a larger mortgage loan. N.Y. State 817 ¶1. We concluded that when there is "a 'gross up' of the actual purchase price and concomitant seller's concession," then "the gross-up . . . must be disclosed," *id*. ¶14.

119 N.Y. State 882 distinguished the situation it considered – one in which there had been a "'gross-up' in the sales price to offset the seller's supposed concession" – from one in which

> "the seller actually bears an economic cost equivalent to the concession. . . . This is a distinction with a difference. . . . The problem here is the matching 'gross-up' of the sales price, which effectively wipes out the seller's concession."

Opinion 882 states that an ethical violation occurs "when a seller, buyer, lender, and their attorneys engage in the device of a seller's concession accompanied by a like increase in the purchase price that create a misrepresentation." The Committee concluded that "an attorney may ethically participate in a real estate transaction where the sales price is grossed-up by an amount equal to a corresponding seller's concession if the amount of the gross-up and the amount of the seller's concession are expressly and meaningfully disclosed."

120 We recognize that the lawyer may not always be aware of the history of negotiations. For example, we understand that it is not unusual for draft contracts already reflecting sellers' concessions to be submitted to lawyers, and we do not suggest that the mere statement of a seller's concession will suffice to put the lawyer on notice of a grossed up purchase price. A lawyer's good-faith omission to disclose unknown facts does not constitute "dishonesty, fraud, deceit or misrepresentation." On the other hand, we do not think that a lawyer may avoid the disclosure requirement by remaining willfully blind to the existence of a gross-up. *Cf.* Restatement (Third) of the Law Governing Lawyers §120, Reporter's Note to Comment c (2000) (citing court decisions that arguably articulate for certain disciplinary purposes "a version of the conscious-avoidance doctrine" applied in criminal law); Rule 1.0(k) ("A person's knowledge may be inferred from circumstances.").

9. The inquiry details problems that can result from use of the Disclosure Clause, including resistance by mortgage lenders. This is not the first time the Committee has addressed such problems. A prior inquiry recounted how use of similar disclosure language led a lender to balk at a transaction, advising the seller's attorney: "Contract states price increased due to Seller concession; increase for this reason is not allowed." N.Y. State 892 ¶2 (2011). The Committee answered that a lawyer may not ethically participate in a residential real estate transaction in which a lender's objection precluded the required disclosure. *Id*. ¶8. The current inquiry tells us that the kind of problem addressed in N.Y. State 892 is not aberrational, but rather is faced with some frequency. That circumstance may make N.Y. State 892 and previous opinions more important in practice, but it does not refute their reasoning, which we believe continues to be sound.

10. The inquiry asserts that "the mortgage loan industry is fully familiar with and permits use of Seller's Concessions." As we have noted, however, the issue is not simply whether there is a seller's concession, but whether there is an associated gross-up of the purchase price. The reported industry reaction supports the significance of this distinction. The inquiry suggests that mortgage lenders do not consider sellers' concessions in general to be "inducements to purchase," but do consider them to be inducements to purchase when the purchase price is stated to be correspondingly grossed up. In effect, the very lenders that "permit" the use of sellers' concessions may not permit associated gross-ups, when explicitly recognized as such, to be included in the basis for the loan amount. This industry reaction does not undercut our prior conclusion that stating a grossed up purchase price without disclosing the gross-up is a misrepresentation. Indeed, the industry reaction demonstrates the materiality of that misrepresentation. The required disclosure of gross-ups may preclude uniformity of loan documents and may lead lenders to reject contracts in some cases, but an attorney's understandable desire to avoid such complications cannot justify misrepresentation.

CONCLUSION:

11. We adhere to the conclusions in N.Y. State 882 and N.Y. State 817. The mere existence of a seller's concession does not require a statement that the purchase price has been increased. However, when the purchase price in a sale of residential real estate has in fact been grossed up in connection with a seller's concession, then a lawyer who participates in the transaction is required to ensure that the grossing up of the price is disclosed.

(37-13)

OPINION 994 (12/05/2013)

TOPIC: Conflict of interest arising from lawyer's nonlegal employment by a law client.

DIGEST: A lawyer who coaches a sports team of a school district may also provide legal services to that school district unless there is a significant risk that the lawyer's professional judgment on behalf of the school district would be adversely affected by the lawyer's financial or other personal interest as a coach.

RULES: 1.7, 1.10

FACTS:

1. The inquirer is a lawyer who recently began working for a law firm that "represents and provides general counsel for school districts," including a school district that has previously employed and paid a stipend to the lawyer to coach one of the school sports teams. During part of the year, the school's team is run by the school district, and during another part, the team members participate in the sport under the auspices of a private club (the "Club"). The inquirer posits that to continue receiving stipends from the school district would create a conflict of interest given the inquirer's new position with the law firm, and asks whether it would be permissible to continue coaching if (a) the inquirer were to coach solely as an employee of the Club, or (b) the inquirer were to forgo the stipends and coach for the school district as a volunteer.

QUESTION:

2. May a lawyer whose firm represents a school district also work as a coach for one of the district's sports teams, and does the answer depend on whether the lawyer's coaching services are compensated by the school district, compensated by an affiliated private club, or not compensated at all?

OPINION:

3. Seeking to avoid any possibility of conflict, the inquirer starts from the premise that a lawyer in a law firm may not be paid by a client of the firm to provide nonlegal services. But that premise goes beyond what is required by the rules of legal ethics. In a wide range of foreseeable circumstances, a law firm may ethically provide legal services to a school even though the school pays one of its lawyers to provide nonlegal services such as sports coaching. Indeed, the very lawyer employed as a coach could, in many circumstances, also provide legal services to the school.

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

5. Before considering whether the firm as a whole could provide legal services to the school district, we first consider whether the inquiring lawyer could provide such services. The relevant analysis, made always from the viewpoint of a reasonable lawyer, is whether the inquirer's financial or

other personal interest as a coach would create a significant risk of adversely affecting the inquirer's professional judgment. The inquirer's employment as a coach may incline the inquirer toward benefiting the school, but that interest generally would not interfere with exercising professional judgment that would also be for the benefit of the school. There may be little or no risk of adverse effect if, for example, the legal work on behalf of the school district were unrelated to the lawyer's work as coach. Whether payment of a stipend would create such a risk could depend on its size, but even if large enough to give the inquirer a significant financial interest in its continuation, there would be no conflict unless that interest were to create a significant risk of interfering with professional judgment on behalf of the client.

6. It is possible to imagine particular circumstances in which employment as a coach could create a conflict. For example, there might be a significant risk that the inquirer's professional judgment would be adversely affected by personal interests if the inquirer were retained to defend the school district in a wrongful termination action filed by another coach of the same team; to defend a Title IX lawsuit alleging insufficient support of girls' sports teams; or to advise the district whether to implement policies that would constrain the ability of certain students to participate on the team.

7. To assess the risk in such cases would require knowing the facts in some detail. If the facts in a particular legal matter give rise to a conflict under Rule 1.7(a) and the inquirer chooses to continue as a coach, then the inquirer could not represent the school district in that matter unless the school district could and did waive that conflict. Waiver would be available if the inquirer reasonably believed it possible to provide competent and diligent representation to the school district despite the conflict, and the school district gave informed consent confirmed in writing. *See* Rule 1.7(b).

8. If a conflict would preclude the inquirer from handling a particular legal matter for the school, then that conflict would also be imputed to the other lawyers in the inquirer's firm. Absent appropriate waiver of the conflict, those other lawyers would be prohibited from representing the school in that matter. *See* Rule 1.10(a). The imputed conflict may, however, be waived by the school under appropriate circumstances. *See* Rule 1.10(d). Even if there were no reasonable prospect that the *inquirer* could adequately represent the school, rendering the inquirer's underlying conflict unwaivable under Rule 1.7(b)(1), the *imputed* conflict may still be waivable if other lawyers in the firm reasonably believe that they could provide competent and diligent representation to the school. *See* N.Y. State 968 ¶25 (2013).

9. We have addressed only those constraints arising from the rules of legal ethics. There may also be relevant legal rules in statutes or regulations relating to employees of the school district, or in internal policies of the school district or law firm. The inquirer would be well advised to consult any such rules, as they may limit outside employment or require its disclosure and approval.

CONCLUSION:

10. Even though a lawyer works for a school district as a volunteer or paid sports coach, the lawyer or the lawyer's firm may provide legal services to the school district unless there appears to be a significant risk that the lawyer's professional judgment on behalf of the school district would be adversely affected by the lawyer's financial or other personal interest as a coach.

(36-13)

OPINION 995 (12/18/2013)

TOPIC: Conflict of interest; lawyer and judge with employee in common

DIGEST: The fact that a lawyer's part-time secretary also works on personal matters of a City Court judge related to the lawyer does not preclude the lawyer's appearance before a different City Court judge, but the lawyer must take appropriate steps to protect confidential client information and may not suggest an ability to exercise improper influence.

RULES: 1.6(c); 8.4(e), 8.4(f)

FACTS:

1. Inquiring attorney's son (the "related judge") is a full-time City Court judge, and there is one other full-time judge (the "unrelated judge") in the same court. The related judge was inquiring attorney's law partner before becoming a judge. The inquiry states that the related judge is permitted to hire a part-time secretary "to handle his personal matters" and he would like to hire a secretary who would also work part time in the inquiring attorney's office. In working for the related judge, the secretary "will not be working on the [unrelated] judge's files."

QUESTION:

2. May the inquiring attorney appear in the City Court, before the unrelated judge only, if the inquiring attorney's part-time secretary also works for the related judge as part-time secretary for his private matters?

OPINION:

3. The inquirer does not propose to appear before the related judge. *Cf.* N.Y. State 725 (1999) (opining that prosecutor may not appear before sibling Town Justice).

4. The inquirer does, however, propose to appear before the unrelated judge. We previously considered a situation in which a lawyer sought to appear before a judge although the lawyer's wife worked as the judge's confidential law assistant. N.Y. State 548 (1983). We found that the law assistant would be required to recuse herself from cases in which her husband appeared. We analyzed the underlying propriety of such appearances as an ethical issue for the judge rather than for the lawyer. Our conclusion was that the judge would not be automatically disqualified from hearing a case in which the lawyer appeared, as long as the law assistant were screened from contact with that case, but that disqualification "may nonetheless be required or appropriate on the facts of circumstances of a particular case." *Id.*

5. In the current inquiry, a lawyer proposing to appear before a judge has a close familial relationship not to one of the judge's employees, but rather to another judge of the same court. We find the considerations expressed in N.Y. State 548, though based on the Code of Judicial Conduct and the prior Code of Professional Responsibility, to be relevant to the current inquiry under the Rules of Professional Conduct (the "Rules"). A lawyer's familial relationship with one judge does not automatically preclude the lawyer's appearance before another judge in the same court. Additional factors in particular cases could count against the propriety of such appearance, but the only additional factor

mentioned in the inquiry, which we address below, is the employment of the same secretary by the lawyer and the related judge.

6. We rely on the inquiry's representation that the secretary will not work on any court cases assigned to the unrelated judge, and we take it that this would be true even if, for example, the unrelated judge were unavailable at a particular time and the related judge had occasion to handle one of the matters ordinarily assigned to the unrelated judge. Limiting our analysis to the ethical question posed, we do not consider other questions such as the legal propriety of the arrangements to compensate the secretary for handling the related judge's personal matters.

7. The contemplated kinds of employment relationships are not specifically addressed by any of the Rules. Nor would more general ethical provisions and the rules of judicial disqualification, such as discussed in N.Y. State 725 and N.Y. State 548, prohibit the proposed conduct. *See*, *e.g.*, Rule 8.4(f) (prohibiting lawyer's conduct in connection with a judge only when the lawyer knowingly assists the judge in conduct "that is a violation of applicable rules of judicial conduct or other law"). The inquiring lawyer is not automatically precluded from appearing before the unrelated judge on account of having an employee in common with a different judge, any more than appearing before the unrelated judge would be automatically precluded by the inquirer's familial relationship with that different judge.

8. The inquiring lawyer must, however, be mindful of the need to protect confidential client information and must fulfill the obligation under Rule 1.6(c) to "exercise reasonable care to prevent the lawyer's employees . . . from disclosing or using confidential information of a client." A secretary who will also be working part time in another law office should be given appropriate instructions about the importance of maintaining confidentiality while at that other office. Particular situations may call for renewed and more tailored warnings to the secretary. For example, if and when the secretary works on one of the lawyer's cases before the unrelated judge, or even a case in some other court involving parties or issues related to a case in the City Court, the duty of reasonable care may require the lawyer to highlight the need to maintain client confidentiality at the office of the related judge. *See also* Rule 5.3(a) (degree of lawyer's required supervision over nonlawyer depends on factors including likelihood that ethical problems might arise in course of working on the matter).

9. The inquirer must also be careful, as required by Rule 8.4(e)(1), not to state or imply an ability "to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official." This proscription is equally applicable to the familial relationship and the shared employment relationship. For example, when negotiating a case pending in City Court, the lawyer should not gratuitously volunteer to other parties to the negotiation that the attorney's son is a judge in that court or that the lawyer's secretary also works for that judge.

CONCLUSION:

10. A lawyer's appearance before the one of two City Court judges who is not related to the lawyer is not precluded by the circumstance that the lawyer's part-time secretary is also employed part time as secretary for personal matters by the judge related to the lawyer, but the lawyer must comply with Rules 1.6(c) and 8.4(e)(1).

(18-13)

2014

OPINION 996 (01/03/2014)

TOPIC: Escrowed client funds

DIGEST: Client funds in a lawyer's escrow account may not be shielded from lawyer's creditor by transferring them to an escrow account held by the lawyer's lawyer.

RULES: 1.15; 8.4

FACTS:

1. The inquiring lawyer ("L1") represents another lawyer ("L2") who owes money to a third party. As part of that representation, L1 is trying to negotiate an installment payment agreement with the third party, but has been unsuccessful. L1 is concerned that L2's creditor may seek to levy on L2's escrow account, which contains unearned advance payment retainers paid by L2's clients. So as to protect those funds, L2 would like to transfer the funds to L1, to be held in L1's escrow account. So long as the funds belong to L2's clients and L2 continues to represent those clients, L1 would maintain the funds in L1's escrow account; once L2 earns the funds, L1 would disburse them in whatever manner L2 directs.

QUESTION:

2. May L2 properly transfer the unearned advance payment retainers from L2's escrow account to L1's escrow account, and may L1 receive those funds, for the purpose of protecting the funds from levy by a third party?

OPINION:

3. The inquiry is governed by Rule 1.15 of the New York Rules of Professional Conduct ("the Rules"). Rule 1.15(a) provides: "A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own." Rule 1.15(b)(1) provides in part that funds belonging to another person but in the lawyer's possession incident to the practice of law shall be maintained in a special account or accounts "in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed."

4. The funds at issue are advance payment retainers from L2's clients that have been paid to, but not yet earned by, L2. *See* N.Y. State 983 ¶5 & n.6 (2013) (distinguishing advance payment retainers from general retainers). L2 may agree with those clients to treat such funds as belonging to the clients until earned, or alternatively, to treat the funds as belonging to L2 subject to an obligation to return any ultimately unearned amounts to L2's clients. *See* N.Y. State 983 ¶4 (2013); N.Y. State 816 ¶¶ 4-7 (2007). The inquiry does not explicitly state whether L2's clients agreed with L2 on one of these options. However, it does state that the funds are being maintained in L2's escrow account. We

assume that the funds are being held in that account properly, which is to say that the funds do not yet belong to L2, but rather are being treated as belonging to L2's clients until earned. See N.Y. State 983 ¶4; N.Y. State 816 ¶ 5. Because the funds currently belong to persons other than L2, but are in L2's possession incident to the practice of law, they constitute property subject to Rule 1.15.

5. Under Rule 1.15, L2 must continue to maintain these advance payment retainers belonging to L2's clients in L2's escrow account. That requirement is subject to client direction, in that L2 must comply with any given client's request for disbursement of that client's funds. *See* Rule 1.15(c)(4). But there is no suggestion in the current inquiry that any client has requested that L2 disburse escrow funds to L1, much less that all the clients have done so, as would be required for L2 to pursue the proposed course of action. Absent such direction from all affected clients and as long as the funds remain unearned, L2 may not transfer them to L1 or anyone else other than the clients to whom the money belongs.

6. We note some matters beyond the scope of our response. There are legal questions about whether the proposed transfer of the client's escrowed funds would tend to serve the purpose of avoiding levy by L2's creditor. These include the questions whether the funds in the L2's escrow account, which are unearned retainer fees not yet belonging to L2, would even be subject to levy under the circumstances, and whether the funds, if they could appropriately be transferred to the L1's escrow account, would be any better protected from the creditor. The Committee does not opine on questions of law as opposed to ethics, and in any event, the propriety of the proposed transfer does not turn on its efficacy.

7. Another kind of legal question is more relevant to ethical propriety. L1 does not ask about the lawfulness of the proposed transfer of the client's escrowed funds for the purpose of avoiding levy by the L2's creditor, but the propriety of the proposed conduct depends in part on whether such conduct is known by L1 or L2 to be in violation of law. Under the facts presented, L1 already is representing L2 in negotiating with the creditor, those negotiations have been unsuccessful, and L2 and L1 are contemplating the transfer from L2 to L1 for the specific purpose of protecting the L2's escrowed funds from being levied upon by the creditor. It is relevant to consider whether there would be anything fraudulent about the proposed transfer or whether, for example, L1 and L2 might reasonably believe that the purpose of transfer would be to protect from a wrongful rather than a legitimate attempt to levy. We note only that whether the proposed transfer would be fraudulent or otherwise unlawful, although a legal question, would implicate various rules of legal ethics. *See* Rule 1.2(d) (a lawyer shall not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client"); Rule 8.4(b) (a lawyer shall not "engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer"); Rule 8.4(c) (a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

8. If L1 and L2 were free under Rule 1.15 to engage in the proposed transfer of funds, then they would need to consider legal questions such as those mentioned above, and the ethical consequences of the answers to those questions. However, because the proposed transfer would violate Rule 1.15, they need not reach such issues.

CONCLUSION:

9. Funds held by a lawyer as advance payment retainers belonging to the attorney's clients and not yet earned by the lawyer must be held in the lawyer's escrow account and may not be transferred into the escrow account of another lawyer who represents the attorney holding the advance payments.

(34-13)

OPINION 997 (01/24/2014)

TOPIC: Payment for evidence

DIGEST: A lawyer may in general pay for physical evidence in connection with contemplated or pending litigation, and such payment may be contingent on the outcome of the matter. There are limitations, however, such as when the transaction involves witness payments or the prospect of false evidence.

RULES: 1.1(c), 1.8(e), 3.4(b), 8.4(d)

FACTS:

1. A lawyer represents a plaintiff in a personal injury action arising out of an automobile accident.

2. A store surveillance camera recorded the events at issue, apparently showing that the defendant's actions caused the accident. The storeowner has contacted the lawyer and has offered to provide the surveillance tape for a payment.

QUESTIONS:

3. May a lawyer purchase video surveillance evidence from a third party on behalf of a client?

4. If a lawyer purchases such evidence, may the amount of the payment be contingent upon the outcome of the matter?

OPINION:

5. This inquiry raises a narrow question regarding the propriety, under the Rules of Professional Conduct (the "Rules"), of purchasing physical evidence for use in contemplated or pending litigation. We therefore do not address various related but different questions about the acquisition or use of physical evidence.[1]

6. Nothing in the Rules explicitly prohibits paying for evidence, nor do we perceive any implied prohibition. Such payment may, depending on the circumstances, be an appropriate means of advancing a client's interests. *See* Rule 1.1(c)(1) (lawyer shall not intentionally "fail to seek the objectives of the client through reasonably available means permitted by law and these Rules"); Rule 1.8(e), Cmts. [9B] & [10] (discussing rule that lawyer may not advance or guarantee financial assistance to client, subject to exceptions for court costs and litigation expenses, including "the costs of obtaining and presenting evidence").

1 For example, we do not address the admissibility of the purchased evidence. Nor do we address factors bearing on a lawyer's choice between seeking to obtain evidence by purchase or subpoena. *See* CPLR 3122(d) ("reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery"). Moreover, this opinion presumes that the evidence in question is acquired legally, and we do not address circumstances in which evidence is acquired in violation of another's rights, or acquired for purposes of alteration, suppression or other obstruction, which would require a separate analysis of the facts and circumstances under Rules 4.4 and 8.4, respectively.

7. However, while it is permissible in general for a lawyer to pay for evidence, particular circumstances may give rise to important limitations on that practice.

8. First is the prohibition of knowingly offering or using false evidence. *See* Rule 3.3(a)(3). A lawyer who knows that a surveillance videotape has been fraudulently altered may not offer or use that videotape. Nor may the lawyer evade that Rule by remaining willfully blind to the falsity of the videotape. *See* N.Y. State 993 ¶9 n.4 (2013) (addressing conscious-avoidance doctrine applied to ethics context).

9. Second, to offer the surveillance tape in evidence, the lawyer may need to offer foundation testimony by the person who has offered the tape for sale. When it is foreseeable that the lawyer will have occasion to call that person as a witness, either to authenticate the tape or for any other reason, then the lawyer will be subject to ethical limitations on witness payments:

> A lawyer shall not . . . pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:
>
> > (1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses . . .

Rule 3.4(b); *see* N.Y. State 962 (2013) (discussing "reasonable related expenses" permitted by Rule 3.4(b)(1)); N.Y. State 668 (1994) (discussing "reasonable compensation" as permitted by predecessor rule and also current Rule 3.4(b)(1)).

10. Of course a lawyer may not circumvent the restrictions of Rule 3.4(b) by disguising witness payments in whole or part as payments for physical evidence. On the other hand, the restrictions do not apply except to the extent that there is actual or proposed compensation to a witness. By the terms of the Rule, the limitations – including the prohibition of payment contingent on the matter's outcome – do not apply to purely physical as opposed to testimonial evidence.

11. Third, particular circumstances of payment for evidence could give rise to concerns about the reliability of that evidence. Such concerns may be heightened when, for example, the evidence in question is readily susceptible to alteration that is difficult to detect; when the payment for the evidence seems disproportionately large; and when a person involved in the transaction otherwise acts in ways raising suspicion about the integrity of the evidence. On sufficiently extreme facts, the purchase in such a case could amount to an ethical violation. *See* Rule 8.4(d) (lawyer shall not "engage in conduct that is prejudicial to the administration of justice"). While we cannot specify in the abstract all the circumstances that could rise to the level of a violation, a trial court would be positioned to assess the facts of a particular case and fashion appropriate remedies. *Cf. Caldwell v. Cablevision Systems Corp.*, 20 N.Y.3d 365 (2013) (citing Rule 3.4(b), noting concern about "what appears to be a substantial payment to a fact witness in exchange for minimal testimony" and "such a disproportionate fee for a short amount of time at trial," and concluding that trial court should have given a special jury instruction as to potential bias of the paid witness).

12. However, when these limitations are not triggered by particular circumstances, a lawyer may purchase surveillance video from a third party for use as evidence in contemplated or pending litigation. There is no requirement that the cost of purchasing evidence be charged to the client immediately, or in some cases, even ultimately. *See* Rule 1.8(e)(1)-(3) and Cmts. [9B] & [10] (providing that lawyer may "advance" expenses of litigation such as costs of obtaining evidence, "the repayment of which may be contingent on the outcome of the matter," and may "pay" such costs for indigent or pro bono clients and in contingent fee matters).

CONCLUSION:

13. A lawyer may in general purchase video surveillance evidence on behalf of a client for use in connection with contemplated or pending litigation. There is no per se rule against such payments being contingent on case outcome. The lawyer's conduct may be subject to limitations, however, such as when the conduct also involves witness payments or the prospect of false evidence.

(42-13)

OPINION 998 (02/05/2014)

TOPIC: Confidential information; criminal conduct

DIGEST: Lawyers who become aware of fraudulent conduct by buyer and seller in a real estate transaction, including delivery of a fraudulent check in payment of the fee of buyer's lawyer, may not disclose attempted or completed fraud unless necessary to withdraw a representation by the lawyer still being relied upon; to the extent necessary to collect the fee; or where required by other law.

RULES: 1.6(b), 3.3

FACTS:

1. Buyer, seller and the mortgage-holding lender agreed to a short-sale residential real estate transaction. A short sale is a transaction in which the holder of a mortgage on the property consents to release its lien in a sale for less than the outstanding amount of its loan. Such a sale is often an alternative to initiating a foreclosure proceeding. In this case, buyer and seller secretly agreed prior to the closing (and without informing their lawyers) that the buyer would pay the seller an amount in addition to the amount being paid to the mortgage holder. At the closing, the buyer and seller signed affidavits swearing that there had been no side agreements and that no money would be exchanged outside of the approved arrangements. Buyer delivered checks to pay the broker's fee and to pay the buyer's own lawyer. Unbeknownst to counsel for either party, the buyer also delivered to the seller a check for the additional amount on which they had agreed.

2. The closing was completed, and a day or two later, the broker, seller and buyer's attorney all discovered that the checks they had received were fraudulent. (The buyer otherwise had used non-fraudulent checks to consummate the closing.) The account on which the fraudulent checks were drawn did not exist. The seller asked the seller's attorney for advice regarding the fraudulent check the seller had received, resulting in that attorney also learning about the side agreement and ultimately about the other fraudulent checks. We are told, and it seems reasonable to conclude, that the side agreement was an attempt to defraud, if not an actual fraud upon, the mortgage holder.

QUESTION:

3. In a short-sale residential real estate transaction in which buyer and seller may have, without the knowledge of their lawyers, committed a fraud on the lender, and buyer has also issued fraudulent checks to buyer's attorney and others involved in the transaction, may or must the lawyers reveal the fraudulent conduct to the lender or law enforcement authorities?

OPINION:

4. The critical facts here – that the buyer and seller had agreed on and attempted to consummate a side payment and swore affidavits to the contrary, and the buyer's issuance of fraudulent checks – are clearly "confidential information" within the meaning of Rule 1.6 of the Rules of Professional Conduct. Rule 1.6(a) defines "confidential information" as follows:

> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.

The information here was gained during or relating to the representation of each lawyer's client. In N.Y. State 866 (2011), we opined that the term "during" in Rule 1.6 should not be read to be purely temporal, but rather "implies some connection between the lawyer's activities on behalf of the client and the lawyer's acquisition of the information – for example, if the lawyer learned the information because of the lawyer-client relationship." *Id.* ¶ 17 (footnote omitted). The seller's lawyer clearly learned the information during the course of his representation of the seller in this sense – indeed, the lawyer learned it in the course of a request for legal advice. The buyer's lawyer might have learned the information after the end of the representation, and thus not "during" the representation, but the information clearly "relat[ed] to" the representation.[2]

5. Moreover, the disclosure of that information by either lawyer is likely to be detrimental to that lawyer's client: the fact that the buyer and seller apparently defrauded the lender would be detrimental to each client if disclosed; the disclosure of the buyer's delivery of fraudulent checks would clearly be detrimental to the buyer; the disclosure of that fact likely would be detrimental to the seller as well, because it would likely lead to disclosure of the apparently illegal side agreement. Under Rule 1.6(a), each side's lawyer is therefore barred from revealing this information unless his or her client gives informed consent or the disclosure is permitted by Rule 1.6(b).

6. Rule 1.6(b) merely authorizes, but does not require, disclosure in the circumstances enumerated therein (and discussed below), and no other rule requires disclosure of confidential information in the present case. Another rule, Rule 3.3, does compel disclosure of confidential information, but it is inapplicable here. Rule 3.3 provides, among other things, that a lawyer who knows that a person has engaged in criminal or fraudulent conduct related to a proceeding before a tribunal must take remedial measures, including, if necessary, disclosure of confidential information. But Rule 3.3 only applies to lawyers who represent clients before a tribunal and only to criminal or fraudulent conduct related to a proceeding before the tribunal. Here, the lawyers do not represent clients before a tribunal and there is no applicable proceeding.

7. Turning to the permissive-disclosure provisions of the Rules, Rule 1.6(b) contains several exceptions to the obligation not to reveal confidential information. There are five exceptions that merit discussion here:

> A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary: . . .
>
> (2) to prevent the client from committing a crime;
>
> (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person,

2 *Cf. Levitt v. Brooks*, 669 F.3d 100, 104 (2d Cir. 2012) (disclosure of client's "vulgar remark" relating to fee dispute did not violate Rule 1.6 because "remark contained no material *information* beyond the use of profanity directed at counsel").

> where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud; . . . .
>
> (5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or
>
> (ii) to establish or collect a fee; or
>
> (6) when permitted or required under these Rules or to comply with other law or court order.

8. Rule 1.6(b)(2) permits disclosure to prevent the client from committing a crime, but not to remedy a past crime.[3] Here, it appears that each of the potential crimes was complete before the lawyers learned of it. The Comments to this Rule recognize that some crimes are continuing crimes, and state that a lawyer "whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts . . . ." Rule 1.6, Cmt. [6D]; *see also* N.Y. State 866 ¶ 26 (2011) (discussing disclosure of continuing crimes). While we do not opine on questions of law, as opposed to ethics, the frauds here do not appear to be continuing crimes, so Rule 1.6(b)(2) does not appear to be applicable.

9. Rule 1.6(b)(3) permits disclosure to the extent reasonably believed necessary to withdraw a written or oral opinion or representation that was based on materially inaccurate information and that the lawyer reasonably believes is still being relied upon by a third person. We do not know whether either lawyer might have given a representation upon which any third person – presumably, the lender – is still relying. If either lawyer gave a representation implying the absence of fraud in the transaction, it may be possible to conclude that the lender is continuing to rely on that representation in not pursuing remedies against the buyer and seller for their attempted fraud.

10. Rule 1.6(b)(5)(i) permits a lawyer to disclose confidential information to defend the lawyer against an accusation of wrongful conduct. On the facts known to us, there does not appear to have been any accusation of wrongful conduct leveled against either lawyer. Unless and until such an accusation is made, this exception to the bar on disclosure of confidential information is inapplicable.

11. Rule 1.6(b)(5)(ii) permits a lawyer to disclose confidential information to collect a fee. The buyer's lawyer thus would be entitled to disclose confidential information to the extent necessary to collect the fee that was purportedly paid with a fraudulent check. Any such disclosure would need to be limited, however. *See* Rule 1.6 Cmt. [14] ("a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose"); N.Y. State 980 ¶¶ 5-6 (2013) (discussing limitations on authorization to reveal information to collect fee). For example, the buyer's lawyer might reasonably conclude that the Rule does not authorize disclosure of the side

3 We note that New York has not adopted the ABA version of the exceptions, which include a provision that a lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." ABA Model Rule of Prof. Conduct 1.6(b)(3). New York's rule thus provides a significantly narrower scope to reveal information about already completed crimes than the ABA model.

agreement for the secret payment, but only the use of the fraudulent check to pay the lawyer's fee. The lawyer will also need to consider whether reporting the fraud to law enforcement authorities is reasonably necessary to collect the fee. Ordinarily, one need not report a crime in order to initiate a civil action to collect damages caused by the criminal conduct, but we do not exclude that in certain circumstances a lawyer could reasonably conclude that such reporting is necessary. *Cf.* N.Y. State 980 (2013) (addressing whether disclosure of fact that client had been "working off the books" was necessary to collect fee in bankruptcy proceeding); N.Y. State 684 (1996) (concluding that lawyer could not disclose to credit bureau client's failure to pay fee because disclosure was not necessary to collect fee).

12. Finally, Rule 1.6(b)(6) permits disclosure to the extent reasonably believed necessary "when permitted or required under these Rules or to comply with other law or court order." There are statutes that require reporting information about some crimes, or that at least prohibit concealment of such information, though the obligations they impose may be limited by judicial consideration of ethical principles.[4] As our jurisdiction is limited to questions of legal ethics under the Rules, we express no view as to whether other law may require disclosure here.

13. There is nothing anomalous about our conclusion that the lawyers may not be able to disclose the frauds to law enforcement authorities. There are various circumstances in which confidentiality obligations prevent a lawyer from exercising the full set of remedies for wrongful conduct available to others, even when the lawyer has suffered the consequences of the wrongful conduct. *See*, *e.g.*, *Simon's New York Rules of Professional Conduct Annotated* 215 (2013 ed.) (explaining rule that lawyer may reveal confidential information relating to future but not past crimes on ground that "preventing client crimes is more important than the duty of confidentiality, but solving crimes is not"); N.Y. City 1994-1 (citing cases for proposition that where an attorney "was pursuing a common law remedy, several courts have not permitted in-house attorneys to sue former employers for retaliatory termination, basing their conclusion on the confidential nature of the attorney-client relationship and the ethical requirements relating to clients' confidences and secrets").

14. Finally, we note that even though the lawyers might be barred from disclosing the information at issue here voluntarily, that does not answer the question whether they might be compelled to disclose it. Some of the information may be protected from compulsory process by attorney-client privilege, such as any facts about the side agreement that were revealed by client to lawyer in confidence. But some of the information at issue here may be confidential for reasons other than the attorney-client privilege, and thus the lawyers may be compelled to disclose it. For example, the receipt of the fraudulent check might well not be privileged. *See In re Subpoena to Testify Before the Grand Jury*, 39 F.3d 973, 976 (9th Cir. 1994) (identity of client who paid lawyer with counterfeit bill was "entirely distinct from the matter in which the client sought the lawyer's services. It was therefore unprotected by the privilege.").

4 See, e.g., Wayne LaFave, Substantive Criminal Law § 13.6 & n.86 (2013) ("There is a misprision of felony statute in the United States Code, but it is not a true misprision statute in that it requires an act of concealment in addition to failure to disclose."); *People v. Belge*, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Co. Ct. Onondaga) (dismissing, on grounds of attorney-client privilege and in interests of justice, indictment of lawyer for failure to report, under Public Health Law §§ 4143 (requirement to report death occurring without medical attendance) and 4200 (duty of decent burial), where location of murder victim's body had been disclosed in attorney-client communication), *aff'd*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (4th Dept. 1975), *aff'd*, 41 N.Y.2d 60, 390 N.Y.S.2d 867 (1976); Stephen Gillers, Guns, Fruits, Drugs, and Documents: A Criminal Defense Lawyer's Responsibility for Real Evidence, 63 Stan. L. Rev. 813, 829-46 (2011) (discussing criminal statutes and court cases dealing with disclosure of evidence of a crime).

CONCLUSION:

15. Neither the buyer's lawyer nor the seller's lawyer may disclose the apparent fraud on the lender or the delivery of fraudulent checks, except (i) to the extent reasonably believed necessary to withdraw any opinion or representation made by the lawyer asserting the absence of such conduct where the lender is reasonably believed still to be relying on such opinion or representation, (ii) where required by other law, or (iii) by the buyer's lawyer, to the extent reasonably believed necessary to collect the lawyer's fee.

(44-13b)

OPINION 999 (03/28/2014)

TOPIC: Marital Mediation and referrals.

DIGEST: An attorney who works exclusively in the field of Marital Mediation, with a stated goal "to help couples resolve problems and stay together", may ethically refer such couples to the attorney's spouse, a psychiatrist, who has volunteered to provide two free couples-counseling sessions to such couples.

RULES: 1.7; 2.4(a); 2.4(b); and 8.4.

QUESTION:

1. May an attorney who works exclusively in the field of marital mediation, with a stated goal: "to help couples resolve problems and stay together" ethically refer couples to the attorney's spouse, a psychiatrist who has volunteered to provide two free couples-counseling sessions to such couples?

OPINION:

2. Rule 2.4(a) is entitled: "Lawyer Serving as Third Party Neutral" and provides that, "a lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them." Since the inquiring attorney is engaging in neutral mediation, that attorney is not representing clients.

3. The attorney serving as a third-party neutral must be mindful of the obligations imposed by Rule 2.4(b), which requires that, "a lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them." Additionally, should it become apparent that "a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."

4. Because the lawyer is not engaging in the representation of a client or clients during the course of the mediation, the lawyer would not have a personal interest conflict under Rule 1.7 (Rule 1.7 applies only to client representation).

5. With respect to the attorney/inquirer's spouse's offer to provide two free "couples-counseling" sessions to the mediating parties, the attorney/inquirer must also be mindful of Rule 8.4(c), which provides that an attorney must not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." It may be that under the circumstances Rule 8.4(c) would require the attorney/inquirer to make clear disclosures that the psychiatrist is in fact the spouse of the attorney and also that the two free sessions might not be sufficient to resolve every issue between the parties and that therefore the attorney could conceivably derive an indirect benefit from fees charged to the parties by the attorney/inquirer's spouse for work beyond the two free sessions.

6. The attorney should be aware that even though a neutral mediator is not representing a client, the lawyer neutral may still be practicing law, and other Rules may apply. *See* N.Y. State 979 (2013); N.Y. State 678 (1996).

CONCLUSION:

7. The attorney inquirer may make the referral to the attorney inquirer's psychiatrist spouse subject to the cautions identified above.

35-13

OPINION 1000 (03/28/2014)

TOPIC: Payment of Legal Fees by a Non-Client Whose Interests Could Be Adverse to the Lawyer's Client

DIGEST: It is permissible for a third-party to pay for a lawyer's representation of a client where the client's interests may be adverse to the interests of the third-party payer if: 1) the lawyer obtains the informed consent of the lawyer's client and 2) the lawyer exercises independent professional judgment on the client's behalf without interference from the potentially adverse third-party payer. That the lawyer may be owed additional fees from the client does not pose a conflict unless the outstanding debt interferes with the lawyer's ability to represent the client.

RULES: 1.0(e), 1.6, 1.7(a), 1.8(f); 1.16(b)(5), 4.3.

QUESTION:

1. The inquiring lawyer asks whether the lawyer may accept payment of a retainer fee from the client's sibling to pursue an appeal on behalf of the client notwithstanding that the appeal could be adverse to the interests of the sibling and that the client remains in arrears on fees owed to the lawyer for work on proceedings giving rise to the appeal. We conclude that the lawyer may do so if the lawyer complies with Rule of Professional Conduct 1.8(f) concerning payments of fees by persons other than the client and if the third-party payer understands that the lawyer's obligations run solely to the client. That the client owes the lawyer additional fees from prior work is not an obstacle to this conclusion unless the debt gives rise to a conflict of interest with the client for which informed consent is not a remedy.

BACKGROUND:

2. The inquirer is a New York lawyer who represents one of two siblings in a dispute arising out of the incapacity of their now-deceased parent. Before the parent died, the client sued for removal of the non-client sibling as guardian of the parent. The court ruled in favor of the non-client sibling on the guardianship issue and awarded attorney's fees from the parent's assets. The parent thereafter died, but the appeal of the award of attorney's fees lives on.

3. The prevailing non-client sibling, apparently unhappy with the amount of the award of attorneys' fees, has paid the inquiring lawyer a retainer from the parent's estate to enable the lawyer's client to pursue an appeal of the attorney's fee award. One of the arguments the inquirer will make on the appeal is that the non-client sibling should be held personally liable for the attorney's fee.

4. The inquirer's client has not satisfied the terms of their fee arrangement for services rendered in connection with the trial-level disputes underlying the appeal. The inquirer is concerned that the inquirer's personal financial interest in being paid for the earlier services could give rise to a conflict between the lawyer and the lawyer's client.

ANALYSIS:

5. Rule of Professional Conduct 1.8(f) deals with third-party payment of attorneys' fees. That Rule states that a "lawyer shall not accept compensation for representing a client from one other than the client unless (1) the client gives informed consent; (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship and (3) information relating to the representation of the client is protected as required by Rule 1.6," which requires a lawyer to maintain the confidential information of the client. Simply put, Rule 1.8(f) means that a lawyer owes a client the same duties owed to a client without regard to the source of the fees the lawyer is paid, with the added proviso that a client must give "informed consent" to the arrangement.

6. Rule 1.0(e) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." We have a number of opinions that apply these principles to various scenarios. *See, e.g.,* N.Y. State 901 (2011) and 867 (2011). Whether a lawyer conveys "adequate information" to constitute "informed consent" varies with the facts and circumstances in which the lawyer seeks consent and involves many factors including the proposed course of conduct, the sophistication of the client as a consumer of legal services, and risks attending the particular representation. Under these specific facts the inquiring lawyer cannot obtain informed consent without clarifying that the lawyer's duty runs solely to the client, that the non-client payer will not affect the lawyer's exercise of independent professional judgment on the client's behalf on the appeal, and, most important, that the non-client payer's interests may be adverse to the client's interests on the appeal, with particular emphasis on the fact that the non-client sibling may be found personally liable for the attorneys' fees.

7. It is common for third parties to pay attorney's fees. Mortgagors commonly pay lenders' legal fees in real estate closings. In 2007, in N.Y. State 818, we acknowledged and approved the regular practice of issuers paying the legal fees of designated underwriters' counsel assuming compliance with DR 5-107(B), the predecessor of Rule 1.8(f), provided there was disclosure of conflicts accompanying the arrangement. We said the same in 1989, in N.Y. State 601, although there we disapproved the proposal because the fee arrangement provided a financial incentive for the lawyer to subordinate the interests of the lawyer's clients (tenants) if the lawyer achieved a settlement with the adverse third-party payer (the landlord).

8. Here, the non-client sibling is willing to finance the appeal without condition and knows that a result of the appeal could be that the non-client-sibling would have to pay the attorneys' fee. The lawyer's full disclosure to the lawyer's client must necessarily entail disclosure of the lawyer's discussions with the non-client payer.[5]

9. Accordingly, the lawyer should leave no doubt in the third-party payer's mind concerning the potential consequences of the appeal for which the payment is being made. We do not mean thereby to suggest that a lawyer who receives payment from a third-party payer in compliance with Rule

5 If the estate is not represented by counsel the lawyer must abide by Rule 4.3. This Rule provides, in relevant part, that, if the lawyer knows or reasonably should know that a possibility of adversity exists, the lawyer must explain that the lawyer is not disinterested in the matter, and should not provide legal advice to the person in the circumstances other than the advice to obtain independent counsel.

1.8(f) must always undertake this responsibility. To the contrary, in most instances, we would expect that the third-party payer is fully mindful of the potential for adversity in the lawyer's representation of a client under some form of indemnity duty, whether contractual or otherwise.

10. Finally, that the inquirer's client is in arrears on fees for prior services is insufficient to suggest that the lawyer has a conflict in representing the client on the appeal. While under Rule 1.7 a lawyer may not represent a client when a lawyer's personal interests conflict with those of the client, it provides a lawyer may obtain a client's informed consent to proceed despite the conflict if the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation" of the client. Sometimes, clients do not pay their lawyers, and this fact alone does not invariably negate a "reasonable belief" that a lawyer will be able to "provide competent and diligent" representation to the client. If the lawyer concludes that the lawyer is able to "provide competent and diligent representation" of the client on the appeal, *see* Rule 1.7(b), then the mere existence of the debt does not ethically disable the lawyer from obtaining informed consent from the client to proceed with the appeal.

CONCLUSION:

11. A lawyer may accept a retainer from a third-party payer whose interests are potentially adverse to the lawyer's client's interests if the lawyer complies with Rule of Professional Conduct 1.8(f) concerning payments of fees by persons other than the client and if the third-party fee-payer understands that the lawyer's obligations run solely to the client. That the client owes the lawyer an additional fee from prior work is not an obstacle to this conclusion unless the debt gives rise to such adversity with the client that the lawyer's representation will be affected by the adversity or the lawyer may not obtain informed consent.

33-13

OPINION 1001 (03/28/2014)

TOPIC: Sale of Third-Party Advertising in Law Firm Brochures and Rules Governing Advertising Brochures with Educational Content

DIGEST: Law firms that distribute brochures with educational content on legal issues of importance to the public may sell advertising in those brochures to third parties, including other law firms, as long as the law firm does not charge rates for the advertising suggestive of improper referral or fee-splitting arrangements. Whether the brochure constitutes lawyer advertising depends on the entirety of the brochure and not only those portions promoting the firm.

RULES: 1.0(a); 1.5(g), 7.1(d), (e), (f), (k), (l), (m), 7.2(a)

QUESTION:

1. The inquiring law firm asks whether the law firm may accept a fee for allowing third parties to advertise in the firm's monthly brochure, which is distributed free of charge through a variety of outlets and contains both articles of legal interest in the areas in which the law firm practices and advertisements, identified as such, for the law firm's services. We see no obstacle in the Rules of Professional Conduct to such a practice subject to the caveats below.

BACKGROUND:

2. The inquirer is a New York law firm that offers professional services in several practice areas. On a monthly basis, the law firm publishes a newsletter containing information about a variety of legal subjects on which the firm concentrates, which is distributed free of charge through several means to clients and non-clients. The content of this newsletter provides analysis of legal issues of importance in the practice areas the law firm offers, but the articles typically conclude with an invitation to call the law firm for additional information. Some articles prominently feature a successful representation by the law firm. The newsletter also prominently features advertisements for the law firm, offering, among other things, free legal consultations, "reasonable" fees, and payment plans for the firm's services. The back cover of the newsletter consists entirely of an advertisement for the firm.

ANALYSIS:

3. The law firm's sole question is whether the law firm may accept advertising for the newsletter from other professionals, including law firms, medical professionals, and others. The law firm states that it will charge a straight fee for this advertising, without any arrangement indicative of referrals, fee-sharing, or other illicit agreements between service providers. The inquiry, then, is essentially whether a lawyer who engages in advertising on the lawyer's own behalf through a regular publication of interest to the public may also sell advertising in the same publication, without any kind of agreement between the publishing law firm and the advertiser. In our view, if the publication complies with New York Rule of Professional Conduct 7.1, then the law firm may provide space in its newsletter to others provided no impermissible conditions accompany the transaction.

4. In so opining, we rely on the law firm's representation that improper factors do not influence the value the law firm receives, if any, for the advertising. For instance, solely for the purpose of pro-

moting good relationships, a law firm may decide to offer at no cost an advertisement for a former colleague who is starting a new law practice, or for a non-lawyer service provider whom the law firm sincerely considers worthy of consideration by persons who receive the brochure. Our concern is not with the price of the advertising but with any explicit or implicit understanding between the publisher and the advertiser suggestive of a fee-splitting or referral arrangement that would violate other Rules of Professional Conduct, including, for example, Rule 1.5(g) and Rule 7.2(a).

5. Although not the subject of the firm's inquiry, we would be remiss if we failed to note that, in our view, the firm's entire newsletter, as presented to us, constitutes "advertising" within the meaning of the Rules of Professional Conduct. Rule 1.0(a) defines "advertisement" to mean "any public or private communications made by or on behalf of a lawyer or law firm about the lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." Whether a brochure constitutes lawyer advertising depends on the entirety of the brochure and not only those portions promoting the firm. That portions of the newsletter are primarily educational in nature is not dispositive, especially when nine of the twelve pages contain advertisements for the law firm, including the entire back cover; almost all the articles end with an invitation to call the law firm for advice; and several articles begin with questions targeting persons with potential issues and identifying the firm as a firm that may assist with those issues.

6. This means that the provisions of Rule 7.1 apply to the entire newsletter. Among other things, the words "Attorney Advertising" should appear in some form on the first page of the brochure. Rule 7.1(f). These words must be "clearly legible and capable of being read by the average person." Rule 7.1(l). Statements "characterizing the quality of the lawyer's or firm's services" or that are "reasonably likely to create an expectation about the results the lawyer can achieve" – which at least some of the articles in the newsletter can be read to do – must be "accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome." Rules 7.1(d) & (e). Rule 7.1(k) requires the law firm to maintain a copy of the advertisement for at least three years. Rule 7.1(m) says that any fee arrangement offered in an advertisement published at least monthly must be held open until the next issue. This is not intended as an exhaustive list of the issues the inquirer should examine in light of Rule 7.1, which we urge the inquirer to review carefully in publishing future issues.

7. Otherwise, we see no problem with a law firm selling or otherwise offering advertising space in its newsletter to other professionals provided that no other arrangement, such as a referral or other fee, attends the transaction. In our recent Opinion 981, we opined that a law firm may place advertisements for a non-legal service provider in the lawyer's office (in this instance, a home security firm), and that the non-legal service provider may pay the lawyer a fee if someone, whether or not a client of the lawyer, happens to retain the third party as a result of the advertisement being placed in the lawyer's office. We have otherwise concluded that a variety of cross-selling techniques are permissible provided that the lawyer complies with Rule 7.1 and does not transgress rules of fee-splitting, referrals and similar improper practices. See, e.g., N.Y. State 947 (2012) (acquisition of mailing lists); N.Y. State 937 (2012) (cooperative arrangement with a hospital for promotional gifts); N.Y. State 915 (2012) (linking of non-legal websites to a lawyer's website).

CONCLUSION:

8. Law firms that distribute brochures with educational content on legal issues of importance to the public may sell advertising in those brochures to third parties, including other law firms, as long

as the publishing law firm does not charge rates for the advertising suggestive of improper referral or fee-splitting arrangements. Whether a brochure constitutes lawyer advertising depends on the entirety of the brochure and not only those portions promoting the firm.

27-13

OPINION 1002 (03/31/2014)

TOPIC: Lawyer's ethical obligations when in possession of lawfully obtained wills containing confidential information in which unknown third parties have an interest

DIGEST: Lawyer appointed as executor to estate of deceased lawyer who had custody of client and non-client wills may access and disclose confidential information in the wills insofar as necessary to learn identity of testator, executor, or beneficiary/ies in order to dispose of wills properly.

RULES: 1.6(a), 1.15(c).

FACTS:

1. The inquirer is a lawyer who works as a prosecutor and has been named his father's executor. The inquirer's father was an attorney who had a law firm that dissolved. After the firm's dissolution, the inquirer's father operated as a solo practitioner. The inquirer's father safeguarded wills from his dissolved law firm, and in addition agreed to preserve client wills of other attorneys who either retired, died, or whose firms dissolved. While a solo practitioner, the inquirer's father hired his former secretary to help him in locating and returning original wills to former clients and others who entrusted wills to him, and a large number of wills were so disposed. The inquirer's father also had made provision with another attorney to take over his few remaining clients, but not the remaining wills in his possession. The inquirer seeks guidance for ethical obligations applicable to himself as executor in disposing of several hundred wills, mostly from the 1980s, belonging both to former clients of his father and non-clients.

QUESTIONS:

2. This inquiry requires us to consider three questions. Does the lawyer have an ethical obligation to notify persons with an interest in the wills that he possesses them? Is the lawyer ethically prohibited from inspecting the wills to identify the executors/executrixes and beneficiaries for notification purposes? How may the lawyer ethically dispose of the wills?

OPINION:

3. Although a lawyer who, incident to the lawyer's practice, comes into possession of property in which a third party has an interest has an ethical obligation under Rule 1.15(c) to promptly notify such third party that he or she has possession of the property, the lawyer-executor here does not have such an ethical obligation because he did not come into possession of the wills incident to his practice. Rule 1.15(c) of the Rules of Professional Conduct requires a lawyer to "promptly notify a client *or third person of the receipt of* funds, securities, or other *properties in which the* client *or third person has an interest*[.]" (Emphasis added). Rule 1.15(c) further directs the lawyer to preserve such property, keep complete records and render appropriate accounts, and to promptly pay or deliver the property as requested by the client or third person. The requirements of Rule 1.15(c) expressly apply to a lawyer who receives property in which a third person, who is not the client of the lawyer, has an interest. Subsections (a) and (b)(1) of Rule 1.15 each expressly apply to property or funds of another within the lawyer's possession "incident to the lawyer's practice of law." While that express qualifica-

tion is not repeated in Rule 1.15(c), we are persuaded that it must necessarily be inferred from the context, including the preceding subsections.

4. Here again, however, it is clear that the inquirer did not come into possession of the wills incident to his practice. Even his father was only safekeeping at least some of the wills prepared by other lawyers. We see no notification obligation under the Rules of Professional Conduct that applies to the inquirer, who merely serves as his father's executor because of the familial relationship, not incident to his practice of law.

5. Turning to the question of confidentiality, in order to make notifications and thereby dispose of the wills that were in his father's possession, he may need to inspect them to identify the testators and/or executors/executrices entitled to receive the wills. The lawyer may ethically do so. Although the wills may contain confidential information protected by the rules of ethics as between the client and the lawyer who prepared the wills, the executor is not prohibited from accessing or disclosing such information to the extent necessary to properly dispose of the wills.

6. We start with our review of a somewhat similar situation in N.Y. State 341 (1974), where a lawyer had a client relationship with the testators of some wills, giving rise to the protections of client confidentiality provided by the Code of Professional Responsibility. Then the lawyer joined a firm, but not all of the lawyer's client relationships continued. Thus, at least for some of the wills in the firm's possession, the relationship was custodial, not professional. The deceased lawyer here likewise had a professional relationship with the makers of some of the wills but only a custodial, non-professional relationship with others.

7. This Committee concluded that a lawyer who receives wills from an attorney who retires from the practice of law "holds them only as a custodian. It is generally unethical for him to examine the wills or files without the clients [*sic*] consent." This was because, we assumed, the wills likely contain information that was obtained by the lawyer under an ethical obligation to keep the information confidential. We concluded that the firm was required to notify the lawyer's clients of his retirement. We recognized that the client has two rights when a lawyer retires: "First, to retake the will whenever he retires, or direct the ultimate disposition of it, and, second, to have his confidences concerning the will and information relating to it respected." *Id.*

8. Rule 1.6(a) establishes the client's right to protect confidential information shared with his lawyer. We assume it would apply, at least in part, to information shared by a testator client with a lawyer where, for example, it was requested or intended that the information not be divulged except in certain ways and/or where disclosure would harm the testator. By its plain language, however, Rule 1.6(a) only applies to confidential information "gained during or relating to the representation of a client." Because the inquirer did not receive the wills from a client or during the representation of a client, but as his father's executor, Rule 1.6(a) does not apply to him. Even if it were applicable, Rule 1.6(a) permits disclosure where the client has given informed consent to disclosure or where "disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community." The purpose of preparing a will is that the testamentary commands and desires eventually be made known in the appropriate circumstances, but not otherwise in many or most cases.

9. For these reasons, we conclude that Rule 1.6(a) does not prohibit the inquirer from accessing or disclosing the confidential information in the wills insofar as reasonably necessary to dispose of the wills. The inquirer should first attempt to identify and contact surviving testators in order to avoid disclosure to other parties where unnecessary.

10. We emphasize that the lawyer should proceed carefully in order to only review or disclose information to the extent necessary for proper will disposal. *Cf.,* N.Y. State 749 (2001) (lawyers may not ethically use available technology to surreptitiously examine and trace email and other electronic documents because such would, among other things, be prejudicial to the administration of justice); N.Y. State 700 (1998) (ethically improper for lawyer to exploit unauthorized communication of confidential information because doing so would, among other things, be prejudicial to the administration of justice). We add that we do not see any ethical reason why the lawyer could not transfer the wills to another custodian, such as a lawyer who could better serve the purpose of proper and timely notification of executors, at least where to do so would be appropriate in discharging the executor's duties and not for an improper purpose proscribed by the Rules. However, transferring them to someone who is not a lawyer and thus not subject to these constraints, combined with other risk factors, might not be viewed has having been impliedly authorized under Rule 1.6(a).

CONCLUSION:

11. To the extent that the lawyer must notify the testators, or executors, or beneficiaries of each of the wills that he possesses that he is holding such property, in order to dispose of them properly, the lawyer may inspect the wills and may transfer them to another custody under certain conditions.

61-12

OPINION 1003 (03/31/2014)

TOPIC: Law Firm Name

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

RULES: 7.5(b), (e)

FACTS:

1. The inquirer's name is John P.J. Jones (fictional name), which is listed on his stationery, business card, and email signature line. The inquirer states that the primary reason he includes his middle initials is that there are other attorneys by the name John Jones.

2. The inquirer plans to leave his current firm and start a solo practice. He has researched available law firm names, including available domain and business entity names, and has found that there are other attorneys named John Jones and that domain names for that name have been taken.

3. The inquirer has determined that "P.J. Jones Law Offices," "The Law Offices of P.J. Jones," or "P.J. Jones Law" would be the best available options for purposes of a domain name, firm name, and marketing because an attorney search of "P.J. Jones" will then usually lead to him first.

4. The inquirer notes that while he wishes to use one of the above proposed firm names, he still plans to practice using his full name, John P.J. Jones, as he has in the past and presently does.

QUESTION:

5. May a lawyer practice under a law firm name that includes only the lawyer's middle name initials and last name, without including his first name?

OPINION:

6. Rule 7.5(b) of the New York Rules of Professional Conduct provides, with certain limited exceptions, that a "lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm . . . ." As we have noted many times, this rule serves to protect the public from being deceived as to the identity, responsibility or status of those who use the firm name. *See* N.Y. State 920 (2012); N.Y. State 732 (2000) (applying trade name prohibition in former Code of Professional Responsibility).

7. In N.Y. State 740 (2001), this Committee opined that "[u]sing a name that is not the legal name of one or more partners or former partners in the law firm constitutes [the] use of a trade name" within the meaning of the language contained in Rule 7.5(b). Therefore, we concluded that a lawyer may not place an advertisement in the Yellow Pages in which the lawyer uses the firm name "A", or inserts the letter "A" before the firm name, in order to insure favorable placement.

8. In N.Y. State 920, a solo practitioner believed that his last name was too long and inquired whether he could call his law firm by his initials, "[JDR Law]." We concluded that "[b]ecause the lawyer's initials do not constitute the lawyer's legal name, they would constitute a trade name, and therefore the lawyer is prohibited from practicing under that name." Similarly, in N.Y. State 948 (2012), we opined that a law firm name may not include a variant on the lawyer's name that is created by conjoining the lawyer's initials with an abbreviation of the lawyer's surname. We concluded that the first portion of the proposed firm name that included the conjoined and abbreviated form of the lawyer's name "deviate[d] . . . substantially from the lawyer's actual name, and in that respect is similar to firm names found impermissible in [our prior] opinions . . . ." N.Y. State 948; see also N.Y. County 677 (1990) (firm name may not include first name of one partner and contraction of surname of another partner, as such a name would violate requirement that lawyers practice only under names of lawyers in the firm).

9. In N.Y. State 948 we acknowledged, however, that "[s]ome variations on names may deviate so slightly from the original as not to offend Rule 7.5(b)." *Cf.* N.Y State 872 (2011) (permissible to use English translation of foreign first name in informal communications, and on business cards and website, if not misleading and if compliant with statutes and court rules). Applying our above precedents, we conclude that the slight name variation proposed by the inquirer here, which maintains his full surname and the initials of two of his three given names and does not add anything to his legal name, does not offend Rule 7.5(b)'s prohibition against the use of trade names. Therefore, the inquirer can drop his first name to formulate a firm name that includes his middle name initials and legal surname. This assumes, however, that the inquirer can ensure that the proposed firm name does not violate the additional prohibition in Rule 7.5(b) against practicing under a firm name that is "misleading as to the identity of the lawyer or lawyers practicing under such name."

10. As we noted in N.Y State 872, the inquirer must also abide by any statutes, court rules, and judicial guidelines that govern an attorney in these circumstances. *See, e.g.*, Judiciary Law § 468 ("Official registration of attorneys to be kept by the chief administrator of the courts"); Part 118 of the Rules of the Chief Administrator of the Courts ("Registration of Attorneys").

11. With regard to domain names, we note that under Rule 7.5(e) "[a] lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm" provided certain conditions are met. As further explained in Cmt. [2] to Rule 7.5, "[a]s long as a law firm's name complies with other Rules, it is always proper for a law firm to use its own name or its initials or some abbreviation or variation of its own name as its domain name."

CONCLUSION:

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

(31-13)

OPINION 1004 (04/01/2014)

TOPIC: Attorney's Obligations Regarding Excessive Fee of Counter-Party's Attorney

DIGEST: Where a contract provides that one party pay the counter-party's attorney's fee and that fee is excessive, the attorney for the first party is not ethically prohibited from participating in the transaction. Whether the attorney has an obligation to report the excessive fee of another attorney depends on the circumstances.

RULES: 1.5(a), 8.3, 8.4(a).

FACTS:

1. The inquirer's client is entering into a commercial loan with a bank, and one of the standard terms of the loan is that the borrower pay the bank's attorney's fee. The inquirer characterizes the contemplated transaction as "standard with some nuances." He states that the nuances will not require a great deal of extra drafting beyond the boiler plate document. The inquirer believes that the bank attorney's proposed fee is "at least double the normal fee" charged for this type of transaction. He asked the bank's attorney to reduce his fee, but that attorney refused.

QUESTIONS:

2. Assuming that an attorney's fee – to be paid by the counter-party – is excessive, can the counter-party's lawyer continue to participate in representing his client in this transaction and must that lawyer report the conduct of the fee-charging attorney?

OPINION:

3. As the question of whether the bank's attorney's fee is excessive does not involve the inquirer's own conduct, we are not in a position to resolve that issue. It is worth noting, however, that Rule 1.5(a) sets forth the ethical standard governing the amount of legal fees that can be reasonably charged. It provides that

> A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive *may* include the following:
>
> > (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> >
> > (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> >
> > (3) the fee customarily charged in the locality for similar legal services;
> >
> > (4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

Cmt. [1] to Rule 1.5 observes that the factors specified in paragraphs (a)(1) through (a)(8) are not exclusive and that each factor will not always be relevant. While it has been noted that factor (a)(3)("the fee customarily charged in the locality for similar legal services") is an important factor, *see* Simon's New York Rules of Professional Conduct Annotated, 2013 Edition, p. 131, it has also been noted that factor (a)(7) ("the experience, reputation and ability of the lawyer or lawyers performing the services") is usually "the most important factor." *Id.* at 134.

4. We further note that the fact that the fee sought by the bank's attorney is roughly double the fee often charged for similar transactions does not render the fee *per se* excessive. A high fee is not necessarily an excessive fee. That is because the excessiveness determination requires a consideration of all the relevant factors. For example, we know nothing about "the experience, reputation and ability of the lawyer" performing the services (*see* Rule 1.5(a)(7)), a critical factor. And the inquirer acknowledges that the prospective transaction does involve "some nuances"; Rule 1.5(a)(1) indicates that the "novelty and difficulty of the questions involved" is relevant to the appropriateness of the fee. An experienced attorney handling a difficult nuance has more leeway to charge a higher fee.

5. Even if the fee is excessive, the inquirer can still ethically participate in the transaction. While Rule 8.4(a) prohibits an attorney from assisting or inducing another to violate the Rules of Professional Conduct, the inquirer did not provide any such assistance or inducement. In Opinion 809, this Committee concluded that a lawyer did not aid in the unauthorized practice of law (as then prohibited by DR 3-101(A) of the Code of Professional Responsibility) where the lawyer, to carry out the representation of one client in a transaction, dealt with a non-lawyer who had been engaged by the client's counter-party. We reasoned that the inquiring lawyer had not caused or encouraged the counter-party's representational situation and was merely continuing to represent his own client in the transaction. The same logic applies to the present inquirer. He did not cause or encourage the counter-party's lawyer to charge a potentially excessive fee. On the contrary, he attempted to negotiate a lower fee.

6. Moreover, even if the fee is excessive, the inquirer does not necessarily have to report the conduct of the bank's attorney. That is because attorneys need not report all ethical violations of which they become aware. Instead, Rule 8.3, which governs the reporting of professional misconduct, provides, in relevant part, that "(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct *that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer* shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation" (emphasis added). *Cf.* Cmt. [2] to Rule 8.4 ("Many kinds of illegal conduct reflect adversely on fitness to practice law. Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation").

Thus, even if the inquirer concludes that the bank's attorney's fee is excessive, he is only obligated to report the conduct of the bank attorney if he concludes, under all the circumstances, that the setting of the fee reflects adversely on that attorney's fitness to practice law or involves dishonesty.[6]

CONCLUSION:

7. Where a contract provides that one party pay the counter-party's attorney's fee and that fee is excessive, the attorney for the first party is not ethically prohibited from participating in the transaction. Whether the attorney has an obligation to report the excessive fee of another attorney depends on the circumstances

(47-13)

6 Of course, if the inquirer believes that the bank's attorney's fee is excessive, he is permitted to report the bank's attorney.

OPINION 1005 (04/02/2014)

TOPIC: Whether using the phrases "I KNOW HOW TO WIN FOR YOU" or "unsurpassed litigation skills," violates Rule 7.1.

DIGEST: Neither the statement "I KNOW HOW TO WIN FOR YOU" or "unsurpassed litigation skills" in lawyer advertising is permissible under Rule 7.1 because the statements are misleading, and neither statement can be factually supported as of the date on which it is disseminated.

RULES: 7.1

QUESTION:

1. Two inquirers have asked about the use of specific phrases to advertise their services. The first asks whether she may use the phrase "I KNOW HOW TO WIN FOR YOU" in print and other advertising. A second inquirer asks whether the law firm can use the words "unsurpassed litigation skills" on its website.

OPINION:

2. Each inquiry concerns a form of lawyer advertising. Whether each is permissible primarily is governed by Rule 7.1 in New York's Rules of Professional Conduct (the "Rules"). In general, Rule 7.1 prohibits the use or dissemination of an advertisement that "contains statements or claims that are false, deceptive or misleading." Rule 7.1(a)(1).

3. Determining whether the proposed advertising is ethical requires an assessment of whether the phrases violate Rule 7.1(a)(1) (prohibiting advertising that is "false, misleading or deceptive"), or 7.1(d) and (e) (together, permitting statements that "compare the lawyer's services with the services of other lawyers" or describe "the quality of the lawyer's or law firm's services" provided the statements do not violate Rule 7.1(a), can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated, and are accompanied by the disclaimer "Prior results do not guarantee a similar outcome").

4. Comment [3] to Rule 7.1 provides that "[a] truthful statement is misleading if it omits a fact necessary to make the lawyer's communication . . . not materially misleading . . . [or if there is] a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services, or about the results a lawyer can achieve, for which there is no reasonable factual foundation." For example, this Committee concluded a proposed advertisement that stated "We will stop your foreclosure" was impermissible because a layperson was likely to read the phrase literally to mean that the lawyer could cease and terminate a foreclosure, rather than merely delay its progress and assist with a negotiated settlement. N.Y. State 921 (2012). Cmt. [12] to Rule 7.1 explains that descriptions of characteristics of a lawyer or law firm that compare its services with other firms and cannot be factually supported could mislead potential clients, and therefore it could be improper for a lawyer to advertise that he or she is the "Best." Rule 7.1, Cmt. [12].

5. Neither of the proposed statements is permissible under Rule 7.1. The statement "I KNOW HOW TO WIN FOR YOU" is misleading because it suggests that the lawyer can win any potential

client's case regardless of the facts of the case or legal support for the prospective client's position, and this statement cannot be factually supported by the lawyer. Similarly, advertising on a website that a lawyer has "unsurpassed litigation skills" is misleading because it compares the skills of the lawyer with others without factual support, similar to listing a lawyer as the "Best" in the example provided in Cmt. [12] to Rule 7.1. *See* N.Y. State 877 (2011) (a statement that describes or characterizes the "quality" of a lawyer's work must be "factually supported" at the time it is disseminated and accompanied by the disclaimer provided in Rule 7.1(e)). Merely posting the disclaimer that "Prior results do not guarantee a similar outcome" will not cure the ethical infirmity of the proposed advertising.

CONCLUSION:

6. The statement "I KNOW HOW TO WIN FOR YOU," and the statement "unsurpassed litigation skills," may not be used in lawyer advertising. Both statements are misleading in suggesting a result or skill level that cannot be factually supported as of the date on which the statements are published or disseminated, and therefore both violate Rules 7.1(a) and 7.1(e).

43b-13

OPINION 1006 (04/02/2014)

TOPIC: Settlement agreements; restrictive covenants; prohibiting solicitation of new clients having similar claims; prohibiting the referral of such claims to other counsel

DIGEST: A lawyer may not settle or offer to settle a claim on the understanding that the lawyer for the claimant will thereafter (a) refrain from soliciting clients for the purpose of bringing similar claims against the settling party, or (b) refrain from referring potential claimants with similar claims to other counsel.

RULES: 5.6(a)(2); 1.6; 1.9(c)

FACTS:

1. The inquiring attorney represents an organization against which one of its employees has asserted certain claims. The matter is in the process of being settled. The organization fears that similarly situated employees may assert additional claims. As part of the settlement negotiation, the inquirer proposes to seek assurances from the claimant's lawyers that they will not solicit or refer further clients from among those similarly situated employees, although the inquirer accepts that if a further employee approached the attorney without being solicited, the attorney would have the right to represent that individual.

QUESTIONS:

2. May a lawyer settle or offer to settle a claim on the understanding that the lawyer for the claimant will not thereafter solicit new clients for the purpose of bringing similar claims against the settling party?

3. May a lawyer settle or offer to settle a claim on the understanding that the lawyer for the claimant will not thereafter refer prospective clients to other lawyers for the purpose of bringing similar claims against the settling party?

OPINION:

4. Rule 5.6(a)(2) of the New York Rules of Professional Conduct (the "Rules") states: "A lawyer shall not participate in offering or making . . . an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy." Policies cited as underlying this rule include enhancement of the public's access to lawyers and avoidance of conflicts.[7] In interpreting Rule 5.6, we are guided also by interpretations of its predecessor rule, DR 2-108 of the former Code

7 According to ABA 93-371 (1993), which we cited in N.Y. State 730 (2000):

> The rationale of Model Rule 5.6 is clear. First, permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals. Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to "buy off" plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients.

of Professional Responsibility (the "Code"). Although DR 2-108 was controversial, its essential terms were carried forward into Rule 5.6.[8]

5. The lawyer whose "right to practice" is at issue here is the lawyer representing the settling claimant, rather than the inquirer who represents the organization that is the target of the actual and potential claims. This distinction, however, is not important to our inquiry, because Rule 5.6 provides that no lawyer may "participate in offering or making" a settlement agreement that restricts *any* lawyer's right to practice. *See* N.Y. State 730 (2000) (predecessor rule applied "equally to a lawyer who would propose or offer such an agreement and to a lawyer who would accept it").

6. This Committee last examined restrictive settlement agreements in N.Y. State 730 (2000), which construed DR 2-108. The question there was whether an attorney for an employment discrimination plaintiff could agree as part of a settlement not to disclose broad categories of information, including facts about the business and operations of the defendant corporation and "any matters relating directly or indirectly" to the settlement agreement. We concluded that such terms would violate DR 2-108. We reasoned that although the terms would not "directly" restrict the inquirer's right to practice law or to represent similar clients, they would nonetheless violate the rule "if their practical effect is to restrict the lawyer from undertaking future representations and if they involve conditions or restrictions on the lawyer's future practice that the lawyer's own client would not be entitled to impose."[9]

7. We recognized in N.Y. State 730 the permissibility of standard agreements not to disclose settlement terms, reasoning that such agreements bolster the client's independent right to require that the lawyer keep information confidential, and do not "effectively restrict the lawyer from representing other clients." In contrast, we found the more sweeping nondisclosure terms at issue in N.Y. State 730 to be impermissibly overbroad in that they "would restrict the lawyer's right to practice law by requiring the lawyer to avoid representing future clients in cases where the lawyer might have occasion to use information that was not protected as a confidence or secret . . . but was nevertheless covered by

8 *See* N.Y. City 99-03 (citing sources arguing that the rule is justified, and others arguing that it is not); Proposed Rules and COSAC Commentary, September 30, 2005, Reporter's Notes at 373 (noting "considerable controversy" about DR 2-108 in that "both the breadth of the prohibition and the public policy benefits of the Rule have been subject to debate," citing court cases, and reporting that Committee on Standards of Attorney Conduct "considered many various possible alternatives to the language of this Rule, but determined to retain the language of the current New York Disciplinary Rule"), available at http://www.onbar.org/news/COSAC_Rules/Rule5.6.pdf; Reporter's Notes, NYSBA Proposed Rules of Professional Conduct at 185 (Feb. 1, 2008) (explaining that Rule 5.6 was intended to be "substantively identical" to the former DR 2-108).

9 *Accord* D.C. Opinion 335 (2006) (surveying ethics opinions, including N.Y. State 730, in which an "underlying rationale . . . is that the prohibited provisions restrict the lawyer's right to practice by effectively preventing him or his firm from representing clients in certain kinds of cases against the settling party"); Colorado Opinion 92 (1993) (stating that the rule may be violated by restrictions "less onerous than a complete prohibition against subsequent representation of clients against a settling party defending a claim," and citing ethics opinions recognizing "impropriety of practice restrictions that fall short of an out-right bar to future or ongoing representation").

the settlement terms."[10] The scope of information protected as a "confidence or secret" under the prior Code is largely carried forward under the Rules as "confidential information," which is protected for current clients under Rule 1.6 and for former clients under Rule 1.9(c). This category of confidential information is broad enough to give the parties considerable leeway in extending the reach of permissible nondisclosure clauses.[11]

Agreements Barring Solicitation

8. Solicitation of clients, once prohibited as an ethical matter, is now permitted subject to various constraints including those of Rule 7.3. Solicitation of clients in compliance with the Rules is an aspect of law practice that may be important or even crucial to a lawyer's ability to engage meaningfully in the profession. On that premise, the reasoning of N.Y. State 730 guides the resolution of this inquiry as well. While a lawyer's agreement not to solicit further clients would not "directly" restrict that lawyer's right to practice law by precluding representation of clients who find the lawyer on their own, such an agreement could nonetheless have the practical effect of substantially restricting the lawyer's ability to undertake future representations. Accordingly, it is impermissible for any lawyer to settle or offer to settle a claim on the understanding that the lawyer for the claimant will not thereafter solicit new clients for the purpose of bringing similar claims against the settling party.[12]

9. The contrary result was reached in *Feldman v. Minars*, 230 A.D.2d 356, 658 N.Y.S.2d 614 (1st Dept. 1997), but that opinion is of limited weight here. In *Feldman*, the court held that plaintiff's law firm should be disqualified, based in part on the firm's solicitation of the plaintiffs in violation of a prior settlement in which the firm had agreed not to "encourage any other parties or attorneys to commence such action or proceeding." The firm sought to be relieved from that prior agreement on the ground that it violated public policy as expressed in DR 2-108. The court rejected that argument on a

10 *Accord* D.C. Opinion 335 (2006) ("A settlement agreement may provide that the terms of the settlement and other non-public information may be kept confidential, but it may not require that public information be confidential."); South Carolina Opinion 10-04 (stating that Rule 5.6 "prohibits settlement agreements that reach information not reached by [Rule] 1.6," and suggesting that lawyers generally should not become parties to their clients' settlement agreements); ABA 00-417 (distinguishing agreements not to reveal confidential information from agreements not to use it, and concluding that Rule 5.6 does not prohibit the former because a "settlement provision, agreed to by the client, that prohibits the lawyer from disclosing information relating to the representation is no more than what is required by the Model Rules absent client consent, and does not necessarily limit the lawyer's future practice in the manner accomplished by a restriction on the *use of information* relating to the opposing party in the matter"); Colorado Opinion 92 (1993) (agreement conditioned upon "nondisclosure of the amount and terms of the settlement, provided this information is not already a matter of public record . . . [does] not materially restrict a lawyer's ability to practice law").

11 Subject to certain exceptions, the category includes all information which the client has requested be kept confidential. *See* Rule 1.6(a). As to a related rule prohibiting employment agreements that restrict the right of a lawyer to practice after termination of the employment, we have noted that "as a practical matter, because the definition of confidential information in Rule 1.6 is so broad, most contractual confidentiality provisions are not likely to exceed the scope of a New York lawyer's confidentiality obligations under the Rules." N.Y. State 858 ¶10 (2011).

12 Other jurisdictions have reached similar results. *See* Texas Opinion 505 (1994) ("To the extent that [solicitation] is permitted under the State Bar Rules, and other applicable state and federal statutes, solicitation is part of the practice of law and therefore cannot be more severely restricted in a settlement agreement [than] it is restricted in the Rules and applicable law."); South Carolina Opinion 10-04 ("Rule 5.6(b) protects a lawyer's access to the legal market, and that protection is implicated by advertisements and solicitations equally.").

number of grounds, most of which do not apply here.[13] However, the court also briefly addressed the ethical issue at hand:

> Even assuming, arguendo, that a settlement agreement that forbids an attorney to represent other clients against the settling defendants in similar litigation is against public policy, as expressed in the Code of Professional Responsibility, an agreement not to *solicit* clients is not likewise against public policy.

Feldman, 230 A.D.2d at 359 (original emphasis). The basis for that conclusion was suggested in the sentence that followed: "In fact, until recently, solicitation of clients, even without an agreement, was barred by applicable disciplinary rules." *Id*. But as noted above, solicitation of clients, when done in accordance with applicable rules, is no longer ethically suspect. A settlement agreement effectively restricting the right to practice is impermissible, and it does not matter that the restriction would be achieved only through limits on otherwise appropriate solicitation. *See* N.Y. State 730 at n.2 (noting that *Feldman* decision had been strongly criticized insofar as it found "that an agreement not to solicit clients would not violate the rule").

Agreements Barring Referral

10. The second question concerns potential claimants whom the claimant's lawyer has not solicited, but who have on their own volition approached the claimant's lawyer for representation, information or guidance. The inquirer recognizes that it would be improper for a settlement agreement to provide that the lawyer may not *represent* such a person, but nonetheless asks whether an agreement could provide that the lawyer may not *refer* the person to be represented by another lawyer.

11. Referral of prospective clients to other lawyers is, like solicitation of clients, integral to the practice of law. If a lawyer who is approached by a prospective client does not, for whatever reason, end up representing that person, the lawyer can nonetheless perform an important service by referring the prospective client to some other lawyer appropriate to the task. To perform this service well, the lawyer may need to ask the prospective client for information that will give rise to certain duties of legal ethics. *See* Rule 1.18 (duties as to confidentiality and conflicts). Then the lawyer will need to exercise legal judgment in assessing which other lawyers would be well suited to provide the representation. All of this helps achieve what Comment [1] to Rule 7.1 calls the "important functions of the legal profession . . . to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." Accordingly, a settlement agreement precluding future referrals would impermissibly restrict the lawyer's right to practice law. *See* Colorado Opinion 92 (1993) (stating that improper restrictions in settlement agreements may include prohibiting settling lawyer's "referral of potential clients to other counsel"); D.C. Opinion 35 (1977) (unethical for lawyer to agree to settle-

13 The court reasoned that "failure to enforce a freely entered-into agreement would appear unseemly, and the 'clean hands' doctrine would preclude the offending attorneys from using their *own* ethical violations as a basis for avoiding obligations undertaken by them." *Feldman*, 230 A.D.2d at 361. It continued that even if the settlement agreement were against public policy of the State, the violation could be addressed by the appropriate disciplinary authorities rather than by invalidating the agreement. *Id.* For both these reasons, an agreement may be enforceable even if it violates a rule of legal ethics. *See* N.Y. City 1999-3 (settlement agreement restricting practice ethically impermissible "even if such an agreement may be enforceable as a matter of law"). Also the *Feldman* court approvingly cited an article calling the relevant ethics rule "an anachronism, illogical and bad policy." *Feldman*, 230 A.D.2d at 360 (citing Gillers, *A Rule Without A Reason, Let the Market, Not the Bar, Regulate Settlements that Restrict Practice,* 79 ABA J 118 [Oct. 1993]). But as noted above, New York later adopted Rule 5.6 despite such policy criticisms.

ment term prohibiting referral to other lawyers of potential clients with claims against settling defendant).

CONCLUSION:

12. The questions are answered in the negative. A lawyer may not settle or offer to settle a claim on the understanding that the lawyer for the claimant will thereafter (a) refrain from soliciting other clients for the purpose of bringing similar claims against the settling party; or (b) when contacted by potential claimants, refrain from referring such persons to other counsel.

(40-13)

OPINION 1007 (04/03/2014)

TOPIC: Advertising a lawyer's listing in "Best Lawyers."

DIGEST: A lawyer may advertise his or her inclusion in "Best Lawyers" provided that the lawyer's assessment of the methodology used to determine inclusion demonstrates that it is an unbiased, nondiscriminatory and defensible process.

RULES: 7.1

QUESTION:

1. The inquirer states that he will be nominated for inclusion in the 2015 "Best Lawyers" publication for the New York Area, but is concerned that inclusion in "Best Lawyers" may violate Rule 7.1 because the listing implies that he has skills or results that are better than other lawyers without a basis in objective criteria. The inquirer notes that the listing in "Best Lawyers" might be considered a statement comparing him to other attorneys or implying to the public that he is one of the best attorneys without any presentation of objective criteria, and he suggests he may not be the "best" attorney as compared to others.

OPINION:

2. The inquiry concerns a form of lawyer advertising. Whether advertising that a lawyer is listed in "Best Lawyers" is permissible is governed by Rule 7.1 in New York's Rules of Professional Conduct (the "Rules"). In general, Rule 7.1 prohibits the use or dissemination of an advertisement that "contains statements or claims that are false, deceptive or misleading." Rule 7.1(a)(1). [14]

3. "Best Lawyers" publishes lists that may constitute professional ratings of lawyers in various geographic areas and areas of legal practice. Rule 7.1(b) provides that an advertisement may include information as to "bona fide professional ratings." A rating is not "bona fide" unless it is "unbiased and nondiscriminatory." Rule 7.1, Cmt. [13].

> [The professional rating] must evaluate lawyers based on objective criteria or legitimate peer review in an manner unbiased by the rating services economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated. Further, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered. For example, a rating service that purports to evaluate all lawyers practicing in a particular geographic area or in a particular area of practice or of a particular age must apply its criteria to all lawyers within that geographic area, practice area, or age group."

14 The Committee responds to inquiries regarding an inquirer's own conduct, rather than the conduct of a third party. In the scenario described above, inclusion in the "Best Lawyers" listing does not constitute an "advertisement" under Rule 1.0(a). A lawyer's inclusion in the "Best Lawyers" list is determined by the publication, and does not occur due to any direct affirmative effort by the lawyer to be included in the listing. At the same time, if the "Best Lawyers" listing violates Rule 7.1, then the lawyer or the lawyer's firm would violate the Rule by making reference to the listing in any marketing material.

Rule 7.1, Cmt. [13]. Thus, determining whether the "Best Lawyers" listing is a "bona fide professional rating" requires a fact specific inquiry into the methodology used by the publication to create the list.

4. The "Best Lawyers" publication explains that its list is based on peer-review and attempts to depict the consensus opinion of "leading lawyers" about the professional abilities of colleagues in the same geographical and legal practice areas. Nominations are open to anyone, although the primary sources for nominations are clients, other lawyers and marketing teams. In-house lawyers are not eligible to be nominated. Lawyers included in the previous "Best Lawyers" edition are automatically nominated into their practice area(s) for the next peer-review process. The ballots are distributed to lawyers currently listed based on the voter's practice area(s) and geographic regions. The ballots ask if the respondent were unable to handle a case himself or herself, how likely would the respondent be to refer it to nominee, and requests a response rating on a scale of "1" to "5," where "5" is the highest. Lawyers may not vote for themselves, and their names will be removed from their own ballots. Voters can complete ballots for lawyers in their own firm, but these votes do not weigh as heavily as votes from outside the firm. Best Lawyers staff reviews the votes and comments, selected lawyers are checked against state bar association sanction lists to ensure the nominees are in good standing, and then the listed lawyers are notified of their inclusion and the list is released to the public.

5. We have opined that for a rating to be "bona fide and nondeceptive it should at least be unbiased, nondiscriminatory and based on some defensible method." N.Y. State 877 (2011); see also Rule 7.1, Cmt. 13. While we will not opine on whether a "Best Lawyers" listing is "bona fide," the Committee has not identified a disqualifying defect in the methodology used. The lawyer must assess whether the methodology is unbiased, nondiscriminatory and defensible. The lawyer's assessment should consider that nominations are open to everyone, and making an assessment of the following: (1) that the "leading lawyers" who participate in voting are limited to the lawyers who are currently listed in the publication; (2) the question posed to voters and the "1' to "5" ranking system; (3) the weighting of votes completed by lawyers in one's own firm as compared to those outside the firm; (4) the review conducted by Best Lawyers staff; and (5) the automatic nomination of lawyers previously included in the publication. In addition, although it does not appear that inclusion is biased by direct economic interest in the form of the receipt of payment from the listed lawyers, an assessment of the bona fides of inclusion in "Best Lawyers" might also consider that automatic nomination of lawyers previously listed in the publication ensures the nomination of lawyers to whom Best Lawyers has sold additional marketing materials associated with the listing, including special reprints and enhanced advertising.

6. The inquirer also questioned whether advertising that he is listed in "Best Lawyers" may constitute a statement comparing the lawyer to other attorneys or implying that he is one of the best attorneys. Rule 7.1(d)(2) permits advertising that compares the lawyer's services with the services of other lawyers and Rule 7.1(d)(4) permits advertising that describes or characterizes the quality of the lawyer's or law firm's services provided that the statement "can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated." Comment [12] explains that descriptions of characteristics of a lawyer or law firm that compare its services with other firms and cannot be factually supported could mislead potential clients and therefore it would be improper for a lawyer to advertise that he or she is the "Best." Rule 7.1, Cmt. [12].

7. We believe that describing a lawyer as the "Best" can be distinguished from inclusion in a "Best Lawyers" listing. Rather than stating that any particular lawyer is the "best," the magazine publishes a long list of attorneys selected according to a nomination and voting methodology that is described in the publication, without ranking the attorneys or making any specific statement about a particular lawyer's skills as compared to those who are not listed. The listing is simply a factual statement that the compilers of the listing have selected the lawyer based on the disclosed methodology. Even if the rating is construed as a comparison of the quality of the lawyer's services to others, the lawyer's determination that the rating is "bona fide" satisfies the requirement under Rule 7.1(e)(2) that the statement be factually supported as of the date that it is published or disseminated.

CONCLUSION:

8. A lawyer may advertise his or her inclusion in "Best Lawyers" provided that an assessment of the methodology used to determine a lawyer's inclusion reveals that it is an unbiased, nondiscriminatory and defensible process. Advertising a lawyer's inclusion in the publication is distinguishable from making a statement in advertising that cannot be factually supported and is misleading. If the listing constitutes a comparison of lawyers' skills, a lawyer's determination that it is a "bona fide" rating satisfies the requirement that the statement be factually supported on the date that it is published or disseminated.

43-13a

OPINION 1008 (04/24/2014)

TOPIC: Representing new clients adverse to a current or former client

DIGEST: Whether a law firm may represent new clients against an entity that the law firm has represented in the past depends on whether the entity is a current or former client, which is a mixed question of fact and law. A law firm may not oppose a current client in any matter, related or unrelated, absent the current client's informed consent, confirmed in writing. However, a law firm may oppose a former client in any matter that is not substantially related to the firm's legal work for that former client. Even if the entity is no longer a client, a law firm has a continuing duty to protect confidential information of that entity.

RULES: 1.6(a); 1.7(a) & (b); 1.9(a) & (c)

FACTS:

1. Inquirer is a law firm ("Law Firm") that desires to represent some new clients ("New Clients") against an entity that the Law Firm considers to be a former client (the "Entity"). The Entity objects to the representation. The Entity and the Law Firm have jointly prepared and submitted a detailed set of facts that we accept for purposes of this opinion. According to the jointly submitted statement of facts, the Entity at one time leased a gas station. The gas station's owner later sued the Entity and a co-defendant ("Co-Defendant") for breaching the lease agreement (the "Lease Action"). The owner sought to recover the costs of removing gasoline storage tanks and remediating the premises. The Law Firm defended the Entity in the Lease Action.

2. The defense in the Lease Action was controlled by the Entity's Co-Defendant, which had purchased the Entity's interest in the property before the Lease Action began. The purchase was made pursuant to a Purchase and Sale Agreement ("PSA") covering scores of gas stations. The Law Firm worked closely with the Co-Defendant's counsel on the Lease Action. The Lease Action eventually settled.

3. Recently, the Law Firm agreed to represent the New Clients against the Entity and/or its Co-Defendant. Specifically, the New Clients claim that the Entity and/or its Co-Defendant operated various gas stations (though not the one involved in the concluded Lease Action) in a manner that damaged the New Clients' property. The Entity at one time owned these other gas stations, but sold them to Co-Defendant pursuant to the PSA before the Lease Action was filed.

4. The Entity has asked the Law Firm to withdraw from representing the New Clients, on two grounds: (a) the Law Firm never sent a termination letter to the Entity, which therefore contends that it remains a current client; and (b) even if the Entity is a former client, it contends that the new matter is substantially related to the Lease Action in which the Law Firm defended the Entity. Specifically, the Entity says that the matters are substantially related because the Law Firm acquired confidential information during the Lease Action regarding: (i) the Entity's negotiating strategy in the Lease Action, (ii) the Entity's interpretation of the PSA, (iii) the relationship between the Entity and its Co-Defendant in the Lease Action, and (iv) the future obligations of the environmental/remediation contractor assigned to the PSA properties by the Entity.

5. The Law Firm counters that (a) the Entity is a former client because the Law Firm has not performed any legal services for the Entity since October 2012, and (b) the New Clients' matter is not substantially related to the Lease Action. Specifically, the Law Firm contends that the New Clients' claims are not substantially related because the present claims involve a different lease agreement and different gas stations. The Law Firm recognizes that the New Clients' matters might involve theories of recovery under the PSA, but the Law Firm says the PSA would potentially be a discoverable document. In sum, the Law Firm argues that the present and former matters are not substantially related because the Law Firm did not acquire any confidential information from the Entity in the Lease Action that New Clients could use to the Entity's disadvantage in the present dispute.

QUESTION:

6. If a law firm represented an entity in a matter and has not performed any legal services for the entity for more than a year, but the law firm has not sent a termination letter to the entity, may the law firm represent new clients against the entity, over the entity's objection, in a new matter that is related in some ways to the original matter?

OPINION:

7. The inquiry raises three sets of issues: (i) conflicts with current clients; (ii) conflicts with former clients; and (iii) duties of confidentiality to former clients. We will address these issues in turn. We address only whether the representation is permitted under the New York Rules of Professional Conduct (the "Rules").[15] We are not taking into account additional factors that a court might consider if deciding a motion to disqualify, and we are not predicting how a court would rule if such a motion were eventually filed. Our jurisdiction extends only to interpreting the Rules; we do not opine on legal questions such as whether there is warrant for disqualification.

A. Conflicts with Current Clients: Rule 1.7.

8. The threshold question is whether the Entity is a current client or a former client. Rule 1.7(a)(1) generally prohibits a law firm from opposing a current client in any matter, related or unrelated, absent compliance with Rule 1.7(b), which among other things would require the client's informed consent confirmed in writing.[16] If the Entity remains a current client of the Law Firm, there-

15 The inquiry was submitted by a law firm rather than by an individual lawyer. For simplicity of expression, this opinion speaks in terms of duties of that firm rather than duties of its individual lawyers. At the expense of that simplicity, we could set forth our analysis in greater detail to account for the following. We rely on certain provisions of the Rules in which the direct imposition of duties is upon an individual lawyer rather than upon a law firm. *See* Rules 1.6(a), 1.7 and 1.9. It is through *other* provisions of the Rules that such duties are imposed derivatively (or related duties are imposed) on others in the lawyer's firm and on the firm as a whole. *See*, *e.g.*, Rule 1.6(c) (requiring lawyer to exercise reasonable care to prevent breaches of confidentiality by others), Rule 1.10 (a)-(c) (imputing specified conflicts to law firm and its associated lawyers), Rule 1.10(e) (requiring law firm to maintain conflict-checking system), Rule 5.1 (requiring law firm and supervisory lawyers to make reasonable efforts to ensure that lawyers in the firm conform to the Rules), and Rule 8.4(a) (providing that a lawyer "or law firm" shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another"). However, we do not think it necessary to set forth all our analysis at that greater level of detail.

16 "The duty to avoid the representation of differing interest prohibits, among other things, undertaking representation adverse to a current client without that client's informed consent. For example, absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated." Rule 1.7, Cmt. [6]. Conflicts arising under Rule 1.7 (and also those arising under Rule 1.9, which we discuss below) are among those imputed by Rule 1.10(a) to other lawyers associated in the same firm.

fore, the Law Firm may not oppose the Entity on behalf of New Clients because the Entity is objecting rather than consenting to the representation. But if the attorney-client relationship between the Law Firm and the Entity has ended, then we would instead apply Rule 1.9, which governs conflicts with former clients.

9. The Rules of Professional Conduct do not define when an attorney-client relationship ends. On the contrary, Scope ¶ 9 says that "principles of substantive law external to these Rules determine whether a client-lawyer relationship exists." Thus, whether the attorney-client relationship between the Law Firm and the Entity has ended depends in part on questions of law beyond our jurisdiction. Scope ¶ 9 also says: "Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." We also lack sufficient facts to determine whether the Entity remains a current client of the Law Firm.

10. We note, however, that the Law Firm's failure to send a termination letter to the Entity does not by itself prove that the attorney-client relationship continues. A termination letter (or email) from a lawyer to a client clearly notifying the client that the attorney-client relationship has ended will often be a good practice, and in some circumstances may be dispositive. But an attorney-client relationship may also terminate without a termination letter. *See, e.g., Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc.,* 687 F. Supp. 2d 381, 389-91 (S.D.N.Y. 2010) ("'In what is perhaps the most typical situation, an attorney-client relationship . . . is terminated, simply enough, by the accomplishment of the purpose for which it was formed in the first place,'" and a rule "that requires a law firm announce the conclusion of its engagement. . . . would conflict with the principle . . . that the relationship is terminated upon the accomplishment of the purpose for which it was created"); *Miller v. Miller*, 203 A.D.2d 338, 339, 610 N.Y.S.2d 88, 89 (2d Dep't 1994) ("When the Family Court matter concluded, so did the attorney-client relationship"); Restatement (Third) of the Law Governing Lawyers § 31(2)(e) (2000) ("a lawyer's actual authority to represent a client ends when . . . the lawyer has completed the contemplated services").

11. The passage of time is another indicator of whether a person remains a current client, but it is not dispositive. Other circumstances, such as a longstanding pattern of representation over the years or the client's reasonable belief that a lawyer needs to perform additional legal work to fulfill the purpose of the representation, could also preserve an attorney-client relationship, even if the Law Firm has no specific pending assignment for the Entity at a given moment.

12. Here, despite the lack of a termination letter, several circumstances – including the fact that the Law Firm has concluded its work on the Lease Action and has not handled (or been asked to handle) any new matters for more than a year – suggest that the Entity is a former client. The parties have not identified any countervailing factors, such as a longstanding pattern of representation over the years, or the Entity's reasonable belief that the Law Firm needs to perform additional legal work to fulfill the purpose of the earlier representation. If such factors exist, they could count in favor of the Entity being a current client.

13. Although we have set forth some relevant factors, we do not have all the facts relevant to whether the Entity remains a current client of the Law Firm, and in any event we lack authority to reach what is ultimately a legal determination on that issue. If the Entity remains a current client of the Law Firm, then the Entity is entitled to the protections of Rule 1.7(a)(1). In that case the Law Firm

may not oppose the Entity in any matter, related or unrelated, unless the conflict is consentable under Rule 1.7(b)(1) and the Law Firm obtains the Entity's informed consent, confirmed in writing, under Rule 1.7(b)(4).

B. Conflicts with Former Clients: Rule 1.9.

14. If the Entity is not a current client, then it is a former client. Under Rule 1.9(a), a lawyer may not represent a client with interests "materially adverse" to those of a former client in a matter "substantially related" to the matter the lawyer handled for the former client, unless the former client gives informed consent, confirmed in writing. Here, the interests of New Clients in the current matter are "materially adverse" to the interests of the Entity, and the Entity has not consented (and in fact has objected) to the Law Firm's representation of New Clients. Given the former client's objection, the only open question is whether the current matter is "substantially related" to the former matter (the Lease Action).

15. Guidance on this question is found in Comment [3] to Rule 1.9. The first sentence says that matters are "substantially related" if (i) they involve the "same transaction or legal dispute" or (ii) a reasonable lawyer would perceive "a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Here, the new matter is plainly not the "same transaction or legal dispute" as the old one, but the new and old matters could still be substantially related based on the risk that confidential information acquired by the Law Firm in the old matter would materially advance the position of New Clients in the new matter. We therefore turn to the balance of Comment [3], which discusses how even distinct matters may be substantially related through confidential information.

16. Some parts of Comment [3] address what "normally" or "ordinar[il]y" happens, rather than whether the lawyer *actually* obtained confidential information in the particular case. It makes sense that what normally happens should trigger the protections of Rule 1.9(a). As Comment [3] notes, the purpose of those protections would be defeated if a party seeking disqualification had to reveal its confidential information in order to protect it:

> A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

17. The relevance of what normally or ordinarily happens is reflected in the Comment's example of a matter deemed to be substantially related even though the example identifies no particular actually acquired confidential information: "[A] lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations . . . ." Rule 1.9, Cmt. [3].

18. On the other hand, the *actual* receipt of confidential information in the prior matter would seem even more compelling than a mere likelihood of its receipt. "*A fortiori*, matters are also substan-

tially related if the lawyer in question actually and knowingly obtained (and now possesses) confidential factual information that would materially advance the prospective client's position in the subsequent matter." N.Y. State 992 ¶7 (2012). This view is supported by the following language from Comment [3]:

> [A] lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. . . . [K]nowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

19. Comment [3] also suggests various reasons that current and former matters might *not* be substantially related:

- The environmental lawyer mentioned above "would not be precluded . . . from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.
- "Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying."
- "Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related."
- "In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation."

20. The inquiring Law Firm should apply the precepts of Rule 1.9(a) and Comment [3] to the various kinds of information that the Entity contends demonstrate a substantial relationship between the Lease Action and the current matter, and to other kinds of potentially relevant information as well, such as the practices of the Entity in maintaining gas stations.

21. If any of these kinds of information would "materially advance" New Clients' position against the Entity, that would make the matters substantially related and preclude the new representation. However, the "materially advances" inquiry is fact-intensive, so we cannot reach a definitive conclusion as to whether the matters are substantially related.

C. Confidentiality Duties to Former Clients: Rule 1.9(c).

22. Whether or not the present and former matters are substantially related, the Law Firm has a continuing duty of confidentiality to the Entity pursuant to Rule 1.9(c), which "generally extends the confidentiality protections of Rule 1.6 to a lawyer's former clients." Rule 1.9, Cmt. [8]. Specifically, Rule 1.9(c) provides that a lawyer (1) shall not "*use*" confidential information "to the disadvantage of the former client" unless the Rules "would permit or require [such use] with respect to a current client" or the information has become "generally known" and (2) shall not "*reveal*" a former client's

confidential information "except as these Rules would permit or require with respect to a current client."[17]

23. Particular pieces of confidential information may lose their protected status as time goes by, such as when the information becomes generally known or when disclosure would no longer be embarrassing or detrimental to the client. But otherwise, a lawyer's duty to protect such information remains in force even after a current client becomes a former client. We lack sufficient facts to determine what information is protected by Rule 1.9(c), but we note that the duty of confidentiality under Rule 1.9(c) applies whether or not matters are substantially related under Rule 1.9(a).

CONCLUSION:

24. Whether a law firm may represent new clients against an entity that the law firm has represented in the past depends on whether the entity is a current or former client, which is a mixed question of fact and law. A law firm may not oppose a current client in any matter, related or unrelated, absent the current client's informed consent, confirmed in writing. However, a law firm may oppose a former client in any matter that is not substantially related to the law firm's legal work for that former client. Even if the entity is no longer a client, a law firm has a continuing duty to protect confidential information of that entity.

(46-13)

17 The term "confidential information" is broadly defined in Rule 1.6(a) to include (subject to certain exceptions not applicable here) "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."

OPINION 1009 (05/21/2014)

TOPIC: Advertising; solicitation; press releases and tweets regarding shareholder litigation

DIGEST: Press releases and tweets directed to potential clients in shareholder suits constitute advertising and solicitation. They are thus subject to retention requirements, and, if directed to New York recipients, are also subject to filing requirements. The tweets must be labeled "attorney advertising" but are not prohibited by the rule against interactive solicitation.

RULES: 1.0(a) & (c); 7.1(f) & (k); 7.3; 8.5(b)

FACTS:

1. Inquirer is a New York attorney who works for a firm based in a different state. The firm focuses its practice on shareholder litigation, and the companies and lawsuits in question are sited in various states.

2. The firm distributes press releases concerning new investigations or lawsuits, and potential clients sometimes contact the firm after seeing such releases. The inquiry states that the releases "are generally issued through an outlet such as Business Wire, PR Newswire or other electronic wire service." The firm also sends out "tweets" to alert recipients to the press releases.

3. According to the inquiry, the general purposes of the press releases are "to inform shareholders of the case or investigation" and to enable potential clients to contact the firm "for a potential attorney-client engagement." The inquiry attaches sample press releases, all of which are labeled "Attorney advertising," and some of which indicate that shareholders may contact the firm concerning their legal rights and remedies with respect to the specific cases described.

QUESTIONS:

4. If a law firm issues press releases to inform potential clients of new investigations or actions, and sends "tweets" to alert recipients to the press releases, then are the press releases and tweets "advertisements" governed by Rule 7.1, and if so, (a) must copies be retained for one year or three years; and (b) must the tweets be labeled "attorney advertising"?

5. Are such press releases and tweets "solicitations" governed by Rule 7.3, and if so, (a) must copies be filed with the attorney disciplinary committee, and (b) are the tweets a permissible form of solicitation?

OPINION:

A. Advertising issues under Rule 7.1

6. Lawyer conduct in using and disseminating advertisements is subject to Rule 7.1 of the New York Rules of Professional Conduct (the "Rules").[18] Under Rule 1.0(a), the term "advertisement" means (subject to exceptions not relevant here) "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." The communication is to be assessed in light of the circumstances of its circulation, and if its primary purpose is to obtain clients, then it is an advertisement for purposes of the Rules. *See, e.g.*, N.Y. State 873 (2011).

7. It seems clear from the nature of the press releases and the tweets that their primary purpose is to secure clients. Such communications are therefore advertisements under the Rules. As such, they can serve potential clients by educating them as to their need for legal advice and helping them obtain an appropriate lawyer, and can serve lawyers by enabling them to attract clients. *See* Rule 7.1, Cmt. [3] (indicating "principal purposes" of advertising).

8. Because press releases and tweets constitute lawyer advertising, they are subject to pre-approval and retention requirements. Rule 7.1(k) provides that all advertisements "shall be pre-approved by the lawyer or law firm." It also provides that a copy of an advertisement "shall be retained for a period of not less than three years following its initial dissemination," but specifies an alternate one-year retention period for advertisements contained in a "computer-accessed communication," and specifies another retention scheme for web sites. Rule 1.0(c) defines "computer-accessed communication" to mean

> any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

9. The releases will be disseminated through wire services. We understand that such wire services typically distribute the releases to a wide variety of media, usually in full-text and without alteration. Even if the lawyers and wire services distribute the press releases by electronic means in the first instance, it does not follow that the alternative one-year retention period applies. Distribution by the wire services is merely the beginning of a pipeline of information that is intended to find its way

18 The inquiry notes that the proposed conduct has connections to jurisdictions other than New York: the inquirer's firm is based in another state, and the companies involved in the derivative suits, and the lawsuits themselves, may be in any state. Although the inquirer is admitted to practice only in New York, in some circumstances ethics rules from other jurisdictions could apply. If the advertising and solicitations in question are "in connection with" a proceeding that has already been filed in court in a jurisdiction other than New York, and the inquirer has been admitted to practice before that court for purposes of that proceeding, then that jurisdiction's ethical rules would govern unless the rules of the court provide otherwise. *See* Rule 8.5(b)(1). But when there is not yet any particular forum for a lawsuit, the New York rules will generally apply to the inquirer's conduct (no matter where the firm is based), because the inquirer is licensed to practice only in New York. *See* Rule 8.5(b)(2)(i). And of course New York rules will also apply to the inquirer's conduct as to any lawsuit that has been filed in New York. In this opinion we limit our analysis to the latter two situations and apply the New York rules of ethics. We also note that beyond the general provisions of Rule 8.5, one of the Rules at issue here includes more specific provisions as to its own applicability. *See* Rule 7.3(c) (discussed *infra* ¶19) and Rule 7.3(i).

into all kinds of mass media, including not only web sites and social networks but also newspapers, magazines and trade journals. Accordingly, the press releases at issue do not appear to constitute "computer-accessed communication[s]" subject to the alternative one-year retention period.

10. We reach a different conclusion as to the tweets. These are disseminated by computer and resemble the examples in Rule 1.0(c). It is conceivable that the tweets could ultimately be reproduced in a newspaper or some other non-electronic format, but that is not their intended route of distribution. The tweets are therefore computer-accessed communications, and their retention is required only for one year.

11. Rule 7.1(f) provides that advertisements must be labeled as "Attorney Advertising" unless they appear in certain specified media such as newspapers, radio, television, or billboards, or are "made in person pursuant to Rule 7.3(a)(1)." We next consider the applicability of Rule 7.1(f) to the tweets described in the inquiry.[19]

The tweets do not appear in any of the media that are explicitly exempted from the labeling requirement in Rule 7.1(f). They would be exempt only if they constituted advertisements "made in person pursuant to Rule 7.3(a)(1)." That provision generally prohibits certain forms of interactive solicitation – those made in person, by telephone, or by "real-time or interactive computer-accessed communication" – but allows those otherwise prohibited forms when "the recipient is a close friend, relative, former client or existing client." For present purposes, we need not determine the precise scope of this exemption from the labeling requirement.[20] Even if the exemption can apply to real-time or interactive computer-accessed communication, the tweets in question do not appear to come within that category. See *infra* ¶22. And even if they did, the exemption would still not apply. The inquirer has not suggested that access to the tweets would be limited to existing or former clients, or friends and relatives, nor does such a limitation seem plausible given the goal of directing potential new clients to the press releases. Because the tweets would not be in any of the categories exempted from Rule 7.1(f), they would need to include the "Attorney Advertising" label.

B. Solicitation issues under Rule 7.3

12. The threshold question is whether the press releases and tweets are "solicitations," a term defined in relevant part as

> any advertisement [1] initiated by or on behalf of a lawyer or law firm [2] that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, [3] the primary purpose of which is the retention of the lawyer or law firm, and [4] a significant motive for which is pecuniary gain.

19 Whether *press releases* must be labeled as attorney advertising may depend on the circumstances. *See* Rule 7.1, Cmt. [5] (explaining that the label is not necessary for advertising in newspapers or on television or for "similar communications that are self-evidently advertisements," such as "press releases transmitted to news outlets" as to which there is no risk of confusion). The inquirer has already chosen to apply the label to the press releases in question, and has not asked us whether such labeling is required, so we do not opine on that issue.

20 Read literally, the exemption could apply only to those solicitations that are permissible under Rule 7.3(a)(1) even though they are made "in person." However, the exemption has also been read more broadly to apply to *all* solicitations permitted under Rule 7.3(a)(1), including those by real-time or interactive computer-accessed communication. *See Simon's New York Rules of Professional Conduct Annotated* 1377 (2013 ed.).

Rule 7.3(b) (numbering added); *see* Rule 7.3, Cmt. [2] (elaborating on the four elements).

13. We have already noted (*supra* ¶7) that the press releases and tweets are advertisements, the primary purpose of which is to obtain retention of the lawyer or firm. It is also clear from the inquiry and the context that the press releases and tweets are initiated by or on behalf of the lawyer or law firm, and are motivated by desire for pecuniary gain. Whether they are solicitations thus depends on whether they are "directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives."

14. The Comments to Rule 7.3 point out a few ways in which communications can be directed to, or targeted at, specific recipients. First, they can be directed to specific recipients by their mode of transmission (such as through telephone calls, mail, email, or in-person contact), which is not the case here. *See* Rule 7.3, Cmt. [3].

15. "Second, an advertisement in public media such as newspapers, television, billboards, web sites or the like is a solicitation if it makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers." Rule 7.3, Cmt. [3]. This is an exception to the general rule that "an advertisement in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or recipients." Rule 7.3, Cmt. [4]. This exception is triggered by reference to people with legal needs arising from a "specific incident," which is "a particular identifiable event (or a sequence of related events occurring at approximately the same time and place) that causes harm to one or more people." Rule 7.3, Cmt. [5]. The harm caused by a "specific incident" to which a solicitation relates will often be physical but may also be economic.[21]

16. Third, an advertisement in a public medium that is aimed at a specific group of people, such as those injured by a defective medical device or medication, is a solicitation even if the potential claimants were injured "over a period of years." In such cases the claims arise "at disparate times and places" and do not relate to one specific incident so as to trigger the "blackout" provisions of Rule 7.3(e). Nonetheless, the advertisements are solicitations because they make reference to, and are "intended to be of interest only to," the potential claimants. Rule 7.3, Cmt. [6].

17. An advertisement in a public medium, seeking retention and pecuniary gain, *does not* become a solicitation "simply because it is intended to attract potential clients with needs in a specified area of law" such as shareholder litigation. *See* Rule 7.3, Cmt. [4]. But the advertisement *does* become a solicitation if it is directed to or targeted at the specific group of recipients who held shares in a particular company on particular dates. From the sample press releases submitted with the inquiry, it appears that at least some refer to a "specific incident" in the management of the companies in question, and to groups of shareholders whose legal needs, the advertisements suggest, arise out of that specific incident. But even if a shareholder suit alleges misconduct too extended in time and place as

21 "Specific incidents *include* such events as traffic accidents, plane or train crashes, explosions, building collapses, and the like." Rule 7.3, Cmt. [5] (emphasis added). But as quoted above, this comment also includes more general language explaining that – for purposes of the definition of solicitation – a specific incident occurs when events closely connected in time and place cause "harm." Comment [5] also refers to "a specific incident involving potential claims for personal injury or wrongful death," but that reference is for the different purpose of describing the scope of the 30- and 15-day "blackout" provisions of Rule 7.3(e), which are explicitly limited to such claims.

to constitute a single incident, it can nevertheless be described in a press release that makes reference to, and is "intended to be of interest only to," the potential claimants. Accordingly, the press releases and tweets at issue here are "solicitations" subject to the requirements of Rule 7.3.

18. A filing requirement applies to solicitations that are "directed to a recipient in this State." Rule 7.3(c); *see* Rule 7.3(c), Cmt. [8] ("Solicitations by a lawyer admitted in New York State directed to or targeted at a recipient or recipients outside of New York State are not subject to the filing and related requirements set out in Rule 7.3(c)."). If a press release or tweet is targeted at the shareholders of a particular company, the lawyer may or may not know those shareholders' identities and residences. A lawyer's solicitation is not "directed" to a New York recipient if the lawyer has no reason to be aware that New York residents are in fact among the target audience. But Rule 7.3(c) would apply if the lawyer knows that the intended audience includes any New York residents, or if the existence of such persons would be apparent from the size or nature of the company. *Cf.* Rule 1.0(k) ("A person's knowledge may be inferred from circumstances.").

19. The remaining issue is whether the tweets violate the rule that prohibits solicitation through certain interactive forms of contact. A lawyer may not engage in solicitation "by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client." Rule 7.3(a)(1). The policy is one of protecting potential clients:

> Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and are regulated in the same manner.

Rule 7.3, Cmt. [9].

20. As noted in ¶12 *supra*, it does not appear that the tweets would go only to close friends, relatives, former clients or existing clients. Accordingly, the tweets would be impermissible if they were to constitute "real-time or interactive computer-accessed communication." The tweets do constitute computer-accessed communications, see ¶10 *supra*, but that leaves open the question whether those communications are also "real-time or interactive." This concept is addressed in Comment [9] to Rule 7.3:

> Ordinary email and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a web site that are not a live response are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication.

21. Our understanding is that the broadly distributed tweets contemplated here, as currently used and in contrast to instant messaging or chat rooms, generally do not involve live responses. In that

sense the tweets are more like ordinary email or web site postings. Because the tweets should not be considered real-time or interactive communication, Rule 7.3 does not prohibit them.

CONCLUSION:

22. The subject press releases and tweets constitute "advertisements" and are thus subject to retention requirements. Copies of the press releases must be retained for three years. The tweets must be labeled "attorney advertising" and copies must be retained for one year. The press releases and tweets also are "solicitations" and are thus subject to filing requirements if directed to recipients in New York. The tweets are not prohibited by the rule against interactive solicitation.

(14-14)

OPINION 1010 (07/21/2014)

TOPIC: Advertising; second opinions

DIGEST: A firm may advertise that it provides second opinions to represented parties.

RULES: 4.2(a), 7.1, 7.3

FACTS:

1. The inquirer is a member of a law firm that advertises via public media including radio. The firm proposes to inform the public that it is available to provide second opinions on pending legal cases on which individuals are already represented. Specifically, the firm proposes to include in its advertisements language such as: "If you are unhappy with your current attorney, you can call [ABC Law Firm] to discuss your matter."

QUESTION:

2. May a law firm advertise its availability to provide second opinions as to pending legal cases on which individuals are already represented?

OPINION:

3. We first consider the "no-contact rule" set forth in Rule 4.2(a) of the New York Rules of Professional Conduct (the "Rules"), which states:

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

4. This rule applies only to communications made by a lawyer in the course of "representing a client." It does not apply, therefore, to the communications proposed by the inquirer, by which the inquirer's firm would seek to obtain new clients in matters in which the firm is not already involved. *Cf.* Rule 4.2, Cmt. [4] (noting that the Rule does not preclude "communication with a represented party or person who is seeking advice from a lawyer who is not otherwise representing a client in the matter"). Accordingly, the proposed communications are not subject to Rule 4.2(a). *Accord* Florida Opinion 02-5 (2003) (citing opinions from several jurisdictions).

5. The proposed communications are, however, subject to restrictions on legal advertisements. *See* Rule 1.0(a) (defining "advertisement" generally to include "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm"). These restrictions include, among other things, prohibition of statements or claims that are false, deceptive or misleading, Rule 7.1(a)(1); limitations on paid endorsements and fictionalized portrayals, Rule 7.1(c); in some media, a requirement to label as attorney advertising, Rule 7.1(f); a requirement to include certain information identifying the advertiser, Rule 7.1(h); and pre-approval and retention requirements, Rule 7.1(k).

6. It does not appear from the face of the inquiry, or from the illustrative sentence quoted in paragraph 1 above, that the proposed advertisement would contain any false, deceptive or misleading statements or claims. A more definitive conclusion would require consideration of the entire actual advertisement in relation to terms of the representation available to the advertisement's recipients.[22] But if the advertisement as a whole and in context is not false, deceptive or misleading, and if it complies with the other requirements such as pre-approval and retention for required periods, then Rule 7.1 would not preclude its use.

7. Rule 7.3 contains further restrictions applying only to those advertisements that are also solicitations. The Rules define "solicitation" to include

> any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.

Rule 7.3(b) (but excluding writings delivered in response to a specific request); *see* N.Y. State 1009 ¶13 (2014) (discussing elements of this definition).

8. "[A]n advertisement in public media such as newspapers, television, billboards, web sites or the like is a solicitation if it makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers." Rule 7.3, Cmt. [3]. But an advertisement in public media that does not make such reference "is presumed not to be directed to or targeted at a specific recipient or recipients" even if "it is intended to attract potential clients with needs in a specified area of law." Rule 7.3, Cmt. [4].

9. Thus, if the proposed advertisements were to refer explicitly to a specific incident and to a specific group of people with legal needs arising out of that incident, then the advertisements would be subject to restrictions on solicitations that are set forth in Rule 7.3.[23] But it does not appear from the inquiry that the advertisements would include such references. In that case, they would not be solicitations and Rule 7.3 would not apply.

10. The inquiry seeks guidance only as to the propriety of the proposed advertisements. Accordingly, we do not address the application of ethical rules to what the lawyer may say in a meeting resulting from a prospective client's response to the advertisement.

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22 For example, the advertisement may not mislead as to the costs of seeking a second opinion or the additional costs, if any, that may be incurred by changing attorneys. Considerations bearing on the possibility of such additional costs may include but are not limited to the import of contingent fee arrangements and work that may need to be reconsidered or redone if a new strategy is adopted. Moreover, if a represented person contacts the inquirer about taking over an existing representation, whether as a result of the advertisement or otherwise, then the inquirer may need to address such considerations. *See* Rule 1.5(b) (requiring lawyer to communicate "the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible").

23 *See*, *e.g.*, Rule 7.3(a)(2)(v) (prohibiting solicitation when lawyer intends but does not disclose that legal services will be performed primarily by a different and unaffiliated lawyer); Rule 7.3(c) (setting forth filing requirements); Rule 7.3(h) (requiring inclusion of certain information about the soliciting lawyer). Additional restrictions apply to solicitations relating to a specific incident involving potential claims for personal injury or wrongful death. *See* Rule 7.3(e) & Cmt. [5].

CONCLUSION:

11. A firm may advertise that it is available to provide second opinions on pending legal cases on which individuals are already represented.

(4-14)

OPINION 1011 (07/29/2014)

TOPIC: Duty to remedy fraudulent submissions to administrative agency

DIGEST: Duty under Rule 3.3 to remedy false statements made to a "tribunal" does not apply to applications for visas or work permits, though other rules may apply.

RULES: 1.2(d), 1.6, 3.3, 4.1, 8.5(b)

FACTS:

1. The inquirer is a New York attorney representing a corporate client (the "Employer," or the "Corporation") in matters related to immigration benefits. In the course of the representation, the inquirer filed several employment-based immigrant visa petitions with the Department of Labor, and related petitions with the Department of Homeland Security, in order to obtain the appropriate visas for foreign workers allowed to accept full-time employment in the United States when no U.S. worker is able to fill the position.

2. The application process required the Corporation to certify that it undertook sufficient efforts to locate a U.S. worker qualified for and willing to accept the position before offering the position to a foreign worker. As another required part of the visa petitions, an employee of the Corporation (the "Corporate Recruiter") signed and submitted attestations regarding the various methods of local recruiting the Corporation had supposedly undertaken. Relying on the Corporate Recruiter's assurances, the inquiring lawyer signed each application and submitted them to the Department of Labor. In each instance, the Department of Labor certified each application, at which time the lawyer prepared and filed related petitions with the Department of Homeland Security, which incorporated the applications certified by the DOL, to obtain permanent resident status for the foreign workers.

3. After the submission of these applications, and after some of the foreign workers acquired permanent resident status, the Corporation discovered that its employee, the Corporate Recruiter, had submitted knowingly false attestations.

4. Upon learning of this misconduct, the inquiring lawyer withdrew from representation of the Employer in connection with the applications that were filed but not resolved and in connection with similarly tainted documents that the lawyer had prepared but had not filed, and urged the Employer to disclose the conduct to the federal agencies. The Employer has refused to give the lawyer consent to disclose information regarding the fraudulent conduct to the federal agencies, claiming that the information is privileged and confidential.

QUESTION:

5. Where an attorney learns of misconduct by an employee of a client that resulted in both the client and the attorney making false representations to a government agency in an application for a foreign-workers' visa, does Rule 3.3(b) require the attorney to disclose the underlying misconduct to the federal agency that granted the visa if the client declines to do so?

OPINION:

The New York Rules of Professional Conduct Apply

6. The inquiry concerns conduct before a federal agency with its own rules of professional conduct. *See* 8 C.F.R. § 1003.102. The choice-of-law provisions in Rule 8.5 of the New York Rules of Professional Conduct (the "Rules") distinguish between an attorney's "conduct in connection with a proceeding in a court," Rule 8.5(b)(1), and "any other conduct," Rule 8.5(b)(2). For conduct in connection with a proceeding in a court, "the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise." Rule 8.5(b)(1). For all other conduct, if "the lawyer is licensed to practice only in this state" – as is the case here – "the rules to be applied shall be the rules of this state." Rule 8.5(b)(2).

7. Rule 8.5(b)(1) is limited to a proceeding before "a court"; the New York Appellate Division declined to adopt a proposed version of the rule that would have extended it to govern conduct in connection with proceedings before any "tribunal." *See* N.Y. State 968 ¶6 (2013) ("we do not believe we are free to read 'court' in Rule 8.5(b)(1) to include administrative tribunals"). We discuss below whether consideration of a visa application is a proceeding before a "tribunal," but it is clearly not a proceeding before a "court." *See* N.Y. State 750 (2001) (conduct of attorney "who represents individuals in immigration matters" is conduct that "does not involve court proceedings"). Accordingly, Rule 8.5(b)(2) governs, and the conduct is subject to the New York Rules of Professional Conduct.

8. Attorney conduct rules of the federal agencies involved, such as those cited above, could also be relevant to the inquirer's obligations. For example, the rules of professional conduct for practitioners before the Executive Office for Immigration Review provide: "If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures." 8 C.F.R § 1003.102(c); *see* 8 C.F.R § 1001.1(i) (defining "practice" to include acts of any person appearing in a case through "the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS, or any immigration judge, or the Board"). However, our jurisdiction is limited to interpreting the New York Rules. We thus analyze the inquirer's ethical obligations under those Rules, but we express no view as to whether those obligations are modified or supplemented by ethics rules of the agencies in question.

Rule 3.3 Does Not Apply to False Statements in an Administrative Immigration Proceeding

9. Rule 3.3, which is entitled "Conduct Before a Tribunal," addresses a lawyer's obligations upon learning that evidence provided to a "tribunal" was false. In relevant part, Rule 3.3 provides:

> (a) A lawyer shall not knowingly:
>
> > (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . or
> >
> > (3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. . . .

> (b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

10. Of central importance here, Rule 3.3(c) requires that a lawyer take such remedial measures "even if compliance requires disclosure of information otherwise protected by Rule 1.6." That is, the duty to remedy false statements of fact or law made to a tribunal, or false "evidence" presented to the tribunal, can override the lawyer's duty of confidentiality to a client.

11. In contrast to Rule 8.5(b)(1), which is limited to proceedings before a "court," Rule 3.3 applies broadly to false statements made to any "tribunal." Rule 1.0(w) defines the term "tribunal" as follows:

> "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

12. We have previously offered the following general criteria to help guide analysis of whether a particular administrative proceeding is sufficiently adjudicative to qualify as a "tribunal":

> (a) Whether specific parties will be affected by the decision;
>
> (b) Whether the parties have the opportunity to present evidence and cross examine other providers [of] evidence; and
>
> (c) Whether the ultimate determination will be made by a person in a policy-making role or by an independent trier of fact, such as an administrative law judge.

N.Y. State 838 ¶12 (2010).

13. Based on the facts provided to us, we conclude that the immigration proceedings at issue here do not qualify as proceedings before a "tribunal." The ordinary meanings of the words "tribunal" and "adjudication" do not encompass an administrative procedure involving a unilateral application for a benefit. In ordinary parlance, the material presented with such an application, although attested to "under penalty of perjury," is not "evidence," and the answers to the questions in the required forms are not "legal argument," both terms used in the Rule's definition of "tribunal." There is also no adverse party, no oral proceeding and no cross-examination, which are hallmarks of many adjudicative proceedings. The consular officers and other government officials who consider these applications, while they presumably endeavor to administer the laws in an impartial and conscientious way, would not be called "triers of fact," another common feature of adjudicative proceedings to which we pointed in N.Y. State 838. We do not say that unilateral proceedings may never be adjudicative – the Rule expressly contemplates that an adjudication may result from a proceeding in which there is "pre-

sentation of evidence or legal argument by a [single] party." But the visa and work permit proceedings at issue here do not meet the test.

14. Two ABA ethics opinions have reached a similar conclusion with respect to administrative proceedings, although each involved proceedings that were more akin to investigations than those here. ABA 93-375 advised that a "routine bank examination" should not "be considered an 'adjudicative proceeding' so as to bring into play the lawyer's duty of candor under Rule 3.3(b)."[24] The opinion relied on a prior ABA opinion that had held, for purposes of predecessor rules, that the Internal Revenue Service was "neither a true tribunal, nor even a quasi-judicial institution," at least when settling tax cases. ABA 314 (1965) (withdrawn on other grounds by ABA 85-352). Professor Wolfram concludes that a patent application, which is in some respects similar to the visa applications at issue here, is "a substantially nonadjudicatory proceeding" for purposes of a predecessor to Rule 3.3 in which "tribunal" was similarly defined to mean "all courts and all other adjudicatory bodies." Wolfram, *Modern Legal Ethics* § 12.6.5, at 673-74 (1986). He notes that "many administrative agencies can be regarded as 'adjudicatory bodies' only if the concept of adjudication is taken very far from its judicial roots" and that the "adjudicatory model" involves "adversarial presentation of two points of view." *Id.*

15. We are aware of contrary authority. In particular, three courts have found applications for a visa or other government benefit to be proceedings before a "tribunal" for purposes of Rule 3.3, but none explained its analysis. In *In re Vohra*, 68 A.3d 766, 781-82 (D.C. 2013), the District of Columbia Court of Appeals affirmed a conclusion that the District of Columbia's version of Rule 3.3 applied to an attorney who forged his clients' signatures on a visa application, but the attorney did not dispute the finding that the Rule applied, and the violation of Rule 3.3 was one of approximately a dozen rules that the underlying disciplinary board had found to have been violated.[25] In *Matter of Bihlmeyer*, 515 N.W.2d 236 (S.D. 1994), the South Dakota Supreme Court found that statements made to the Industrial Commissioner of Iowa regarding the attorney's fee arrangement in an application for a lump-sum payment on a worker's compensation claim were also "before a tribunal" for purposes of Rule 3.3, but the attorney there also had admitted that the rule applied. In *In re Disciplinary Proceeding Against Conteh*, 284 P.3d 724 (Wash. 2012), the Washington Supreme Court found a lawyer's misrepresentation of his own employment history in his asylum application to be a violation of Rule 3.3, but the opinion does not discuss whether the application was made before a "tribunal." *See also* Hazard & Hodes, *The Law of Lawyering* § 29.3, at 29-7 (2007 Supp.) (stating, without citing authority, "Rule 3.3(d) applies to such matters as applications before the Patent Office and other *ex parte* presentations").

16. In addition, while not determinative of the ethics question, we note that Congress, in creating the Bureau of Citizenship and Immigration Services, referred to one of the functions being transferred

24 The ABA opinion predates the inclusion of the definition of "tribunal" in the ABA Model Rules, but the ABA committee viewed Rule 3.3 as applying to an "'adjudicative proceeding' before a 'tribunal,'" a view derived from the contrast to Rule 3.9, which applies to "nonadjudicative proceedings." The opinion thus predicted the definition of "tribunal" that was later adopted.

25 The D.C. definition of "tribunal" is different from New York's, although the gist of the test appears to be similar. In place of the term "adjudicative capacity," the D.C. rule defines "tribunal" to be "a court, regulatory agency, commission, and any other body or individual authorized by law to render decisions of a *judicial or quasi-judicial nature*, based on information presented before it, regardless of the degree of formality or informality of the proceedings." *See* Report and Recommendation of Hearing Comm. No. 1, *In the Matter of Robert N. Vohra*, Bar Dkt. 324-06, at 42 n.6 (Aug. 9, 2011) (emphasis added).

from the Immigration and Naturalization Service as "[a]djudications of immigrant visa petitions." 6 U.S.C. § 271(b)(1). This is in line with the Administrative Procedure Act, which treats "licensing" as "adjudications." 5 U.S.C. § 551(6), (7).[26]

17. We are not persuaded by these authorities. We are concerned that interpreting the terms "tribunal" and "adjudicatory" to apply to unilateral applications for government benefits would lay a trap for the unwary, because such an application would, as Professor Wolfram notes, take the term "adjudicative" "very far from its judicial roots." Wolfram, *supra*, at 673-74. There may well be, as Professor Wolfram also notes, *id.*, policy reasons that duties of candor should apply with even more rigor in unilateral proceedings. But the drafters of the Rules were conscious of the very strong countervailing force of a lawyer's duty of confidentiality. The circumstances in which a lawyer is required to override that duty are thus very limited. Indeed, the New York Rules do not contain the one other rule in the ABA Model Rules in which the lawyer has an obligation to disclose false testimony, Rule 3.9. ABA Model Rule 3.9 states that a lawyer representing a client "before a legislative body or administrative agency in a nonadjudicative proceeding . . . shall conform to the provisions of Rules 3.3(a) through (c) . . . ." New York's version of that Rule omits the duty to conform to Rule 3.3 and does not does not address the question of correcting false statements.

18. A Comment to the ABA version of Rule 3.9 also supports the conclusion that administrative proceedings such as those at issue here are not "adjudications" for purposes of ABA Model Rule 3.3 (which served as the model for New York's Rule 3.3). Comment [3] provides that Rule 3.9 applies only when the lawyer or the lawyer's client "is presenting evidence or argument. *It does not apply to representation of a client* in a negotiation or other bilateral transaction with a governmental agency or *in connection with an application for a license or other privilege* or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns." ABA Model Rule 3.9 Comment [3] (emphasis added). The Comment thus appears to consider "applications for a license or other privilege" not to involve the presentation of "evidence or argument." As quoted above, the definition of "tribunal" indicates that the presentation of "evidence or legal argument" is one of the required elements of adjudication.

Other Rules or Law May Permit, or Even Require, Disclosure of the False Statements

19. The inquirer asks only about the obligation to correct false statements under Rule 3.3. We note, however, that even if, as we conclude above, Rule 3.3 does not apply to *require* disclosure of the false statements here, Rule 1.6(b)(3) *permits* a lawyer to reveal confidential obligation to the extent that the lawyer reasonably believes necessary

> to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

The forms that we understand the inquirer submitted each require that the "preparer" of the form certify that the information contained in the forms is true to the best of the preparer's knowledge. If the

26 Issuance of a visa appears to be a form of "licensing," which is defined as, among other things, the grant of "an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(8)-(9).

inquirer reasonably believes that the relevant federal agencies are continuing to rely upon any certification that the inquirer may have made, or that such certification is being used to further a crime or fraud, then Rule 1.6 permits (but does not require) him to withdraw that certification.

20. In addition, Rule 1.6(b)(6) permits disclosure of confidential information to the extent a lawyer reasonably believes necessary "when permitted or required under these Rules or *to comply with other law* or court order." (Emphasis added.) Thus, for example, if the federal rule noted in paragraph 8 above (8 C.F.R § 1003.102(c)) requires that the inquirer take action to remedy the false statements here, and the inquirer reasonably concludes that disclosure of confidential information or withdrawal of his certification is necessary to comply with that obligation, then such disclosure or withdrawal would not violate Rule 1.6. However, any such "disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose." Rule 1.6, Cmt. [14].

21. Further, Rule 1.2(d) provides that a lawyer generally shall not assist a client "in conduct that the lawyer knows is illegal or fraudulent," and Rule 4.1 provides that a lawyer, in representing a client, "shall not knowingly make a false statement of fact or law to a third person." A comment notes that "[s]ometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like." Rule 4.1, Cmt. [3]. We do not express any view on whether silence in the present circumstances could be deemed to be a continuing affirmative statement of fact such as to *require* correction. *Cf.* D.C. Ethics Op. 336 (2006) (opining that when incapacitated person gave false name and social security number, and court-appointed guardian used that information to obtain benefits and learned later that the information was false, withholding those facts in periodic reports to the court "would likely constitute a 'circumstance[] where the failure to make a disclosure is the equivalent of an affirmative misrepresentation'" for purposes of Rules 3.3 and 8.4).

CONCLUSION:

22. The lawyer's conduct is subject to the New York Rules of Professional Conduct. The immigration proceedings at issue here do not constitute adjudicative proceedings before a "tribunal" so as to trigger the lawyer's obligations under Rule 3.3. The lawyer should consider, however, whether obligations may by imposed by other ethics rules including rules of the federal agencies involved.

(23-14)

OPINION 1012 (07/30/2014)

TOPIC: Conflicts arising from limited-services pro bono representation

DIGEST: A lawyer who represents a client in a limited pro bono legal services program owes a continuing duty of confidentiality to that client, and is precluded from later representing a materially adverse client in the same or a substantially related matter if the lawyer has actual knowledge of the unwaived conflict, but conflicts arising from participation in such a program are not imputed to others in the lawyer's firm.

RULES: 1.6, 1.7, 1.9, 1.10, 5.1, 6.5

FACTS:

1. The inquirer is the managing attorney of a county bar association legal services project. The bar association sponsors a legal services corporation that runs a limited pro bono legal services program (the "Program"). A lawyer who volunteers in such a program (a "Participating Lawyer") renders advice to individual clients (the "Program Clients") in a clinic setting on subjects such as landlord/tenant, domestic violence, family court and pro se federal court matters. The services are completed in one evening and often involve referral to another agency to assist the Program Client. After that evening, the Participating Lawyer does not provide any additional services to, or have any continuing relationship with, the Program Client.

2. Participating Lawyers typically volunteer their services three to four times per year. The Program advises the Program Clients that the services are limited to addressing one problem and that the lawyer rendering the limited service will not provide any further services to the client. The rights and responsibilities of the Program and the Program Client, including the limited nature of the representation, are set forth in a written agreement signed by the Program and the Program Client, and the Program retains that written agreement.

QUESTIONS:

3. If a lawyer has represented a client in a limited pro bono legal services program, may that same lawyer later represent another client with interests materially adverse to the Program Client in the same or a substantially related matter?

4. If a lawyer in a firm has represented a client in a limited pro bono legal services program, may another lawyer associated in the same firm represent a client with interests materially adverse to the Program Client in the same or a substantially related matter?

OPINION:

5. The inquiry is governed by Rule 6.5 of the New York Rules of Professional Conduct (the "Rules"). That rule's precursor, ABA Model Rule 6.5, was adopted in 2002 based on a proposal by the ABA Ethics 2000 Commission. The ABA proposal addressed conflict-checking requirements in the context of providing short-term limited representation under the auspices of a volunteer legal services project operated by a local bar association. The concern underlying the ABA rule was that

"strict application of the conflict-of-interest rules may be deterring lawyers from serving as volunteers in programs in which clients are provided short-term limited legal services." Report of the ABA Ethics 2000 Commission, quoted in *Simon's New York Rules of Professional Conduct Annotated* 1314 (2013 ed.). In New York, prior to the adoption of Rule 6.5 in 2007, Rule 1.10(e) required a lawyer advising a client in a limited-services program to do a firm-wide conflicts check even though such programs "are normally operated under circumstances in which it is not feasible for a lawyer to utilize the conflict-checking system required by Rule 1.10(e)" before providing the limited kinds of services that such programs provide. Rule 6.5, Cmt. [1].

6. New York adopted a version of Rule 6.5 in 2007, using language slightly different from the ABA Model Rule. The current New York Rule 6.5 applies to a lawyer who provides short-term limited legal services under the auspices of a program sponsored by a bar association or certain other kinds of entities.[27]

7. Rule 6.5 provides in part that such a lawyer is required to comply with certain conflicts rules – namely, Rules 1.7, 1.8 and 1.9 – "only if the lawyer has *actual knowledge* at the time of commencement of representation that the representation of the client involves a conflict of interest." Rule 6.5(a)(1) (emphasis added). It also provides that the lawyer is required to comply with the imputation provisions in Rule 1.10 "only if the lawyer has *actual knowledge* at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by Rules 1.7, 1.8 and 1.9." Rule 6.5(a)(2) (emphasis added). However, Rule 6.5 ceases to apply "if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation." Rule 6.5(e).

8. Rule 6.5 is written from the perspective of the individual Participating Lawyer and addresses what the lawyer must consider when undertaking a limited-services assignment. It makes the usual conflicts rules inapplicable unless the Participating Lawyer has "actual knowledge" that the representation of the client involves a conflict of interest.[28] In the absence of such actual knowledge, the lawyer does not need to make any further conflicts inquiry and may provide the short-term services.

9. The reason for relaxing the conflicts rules in this context is that "a lawyer who is representing a client in the circumstances addressed by [Rule 6.5] ordinarily is not able to check systematically for conflicts of interest." Rule 6.5, Cmt. [3]; *see* Rule 6.5, Cmt. [1], quoted in paragraph 5 *supra*. Thus the clear implication of Rule 6.5 is that a Participating Lawyer may undertake a limited-services representation without first consulting the conflict-checking system required by Rule 1.10(e). Moreover, while Rule 6.5 does not explicitly address what is required by Rule 1.10(e), we think it is within the fair import of the approach taken in Rule 6.5 that a limited-services representation does not require the Participating Lawyer or that lawyer's firm to enter the limited-services relationship into the firm's conflict-checking system.

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27 "Short-term limited legal services" is defined to mean "services providing legal advice or representation free of charge as part of a program described in [Rule 6.5(a)] with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance." Rule 6.5(c).

28 For example, if, at the outset of the consultation, the lawyer actually knows that the short-term representation would conflict with a current client under Rule 1.7 or with a former client under Rule 1.9, then the lawyer generally may not provide the short-term limited legal services. Likewise, if the lawyer obtains such actual knowledge during the course of the consultation, then the lawyer may not continue to provide the services.

A. Do the Usual Conflict Rules Apply to a Participating Lawyer?

10. The first question is whether the relaxed conflicts rules that apply to the Participating Lawyer *during* the provision of the short-term limited legal services also apply if a conflict between a Program Client and another client or prospective client arises (or is discovered) *after* the short-term representation has ended. Suppose, for example, that after the Participating Lawyer has finished rendering services in a certain matter to a short-term Program Client, a prospective client seeks to retain the Participating Lawyer in the same or a substantially similar matter, and the prospective client's interests in the matter are materially adverse to those of the Program Client. Does Rule 6.5 continue to apply? If not, then the lawyer would be subject to the more exacting conflict provisions that ordinarily apply.[29]

11. We believe that Rule 6.5 continues to relax the conflict rules in this situation until there is actual knowledge of a conflict. Our conclusion is based on the Rule's broad language, its policy of facilitating participation in limited legal services programs, and the lack of any provision explicitly terminating its application at the conclusion of the short-term representation. *See* Rule 6.5(b) (providing that except when conflict is imputed based on actual knowledge, Rules 1.7 and 1.9 "are inapplicable to a representation governed by this Rule").

12. Thus, when a prospective client seeks to retain the Participating Lawyer, and unknown to the Participating Lawyer there is a potential conflict arising from the lawyer's participation in the Program, the Participating Lawyer remains subject only to the relaxed conflict provisions of Rule 6.5(a)-(b). In other words, if the Participating Lawyer does not have "actual knowledge" of a conflict with the Program Client, then the Participating Lawyer may undertake the new representation.[30]

13. However, if at any time the Participating Lawyer comes to have actual knowledge that the prospective client is seeking representation in a matter that is the same as or substantially related to a matter on which the Participating Lawyer represented a Program Client, and that the interests of the two are materially adverse, then the relaxed conflict provisions of Rule 6.5(a)-(b) cease to apply. *See* Rule 6.5(e). At that point, the regular conflicts rules apply as usual, and the Participating Lawyer may not represent the prospective client absent the former Program Client's informed consent confirmed in writing. *See* Rule 1.9(a).

B. Are the Participating Lawyer's Conflicts Imputed to the Firm?

14. In the second question, the inquirer asks whether Rule 1.10(a), which imputes a lawyer's conflicts under certain rules to others associated in the same firm, would prohibit another member of the

29 If Rule 6.5 did not apply, the lawyer would be subject to the provisions in Rule 1.9 that govern conflicts relating to former clients. *See* Rule 6.5, Cmt. [1] (noting that in advice-only clinics and pro se counseling programs, "a client-lawyer relationship is established"); Rule 6.5, Cmt. [2] (stating that except as provided in Rule 6.5, the limited representation is subject to all the Rules, and citing as an example Rule 1.9(c), which applies to former clients). *But see Simon's New York Rules of Professional Conduct Annotated* 1321 (2013 ed.) (arguing that limited-service clients should enjoy only the protections accorded prospective clients under Rule 1.18 rather than the broader protections accorded former clients under Rule 1.9).

30 Of course it would still be necessary to consult the firm conflict-checking system to check for possible conflicts with current firm clients, and with former clients other than Program Clients. Rule 6.5 relaxes the requirement of using a conflict-checking system only with respect to short-term clients under that Rule; with respect to other former clients and current ones, Rules 1.7, 1.9 and 1.10(e) apply as usual.

Participating Lawyer's firm from representing a client who has interests materially adverse to the Program Client in the same or a substantially similar matter.

15. In analyzing this question, we are again guided by the Rule's broad language and its policy of facilitating participation in short-term legal services programs. For such programs, Rule 6.5 not only limits the application of underlying conflict provisions such as Rules 1.7 and 1.9, but also – at least as to a Participating Lawyer – limits the application of the imputation provisions of Rule 1.10. *See* Rule 6.5(a)(2). We believe that just as applying a rigid imputation rule to a Participating Lawyer could unduly burden a firm's participation in such programs, so could undue burdens result from applying a rigid imputation rule to other lawyers in the Participating Lawyer's firm. And the rules do not by their terms explicitly mandate such imputation to other lawyers in the firm.[31]

16. Thus, if a new client seeks to retain the Participating Lawyer's firm in a matter that is the same as or substantially related to a matter on which the Participating Lawyer represented a Program Client, and there is known material adversity between the interests of the two, then Rule 1.10(a) will not preclude other members of the firm from representing the new client, even though Rule 1.9(a) will preclude the Participating Lawyer from doing so absent proper waiver.[32] The same reasoning applies if the firm discovers that it is *already* representing a client in a matter that is the same as or substantially related to a matter on which the Participating Lawyer represented a Program Client, and that there is material adversity between the interests of the two. In that case too, the Participating Lawyer's conflict would not be imputed to other members of the firm, and those other members could continue the representation.[33]

17. Nothing about the limited nature of the Program modifies the Participating Lawyer's duties of confidentiality to the Program Client.[34] Thus, even when the Participating Lawyer or another lawyer in the firm may and does represent another client with materially adverse interests in a substantially related matter, the Participating Lawyer may not reveal confidential information of the former Program Client, or use confidential information of the former Program Client to that former client's disadvantage, except as permitted by Rule 1.9(c).

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31 So long as a possible conflict remains governed by Rule 6.5 – which means that the application of that Rule has not been negated by actual knowledge under Rule 6.5(a) and (e) – then the possible conflict is not governed by Rule 1.7 or 1.9, and the literal terms of Rule 1.10(a) therefore do not impute any conflict. Rule 6.5 ceases to apply when the Participating Lawyer comes to have actual knowledge of a conflict, but the Rules do not explicitly provide in that case that Rule 1.10 springs back to apply to other lawyers in the firm. *Cf.* Rule 6.5(a)(2) (providing that in case of actual knowledge *the Participating Lawyer* shall comply with Rule 1.10); Rule 6.5, Cmt. [5] (Rule 1.10 does "become applicable" if the Participating Lawyer later undertakes to represent the Program Client "on an ongoing basis," meaning beyond the confines of the short-term program).

32 We have addressed only the situation in which the conflict is known to the firm. It is also possible, especially since conflict-checking systems are not required to include short-term clients, see paragraph 9 *supra*, that the firm would not discover the conflict. But in that case there would be no argument for imputation. *See* Rule 1.10(a) (providing that lawyers shall not "knowingly" represent a client whom an associated lawyer could not represent due to certain kinds of conflicts).

33 Of course Rule 6.5 affects only those conflicts that could arise as a result of a lawyer's participation in a short-term limited legal services program. If other lawyers in the firm have any direct or imputed conflicts arising from any other source, then Rule 6.5 would not alter their obligation to follow the normal rules governing conflicts of interest.

34 Confidentiality duties are defined by Rule 1.6 during the short time of the representation in the Program, and thereafter are defined by Rule 1.9(c). *See* Rule 6.5(d) (short-term limited legal services representation "shall be subject to the provisions of Rule 1.6"); Rule 6.5, Cmt. [2] (except as provided in Rule 6.5, all rules of legal ethics, "including Rule[ ] 1.6 and Rule 1.9(c), are applicable to the limited representation"). We decline to follow the alternative suggestion, see note 3 *supra*, that confidentiality duties should be only those that apply to prospective clients under Rule 1.18.

18. The ethical obligations arising from participating in the Program extend beyond the Participating Lawyer. All lawyers with management responsibility in the firm, and the firm itself, are required to make reasonable efforts to ensure that the lawyers in the firm conform to ethical obligations. *See* Rule 5.1(a), (b). Here, those obligations include (i) the Participating Lawyer's duty of confidentiality to the Program Client and (ii) the Participating Lawyer's duty to refrain from representing a client materially adverse to the Program Client when the Participating Lawyer actually knows of a conflict prohibiting such representation.

CONCLUSION:

19. A lawyer who has represented a client in a limited pro bono legal services program is prohibited from subsequently representing a materially adverse client in the same or a substantially related matter only if the lawyer has actual knowledge of the conflict. Even if the lawyer has actual knowledge of such a conflict, however, the conflict is not imputed to others in the lawyer's firm. Whether or not anyone in the firm represents a client adverse to the limited-services client, the lawyer who represented the limited-services client remains bound by confidentiality obligations to that client.

20-14

OPINION 1013 (08/01/2014)

TOPIC: Dual Practice; Conflict of Interest

DIGEST: An attorney who works as a broker at a brokerage firm cannot represent an owner of property in foreclosure proceedings for the purposes of preventing the foreclosure and allowing the attorney to subsequently act as a broker for the brokerage firm to purchase the property.

RULES: Rules 1.7(a) & (b).

FACTS:

1. The inquirer, who is an attorney, is also working as a broker at a brokerage firm that wishes to purchase a property. The owner of the property is in foreclosure proceedings.

2. The inquirer desires to represent the defendant owner in foreclosure proceedings for the purpose of preventing the foreclosure so the brokerage firm where he works as a broker can purchase the property. The inquirer concedes that he would be "the broker and attorney on the same property at the same time," but contends that "the roles would be played in two different manners[:] One as attorney in litigation with the lien holder, and one as broker for the prospective purchasing brokerage."

QUESTION:

3. May an attorney who works as a broker at a brokerage firm represent an owner of property in foreclosure proceedings for the purposes of preventing the foreclosure and allowing the attorney to subsequently act for the brokerage firm in its purchase of the property?

OPINION:

4. We have concluded in a legion of opinions that a lawyer may not act as an attorney on behalf of any party to a real estate transaction in which the lawyer or the lawyer's spouse is acting as a broker because the dual role creates a conflict between the interests of the client and the interests of the lawyer. *See, e.g.*, N.Y. State 919 (2012); N.Y. State 493 (1978); N.Y. State 340 (1974); N.Y. State 291 (1973); N.Y. State 244 (1972); N.Y. State 208 (1971). This conflict is not waivable, so the prohibition cannot be overcome through disclosure and client consent under Rule 1.7(b). *See* N.Y. State 919; N.Y. State 208. "'The rationale for these opinions is that a lawyer should not have a personal stake in the advice rendered, and a broker who is paid only if the transaction closes cannot be fully independent in advising the client as a lawyer.'" N.Y. State 919 (2012) (quoting N.Y. State 753 (2002)).

5. The facts presented by this inquiry demand the same analysis and the same result; a nonconsentable conflict arises in the situation posed by the inquirer. As in situations where an attorney acts as both a real estate broker and an attorney, an inherent conflict of interest arises when the lawyer represents the defendant owner in mortgage foreclosure proceedings with the intention of thereafter purchasing the property as broker for a prospective purchaser. A "reasonable lawyer would conclude" that where an attorney representing a defendant owner in a mortgage foreclosure proceeding plans to subsequently purchase the property as a broker for a prospective purchaser, "there is a significant risk

that the lawyer's professional judgment on behalf of [the] client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Rule 1.7(a)(2). This is due to the fact that any outcome in the mortgage foreclosure proceeding in which the plaintiff lender obtains the property, even if that is the best possible result for the client, will thwart the attorney's plan to broker the purchase of the property from the client.

6. Furthermore, we conclude that the inquirer cannot "provide competent and diligent representation" to the defendant owner in the mortgage foreclosure proceeding, as required by Rule 1.7(b)(2), because his judgment will be inherently tainted by his desire to subsequently broker the purchase of the property from the client, which will necessarily be contingent on the outcome of the foreclosure proceeding. Therefore, the inquirer's conflict cannot be cured by the client's informed consent under Rule 1.7(b)(4).

CONCLUSION:

7. An attorney who works as a broker at a brokerage firm cannot represent an owner of property in foreclosure proceedings for the purposes of preventing the foreclosure and allowing the attorney to subsequently act as a broker for the brokerage firm to purchase the property.

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OPINION 1014 (08/04/2014)

TOPIC: Solicitation; client recommendation

DIGEST: Lawyer may contact prospective client recommended by current client when prospective client has made known that lawyer should contact the prospective client and the lawyer did not make any payment or give any other consideration to the current client for the recommendation.

RULES: 1.0(a), 7.2, 7.3, 8.4(a)

QUESTION:

1. May a lawyer contact a prospective client who is detained in jail, prison or an immigration holding center when a current client advises the lawyer that the prospective client desires the lawyer to contact him as a result of the current client's recommendation, for which no payment or other consideration was made?

FACTS:

2. A lawyer's current client is being held in a detention center and has recommended the lawyer to a fellow detainee. The prospective client has told the lawyer's client that he would like the lawyer to contact him to discuss his defense. The client has given the prospective client's name and telephone number to the lawyer and advised the lawyer that the prospective client would like the lawyer to contact him. The lawyer neither requested that the client make any recommendations nor did the lawyer make any payment or give any other consideration to the client.

OPINION:

3. The traditional manner of obtaining new clients has from early days been the recommendation of satisfied clients. The original Canon 27 of the ABA Canons of Professional Ethics adopted in 1908 provided in part that "[T]he most worthy and effective advertisement possible, even for young lawyers . . . is the establishment of a well-merited reputation for professional capacity and fidelity to trust." "The best way to build a practice is to work hard and conduct yourself ethically. In short time you will win the approval of clients, other lawyers, and judges; with their approval will come recommendation and success." Raymond L. Wise, *Legal Ethics* 137 (1970).

4. The vast majority of people do not know a lawyer. It is natural for one to ask a neighbor, an acquaintance, a business associate, a fellow worker or even a fellow prisoner or detainee not only for a recommendation, but in many instances an introduction to their lawyer.

5. Where nothing of value is given to the person recommending the lawyer, the proscription of Rule 7.2(a) and its predecessor DR 2-103(B) that provide that a "lawyer shall not compensate or give anything of value to a person . . . to recommend . . . a client or as a reward for having made a recommendation resulting in employment by a client . . ." is inapplicable. The recommendation by the lawyer's current client was unsolicited and nothing was paid to the client by the lawyer. Gratuitous referrals from current and former clients were never viewed as unethical. ABA Inf. 1298 (1974). Indeed the title of Rule 7.2 is "*Payment* for Referrals."

6. Comment [1] to Rule 7.2 which provides that "[l]awyers are not permitted *to pay* others for channeling professional work" (emphasis added) similarly places the prohibition on the fact of a payment or reward. As stated in Roy D. Simon, *New York Rules of Professional Conduct* 1633 (2014 ed.) "[a] lawyer must not pay cash or any other form of compensation to anyone or any entity for referring business to the lawyer unless one of the exceptions to subparagraphs (a)(1) and (a)(2) applies." The vice that these rules address is the *payment* to what have been described as "touts," "runners" and "ambulance chasers." If there is no payment involved the proscription in not applicable.

7. Not surprisingly we find no Rule that prohibits a lawyer from contacting a prospective client who has requested the lawyer do so on the recommendation of a current client.

8. The provisions of Rule 7.3(a)(1) which prohibit "in-person or telephone" solicitation (with exceptions not here pertinent) are also inapplicable. Solicitation is *advertising initiated* by or on behalf of a lawyer. Rule 7.3(b). Here the contact with the potential client was not initiated by or on behalf of the lawyer. Comment 2 to Rule 7.3 further emphasizes the point that to be solicitation the contact must be initiated by the lawyer. The Comment provides that solicitation means an advertisement "that is initiated by a lawyer or law firm *(as opposed to a communication made in response to an inquiry initiated by a potential client.)"* (Emphasis added). Here the current client, without prompting by the lawyer, recommended the lawyer to a fellow detainee. Even though the lawyer's contact with the prospective client might be considered an advertisement under Rule 1.0(a), the contact by the lawyer to the prospective client is being made at the request of the prospective client and thus has not been *initiated* by the lawyer. This is no different than a lawyer returning a voice mail message left by a prospective client or a response by a lawyer to a request for proposals to provide legal services. There is nothing improper in returning a request to be contacted. It has been summarized that "a response to a prospective client is not a solicitation." *Simon* at 1699. If upon the initial contact with the prospective client it is apparent that the prospective client did not request to be contacted by the lawyer, the lawyer must cease the conversation as further contact would constitute proscribed solicitation under Rule 7.3(a)(1).

9. Under the Code of Professional Responsibility, which governed the conduct of lawyers until April 1, 2009, this Committee determined that it was not ethically improper for a lawyer to accept referrals from real estate brokers. N.Y. State 467 (1977). Under the Rules of Professional Conduct, which replaced the Code, we have determined that it is not improper to accept referrals from accountants and bankers. N.Y. State 988, ¶7 (2013). In these instances there was no consideration paid by the lawyer for the referrals.

10. We conclude that the question is not who made the referral, but rather whether the lawyer initiated the solicitation or paid the person for the referral. If the lawyer neither initiated the solicitation of the proposed client nor paid for the referral, the lawyer may accept the proposed client. Thus, the inquiry is answered in the affirmative. The lawyer may contact a prospective client that a current client advises wants to be contacted by the lawyer, provided the lawyer neither initiated the contact nor paid for the referral. The same conclusion was reached in N. Y. City 2000-1 (2000), Texas Opinion 623 (2013), Boston Opinion 2012-01 (2012) and Rhode Island Opinion 98-16 (1998).

11. Nevertheless, a lawyer cannot instigate a current client or anyone else to solicit a specific client for the lawyer if the lawyer could not directly solicit the prospective client under Rule 7.3(a). The

lawyer cannot do indirectly through the acts of a third- party that which he is forbidden to do. Rule 8.4(a) ("A lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another"). N.Y. State 988, ¶6 (2013). On the other hand, it is not improper to encourage clients and others to recommend the lawyer to their friends if they know someone who needs a lawyer.

CONCLUSION:

12. It is not unethical for a lawyer to contact a prospective client who has advised a current client that the prospective client would like the lawyer to contact him after the current client recommended the lawyer, provided that the lawyer has not paid or given anything of value to the current client for the recommendation.

(3-14)

OPINION 1015 (08/04/2014)

TOPIC: Dual practice; conflict of interest; nonlegal services

DIGEST: Lawyer who is also a real estate broker may represent the seller of real property and act as broker in same transaction if the lawyer's fee as a broker is fixed and non-refundable and any conflict is properly waived. Broker services that are not distinct from legal services are subject to the rules of legal ethics.

RULES: 1.5(a); 1.7; 5.7

FACTS:

1. The inquirer is both a lawyer and a licensed real estate broker. He proposes to provide certain broker services to sellers of real estate and then, if a buyer is found, also to provide legal services to the seller in the resulting transaction. The broker services would be compensated in a flat fee paid in advance rather than in a commission-based payment contingent upon closing.

2. The inquirer has provided two examples of the proposed arrangements. One example is that he would charge a fixed non-refundable fee of $300 for listing the property on the local multiple listing service ("MLS"), and the client would be advised that such listing would be the only service provided.[35] In the other example, the inquirer would charge a fixed non-refundable fee of $1,500 for all services normally provided by a broker for a seller. Even this larger amount would typically be less than the traditional broker's fee.[36]

3. In both examples, the inquirer would also represent the seller as the seller's lawyer in connection with the sale. Although the flat-rate broker fees would be lower than standard commission-based fees, the inquirer would not on that account charge more for his legal services than he charges other law clients for similar services.

QUESTION:

4. May a lawyer who is also a licensed real estate broker act as the lawyer for a seller of real property and also act as the seller's broker if the lawyer's compensation as broker is a fixed non-refundable fee not contingent on the closing of the sale?

35 This is in effect a listing for sale by owner ("FSBO"). However, if the seller wants the property listed on an MLS, the seller needs to engage a broker who is a participant in that MLS. The MLS arrangements, by providing for a commission to a broker representing the ultimate buyer, encourage brokers for prospective buyers to show the property. Typically the MLS listing form, signed by the seller and the seller's broker, sets forth the compensation of the seller's broker and the compensation of the buyer's broker, if any, to be paid by the seller. The inquirer is a participant in the local MLS.

36 We understand that there is some variation in fee arrangements depending on the transaction and the area of the State. Sometimes the seller's broker is paid a contingent fee of 6%, split equally with the buyer's broker so that each receives 3% of the selling price. In other cases the commission percentage and the split may be a bit different. But under any of the variations, the $1,500 fixed broker's fee would in most instances be significantly less than a traditional percentage-based fee.

OPINION:

5. The New York Rules of Professional Conduct (the "Rules") generally prohibit a representation in which there is a significant risk that the lawyer's personal interests would have an adverse effect on the lawyer's exercise of professional judgment.[37]

6. We have opined on numerous occasions that a lawyer may not act as an attorney on behalf of any party to a real estate transaction in which the lawyer is acting as a broker. *See, e.g.*, N.Y. State 1013 ¶1 (2014); N.Y. State 933 ¶7 (2012), N.Y. State 919 ¶3 (2012) (citing N.Y. State 493 (1978); N.Y. State 340 (1974); N.Y. State 291 (1973); N.Y. State 244 (1972); N.Y. State 208 (1971)). "The rationale for these opinions is that a lawyer should not have a personal stake in the advice rendered, and a broker who is paid only if the transaction closes cannot be fully independent in advising the client as a lawyer." N.Y. State 1013 ¶1 (2014) (quoting N.Y. State 753 (2002) and N.Y. State 919 (2012)).

7. The risk that legal judgment would be adversely affected is heightened by the common circumstance that the broker's contingent fee will be substantially greater than the fee of the lawyer representing the seller. Indeed, given the usual fee arrangements, we have found the risk so great that "[t]he conflict is nonconsentable (*i.e.*, non-waivable), meaning that the prohibition cannot be overcome through disclosure and client consent" under Rule 1.7(b). N.Y. State 919 ¶3; *see* Rule 1.7(b)(1) (providing that conflict is nonconsentable if the lawyer cannot "reasonably" believe that the lawyer will be able to provide competent and diligent representation to the affected client).

8. However, these prior opinions were based on the premise of contingent brokers' commissions; we have not previously addressed the kind of broker's fee proposed in this inquiry. If a fee for broker services is not contingent on the transaction being closed and is non-refundable, then there is no reason to believe that the lawyer's professional judgment would be adversely affected by the lawyer's interest in that broker's fee. The reasoning in our prior opinions thus does not apply to the current inquiry.

9. On the facts of the current inquiry, however, there may still be a conflict of interest arising from considerations other than the lawyer's interest in the broker's fee.

> When a lawyer or law firm provides both legal and nonlegal services in the same matter . . . , a conflict with the lawyer's own interests will nearly always arise. For example, if the legal representation involves exercising judgment about whether to recommend nonlegal services and which provider to recommend, or if it involves overseeing the provision of the nonlegal services, then a conflict with the lawyer's own interests under Rule 1.7(a)(2) is likely to arise.

Rule 5.7, Cmt. [5A]; *see* N.Y. State 958 ¶17 (2013) (citing opinions holding that Rule 1.7 applies with undiminished force when lawyer's conflicting personal interest arises from a separate, permitted nonlegal business). For example, a lawyer representing a real estate seller who also engages the services

37 Rule 1.7(a)(2) provides that "a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests" unless the conflict is waivable and properly waived pursuant to Rule 1.7(b).

of a real estate broker may have occasion to advise his client as to whether the broker services are being well performed. When, as proposed in the inquiry, the lawyer performs the broker services as well, there can be the kind of personal-interest conflict described in the Comment. This leads to the question whether such a conflict would be consentable.

10. The nonconsentability of the conflicts discussed in our prior broker opinions was based on fee considerations not present here. As to the current inquiry, if the lawyer believes that he will be able to provide competent and diligent legal representation to a particular seller, we do not see anything in the facts presented that would preclude that seller's proper waiver of the conflict.[38] If the seller gives informed consent confirmed in writing, as required by Rule 1.7(b)(4), then the inquiring lawyer may undertake the representation.

11. We referred in paragraph 9 to the lawyer's provision of nonlegal services – here, acting as a broker – because it bears on whether the lawyer has a conflict of interest in the concurrent provision of legal services. But an analysis of the inquirer's ethical obligations also requires consideration of the ways in which nonlegal services can themselves be subject to the rules of legal ethics. Rule 5.7 sets forth the responsibilities regarding nonlegal services, which are defined as "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." Rule 5.7(c).

12. We understand that the services of a real estate broker may include pricing the house, market analysis, and advice on how to present the house and highlight desirable amenities. The broker may participate in marketing the house with for-sale signs, internet and newspaper advertising, direct-mail flyers, showings, an MLS listing to interest other brokers, and determination of factors such as annual utility costs and local school facts. The broker may also handle offers, counter-offers and contingency issues, up to final price negotiations, and keep a paper trail from initial offer to final closing. These are all services that both lawyers and nonlawyers may lawfully provide. Thus, as noted in N.Y. State 933 ¶8 (2012), broker services are nonlegal services within the meaning of Rule 5.7.

13. Different parts of Rule 5.7 apply to different situations. To determine which provision applies when a lawyer provides both legal and nonlegal services to a client, it is necessary to consider whether the nonlegal services "are distinct" from legal services being provided to that client. *See* Rule 5.7(a)(1), (2); Rule 5.7, Cmt. [1] ("Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other."). If they are not distinct, then the lawyer is subject to the Rules of Professional Conduct "with respect to the provision of both legal and nonlegal services." Rule 5.7(a)(1).

14. In the arrangements proposed here, the inquiring lawyer would provide legal and nonlegal services to a client from the same office and in the very same matter. Some of the potential nonlegal services, such as price negotiation, are ones also commonly performed by lawyers. Moreover, it appears that the client would communicate with the inquirer in the same way, and perhaps in the same conversations, for the provision of legal and nonlegal services. Possibly the contemplated legal and nonlegal

38 *See* Rule 1.7(b)(1) (precluding waiver if belief in ability to provide competent and diligent representation would be unreasonable); Rule 1.7(b)(2) (precluding waiver when representation is prohibited by law); Rule 1.7(b)(3) (precluding waiver when one client asserts claim against another).

services could be structured so as to keep them distinct.[39] But that has not been attempted here. Under the facts as presented, the inquirer's broker services to a client would *not* be distinct, for purposes of Rule 5.7, from the legal services to that client. *Cf.* N.Y. State 860 (2011) (legal and nonlegal services not distinct "where the law firm provides both grant writing services and tax advice or other legal services related to the grant application").

15. Because the nonlegal and legal services would not be distinct, nonlegal broker services would be subject to all ethical protections "that ordinarily accompany a client-lawyer relationship," such as "the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence." Rule 5.7, Cmt. [1]. Moreover, the prohibition of excessive fees in Rule 1.5(a) applies not only to legal fees, but also to the lawyer's overall compensation for the transaction, when there are legal and nonlegal services that are not distinct. *See* N.Y. State 958 ¶14 (2013).

CONCLUSION:

16. A lawyer may represent a seller of real property while also representing the seller as broker if (a) the services as broker are for a fixed non-refundable fee that is not contingent on the closing of the transaction, and (b) any conflict is properly waived. If the legal and broker services are not distinct, then the provision of broker services is subject to the rules of legal ethics, and the combined fees for legal and broker services may not be excessive.

(19-14)

39 For example, it could count toward a conclusion of distinct services if the lawyer performs all broker services at an office away from the law office and with a different company name, staff, and telephone number. If the services are distinct and the lawyer advises the client in writing that the broker services "are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services," then the broker services would not be subject to rules of legal ethics, with some exceptions. Rule 5.7(a)(2), (4); *see* Rule 5.7, Cmt. [4] (noting that some rules, "such as those prohibiting lawyers from misusing the confidences or secrets of a former client (see Rule 1.9), requiring lawyers to report certain lawyer misconduct (see Rule 8.3), and prohibiting lawyers from engaging in illegal, dishonest, fraudulent or deceptive conduct (see Rule 8.4), apply to a lawyer irrespective of the existence of a representation" and thus govern even the provision of distinct nonlegal services).

OPINION 1016 (08/04/2014)

TOPIC: Advertising

DIGEST: An attorney may advertise using commercial posts sent via email to members of internet message boards provided the advertisement is not false, deceptive or misleading, does not otherwise violate the Rules and the label "Attorney Advertising" is in the subject line of the email.

RULES: Rule 1.0(a), 1.0(c), 7.1, 7.3, 7.4 & 8.4(c)

FACTS:

1. A sole practitioner belongs to several internet message boards, including one for parents and one for residents of specific neighborhoods. The attorney primarily practices in the areas of wills, trusts & estates and guardianship matters and proposes to advertise on the internet message boards to which the attorney belongs through an email sent to all the members of a particular message board.

2. The proposed advertisement would include the attorney's contact information, practice areas and a list of languages spoken, and would state that the attorney offers in-home consultations for the elderly and parents of young children.

QUESTION:

3. May an attorney advertise via commercial post email sent to the members of a message board to which the attorney belongs?

4. If so, are there any relevant limitations?

OPINION:

Attorney Advertising

5. Rule 1.0(a) of the New York Rules of Professional Conduct (the "Rules") defines the term "advertisement" as follows:

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

6. Rule 7.1 of the Rules governs advertisements by lawyers and law firms and states in part as follows:

> (a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:
>
> (1) contains statements or claims that are false, deceptive or misleading; or

(2) violates a Rule.

7. Rule 7.1(b) expressly provides that subject to the provisions of Rule 7.1(a), advertisements may include information as to "legal and nonlegal education, degrees and other scholastic distinctions . . . areas of law in which the lawyer or law firm practices, as authorized by these Rules . . . foreign language fluency . . ." In addition, Rule 7.1(h) requires that "[a]ll advertisements . . . include . . . the principal law office address . . . of the lawyer or law firm whose services are being offered."

8. Clearly the information that the attorney proposes to include in the advertisement is permissible under Rule 7.1(b).

9. The Rules also contain certain requirements to be included in advertising. Rule 7.1(f) requires that most lawyer advertising be labeled "Attorney Advertising." Specifically Rule 7.1(f) states in part that:

> "every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any website related thereto) or made in person under Rule 7.3(a)(1) must be labeled "Attorney Advertising" on the first page or on the home page in the case of a website . . . in the case of electronic mail, the subject line shall contain the notation "**ATTORNEY ADVERTISING**."

10. In N.Y. State 848 (2010), the Committee determined that if a proposed newsletter is determined to be an advertisement then the law firm "should consider the audience for the newsletter in order to determine whether it must be labeled "Attorney Advertising." The Committee concluded that if the newsletter at issue "will also be circulated and made available electronically via the firm's website, via email, and via blogs, and posts where the precise nature of the receiving audience is unknown, [the] Law Firm must include the phrase "Attorney Advertising" on electronic versions of the newsletter." In making this determination the Committee explained that "[t]he "Attorney Advertising" label serves to dispel any confusion or concern that might be created when non-lawyers receive letters or emails from lawyers and the recipients might not otherwise know whether these communications are advertisements or educational items."[40]

11. The advertisement must also comply with Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation," and "with Rule 7.4 ("Identification of Practice and Specialty"), which prohibits a lawyer or law firm from stating that the lawyer or law firm is a specialist or specializes in a particular field of law except in special circumstances." N.Y. State 841 (2010).

Does the Advertisement Constitute a Solicitation?

12. The advertisement would be transmitted via an email commercial post to all the members of the various message boards of which the attorney is a member, including parenting groups, neighbor-

40 In addition, if the advertisement contains "statements that are reasonably likely to create an expectation about results the lawyer can achieve," and "statements that compare the lawyer's services with services of other lawyers" the precise disclaimer language, "prior results do not guarantee a similar outcome" is required. See, Rule 7.1(e) (3).

hood specific groups and parents of children with special needs. Does such advertising constitute a solicitation?

Comment [1] of Rule 7.3 states that "Not all advertisements are solicitations within the meaning of this Rule." Solicitation is defined in Rule 7.3(b) as follows:

> "Solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

13. Comments [3] and [4] to Rule 7.3 provide guidance as to whether an advertisement is considered to be directed to or targeted at a specific recipient or recipients.

14. Comment [3] states that one way that an advertisement may be considered to be directed to or targeted at a specific recipient or recipients is if it is made by "in-person or telephone contact or by real time or interactive computer-accessed communication or if it is addressed so that it will be delivered to the specific recipient or recipients or their families or agents." A non-interactive commercial post to members of the message group would not constitute an interactive computer-accessed communication.

15. In addition, comment [4] of Rule 7.3 states that "[u]nless it falls within Comment [3] an advertisement in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or recipients." The presumption would not be rebutted simply because the advertisement is "intended to attract potential clients with needs in a specified area of law" and that fact would not render the advertisement to be targeted at a specific recipient or recipients. *See* Rule 7.3, Cmt. [4]. Similarly, the reality that some of the recipients of the proposed advertisement might be in need of the legal services offered by the attorney does not transform the advertisement into a solicitation. *Id*.

16. Because the proposed advertisement is not directed to, or targeted at, a specific recipient or group of recipients, it would not be a solicitation under Rule 7.3.

CONCLUSION:

17. An attorney may advertise using commercial posts sent via email to members of internet message boards to which the attorney belongs provided the advertisement is not false, deceptive or misleading, does not otherwise violate the Rules and the label "Attorney Advertising" is in the subject line of the email.

(39-13)

OPINION 1017 (08/06/2014)

TOPIC: Firm Name; Trade Name

DIGEST: A law firm's staff may answer the firm's telephones using the first initials of the last names of the named partners. Such limited use of the initials would not be practice under a trade name and would not violate Rule 7.5(b) as long as the firm will not practice law using those initials. The name of the little league team sponsored by the inquirer's firm could be the first initials of the named partners' last names; such a designation would not constitute practice under a trade name.

RULES: 7.5(b), 7.5(e)

FACTS:

1. For ease of answering phones, the inquirer would like to have the office staff answer the phones stating "ABC Law Firm." "ABC" represents the first initials of the last names of the named partners and would be for the limited purpose of answering the phones.

2. The inquirer also indicates that the firm would like to sponsor a little league team with the name "ABC Law Firm" and ABC would again represent the first initials of the last names of the named partners.

QUESTION:

3. Is the proposed conduct ethically permissible?

OPINION:

4. Rule 7.5(b) of the New York Rules of Professional Conduct (the "Rules") is relevant to answer the first question as it governs law firm names and the restrictions involved. Specifically, Rule 7.5(b) states in pertinent part:

> A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that by the name of a professional corporation shall contain "PC" or such symbols permitted by law, the name of a limited liability company or partnership shall contain "LLC," "LLP" or such symbols permitted by law . . .

In N.Y. State 740 (2001), the Committee concluded that "using a name that is not the legal name of one or more partners or former partners in the law firm constitutes use of a trade name."The prohibition against practice under trade names is broad and Rule 7.5(b) serves to protect the public from being deceived as to the identity, responsibility or status of those who use the firm name. *See* N.Y. State 920 (2012) (citing N.Y. State 732 (2000), which applied the trade name prohibition under the former Code of Professional Responsibility).

5. Rule 7.5(e)(2) states that "A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided: the lawyer or law firm in no way attempts to engage in the practice of law using the domain name." Comment [2] to Rule 7.5(e) states that "as long as a firm's name complies with other Rules, it is always proper for a law firm to use its own name or its initials or some abbreviation or variation of its own name as its domain name."

6. In N.Y. State 872 (2011), we opined on the question of whether a lawyer with a Polish first name could use an English version of that name on business cards and his firm's website. We concluded that "a lawyer's use of an English name [in informal communications, on business cards and on his firm's website] is not misleading as to the identity of the lawyer and is not dishonest, fraudulent, deceitful, or a misrepresentation." Accordingly, it "does not run afoul of either Rule 7.5(b) or Rule 8.4(c)." We also stated that the attorney could use a "nickname by which the attorney is commonly known, as long as the name is not misleading as to the lawyer's identity."

7. In N.Y. State 1003 (2014), we concluded that a lawyer who practices under his full name may use a law firm name that includes only the lawyer's middle name initials and last name, without including his first name.

8. In the instant inquiry, the law firm does not want to change its name or practice under a different name. The law firm merely wants to use the named partners' initials for the limited purpose of answering the phones. The proposed use of the initials as a greeting to answer the phones is similar to the use of a nickname or English name in "informal communications" by the lawyer in N.Y. State 872. Neither the use of the nickname nor the use of the initials to answer the phone (as in the instant inquiry) would be used by the respective attorneys to practice law. We conclude that the use of the partners' initials when answering the telephones does not constitute practicing under a trade name, and does not misrepresent the identities of the lawyers. Therefore, the proposed limited use would not violate Rule 7.5(b). In addition, the sponsorship of a little league baseball team named after the initials of the named partners' last names, to wit, ABC Law Firm, would not constitute practice under a trade name, is not misleading as to the identities of the attorneys and is permissible under the applicable Ethics Rules.

9. In N.Y State 920 (2012), this Committee concluded that a lawyer may not practice under a law firm name that consists only of the lawyer's initials, but that the initials could constitute the firm's motto. We also stated that "[l]anguage or a name that is impermissible as a trade name may be permissible as a firm 'motto'" Here, the law firm does not intend to practice under the firm name ABC Law Firm, but rather intends to utilize the initials as a matter of convenience for the limited purpose of answering the phones. The firm name will remain the complete last names of the three named partners.

CONCLUSION:

10. A law firm's staff may answer the firm's telephones using the first initials of the last names of the named partners. Such limited use of the initials, without more, would not be practice under a trade name and would not violate Rule 7.5(b) as long as the firm will not practice law using those initials.

11. For the same reason, the name of the little league team sponsored by the inquirer's firm could be the initials of the named partners' last names.

(11-14)

OPINION 1018 (08/06/2014)

TOPIC: Conflict of interest; withdrawal of representation; referral to new attorney.

DIGEST: A law firm that has a conflict of interest and withdraws from representation may provide the former client with a good faith referral to other attorneys the law firm believes appropriate to represent the client.

RULES: Rule 1.1(c)(2), 1.7, 1.9(c)(1), 1.16

FACTS:

1. The inquiring law firm has determined that it has a conflict of interest with an existing client and is moving to withdraw as attorneys of record for the client. The law firm states that it is not retaining any financial interest in the client's case.

QUESTION:

2. The question posed by the inquiring law firm is whether, after withdrawing as the client's attorneys, it can refer the former client to specific attorneys that it believes would be appropriate counsel for the former client or whether it can only recommend that the former client seek other counsel.

OPINION:

3. At the outset, we note that lawyers are not required under the New York Rules of Professional Conduct to provide former clients with specific referrals when a conflict of interest arises. In the event that a lawyer decides to provide such a referral in good faith, this opinion addresses the ethical considerations that a lawyer faces.

4. While the Rules do not directly address the question posed, Rule 1.16(e) provides that upon termination of representation a lawyer shall take steps to avoid foreseeable prejudice to the rights of a client, including allowing time for the client to employ other counsel.

5. Accordingly, providing a recommendation concerning new counsel to the former client is consistent with Rule 1.16(e). For example, such a recommendation reduces the potential for prejudice to the rights of the former client because the former client will have available to it "appropriate" new counsel that can take over representation of the client's interests. As another example, a recommendation will likely result in the former client finding new counsel that can handle its matter more quickly than it otherwise might in the absence of the referral.

6. Further, such a recommendation provides the former client with the benefit of the law firm's judgment of the appropriateness of the recommended new counsel based on information the law firm possesses about the client and the client's case, and depriving the former client of the benefit of such a recommendation could potentially cause prejudice to the client, contrary to Rule 1.16(e).

7. The former client is free to accept or reject the recommendation or to consider the recommended attorney as one option in the search for new counsel. Ultimately, it will be up to the client to decide which attorney to retain to represent its interests.

8. It is also worth noting that our prior opinions have assumed referrals were permitted where representation by the referring attorney was not permitted under the governing ethical standards. *See*, *e.g.*, N.Y. State 338 (1974) (discussing that an attorney disqualified from representing a client may not accept a referral fee from the lawyer he recommended to handle a matter).

9. Consideration must also be given to whether such a referral runs afoul of Rules 1.1(c)(2) and 1.7 with respect to the rights of any continuing client whose representation caused the conflict that led to the withdrawal.

10. Rule 1.1(c)(2) prohibits a lawyer from intentionally prejudicing or damaging the client during the course of representation. However, we do not believe that a good faith recommendation of competent counsel to a former client under these circumstances is the type of prejudice or damage encompassed by Rule 1.1(c)(2).

11. Rule 4.3 supports this interpretation by allowing lawyers to advise unrepresented persons with potential conflicts with the lawyers' clients to seek counsel. Arguably, a lawyer's clients would be prejudiced by such a recommendation and in a better position had the unrepresented person remained uninformed about potentially needing counsel. Yet, the rules do not ban such a recommendation nor is the effect on the lawyer's client a factor in determining if the recommendation can be made.

12. This opinion is also consistent with D.C. Opinion 326 (2004) holding that a lawyer may recommend a specific attorney to a prospective client whose matter is adverse to that of an existing client. The D.C. Bar likewise opined that providing a specific referral did not violate the District of Columbia's equivalent to Rule 1.1(c)(2):

> We assume that in making the referral, the lawyer will act in good faith and will recommend competent and independent counsel. First, the person would almost certainly find a lawyer even in the absence of a recommendation. Second, it would be mere speculation to conclude that the lawyer the person might find on his own would not be as competent as the one recommended by the conflicted lawyer. The lawyer could be as good, better, or not as good as the one that the conflicted lawyer might recommend. Moreover, we cannot assume that it is disadvantageous to the referring lawyer's existing client for its adversary to be represented by competent counsel. Competent opposing counsel is likely in many cases to contribute to reaching a reasonable resolution of the dispute.

D.C. 326 (2004).

13. Before making a specific referral, the lawyer should also consider whether his or her professional judgment is affected, as set forth in Rule 1.7(a)(2). Ordinarily, we do not believe that providing a referral under these circumstances will impair a lawyer's professional judgment for purposes of Rule 1.7. However, should a lawyer reasonably believe that his or her professional judgment is affected, it would then be impermissible for the lawyer to provide a specific referral.

14. Likewise, Rule 1.9(c)(1) also prohibits an attorney from acting in a way that would disadvantage the former client.

15. The D.C. Bar also noted a few practical considerations that lawyers should consider before making a specific referral. For example, some clients may not understand why their lawyer helped an opposing party obtain other counsel and therefore client relations may impact whether a lawyer provides a specific referral. A lawyer may also want to provide several referrals "to avoid recriminations from the inquirer, should the recommended lawyer prove unsatisfactory, or from her client, should the recommended lawyer turn out to be vexatious." D.C. Opinion 326 (2004).

16. Ultimately, "each lawyer must decide for herself whether under the particular circumstances this is a wise thing to do." *Id*.

17. Of course, the referral itself must comply with the rules. *See* Rule 7.2; N.Y. State 745 (2001).

CONCLUSION:

18. A law firm that withdraws from representation of a client due to a conflict of interest may provide the client with a good faith referral to attorneys the law firm believes appropriate to handle the client's matter.

5-14

OPINION 1019 (08/06/2014)

TOPIC: Confidentiality; Remote Access to Firm's Electronic Files

DIGEST: A law firm may give its lawyers remote access to client files, so that lawyers may work from home, as long as the firm determines that the particular technology used provides reasonable protection to client confidential information, or, in the absence of such reasonable protection, if the law firm obtains informed consent from the client, after informing the client of the risks.

RULES: 1.0(j), 1.5(a), 1.6, 1.6(a), 1.6(b), 1.6(c), 1.15(d).

QUESTION:

1. May a law firm provide its lawyers with remote access to its electronic files, so that they may work from home?

OPINION:

2. Our committee has often been asked about the application of New York's ethical rules – now the Rules of Professional Conduct – to the use of modern technology. While some of our technology opinions involve the application of the advertising rules to advertising using electronic means, many involve other ethical issues. See, *e.g.:*

N.Y. State 680 (1996). Retaining records by electronic imaging during the period required by DR 9-102(D) [now Rule 1.15(d)].

N.Y. State 709 (1998). Operating a trademark law practice over the internet and using e-mail.

N.Y. State 782 (2004). Use of electronic documents that may contain "metadata".

N.Y. State 820 (2008). Use of an e-mail service provider that conducts computer scans of emails to generate computer advertising.

N.Y. State 833 (2009). Whether a lawyer must respond to unsolicited emails requesting representation.

N.Y. State 842 (2010). Use of a "cloud" data storage system to store and back up client confidential information.

N.Y. State 940 (2012). Storage of confidential information on off-site backup tapes.

N.Y. State 950 (2012). Storage of emails in electronic rather than paper form.

3. Much of our advice in these opinions turns on whether the use of technology would violate the lawyer's duty to preserve the confidential information of the client. Rule 1.6(a) sets forth a simple prohibition against disclosure of such information, i.e. "A lawyer shall not knowingly reveal confidential information, as defined in this Rule . . . unless . . . the client gives informed consent, as defined

in Rule 1.0(j).” In addition, Rule 1.6(c) provides that a lawyer must “exercise reasonable care to prevent . . . others whose services are utilized by the lawyer from disclosing or using confidential information of a client” except as provided in Rule 1.6(b).

4. Comment 17 to Rule 1.6 provides some additional guidance that reflects the advent of the information age:

> [17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. The duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered to determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to use a means of communication or security measures not required by this Rule, or may give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.

5. As is clear from Comment 17, the key to whether a lawyer may use any particular technology is whether the lawyer has determined that the technology affords reasonable protection against disclosure and that the lawyer has taken reasonable precautions in the use of the technology.

6. In some of our early opinions, despite language indicating that the inquiring lawyer must make the reasonableness determination, this Committee had reached general conclusions. In N.Y. State 709, we concluded that there is a reasonable expectation that e-mails will be as private as other forms of telecommunication, such as telephone or fax machine, and that a lawyer ordinarily may utilize unencrypted e-mail to transmit confidential information, unless there is a heightened risk of interception. We also noted, however, that “when the confidential information is of such an extraordinarily sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyer’s control, the lawyer must select a more secure means of communication than unencrypted internet e-mail.” Moreover, we said the lawyer was obligated to stay abreast of evolving technology to assess changes in the likelihood of interception, as well as the availability of improved technologies that might reduce the risks at a reasonable cost.

7. In N.Y. State 820, we approved the use of an internet service provider that scanned e-mails to assist in providing user-targeted advertising, in part based on the published privacy policies of the provider.

8. Our more recent opinions, however, put the determination of reasonableness squarely on the inquiring lawyer. See, e.g. N.Y. State 842, 940, 950. For example, in N.Y. State 842, involving the use of “cloud” data storage, we were told that the storage system was password protected and that data stored in the system was encrypted. We concluded that the lawyer could use such a system, but only if the lawyer took reasonable care to ensure that the system was secure and that client confidentiality

would be maintained. We said that "reasonable care" to protect a client's confidential information against unauthorized disclosure may include consideration of the following steps:

> (1) Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information;
>
> (2) Investigating the online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances;
>
> (3) Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored; and/or
>
> (4) Investigating the storage provider's ability to purge and wipe any copies of the data, and to move the data to a different host, if the lawyer becomes dissatisfied with the storage provider or for other reasons changes storage providers.

Moreover, in view of rapid changes in technology and the security of stored data, we suggested that the lawyer should periodically reconfirm that the provider's security measures remained effective in light of advances in technology. We also warned that, if the lawyer learned information suggesting that the security measures used by the online data storage provider were insufficient to adequately protect the confidentiality of client information, or if the lawyer learned of any breaches of confidentiality by the provider, then the lawyer must discontinue use of the service unless the lawyer received assurances that security issues had been sufficiently remediated.

9. Cyber-security issues have continued to be a major concern for lawyers, as cyber-criminals have begun to target lawyers to access client information, including trade secrets, business plans and personal data. Lawyers can no longer assume that their document systems are of no interest to cyber-crooks. That is particularly true where there is outside access to the internal system by third parties, including law firm employees working at other firm offices, at home or when traveling, or clients who have been given access to the firm's document system. See, e.g. Matthew Goldstein, "Law Firms Are Pressed on Security For Data," N.Y. Times (Mar. 22, 2014) at B1 (corporate clients are demanding that their law firms take more steps to guard against online intrusions that could compromise sensitive information as global concerns about hacker threats mount; companies are asking law firms to stop putting files on portable thumb drives, emailing them to non-secure iPads or working on computers linked to a shared network in countries like China or Russia where hacking is prevalent); Joe Dysart, "Moving Targets: New Hacker Technology Threatens Lawyers' Mobile Devices," ABA Journal 25 (September 2012); Rachel M. Zahorsky, "Being Insecure: Firms are at Risk Inside and Out," ABA Journal 32 (June 2013); Sharon D. Nelson, John W. Simek & David G. Ries, Locked Down: Information Security for Lawyers (ABA Section of Law Practice Management, 2012).

10. In light of these developments, it is even more important for a law firm to determine that the technology it will use to provide remote access (as well as the devices that firm lawyers will use to effect remote access), provides reasonable assurance that confidential client information will be protected. Because of the fact-specific and evolving nature of both technology and cyber risks, we cannot recommend particular steps that would constitute reasonable precautions to prevent confidential

information from coming into the hands of unintended recipients, including the degree of password protection to ensure that persons who access the system are authorized, the degree of security of the devices that firm lawyers use to gain access, whether encryption is required, and the security measures the firm must use to determine whether there has been any unauthorized access to client confidential information. However, assuming that the law firm determines that its precautions are reasonable, we believe it may provide such remote access. When the law firm is able to make a determination of reasonableness, we do not believe that client consent is necessary.

11. Where a law firm cannot conclude that its precautions would provide reasonable protection to client confidential information, Rule 1.6(a) allows the law firm to request the client's informed consent. See also Comment 17 to Rule 1.6, which provides that a client may give informed consent (as in an engagement letter or similar document) to the use of means that would otherwise be prohibited by the rule. In N.Y. State 842, however, we stated that the obligation to preserve client confidential information extends beyond merely prohibiting an attorney from revealing confidential information without client consent. A lawyer must take reasonable care to affirmatively protect a client's confidential information. Consequently, we believe that before requesting client consent to a technology system used by the law firm, the firm must disclose the risks that the system does not provide reasonable assurance of confidentiality, so that the consent is "informed" within the meaning of Rule 1.0(j), i.e. that the client has information adequate to make an informed decision.

CONCLUSION:

12. A law firm may use a system that allows its lawyers to access the firm's document system remotely, as long as it takes reasonable steps to ensure that confidentiality of information is maintained. Because of the fact-specific and evolving nature of both technology and cyber risks, this Committee cannot recommend particular steps that constitute reasonable precautions to prevent confidential information from coming into the hands of unintended recipients. If the firm cannot conclude that its security precautions are reasonable, then it may request the informed consent of the client to its security precautions, as long as the firm discloses the risks that the system does not provide reasonable assurance of confidentiality, so that the consent is "informed" within the meaning of Rule 1.0(j).

7-14

OPINION 1020 (09/12/2014)

TOPIC: Confidentiality; use of cloud storage for purposes of a transaction

DIGEST: Whether a lawyer to a party in a transaction may post and share documents using a "cloud" data storage tool depends on whether the particular technology employed provides reasonable protection to confidential client information and, if not, whether the lawyer obtains informed consent from the client after advising the client of the relevant risks.

RULES: 1.1, 1.6

FACTS:

1. The inquirer is engaged in a real estate practice and is looking into the viability of using an electronic project management tool to help with closings. The technology would allow sellers' attorneys, buyers' attorneys, real estate brokers and mortgage brokers to post and view documents, such as drafts, signed contracts and building financials, all in one central place.

QUESTION:

2. May a lawyer representing a party to a transaction use a cloud-based technology so as to post documents and share them with others involved in the transaction?

OPINION:

3. The materials that the inquirer seeks to post, such as drafts, contracts and building financials, may well include confidential information of the inquirer's clients, and for purposes of this opinion we assume that they do.[41] Thus the answer to this inquiry hinges on whether use of the contemplated technology would violate the inquirer's ethical duty to preserve a client's confidential information.

4. Rule 1.6(a) contains a straightforward prohibition against the knowing disclosure of confidential information, subject to certain exceptions including a client's informed consent, and Rule 1.6(c) contains the accompanying general requirement that a lawyer "exercise reasonable care to prevent . . . [persons] whose services are utilized by the lawyer from disclosing or using confidential information of a client."

5. Comment [17] to Rule 1.6 addresses issues raised by a lawyer's use of technology:

> When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. The duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the

41 Rule 1.6(a) defines "confidential information" generally to include "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."

> lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to use a means of communication or security measures not required by this Rule, or may give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.

6. In the recent past, our Committee has repeatedly been asked to provide guidance on the interplay of technology and confidentiality. N.Y. State 1019 (2014) catalogues the Committee's opinions on technology. In that opinion, we considered whether a law firm could provide its lawyers with remote access to its electronic files. We concluded that a law firm could use remote access "as long as it takes reasonable steps to ensure that confidential information is maintained." *Id.* ¶12

7. Similarly, in N.Y. State 842 (2010), which considered the use of cloud data storage, we concluded that a lawyer could use this technology to store client records provided that the lawyer takes reasonable care to protect the client's confidential information. We also reached a similar conclusion in N.Y. State 939 (2012) as to the issue of lawyers from different firms sharing a computer system.

8. The concerns presented by the current inquiry were also present in N.Y. State 1019, N.Y. State 939 and N.Y. State 842, and those opinions govern the outcome here. That is, the inquirer may use the proposed technology provided that the lawyer takes reasonable steps to ensure that confidential information is not breached.[42] The inquirer must, for example, try to ensure that only authorized parties have access to the system on which the information is shared. Because of the fact-specific and evolving nature of technology, we do not purport to specify in detail the steps that will constitute reasonable care in any given set of circumstances. *See* N.Y. State 1019. ¶10. We note, however, that use of electronically stored information may not only require reasonable care to protect that information

42 This result is consistent with results in other jurisdictions that have considered lawyers' use of off-site, third-party cloud services for storing and sharing documents. *See, e.g.,* ABA 95-398; Arizona Opinion 05-04; California Opinion 2010-179; Connecticut Inf. Opinion 2013-07; Florida Opinion 12-3 (2013); Illinois Opinion 10-01 (2009); Iowa Opinion 11-01; Maine Opinion 207 (2013); Massachusetts Opinion 12-03; Massachusetts Opinion 05-04; Missouri Inf. Opinion 2006-0092; Nebraska Opinion 06-05; New Hampshire Opinion 2012-13/4 (2013); New Jersey Opinion 701 (2006); North Carolina Opinion 2011-6 (2012); North Dakota Opinion 99-03 (1999); Ohio Opinion 2013-03; Oregon Opinion 2011-188; Pennsylvania Opinion 2011-200; Pennsylvania Opinion 2010-060; Vermont Opinion 2010-6 (2012); Washington Inf. Opinion 2215 (2012).

under Rule 1.6, but may also, under Rule 1.1, require the competence to determine and follow a set of steps that will constitute such reasonable care.[43]

9. Finally, we note that Rule 1.6 provides an exception to confidentiality rules based on a client's informed consent. Thus, as quoted in paragraph 5 above, a client may agree to the use of a technology that would otherwise be prohibited by the Rule. But as we have previously pointed out, "before requesting client consent to a technology system used by the law firm, the firm must disclose the risks that the system does not provide reasonable assurance of confidentiality, so that the consent is 'informed' within the meaning of Rule 1.0(j), i.e. that the client has information adequate to make an informed decision." N.Y. State 1019 ¶11.

CONCLUSION:

10. Whether a lawyer for a party in a transaction may post and share documents using a "cloud" data storage tool depends on whether the particular technology employed provides reasonable protection to confidential client information and, if not, whether the lawyer obtains informed consent from the client after advising the client of the relevant risks.

(17-14)

43 It has been said for example that the duty of competence may require litigators, depending on circumstances, to possess a basic or even a more refined understanding of electronically stored information. *See, e.g.*, Zachary Wang, "Ethics and Electronic Discovery: New Medium, Same Problems," 75 Defense Counsel Journal 328, at 7 (October 2008) ("disclosure of privileged information as a result of a lack of knowledge of a client's IT system would subject an attorney to discipline under Rules 1.1 and 1.6"). The California State Bar Standing Committee on Professional Responsibility and Conduct has tentatively approved an interim opinion interpreting California ethical rules as follows:

> Attorney competence related to litigation generally requires, at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, i.e., the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a given matter and the nature of the ESI involved. . . . An attorney lacking the required competence for the e-discovery issues in the case at issue has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation.

COPRAC Proposed Formal Opinion 11-0004 (2014).

OPINION 1021 (09/12/2014)

TOPIC: Use of the word "expert" in law firm domain name

DIGEST: A law firm may not use a domain name that couples the word "expert" with the law firm's area of concentration.

RULES: 7.1, 7.4, 7.5

QUESTION:

1. The inquiring law firm asks whether the firm may use, as its website domain name, the firm's sole field of practice with the word "expert" added.

BACKGROUND:

2. The inquiring law firm practices exclusively in one area of law, in which, it is said, the firm "has a very successful track record." The firm wishes to use as its internet website domain name a combination of the name of its sole practice area and the word "expert," for example, "realestatelaw-expert" or bankruptcylawexpert," or the like. The inquirer says that the website will elsewhere contain a disclaimer that the firm does not guarantee any favorable outcomes, and that past success does not assure future results. The law firm says that the firm will not use the word "expert" except in its domain name.

OPINION:

3. N.Y. Rule of Professional Conduct 7.5(e)(3) specifically addresses domain names, so we begin our discussion there. That Rule says that a lawyer or law firm may use "a domain name for an internet web site that does not include the name of the lawyer or law firm provided," among other things, that "the domain name does not imply an ability to obtain results in a matter." Comment 2 accompanying this Rule notes that "a personal injury firm could not use the domain name www.win-your-case.com or www.settle-for-more.com because such names imply that the law firm can obtain favorable results in every matter regardless of the particular facts and circumstances." We echoed this sentiment, albeit in the context of a different form of advertising, in our Opinion 1005 (2014), in which we concluded that a claim "We Know How To Win For You" was impermissible under Rule 7.1, adding that "[m]erely posting the disclaimer that 'Prior results do not guarantee a similar outcome' will not cure the ethical infirmity of the proposed advertising."

4. The word "expert" in a domain name is laden with claims of comparison. In its common and ordinary meaning, the word denotes having been "proved or approved by test," or a sense of relative superiority "having special skill or knowledge derived from training or experience" or "knowing and ready as a result of wide experience or extensive practice." *Webster's Third (Unabridged) International Dictionary* 800 (2002). The implication of the word is that the law firm may bring to the matter a seal of approval that provides comparatively greater assurance of some favorable outcome which no disclaimer may readily cure.

5. We need not rely on Rule 7.5(e) alone, however, for two other Rules accent our point. First, Comment 12 accompanying Rule 7.1 teaches that "descriptions of characteristics of the law firm that compare its services with those of other law firms and that are not susceptible of being factually supported could be misleading to potential clients. Accordingly, a lawyer may not advertise that the lawyer is the 'Best,' 'Most Experienced,' or 'Hardest Working.'" To us, the use of the word "expert" is exactly the sort of description that the Comment intends lawyers to avoid – an avoidance that a disclaimer about the past does not fix.

6. Second, Rule 7.4 provides that a lawyer may claim to be recognized or certified as a "specialist" only in certain specific circumstances, none applicable here, and then only if married to a statement qualifying the limits on the "specialist" label. The word "expert" is an obvious synonym for the word "specialist." *See, e.g., Roget's International Thesaurus* 639 (7th ed. 2010) (listing "expert" as synonym for "specialist"). To suppose that the framers of Rule 7.4 would so restrict the use of the word "specialist" but approve the use of the near-identical label of "expert" is incongruous. Other jurisdictions agree. *Spencer* v. *The Honorable Justices of the Supreme Court of Pennsylvania*, 579 F. Supp. 880, 885-88 (E.D. Pa. 1984); Maryland Op. 00-21; Ohio Opinion 2005-06; *cf.* N.Y. State 757 (2002) (no support in rules for use of "expert" even in communications with other lawyers).

7. Nothing in this opinion is intended or should be interpreted to prevent a lawyer from offering or advertising the lawyer's services as an expert witness, whether as a testifying or consulting expert. Courts frequently qualify lawyers as experts to provide admissible testimony on issues in dispute in civil and criminal actions, arbitrations, and other dispute resolution forums. A common example is testimony in a legal malpractice action concerning, among other things, the reasonable standard of care applicable to the legal services in question. The use of the word "expert" in this context, which is typically though not always directed to other lawyers, does not raise the concerns set forth above about claims of superiority to the general public.

CONCLUSION:

8. In sum, we conclude that a law firm may not use the word "expert" in the law firm's domain name regardless of whether the website otherwise contains a disclaimer that prior results do not guarantee future results.

25-14

OPINION 1022 (09/26/2014)

Modifies N.Y. State 882

TOPIC: Seller's concessions in real estate transactions

DIGEST: A lawyer may participate in a real estate transaction where the form TP-584 reports the full (gross) sales price, and the form RP-5217 reports the sale price as the price net of the seller's concession, and neither form discloses that the purchase price was grossed up prior to application of the seller's concession, even though this will result in a different sale price on the two documents. Neither document is misleading within the meaning of this Committee's prior opinions on seller's concessions, because the forms are completed in accordance with their instructions and the lack of disclosure will not result in foreseeable negative consequences.

RULES: 8.4(b), (c) and (d).

FACTS:

1. A lawyer working on a residential house closing inquires as to the proper method of completing the TP-584 and RP-5217 forms so as to comply with our opinions on seller's concessions.

2. The TP-584 is a tax form used to satisfy the filing requirements regarding certain taxes, including the real property transfer tax (or to claim a transfer tax exemption). The form requires the filer to report the consideration for the conveyance, among other things. The instructions to the form TP-584 define "consideration" as "the price actually paid or required to be paid for the real property," including cash consideration, assumed mortgages and the fair market value of other property received. In other words, the full (gross) purchase price must be reported on this document. If there has been a gross-up of the purchase price, the price reported would be the grossed up price. There is no place on this document to indicate that a seller's concession is a part of the transaction.

3. The RP-5217 also is used to report the sale price of a conveyance. The purpose of this document is to provide information that taxing authorities will use to calculate certain assessments. Like the form TP-584, the form calls for the total amount paid for the property, including cash consideration, assumed mortgages and the fair market value of other property received. Unlike the TP-584, however, the instructions for this document expressly state that a seller's concession is not to be included in the "full sale price," i.e. it calls for the sale price, net of the "seller concession":

> Do NOT include seller concessions in the full sale price (i.e., the buyer and seller have agreed on a price of $100,000 for the purchase of the property. As part of the agreement, the seller will pay $4000 of the buyer's closing costs. Therefore, the actual full sale price paid by the buyer (or received by the seller) is $96,000 ($100,000 - $4000)).

This form also contains a place to note information affecting sale price and to describe that information. However, the instructions to the form indicate that a seller's concession should not be included at that location.

QUESTION:

4. Will a lawyer's accurate completion and submission of the TP-584 and RP-5217 forms in accordance with their instructions result in misrepresentation under the prior opinions of this Committee on seller's concessions, even though the gross up would not be disclosed in all deal documents?

DISCUSSION:

5. This Committee has issued four opinions on seller's concessions (N.Y. State 817 (2007), 882 (2011), 892 (2011) and 993(2013)). All of these essentially opine, as we first stated in N.Y State 817, that:

> [A] lawyer may not ethically participate in such a "gross up" of the actual purchase price and concomitant seller's concession, unless there is neither deception nor misrepresentation at work in the transaction and its predictable consequences. At a minimum this means that the gross-up (and not merely the grossed-up purchase price) must be disclosed in the transaction documents.

N.Y. State 817, ¶14. The opinion cites the Disciplinary Rule predecessors to Rules 8.4(b), (c) and (d). In N.Y. State 882 we said the amount of the gross-up and the amount of the seller's concession must be "expressly and meaningfully disclosed in all documents that state the sales price, including but not limited to the contract of sale, the HUD-1 Settlement Statement, and all other documents that the attorneys prepare, review or approve."

6. The question presented in the current inquiry is whether filling out these two forms as required by the forms and their instructions is a misrepresentation. It is not. The governmental entities that use these forms have specified how the sale price should be reported, for the particular purposes of the governmental entities. Furthermore, failure to disclose the gross up does not undermine the purpose of the form or result in either entity receiving less in taxes than it would have in the absence of the gross-up. In the case of the TP-584, where the sale price was grossed up, the tax is computed on the grossed-up amount, potentially resulting in higher transfer taxes. In the case of the RP-5217, if there has been a gross-up, the sale price for purposes of tax assessments would be the price net of the gross-up. But if there had been no gross up and seller concession, the sale price for purposes of tax assessments would also have been the net price. Consequently, if a lawyer states the purchase price on each form in accordance with the instructions for the form, there cannot be a misrepresentation.

7. In the case of the RP-5217, this conclusion differs from our conclusion regarding that form in N.Y. State 882. That opinion involved a contract for the sale of a home for $306,000, and a seller's concession of $6,000 to pay for closing costs, where the sales contract expressly stated that the sales price had been increased by $6,000. We discussed disclosures in a number of closing documents, including the RP-5217. Of that form, we said:

> We assume that the real property will be assessed based upon the $306,000 disclosed sales price, not the $300,000 actual price, unless the documents make clear to the assessor that the true sales price was $300,000. See RP-5217 Real property Transfer

Report Instructions ¶13, (requiring that the seller's concession be deducted to reach the actual or full sales price.)

8. Upon reconsideration, for the reasons stated in paragraph 6 above, we do not believe that failure to disclose the gross-up is misleading to the government or to other persons who may see the forms. There are no foreseeable negative consequences within the meaning of N.Y. State 817. This situation is markedly different from failure to disclose the gross-up on other transaction documents, such as the sales contract and the HUD-1 Form, where other parties affected by the transaction (including lenders and subsequent purchasers of the mortgage) may be misled as to the terms of the transaction and there may be foreseeable negative consequences (e.g. the bank lending more than it otherwise would, or a purchaser assuming that a stated sales concession is a genuine sales concession and not an inducement to purchase). To the extent N.Y. State 882 reaches a different conclusion, it is hereby modified.

CONCLUSION:

9. A lawyer may participate in a real estate transaction where the form TP-584 reports the full (gross) sales price and does not disclose that a seller's concession is a part of the transaction, and the form RP-5217 reports the sale price as the price net of the seller's concession, and does not disclose that the purchase price was grossed up prior to application of the seller's concession, even though this will result in a different sale price on the two documents. Neither document is misleading within the meaning of this Committee's prior opinions on seller's concessions, because the forms are completed in accordance with their instructions and the lack of disclosure will not result in foreseeable negative consequences.

(15-14)

OPINION 1023 (09/26/2014)

TOPIC: Firm Name; Trade Name; Disciplinary Authority; Choice of Law

DIGEST: A lawyer admitted only in New York, which prohibits a lawyer from practicing under a trade name, may not be of counsel to an out-of-state firm with a trade name.

RULES: 7.5(b), 8.5(a), 8.5(b)

FACTS:

1. The inquirer (Y) is a New York licensed attorney who has a full time job and wants to be of counsel to a District of Columbia law firm that a colleague (X) is forming. X is a member of the District of Columbia bar, and Y is a member of only the New York State bar. X has been informed that the firm name could not be "X and Y," since that would imply that Y was a partner and therefore would be misleading. *See* Rule 7.5(c) ("Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.") X has proposed using a trade name, based on the kind of law the firm would practice, which the District of Columbia permits and New York State does not. The firm would disclose that the inquirer is a member of only the New York State bar.

QUESTION:

2. May an attorney admitted only to the New York State bar be of counsel to a District of Columbia law firm that practices under a trade name?

OPINION:

3. The law firm involved in this inquiry is a District of Columbia entity. Although many aspects of the practice of the D.C. firm will be governed by the D.C. Rules of Professional Conduct, to determine whether Y may become of counsel to[44] and practice with the firm, certain aspects of Y's practice will be governed by the New York Rules of Professional Conduct (the "Rules").

4. The question of which jurisdiction's ethics rules are to be applied to particular circumstances is governed by Rule 8.5 ("Disciplinary Authority and Choice of Law"), which reads as follows:

> (a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.
>
> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

44 Although Y proposes to become "of counsel" to the firm, the principles set forth in this opinion would also apply to a lawyer admitted only in New York who wished to become an associate or partner in an out-of-state firm practicing under a trade name.

> (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
>
> (2) for any other conduct: (i) if the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and (ii) if the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

5. Under Rule 8.5(b)(2), since Y is licensed to practice only in New York, the New York Rules will apply to his conduct.

6. Rule 7.5(b) prohibits an attorney in private practice from practicing under a trade name. Specifically, Rule 7.5(b) states in pertinent part:

> A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that by the name of a professional corporation shall contain "PC" or such symbols permitted by law, the name of a limited liability company or partnership shall contain "LLC," "LLP" or such symbols permitted by law and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.

7. In N.Y. State 740 (2001), the Committee concluded that "using a name that is not the legal name of one or more partners or former partners in the law firm constitutes use of a trade name."

8. In N.Y. State 861 (2011), the committee held that, although the New York office of a law firm may not ethically operate under a trade name, a lawyer who is admitted in New York and another jurisdiction that permits a law firm to practice under a trade name, and who principally practices in the other jurisdiction, may be of counsel to a firm with a trade name, even though the lawyer could not do so in New York. In reaching its conclusion, the committee analyzed Rule 8.5(b)(2)(ii) and concluded that "[b]ecause the conduct – practicing with a firm that uses a trade name – principally occurred in the other jurisdiction, the applicable ethical rules would be those of the other jurisdiction." *See also* N.Y. State 889 (2011) (a lawyer admitted in New York and D.C. who principally practices in D.C., which allows partnership with a non-lawyer, may conduct New York litigation even if the D.C. partnership includes a non-lawyer who would benefit from the resulting fees, because the governing ethical provisions would be those of D.C.).

9. The analysis of N.Y. State 861, however, does not apply to the instant inquiry, because the inquiring attorney – Y – is only admitted to the New York State Bar and is not admitted in D.C. (the

other jurisdiction involved here), and is therefore not authorized to "principally practice" in the jurisdiction that allows lawyers to practice under a trade name.

CONCLUSION:

10. A lawyer admitted solely in New York, where lawyers are prohibited from practicing under trade names, may not be of counsel to an out-of-state firm that is practicing under a trade name.

(30-14)

OPINION 1024 (09/29/2014)

TOPIC: Counseling clients in illegal conduct; medical marijuana law.

DIGEST: In light of current federal enforcement policy, the New York Rules permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana.

RULES: 1.2(d), 1.2(f), 1.2 cmt 9, 1.16(c)(2), 6.1 cmt 1, 8.4(b).

FACTS:

1. In July 2014, New York, following the lead of 22 other states, adopted the Compassionate Care Act ("CCA"),[45] a law permitting the use of medical marijuana in tightly controlled circumstances. The CCA regulates the cultivation, distribution, prescription and use of marijuana for medical purposes. It permits specially approved organizations such as hospitals and community health centers to dispense medical marijuana to patients who have been certified by a health care provider and who have registered with the state Department of Health, and it further provides for the regulation and registration of organizations to manufacture and deliver marijuana for authorized medical uses.

2. At the same time, federal criminal law forbids the possession, distribution, sale or use of marijuana, and the federal law provides no exception for medical uses. The U.S. Department of Justice takes the position that the federal law is valid and enforceable even against individuals and entities engaged in the cultivation, transportation, delivery, prescription or use of medical marijuana in accordance with state regulatory law; however, the U.S. Department of Justice has adopted and published formal guidance restricting federal enforcement of the federal marijuana prohibition when individuals and entities act in accordance with state regulation of medical marijuana.

QUESTION:

3. Under these unusual circumstances, do the New York Rules of Professional Conduct ("Rules") permit a lawyer to provide legal advice and assistance to doctors, patients, public officials, hospital administrators and others engaged in the cultivation, distribution, prescribing, dispensing, regulation, possession or use of marijuana for medical purposes to help them act in compliance with state regulation regarding medical marijuana and consistently with federal enforcement policy?

OPINION:

4. Lawyers may advise clients about the lawfulness of their proposed conduct and assist them in complying with the law, but lawyers may not knowingly assist clients in illegal conduct. Rule 1.2(d) provides: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client." Disciplinary Rule 7-102(A)(7), contained in the pre-2009 Code of Professional Responsibility, was to the same effect. As this Committee has observed, if a cli-

45 Laws of 2014, Chap. 90 (signed by the Governor and effective on July 5, 2014).

ent proposes to engage in conduct that is illegal, "then it would be unethical for an attorney to recommend the action or assist the client in carrying it out." N.Y. State 769 (2003); *accord* N.Y. State 666 (1994).

5. This ethical restriction reflects lawyers' fundamental role in the administration of justice, which is to promote compliance with the law by providing legal advice and assistance in structuring clients' conduct in accordance with the law. *See also* Rule 8.4(b) (forbidding "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer"). Ideally, lawyers will not only attempt to prevent clients from engaging in knowing illegalities but also discourage clients from conduct of doubtful legality:

> The most effective realization of the law's aims often takes place in the attorney's office, . . . where the lawyer's quiet counsel takes the place of public force. Contrary to popular belief, the compliance with the law thus brought about is not generally lip-serving and narrow, for by reminding him of its long-run costs the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose. . . .
>
> The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair, or of doubtful legality.

Am. Bar Ass'n & Ass'n of Am. Law Sch., Professional Responsibility Report of the Joint Conference, 44 A.B.A. J. 1159, 1161 (1958). The public importance of lawyers' role in promoting clients' legal compliance is reflected in the attorney-client privilege, which protects the confidentiality that is traditionally considered essential in order for lawyers to serve this role effectively. *See, e.g.*, *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

6. It is counter-intuitive to suppose that the lawyer's fundamental role might ever be served by assisting clients in violating a law that the lawyer knows to be valid and enforceable. But the question presented by the state's medical marijuana law is highly unusual if not unique: Although participating in the production, delivery or use of medical marijuana violates federal criminal law as written, the federal government has publicly announced that it is limiting its enforcement of this law, and has acted accordingly, insofar as individuals act consistently with state laws that legalize and extensively regulate medical marijuana. Both the state law and the publicly announced federal enforcement policy presuppose that individuals and entities will comply with new and intricate state regulatory law and, thus, presuppose that lawyers will provide legal advice and assistance to an array of public and private actors and institutions to promote their compliance with state law and current federal policy. Under these unusual circumstances, for the reasons discussed below, the Committee concludes that Rule 1.2(d) does not forbid lawyers from providing the necessary advice and assistance.

Legal background

7. Much has been written elsewhere about the interrelationship between federal criminal narcotics laws and recent state medical marijuana laws. For purposes of this opinion, only the following basic understanding is needed.

8. Under federal criminal law, marijuana is a Schedule I narcotic, whose manufacture, possession and distribution is prohibited, and for which there is no approved medical use. Further, individuals and entities are forbidden by federal law not only from violating these laws as principals, but also, under principles of accessorial liability, from intentionally aiding and abetting others in violating the narcotics law, counseling others to violate the narcotics law, or conspiring with others to violate the narcotics law.[46]

9. For many years, states likewise criminalized the manufacture, possession and distribution of marijuana, allowing for concurrent federal and state enforcement of the criminal law. Most prosecutions of narcotics laws, especially with regard to marijuana, occurred at the state and local level. However, in recent years, more than 20 states have legalized marijuana for medicinal purposes to make it available by prescription. Colorado and Washington have gone farther, developing regulation permitting the sale and use of marijuana for recreational purposes.

10. The U.S. Department of Justice ("DOJ") takes the position that the manufacture, possession and distribution of marijuana remains a federal crime, and can be enforced by federal law enforcement officials, even when the conduct in question is undertaken in accordance with state medical marijuana laws. However, current federal policy restricts federal enforcement activity, including civil as well as criminal enforcement, concerning medical marijuana. The Deputy Attorney General's August 29, 2013 memorandum, titled "Guidance Regarding Marijuana Enforcement," acknowledges that "the federal government has traditionally relied on state and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws," and the federal government has concentrated its effort in accordance with federal enforcement priorities, such as preventing the distribution of marijuana to minors, preventing revenue from marijuana sales from going to criminal enterprises, and preventing marijuana activity from being used as a cover for trafficking other drugs. The memorandum directs Department attorneys and federal law enforcement authorities to focus their enforcement resources and efforts on these priorities, which are less likely to be threatened "[i]n jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana." Although the memorandum makes plain that it is not intended to create any enforceable substantive or procedural rights, the memorandum might fairly be read as an expression by the current Administration that it will not enforce the federal criminal law with regard to otherwise-lawful medical marijuana activities that are carried out in accordance with a robust state regulatory law and that do not implicate the identified federal enforcement priorities. Over the period

46 *See, e.g.*, 18 U.S.C. §2(a)("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."); 18 U.S.C. § 2(b)("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."); 21 U.S.C. § 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

of more than a year since the memorandum was published, federal law enforcement authorities have acted consistently with this understanding.

11. The CCA allows specified licensed New York physicians to prescribe, and patients to use, medical marijuana only in pill form or in a form that may be inhaled as a vapor, but not in a form that may be smoked. Medical marijuana may only be prescribed for identified, documented medical conditions categorized as "severe[ly] debilitating or life-threatening." The regulation of medical marijuana under the law will be overseen by the Health Department, which, among other things, will authorize and register a limited number of organizations ("Registered Organizations") to manufacture and dispense marijuana for medical use, will issue registration cards to patients or their caregivers certified to receive medical marijuana, and will set prices. The law restricts who may be hired by Registered Organizations, regulates their production and dispensation of medical marijuana, establishes a tax on their receipts, and criminalizes various abuses. *See generally* Francis J. Serbaroli, "A Primer on New York's Medical Marijuana Law," NYLJ, July 22, 2014, p. 3.

The potential role of lawyers in providing legal assistance regarding compliance with the medical marijuana law

12. Lawyers might provide a range of assistance to clients seeking to comply with the CCA and to act consistently with federal law enforcement policy. Among the potential clients are public officials and agencies including the Health Department that have responsibility for implementing the law, health care providers and other entities that may apply to be selected or eventually be selected as Registered Organizations authorized to manufacture and dispense medical marijuana, physicians seeking to prescribe medical marijuana, and patients with severely debilitating or life-threatening conditions seeking to obtain medical marijuana. Any or all of these potential clients may seek legal assistance not only so that they may be advised how to comply with the state law and avoid running afoul of federal enforcement policy but also for affirmative legal assistance. The Health Department may seek lawyers' help in establishing internal procedures to conduct the registrations and other activities contemplated by the law. Entities may seek assistance in applying to become Registered Organizations as well as in understanding and complying with employment, tax and other requirements of the law. Physicians may seek help in understanding the severe restrictions on the issuance of prescriptions for medical marijuana and in navigating the procedural requirements for effectively issuing such prescriptions.

13. Leaving aside the federal law, the above-described legal assistance would be entirely consistent with lawyers' conventional role in helping clients comply with the law. Indeed, it seems fair to say that state law would not only permit but affirmatively expect lawyers to provide such assistance. In general, it is assumed that lawyers, by virtue of their expertise and ethical expectations, have a necessary role in ensuring the public's compliance with the law. "As our society becomes one in which rights and responsibilities are increasingly defined in legal terms, access to legal services has become of critical importance." Rule 6.1, Cmt. [1]. This is especially true with regard to complex, technical regulatory schemes such as the one established by the CCA, and where, as in the case of the CCA, noncompliance can result in criminal prosecution.

14. However, the federal law cannot easily be left aside. The question of whether lawyers may serve their traditional role is complicated by the federal law. Assuming, as we do for purposes of this opinion, that the federal marijuana prohibition remains valid and enforceable notwithstanding state

medical marijuana law, then individuals and entities seeking to dispense, prescribe or use medical marijuana, or to assist others in doing so, pursuant to the CCA would potentially be violating federal narcotics law as principals or accessories; in that event, the legal assistance sought from lawyers might involve assistance in conduct that the lawyer knows to be illegal.

Prior ethics opinions

15. Several other bar association ethics committees have confronted this problem but reached different conclusions under their counterparts to Rule 1.2(d). Most of these opinions pre-dated DOJ's August 2013 guidance, but took account of a 2009 DOJ memorandum suggesting that federal law enforcement would not be directed at patients and their caregivers who are in "clear and unambiguous compliance" with state medical marijuana laws.

16. In 2010, Maine's ethics committee took the view that although lawyers may assist clients in determining "the validity scope, meaning or application of the law," the rule "forbids attorneys from assisting a client in engaging in the medical marijuana business" because the rule "does not make a distinction between crimes which are enforced and those which are not. . . . [A]n attorney needs to . . . determine whether the particular legal service being requested rises to the level of assistance in violating federal law." Maine Op. 199 (July 7, 2010).

17. Connecticut's ethics committee similarly concluded that a lawyer may not assist a client insofar as its conduct, although authorized by the state's medical marijuana law, which created a broad licensing and registration structure to be implemented by the Department of Consumer Protection, violates federal law. Connecticut Op. 2013-02 (Jan. 16, 2013). The opinion noted that much of the legal assistance sought by clients seeking to comply with the law (e.g., patients, caregivers, physicians, pharmacists, distributers and growers), such as legal advice and assistance regarding the law's requirements and the rule-making and regulatory processes, would be consistent with lawyers' "traditional role as counselors" and "in the classic mode envisioned by professional standards." But some of that legal work might nevertheless constitute impermissible assistance in violating federal law.

18. More recently, in the context of Colorado's state law decriminalizing and regulating the sale of marijuana for recreational purposes, the state's ethics committee opined: "[U]nless and until there is a change in applicable federal law or in the Colorado Rules of Professional Conduct, a lawyer cannot advise a client regarding the full panoply of conduct permitted by the marijuana amendments to the Colorado Constitution and implementing statutes and regulations. To the extent that advice were to cross from advising or representing a client regarding the consequences of a client's past or contemplated conduct under federal and state law to counseling the client to engage, or assisting the client, in conduct the lawyer knows is criminal under federal law, the lawyer would violate Rule 1.2(d)." Colorado Op. 125 (Oct. 21, 2013). However, the committee recommended amending the state ethics rules

to authorize lawyers to advise and assist clients regarding marijuana-related conduct, notwithstanding contrary federal law.[47]

19. In 2011, Arizona's ethics committee reached a very different conclusion, however, based in significant part on the premise that "no court opinion has held that the state law is invalid or unenforceable on federal preemption grounds."

> In these circumstances, we decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in "clear and unambiguous compliance" with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits. The maintenance of an independent legal profession, and of its right to advocate for the interests of clients, is a bulwark of our system of government. History is replete with examples of lawyers who, through vigorous advocacy and at great personal and professional cost to themselves, obtained the vindication of constitutional or other rights long denied or withheld and which otherwise could not have been secured.
>
> A state law now expressly permits certain conduct. Legal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law. In any potential conflict between state and federal authority, such as may be presented by the interplay between the Act and federal law, lawyers have a critical role to perform in the activities that will lead to the proper resolution of the controversy. Although the Act may be found to be preempted by federal law or otherwise invalid, as of this time there has been no such judicial determination.

Arizona Op. 11-01 (Feb. 2011). The opinion concluded:

> • If a client or potential client requests an Arizona lawyer's assistance to undertake the specific actions that the Act expressly permits; and
>
> • The lawyer advises the client with respect to the potential federal law implications and consequences thereof or, if the lawyer is not qualified to do so, advises the client to seek other legal counsel regarding those issues and limits the scope of his or her representation; and
>
> • The client, having received full disclosure of the risks of proceeding under the state law, wishes to proceed with a course of action specifically authorized by the Act; then

47 Colorado added a new comments [14] to Rule 1.2 of the Colorado Rules of Professional Conduct, permitting a lawyer to counsel a client regarding the validity, scope and meaning of the Colorado marijuana law and to assist a client in conduct that the lawyer reasonably believes is permitted by that law, but the lawyer must also advise the client regarding related federal law and policy. Nevada adopted a new Comment [1] to Rule 1.2 that is substantively identical to Colorado Comment [14]. In Washington State, the King County Bar Association has urged the Washington Supreme Court to amend the Washington Rules of Professional Conduct to add a comment to Rule 8.4 and a new Rule 8.6, to make clear that conduct permitted by the state marijuana law does not reflect adversely on the lawyer's honesty, trustworthiness or fitness in other respects, and that a lawyer is not subject to discipline for counseling or assisting a client in conduct permitted by the state marijuana law, even though the conduct may violate federal law. Those proposals were still pending when we issued this opinion.

> • The lawyer ethically may perform such legal acts as are necessary or desirable to assist the client to engage in the conduct that is expressly permissible under the Act.

Id.

20. A recent opinion of the King County (Washington) Bar Association endorsed the Arizona committee's conclusion and much of its reasoning,[48] in the context of Washington's adoption of a state-regulated system for producing and selling marijuana for recreational purposes:

> While the KCBA does not agree with all components of the Arizona opinion, its emphasis on the client's need for legal assistance to comply with state law accurately reflects the reality that Washington clients face in navigating the new Washington law. The initial proposed implementing regulations for I-502, for example, have added 49 new sections in the Washington Administrative Code encompassing 42 pages of text. These regulations are consistent with I-502's express goal of removing the marijuana economy from the province of criminal organizations and bringing it into a "tightly regulated, state-licensed system." In building this complex system, the voters of Washington could not have envisioned it working without attorneys. As the State Bar of Arizona recognized, disciplining attorneys for working within such a system would deprive the state's citizens of legal services "necessary and desirable to implement and bring to fruition that conduct expressly permitted under state law."

KCBA Ethics Advisory Opinion on I-502 [Initiative 502 - marijuana legalization] & Rules of Professional Conduct (Oct. 2013). Following suit, the Washington State bar ethics committee recently proposed adding a Comment to the state's ethics code and issuing an advisory opinion authorizing lawyers to assist clients in complying with the state marijuana law at least until federal enforcement policy changes.

Analysis

21. As Rule 1.2(d) makes clear, although a lawyer may not encourage a client to violate the law or assist a client in doing so, a lawyer may advise a client about the reach of the law. *See* N.Y. State 455 (1976) ("[W]here the lawyer does no more than advise his client concerning the legal character and consequences of the act, there can be no professional impropriety. That is his proper function and fully comports with the requirements of Canon 7. . . . But, where the lawyer becomes a motivating force by encouraging his client to commit illegal acts or undertakes to bring about a violation of law, he oversteps the bounds of propriety."). Thus, a lawyer may give advice about whether undertaking to manufacture, transport, sell, prescribe or use marijuana in accordance with the CCA's regulatory scheme would violate federal narcotics law. If the lawyer were to conclude competently and in good faith that the federal law was inapplicable or invalid, the lawyer could so advise the client and would not be subject to discipline even if the lawyer's advice later proved incorrect. *See, e.g.*, ABA Op. 85-352 (1985) ("[W]here a lawyer has a good faith belief . . . that a particular transaction does not result in taxable income or that certain expenditures are properly deductible as expenses, the lawyer has no duty to require [disclosure] as a condition of his or her continued representation. . . . In the role of

48 The King County opinion rejected the implication of the Arizona opinion that the propriety of the lawyer's assistance turned on the fact that the state medical marijuana law had not yet been invalidated or preempted.

advisor, the lawyer should counsel the client as to whether the position is likely to be sustained by a court if challenged by the IRS, as well as of the potential penalty consequences to the client if the position is taken on the tax return without disclosure.").[49] As the Second Department recognized in dismissing a prosecution against a lawyer who allegedly gave erroneous advice about the lawfulness of the client's proposed conduct:

> We cannot conclude that an attorney who advises a client to take an action that he or she, in good faith, believes to be legal loses the protection of the First Amendment if his or her advice is later determined to be incorrect. Indeed, it would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice. The potential impact of allowing an attorney to be prosecuted in circumstances such as those presented here is profoundly disturbing. A looming threat of criminal sanctions would deter attorneys from acquainting individuals with matters as vital as the breadth of their legal rights and the limits of those rights. Correspondingly, where counsel is restrained, so is the fundamental right of the citizenry, bound as it is by laws complex and unfamiliar, to receive the advice necessary for measured conduct.

Matter of Vinluan v Doyle, 60 AD3d 237, 243, 873 NYS2d 72 (2d Dep't 2009).

22. Further, Rule 1.2(d) forbids a lawyer from assisting a client in conduct only if the lawyer *knows* the conduct is illegal or fraudulent. If the lawyer believes that conduct is unlawful but there is some support for an argument that the conduct is legal, the lawyer may provide legal assistance under the Rules (but is not obligated to do so). *See* Rule 1.2(f) ("A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal."); s*ee also* Rule 1.16(c)(2) ("a lawyer may withdraw from representing a client when . . . the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent").

23. The difficult question arises if the lawyer *knows* that the client's proposed conduct, although consistent with state law, would violate valid and enforceable federal law.[50] Ordinarily, in that event, while the lawyer could advise the client about the reach of the federal law and how to conform to the federal law, the lawyer could not properly encourage or assist the client in conduct that violates the federal law. That would ordinarily be true even if the federal law, although applicable to the client's proposed conduct, was not rigorously enforced and the lawyer anticipated that the law would not be enforced in the client's situation. *See* Charles W. Wolfram, Modern Legal Ethics 703 (1986) ("on the whole, lawyers serve the interests of society better if they urge upon clients the desirability of complying with all valid laws, no matter how widely violated by others they may be"); *cf.* Restatement

49 Inasmuch as this Committee limits itself to interpreting the ethics rules, we take no view on whether a colorable argument can be made that the federal narcotics law is invalid or unenforceable in situations where individuals or entities transport, distribute, possess or use marijuana pursuant to state medical marijuana law. We note, however, that as a constitutional matter, duly enacted federal laws ordinarily preempt inconsistent state laws under the federal Supremacy Clause. We also note, in particular, that in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court rejected a claim that Congress exceeded its authority under the Commerce Clause insofar as the marijuana prohibition applied to personal use of marijuana for medical purposes.

50 Rule 1.2(d) allows lawyers to assist clients in good faith challenges to a law's validity, but that is not the situation posed here.

(Third) of the Law Governing Lawyers § 94, Cmt. f (2000) ("A lawyer's advice to a client about the degree of risk that a law violation will be detected or prosecuted [is impermissible when] the lawyer thereby intended to counsel or assist the client's crime, fraud, or violation of a court order."). But the situation is different where the state executive branch determines to implement the state legislation by authorizing and regulating medical marijuana, consistent with current, published federal executive-branch enforcement policy, and the federal government does not take effective measures to prevent the implementation of the state law. In that event, the question under Rule 1.2(d) is whether a lawyer may assist in conduct under the state medical marijuana law that the lawyer knows would violate federal narcotics law that is on the books but deliberately unenforced as a matter of federal executive discretion.

24. This situation raises political and philosophical questions that this Committee cannot and need not resolve regarding how best to make and implement law in a federal system. Some may think it anomalous, where Congress has recognized no relevant exception to its narcotics prohibitions, for states to adopt medical marijuana laws that appear to contravene federal law and for the federal executive branch, through the exercise of prosecutorial discretion, effectively to carve out an exception for the implementation of these state laws. Others may think that DOJ's forbearance is consistent with its tradition, known to Congress, of exercising prosecutorial discretion to mitigate the criminal law's excesses, including where the criminal law reaches farther than its underlying purposes. We do not believe that by adopting Rule 1.2(d), our state judiciary meant to declare a position on this debate or meant to preclude lawyers from counseling or assisting conduct that is legal under state law. Rule 1.2(d) was based on an ABA model and there is no indication that anyone – not the ABA, not the state bar, and not the state court itself – specifically considered whether lawyers may serve in their traditional role in this sort of unusual legal situation. We assume for purposes of this Opinion that state courts will themselves serve in their traditional role: As issues of interpretation arise in litigation under the CCA, state courts will be available to issue interpretive rulings and take other judicial action that has the practical effect of assisting in the implementation of the CCA.[51] Serving this role will not undermine state judicial integrity. Similarly, we do not believe that it derogates from public respect for the law and lawyers, or otherwise undermines the objectives of the professional conduct rules, for lawyers as "officers of the court" to serve in their traditional role as well, if they so choose. Obviously, lawyers may decline to give legal assistance regarding the CCA.

25. We conclude that the New York Rules of Professional Conduct permit lawyers to give legal assistance regarding the CCA that goes beyond a mere discussion of the legality of the client's proposed conduct. In general, state professional conduct rules should be interpreted to promote state law, not to impede its effective implementation. As the Arizona and King County opinions recognized, a state medical-marijuana law establishing a complex regulatory scheme depends on lawyers for its success. Implicitly, the state law authorizes lawyers to provide traditional legal services to clients seeking to act in accordance with the state law. Further, and crucially, in this situation the federal enforcement policy also depends on the availability of lawyers to establish and promote compliance with the "strong and effective regulatory and enforcement systems" that are said to justify federal forbearance from enforcement of narcotics laws that are technically applicable. The contemplated legal work is not designed to escape law enforcement by avoiding detection. *Cf.* Rule 1.2 cmt. [9] ("There

51 If the state courts were to nullify the CCA based on inconsistent federal narcotics law, the question addressed in this opinion would, of course, become moot.

is a critical distinction between presenting an analysis of the legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."); N.Y. State 529 (1981) ("[T]he Code distinguishes between giving legal advice and giving advice which would aid the client in escaping punishment for past crimes. EC 7-5 warns that 'a lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment'"). Lawyers would assist clients who participate openly and subject to a state regulatory structure that the federal government allows to function as a matter of discretion. Nothing in the history and tradition of the profession, in court opinions, or elsewhere, suggests that Rule 1.2(d) was intended to prevent lawyers in a situation like this from providing assistance that is necessary to implement state law and to effectuate current federal policy.[52] If federal enforcement were to change materially, this Opinion might need to be reconsidered.

CONCLUSION:

26. In light of current federal enforcement policy, the New York Rules of Professional Conduct permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana.

(34-14)

52 For essentially the same reason, we regard Rule 8.4(b) as inapplicable. Assuming that a lawyer's legal assistance in implementing the state medical-marijuana law technically violates the unenforced federal criminal law, we do not believe that the lawyer's assistance under the circumstances described here would amount to "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

OPINION 1025 (09/29/2014)

Modifies N.Y. State 756 and 964

TOPIC: Virtual law office; Advertising principal law office address

DIGEST: An attorney may operate via a purely virtual office, provided the attorney complies with all applicable laws and Rules. An attorney who is admitted to practice in New York but who is not resident in New York and who advertises his or her law practice in New York must include the address of the attorney's principal office, which may be the Internet address of a virtual law office. The attorney must have an office that meets the minimum requirements of Judiciary Law §470, but we express no opinion as to what Judiciary Law §470 requires.

RULES: 7.1(h)

FACTS:

1. The inquirer seeks to operate a "virtual law office," meaning solely an online presence. The inquirer does not reside in New York (in fact, lives outside the U.S.) and does not have in New York a brick-and-mortar office of any kind for the purpose of client meetings or otherwise conducting the practice of law (hereafter referred to as a "physical office"), but is licensed to practice in New York. The inquirer is a solo practitioner and engages only in transactional practice, such as preparing contracts relating to employment law, business law, and charity law. The inquirer does not accept litigation clients and would make this clear in any advertising.

2. The inquirer would advertise through a website and other forms of electronic communications.

3. The inquirer would interact with clients online and by other electronic means. The inquirer would contract with a service (the "Service") that would (i) provide a website and electronic means of communication, (ii) provide someone based in New York to answer calls to the inquirer's New York phone number, (iii) forward mail and other delivered materials to the inquirer, and (iv) accept service of process on behalf of the inquirer. Alternatively, the inquirer would rely upon a relative who resides in New York to receive calls, forward deliveries and mail, and accept service of process.

4. The inquirer's law office, which could be described as an "online" or "virtual" law office, would allow the client and attorney to communicate rapidly and securely, without regard for their physical location or the time of day. Once a client is registered, the client would have access to a private portal for obtaining legal services, checking on the status of matters, storing relevant documents, and communicating with the attorney. A prospective client would be informed that the attorney will operate only virtually, and that the client would receive an email instructing the client how to download the relevant software and obtain a user name and password. Then, the attorney would send the prospective client an engagement letter, an intake form, and invoices. Client communications would be secured using a level of security comparable to what banks and government agencies use. (The Service uses "secure HTTP" protocols.) Only the client would have authorized access to the client's information. Documents would be backed up on secure servers that keep redundant copies in multiple locations to reduce the risks of data loss.

QUESTION:

5. Rule 7.1(h) of the Rule of Professional Conduct, governing advertising, requires that advertisements contain the attorney's principal law office address. Does that Rule prohibit the inquirer from operating via a purely virtual law office?

OPINION:

6. Rule 7.1(h) of the New York Rules of Professional Conduct (the "Rules") requires attorney advertising to include the attorney's "principal law office address." Rule 7.1(h) states what an attorney's advertising must contain, but does not expressly state that all attorneys "shall" or "must" maintain a physical office, or set standards to determine what constitutes such an office.

7. In N.Y. State 964 (2013), we interpreted Rule 7.1(h) to mean that "[a]dvertising for legal services may not identify a mail drop as the sole address, and must include the street address of the lawyer's principal office."[53] The inquirer in that opinion was a New York attorney whose principal office was the attorney's home and who did not wish to receive mail or drop-in clients at home. We concluded that a mail drop was not a principal office within the meaning of Rule 7.1(h), and cited N.Y. State 756 (2002) for the proposition that an advertised office address must be a physical street address at which the office of the attorney or law firm is located.

8. In N.Y. State 756, we interpreted the phrase "office address" in DR 2-101(k), the predecessor of Rule 7.1(h), to require a *physical* address. The opinion cited three reasons for that interpretation. First, "this was the accepted meaning of the term prior to advent of the Internet." Second, the absence of a street address could be misleading by suggesting a physical proximity to the recipient of the advertisement that does not in fact exist (and by suggesting the ability to provide services in jurisdictions in which the advertising lawyer is not qualified to practice). Third, we wanted to ensure that attorneys practicing in New York are amenable to contact by their clients, adversaries and other interested parties, and to ensure a client's ability to find and meet with the lawyer "at a known physical location."[54]

9. In N.Y. State 964 (2013) we noted that the advertising rules adopted by the Appellate Divisions in 2007 modified the term "office address" in DR 2-101(K) to read "principal law office address," and we inferred (citing a law dictionary) that this was meant "to disclose the address of an office where the lawyers were present and available for contact, and where personal service or delivery of legal papers could be effected." We noted that the phrase "principal law office address" in the 2007 version of the former Disciplinary Rule was "carried forward *in haec verba* in the Rules of Professional Conduct . . . effective April 1, 2009," despite the fact that the requirement was not in the rules proposed by the New York State Bar Association. From this we concluded that "the intent of the Appellate Divisions [was] that all lawyer advertisements were to disclose the address of an office where the lawyers were present and available for contact, and where personal service or delivery of legal papers could be effected." We also concluded that there is "no exception from the mandate of Rule 7.1(h) for advertisements that are in the form of business cards or letterhead."

53 We also concluded that "a lawyer's business cards and letterhead may use a mail drop as the sole address, provided they are not being used as advertising and use of the address is not misleading."

54 N.Y. 756 did not state that these interests are only important when lawyers advertise, and it would be difficult to conclude they are.

10. Our Opinions therefore construe Rule 7.1(h) to require all attorneys who advertise to have and disclose a physical office address.

11. In N.Y. State 756, we noted that the requirement of a street address served the same purpose as Judiciary Law §470[55] – to ensure that attorneys practicing in New York are amenable to contact by their clients, adversaries and other interested parties. Although our interpretation related in part to Judiciary Law §470, it implied that Rule 7.1(h) by itself provided an independent basis for requiring a physical office. Interpreting Rule 7.1(h) and DR 2-101(K) in light of requirements of Judiciary Law §470 is appropriate. We have now concluded, however, that it is incorrect to interpret the attorney-advertising rule as an independent mandate for attorneys who advertise to maintain a physical office address.

12. Before our opinions, Judiciary Law §470 was held to be unconstitutional when applied only to non-New York residents residing in adjoining states, and thus was construed instead to require all lawyers who do not reside in New York but are licensed to practice here and who wish to practice law in New York to have a local office. *See Lichtenstein v. Emerson,* 171 Misc. 2d 933, 656 N.Y.S.2d 180 (Sup. Ct. 1997)*, aff'd* 251 A.D.2d 64, 674 N.Y.S.2d 298 (1st Dep't 1998)*; White River Paper Co. v. Ashmont Tissue, Inc.*, 110 Misc. 2d 373, 441 N.Y.S.2d 960 (Sup. Ct. 1981). The requirements of Judiciary Law §470 for such an office for non-residents has been interpreted by various courts in ways that may differ from, or impose lesser obligations than, our past interpretation of DR 2-101(k) and Rule 7.1(h). For example, one court found that the non-resident office requirement was satisfied by having an office at a family member's residence or a New York hotel. *See Rosenstein v. Ernstoff*, 176 A.D. 2d 686 (App. Div. 1991). Another found it met by maintaining a desk at a realty company's Manhattan office and having access to a secretary at that location even though the secretary was not on the attorney's payroll. *See Matter of Scarsella*, 195 A.D. 2d 513 (App. Div. 1993). These holdings verge on approving the kind of "mail drop" we found inadequate in N.Y. State 964. In order to align this Committee's interpretation of Rule 7.1(h) with rulings by courts applying Judiciary Law §470, we have reconsidered whether Rule 7.1(h) independently requires a physical office.

13. Recently, the physical office requirement has come under judicial scrutiny. In *Schoenefeld v. New York*, after a District Court found unconstitutional the interpretation of Judiciary Law §470 to require a physical office, the Second Circuit referred the following certified question to the New York Court of Appeals:[56]

> Under New York Judiciary Law §470, which mandates that a nonresident attorney maintain an "office for the transaction of law business" with the state of New York, what are the minimum requirements necessary to satisfy that mandate?

55 Judiciary Law §470 states: "Attorneys having offices in this state may reside in adjoining state. A person, regularly admitted to practice . . . in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state."

56 *Schoenefeld v. New York*, 748 F.3d 464 (2d Cir. 2014). The Second Circuit did not cite to either N.Y. State 756 or 964, and only cited Rule 1.15 of the Rules of Professional Conduct in passing, in a footnote stating that it "requires an attorney to maintain complete and accurate books and records, but nothing in that Rule requires an attorney to maintain an "office."

14. In addition, the physical office requirement is undergoing changes in other states.[57]

15. In light of these developments, we no longer believe that Rule 7.1(h) – a rule that on its face regulates only advertising – provides an independent basis for requiring a physical office.

16. The New York City Bar recently issued an opinion – N.Y. City 2014-2 – in response to a somewhat different inquiry concerning a virtual law office arrangement, and opined that "a New York lawyer may use the street address of a virtual law office located in New York state as the 'principal law office address' for the purposes of rule 7.1(h) of the New York Rules of Professional Conduct, even if most of the lawyer's work is done at another location." N.Y. City 2014-2 also concluded that such an address may be used on business cards, letterhead and law firm websites. There, as here, the lawyer did not intend to maintain a separate office, but there the lawyer had access to an office run by the virtual law office service provider contracted by the lawyer (which distinguishes it from the facts in Opinion 964)[58] whereas here the lawyer will not use any office in New York (although the lawyer will appoint an agent for purposes of personal delivery and acceptance of service of process). N.Y. City 2014-2 referred to our Opinions 756 and 964 as well as *Schoenefeld,* but it did not consider, as we do here, whether having no physical office in New York runs afoul of the Rules of Professional Conduct. Instead, it opined that the virtual law office service there provided a level of physical office presence in New York that would satisfy our Opinions 756 and 964.

17. For several reasons, we agree with the reasoning of N.Y. City 2014-2 that a virtual law office can, at least in some cases, adequately advance the policy interests we identified in Opinion 756 (see ¶ 8 above). First, a prospective client's intelligent selection of a lawyer can be facilitated not merely by physical presence but also by the potential value (due to lower overhead) of having a lawyer who works solely through a virtual law office (where that can be done competently, as we address below). Second, some clients who work only virtually might also prefer, for some kinds of work, the lawyer who operates virtually as well. Third, the robustness of electronic communications, and the appointment of a virtual law office service as an agent for accepting service of process, effectively combine to eliminate any concern that a physical office is necessary in all cases for the receipt of service and other communications. Indeed, as N.Y. City 2014-2 points out, the more electronically-connected lawyer may be "at least as accessible as a lawyer who rents a dedicated physical office space." We note that physical offices almost always are open only on a limited schedule. Finally, there is nothing inherently misleading about advertising a virtual law office. All such advertising must be truthful and

57 In *In re Application of Carlton*, 708 F. Supp. 2d 524, 526 (D. Md. 2010), the District Court overruled the denial of an attorney's license renewal, holding that the "principal law office" rule had evolved with advances in technology allowing attorneys the flexibility to carry out their work at different locations. The court, however, interpreted the rule to continue to require some physical presence "sufficient to assure accountability of the attorney to clients and to the court." Last year, New Jersey significantly altered its "*bona fide* office" requirement. The New Jersey Supreme Court amended Supreme Court Rule 1:21-1(a) to provide that "an attorney need not maintain a fixed physical location for the practice of law, but must structure his or her practice in such a manner as to assure, as set forth in Rules of Professional Conduct 1.4 (New Jersey's equivalent of our Rule 1.4), prompt and reliable communication with and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice, provided that an attorney must designate one or more physical locations where client files and the attorney's business and financial records may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served on the attorney for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto."

58 New York City Bar offers its members a virtual law firm service that it describes as "so much more than just a 'mail drop' or a street address," including its meeting rooms, library, and phone answering service. *See* http://www.nycbar.org/small-law-firm-center/virtual-law-firm-program.

not misleading, and the inquirer here intends to disclose that all services are conducted virtually and not via a physical office.

18. Pennsylvania Opinion 2010-200 concluded that an attorney is permitted to operate from a virtual law office, *i.e.*, one "without a traditional physical counterpart," and specifically concluded that an attorney practicing in a virtual office is not required to list a physical address in advertisements and on letterheads. The Pennsylvania Committee also concluded that an attorney may use a post office address in advertisements and letterheads, but may not state that services are performed at the address where the post office box is located and that a virtual law office must disclose information specifying where the services advertised will be performed, but need not disclose the specific address where each attorney is located.[59]

19. North Carolina Opinion 10 (2005) opined that North Carolina rules do not prohibit "use of the Internet as an exclusive means of promoting and delivering legal services." However, the Opinion reminded lawyers that advertising must include "a physical office address on its website pursuant to Rule 7.2(c)" and pointed out some key concerns for cyberlawyers who use the Internet as the foundation of their law practice. These included (1) engaging in unauthorized practice in other jurisdictions, (2) violating advertising rules in other jurisdictions, (3) providing competent representation given the limited client contact, (4) creating a client-lawyer relationship with a person the lawyer does not intend to represent, and (5) protecting client confidences.

20. This opinion does not pass upon every potential form of virtual law practice. Our inquirer, for example, will not be engaging in litigation, which may present additional issues. Other fact-sensitive matters affect virtual law practice, such as how the matters are staffed, and how effectively the document storage and communications technologies function, and such matters are beyond the scope of this opinion. No matter how this inquirer proceeds, the Rules impose various duties that we emphasize here:

- All attorneys owe their clients a duty of competence (Rule 1.1) and this not only includes competence in performing the legal work but also competence in handling communications and storing and providing access to client files. An attorney should only use technology that he or she is competent to use.

- Attorneys owe duties of effective communication with clients to keep them promptly and reasonably informed and consulted about the means of achieving the client's objectives (Rule 1.4).

- Attorneys owe duties to maintain confidentiality (Rule 1.6), and there are unique concerns about confidentiality that relate to conducting all communications and client file storage electronically.

59 The Pennsylvania Committee also addressed whether an attorney must maintain a physical office, concluding, among other things, that "an attorney may maintain a virtual law office in Pennsylvania;" "an attorney may maintain a virtual law office in which the attorney works from home, and associates work from their homes in various locations, including locations outside of Pennsylvania;" and "an attorney with a virtual office is not required to meet with clients at the address listed in any advertisements and/or in the geographic location where the attorney will perform the services advertised, but must disclose to the client all of the information required under the Rules of Professional Conduct."

- Attorneys have numerous duties relating to the proper preservation of client materials (Rules 1.6(c) and 1.15).

- Attorneys must assure adequate supervision of subordinate lawyers and of non-lawyers (Rule 5.1 and 5.3).

There is no "virtual law office exception" to any of the Rules.

21. A lawyer is, of course, required to comply with applicable law. *See* Rule 8.4(b) (A lawyer must not engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer.) We believe that violation of the requirements of the Judiciary Law applicable to the practice of law may adversely reflect on the lawyer's honesty, trustworthiness or fitness.

CONCLUSION:

22. In whatever manner the courts resolve the statutory issues regarding virtual law offices – and we express no opinion on how they will or should resolve those issues – neither Rule 7.1(h) nor any other advertising rule imposes or defines the contours of an attorney's office or style of practice. To the extent N.Y. State 756 and 964 opine that Rule 7.1(h) or its predecessor imposes an obligation for a physical office, they are modified. We now conclude that an attorney who is admitted to practice in New York but who is not resident in New York and who advertises his or her law practice in New York must include the address of the attorney's principal office, which may be the Internet address of a virtual law office. The attorney must have an office that meets the minimum requirements of Judiciary Law §470, but we express no opinion as to what Judiciary Law §470 requires.

(2-14)

OPINION 1026 (10/01/2014)

TOPIC: Ethical duties of lawyer-mediator; confidentiality duties as to work of fiction

DIGEST: A lawyer-mediator who provides mediation services that are not distinct from legal services is subject to the Rules of Professional Conduct with respect to the mediation services, and those Rules protect confidential information that the lawyer-mediator learns about a client. The lawyer-mediator may not include such information in a work of fiction if there is a reasonable likelihood that readers will be able to ascertain the client's identity.

RULES: 1.6; 1.9(c); 2.4; 5.7(a)

FACTS:

1. The inquirer is an attorney who also serves as a private mediator in divorce cases. The inquirer does not advertise, but potential parties to a mediation learn that he is a lawyer because, among other things, his answering machine greeting says, "You have reached the law and mediation offices of [name of inquirer]," and parties who wish to retain the inquirer must sign retainer papers making clear that the inquirer is a practicing attorney. In fact, many divorcing parties come to the inquirer precisely because he is also a lawyer.

2. Inquirer's services for divorcing parties are not limited to mediation services. When mediation is successful – *i.e.,* the parties reach a settlement – the inquirer drafts the court papers to formalize the divorce according to the settlement terms. In advance of the mediation, divorcing parties sign both a mediation retainer agreement and a separate retainer agreement by which they retain the inquirer, in his capacity as an attorney, to draft and file with a court the papers necessary to obtain a divorce.[60]

3. The mediation retainer agreement contains a section governing confidentiality, which promises "complete confidentiality" from all outside parties and proceedings, unless all parties to the mediation give their written consent. The mediation retainer agreement also states that the inquirer in his role as a mediator does not represent the parties and is not providing legal advice or legal assistance to either party in the context of the mediation. But, as provided in the legal retainer agreement, he will represent the parties in drafting and filing the court papers to obtain a divorce if the mediation results in a settlement.

4. The inquirer now wants to write a book containing stories and events drawn from information about his divorce mediation clients. He would change the clients' names and geographic locations,

60 We have not been asked whether a lawyer-mediator may ethically represent the mediating parties in filing for a divorce in court, but we note N.Y. State 736 (2001) ("An attorney-mediator may prepare divorce documents incorporating a mutually acceptable separation agreement and represent both parties only in those cases where mediation has proven entirely successful, the parties are fully informed, no contested issues remain, and the attorney-mediator satisfies" the applicable conflict Rules). In addition, Rule 1.12(b) – which did not exist when N.Y. State 736 was issued – provides that the inquirer may not represent either party after the mediation (in court or otherwise) "unless all parties to the proceeding give informed consent, confirmed in writing." The inquirer should also consult Rule 1.12(c), which provides that a lawyer "shall not negotiate for employment with any person who is involved as a party . . . in a matter in which the lawyer is participating personally and substantially as . . . an arbitrator, mediator or other third-party neutral." This rule may prohibit the inquirer from asking the party to sign a retainer for post-mediation legal services *during* the mediation, but we have not been asked whether it is permissible to propose a retainer for post-mediation legal services *before* the mediation begins.

and would fictionalize various segments by adding children, addictions, extramarital affairs, etc. He would also sometimes blend the stories of multiple clients to safeguard against revealing sensitive and personal information that he obtained in confidence as a divorce mediator. He wants to know whether he may ethically do this without violating the New York Rules of Professional Conduct (the "Rules").

QUESTION:

5. May a lawyer-mediator who handles divorce mediation, and subsequently provides legal services to those parties when the mediation is successful, publish a book of fiction that is based in part on facts relating to the mediation parties without obtaining the consent of those parties?

OPINION:

6. Service of a lawyer as a mediator is expressly addressed by Rule 2.4 ("Lawyer Serving as Third-Party Neutral"), which had no equivalent in the former New York Lawyer's Code of Professional Responsibility. Rule 2.4 provides, in full, as follows:

> (a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a ***mediator*** or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
>
> (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client. [Emphasis added.]

This Rule, which refers to mediation parties as persons who are not law clients represented by the lawyer-mediator, does not by itself make a lawyer's service as a mediator subject to all the duties imposed by the other Rules. In particular, the Rule, by itself, imposes no duty of confidentiality. *See* Rule 1.12, Cmt. [3] (noting generally that "lawyers who serve as third-party neutrals do not obtain information concerning the parties that is protected under Rule 1.6"). But there are other possible sources of confidentiality duties.

7. We do not consider whether substantive laws (such as statutes or court rules) or private sources of guidance (such as ethics codes promulgated by mediation groups) impose duties of confidentiality on mediators. Our jurisdiction is limited to interpreting the Rules. The inquirer should therefore research substantive law and ethics codes that may apply to him in his capacity as a mediator. *See* Rule 2.4, Cmt. [2] ("the lawyer may be subject to court rules or other law that applies either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics"); Rule 1.12, Cmt. [3] (lawyers who serve as third-party neutrals "typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals").

8. Rather, the question before us is whether the New York Rules of Professional Conduct impose a duty of confidentiality on a divorce mediator who also drafts and files divorce papers with the appropriate court if the mediation results in an agreement. We think they do, even though the duty is not based on Rule 2.4.

9. Mediation is a "nonlegal service" as defined by Rule 5.7(c), and it therefore implicates Rule 5.7 ("Responsibilities Regarding Nonlegal Services"). Rule 5.7(a)(1) provides:

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

10. The mediation services that the inquirer provides to the mediating parties are "not distinct" from the legal services that he provides. The mediation itself (the nonlegal service) is designed to result in a "Memorandum of Understanding," and the inquirer's separate retainer for drafting and filing the divorce papers in court (the legal services) says that he will draw up the legal divorce documents in accordance with the Memorandum of Understanding. Thus the legal and nonlegal services that the inquirer provides, far from being "distinct," are intimately bound up with each other. *Cf.* N.Y. State 1015 ¶14 (2014) (discussing factors bearing on whether legal and nonlegal services are distinct). Consequently, the inquirer is subject to the Rules – including their confidentiality provisions – not only when he provides legal services (representing the parties in court) but also when he provides nonlegal services (serving as a divorce mediator). [61]

11. Under Rule 5.7(a)(1), therefore, the inquirer is "subject to" the duty of confidentiality articulated in Rule 1.6 with respect to information that the inquirer learns from the parties during the mediation process.[62] Unless there is informed consent or some other applicable exception:

> A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person . . . .
>
> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-cli-

61 Given the relationship between the legal and nonlegal services in this inquiry, the disclaimer found in Rule 5.7(a)(4) is not available. Rule 5.7(a)(4) provides:

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

Because paragraph (a)(1) is not listed, the disclaimer is not effective when, as here, the legal and nonlegal services are not distinct from each other.

62 We have previously opined that even if nonlawyers may engage in divorce mediation, *lawyers* who serve as mediators "should be presumed to be rendering a legal service". N.Y. State 678 (1996). That presumption too would support our conclusion that there is a duty of confidentiality, but the presumption is controversial, especially after the adoption of Rule 2.4. *See* N.Y. State 979 ¶¶ 6-7 (2013) (citing conflicting authorities but not opining as to continuing validity of N.Y. State 678). Here, Rule 5.7(a)(1) gives rise to a duty of confidentiality even if the mediation services by the inquirer are not legal services. Thus we again have no need to address the status of N.Y. State 678.

> ent privilege, ***(b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.*** "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

Rule 1.6(a) (emphasis added).

12. Applying this Rule to the mediation process, the inquirer wishes to use information "gained during" the mediation and the post-mediation court proceedings. The information is not protected by the attorney-client privilege (because both opposing parties take part in the communications with the inquirer), but much of the information is "likely to be embarrassing or detrimental to the client if disclosed," and is also "information that the client has requested be kept confidential" by signing a retainer agreement in which the client is promised "complete confidentiality." Such information is thus confidential within the meaning of Rule 1.6. Under that Rule, the inquirer may not publish a book revealing that information in the absence of informed consent or some other applicable exception to the duty of confidentiality. And that duty continues even after conclusion of the post-mediation legal representation. *See* Rule 1.9(c)(2) (providing that a lawyer "who has formerly represented a client in a matter . . . shall not thereafter . . . reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client).

13. However, the conclusion that the inquirer owes a duty of confidentiality to the mediating parties does not end our analysis. The inquirer plans to write what is essentially a work of fiction based on confidential information that will be altered, augmented, rearranged, and amplified with details from the inquirer's imagination. Comment [4] to Rule 1.6 briefly addresses the issue of hypotheticals, saying:

> Paragraph (a) [of Rule 1.6] prohibits a lawyer from knowingly revealing confidential information as defined by this Rule. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal confidential information but could reasonably lead to the discovery of such information by a third person. ***A lawyer's use of a hypothetical to discuss issues relating to the representation with persons not connected to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client.*** [Emphasis added.]

14. The issue addressed by Comment [4] arises not only in the context of hypotheticals but also in the context of fiction. Indeed, there are many well-known lawyer-novelists (such as Scott Turow, David Baldacci, Alafair Burke, John Grisham, Lisa Scottoline, Erle Stanley Gardner, and Louis Auchincloss), and their books are often apparently based in part on the authors' personal experiences as lawyers. But when a lawyer's writings could not reasonably lead to the discovery of confidential information by a third person, then the common-sense implication of Comment [4] is that the duty of confidentiality is not violated. A lawyer may publish a work of fiction inspired by issues relating to a represented client so long as there is no reasonable likelihood that the reader will be able to ascertain the client's identity.

15. Applying that standard here, if the inquirer writes a book in which there is "no reasonable likelihood" that readers will be able to identify his mediation and divorce clients, then the inquirer

will not violate any duty of confidentiality imposed by the Rules. In essence, if confidential information is sufficiently altered, disguised, rearranged, and infused with the inquirer's own imagination so that no one can trace particular information to a particular client, then the book will not reveal "confidential information" within the meaning of Rule 1.6.

16. We caution, however, that this is a high standard that may be difficult to meet. The inquirer has a local practice serving individual clients. Details that would be meaningless to a person across the country may provide meaningful clues to a person living in the same county or village. The inquirer will need to pay meticulous attention, fact by fact and detail by detail, to ensure that readers cannot identify his clients. For readers of the book who know (or know of) the inquirer's clients, concealing their identities may be nearly impossible. Perhaps it can be done, but we do not want to make it sound like an easy task.

17. Finally, because the inquirer's retainer agreement for mediation services promises "complete confidentiality" to the mediating parties, the inquirer would appear to have contractual obligations of confidentiality to those who sign the retainer. Whether the scope of that contractual promise is broader than the inquirer's duty of confidentiality under the Rules is a question of law beyond our jurisdiction to decide.

CONCLUSION:

18. A lawyer-mediator who serves as a private mediator in divorce cases, and thereafter represents the mediating parties by drafting and filing the papers needed to secure a divorce in court, is providing mediation services that are not distinct from legal services. The lawyer-mediator is therefore subject to the Rules of Professional Conduct with respect to the mediation services. In particular, the Rules protect confidential information about a client that was learned in the mediation or subsequent court proceedings. The lawyer-mediator may not publish a work of fiction that includes such confidential information if there is a reasonable likelihood that the reader will be able to ascertain the client's identity.

(21-14)

OPINION 1027 (10/16/2014)

TOPIC: Choice of ethics rules for non-court matters

DIGEST: If a lawyer is licensed only in New York, then the New York Rules of Professional Conduct apply to the lawyer's conduct in all non-court matters. If a lawyer is licensed in New York and one or more other jurisdictions, then the lawyer's conduct in non-court matters will be governed by the rules of the jurisdiction in which the lawyer "principally practices" *unless* the "predominant effect" of the lawyer's conduct clearly will be felt in another jurisdiction in which the lawyer is also licensed to practice.

RULE: 8.5

FACTS:

1. The inquiring lawyer (the "Dual-Licensed Lawyer") is licensed and in good standing in both New York and the District of Columbia, and has offices in both jurisdictions. The lawyer handles state and federal matters outside of court. For example, he negotiates commercial contracts and real estate deals, and he represents clients in matters before various federal agencies such as the United States Patent and Trademark Office and the Internal Revenue Service. The lawyer does not handle any matters pending in a court.

2. Questions regarding confidentiality, conflicts of interest, and other legal ethics issues have arisen in some of the matters that the Dual-Licensed Lawyer is handling, and he wishes to know which jurisdiction's ethics rules apply to his conduct. This opinion does not address the underlying legal ethics questions in the inquirer's matters. It addresses only choice-of-ethics rules, and only in the context of the inquirer's practice, which does not include matters pending in any court.

QUESTION:

3. When a lawyer is licensed to practice in both New York and the District of Columbia, and the lawyer is handling a non-court matter (meaning a matter *other than* a matter in connection with proceedings pending before a court in which the lawyer has been admitted), which jurisdiction's rules of legal ethics govern the matter?[63]

OPINION:

4. The relevant provision in the New York Rules of Professional Conduct (the "Rules") is Rule 8.5, entitled "Disciplinary Authority and Choice of Law." Rule 8.5 has two paragraphs.

63 We are choosing the unusual term "non-court" to track the structure of New York Rule 8.5(b), which divides lawyer conduct into two categories: (1) "conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice"; and (2) "any other conduct." Many types of litigation occur outside of a "court," so the term "non-litigation matters" would be too narrow to describe the second category, and many types of law practice cannot be described as "transactions," so the term "transactional practice" would also be too narrow. The term "non-court" covers the range of the inquirer's conduct that is not "in connection with a proceeding in a court before which a lawyer has been admitted to practice . . . ." Use of this term could be confusing in some contexts, because a lawyer could work on a proceeding in a court to which the lawyer is not admitted, but the inquirer does not do such work.

5. Rule 8.5(a), the "disciplinary authority" part of the rule, provides that a lawyer who is licensed in New York may be disciplined by New York disciplinary authorities for professional misconduct whether the misconduct occurs in New York or elsewhere, and may be disciplined by New York disciplinary authorities even if the lawyer is also disciplined for the same conduct by disciplinary authorities in another jurisdiction. Specifically, Rule 8.5(a) provides as follows:

> (a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

6. However, Rule 8.5(a) does not specify which jurisdiction's rules of legal ethics will be applied by New York disciplinary authorities when the lawyer is admitted to practice in more than one jurisdiction. That question is instead addressed by the "choice of law" part of Rule 8.5, which provides as follows:

> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
>
> (1) For ***conduct in connection with a proceeding in a court*** before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
>
> (2) For ***any other conduct***:
>
> (i) If the lawyer is ***licensed to practice only in this state***, the rules to be applied shall be the rules of this state, and
>
> (ii) If the lawyer is ***licensed to practice in this state and another jurisdiction***, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Rule 8.5(b) (emphasis added).[64]

7. Rule 8.5(b) is thus designed to ensure that New York disciplinary authorities will apply one and only one set of ethics rules to any particular conduct by a lawyer. *See* Rule 8.5, Cmt. [3] (explaining that the rule takes the approach of "providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct"). To analyze how Rule 8.5(b) applies to the Dual-Licensed Lawyer in non-court matters, we will examine the rule's subparagraphs.

64 New York Rule 8.5(b) is intended to guide choice-of-law decisions by New York disciplinary authorities. Other jurisdictions may have different versions of rules of professional conduct governing choice-of-law questions, or may govern such questions by common law, such as by reference to Restatement (Second) of Conflict of Laws §§ 6 and 188 (setting forth multiple factors for resolving a conflict of laws).

Rule 8.5(b)(1): "conduct in connection with a proceeding in a court"

8. Rule 8.5(b)(1) applies only to "conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice," and thus does not apply at all to matters not in a "court." The term "court" is not defined in the Rules, but it is narrower than the word "tribunal," which is defined in Rule 1.0(w) as follows:

> "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

9. Thus, a "court" is just one of many kinds of "tribunal" – and canons of statutory construction support the conclusion that the term "court" excludes the other types of tribunal listed in Rule 1.0(w). *See* N.Y. State 1011 ¶7 (2014) (citing the Rule's history); N.Y. State 968 ¶6 (2013) (also citing Rule 1.0(w) and stating that "we do not believe we are free to read 'court' in Rule 8.5(b)(1) to include administrative tribunals" such as the Merit Systems Protection Board). The practice of the Dual-Licensed Lawyer includes matters before federal agencies, but not matters before courts. Accordingly, Rule 8.5(b)(1) does not apply to his inquiry, and we therefore proceed to Rule 8.5(b)(2).

Rule 8.5(b)(2): "any other conduct"

10. Rule 8.5(b)(2) governs "any other conduct," a phrase that encompasses all of a lawyer's conduct *not* in connection with a proceeding in a court before which the lawyer has been admitted to practice. Thus, non-court law practice encompasses many types of conduct, including:

- *adversarial matters* (*i.e.*, matters with an opposing party) that are pending before (i) a state or federal agency, (ii) an arbitrator not annexed to a court, or (iii) some other adjudicative body that is not a "court" – *see* Rule 1.0(w) (defining "Tribunal");
- *non-adversarial matters* before a government agency, such as prosecuting patents in the USPTO, filing papers with the SEC, and requesting private letter rulings from the IRS;
- *transactional matters,* such as mergers and acquisitions, contract negotiations, and formation of partnerships; and
- *counseling-only matters,* such as tax advice, estate planning advice, advice on corporate by-laws, and other counseling matters involving neither a government agency or an opposing party.[65]

65 The phrase "any other conduct" in Rule 8.5(b)(2) would also seem to include conduct in connection with a proceeding in a court before which a lawyer has *not* been admitted to practice. But because the inquirer does not practice in any "court," this opinion does not address a lawyer's conduct in connection with a proceeding in a court before which the lawyer has not been admitted to practice. It addresses only conduct that is not in connection with any court proceeding.

11. Rule 8.5(b)(2) is divided into two subparagraphs. Subparagraph (b)(2)(i) governs lawyers who are licensed to practice solely in New York. Subparagraph (b)(2)(ii) governs lawyers who are licensed to practice in New York and in at least one other jurisdiction, whether in the United States or a foreign country. *See* Rule 8.5, Cmt. [7] ("The choice-of-law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between or among competent regulatory authorities in the affected jurisdictions provide otherwise."). We will deal with both subparagraphs in turn.

12. Rule 8.5(b)(2)(i) provides that if a lawyer is "licensed to practice only in this state" (meaning only in New York), then the applicable ethics rules shall be "the rules of this state." The inquirer here, however, is licensed in both New York and in the District of Columbia, so subparagraph (b)(2)(i) does not apply.

13. Rule 8.5(b)(2)(ii) contains both a general rule and an exception. The general rule is that when a lawyer is licensed in two or more jurisdictions, "the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices." An exception applies, however, if "particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice." In that case, the rules of the jurisdiction feeling the "predominant effect" apply to the lawyer's conduct.

14. Here, the Dual-Licensed Lawyer maintains offices in both New York and D.C., but we do not know the jurisdiction in which he "principally practices." Neither the text of Rule 8.5 nor its Comments provide any guidelines for determining where a lawyer principally practices. We believe that when a lawyer is licensed in more than one jurisdiction, various factors are relevant to determining the one in which the lawyer principally practices, including: (a) the number of calendar days the lawyer spends working in each jurisdiction; (b) the number of hours the lawyer bills in each jurisdiction; (c) the location of the clients the lawyer serves; (d) the activities the lawyer performs in each jurisdiction (*e.g.,* legal work for clients vs. administrative work for the law firm); and (e) special circumstances (such as a recent move, an extended illness, or a natural disaster). For a discussion of each of these factors, *see* Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 1915-17 (2014). Given the increase in law practice over the Internet, and the corresponding decrease in the importance of a lawyer's physical location, the jurisdiction in which a lawyer "principally practices" for purposes of Rule 8.5(b)(2)(ii) is becoming less certain, and we should consider a lawyer's significant contacts with all jurisdictions, not solely the jurisdiction in which the lawyer is most often physically present.

15. Even if we had sufficient information to determine the jurisdiction in which the Dual-Licensed Lawyer principally practices, his conduct could in some situations be evaluated by the ethics rules of the *other* admitting jurisdiction because of the exception stated in Rule 8.5(b)(2)(ii). Specifically, "if particular conduct *clearly* has its *predominant effect* in another jurisdiction in which the lawyer is licensed to practice," then "the rules of that jurisdiction" – the one where the predominant effect occurs – "shall be applied to that conduct." (Emphasis added.) Here, for example, if the Dual-Licensed Lawyer principally practices in New York but the predominant effect of particular conduct "clearly" would be in D.C., then the D.C. Rules of Professional Conduct would govern that conduct. But if the Dual-Licensed Lawyer principally practices in New York and the predominant effect of the

conduct would *not* "clearly" be in D.C., then the New York Rules of Professional Conduct would govern that conduct.

16. Unfortunately, no simple formula is available to determine where the "predominant effect" will occur. As Comment [5] to New York Rule 8.5 points out: "When a lawyer is licensed to practice in New York and another jurisdiction and the lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in an admitting jurisdiction other than the one in which the lawyer principally practices."[66] Factors to consider include such things as: (a) where the clients reside, and where they work; (b) where any payments will be deposited; (c) where any contract will be performed; and (d) where any new or expanded business will operate. For example, if a lawyer principally practices in D.C. but is advising a New York client on how to draft (or interpret, or enforce) a commercial contract among several parties, and all of those parties live and work in New York, and the contract will be performed solely in New York, then advising the client would ordinarily be conduct that "clearly has its predominant effect" in New York. But if some of the parties to the contract work outside New York, or if part of the contract will be performed outside New York, then the lawyer's advice may not "clearly" have its predominant effect in New York – in which case the ethics rules applicable under Rule 8.5(b)(2)(ii) will be the rules of the jurisdiction in which the lawyer principally practices.

17. Notably, the exception in the second half of Rule 8.5(b)(2)(ii) applies only if the predominant effect occurs in another jurisdiction *and* the lawyer is licensed to practice in that jurisdiction. Both criteria must be met for the exception to apply. If the Dual-Licensed Lawyer principally practices in D.C. but the predominant effect will clearly occur in a jurisdiction where he is *not* licensed to practice (in this case, anywhere other than New York or D.C.), then the ethics rules of D.C. (the jurisdiction in which the lawyer principally practices) will apply even though the predominant effect is elsewhere. As Comment [5] says, "as long as the lawyer's conduct conforms to the rules of the jurisdiction in which the lawyer principally practices, the lawyer should not be subject to discipline unless the predominant effect of the lawyer's conduct will clearly occur in another *admitting* jurisdiction." (Emphasis added.)

Do the ethics rules of a federal agency apply?

18. Because this inquiry concerns a lawyer who handles matters before federal agencies, the rules of the federal agency in question may also come into play.[67] If an agency has its own professional conduct rules, then those rules might take precedence over state rules by virtue of the Supremacy

66 The ABA version of this rule adds the following escape hatch: "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." Model Rule 8.5(b)(2). The New York State Bar Association proposed that language to the Courts in 2008, but the Courts decided not to adopt it. Consequently, New York Rule 8.5(b)(2)(ii) has no exemption based on a lawyer's reasonable belief. However, New York builds in some leeway by limiting the exception to those admitting jurisdictions in which the predominant effect will "clearly" occur. If a lawyer "reasonably believes the predominant effect of the lawyer's conduct will occur" (to use the ABA's wording) in the admitting jurisdiction in which the lawyer principally practices, then it will seldom be the case that the predominant effect "clearly" occurs in a different jurisdiction.

67 For example, the USPTO adopted Rules of Professional Conduct, effective May 3, 2013, that govern a wide range of professional conduct by lawyers and others practicing before the USPTO. *See* 37 C.F.R. §§ 11.101 *et seq.* Similarly, the IRS has adopted ethics rules governing lawyers and others in practice before the IRS. *See* 31 C.F.R. §§ 10.20 *et seq.*

Clause and the pre-emption doctrine.[68] There are interesting and controversial questions about the circumstances in which a federal agency's rules might pre-empt state rules of legal ethics.[69] But these are questions of law beyond our jurisdiction, and we do not address them.

CONCLUSION:

19. If a lawyer is licensed only in New York, then the New York Rules of Professional Conduct apply to the lawyer's conduct in non-court matters (meaning all matters not in connection with proceedings pending before a court in which a lawyer has been admitted). If a lawyer is licensed in New York and other jurisdictions, then the lawyer's conduct in non-court matters will be governed by the rules of the jurisdiction where the lawyer principally practices *unless* the predominant effect of the lawyer's conduct clearly will be felt in another jurisdiction where the lawyer is also licensed to practice. Whether a federal agency's rules of ethics pre-empt the New York Rules in particular cases depends on questions of law beyond our jurisdiction.

(68-12)

68 *See* U.S. Const., Art. VI, cl. 2 (providing that federal laws "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-54 (1982) (discussing various forms of pre-emption).

69 For example, controversy continues as to whether Sarbanes-Oxley regulations governing attorneys who practice before the SEC enjoy supremacy over contrary state rules of professional conduct. Under 17 C.F.R. § 205.3(d)(2), an attorney practicing before the SEC may reveal a client's confidential information to the extent the attorney reasonably believes necessary to "prevent the issuer from committing a material violation [of the federal securities laws] that is likely to cause substantial injury to the financial interest or property of the issuer or investors." Other regulatory provisions address choice of law. *See* 17 C.F.R. § 205.1 ("Where the standards of a state . . . where an attorney is admitted or practices conflict with this part, this part shall govern."); 17 C.F.R. § 205.5(c) ("An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state . . . where the attorney is admitted or practices."). Nevertheless, N.Y. County 746 (2013) opined that a New York lawyer may not disclose confidential information pursuant to SEC regulations that permit but do not mandate disclosure. We have no occasion here to endorse or reject N.Y. County 746.

OPINION 1028 (10/24/2014)

TOPIC: Firm Name, Letterhead, Business Cards

DIGEST: A. If two lawyers, X and Y, form a law firm that is a professional corporation, the law firm may not be called simply "X & Y". The firm name must contain "P.C."

B. A law firm name need not expressly refer to the firm as a law office, e.g. "Law Offices of X & Y." It is sufficient that the firm is identified as "X & Y, P.C."

C. On personal letterhead and business cards, it is sufficient to identify lawyers by their name (with or without "Esq.") without a designation of their position within the firm, *e.g.*, "partner," "principal" or "associate."

D. On firm letterhead that lists both partners and associates, a law firm must distinguish between partners and associates, such as by using a separating line or by listing partners and associates on different sides of the letterhead, because failure to do so would be misleading.

RULES: 7.1, 7.5(a) and (b).

QUESTION:

1. The inquirer asks several questions:

A. If two lawyers, X and Y, form a law firm that is a professional corporation, may the law firm be called "X & Y", or must the firm name contain "P.C."?

B. Must the name of the firm on letterhead or business cards expressly refer to it as a law office, e.g. "Law Offices of X & Y," or is it sufficient that the firm is identified as "X & Y, P.C."?

C. On personal letterhead and business cards, is it sufficient to identify lawyers by their name (with or without "Esq."), or must there also be a designation of the lawyers' position within the firm, *e.g.*, "partner" or "associate"?

D. On firm letterhead that lists all partners and associates, must there be a designation of the lawyers' position within the firm, *e.g.*, "partner" or "associate"?

OPINION:

Use of "P.C." by Professional Corporations

2. Rule 7.5(a) of the New York Rules of Professional Conduct (the "Rules") provides that a lawyer or law firm may use professional cards, office signs and letterheads, as long as they do not violate any statute or court rule and are in accordance with Rule 7.1. Rule 7.1(a)(1) prohibits a lawyer from using an advertisement that is false, deceptive or misleading.

3. Rule 7.5(b), in pertinent part, states that "the name of a professional corporation shall contain 'PC' or such symbols permitted by law, [and] the name of a limited liability company or partnership shall contain 'LLC,' or 'LLP' or such symbols permitted by law." Consequently, the name of a law firm organized as a professional corporation cannot be "X & Y," but must also include "P.C." or such symbols as may be permitted by law. *See also* N.Y. Bus. Corp. Law § 1515(b) ("The name of a professional service corporation shall end with the words 'Professional Corporation' or the abbreviation 'P.C.'")

4. The purpose of this requirement is to avoid misleading prospective clients who may believe that a law firm is a partnership whose members are personally liable for the firm's debts, including those arising out of liability for malpractice, when the firm is in fact practicing as a professional corporation with more limited liability. *Cf.* D.C. Opinion 235 (1993).

Identification as a Law Office

5. No provision of the Rules specifically requires a law firm to be identified as "law offices," whether the firm is formed as a professional corporation, a partnership or another permitted form of organization. The question is governed by Rules 7.1 and 7.5. As noted above, Rule 7.1(a)(1) generally forbids deceptive and misleading advertisements, while Rule 7.5 sets forth certain standards for professional notices, letterheads and signs, including professional cards. Neither these nor other rules expressly require law firms to refer to themselves as "law offices" in their professional cards and letterheads. Nor is there any invariable tradition of including that phrase in firm names. While a law firm may wish to identify itself in its name or on its letterhead or business cards as a law office, in order to indicate to potential clients that the firm provides legal services, it is not required by the Rules or by applicable law to do so. Moreover, we do not believe that a law firm's failure to identify itself as a law firm in its name, on its letterhead and on professional cards is misleading. Ordinarily, the context in which the firm uses its name, its letterhead and its professional cards will indicate the nature of the firm's work.

Identification of Role of Lawyers

6. Rule 7.5(a)(1) and (4) authorize professional cards and letterheads to identify the lawyer "by name and as a lawyer." May a professional card or personalized letterhead identify only the firm name and the name of the lawyer, or must it also identify the lawyer as a lawyer, *e.g.*, "lawyer," "Esquire" or a similar identifier, and/or include the designation of the lawyer's role within the firm, *e.g.* partner, principal, associate? We believe that both a professional card and personal letterhead may designate only the name of the lawyer, without adding "lawyer," "Esquire" or a similar identifier, or the lawyer's role within the firm.

7. In N.Y. State 704 (1998), the inquirer asked whether an attorney's relationship with the firm (*e.g.*, partner, associate or of counsel) must be disclosed on personal letterhead and professional cards. We concluded that it would be ethically permissible to use personal letterhead or professional cards that did not provide any information on the attorney's role in the firm, as long as the omission was not false, deceptive or misleading and did not violate any statute or court rule. We also stated "we have not found any rule or ethical authority that suggests that the nature of the precise status of an attorney in the law firm must be indicated on the letterhead." We noted that the language in DR 2-102(A) – the

predecessor provision in the Code of Professional Responsibility that corresponds to Rule 7.5(a) – did not require any particular information to be included on a lawyer's professional card or letterhead but instead provided a non-exclusive list of information that might permissibly be included. We said:

> While DR 2-102(A)(4) states literally that "a letterhead identifying the lawyer by name and as a lawyer" is permissible, we believe that provision to be enabling and not limiting.

See also N.Y. State 932 (2012)("Rule 7.5(a)(i) provides a non-exclusive list of the content of a lawyer's professional card. It provides that the card may contain [the enumerated items]"); N.Y. County 682 (1990) (An associate's professional card need not indicate the fact that the associate is only an associate as opposed to a partner in the law firm; as long as the individual is a lawyer, further designation of the lawyer's status in the firm is not ethically required.)

8. We would not reach the same conclusion with respect to firm letterhead that listed both partners and associates. *See* N.Y. County 612 (1973) (firm letterhead must differentiate between partners and associates); N.Y. City 890 (1977) (same). For example, N.Y. County 612 states:

> It has been a long established practice in New York City for law firm letterheads to distinguish between partners and associates thereof by a separating line, enlarged spacing between the classes or otherwise. On the letterheads of many law firms only the names of partners are listed.
>
> In light of such strong precedent it would appear misleading to all who receive such non-differentiating letterheads to depart from the usual form of separation between partner and associate. Absent some clear form of differentiation . . . the letterhead would constitute in the mind of a recipient a representation that all the listed names were those of partners. The public is entitled to know the status of those listed on the letterhead.

We agree with that reasoning. Furthermore, we believe the practice of distinguishing between partners and associates on letterhead also exists throughout the state. Typical methods of making the distinction include using a separating line between partners and associates or listing partners and associates on different sides of the letterhead. Because the practice of distinguishing between partners and associates on letterhead is longstanding and statewide, a law firm's failure to do so would be misleading within the meaning of Rule 7.1 and therefore would violate Rule 7.5(a).

CONCLUSION:

9. We conclude as follows:

A. If two lawyers, X and Y, form a law firm that is a professional corporation, the law firm may not be called simply "X & Y". The firm name must also contain "P.C."

B. A law firm name need not expressly refer to the firm as a law office, *e.g.*, "Law Offices of X & Y." It is sufficient that the firm is identified as "X & Y, P.C."

C. On personal letterhead and professional cards, it is sufficient to identify lawyers by their name (with or without "Esq.") without a designation of position within the firm, *e.g.*, "partner," "principal" or "associate".

D. On firm letterhead that lists both partners and associates, a law firm must distinguish between partners and associates, such as by using a separating line or by listing partners and associates on different sides of the letterhead, because failure to distinguish between partners and associates would be misleading.

(32 -12)

OPINION 1029 (10/23/2014)

TOPIC: Conflicts of interest for government lawyers with prior private clients

DIGEST: A government agency lawyer who previously represented a nongovernmental client in litigation against the agency is prohibited from representing the agency in a particular matter if that matter is the same as or substantially related to the litigation and the interests of the former client and the agency are materially adverse, although such conflict may be cured by informed consent of the prior client. If the lawyer participated personally and substantially in the prior litigation, then, notwithstanding any consent of the prior client, the lawyer is also prohibited from representing the agency in a particular matter that is the same as the prior litigation, such as advising the agency on compliance with the settlement agreement that ended the litigation. Advice on programs that were not involved in the litigation likely would not be the same matter as, nor substantially related to, the litigated matter unless the parties and the underlying facts were the same. Advice on programs that were involved in the litigation would require closer scrutiny to determine if the matter were the same or substantially related. The fact that legal issues involved in a new matter may be the same as ones in the litigation does not automatically make the matters substantially related.

RULES: 1.0(*l*); 1.9(a); 1.11(d)

FACTS:

1. The inquirer is employed as an attorney for a municipal agency. The inquirer was previously employed by an advocacy organization that conducted class action litigation (the "Litigation") against the agency. In that capacity the inquiring lawyer participated personally and substantially in the Litigation, which was eventually settled.

2. The lawyer's responsibilities with the agency include setting policy for programs provided to the agency's constituents. The lawyer does not provide legal advice to the agency on compliance with the settlement agreement that resolved the Litigation. While much of lawyer's advice to the agency involves new programs for the agency's constituents, the lawyer may be called upon to advise on programs involving the same settings that gave rise to the Litigation.

3. The inquirer asks whether his prior involvement in the Litigation presents any ethical issues for his ongoing work for the agency on any programs or issues that were involved in the Litigation.

QUESTION:

4. May the lawyer advise the agency on issues involved in the Litigation, including issues relating to the provision of services to the agency's constituents with respect to (i) programs that were not involved in the Litigation, and (ii) programs that were involved in the Litigation?

OPINION:

5. Two separate conflicts rules in the New York Rules of Professional Conduct (the "Rules") apply to this situation: Rule 1.9 and Rule 1.11.

6. Rule 1.9(a) is the general rule applicable to conflicts with former clients. It provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter" in which the new client's interests "are materially adverse to the interests of the former client" unless the former client gives informed consent, confirmed in writing.

7. The goals of Rule 1.9 include (1) preventing a lawyer from switching sides (e.g., from participating in the litigation and settlement of a matter and then attacking the settlement), and (2) preventing a lawyer from improperly using confidential information of the former client. *See* Rule 1.9, Cmts. [2] & [3]. To achieve these goals, Rule 1.9(a) applies not only to representation in the very matter in which the lawyer represented the former client, but also to representation in matters that are "substantially related."

8. Rule 1.11, as its name denotes, is the special conflicts rule applicable to current and former government employees. Rule 1.11(a) applies to a lawyer in the private sector who formerly served as a public officer or employee of the government. Rule 1.11(d) applies to the reverse situation – the one presented here – providing in part:

> (d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:
>
> > (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter . . .

9. Rule 1.11(a) applies *instead of* Rule 1.9(a) with respect to lawyers who leave the government and join the private sector, but Rule 1.11(d), which applies to lawyers who leave private practice to join the government, applies *in addition to* Rule 1.9(a). *Compare* Rule 1.11, Cmt. [4] (explaining that a former government lawyer is disqualified "only from particular matters in which the lawyer participated personally and substantially") *with* Rule 1.11, Cmt. [9B] ("Where a government law office's representation is materially adverse to a government lawyer's former private client, . . . the representation would, absent informed consent of the former client, also be prohibited by Rule 1.9.").

10. The goal of Rule 1.11 is not to prevent switching sides. In particular, Rule 1.11(d) applies "regardless of whether a lawyer is adverse to a former client." Rule 1.11, Cmt. [3] (noting that rule is designed not only to protect former clients "but also to prevent a lawyer from exploiting public office for the advantage of another client," so that in general, "a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government"). The goals of Rule 1.11 are discussed in a Comment which goes on to state:

> On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. . . . [Certain provisions in Rule 1.11(b)] are necessary to prevent the disqualification rule from imposing too severe a deterrent to entering public service. The limitation on disqualification in paragraphs

> (a)(2) and (d) to matters involving a specific party or specific parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

Rule 1.11, Cmt. [4] (noting that the Rule "represents a balancing of interests").

Are the Litigation and the Current Representation the Same Matter?

11. The term "matter," which appears in both Rule 1.9 and Rule 1.11, appears in the definition section of the Rules: "'Matter' includes "any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties." Rule 1.0(*l*); *see* Rule 1.9, Cmt. [2] ("The scope of a 'matter' for purposes of this Rule depends on the facts of a particular situation or transaction."). And, at least for purposes of Rule 1.11:

> [A] "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which (i) the matters involve the same basic facts, (ii) the matters involve the same or related parties, and (iii) time has elapsed between the matters.

Rule 1.11, Cmt. [10].[70]

12. The inquiry specifies that the lawyer does not provide legal advice to the agency on compliance with the settlement agreement that resolved the Litigation. We note that for the lawyer to give such advice would seemingly be prohibited under Rule 1.9(a) and Rule 1.11(d). The lawyer participated personally and substantially in the Litigation settled by that agreement, and advising on compliance with the agreement with respect to the very parties involved in the Litigation would implicate concerns of switching sides, improperly using the former client's confidential information, and exploiting public office for the advantage of the former client.

13. Since the lawyer does not in fact advise the agency on compliance with the settlement agreement, the lawyer's representation of the agency does not necessarily constitute representation in the same "matter" as the Litigation. We turn to an analysis of the factors mentioned in Comment [10] to Rule 1.11 – the facts, the passage of time, and the parties.

14. As to whether the matters involve the same basic facts, we distinguish between (i) programs that were not involved in the Litigation and (ii) programs that were involved in the Litigation. If the lawyer's advice to the agency does not involve the same programs that were the subject of the Litigation, it may be easy to conclude that the current representation and the Litigation do not involve the

70 Comment [10] addresses the relationship of two matters "[f]or purposes of paragraph (e)." Rule 1.11(e) does not define "matter" in general, but merely provides that "[a]s used in this Rule, the term 'matter' as defined in Rule 1.0(*l*) does not include or apply to agency rulemaking functions." The Rule's history may shed light on why the Comment, in making a general point about the definition of "matter," refers to a paragraph that addresses only rulemaking. The ABA Model Rules do not include a definition of "matter" in the definition section, but rather define that term in Rule 1.11(e). Nor was the term defined in the definition section in the version of the Rules proposed to the Appellate Divisions by the New York State Bar Association in 2008. Rule 1.0(*l*) was added by the New York Administrative Board *sua sponte*.

same basic facts. But if the lawyer were to advise the agency regarding the *same* programs, especially if the advice were given in connection with an adversarial proceeding brought on behalf of the agency's constituents, then a more detailed analysis would be required to determine whether the new advice involves the same basic facts as the Litigation.

15. As to the passage of time, the Litigation was commenced years ago and has already been settled. Although the settlement agreement was finalized only within the past year, the inquiry nonetheless involves matters separated by time.

16. Finally, as to whether the matters involve the same or related parties, the current clients of the agency were not named plaintiffs in the Litigation. We have found no case law or ethics opinions attempting to define "a specific party or parties" as that phrase is used in Rule 1.0(*l*), but our prior opinions citing that Rule involve the same party or parties. *See, e.g.,* N.Y. State 904 ¶ 8 (2012) (concluding that criminal investigation and civil claim for restitution, though related, were not same matter, in part because prosecutor was party only to the former and claimant was party only to the latter).

17. We believe the term "a specific party or parties" in Rule 1.0(l), at least for purposes of Rule 1.11, should be interpreted narrowly. See Rule 1.11, Cmt. [4] (quoted above). In a class action, only named plaintiffs should be considered a "specific party or parties," and that term should generally not be deemed to include all members of the class even though they may benefit from relief resulting from the lawsuit. *Cf.* N.Y. City 2004-1 (2004) ("If a class member has not individually retained the class lawyer or consulted with that lawyer and the lawyer has not acquired confidential information about that class member, the lawyer should be free to accept an unrelated matter against the class member while the class action is pending."). This factor thus counts against a conclusion that the matters are the same.

18. Taking these various factors into account, it seems unlikely that the current representation and the Litigation would be deemed the same matter if the advice does not involve the programs that were the subject of the Litigation. We do not foreclose the possibility that they could be deemed the same matter in some circumstances, such as if the lawyer were to advise the agency regarding the litigated programs and the advice were given in connection with an adversarial proceeding brought on behalf of the agency's constituents, especially if that adversarial proceeding were similar or related to the prior Litigation.

Are the Litigation and the Current Representation Substantially Related Matters?

19. If a matter on which the inquirer would advise the agency were not the same as the one in which the inquirer "participated personally and substantially while in private practice or nongovernmental employment," then Rule 1.11(d) would not preclude the inquirer's participation in giving such advice. However, giving such advice could still implicate Rule 1.9(a), which applies to representation not only in the same matter, but also in matters that are "substantially related." It is therefore relevant to determine whether issues involving the constituents of the agency should be viewed as substantially related to the Litigation.

20. Comment [3] to Rule 1.9 explains that matters are "substantially related" if "they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude

that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Ultimately, the determination of substantial relationship is a factual one. *See* N.Y. State 1008 ¶ 21(2014) ("the 'materially advances' inquiry is fact-intensive").

21. The test of substantial relation between two matters is more easily met than the test of whether two matters will be deemed the same, but the factors discussed above are again relevant to the analysis. If the lawyer's advice to the agency does not involve the same programs that were the subject of the Litigation, then the current representation and the Litigation probably are not substantially related. But if the advice involves the same programs, and especially if the advice is given in connection with litigation (such as an adversarial proceeding brought on behalf of the agency's constituents), then a more detailed analysis would be required to determine whether a reasonable lawyer would perceive a substantial risk that "confidential factual information that would normally have been obtained in the prior representation" would materially advance the agency's position in the new representation.

22. The mere circumstance that the current representation may involve legal issues that were also involved in the Litigation does not make the matters substantially related. Interpretations of the ethical rules have long distinguished between conflicts involving the same matter and conflicts involving the same legal issue. Such "issue" (or "positional") conflicts tend to be more problematic in the case of concurrent representation than in the case of former representation. Even as to concurrent representation, a lawyer may ordinarily "take inconsistent legal positions in different tribunals at different times on behalf of different clients," although there can be circumstances in which an issue conflict arises because "there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's representation of another client in a different case.[71] As to former representation:

> When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type, even though the subsequent representation involves a position adverse to the prior client.

Rule 1.9, Cmt. [2]. That is not to say that an issues conflict could never arise as to a former client, but the Comment makes clear that such conflicts are not typical, and they are even less likely to occur when (as here) the second representation does not involve litigation.

23. If the inquirer were asked to give advice to the agency in a matter substantially related to the Litigation, then the inquirer would need to consider whether the agency's interest in that matter is "materially adverse to the interests of the former client" under Rule 1.9(a). If so, then Rule 1.9 would preclude the inquirer's representation of the agency in that matter. Of course at the time of the Litigation, there was adversity between the plaintiffs and the agency. The inquiry does not provide the facts necessary to determine whether the interests of the agency and the former client are, currently, materially adverse in any matter in which the lawyer would be advising the agency.

71 Rule 1.7, Cmt. [24]; *accord* Restatement (Third) of the Law Governing Lawyers § 128, comment (f) (2000); *see* N.Y. State 826 (2008) (discussing consentability of positional conflicts).

Consent to Conflicts

24. A conflict under Rule 1.9(a) may be cured if "the former client gives informed consent, confirmed in writing," and those terms are defined. *See* Rule 1.0(j) (defining "Informed consent"); Rule 1.0(e) (defining "Confirmed in writing"). If representation of the agency in a particular matter presents a conflict under Rule 1.9 but not under Rule 1.11, then the former client's informed consent, confirmed in writing, would allow the lawyer to represent the agency in that matter. Situations in which there would be a conflict under Rule 1.9 but not under Rule 1.11 could arise if the interests of the agency in the new matter were materially adverse to those of the former client, but the government lawyer had not participated "personally and substantially" in the prior matter, or if the new matter were not the same as the prior one but only substantially related.

25. On the other hand, informed consent does not cure a conflict under Rule 1.11(d). Under that Rule, a lawyer currently serving as a public officer may not participate in a matter in which the lawyer participated personally and substantially while in private practice. The only exceptions arise when "law may otherwise expressly provide" or when, "under applicable law, no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter." Rule 1.11(d).

26. Here, the lawyer did participate personally and substantially in the Litigation, so the existence of a conflict under Rule 1.11(d) turns on whether the matter of the current representation is the same matter as the Litigation. If the matters are the same, then the lawyer would be disqualified, notwithstanding any consent of the former client, because neither of the exceptions in Rule 1.11(d) would apply. The lawyer is apparently not the only one authorized to act for the agency. Nor has the inquirer mentioned any law expressly providing that the lawyer may represent the agency notwithstanding the conflict.

CONCLUSION:

27. The lawyer may not advise the agency on compliance with the Litigation settlement agreement with respect to the parties in that Litigation. Otherwise, the lawyer may advise the agency on a matter involving the agency's programs unless (a) the matter is the same as the matter in the Litigation, or (b) the matter is substantially related to the matter in the Litigation and the agency's interest in that matter is materially adverse to the interests of the former client. Advice on programs that were not involved in the Litigation likely would not be in the same or a substantially related matter unless the parties and the underlying facts were the same as those in the Litigation. Before giving advice on a program that *was* involved in the Litigation, the lawyer would need to determine whether such advice is in the same matter, or, if in a substantially related matter, whether there is material adversity between the interests of the agency and the former client. Even if legal issues involved in the new matter may be the same as issues in the prior Litigation, that does not automatically make the matters substantially related.

(22-14)

OPINION 1030 (10/30/2014)

TOPIC: Trust Account; Letterhead

DIGEST: If a law firm with a new name partner is either the same firm (with a new name) or a legal successor to the business and property of the original firm, and the firm (i) makes all necessary corporate filings, and (ii) takes all steps with the bank that maintains its trust account necessary to reflect any changes taking place under the Business Corporation Law and the firm's constituent documents, then the firm may (1) continue to use its old letterhead while the remaining stock is being depleted and (2) continue to use the trust account and the checks used to draw upon it (although it would be desirable to indicate the change in firm name on the old checks).

RULES: Rules 1.15(b), 7.5(b), 8.4(c).

FACTS:

1. A lawyer (Z) recently joined a law firm known as W, X & Y, P.C. as a partner. The firm would like to change the firm's name to add attorney Z's name to the firm's name to create the law firm of W, X, Y & Z, P.C.

QUESTIONS:

2. A. Must the law firm discard all existing letterhead/stationery in the original name of the firm, or may it continue to use the old stationery, until it runs out?

B. May the law firm continue to use the original firm's checking account and checks until the checks run out, or must the firm open a new checking account in the new name?

OPINION:

3. The answer to the questions posed here depend on both applicable law and the applicable provisions of the New York Rules of Professional Conduct (the "Rules"). The questions about applicable law – whether the firm has merely changed its name, or is considered a completely new law firm, and, if the firm is a new corporate entity, whether it has succeeded to all of the rights and liabilities of the original firm, including its business and bank accounts – are legal questions beyond our jurisdiction to answer, but, in the Committee's experience, it is common, when a professional corporation adds a name partner, to amend its certificate of incorporation to change its name. In this case, the firm is the same firm.[72]

Use of Old Letterhead

4. Rule 7.5 sets out the ethical rules with respect to professional notices, letterheads and signs. It provides generally that a lawyer or law firm may use letterheads, professional cards and similar professional notices, as long as they do not violate any statute or court rule and are not false, deceptive or

72 New York Professional Corporations are formed under Article 15 of the Business Corporation Law. P.C.'s, like other corporations, are entitled to amend their certificates of incorporation to change their corporate names. See N.Y. Bus. Corp. L. § 801(b)(1).

misleading. In addition, Rule 7.5(b) provides, among other things, that "[a] lawyer in private practice shall not practice under . . . a name that is misleading as to the identity of the lawyer or lawyers practicing under such name." Rule 8.4(c) prohibits an attorney from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation."

5. It is common for law firms to add partners from time to time, and also common for law firm names not to include the name of all partners in the firm. Consequently, assuming that W, X, Y & Z is either the same firm or a legal successor to W, X & Y, and that all necessary public filings have been made, we do not believe use of the old letterhead would be misleading while the remaining stock is being depleted merely because it does not reflect the new name of the firm.[73]

Use of Original Bank Account

6. Rule 1.15(b)(1) provides in relevant part:

> A lawyer who is in possession of funds belong to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State. . . . Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or . . . is employed . . . .

The Rule does not apply to the firm's general (i.e. operating) account, that is, the account that contains only funds that belong to the lawyer or law firm, such as funds that will be used to pay salaries or rent. Rather, Rule 1.15(b)(1) applies only to the attorney trust or escrow account containing client funds. With respect to the firm's general account, Rule 8.4(c), quoted in ¶4, above, would be the applicable provision.

7. We believe that whether an attorney trust account in the original firm name is an account in the name of a firm of lawyers of which the lawyer is a member depends on the legal issue of whether the new firm is the same as, or a legal successor to, W, X & Y, so that the original trust account remains or becomes the trust account of the successor firm. If the trust or escrow account is or becomes the property of the successor firm, and the firm takes the steps necessary with the bank to reflect the changes taking place under the Business Corporation Law and the firm's constituent documents, then we believe that the firm may ethically continue to use the trust or escrow account and the checks used to draw on that account without violating Rule 1.15(b)(1), although it would be desirable to indicate the change in firm name on the old checks.

8. Similarly, if the firm with the new name partner is the same as or a successor to the original firm, and the firm takes the steps necessary with the bank to reflect the changes taking place under the Business Corporation Law and the firm's constituent documents, then the firm may ethically continue to use the general account and the checks associated with that account without violating Rule 8.4(c), while the old checks are being depleted, although it would be desirable to indicate the change in firm name on the old checks.

73 We might not reach the same conclusion with respect to a firm that has lost a name partner due to retirement or other departures, depending on the context.

CONCLUSION:

9. If a law firm with a new name partner is either the same firm (with a new name) or a legal successor to the business and property of the original firm, and if the firm (i) makes all necessary corporate filings, and (ii) takes all steps with the bank that maintains its trust or escrow account and its general account necessary to reflect any changes taking place under the Business Corporation Law and the firm's constituent documents, then the firm may (1) continue to use its old letterhead while the remaining stock is being depleted and (2) continue to use the trust account and general account and the checks used to draw on them (although it would be desirable to indicate the change in firm name on the old checks).

(36-14)

OPINION 1031 (10/30/2014)

TOPIC: Specialization; Use of term "specialist" in the title of a job held by a lawyer that a nonlawyer may lawfully perform

DIGEST: A lawyer may use the title "immigration specialist" in a job previously and lawfully held by nonlawyers where the lawyer does not publicly associate the title with his or her status as a lawyer. The lawyer may disclose the status as a lawyer to persons interacting with the lawyer as long as the lawyer does not do so "publicly." Disclosure of the lawyer's status as a lawyer and "specialist" title on a resume ordinarily would not be prohibited by Rule 7.4, but disclosure of this title on a LinkedIn site would be prohibited.

RULES: Rules 5.7(a) & (c), 7.4(a) & (c).

FACTS:

1. The inquirer is a lawyer who has been hired as an "immigration specialist" in the Human Resources Department of an educational institution in New York. In that role, the inquirer will prepare filings on behalf of the institution and devise immigration visa strategies, but she will not make any appearance on behalf of the institution and her status as an attorney will not generally be visible to the public. The position was previously held by a nonlawyer. The inquirer's email signature would identify her as "Immigration Specialist, Human Resources Department," with no indication that she is a lawyer.

QUESTION:

2. May a lawyer use the title of "specialist" when working in a position in which the lawyer's status as a lawyer is not disclosed to the public?

3. If so, may the lawyer include the title in a resume and LinkedIn profile?

OPINION:

4. This inquiry arises at the intersection of two provisions of the New York Rules of Professional Conduct (the "Rules"). First, Rule 7.4 prohibits a lawyer from "publicly" identifying himself or herself as a "specialist" in an area of law unless he or she has been certified by certain approved organizations. *See* N.Y. State 757 (2002).[74]

5. Second, Rule 5.7 addresses the provision of nonlegal services by lawyers and the circumstances in which the Rules apply to the rendition of such services. Among other things, Rule 5.7(a) provides that where a lawyer renders both legal and nonlegal services to a person in circumstances in which the services are not kept "distinct," the Rules apply to the provision of both legal and nonlegal

74 Rule 7.4(a) states: "A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that *the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field*, except as provided in Rule 7.4(c)." (Emphasis added.) Rule 7.4(c), the exception referred to, provides that a lawyer may state that the lawyer has been recognized or certified as a specialist only if certified by certain organizations and only if the statement is accompanied by certain disclosures.

services. The services at issue here appear potentially to encompass both nonlegal and legal services. "Nonlegal services" means "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." Rule 5.7(c). We assume that the immigration-related services at issue here are such a nonlegal service – that is, that they could lawfully be provided by a nonlawyer.[75] We have observed, however, that there are services that may be legally undertaken by both lawyers and nonlawyers but "when such services are performed by a lawyer who holds himself out as a lawyer, they constitute the practice of law and the lawyer, in performing them, is governed by the Code." N.Y. State 557 (1984). Some of the services that the inquirer provides – such as the development of immigration visa strategies for her employer and preparation of immigration filings – are services that, if provided by a lawyer "who holds himself out as a lawyer," would be governed by the Rules. *See* N.Y. State 832 ¶ 6 (2009) ("despite the fact that a nonlawyer might be entitled to provide some advice about a shelf corporation without committing the unauthorized practice of law, when a lawyer provides such advice it becomes the provision of legal services").

6. As indicated in ¶5, in our opinions addressing the services that may be provided by both lawyers and nonlawyers, we looked to whether the lawyer was "holding himself out as a lawyer." N.Y. State 557; *see also* N.Y. State 636 (1992) (lawyer could conduct business of selling will forms where lawyer does not identify himself as a lawyer); N.Y. State 832 ¶ 10 (noting that identifying person selling shelf corporations as a lawyer creates risk of confusion that the lawyer has a lawyer-client relationship with buyers); N.Y. State 951 ¶ 12 (2012) (same as to lawyer offering letter-writing service where the letters address legal subjects). Obscuring the fact that the person providing the service in question is a lawyer is not always effective to avoid the application of the Rules. *See* N.Y. State 662 (1994) (lawyer assisting nonlawyer in representing homeowners challenging real estate taxes must disclose status to avoid misleading the tribunal and opposing party). Nevertheless, in this circumstance we see no reason why the bar on use of the term "specialist" would apply to a lawyer who does not hold him- or herself out as a lawyer.

7. In short, whether the prohibition on use of the term "specialist" in Rule 7.4(a) applies here depends, first, on whether the inquirer is holding herself out as a lawyer, and second, whether she "publicly" uses the term "specialist." Combining these two provisions, we conclude that the use of the term "specialist" for a lawyer rendering immigration services that can lawfully be provided by a nonlawyer does not offend Rule 7.4 if the lawyer does not publicly associate the services with his or her status as a lawyer.

8. This conclusion is supported by substantial policy. The prohibition on the term "specialist" is derived from concerns that the term implies a statement as to the quality of services being provided by lawyers that may be difficult for laymen to assess and therefore particularly likely to be misleading. *See*, *e.g.*, *Bates v. State Bar of Arizona*, 433 U.S. 350, 383-84 (1977) ("misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising"). It makes little sense to bar a term that might be used by nonlawyers providing the same services if the lay public does not know that the person providing the services is in fact a lawyer. Second, the inquirer has taken a job with a title assigned by her employer for reasons apparently unre-

75 Whether a particular service would be the unauthorized practice of law if rendered by a nonlawyer is a question of law that is beyond the jurisdiction of this Committee. *See, e.g.*, N.Y. State 863 ¶¶ 4-5 (2011) (whether lawyer admitted in another state is engaging in the unauthorized practice of law if he practices exclusively immigration law is a question of law beyond the Committee's jurisdiction).

lated to her status as a lawyer. It would be unfair and counterproductive to bar her from taking the job, or to condition her ability to take the job on the extent of her ability to persuade her employer to change the title, because of her status as a lawyer.

9. This does not necessarily mean that the inquirer must hide her status from those within the institution with whom she interacts – the institution itself and the individual employees whose immigration status is at issue. Even if that might in some circumstances constitute "holding herself out as a lawyer," Rule 7.4 would not prohibit the use of the term "specialist," because disclosure to this relatively limited universe of persons would not constitute a "public" statement.

10. Turning to the second question, an accurate statement of the inquirer's title on her resume does not constitute a "public" statement for purposes of Rule 7.4, as long as the inquirer does not post or distribute the resume beyond specific potential employers. A notation on the inquirer's LinkedIn page, however, must be construed as "public." *See* N.Y. State 757 (letterhead and business cards are forms of public communications for purposes of DR 2-105 (now Rule 7.4)). If the LinkedIn page notes the inquirer's status as an attorney, it cannot also note a title including the word "specialist." We have considered whether a notation on the site that the job does not entail the rendering of legal services might be sufficient to avoid the prohibition. The difficulty is that, as noted above, it appears that the inquirer does in fact render services that are "legal services" if rendered by a lawyer, so that the disclaimer would not be accurate. *Cf.* N.Y. State 832 ¶ 11 (a disclaimer that no legal services are being rendered and the protections of the attorney-client relationship do not exist "would not be effective if the lawyer actually provided legal advice or other legal services to the customer of the nonlegal business").

CONCLUSION:

11. The inquirer may use the title "immigration specialist" as long as she does not publicly associate her status as an attorney with her title. Noting the title on her resume would not ordinarily be prohibited by Rule 7.4, but noting it on her LinkedIn page together with her status as a lawyer would be prohibited.

(40-14)

OPINION 1032 (10/30/2014)

TOPIC: Responding to a former client's critical commentary on a website

DIGEST: A lawyer may not disclose confidential client information solely to respond to a former client's criticism of the lawyer posted on a lawyer-rating website.

RULES: 1.6(a); 1.6(b); 1.9(c)

FACTS:

1. The inquirer, a New York law firm, believes that a "disgruntled" former client has unfairly characterized the firm's representation of the former client on a website that provides reviews of lawyers. A note posted by the former client said that the former client regretted the decision to retain the firm, and it asserted that the law firm provided inadequate services, communicated inadequately with the client, and did not achieve the client's goals. The note said nothing about the merits of the underlying matter, and it did not refer to any particular communications with the law firm or any other confidential information. The former client has not filed or threatened a civil or disciplinary complaint or made any other application for civil or criminal relief.

2. The law firm disagrees with its erstwhile client's depiction of its services and asserts that the firm achieved as good a result for the client as possible under the difficult circumstances presented. The firm wishes to respond to the former client's criticism by telling its side of the story if it may do so consistently with its continuing duties to preserve a former client's confidential information.

QUESTION:

3. When a lawyer's former client posts accusations about the lawyer's services on a website, may the lawyer post a response on the website that tends to rebut the accusations by including confidential information relating to that client?

OPINION:

4. The Internet and social media today provide a number of sites that ask visitors to state their views of and experiences with lawyers, presumably to provide other visitors with information on which to base their choice of counsel. Our survey of a few of these sites did not reveal any protocols to monitor the accuracy of the commentary, except to assure that the very lawyers being reviewed are not the source. In this respect, the sites differ from other lawyer-rating agencies – *Chambers*, *Super Lawyers, Best Lawyers in America*, *Martindale-Hubbell* and the like – which claim to base their ratings on a canvass of clients and other members of the bar.

5. The inquiry concerns a negative posting on such a site by a former client. The inquiring firm believes that certain information about its representation of that client would tend to rebut the posted allegations. The information in question constitutes "Confidential information" as defined by Rule 1.6(a) of the Rules of Professional Conduct (the "Rules"). Under Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client.

6. There is, however, a "self-defense" exception to the duty of confidentiality set forth in Rule 1.6, which as to former clients is incorporated by Rule 1.9(c). Rule 1.6(b)(5)(i) says that a lawyer "may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct." When applicable, this exception permits, but does not require, disclosure of confidential information, and only to the extent the lawyer reasonably believes necessary to serve the purpose of self-defense. *See* Rule 1.6, Cmts. [12] & [14].

7. The inquiry raises the question whether a lawyer may rely on this exception to disclose a former client's confidential information in response to a negative web posting, even though there is no actual or threatened proceeding against the lawyer. We do not believe that a lawyer may do so.

8. The language of the exception suggests that it does not apply to informal complaints such as this website posting. The key word is "accusation," which has been defined as "[a] formal charge against a person, to the effect that he is guilty of a punishable offense," *Black's Law Dictionary* 21 (5th ed. 1979), or a "charge of wrongdoing, delinquency, or fault," *Webster's Third International Dictionary Unabridged* 22 (2002). *See* Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated* 230 (2013 ed.) ("An accusation means something more than just casual venting.")

9. Comment [10] to Rule 1.6 supports this conclusion. It says that "[w]here a claim or charge alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense." In the context of a set of legal standards, the words "claim" and "charge" typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other procedure that can result in a sanction. Comment [10] continues by saying: "Such a claim may arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone." Each of these examples involves a formal proceeding in which the lawyer's conduct has been placed in issue.

10. Case law supports our conclusion. New York cases permitting disclosure of confidential information under Rule 1.6(b)(5)(i) and its nearly identical predecessor DR 4-101(C)(4) have invariably involved allegations of lawyer wrongdoing in formal proceedings such as legal malpractice or other civil actions, disqualification proceedings, or sanctions motions.[76] Those cases stand in contrast to those in which lawyers have not been permitted to use a client's confidential information to initiate actions against former clients (other than lawsuits to collect legal fees, for which Rule 1.6(b)(5)(ii) provides a different exception to confidentiality).[77] Thus under the case law, a lawyer is not autho-

76 *See, e.g., Meyerhofer* v. *Empire Fire and Marine Ins. Co.*, 497 F.2d 1190, 1195 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974); *First Fed. Sav. & Loan Ass'n of Pittsburgh* v. *Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557, 567-68 (S.D.N.Y. 1986); *Creditanstalt Inv. Bank AG* v. *Chadbourne & Parke LLP*, 39 A.D.3d 201, 201 (1st Dep't 2007); *Nesenoff* v. *Dinerstein & Lesser, P.C.*, 12 A.D.3d 427, 429 (2d Dep't 2004); *In the Matter of Koeppel*, 32 Misc.3d 1245(A) (Surr. Co. N.Y. Co. 2011); *General Realty Assoc.* v. *Walters*, 136 Misc. 2d 1027, 1029 (Civ. Ct. N.Y.C. 1987).

77 *See, e.g., Eckhaus* v. *Alfa-Laval, Inc.*, 764 F. Supp. 34, 37-38 (S.D.N.Y. 1991) (defamation); *Wise* v. *Con. Edison Co. of N.Y., Inc.,* 282 A.D.2d 335, 336 (1st Dep't 2001) (wrongful discharge). *See also* D.C. Opinion 363 (2012) (in-house lawyer may not disclose confidential information in retaliatory discharge claim).

rized to reveal confidential information whenever helpful in a dispute, but rather only when facing some kind of formal proceeding.[78]

11. In at least one case, discipline has been imposed for the kind of conduct in question here. *In re Tsamis*, Joint Stipulation and Recommendation ¶¶ 4-10 & Reprimand ¶ 1, No. 2013PR00095 (Hearing Board, Ill. Att'y Reg. & Disc. Comm. 2014) (reprimanding lawyer for revealing confidential information about her former client in response to client's negative review on AVVO legal referral website). Ethics opinions from other jurisdictions have reached varying results on the question facing us, but their relevance is limited by differences in the ethical rules in force in those jurisdictions.[79]

12. We note a New York opinion that addressed the predecessor to Rule 1.6(b)(5)(i), though in a different context. In N.Y. County 732 (2004), a client threatened to file a disciplinary complaint against a lawyer if the lawyer did not release funds in an IOLA account, the proper disposition of which was a part of the lawyer's inquiry to the Committee. The Committee opined that in the event of such a complaint, "the law firm would be entitled to disclose confidences or secrets necessary to defend itself against the client's accusations." The Committee concluded that the "rules permitting disclosure of client confidences should be read restrictively" but that the law firm may disclose protected client information "if the client files a complaint or claim against the law firm."

13. We do not mean to say that a formal proceeding must be actually commenced to trigger the authorization of disclosure by Rule 1.6(b)(5)(i). There may be circumstances in which the material threat of a proceeding would give rise to that right. *See* N.Y. City 1986-7 (in-house lawyer may disclose confidential information to government prosecutors who have identified the lawyer as the subject of a grand jury investigation in which other witnesses have made incriminating statements about the lawyer). We do not need to reach that question here because no material threat of a proceeding has been made on the website posting that is the subject of this inquiry.

14. Nor do we consider the question of whether and when a negative website posting may effect a waiver of a client's right to confidentiality, because that question is not raised by the facts as presented in the inquiry. If there were facts raising the question of waiver, it would be necessary to consider separately the possible waivers of attorney-client privilege and of other kinds of confidentiality under

78 *See* N.Y. City 2005-03 (noting recognition by courts that "an attorney may use client confidences or secrets to defend himself or herself from a claim or counterclaim brought by the client, or as evidence in a fee collection dispute, but may not necessarily be permitted to use that same information affirmatively in a different type of claim against a client"); Restatement (Third) of the Law Governing Lawyers § 64, comment (c) (2000) (noting that a lawyer may act under the Restatement's self-defense provision "only to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification").

79 In California there is no ethical counterpart to New York Rule 1.6(b)(5)(i), but the Evidence Code contains a self-defense exception to attorney-client privilege. Opinions interpreting that exception have concluded that California law does not permit a lawyer "to disclose otherwise confidential information in an online attorney review forum, absent client consent or a waiver." San Francisco Opinion 2014-1; *see* Los Angeles County Opinion 525 (2012) (attorney may respond to former client's internet posting if (1) "response does not disclose confidential information"; (2) response will not injure former client in matter involving the former representation; and (3) response is proportionate and restrained). An Arizona opinion concluded that the right to disclose was not limited to "a pending or imminent legal proceeding," relying on a provision found in the Arizona rule (and in the ABA Model Rule) but not in the New York rule. Arizona Opinion 93-02 (reasoning that one category of cases within the exception, for a claim or defense "in a controversy" between the lawyer and the client, would include cases not covered by another category within the exception, for "allegations in any proceedings").

Rule 1.6(a). Waiver of attorney-client privilege turns on questions of law beyond our jurisdiction. *See, e.g., 1050 Tenants Corp.* v. *Lapidus*, 12 Misc. 3d 1118, 1123-25 (Civ. Ct. N.Y.C. 2006). Given the facts as presented, we need not consider whether a negative website posting might waive other kinds of confidentiality. Rather, we assume for present purposes that confidentiality has not been waived. It suffices to say that the mere fact that a former client has posted critical commentary on a website is insufficient to permit a lawyer to respond to the commentary with disclosure of the former client's confidential information.

15. This result properly respects the vital purpose of Rule 1.6(a) in preserving client confidentiality and fostering candor in the private communications between lawyers and clients, and it does not unduly restrict the self-defense exception. That exception reflects the fundamental unfairness of a current or former client – or others – being able to make consequential accusations of wrongful conduct against a lawyer, while the lawyer is disabled from revealing information to the extent reasonably necessary to defend against such accusations. Unflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice. We do not believe that Rule 1.6(b)(5)(i) should be interpreted in a manner that could chill such discussion.

CONCLUSION:

16. A lawyer may not disclose client confidential information solely to respond to a former client's criticism of the lawyer posted on a website that includes client reviews of lawyers.

(1-14)

OPINION 1033 (11/07/2014)

TOPIC: Conduct involving misrepresentation

DIGEST: Where a prospective buyer makes an offer for real property and is asked both to pay the cost of a "short sale negotiator" and to reduce the offer price by the same amount, the lawyer for the buyer may not participate in the transaction unless the bank is informed that the offer price was reduced by the cost of the short sale negotiator. Disclosure on the HUD-1 form that the seller is paying the fee of the short sale negotiator is insufficient, by itself, to put the bank on notice that the offer price was originally higher.

RULES: 8.4(c)

FACTS:

1. A lawyer represents a client (a prospective buyer) who made an offer to purchase residential real property for $310,000. The sale price will be subject to approval by the bank that holds the seller's mortgage, since the sale price is less than the outstanding amount of the mortgage (*i.e.,* it is a "short sale"). However, the seller's real estate agent refuses to submit the offer to the bank for approval unless the buyer signs an agreement with a third party "short sale negotiator" for a fee of $10,000 (payable upon completion of a successful short sale) and submits a reduced purchase offer for $300,000. (The purpose of a short sale negotiator is to assist the seller in completing the paperwork necessary to support the bank's decision to accept less than the outstanding amount of the mortgage in satisfaction of all amounts owed to the bank. We assume for purposes of this opinion that this is a legitimate purpose and that the short sale negotiator will perform a valuable service.) The inquirer perceives an ethical issue because where a short sale is involved, the bank customarily requires that the offer submitted for its approval be the "highest and best" offer received by the seller. The Form HUD-1 would disclose that the $10,000 fee of the short sale negotiator is being paid by the buyer, but apparently would not disclose that the buyer's original offer of $310,000 has been reduced to $300,000 to cover this cost.

QUESTION:

2. May the buyer's lawyer proceed with a real estate transaction in which the buyer pays the cost of a short sale negotiator, and reduces the original offer price by the same amount, without disclosing that the original offer price was reduced to cover the cost of the seller's short sale negotiator?

OPINION:

3. Rule 8.4(c) of the New York Rules of Professional Conduct (the "Rules) states that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Although the Rules do not define dishonesty or misrepresentation, this committee has previously identified circumstances that would constitute misrepresentation. *See, e.g.*, N.Y. State 882 (2011), N.Y. State 817 (2007) (both involving a gross-up of the purchase price of real property before application of a so-called seller's concession). In N.Y. State 882 we stated:

> In essence, we concluded in N.Y. State 817 that it is a misrepresentation under DR 1-102(A)(4) (the predecessor to Rule 8.4(c)) for the transaction documents in a residential real estate transaction either to contain an untrue statement of a material fact or to omit a material fact where the untrue statement or the material omission makes the statements contained in the transaction document materially misleading. . . . A statement may be literally true with respect to the facts stated, but may fail to include other facts necessary to prevent a false implication, and a "failure to disclose is generally considered as much a misrepresentation as a false affirmative statement." *U.S. Express, Inc. v. Intercargo Ins. Co.*, 841 F. Supp. 1328, 1337 (E.D.N.Y. 1994). An assertion need not be fraudulent to be a misrepresentation. Disclosing a seller's concession without disclosing a matching gross-up in the sales price produces a half-truth, which is a form of misrepresentation within the meaning of Rule 8.4(c).

4. In this case, disclosing that the buyer has offered $300,000 for the property and is paying $10,000 to a short sale negotiator, without also disclosing that the buyer's original offer was $310,000, would be misleading. This would be particularly so if, under the bank's short-sale program, the bank typically authorizes real estate commissions and other expenses to be paid out of the sale proceeds but does not treat third party short sale negotiator fees as an authorized expense payable from the sale proceeds.

5. Accordingly, a lawyer may not proceed with the real estate transaction proposed here unless the short sale bank is given notice that the original offer was for $310,000 and that it was reduced by an amount equal to the fee of a short sale negotiator. Failure to make that disclosure would constitute conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rule 8.4(c). Disclosure on the HUD-1 form that the seller is paying the fee of the short sale negotiator is insufficient, by itself, to put the bank on notice that there was a higher offer.

CONCLUSION:

6. Where a prospective buyer makes an offer for real property and is asked both to pay the cost of a "short sale negotiator" and to reduce the offer price by an amount equal to that cost, the lawyer for the buyer may not participate in the transaction unless the bank is informed that the offer price was reduced by the cost of the short sale negotiator. Disclosure on the HUD-1 form that the seller is paying the fee of the short sale negotiator is insufficient, by itself, to put the bank on notice that the offer price was originally higher.

(35-14)

OPINION 1034 (11/10/2014)

Distinguishes N.Y. State 496 (1978), 512 (1979), 649 (1993)

TOPIC: Executor as lawyer's client; confidential information – disclosure of suspicion of misconduct by executor; withdrawal from representation of executor

DIGEST: Lawyer who represents executor has no ethical duty to beneficiary of estate, absent agreement to contrary. Lawyer must avoid assisting the client in conduct the lawyer knows to be illegal or fraudulent and must not knowingly make a false statement to a third person. A lawyer representing a client before a tribunal and who knows that the client intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding must take reasonable remedial measures, including, if necessary, disclosure to the tribunal. It is not clear that the inquirer has sufficient knowledge of misconduct by the client in this case. A suspicion of misconduct is not enough. But a reasonable belief that the client is engaging or has engaged in criminal or fraudulent conduct constitutes grounds for withdrawal from representation. If withdrawing when Rule 3.3(b) does not apply, the lawyer must preserve the confidences of the client unless an exception to confidentiality in Rule 1.6(b) applies. In any event, before making any permitted or required disclosures, the lawyer should remonstrate with the client.

RULES: Rules 1.2(d); 1.6(a); 1.16(b)(1); 1.16(c)(2), (4) and (7); 1.16(e); 3.3(b); 3.4(a); 4.1

FACTS:

1. A lawyer has been serving as attorney of record for a client who is one of a decedent's two surviving children. The client is (i) the executor of the decedent's estate, (ii) a beneficiary of half the residuum of that estate, and (iii) trustee of a supplemental needs trust created for the benefit of his sibling, who is disabled.[80] The trust will be funded with the other half of the residuum. To close this estate informally, the client must obtain a release from the sibling and then fund the trust. The lawyer is aware that an account of the client's proceedings as executor must be prepared and furnished to the sibling to obtain a legally effective release. The account will contain a statement by the client that, inter alia, all assets of the estate have been properly accounted for and that the client does not know of any assets that are not included in the account.

2. The lawyer has come to believe that the client could not truthfully make the representations that would be required to obtain a legally effective release. This belief is based on the facts that the client has not provided the lawyer with back-up for distributions from the estate accounts, that initial distributions may have been unequal (although that situation seems to have been corrected), that the client has mentioned selling an estate asset to a third party for 10% of what the client believed was its value, and that the client has repeatedly failed to cooperate with the lawyer throughout the course of the estate's administration. Because there will be no judicial settlement of the executor's account, the lawyer is concerned that the sibling will not be protected against any possible mismanagement of the estate.

80 The inquiry does not state the nature of the disability. We assume it is a medical disability, and not one that would qualify the sibling as a person under a disability under Section 103(40) of the SCPA, including an infant, an incompetent, or an incapacitated person, in which case special procedures would have been required.

QUESTION:

2. Is the lawyer obligated to protect the trust beneficiary? May the lawyer withdraw from the representation? If so, what information may or must the lawyer disclose?

OPINION:

Must the Lawyer Protect the Trust Beneficiary?

3. This Committee has issued a series of opinions addressing a lawyer's obligations when representing a fiduciary. For example, in N.Y. State 496 (1978), we decided that the attorney for the guardian of an infant should reveal the guardian's failure to comply with a court order relating to the infant's property. Consistent with the then prevailing case law, our analysis began by saying:

> The lawyer, although nominally characterized as attorney for the guardian, in fact and legal theory represents the guardian only as and to the extent that the [guardian] acts in a fiduciary capacity for the infant's benefit. The lawyer owes his allegiance to the infant whom he represents through the guardian. Hence the lawyer is ethically bound to treat the infant as his client and to act in a manner consistent with the best interests of the infant when those interests appear to conflict with the actions of the guardian.

Similarly, in N.Y. State 649 (1993) we discussed authorities both in this state and elsewhere, concluding that a lawyer for a fiduciary has a duty not only to the fiduciary client but also to serve the best interests of an estate to which the fiduciary owes fiduciary duties. *See also* N.Y. State 512 (1979) (a lawyer retained by the executors of an estate has a duty also to serve the best interests of the estate to which they owe their fiduciary responsibilities).

4. At the time we issued N.Y. State 496, the courts had recognized a kind of derivative (or constructive) representation of beneficiaries where the lawyer represented a fiduciary charged with the administration of an estate or trust in which such beneficiaries were interested. The courts continued to develop the concept of derivative representation in the years following the issuance of N.Y. State 496 and eventually created a so-called "fiduciary exception" to the attorney-client privilege. *See, e.g.*, Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, 62 Fordham L. Rev. 1319 (1994). Under the fiduciary exception, courts would not protect confidential communications between a lawyer and a fiduciary against discovery by an allegedly aggrieved beneficiary.

5. The New York Legislature, however, disagreed with these exceptions to the attorney-client privilege. In 2002, the Legislature amended § 4503(a) of the Civil Practice Law and Rules (the "CPLR"), which governs the attorney-client privilege in New York. The amendment added a new § 4503(a)(2), which states in relevant part:

> For purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that capacity, in the absence of an agreement between the attorney and the personal representative to the contrary:
>
> (i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and

> (ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client.

6. The question of who is the client is largely a matter of law. *See* N.Y. Rules of Professional Conduct (the "Rules"), Scope ¶[9] ("for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists.") The question here is whether the sibling is a client so that the lawyer may disclose otherwise confidential information, and the 2002 amendment to the CPLR calls into question the conclusion of N.Y. State 496 that the attorney for the fiduciary represents not only the fiduciary but also the beneficiary. Under CPLR § 4503(a)(2), for purposes of the attorney-client privilege, absent an agreement to the contrary between the attorney and the personal representative, no beneficiary of an estate may be treated as the client, and the existence of the fiduciary relationship does not by itself constitute a waiver of the privilege.

7. Whether any other New York law (*e.g.*, the law governing fiduciaries) would require the attorney for an estate fiduciary to treat the estate beneficiaries as clients is a legal question beyond our jurisdiction.

8. Absent other law or agreements to the contrary, we conclude that the Rules and the CPLR require that the lawyer consider the executor as the only client. We also conclude that the executor's sibling would have no right to the disclosure of information protected by the attorney-client privilege solely by virtue of the sibling's status as a beneficiary. Moreover, because the executor is the lawyer's only client, the executor would also be ethically entitled to the lawyer's undivided loyalty, including strict confidentiality pursuant to Rule 1.6(a).

Misconduct by the Client-Fiduciary

9. Even if the fiduciary is the lawyer's only client, the lawyer is still bound by the requirements of Rules 1.2(d), 3.3(b), 3.4(a), and 4.1.

10. Rule 1.2(d) states in relevant part:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent. . . .

11. Rule 3.4 states in relevant part:

> A lawyer shall not:
>
> > (a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;
>
> * * *

> (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;
>
> * * *
>
> (6) knowingly engage in other illegal conduct or conduct contrary to these Rules [.]

12. Rule 4.1 states:

> In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

13. As we pointed out in N.Y. State 831 (2009), the definition of "fraud" or "fraudulent" in the Rules is broader than the term "fraud" in the law outside of the Rules. The definition in Rule 1.0(i) is as follows:

> "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction *or has a purpose to deceive*, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another. (emphasis added)

14. Taken together, Rules 1.2(d), 3.4(a) and 4.1 prohibit the lawyer from participating in the preparation or submission of an account to the sibling that the lawyer knows to be false or misleading. The question raised by the inquiry is whether or not the information the lawyer has satisfies the requisite knowledge component of the Rules. Rule 1.0(k) defines "knows" as denoting actual knowledge of the fact in question. Although a person's knowledge may be inferred from circumstances, it is clear that a mere suspicion would not be enough to constitute knowledge. *Cf.*, N.Y. State 837 (2010) (A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's actual knowledge that evidence is false, however, can be inferred from the circumstances.)

15. In N.Y. State 837, the client had informed the lawyer that a document that had been introduced into evidence was forged. Consequently, the lawyer came to "know" that it was false evidence. In this case, the fact that the client has not provided the lawyer with back-up for distributions from the estate accounts, that initial distributions may have been unequal (although that situation seems to have been corrected) and that the client has repeatedly failed to cooperate with the lawyer may all constitute grounds for suspicion, but they do not result in the lawyer having knowledge of wrongdoing by the client. The fact that the client has mentioned selling an estate asset to a third party for a price that was 10% of what the client believed was its value may or may not constitute knowledge that the accounting is false, depending upon what facts the client disclosed about determining the value of the asset, and the circumstances in which the sale price was determined.

16. We have also considered whether the lawyer has ethical obligations under Rule 3.3(b). Rule 3.3(b) states:

> A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Thus, Rule 3.3(b) requires a lawyer who represents a client before a tribunal and who knows that the client or another person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding to take reasonable remedial measures, including, if necessary, disclosure to the tribunal. In this respect, it differs from the other Rule provisions cited above, which are subject to the restrictions against disclosure of client confidential information, unless one of the exceptions to confidentiality in Rule 1.6(b) is applicable.

17. Comment [12] to Rule 3.3 explains the reason for Rule 3.3(b): "Lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process." Whether the lawyer has duties under Rule 3.3(b) depends on two issues – (1) whether the lawyer "knows" that the client has engaged or is engaging in criminal or fraudulent conduct relating to the proceeding, and (2) whether the probate matter constitutes representation "before a tribunal."

18. Regarding whether the lawyer has the requisite knowledge under Rule 3.3(b), the answer is the same as that discussed above with respect to other rules requiring knowledge.

19. The question of whether the matter is "before a tribunal" within the meaning of Rule 3.3(b) is a mixed one of ethics and law. Our understanding is that the probate matter at issue here was filed with the Surrogate's Court, which granted letters testamentary to the executor. Although the accounting is informal – meaning that no approval of the Surrogate's Court will be necessary as long as the beneficiaries sign a form of "receipt and release" provided by the Surrogate's Court – our understanding is that the affidavits filed by the fiduciary and the form of receipt and release all have captions indicating that the matter is before the Surrogate's Court. Moreover, consistent with SCPA § 207.1(d), attorneys of record are required to file a motion under CPLR § 321(b)(2) to withdraw unless a substitution can be arranged on consent of the client. These factors suggest that the matter is before the Surrogate's Court. The definition of "tribunal" in Rule 1.0(w) includes a court. Although we believe the inquirer must make his own determination on this question, it appears to us that the matter is before a tribunal within the meaning of Rule 3.3(b) and that the preparation of an inaccurate accounting is clearly "related to the proceeding" within the meaning of Rule 3.3(b).

20. Rule 3.3(b) would require the lawyer, if he knows that the client intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, to take reasonable remedial measures, including, if necessary, disclosure to the tribunal, if remonstration with the client did not result in the client's submission of an accurate accounting. Because it is not clear that the inquirer has such knowledge, we will not discuss here the considerations of what remedial measures are reasonable. *But see* N.Y. State 837 (2010).

Withdrawal from Representation

21. Even if the lawyer does not have "knowledge" of impropriety on the client's part, his suspicions and the client's apparent lack of cooperation may be sufficient to warrant withdrawal from the representation. Rule 1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer knows to be illegal or fraudulent. Indeed, Rule 1.16(b)(1) will require a lawyer to withdraw from a representation if he knows that the representation will result in a violation of the Rules or of law. And paragraphs (c)(2), (c)(4) and (c)(7) of Rule 1.16 *permit* a lawyer to withdraw from a representation under standards that are lower than "knowledge" of illegal or fraudulent conduct, where (1) the client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* is criminal or fraudulent, (2) the client insists upon taking action with which the lawyer has a fundamental disagreement, or (3) the client fails to cooperate in the representation or otherwise makes the representation unreasonably difficult for the lawyer to carry out effectively. Furthermore, Rule 1.16(c)(1) always permits withdrawal for any reason if it can be accomplished without material adverse effect on the interests of the client.

Disclosure to the Court

22. Although we cannot resolve issues of substantive or procedural law, as noted above, in Surrogate's Court under SCPA § 207.1(d), attorneys of record are required to file a CPLR § 321(b)(2) motion to withdraw unless a substitution can be arranged on consent of the client. If a motion to withdraw will be required, then Rule 1.16(d) will apply and the lawyer will need the court's permission to withdraw.

23. In seeking permission to withdraw, the disclosures the lawyer may or must make about the client's conduct depend upon whether the lawyer knows that the client has engaged or is engaging in criminal or fraudulent conduct. If the lawyer does not have such knowledge, the lawyer should regard any information or suspicions about the client fiduciary's conduct as protected by Rule 1.6(a), which provides in relevant part:

> A lawyer shall not knowingly reveal confidential information, as defined by this Rule . . . . "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.

24. Rule 1.6(a) generally prohibits a lawyer from revealing confidential information unless the client gives informed consent or the disclosure is permitted by Rule 1.6(b) or required by Rule 3.3. Rule 1.6(b) would allow the lawyer to reveal confidential information to the extent he reasonably believes necessary (1) to prevent the client from committing a crime (but not to prevent a non-criminal fraud or to rectify a past crime or fraud), (2) to the extent implicit in withdrawing a written or oral representation the lawyer has previously made and that he reasonably believes is still relied upon by a third person, where he has discovered that the representation was based on materially inaccurate information or is being used to further a crime or fraud, or (3) to comply with other law or court order. *See generally* Rule 1.6, Cmts. [6], [6A], [6C], [6D], [12], [13], [14], [15A].

25. In particular, in determining whether to exercise the discretion to reveal information under Rule 1.6(b), the lawyer should consider the guidance set forth in Comment [6A] to Rule 1.6.[81] In addition, if the lawyer believes, after balancing the factors set forth in Comment [6A], that disclosure is warranted, the lawyer should first remonstrate with the client about the desirability of filing a proper accounting.

26. Even if the lawyer obtains permission to withdraw, he must still abide by the requirements of Rule 1.16(e), which states:

> Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

CONCLUSION:

27. In sum, the lawyer has no ethical duty to the non-client beneficiary. His only client is the executor and his ethical duty is to avoid assisting the client in conduct that he knows to be illegal or fraudulent. The lawyer may not assist the client in conduct the lawyer knows is fraudulent or knowingly make a false statement to a third person. And a lawyer who represents a client before a tribunal and who knows that the client intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding must take reasonable remedial measures, including, if necessary, disclosure to the tribunal. It is not clear that the inquirer has sufficient knowledge of misconduct by the client in this case. A suspicion of misconduct is not enough. But a reasonable belief that the client is engaging or has engaged in criminal or fraudulent conduct constitutes grounds for withdrawal from representation. If withdrawing when Rule 3.3(b) does not apply, the lawyer must preserve the confidences of the client unless an exception to confidentiality in Rule 1.6(b) applies. In any event, before making any permitted or required disclosures, the lawyer should remonstrate with the client.

(29-14)

81 This comment provides: "The lawyer's exercise of discretion conferred by paragraphs (b)(1) through (b)(3) requires consideration of a wide range of factors and should therefore be given great weight. In exercising such discretion under these paragraphs, the lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime."

OPINION 1035 (11/14/2014)

TOPIC: Taking over practice of retiring attorney; obligations as to original wills

DIGEST: A lawyer receiving an original will must take reasonable steps to locate and notify the testator or others with an interest in the will. The lawyer may review or disclose confidential information from the will as necessary for its appropriate disposition, and may file the original will with the local surrogate's court.

RULES: 1.15(c), 1.6

FACTS:

1. The inquiring lawyer has recently taken over the law practice of a retiring solo practitioner through a sale of the practice. An agreement between the retiring lawyer and the inquirer provided, inter alia, that the inquirer assumed the obligation to notify the clients whose wills had been drafted by the retiring lawyer.

2. The inquirer received from the retiring lawyer original wills of his clients dating back to 1970. Some of these wills were inherited when the retiring attorney took over the practices of other lawyers. At the time the practice was sold, none of the testators were clients of the inquirer, and we assume that none have become clients of the inquirer since then.

3. The inquirer has no original files related to any of the wills dated between 1970 and 2000, nor does she know whether clients of practices taken over by the retiring lawyer were notified that he had taken over those practices. Many of the wills contain phrases such as "I [name of testator], residing in the City of [named], State of New York," and "to my [unnamed] children, if they survive me," and do not include any more detailed address or beneficiary information.

4. The inquirer has painstakingly researched the whereabouts of the testators through Internet searches, obituaries, estate proceedings and real property records. To the testators whose whereabouts could be confirmed, the attorney sent letters with a request that the testators contact her regarding the original wills.

5. The inquirer also has confirmed that some of the testators are deceased. Some of those had moved out of state before they died. The inquirer has been unable to confirm whether other testators are still alive or whether they have moved out of state.

6. The inquirer also discovered that in some cases, estate proceedings were commenced in New York and in other jurisdictions, and those estate proceedings are now closed. In some of those cases, the testators had newer wills that were probated. In others, administrative proceedings were commenced because no wills were found.

QUESTIONS:

7. What is the lawyer's obligation with respect to original wills when (a) the lawyer cannot determine the testator's whereabouts; (b) administrative proceedings were filed because the petitioner did

not know of the will, and that estate matter is closed; (c) probate proceedings were filed based upon a more recent will of the deceased, and that estate matter is closed; or (d) the testator has died and no estate proceedings have been filed?

8. May the lawyer file the original wills with the local surrogate's court if she cannot determine the testator's whereabouts?

OPINION:

9. The principal ethical obligations applicable to the inquiry are set forth in Rule 1.15(c) of the New York Rules of Professional Conduct (the "Rules"). Rule 1.15(c)(1) provides that a lawyer shall "promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest." The Rule further requires the lawyer to preserve such property, keep complete records and render appropriate accounts, and promptly pay or deliver the property as requested by a client or third person entitled to receive it. Rule 1.15(c)(2)-(4).

10. "The requirements of Rule 1.15(c) expressly apply to a lawyer who receives property in which a third person, who is not the client of the lawyer, has an interest." N.Y. State 1002 ¶3 (2014); *cf*. N.Y. City 1999-05 (interpreting prior Code of Professional Responsibility to require that lawyer in possession of original will, including successor to lawyer who drafted the will, must keep original will of a missing testator secure, comply with any legal obligations regarding that will, or, if appropriate, follow legal procedures to deposit the will with the court"). However, Rule 1.15(c) applies only to property obtained incident to the lawyer's practice of law. N.Y. State 1002 ¶3 (2014).

11. The obligation to protect confidential information is also relevant. We have previously discussed confidentiality obligations of lawyers with respect to original wills. In N.Y. State 341 (1974) we opined that an attorney who retires from practice may transfer clients' executed wills to another attorney, but that "the receiving attorney holds them only as a custodian" rather than in an attorney-client relationship, and that it would "generally" be unethical for the receiving attorney to examine the wills without consent from the transferring lawyer's clients.

12. More recently, we opined that a lawyer who received wills not from a client or during the representation of a client, but rather as his father's executor, was not prohibited by Rule 1.6 from "accessing or disclosing the confidential information in the wills insofar as reasonably necessary to dispose of the wills." N.Y. State 1002 ¶¶ 8-9 (2014). Although the lawyer did not represent those testators, and did not even come into possession of the wills incident to his practice, we followed N.Y. State 341 in recognizing certain imperatives of confidentiality. In particular, we emphasized that "the lawyer should proceed carefully in order to only review or disclose information to the extent necessary for proper will disposal." N.Y. State 1002 ¶10.

13. We next apply these principles to this inquiry. The importance of respecting confidentiality, and also the authority to access and disclose confidential information as necessary to dispose properly of the will, apply to the inquirer – who holds the wills as custodian incident to her law practice – just as they applied to the lawyer in N.Y. State 1002 who came into possession of wills other than incident to his practice. Thus, even though there may well be confidential information in the wills, the inquirer may access or disclose that information as reasonably necessary to provide for appropriate disposition

of the wills and ultimately of the property subject to those wills. For that purpose, she may notify testators, executors, or beneficiaries of the wills.

14. The inquirer has not only the *ability* to take steps toward the proper disposition of the wills (even if it requires reviewing or disclosing confidential information), but also a *responsibility* to take at least one such step. Rule 1.15(c) applies here because the wills in question constitute property in which third parties have an interest, and the inquirer obtained them incident to her practice of law. Thus she would generally have an obligation to notify the testators of her receipt of their wills, even apart from having agreed with the retiring lawyer to do so.[82]

15. We note two common-sense exceptions to that general obligation. First, if the agreement for transfer of the practice had been different, and the retiring lawyer had been the one to notify his clients of the will transfers, then the notice requirement would have been satisfied. The inquirer need not give an additional notice contemporaneous with and duplicative to a notice given by the retiring lawyer. *Cf.* N.Y. State 341 (1974) (opining that when a lawyer who drafts and holds an original will later retires and transfers the will to the lawyer's partners, the firm is not required to give the client notice that the lawyer has retired, and that the will is now in the firm's possession, if the lawyer was already part of the firm at the time of the representation, or if the lawyer later joined the firm and the client had become aware of the lawyer's membership in the firm).

16. Second, when Rule 1.15(c)(1) requires an attorney to give notice to a third person whose location is unknown, the attorney should take reasonable steps to locate and notify that person. But the rule does not impose the impossible requirement of notifying someone who cannot be found. *Cf.* Massachusetts Opinion 76-7 (stating that lawyer who succeeds to another's practice, including files with wills that the prior lawyer's clients requested be held for safekeeping, "is obligated to make a reasonable effort" to locate the testators). Here the inquirer has made appropriate and extensive efforts to locate the testators and notify them of the existence and location of the wills. Based on the facts as presented, it appears that she has exercised due diligence and has satisfied the requirements of the Rule.

17. The inquiry includes various scenarios as described in paragraph 7 above, but the basic ethical analysis is the same for each: Rule 1.15(c)(1) requires the inquirer to notify those with an interest in the property received. In some cases, the inquirer has successfully contacted the testator or executor and transferred the will. In other cases, the inquirer has learned that the testator is deceased, but it still may be possible to locate third persons with an interest in the property that has been received by the inquirer. Rule 1.15(c) requires her to notify such persons if it is reasonably possible to identify and

82 This ethical obligation arises from receiving the property of others, but there can be contractual obligations as well. In an opinion involving the retention of wills by the lawyer who had drafted them, we discussed agreements with clients:

> Whether the lawyer will maintain the original will and, if so, what additional obligations the lawyer will assume, are primarily matters to be agreed upon by the lawyer and client after consultation. . . . Ordinarily, a lawyer would be obligated to carry out such contractual undertakings. . . . At least absent agreement to the contrary, there will ordinarily be an implied understanding that after the client's death, if the lawyer has maintained the original will and, as far as the lawyer knows, there is no later valid one, the lawyer must take steps to ensure that the executor and/or beneficiaries are aware of the will's existence.

N.Y. State 724 (1999). Here, while the inquirer has contractual obligations to the retiring lawyer, she never entered into agreements with the testators.

locate them, and she may use information from the wills to try to do so. All this remains true even if there have been administrative or probate proceedings and the estate has been closed. Notifying administrators, executors or beneficiaries may not be an empty exercise if, for example, someone with an interest in the will should choose to pursue legal action.

18. Finally, the inquirer asks whether she may file the original will with the local surrogate's court under section 2507 of the Surrogate's Court Procedure Act.[83] We see no ethical bar to that practice. As discussed in paragraph 12 above, even though the inquirer should be protective of confidential information in the wills, she is nevertheless free to make disclosures as reasonably necessary, and the statute explicitly protects the confidentiality of filed wills.[84] There may be good reasons to file the wills with surrogate's court when the testators' whereabouts cannot be determined. The prudential benefits of filing with the court would depend on the facts and circumstances of the particular case. In some circumstances, it might be prudent for the attorney to remain as custodian of the will.

CONCLUSION:

19. A lawyer who comes into possession of a will by acquiring the practice of a retiring lawyer is required to take reasonable steps to locate and notify third persons, such as the testator, with an interest in the will. In certain circumstances the obligation is excused if the third person otherwise has the necessary information, such as if the retiring lawyer has provided the notice. Although the lawyer newly in possession of the will may be holding it as a custodian rather than in an attorney-client relationship with the testator, the lawyer should nevertheless respect the confidentiality of information in the will. The lawyer may, however, review or disclose confidential information in the will to the extent reasonably necessary to help ensure the will's proper disposition, and the lawyer may file the will with the local surrogate's court.

(8-14)

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83 "The court of any county upon being paid the fees allowed therefor by law shall receive and deposit in the court any will of a domiciliary of the county which any person shall deliver to it for that purpose . . ." SCPA §2507(1); *see* SCPA §2507(3)(d) (providing for delivery of will to surrogate's court if deposited with officer other than a surrogate). There is a statutory fee for filing a will for safekeeping, "except that the court in any county may reduce or dispense with such fee." SCPA §2402(9)(v). We are advised that some jurisdictions in New York permit an attorney to file such wills without fee, and that others require the attorney to remit a filing fee but could be amenable to a waiver of the fee.

84 *See* SCPA § 2507(2) ("will shall be enclosed in a sealed wrapper so that the contents thereof cannot be read . . . and shall not on any pretext whatever be opened, read or examined until delivered to a person entitled to it" under § 2507(3)).

OPINION 1036 (11/25/2014)

TOPIC: Law Firm; Legal Assistance Organization

DIGEST: The local sections of a national legal services project are considered a single law firm for conflict of interest and confidentiality purposes where, among other things, the local sections share a single case management system and there is supervision across the local sections.

RULES: 1.0(h), 1.6, 1.10. 1.10(e)

FACTS:

1. The inquirer practices law with a national law project focusing on immigration matters that provides free legal services to non-citizens in several states. A number of attorneys work under the umbrella of the national organization, conducting clinics in churches around the country. The national board provides periodic financial grants and programmatic support, such as training of volunteers. The national board is incorporated, but each local section is also independently incorporated and receives local funding. All of the local sections share the same logo, the same insurance carrier and a group list serve. Additionally, the local sections share a single case management system that enables each attorney to have access to the information of all of the project's clients in all sections. The national board designates several lawyers as "Regional Attorneys" to supervise the attorneys in several local sections. The inquirer asks whether the nationwide network of local sections is a single law firm for confidentiality and conflict of interest purposes.

QUESTION:

2. Where the local sections of a national legal services project are separately incorporated, but share the same logo, the same insurance carrier, a group list serve, and a single case management system, and where the national board designates regional attorneys who supervise offices in multiple states, are the local sections a single law firm for purposes of the New York Rules of Professional Conduct, including for conflict of interest and confidentiality purposes?

OPINION:

3. Rule 1.0(h), in the "Terminology" section of the New York Rules of Professional Conduct (the "Rules"), provides that a "firm" or "law firm" "includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers engaged in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization." Some groups may constitute a firm for the purposes of some of the Rules but not others. *See* Comment [2] to Rule 1.0 ("a group of lawyers could be regarded as a firm for purposes of determining whether a conflict of interest exists but not for application of the advertising rules."). Where a legal services organization consists of more than one component or section, the entire organization may constitute one single firm or each component may constitute a separate firm, depending on the organizational structure. *See* Comment [4] to Rule 1.0. Determining whether a group of lawyers is a single firm "is a fact-intensive inquiry." N.Y. State 881 (2011).

4. As to the facts that are relevant to that inquiry, Comment [2] to Rule 1.0 points to (1) whether the group presents itself to the public in a way that suggests it is a firm; and (2) whether the lawyers in the group have mutual access to information concerning the clients they serve. Our ethics opinions focus on similar facts, placing particular weight on access to client information. Thus, in N.Y. State 794 (2006), we concluded that the various divisions of a law school clinic constituted a single firm for purposes of the conflict rules where, even though each division maintained computer databases that were inaccessible to other divisions, the clinic shared common office and file space.

5. Our opinions also look to the independence of the lawyers in assessing whether a group of lawyers is a single firm. Thus, in N.Y. State 914 (2012), we concluded that the members of a panel of lawyers established to provide legal assistance to clients who had conflicts with the local Legal Aid office did not consist of a single firm. We focused on the independence of the members of the panel, noting that "[n]either the project nor its lawyers would exercise any supervision or control over the legal services provided by conflict panel volunteers."

6. Under the above principles, it is clear that the group of lawyers at issue in this inquiry is a single law firm for conflict and confidentiality purposes. Some of the factors present here would not, in-and-of-themselves, render the project a single firm, *see* N.Y. State 643 (1993) (shared liability insurance not sufficient for members of a panel to constitute single firm). Nevertheless, the facts taken together lead to only one conclusion about the status of the inquirer's entity. The factors that most strongly support this conclusion are (i) the project's use of a single case management system with shared access and (ii) the supervisory structure of the project. As currently constituted, the project's case management system permits all attorneys access to all confidential information about all matters in all sections of the project. The system provides no reliable means for confining confidential information to any one office. This joint access to confidential information can pass muster under Rule 1.6 only if those with shared access are treated as a single firm. See Rule 1.6, Cmt. [5] ("lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers"). If each of the project's various sections were treated as a separate firm, then Rule 1.6(a) would prohibit one section from sharing confidential information with lawyers from another section absent client consent or another exception to the duty of confidentiality. A legal services organization, however, must consider whether a request for such consent would be coercive. *See* N.Y. State 490 (a legal services staff should be particularly sensitive to any element of submissiveness on the part of their indigent clients and such requests should be made only when the staff is satisfied that the clients could refuse to consent without any sense of guilt or embarrassment).

7. Even if the project's case management system compartmentalized confidential information by section, the regional supervision of lawyers from multiple local sections would prevent us from treating each section as a separate firm. Because each regional supervisor oversees local lawyers, the local lawyers are not acting independently, *cf.* N.Y. State 914, *supra*, and the supervisor gains access to confidential information from multiple local sections. This supervisory structure is incompatible with treating each local section as a single firm.

8. Since we find that the entire national project is a single firm for purposes of the Rules, the firm must comply with Rule 1.10 (Imputation of Conflicts of Interest), which provides that conflicts arising under Rules 1.7, 1.8 and 1.9 are imputed to all lawyers "associated in a firm." As part of a firm's

Rule 1.10 obligations, it must implement and maintain a conflict-checking system in accordance with Rule 1.10(e) as follows:

> A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:
>
> (1) the firm agrees to represent a new client;
>
> (2) the firm agrees to represent an existing client in a new matter;
>
> (3) the firm hires or associates with another lawyer; or
>
> (4) an additional party is named or appears in a pending matter.

9. Of course, lawyers who practice primarily in a firm's office that is in a jurisdiction other than New York are not bound by New York's Rule 1.10. But, as a practical matter, the lawyers practicing in the firm's New York office cannot comply with Rule 1.10 unless the entire firm is part of a single conflict-checking system.

CONCLUSION:

10. The local sections of a national legal services project are considered a single law firm for conflict of interest and confidentiality purposes where, among other things, the local sections share a single case management system and regional attorneys supervise lawyers in multiple local sections.

(38-14)

OPINION 1037 (12/06/2014)

TOPIC: Limiting means used to pursue client's objectives; conduct prejudicial to administration of justice; status hearing

DIGEST: Government attorneys who handle matters before the Immigration Court may, with the informed consent of the client as well as the consent of the Immigration Court, provide the Immigration Court with a position paper and decline to attend in person Immigration Court status hearings at which no substantive or procedural issues can or will be addressed, as long as the government attorneys are not thereby impeded from competently and diligently representing their client.

RULES: 1.1(a) & (c), 1.2(a), 1.4(a); 3.4(c), 8.4(d)

FACTS:

1. The New York Office of the Chief Counsel (OCC) of Immigration and Customs Enforcement (ICE) represents ICE in litigating removal proceedings before the Immigration Court.[85] Litigation before the Immigration Court—particularly litigation regarding the removal of unaccompanied alien children—often takes years to resolve because many respondent aliens make external applications to other administrative bodies (such as the U.S. Citizenship and Immigration Service) or courts (such as New York Family Court), and the Immigration Court often cannot decide individual cases until those other administrative bodies or courts issue their decisions.

2. While these external applications are pending, cases pending before the Immigration Court are listed on a master calendar and scheduled for periodic status hearings (each a "Status Hearing"). The purpose of a Status Hearing is to update the Immigration Court on the status of the external applications, but Status Hearings are repeatedly adjourned because there is nothing to report while the external applications remain pending. The ICE attorney generally does not oppose adjournments, changes of venue, or, in certain circumstances, administrative closure or dismissal of the Immigration Court proceedings. Once a respondent-alien has exhausted the external applications, the Immigration Court schedules the case for a merits hearing (the "Merits Hearing"). Under current practice, ICE attorneys appear in person before the Immigration Court for every Status Hearing and Merits Hearing.

3. The OCC is considering altering current practice regarding its representation of ICE before the Immigration Court during the Status Hearing stage. In order to increase efficiency, the OCC would like to have its attorneys submit position papers in lieu of in-person appearances at the Status Hearings. The OCC has requested an opinion as to the ethical implications of this proposed practice (assuming the Immigration Court would permit it).

QUESTION:

4. May OCC lawyers decline to attend the Immigration Court's Status Hearings at which no substantive or procedural issues can or will be addressed?

85 A removal proceeding is an administrative proceeding in Immigration Court to determine if an individual is removable under U.S. immigration law. Such proceedings formerly were known as deportation proceedings.

OPINION:

5. The New York Rules of Professional Conduct (the "Rules") prohibit an attorney from engaging in "conduct that is prejudicial to the administration of justice." Rule 8.4(d). The phrase "prejudicial to the administration of justice" is explained in Comment [3] to Rule 8.4:

> The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding. . . . The conduct must be seriously inconsistent with a lawyer's responsibility as an officer of the court.

6. Rule 3.4(c) prohibits a lawyer from disregarding, or advising the client to disregard, a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, with exceptions not relevant here. Thus, if the Immigration Court required personal attendance by OCC attorneys, the attorneys could not ethically refuse to attend. *See* N.Y. State 719 (1999) (a lawyer's retainer agreement may not vary a requirement of a court rule because doing so would constitute a violation of DR 7-106(A) [the predecessor to Rule 3.4(c)]); N.Y. State 613 (1990) (whether a lawyer may help a "pro se" client to draft a pleading depends on whether the lawyer would be disregarding a standing rule of the tribunal that requires disclosing the drafter of the pleadings). The purpose of the prohibition in Rule 3.4(c) is similar to the purpose of the legal doctrine of contempt of court, i.e. engaging in contemptuous behavior tending to impair the respect due to the authority of the court or intentional disobedience to a mandate of the court. *See* NY Penal Law § 215.50.

7. Attorneys who fail to attend court ordered hearings in New York are subject to discipline under Rule 8.4(d). *Matter of Cronk,* 52 A.D.3d 54, 58 (2d Dept 2008) (respondent disciplined for failure to attend scheduled court conferences). Other states' disciplinary authorities have reached similar conclusions. *See, e.g., Oklahoma Bar Association v. Benefield*, 125 P.3d 1191, 1194 (2005); *Attorney Grievance Com'n of Maryland v. Monfried*, 368 Md. 373 (2002); *In re Davidsion*, 761 N.E.2d 854 (2002); *Florida Bar Association v. Ossinsky*, 255 So.2d 526 (1971). Attorneys who disregard the ruling of a tribunal in New York also are subject to discipline. See, e.g. *Matter of Goll*, 27 A.D.3d 131 (2d Dept 2006) (violation of 7-106(A) for failing to prepared and submit documents when court directed lawyer to do so, among other violations, results in a 2-year suspension); *Matter of Fretz*, 88 A.D.3d 470 (4th Dept 2011)(violation of DR 7-106(A), among other violations, results in a 3-year suspension).

8. None of the cited decisions involve situations where the client and the court consented to the non-appearance (or appearance through a position paper in lieu of a personal appearance).

9. As long as the tribunal permits the lawyer to submit a position paper rather than appearing in person at a Status Hearing, the decision whether to forego the opportunity to make an in-person presentation before the judge is for the lawyer to make, in consultation with the client. Rule 1.2(a) requires a lawyer to abide by a client's decisions concerning the "objectives" of a representation, and to consult with the client as to the "means" by which those objectives are to be pursued. Rule 1.4(a)(2) reinforces that provision by providing that a lawyer shall reasonably consult with the client

about the means by which the client's objectives are to be accomplished. In this case, appearing at a Status Hearing by submitting a position paper rather than appearing in person would be a decision as to "means," not "objectives." Nevertheless, we have warned that a client may not limit the representation in a manner that will compel the lawyer to neglect the matter, to prepare inadequately, or otherwise to represent the client incompetently. *Cf.* N.Y. State 751 (2002) (government agency may not require its lawyers to undertake more matters than the lawyers can competently handle, on the grounds that the agency does not have the funding to hire an adequate number of lawyers). Furthermore, while client consent is sufficient under Rule 1.2(a), the lawyer also needs the concurrence of the court under Rules 3.4(c) and 8.4(d).

10. Other provisions of the Rules also have a bearing on the questions posed here. For example, Rule 1.1(c)(2) prohibits a lawyer from intentionally prejudicing or damaging the client during the course of the representation, except as permitted or required by the rules. This provision demonstrates the importance of having the court approve the proposal to appear at Status Hearings through a position paper. Similarly, Rule 1.1(a) states that the lawyer should provide competent representation to a client.

11. According to the OCC, the submission of position papers in lieu of personal appearance would not undercut their ability to competently and diligently represent their client under Rule 1.1. Memoranda submitted to the Immigration Court would provide it with the same information as would the physical presence of an OCC attorney, and the absence of an OCC attorney would not prejudice the OCC attorney's client (which is ICE). Whether an OCC attorney's failure to attend Status Hearings delays the administration of justice rests ultimately with the Immigration Court. If that court permits OCC attorneys to send a position paper rather than attending a Status Hearing in person, we see no reason why the Rules would prohibit the practice.

CONCLUSION:

12. An OCC attorney may, with the informed consent of both the Immigration Court and the client, provide the Immigration Court with a position paper and decline to attend in person an Immigration Court Status Hearing at which no substantive or procedural issues can or will be addressed, as long as OCC attorneys are not thereby impeded from competently and diligently representing their client.

(26-14)

OPINION 1038 (12/06/2014)

TOPIC: Legal fees – sharing with nonlawyer, partnership with nonlawyer

DIGEST: New York lawyer with New York-based practice may not partner with nonlawyer or practice in law firm owned by parent firm that has nonlawyer partner.

RULES: 5.4; 8.5.

FACTS:

1. A law firm based in Washington, D.C. includes a nonlawyer partner, which is permitted by the D.C. Rules of Professional Conduct. The firm is interested in associating with a New York-admitted lawyer, who is also licensed in D.C., to handle New York cases, staff an office in New York and have a primarily New York-based practice. The firm is contemplating having the New York lawyer join the firm as a partner or forming a "wholly-owned subsidiary law firm" in New York to be "independently managed/operated" by the New York lawyer. We understand the term "subsidiary law firm" to mean a firm whose partnership interests are owned entirely by the D.C. firm.

QUESTIONS:

2. May the New York lawyer join the D.C. firm as a partner?

3. May the New York lawyer practice in a subsidiary partnership of the D.C. firm?

OPINION:

4. Rule 5.4(a) of the New York Rules of Professional Conduct (the "Rules") provides, "A lawyer or law firm shall not share legal fees with a nonlawyer," with exceptions not applicable to the question presented. Rule 5.4(b) provides, "A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." Rule 5.4(d) provides, "A lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if: (1) a nonlawyer owns any interest therein . . . (2) a nonlawyer is a member, corporate director or officer thereof or occupies a position of similar responsibility . . . or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer."

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

6. Implicit in the inquiries here is the question whether New York's rules govern the proposed conduct of the New York lawyer. Choice of law questions are governed in New York by Rule 8.5, which provides as follows:

> (a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to

> the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.
>
> (b) In any exercise of the disciplinary authority of this state, the Rules of Professional Conduct to be applied shall be as follows:
>
> (1) For ***conduct*** in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
>
> (2) For any other ***conduct***:
>
> (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
>
> (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct. [Emphasis added.]

7. We view the "conduct" at issue here to be (i) practicing in New York in a partnership with a nonlawyer partner and (ii) sharing legal fees from New York matters with a nonlawyer partner. Applying Rule 8.5(b) to that conduct, we believe that entering into either of the arrangements proposed here, and the profit-sharing that results, would not be conduct "in connection with" a New York proceeding, even if the lawyer were to undertake New York litigation. Consequently, the applicable choice-of-law rule is that set forth in Rule 8.5(b)(2). Under that provision, the choice of law will depend on (1) the jurisdiction in which the lawyer "principally practices," and (2) whether the lawyer's conduct – *i.e.,* entering into a partnership that includes nonlawyers or sharing fees with nonlawyers – "clearly" has its "predominant effect" in D.C.

8. The inquiry specifies that the lawyer will handle New York cases and have a practice based primarily in New York, so it seems clear that the lawyer "principally practices" in New York. This means that Rule 5.4 will apply to the proposed conduct unless, in the words of Rule 8.5(b)(ii), the conduct "clearly has its predominant effect" in D.C., in which case the D.C. Rules would apply.

9. In N.Y. State 1027 (2014) we considered how to determine the location of the "predominant effect" when the conduct in question relates directly to the provision of legal services in a particular matter, and we advised looking to various factors relating to the circumstances of the particular matter. Here, however, the conduct does not relate to any particular matter, but rather relates to the entire operation of the partnership – specifically, practicing in New York in a partnership with a nonlawyer partner and sharing legal fees from New York matters with the nonlawyer partner. In these circumstances, the "predominant effect" of the conduct is "clearly" in New York. Two of our prior opinions interpreting Rule 8.5(b) – N.Y. State 911 (2012) and N.Y. State 889 (2011) – help to frame our conclusion.

10. In N.Y. State 911, a New York lawyer proposed to establish the New York office of a UK law firm that, as permitted by English law, included UK nonlawyers in ownership and supervisory positions. We concluded that New York Rule 5.4 prohibited the association because "[e]ven if the lawyers in question are also licensed in the UK, the predominant effect of their conduct, in practicing law from a New York office on behalf of New York clients, would be in New York."

11. Similarly, in N.Y. State 889, we were asked whether a lawyer licensed in New York and D.C. could practice in a D.C. firm with a nonlawyer member. Because the lawyer principally practiced in D.C. and received a majority of revenue from D.C. cases and matters, we concluded that Rule 5.4 did not prohibit the proposed arrangement, even if the lawyer undertook "occasional litigation in New York." We noted, however, that:

> Our conclusion as to choice of law is premised on the particular facts of the inquiry. . . . Different facts could lead to a different result. For example, if a major portion of the revenue of the lawyer or the law firm were derived from the practice of law in the State [of] New York, then, depending on the particular facts, Rule 8.5 could make applicable the prohibitions of New York Rule 5.4. Certainly if the partnership were created for the very purpose of litigation in New York, establishing it in the District of Columbia would be ineffective to circumvent the New York rules on fee sharing.

12. Under New York's Rule 5.4 it is clear that both forms of practice proposed in the inquiry are prohibited. As noted, Rule 5.4(b) expressly prohibits forming a partnership with a nonlawyer.

13. The question of practicing in a "wholly-owned subsidiary law firm" in New York that is owned by a partnership that has a nonlawyer member is not addressed directly by the language of Rule 5.4, but the result is the same. Rule 5.4(b) would plainly prohibit the lawyer from partnering, either directly (as proposed in the first question) or indirectly (through a subsidiary structure which ultimately has the effects of partnership) with a nonlawyer. *Cf.,* Rule 8.4(a) (lawyer may not violate the Rules "through the acts of another"). But even if the inquiring lawyer were only an employee of either entity, without a partnership interest, Rule 5.4(d) would prohibit him from practicing "with or in the form of an entity authorized to practice law for profit, if . . . a nonlawyer owns any interest therein" or "has the right to direct or control the professional judgment of a lawyer."

14. We need not decide whether the undertaking that the New York lawyer would "independently manage/operate" the New York firm would surmount the ordinary incidents of law firm ownership with respect to directing or controlling the New York lawyer's professional judgment. The term "owns any interest therein" clearly extends to an indirect ownership interest such as that proposed by the subsidiary relationship, where one or more nonlawyers own an interest in a partnership that in turn owns the entirety of the ownership interests in the New York firm.

CONCLUSION:

15. A New York-based lawyer practicing primarily in New York may not join a D.C. firm that includes a nonlawyer partner. The lawyer is also prohibited from practicing in a firm organized as a wholly-owned subsidiary of that D.C. firm.

(41-14)

OPINION 1039 (12/08/2014)

TOPIC: Advertising; solicitation

DIGEST: An attorney may operate a blog containing an opt-in box where a person who subscribes can receive a free written report about copyrights in return for providing contact information that the attorney will later use to offer subscribers the attorney's products and services, provided that such later offers comply with applicable law and ethics rules. The blog does not itself constitute a solicitation. If the attorney later uses the contact information obtained through the opt-in box to send advertisements to subscribers, those communications would be subject to the rule on advertising and might also be subject to the rule governing solicitation.

RULES: 1.0(a), 7.1(a), (f) & (h), 7.3(b)

FACTS:

1. The inquirer is a member of the New York and California bars[86] and operates a blog (available on the internet) that provides legal and publishing information to authors. She wants to build a list of subscribers who are interested in her blog posts and to whom she might send alerts about changes in publishing matters and copyright law. She also wishes to periodically survey these same subscribers about what they regard as their legal and publishing needs in order to create products that suit those needs. Finally, she wishes to advertise those legal products to the subscribers and others in the future.

2. The entire blog is marked as an "attorney advertisement" and contains an opt-in box where the inquirer offers a free written report about copyrights in exchange for readers' names and legal addresses. Those subscribers that check the opt-in box will be broken down based on the state in which they live so the inquirer can determine what she "might offer as an attorney licensed in those states vs. general publishing information."

QUESTION:

3. May an attorney operate a blog containing an opt-in box whereby a person who subscribes can receive a written report about copyrights in return for providing contact information, which the attorney may later use to offer subscribers her products and services?

4. Does the above activity constitute "solicitation" within the meaning of Rule 7.3(b) of the New York Rules of Professional Conduct (the "Rules")?

OPINION:

5. Our jurisdiction extends only to questions of legal ethics. We note that the use of email for commercial purposes is covered by the Federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (commonly known as the "CAN-SPAM Act"), and by rules promulgated by the Federal Trade Commission, *see* 16 C.F.R. 316. The inquirer should therefore determine

86 Whenever a lawyer is licensed in more than one jurisdiction, there is a question of choice of law under Rule 8.5(b)(2). We have assumed for purposes of this opinion that the inquirer principally practices in New York and that her conduct will have its predominant effect here.

whether the use of email addresses gathered for one purpose may be used for another purpose and what disclosures or disclaimers are legally required. Those are questions of law beyond our jurisdiction.

6. Rule 1.0(a) defines the term "advertisement" for purposes of the Rules as: "any public or private communication made by or on behalf of a lawyer or law firm about the lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers."

7. If a communication constitutes an "advertisement," it is subject to numerous requirements in Rule 7.1. *See* N.Y. State 848 (2010). Primary among those is the requirement that the advertisement not contain any "statements or claims that are false, deceptive or misleading." Rule 7.1(a)(1). In addition Rule 7.1 requires that each advertisement (with certain listed exceptions) be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. An advertisement must include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered. Rule 7.1(h). It must be pre-approved by the lawyer or law firm, and a copy must be retained for a period of not less than three years following its initial dissemination. (Advertisements contained in a computer-accessed communication must be retained for a period of not less than one year.) Rule 7.1(k).

8. Not all blogs operated by attorneys constitute advertisements under the Rules. *See* Rule 7.1, Comment [7] ("Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising."); N.Y. State 967 (2013) (blog written by an attorney that does not discuss legal topics and whose primary purpose is not the retention of the lawyer is not an advertisement). However, as Rule 7.1, Cmt. [7] points out, "a newsletter, client alert, or blog that provides information or news primarily about the lawyer or law firm (for example, the lawyer or law firm's cases, personnel, clients or achievements) generally would be considered advertising." *See also Hunter v. Virginia State Bar ex rel. Third Dist. Committee*, 285 Va. 485, 744 S.E.2d 611(Va. 2013) (attorney's blog posts, while containing some political commentary, were deemed commercial speech subject to attorney advertising rules).

9. The inquirer states that her blog is labeled an "attorney advertisement" because *a* primary purpose of the blog is to advertise her services. The definition of "advertisement" quoted in ¶6 above requires that *the* primary purpose must be the retention of the lawyer or law firm. We do not opine on whether the label is actually required here, but we recognize that many lawyers take a conservative approach to whether educational material prepared for clients is an advertisement and thus should bear the label "attorney advertisement" as required by Rule 7.1(f). Whether a given communication is an "advertisement" is not always clear. *See* N.Y. State 848 (discussing factors to be considered in determining if attorney communication constitutes an "advertisement," including: (i) the intent of the communication, (ii) the content of the communication and (iii) the targeted audience of the communication). The fact that the lawyer decides as a precautionary matter to use the "advertising" label is not dispositive.

10. In N.Y. State 873 (2011), we noted that the Rules do not prohibit an attorney from offering a prize to those who join the attorney's social networking sites, so long as the offer does not constitute

illegal conduct. Similarly, we see no ethical bar prohibiting the inquirer here from offering a written report about copyrights in exchange for readers' names and email addresses.

11. The inquirer also asks whether her communications constitute a "solicitation," thereby subjecting them to the special requirements of Rule 7.3. The blog and opt-in box do not, standing alone, constitute a solicitation. Rule 7.3(b) defines a "solicitation" as an "advertisement" that meets other criteria. Thus, if the blog is not an "advertisement" under Rule 1.0(a), by definition it cannot be a solicitation under Rule 7.3(b). However, if the blog is in fact an "advertisement," the lawyer needs to consider whether it is also a solicitation.

12. Under 7.3(b), a "solicitation" is "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients . . . the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain." Comment [3] to Rule 7.3 states that one way that an advertisement may be considered to be "directed to, or targeted at, a specific recipient or group of recipients" within the meaning of Rule 7.3(b) is if it is made by "in-person or telephone contact or by real time or interactive computer-accessed communication or if it is addressed so that it will be delivered to the specific recipient or recipients or their families or agents." The blog and opt-in box here are not transmitted by real time or interactive computer-accessed communication and are not delivered to any specific recipients. *See* N.Y. State 1016 (2014) ("A non-interactive commercial post to members of [a] message group would not constitute an interactive computer-accessed communication.").

13. Furthermore, the blog does not make "reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers." Rule 7.3(b), Comment 3; *see also* Rule 7.3(b), Comment [4] ("an advertisement in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or recipients. For example, an advertisement in a public medium is not directed to or targeted at 'a specific recipient or group of recipients' simply because it is intended to attract potential clients with needs in a specified area of law.") Thus, even if the blog were an "advertisement" under the Rules, it is not a solicitation.

14. If the attorney (or someone on the attorney's behalf) later uses the email addresses obtained through the opt-in box to send the inquirer's advertisements, these communications would quality as "advertisements" and, in addition, may very well fall within the definition of "solicitation" in Rule 7.3(b) and would be subject to the rules governing solicitation in Rule 7.3.

CONCLUSION:

15. An attorney may operate a blog containing an opt-in box where a person who subscribes can receive a written report about copyrights in return for providing contact information that the attorney will later use to offer subscribers the attorney's products and services, provided that such later offers comply with applicable law and ethics rules. The blog does not itself constitute a solicitation. If the attorney uses the contact information obtained through the opt-in box to forward advertisements to subscribers, those communications would be subject to the rule governing advertising and might also be subject to the rule governing solicitation.

(42-14)

OPINION 1040 (12/09/2014)

TOPIC: Judge (Lawyer responding to unfair criticism), Prejudicing client

DIGEST: A lawyer ordinarily may respond to unjust criticism of a judge in the media. However, a lawyer with a case pending before the judge should consider whether support of the judge is likely to cause the public reasonably to question the impartiality of the judge in presiding over such matter, and hence cause the judge's recusal. If so, and if the judge's recusal would prejudice or damage a client of the lawyer, the lawyer may not publicly support the judge.

RULES: 1.1(c), 8.2

FACTS:

1. A judge has been accused in the media of impropriety on the bench. In the lawyer's experience, the judge is hardworking, intelligent and even-handed, and the lawyer believes the accusations in the media are unfounded.

QUESTION:

2. Where a lawyer believes that the media has unjustly accused a judge of impropriety on the bench, may the lawyer – either individually or as one of multiple signatories sending an open letter or other communication to the media and/or to investigating authorities – publicly express support for that judge, if the lawyer has a case pending before the judge?

OPINION:

Defending Judges Against Unjust Accusations

3. It has long been the tradition of lawyers, individually and collectively (often through bar associations), to come to the aid of judges they believe have been unjustly criticized in the media. As stated in Comment [3] to Rule 8.2 of the New York Rules of Professional Conduct (the "Rules"): "To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized."

4. Comment [3] is merely the most current reflection of this long tradition. EC 9-6 of the 1970 New York Code of Professional Responsibility ("Code"), the predecessor to the Rules, exhorted attorneys "to uphold the integrity and honor of the profession; to encourage respect for the law and the courts and the judges thereof . . ." EC 8-6 of the Code provided that "Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism." Even earlier, Canon 1 of the 1908 Canons of Professional Ethics[87] provided: "Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor." The 1887 Alabama State Bar Association Code of Ethics, which was a model for many later codes of lawyer ethics, provided in Rule 4:

87 For an exhaustive treatment of the history of the 1908 Canons, see James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics,* 71 Fordham L. Rev. 2395 (2003).

> Courts and judicial officers, in their rightful exercise of their functions, should always receive the support and countenance of attorneys against unjust criticism and popular clamor; and it is the attorney's duty to give them his moral support in all proper ways . . . .

5. Preserving the quality and independence of the judiciary has been a key goal of lawyers and the Bar over the years. Lawyers individually and the Bar as the collective voice of the legal profession frequently work to maintain and support public confidence in the judiciary by providing timely assistance to members of the bench in responding to adverse publicity, misinformation, or unwarranted criticism of an individual judge or the judiciary. The effectiveness of our justice system depends in large measure on public confidence. Inaccurate reporting and unjust criticism in the media regarding judges, courts or the system of justice erodes public confidence and weakens the administration of justice. It is vital that all members of the public – litigants and non-litigants alike – have faith that the courts, their procedures and their decisions are fair and impartial.

6. It is important for lawyers to ensure the accuracy of information published about the actions of judges because it is unethical for judges to answer criticism of their actions regarding pending or impending matters. *See* Code of Judicial Conduct ("CJC"), Canon 3(B)(8) (A judge shall not make any public comment about a pending or impending proceeding in any court in the U.S.). Responses by members of the profession to inaccurate information about judges promote the dignity of the administration of justice, prevent interference with pending litigation, and affirm the commitment to an independent judiciary – a judiciary dedicated to decision making based on facts and the law.

7. For these reasons, numerous bar associations have encouraged attorneys to respond accurately, quickly and fairly to criticism of judges and courts that is unwarranted.[88] *See, e.g.,* American Board of Trial Advocates, *Responding to Unfair Criticism of Judges*; American Bar Assn. Standing Committee on Judicial Independence, *Rapid Response to Unfair and Unjust Criticism of Judges* (April 2008); Philadelphia Bar Assn. Special Committee to Respond to Attacks on the Judiciary (April 30, 1998); Nebraska State Bar Assn. Policy for Responding to Unjust Criticism (Nov. 3, 2006); 63 Bench & Bar of Minnesota, No. 6 (July 2006).

Effect on Appearances Before the Judge

8. An individual lawyer who responds to criticism of judges may wish to consider whether such support for the judge might be viewed as cause for the judge to be biased in favor of the lawyer. The issues that arise from such support are similar to those that arise where a judge may learn of a lawyer's contribution to a judge's reelection campaign. *See* N.Y. State 574 (1986), N.Y. City 893 (1978). Under the Code of Judicial Conduct, a judge must disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including where the judge has a personal bias toward a party's lawyer. CJC Canon 3E(1). The judge therefore will have to determine

88 For a discussion of possible boundaries of a lawyer's criticism of a judge see N.Y. City 1996-1 (1996).

whether his or her impartiality might reasonably be questioned as a result of the lawyer's support. This requires determinations of fact and law that are beyond the jurisdiction of our Committee.[89]

9. Our prior opinions have considered whether the lawyer should withdraw under the Rules or the judge should be disqualified under the CJC where the lawyer and the judge have prior connections that might affect the judge's impartiality. N.Y. State 574 (1986) thoroughly reviewed the authorities and held that:

> Where a judge and a lawyer have had previous connections, the question of whether the judge should be disqualified from sitting or the lawyer should be disqualified from appearing should be governed primarily by the Code of Judicial Conduct. N.Y. State 548 (1983), N.Y. State 384 (1975), ABA Inf. 1331 (1975). N.Y. State 548 extensively reviewed Codes governing lawyers' and judges' conduct and concluded that, absent statutory prohibition or special circumstances, *the lawyer is not required to disqualify himself by reason of a relationship with the judge. Rather, it is the judge's duty to consider disqualification.* [Emphasis added.][90]

10. Also relevant to our analysis is Rule 1.1(c)(2), which provides that a lawyer shall not intentionally "prejudice or damage the client during the course of the representation . . . ." If the lawyer's defense of the judge is likely to cause the judge to recuse himself or herself on grounds that the judge's impartiality toward the lawyer might reasonably be questioned, and if the judge's recusal is likely to prejudice or damage the client, then the lawyer may not publically support the judge. Rule 1.1(c)(2) would likely apply, for example, if (i) the lawyer is representing a client in a matter that has been long pending before that judge or the matter is on the eve of trial, and (ii) the lawyer's public support of the judge is likely to cause the judge's recusal, and (iii) reassignment of the matter to another judge would cause delay to the prejudice of the client.

Effect on Future Clients

11. If the lawyer has no pending matters before the judge, the question of the judge's recusal may arise with respect to future matters. Nevertheless, the lawyer does not have obligations to future clients under Rule 1.1(c). First, the rule by its terms applies only to actions by the lawyer "during the course of the representation." In any event, even if the judge were to determine that his or her impartiality might reasonably be questioned, it is unlikely that the judge's recusal and the assignment of a new proceeding to another judge would prejudice or damage the client within the meaning of Rule 1.1(c).

89 Thorough discussions of the circumstances that might lead to a judge's disqualification are found in N.Y. State 574 (1986) and N.Y. State 602 (1989). N.Y. State 602 involved a lawyer who had been subpoenaed to testify before the Commission on Judicial Conduct in a proceeding brought against a judge. We noted that, regardless of whether the witness' testimony would support the judge's position in those proceedings, the witness would be perceived to have some power to influence its outcome, and thus would have significant power over the judge's reputation and career. It is not clear that the same conclusion would apply to a lawyer's response to criticism of a judge in the media, as opposed to a judicial conduct proceeding. Ultimately, the judge would have to determine whether the lawyer's defense of the judge against criticism in the media would be perceived as reasonably calling into question the judge's impartiality toward the defender.

90 To the same effect is N.Y. State 673 (1995), where the lawyer was a relative of judge.

CONCLUSION:

12. A lawyer individually or the Bar collectively ordinarily may respond to unfair criticism of a judge in the media. Before responding as an individual or in a small group of lawyers, however, a lawyer with a case pending before the judge should consider whether support of the judge is likely to cause the public reasonably to question the impartiality of the judge in presiding over such matter, and hence cause the judge's recusal. If so, and if the judge's recusal would prejudice or damage a client of the lawyer, the lawyer may not publicly support the judge.

(45-14)

OPINION 1041 (12/10/2014)

TOPIC: Foreign jurisdiction (practice in); Choice of law, partnership with non-lawyer

DIGEST: A New York lawyer who practices principally in a foreign country but is not admitted to practice in that country may, without violating the New York Rules of Professional Conduct, (A) engage in lawful conduct that does not require licensing in the foreign country but would constitute the practice of law in New York, and (B) practice in the foreign country in partnership or association with an entity that includes a non-lawyer as a supervisor or owner; provided in each case that such practice is permitted under the laws and rules of the foreign country and the "predominant effect" of the lawyer's practice is not in New York.

RULES: 5.4(b) & (d), 8.5(a) & (b)

FACTS:

1. A New York lawyer contemplates establishing a practice based in the United Kingdom. For purposes of this opinion, we assume that the lawyer will practice principally in the U.K. While the lawyer's practice would constitute the practice of law if conducted in New York, the lawyer advises us, and we assume for purposes of this opinion, that the lawyer need not register as a foreign lawyer or otherwise be admitted to the bar in the U.K. in order to carry on his contemplated practice in that country. (Although the lawyer does not plan to register as a foreign lawyer at the outset, he may do so at some point.)

2. The lawyer also expects to join his practice with that of an entity formed and based in the U.K. to render legal services as an Alternative Business Structure ("ABS") under the U.K.'s Legal Services Act. The lawyer informs us, and we assume for purposes of this opinion, that the laws of the applicable jurisdiction in the U.K., unlike the laws and rules of New York, permit an entity practicing law to include among its supervisory personnel and owners both persons who are lawyers duly admitted in a jurisdiction other than the U.K. (but not in the U.K.) and persons who are not lawyers at all, such as management consultants or economists, and to render services as an ABS.

QUESTIONS:

3. May a New York lawyer who is based in the U.K. but is not formally admitted to practice in that country ethically engage in conduct there that does not require formal admission to the bar of the U.K. but would be the practice of law in New York?

4. May a New York lawyer who is based in the U.K. but is not formally admitted to practice there ethically practice law there with an entity authorized to practice law for profit if that entity has non-lawyer owners or supervisors?

OPINION:

Our Prior Opinions on Foreign Lawyers

5. This Committee has written several times in recent years on the application of the New York Rules of Professional Conduct (the "Rules") to New York lawyers practicing in foreign jurisdictions (or domestic, non-New York jurisdictions), and, in particular, which jurisdiction's ethical rules and disciplinary authority apply under Rule 8.5. *See* N.Y. State 1027 (2014), N.Y. State 1023 (2014), N.Y. State 911 (2012), N.Y. State 889 (2011), N.Y. State 861 (2011) and N.Y. State 815 (2007).

6. Rule 8.5 provides as follows:

> (a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.
>
> (b) In any exercise of the disciplinary authority of this state, the Rules of Professional Conduct to be applied shall be as follows:
>
> > (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
> >
> > (2) For any other conduct:
> >
> > > (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
> > >
> > > (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

7. From these prior opinions and the Rules, the following principles emerge:

- If a lawyer is licensed to practice law by the State of New York, the lawyer – whether licensed in another jurisdiction or not – is subject to New York's disciplinary authority irrespective of where his or her conduct occurs (*see* Rule 8.5(a)).

- If the lawyer is licensed only by the State of New York *and by no other jurisdiction*, conformity to the New York Rules of Professional Conduct will be the standard against which a lawyer's conduct will be judged by disciplinary authorities in New York. Rule 8.5(b)(2)(i); N.Y. State 911 at ¶ 3.

- If a lawyer is admitted or licensed to practice in New York *and also in another jurisdiction*, then, in exercising its disciplinary authority, under Rule 8.5(b)(2)(ii) the court will apply the rules of the admitting jurisdiction in which the lawyer principally practices, *unless* the "predominant effect" of the lawyer's conduct is "clearly" in another admitting jurisdiction, in which case that jurisdiction's rules of ethics will apply.[91]

Engaging in a Foreign Jurisdiction in Conduct that Does Not Require Foreign Admission

8. Rule 8.5(b)(ii) by its terms applies when the New York lawyer is also admitted or licensed to practice in another jurisdiction. However, occasionally (as is the case in this inquiry) a New York lawyer based in a foreign jurisdiction may engage in conduct that does not trigger a registration requirement in that jurisdiction, but that would constitute the practice of law if conducted in New York. The question in that situation is whether the lawyer may be deemed to be "admitted" or "licensed to practice" in the foreign jurisdiction within the meaning of Rule 8.5(b) notwithstanding the lack of formal admission there.

9. We addressed that question in N.Y. State 815 (2007). In that opinion, we stated:

> "[L]icensed to practice" includes not only formal licensing procedures like those required by the states in the United States, but also less formal procedures that authorize a lawyer to undertake activities in a foreign jurisdiction that would constitute the practice of law if they were undertaken in the United States. So long as the activities are lawful in the jurisdiction in which they are performed, it is our view that a lawyer undertaking such activities is "licensed to practice" in that jurisdiction, and that jurisdiction is an "admitting jurisdiction," for purposes of DR 1-105(B)(2)(b).

Former DR 1-105(B)(2)(b) is identical to present day Rule 8.5(b)(2)(ii). Accordingly, nothing in the replacement of the Code of Professional Responsibility with the Rules of Professional Conduct gives us cause to alter the conclusions reached in N.Y. State 815.

Affiliation with a U.K. Alternative Business Structure

10. Whether a New York lawyer may affiliate with a law firm in the U.K. that is permitted by the laws of that jurisdiction to have non-lawyers among its owners and supervisors may be resolved by an analysis under Rule 8.5. The New York Rules preclude a New York lawyer from practicing law in any capacity with an entity authorized to practice law if a nonlawyer (a) is a partner, (b) owns an interest in the entity, (c) is a member, director or officer or has a position of similar responsibility, or (d) has the right to direct or control the professional judgment of a lawyer. Rule 5.4(b) & (d). The New York Rules also preclude a New York lawyer from sharing legal fees with a non-lawyer or from forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. Rule 5.4(a) & (b). Those principles normally prohibit a New York lawyer from becoming a partner in

91 Rule 8.5(b)(1) sets forth an exception, not apparently applicable in the inquirer's situation, "for conduct in connection with a proceeding before a court before which a lawyer has been admitted to practice." With respect to such conduct, the rules of the jurisdiction in which the court sits are the rules to be applied. We concluded in N.Y. State 889 that Rule 5.4 does not prohibit occasional participation in litigation in New York by a lawyer licensed in New York but also licensed and practicing in a firm with non-lawyers principally in another jurisdiction that permits such practice. A lawyer in that general circumstance will need to judge whether that exception has any possible application to his or her situation.

a firm with nonlawyer owners or supervisors. The prohibitions against non-lawyer owners and splitting legal fees and forming law partnerships with non-lawyers apply even if the entity is located in another jurisdiction in which non-lawyer owners and supervisors are permitted, unless, under New York's choice of law rule, the rules of that other jurisdiction govern the New York lawyer's conduct. *See* Rule 8.5(b); N.Y. State 911 (New York lawyer may not practice law principally in New York as an employee of an out-of-state entity that has non-lawyer owners or managers); N.Y. State 889 (New York lawyer who principally practices in another jurisdiction allowing partnership with non-lawyers may ordinarily conduct litigation in New York because the other jurisdiction's ethics rules govern fee sharing with nonlawyers).

11. Under Rule 8.5(b), whether the laws of another admitting jurisdiction apply depends generally upon (a) where the New York lawyer has been "admitted to practice" or may be deemed to have been admitted to practice, (b) where the lawyer "principally practices" and (c) whether the predominant effect of the lawyer's practice will be in another admitting jurisdiction or in New York. *See* Rule 8.5(b)(2)(ii) (the rules to be applied to the conduct of a lawyer admitted to practice in more than one jurisdiction "shall be the rules of the admitting jurisdiction in which the lawyer principally practices "unless the particular conduct "clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice").

12. The first question under Rule 8.5(b) is whether the inquirer has been admitted to practice or may be deemed to have been admitted in a jurisdiction besides New York. As we noted above, in this case the inquirer may be deemed to be "licensed to practice" in the U.K. (*i.e.,* "admitted" to practice there) within the meaning of Rule 8.5(b). As to that question of interpretation, this Committee opined in N.Y. State 815 that "so long as the activities are lawful in the jurisdiction in which they are performed, it is our view that a lawyer undertaking such activities is 'licensed to practice' in that jurisdiction, and that jurisdiction is an 'admitting jurisdiction' for purposes of DR 1-105(B)(2)(b) [now Rule 8.5(b)(2)(ii).]" *See also,* N.Y. State 911; N.Y. State 889.

13. The second question under Rule 8.5(b) is where the lawyer "principally practices." In N.Y. State 1027 (2014), where the lawyer had offices in two different admitting jurisdictions, we noted that the Rules do not contain any guidance on the meaning of "principally practices." To help fill this gap, we set forth various factors that we believe are relevant to determining the jurisdiction in which the lawyer principally practices, including:

> (a) the number of calendar days the lawyer spends working in each jurisdiction; (b) the number of hours the lawyer bills in each jurisdiction; (c) the location of the clients the lawyer serves; (d) the activities the lawyer performs in each jurisdiction (e.g., legal work for clients vs. administrative work for the law firm); and (e) special circumstances (such as a recent move, an extended illness, or a natural disaster). (*citing* Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 1915-17 (2014).

We also noted that, given the increase in law practice over the Internet, and the corresponding decrease in the importance of a lawyer's physical location, the jurisdiction in which a lawyer "principally practices" for purposes of Rule 8.5(b)(2)(ii) is becoming less certain.

14. The present inquirer indicates that his practice would be "based" in the U.K., and this is certainly a significant factor. But, ultimately, the determination of "principally practices" is question of fact that is beyond the Committee's jurisdiction to decide.

15. The third question under Rule 8.5(b) is whether the lawyer's practice in the principal practice jurisdiction will have its "predominant effect" in another admitting jurisdiction. For example, if the inquirer principally practiced in the U.K., but most of his clients were in New York, then the choice of law rule would apply the New York rules because the predominant effect of the lawyer's conduct occurred in New York, which is also an admitting jurisdiction. This, too, is a question of fact.

16. In N.Y. State 889, we addressed whether a lawyer admitted to practice law in New York and, therefore, subject to New York's jurisdiction for disciplinary matters may join in the practice of law with an entity in the District of Columbia that has a non-lawyer partner, a technical expert, with whom legal fees are shared, where the majority of the partnership's revenue is derived from matters within D.C., but the firm might occasionally bring cases in New York. We noted that conduct in connection with litigation in New York would be subject to the New York Rules, as provided by Rule 8.5(b)(1) (conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice is ordinarily governed by the ethics rules of "the jurisdiction in which the court sits"). However, we also determined that, as long as undertaking occasional matters in New York did not shift the lawyer's principal practice from D.C. to New York, the formation of the partnership and the distribution of its profits would not constitute "conduct in connection with" the New York proceeding, and thus would be analyzed under Rule 8.5(b)(2).

17. In N.Y. State 911, the inquirer proposed to establish a New York office of an entity formed as a U.K. Alternative Business Structure under the U.K.'s Legal Services Act. We noted that the New York lawyers would be practicing principally in New York, and that the "predominant effect" of their conduct, while practicing law from a New York office on behalf of New York clients, also would be in New York. We therefore concluded that the New York Rules prohibiting sharing legal fees with non-lawyer would apply, even if the lawyers were also licensed in the U.K.

18. The distinctions we made in these prior opinions indicate the importance of determining (i) where a lawyer is "licensed" (or "admitted") to practice, (ii) where the lawyer "principally practices," and (iii) where the "predominant effect" of the lawyer's conduct occurs.

CONCLUSION:

19. For the reasons, and subject to the conditions, stated above, a New York lawyer who practices principally in a foreign country but is not admitted to practice in that country may, without violating the New York Rules of Professional Conduct, (A) engage in lawful conduct that does not require licensing in the foreign country but would constitute the practice of law in New York, and (B) practice in the foreign country in partnership or association with an entity that includes a non-lawyer as a supervisor or owner; provided in each case that such practice is permitted under the laws and rules of the foreign country and the predominant effect of the lawyer's practice is not in New York.

(45-13)

OPINION 1042 (12/11/2014)

TOPIC: Choice of Law, Firm Name, Letterhead, Business Cards, Website

DIGEST: Where a lawyer admitted to the New York bar has applied for admission to the District of Columbia bar, and, while such application is pending, will practice from an office located in D.C. under the direct supervision of a member of the D.C. bar in accordance with the applicable D.C. court rule, the lawyer will be deemed to be "licensed to practice" in D.C. for purposes of applying New York Rule 8.5(b) on choice of law for disciplinary purposes. The rules of professional conduct to be applied to such lawyer will depend upon the jurisdiction where the lawyer "principally practices," and whether the conduct of the lawyer will have its "predominant effect" in another jurisdiction where the lawyer is admitted or deemed admitted. Determining which jurisdiction's rules apply to the website, letterhead and business card of the inquirer depends on the same principles.

RULES: 7.1(a), 7.5(d), 8.5(b).

FACTS:

1. The inquirer previously submitted an inquiry asking whether an attorney admitted to practice only in New York may be of counsel to a D.C. law firm that practices under a trade name. In N.Y. State 1023 (2014), the Committee concluded that, under the New York Rules of Professional Conduct (the "Rules"), a lawyer who is admitted solely in New York, where Rule 7.5(b) prohibits lawyers from practicing under trade names, may not be of counsel to an out-of-state firm that is practicing under a trade name.

2. The inquirer subsequently informed us, and we assume for purposes of this opinion, that (i) he has applied for admission to the D.C. bar, (ii) the applicable court rule, D.C. App. Rule 49(c) (8) (the "D.C. Court Rule"), permits a lawyer who is admitted in another jurisdiction and who has submitted an application for admission to the D.C. bar to practice law from a principal office located in D.C. for up to 360 days under the direct supervision of a member of the D.C. bar while the application for admission to the D.C. bar is pending, provided that (A) the District of Columbia Bar member takes responsibility for the quality of the work and for any complaints concerning the services, and (B) the practitioner or the District of Columbia Bar member gives notice to the public of the member's supervision and the practitioner's bar status, and (iii) the lawyer complies with each requirement of the D.C. court rule.

QUESTION:

3. Where a lawyer admitted to practice only in New York has applied for admission to the D.C. bar, and, while such application is pending, will practice from an office located in D.C. under the direct supervision of a member of the D.C. bar in accordance with the applicable D.C. Court Rule, will the rules applicable to the lawyer's conduct be those of New York or D.C.?

4. What rules will govern disclosures about the lawyer's practice made on the website, business cards and stationery of the law firm?

OPINION:

5. Rule 8.5 provides as follows:

> (a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.
>
> (b) In any exercise of the disciplinary authority of this state, the Rules of Professional Conduct to be applied shall be as follows:
>
> > (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
> >
> > (2) For any other conduct:
> >
> > > (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
> > >
> > > (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

6. In N.Y. State 1023, we concluded that the inquirer was admitted only in New York and that the lawyer was therefore subject only to New York's disciplinary authority under Rule 8.5(b)(1). The question raised in the inquirer's follow-up inquiry is whether the inquirer may be deemed to be "licensed to practice" in D.C. as well, in which case Rule 8.5(b)(2) will apply. Rule 8.5(b)(2)(ii) by its terms states that, in the exercise of the disciplinary authority of New York, the rules of another admitting jurisdiction will be applied to the lawyer's conduct if (a) the lawyer is "licensed to practice" both in New York and in another jurisdiction, (b) the lawyer "principally practices" in the other jurisdiction, and (c) the lawyer's conduct does not clearly have its "predominant effect" in another jurisdiction in which the lawyer is licensed.

Being "Licensed to Practice" in Another Jurisdiction

7. With respect to the first of these three tests, in N.Y. State 815 (2007), we determined that, if a New York lawyer is permitted to engage in conduct in a foreign jurisdiction without being formally admitted in the foreign jurisdiction, even though such conduct would constitute the practice of law in New York, the lawyer should be deemed to be "licensed to practice" in the foreign jurisdiction. We explained:

> With respect to DR 1-105(B)(2)(b), it is the opinion of the Committee that "licensed to practice" includes not only formal licensing procedures like those required by the states in the United States, but also less formal procedures that authorize a lawyer to undertake activities in a foreign jurisdiction that would constitute the practice of law if they were undertaken in the United States. So long as the activities are lawful in the jurisdiction in which they are performed, it is our view that a lawyer undertaking such activities is "licensed to practice" in that jurisdiction, and that jurisdiction is an "admitting jurisdiction" for purposes of DR 1-105(B)(2)(b).

8. Although N.Y. State 815 interpreted DR 1-105(b)(2)(b) under the former Code of Professional Responsibility, the analysis employed in N.Y. State 815 is still applicable under the instant facts because Rule 8.5(b)(2)(ii) is identical to its predecessor DR 1-105(B)(2)(b). See also N.Y. State 1041 (2014) (interpreting the Rules).

9. Assuming for purposes of this opinion that the inquirer's proposed practice complies with the D.C. Court Rule, then such practice would constitute being "licensed to practice" in another jurisdiction for purposes of New York's Rule 8.5, and D.C. would be an "admitting jurisdiction" for purposes of Rule 8.5(b)(2).

Whether the Lawyer "Principally Practices" in Another Jurisdiction

10. If a lawyer is deemed admitted in a second jurisdiction, it is still necessary under Rule 8.5 to determine the admitting jurisdiction in which the lawyer "principally practices." In N.Y. State 1027 (2014), the inquirer was licensed in both New York and D.C. and had offices in both jurisdictions. We noted there that neither the text of Rule 8.5 nor its Comments provide any guidelines for determining where a lawyer principally practices, and we set forth various factors that we believe are relevant to determining the jurisdiction in which the lawyer principally practices, including:

> (a) the number of calendar days the lawyer spends working in each jurisdiction; (b) the number of hours the lawyer bills in each jurisdiction; (c) the location of the clients the lawyer serves; (d) the activities the lawyer performs in each jurisdiction (e.g., legal work for clients vs. administrative work for the law firm); and (e) special circumstances (such as a recent move, an extended illness, or a natural disaster). (*citing* Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 1915-17 (2014).

We also noted that, given the increase in law practice over the Internet, and the corresponding decrease in the importance of a lawyer's physical location, the jurisdiction in which a lawyer "principally practices" for purposes of Rule 8.5(b)(2)(ii) is becoming less certain. Thus it is important to consider a lawyer's significant contacts with all jurisdictions, not solely the jurisdiction in which the

lawyer is most often physically present.[92] Ultimately, this determination is one of fact that is beyond the jurisdiction of this Committee.

Whether Lawyer's Conduct has its "Predominant Effect" in Another Jurisdiction

11. Under Rule 8.5(b)(2)(ii), even if the lawyer principally practices in a particular admitting jurisdiction, there is an exception to the usual choice of law rule if the conduct of the lawyer would have its "predominant effect" in a different admitting jurisdiction. For example, if the inquirer principally practiced in D.C., but most of his clients were in New York, then the choice of law rule would apply the New York Rules (absent some countervailing factor) because the predominant effect of the lawyer's conduct would occur in New York, which is also an admitting jurisdiction. Determining where the predominant effect occurs, however, is also a question of fact that is beyond the jurisdiction of this Committee. Here, the inquirer has told us that the firm will not advertise in New York, which may make it more likely that the conduct of the lawyer's practice will not have its predominant effect in New York.

12. Comment [5] of Rule 8.5 states:

> When a lawyer is licensed to practice in New York and another jurisdiction and the lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in an admitting jurisdiction other than the one in which the lawyer principally practices. For conduct governed by paragraph (b)(2), as long as the lawyer's conduct conforms to the rules of the jurisdiction in which the lawyer principally practices, the lawyer should not be subject to discipline unless the predominant effect of the lawyer's conduct will clearly occur in another admitting jurisdiction.

13. In contrast, in N.Y. State 815, the Committee concluded that "[i]f the lawyer principally practices in that [foreign/non-New York] jurisdiction and the particular conduct does not clearly have its predominant effect in New York, then under DR 1-105(B)(2)(b), the rules of the foreign jurisdiction apply."

14. We have previously addressed a choice-of-law question involving a trade name. In N.Y. State 861 (2011), the Committee considered whether a lawyer who is admitted both in New York and another jurisdiction that permits a law firm to practice under a trade name, and who principally practices in the other jurisdiction, may be of counsel to a firm with a trade name, even though the lawyer could not do so in New York. The committee held that the lawyer could ethically do so. In reaching its conclusion, the committee analyzed Rule 8.5(b)(2)(ii) and concluded that "[b]ecause the conduct – practicing with a firm that uses a trade name – principally occurred in the other jurisdiction, the applicable ethical rules would be those of the other jurisdiction." *See also* N.Y. State 889 (2011) (a lawyer admitted in New York who principally practices in D.C., which allows partnership with a non-lawyer,

92 We understand that the inquirer in this case teaches law but is not formally admitted to practice in yet a third jurisdiction (neither New York nor D.C.), and that inquirer may perform some client work in that jurisdiction. If the work performed in that jurisdiction would not require formal admission in that jurisdiction (*e.g.,* if the work is authorized by some variant of ABA Model Rule 5.5(b), which governs temporary practice by out-of-state lawyers), then that jurisdiction could be deemed to be a third admitting jurisdiction. The existence of a third jurisdiction may complicate the determination of where the lawyer principally practices.

may conduct New York litigation even if the D.C. partnership includes a non-lawyer who would benefit from the resulting fees, because the governing ethical provisions would be those of D.C.).

Disclosures on the Website, Business Cards and Stationery of the Law Firm

15. The inquirer also asks whether anything other than the fact he is practicing law in D.C. under the D.C. Court Rule should be disclosed on the firm's website and letterhead and on the lawyer's business cards. Such disclosures are covered by Rule 7.1 and by Rule 7.5(d). Specifically, New York Rule 7.5(d) requires that a law firm's letterhead listing the names of lawyers in the firm "must make clear the jurisdictional limitations" on lawyers not licensed to practice in all of the jurisdictions listed on the letterhead. *See generally* N.Y. State 704 (1997). Whether the New York rules or the rules of another admitting jurisdiction will apply to the website, letterhead and business card of the inquirer depends on the same principles discussed above in connection with the choice of law for other purposes.

CONCLUSION:

16. Where a lawyer admitted to the New York bar has applied for admission to the D.C. bar, and, while such application is pending, will practice from an office located in D.C. under the direct supervision of a member of the D.C. bar in accordance with the applicable D.C. Court Rule, the lawyer will be deemed to "licensed to practice" in D.C. for purposes of New York Rule 8.5(b). The rules to be applied to such lawyer will also depend upon the jurisdiction where the lawyer "principally practices," and whether the conduct of the lawyer will have its "predominant effect" in another jurisdiction where the lawyer is licensed or deemed to be licensed. Determining which jurisdiction's rules apply to the website, letterhead and business card of the inquirer depends on the same principles.

(30-14A)

2015

OPINION 1043 (01/08/2015)

TOPIC: Lawyer's Receipt of Referral Fee from a Real Estate Broker

DIGEST: A lawyer may not accept, as a referral fee, a portion of a real estate broker's commission in lieu of charging a fee to the lawyer's client.

RULES: 1.7(a)

FACTS:

1. A lawyer represented an estate in the sale of real property through a real estate broker the lawyer had recommended to the executors of the estate. The broker has offered to pay the lawyer a referral fee of 25% of the broker's commission, which the lawyer proposes to accept in lieu of the lawyer charging legal fees to the estate for services rendered in the real estate transaction.

QUESTION:

2. May a lawyer accept a referral fee from a real estate broker whom the lawyer recommended for a real property transaction in lieu of charging the lawyer's client for legal fees the lawyer would otherwise charge for legal services on the real estate transaction?

OPINION:

3. We have long and consistently stated that a lawyer may not act as a lawyer and a broker in the same real estate transaction, with or without client consent, and whether or not the lawyer charges for legal services. *See, e.g.*, N.Y. State 916 (2012); N.Y. State 493 (1978); N.Y. State 340 (1974); N.Y. State 208 (1971). In N.Y. State 916, we explained: "The rationale of [our earlier] opinions is that the broker's personal and financial interest in closing the transaction interferes with the lawyer's ability to render independent legal advice with respect to the transaction consistent with the principles now embodied in Rule of Professional Conduct 1.7(a). Otherwise put, the problem primarily stems not from the fee the lawyer receives from rendering purely legal advice, but from the separate and independent financial interest of the lawyer/broker arising from compensation for the non-legal services."

4. This rationale applies as long as the lawyer has a financial interest in the real estate broker's commission, whether or not the lawyer is acting as a broker. The disabling conflict that these opinions identify is a lawyer's pecuniary interest in the broker's success and attendant commission, which irredeemably interferes with the lawyer's distinct obligation to exercise independent professional judgment on the client's behalf. That the estate beneficiaries may benefit from the arrangement does not remedy this circumstance, any more than a lawyer/broker's waiving a legal fee, which is also of benefit to the client, can do so. Our conclusion is the same whether the broker's offer of compensation was made before or after the completion of the transaction.

CONCLUSION:

6. A lawyer may not accept a referral fee consisting of a portion of a real estate broker's commission in place of charging a fee to the lawyer's client, even with a client's informed consent. (32-14)

OPINION 1044 (01/08/2015)

TOPIC: Attorney Payment of Expense of Litigation

DIGEST: Whether an attorney may advance the client's taxi and other transportation costs to and from (i) an independent medical examination under the New York no-fault insurance law or (ii) other appointments with doctors or for other medical treatments, depends on whether the cost qualifies as an expense of the litigation. Transportation to an IME clearly qualifies as such an expense, since an IME is a condition to receiving no-fault payments. Whether the cost of transportation to and from other appointments with doctors or for medical treatment are expenses of litigation depends on whether they are necessary to diagnose, assess or demonstrate the client's condition, or the client's efforts to treat that condition, for litigation purposes. We believe many such costs will qualify as expenses of litigation. However, some costs of routine medical care necessary to treat the client's injuries may not so qualify. The determination of what is a necessary expense of litigation is a question of fact that is beyond our jurisdiction to determine. If a client is indigent or pro bono, the attorney may pay qualifying expenses without seeking reimbursement.

RULES: 1.8 (a) & (e)

FACTS:

1. The inquiring attorney represents a client in a matter covered by no-fault insurance. Once a claim for coverage is filed with the insurance carrier, the carrier may demand that the client-claimant see a doctor chosen by the insurance company for an Independent Medical Examination or "IME". Failure to attend the IME may result in a cut-off or reduction in benefits. The client also may have appointments with treating physicians or for other medical treatments. In either case, the client will incur taxi and other transportation costs to and from appointments with doctors or for other medical treatments. These transportation costs are included in the client's claim under the no-fault law for "basic economic loss" arising out of the accident, up to $25 per day. The client is indigent and unable to pay these transportation expenses and has asked the inquirer to advance them.

QUESTION:

2. May the inquiring attorney advance the client's taxi and other transportation costs to and from (i) the IME, and (ii) appointments with doctors or for other medical treatments, either subject to repayment out of the no-fault insurance, or on a contingent basis?

OPINION:

3. Rule 1.8(e) of the New York Rules of Professional Conduct (the "Rules") provides:

> (e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
>
> > (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

> (2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client . . . .

4. As stated in Comment [9B] to Rule 1.8, paragraph (e) limits permitted financial assistance to court costs and expenses directly related to litigation. Comment [9B], however, cautions that permitted expenses do not include "living or medical expenses" other than those listed in Comment 9B. Comment [10] provides the rationale for this Rule:

> [10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee arrangements and help insure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

5. Assuming that the representation involves a pending or contemplated litigation,[1] the issue under Rule 1.8(e)(1) is whether the transportation expenses constitute "expenses of litigation." As examples of permitted litigation expenses that a lawyer may advance, Comment [9B] to Rule 1.8 lists "expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence." Professor Simon indicates that "expenses of litigation" would include such items as fees of a private investigator, the lawyer's travel expenses to visit witnesses or attend depositions, long distance phone bills, costs of clandestine videos and any other expenses that a lawyer or lawyer's agents incur while investigating the facts of the case. R. Simon, Simon's New York Rules of Professional Conduct Annotated 484 (2014 ed.).

6. The cost of the client's transportation to and from the IME is clearly an expense of the litigation, since it is a condition to receiving no-fault payments. Without it, the goal of the proceeding is unlikely to be met. With respect to transportation to other doctors or medical treatment, whether these costs are expenses of litigation depends on whether they are necessary to diagnose, assess or demonstrate the client's condition, or the client's efforts to treat that condition, for litigation purposes. For example, if the doctor or service provider will be testifying about the extent of the client's injuries, or, if the client otherwise cannot afford to travel to treatment and if failure to obtain treatment may be used by the insurer to minimize the extent of the client's injuries, then such costs certainly would qualify as costs of litigation. They are essentially "costs of obtaining . . . evidence" of the fact that the client requires and is obtaining ongoing medical treatment because of the injury. We believe many such expenses would qualify.

1 If there were no contemplated or pending litigation, Rule 1.8(e) would not by its terms apply. The lawyer could make a gift of the travel expenses. If the lawyer advanced the expenses, the financial arrangement would be subject to the provisions of Rule 1.8(a) on lawyer-client business transactions.

7. However, some costs of routine medical care necessary to treat the client's injuries may not qualify as costs of litigation, and the lawyer would not be authorized to pay them under Rule 1.8(e). The dividing line between what is and is not a necessary cost of litigation is a question of fact that is beyond our jurisdiction to determine.

8. Under Rule 1.8(e), the lawyer may advance permitted transportation costs, contingent on the outcome of the matter. In addition, if the client is indigent or represented on a pro bono basis, the lawyer may pay such costs. *See* Comment [9B] to Rule 1.8(e) (quoted above), as well as N.Y. State 852 (2011) and N.Y. State 840 (2010). In N.Y. State 786 (2005), interpreting the predecessor to Rule 1.8(e) in the Code of Professional Responsibility, we noted that the Code contained no definition of "indigent," but that New York courts have defined the term as "destitute of property or means of comfortable subsistence; needy; poor; in want; necessitous," (*citing Healy v. Healy*, 99 N.Y.S.2d 874, 877 (Sup. Ct. Kings County 1950). We note that Comment [3] to Rule 6.1 now contains a definition of "poor person" in the context of pro bono representation.[2] Such a person would in our opinion be "indigent" under Rule 1.8(e).

CONCLUSION:

9. Whether an attorney may advance the client's taxi and other transportation costs to and from (i) an independent medical examination under the New York no-fault insurance law or (ii) other appointments with doctors or for other medical treatments, depends on whether the cost qualifies as an expense of the litigation. Transportation to an IME clearly qualifies as such an expense, since an IME is a condition to receiving no-fault payments. Whether transportation to other appointments with doctors or for medical treatment are "expenses of litigation" depends on whether they are necessary to diagnose, assess or demonstrate the client's condition or the client's efforts to treat that condition, for litigation purposes. We believe many such expenses would qualify as expenses of litigation. However, some costs of routine medical care necessary to treat the client's injuries may not so qualify. The determination of what is a necessary expense of litigation is a question of fact that is beyond our jurisdiction to determine. If a client is indigent or pro bono, the attorney may pay qualifying expenses without seeking reimbursement.

(33-14)

2 "Poor persons" under Rule 6.1 include both individuals who qualify for participation in programs funded by the Legal Services Corporation and individuals whose incomes and financial resources are slightly above the guidelines utilized by Legal Services Corporation programs but nevertheless cannot afford counsel. The Legal Services Corporation services those with annual income at or below 125% of the federal poverty guidelines, which, in 2014, were $14,588 for an individual and $29,813 for a family of four.

OPINION 1045 (01/08/2015)

TOPIC: Lawyer as witness

DIGEST: In-house counsel for a corporation may submit to an interview with an administrative agency that is investigating alleged wrongdoing by the client, where the facts to be disclosed by the lawyer will not constitute confidential information. However, if the agency's investigation results in a proceeding before a tribunal, and if the lawyer is likely to be a witness on a significant issue of fact, the lawyer may not also act as an advocate before the tribunal in such proceeding, absent an exception to the advocate-witness rule.

RULES: 1.0(w), 1.1(c), 1.6(a), 3.7(a)

FACTS:

1. In-house counsel for a corporation has been asked to submit voluntarily to an interview with an administrative agency that is investigating a charge by a third party of wrongdoing by the client. The interview will involve what occurred at a meeting between the corporation and the third party, at which the lawyer was a participant. The lawyer's interview may help to avert a formal complaint against the client, and therefore may be beneficial to the client. The corporation has no objection to its lawyer appearing for such interview. The facts the lawyer would discuss during the interview are not subject to the attorney-client privilege and do not otherwise constitute confidential information of the client (*e.g.* will not be embarrassing or detrimental to the client and will not reveal information the client has requested be kept confidential). If, after its investigation, the agency believes the charge against the client has merit, it could file charges, in which case a hearing would be held before a tribunal.

QUESTION:

2. May in-house counsel for a corporation voluntarily submit to an interview with an administrative agency that is investigating a charge by a third party of wrongdoing by the client, where the facts disclosed by the lawyer will not constitute confidential information?

OPINION:

3. Rule 1.6 of the New York Rules of Professional Conduct (the "Rules") prohibits a lawyer from knowingly revealing confidential information (as defined in that Rule) unless the client gives informed consent, as defined in Rule 1.0(j). Confidential information includes information gained during the representation that (a) is protected by the attorney-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential. We have been told, and we assume for purposes of this opinion, that the information the lawyer would relate to the agency concerns the conduct of the client at a meeting at which the adversary was present (and thus would not be protected by the attorney-client privilege), and that the information related by the lawyer will not be embarrassing or detrimental to the client, and that the client has not requested that it be kept confidential. Consequently, we see no issue under Rule 1.6. If the information might be embarrassing or detrimental to the client, or if the client had requested that the lawyer not disclose it, the lawyer could not voluntarily disclose it without the informed consent of the client.

4. Rule 3.7(a) prohibits a lawyer from acting as an advocate before a "tribunal" in a matter in which the lawyer is likely to be a witness on a significant issue of fact. The term "tribunal" is defined in the Rules to include not only a court or arbitrator but also an administrative agency "acting in an adjudicative capacity," meaning that a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter. Rule 1.0(w).

5. Although the interview here is with an administrative agency, the agency at this stage is exercising its investigative functions, rather than acting in an "adjudicative capacity." Consequently, Rule 3.7(a) is not currently implicated.

6. If the agency determines to bring a formal complaint against the client following the interview, then the agency will be acting in its "adjudicative capacity." At that point, if the lawyer is "likely" to be a witness on a significant issue of fact, Rule 3.7(c) will come into play, and the lawyer will not be able to act "as advocate before" the tribunal unless one of the exceptions in Rule 3.7(a) applies. *See* N.Y. State 642 (1993) (lawyer may not serve as both lawyer for a union and as a witness in an arbitration concerning a collective bargaining agreement the lawyer negotiated).[3]

7. If the agency determines to bring charges against the client, the lawyer will need to determine if he is likely to be a witness on a significant issue of fact. This requires evaluating other available testimony. As the court stated in *MacArthur v. Bank of New York,* 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981), "An additional corroborative witness would almost always be of some use to a party, but might nevertheless be essentially cumulative. At some point, the utility of additional corroboration is de minimus [sic] and does not require the attorney's disqualification." In that case, the court found that an independent lawyer would likely call the lawyer, both to supply his own account of the events in question (even if corroborative) and to prevent the jury from speculating about his absence. It therefore found the lawyer's testimony would be far from cumulative, because his role was pivotal, and his conduct had been brought into question by the adversary. Determining whether the lawyer is likely to be a witness on a significant issue of fact is a factual question beyond the jurisdiction of this Committee.

8. If the lawyer is likely to be a witness on a significant issue of fact, Rule 3.7(a) does not authorize the lawyer to choose whether to be a lawyer or a witness. The lawyer must not act as an advocate before the tribunal. The rule applies whether the lawyer would be called as a witness by the lawyer's client or the client's adversary, and whether or not the lawyer's testimony would be favorable to the client. Under the former Code of Professional Responsibility, EC 5-10 elaborated on the predecessor to Rule 3.7 as follows: "Where the question [of whether to be a witness or an advocate] arises, doubts should be resolved in favor of the lawyer testifying and against the lawyer's becoming or continuing as an advocate." *See MacArthur v. Bank of New York*, *supra* ("[T]he stricture is mandatory: the party cannot choose between the attorney's testimony and his representation. The rule embodies a conclusive preference for testimony. . . . A party can be represented by other attorneys, but cannot obtain substitute testimony for a counsel's relevant, personal knowledge.") This obligation is not eliminated by client consent. *Id*. at 1209. Although the language of EC 5-10 was not carried over into the comments to Rule 3.7, we believe it is implicit in the language of the rule itself.

3 While the lawyer could not appear before the tribunal as counsel in the matter, he or she could participate in the case outside the courtroom, for example, by directing outside counsel. Rule 3.7(a) (lawyer shall not act *as advocate before a tribunal*); *see* ABA Inf. 89-1529 (1989). But that is not the issue at this stage.

9. Similarly, Rule 1.1(c) prohibits a lawyer from intentionally prejudicing or damaging the client during the course of the representation, except as permitted or required by the Rules. Such prejudice might arise if the lawyer withheld material testimony on a significant issue of fact, either in the investigatory stage of the matter or at a later hearing before a tribunal.

CONCLUSION:

10. In-house counsel for a corporation may submit to an interview with an administrative agency that is investigating alleged wrongdoing by the client, where the facts to be disclosed by the lawyer will not constitute confidential information. However, if the agency's investigation results in a proceeding before a tribunal, and if the lawyer is likely to be a witness on a significant issue of fact, the lawyer could not also act as an advocate before the tribunal in such proceeding, absent an exception to the advocate-witness rule.

(44-14)

OPINION 1046 (01/08/2015)

TOPIC: Representing incapacitated client; conflict of interest

DIGEST: A lawyer may accept court appointments to serve as Court Evaluator or Guardian for an Alleged Incapacitated Person in a guardianship proceeding under the Mental Hygiene Law for an individual who is a resident of a health care facility represented by the law firm in matters unrelated to AIP. The lawyer does not represent the AIP as counsel and Rule 1.7(a) is not implicated. Whether a lawyer may accept a court appointment to serve as counsel for the AIP in a guardianship proceeding in which the petitioner is the health care facility depends on (1) whether the interests of the AIP and the health care facility are "differing interests" and whether the lawyer has a disabling personal interest, which are questions of fact beyond the jurisdiction of this Committee, and (2) whether the lawyer can obtain consent to the potential conflict, which requires a careful assessment by the lawyer of whether the AIP is capable of giving informed consent.

RULES: 1.0(f), 1.7(a) & (b), 1.14(a)

FACTS:

1. The inquiring law firm or its lawyers receive court appointments under the Mental Hygiene Law to serve as Court Evaluator or Guardian to an Alleged Incapacitated Person ("AIP") or Counsel to an AIP. These appointments are necessary when there is no family member or close associate willing to serve on behalf of the AIP.

2. Often, it is the residential care facility (the "Care Facility") where the AIP resides that is the petitioner in the proceedings, because there are no family members or close associates to act as petitioner.

3. The duties of a Court Evaluator are to interview the AIP and determine whether the AIP understands English, to explain the nature and possible consequences of the proceeding and the rights of the AIP, to determine whether the AIP wishes legal counsel of his or her own choice, to interview the petitioner or others familiar with the AIP's condition, affairs and situation, to determine whether sufficient resources are available to provide for the personal needs or property management of the AIP without the appointment of a guardian, and to make a written report and recommendation to the court.

4. The role of a Guardian is to manage the property and provide for the personal needs of the AIP, if the court determines (as a result of the guardianship petition) that the AIP cannot manage his or her own personal needs and either (i) the AIP agrees to the appointment, or (ii) the court determines that the AIP is incapacitated as defined in section 81.02(b) of the Mental Hygiene Law. Where the AIP does not have sufficient assets to manage his or her personal needs, the Guardian will apply for Medicaid to help to defray the costs of the Care Facility.

5. The role of independent counsel to the AIP is to represent the interests of the AIP where (i) the AIP has requested counsel, (ii) the AIP wishes to contest the petition or does not consent to the authority requested in the petition to move the AIP from where the AIP presently resides to a nursing

home or other residential care facility, or (iii) the court determines that there is a potential conflict between the court evaluator's role and the advocacy needs of the AIP.

6. The inquiring law firm also represents residential care facilities in various matters involving Medicaid benefits, guardianship, litigation and collection. However, the law firm does not represent the Care Facility in any matter in which it has accepted an appointment to serve on behalf of a resident. Such work is handled by other law firms that regularly represent the Care Facility.

QUESTION:

7. May lawyers in a firm accept court appointments to serve as Court Evaluator, Guardian or Counsel to an Alleged Incapacitated Person in a proceeding under the Mental Hygiene Law for an individual who is a resident of a health care facility if their law firm simultaneously represents the health care facility in matters unrelated to the AIP?

OPINION:

8. The answer to the question depends upon whether there is a conflict of interest under Rule 1.7. Rule 1.7(a) states, in part, "a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Thus the answer to the question turns on (a) whether the lawyer or others in the lawyer's firm represent both the AIP and the Care Facility, and (b) whether the interests of the AIP and the Care Facility are "differing interests" or there is a significant risk that the lawyer's professional judgment on behalf of the AIP would be adversely affected by the lawyer's personal interest in remaining in the good graces of the Care Facility.

9. Rule 1.0(f) defines "differing interests" as including "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Comment [8] under Rule 1.7 explains:

> Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. . . . The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of a client.

Court Evaluator for an AIP

10. The responsibilities of a Court Evaluator differ from those of counsel to an alleged incapacitated person. The person acting as court evaluator is required to make inquiry into an AIP's assets, mental state and ability to handle his or her affairs, and then to report the findings to the court, so that

the court may decide whether a guardian is needed and who that guardian should be. A Court Evaluator need not be a lawyer.

11. An appointment by a court to serve as a Court Evaluator under the Mental Hygiene Law does not create a lawyer-client relationship. Consequently, the limitations of Rule 1.7(a)(1) do not apply to a lawyer serving in such role,[4] because the lawyer does not "represent" the AIP.

Guardian for an AIP

12. The responsibilities of a Guardian do not begin until the court determines a Guardian should be appointed. For a general description of guardianship proceedings, see N.Y. State 986 (2013). As in the case of a Court Evaluator, a Guardian does not have an attorney-client relationship with the AIP. Consequently, the limitations Rule 1.7(a)(1) do not apply to a lawyer serving in such role.

Counsel for an AIP

13. Unlike a Court Evaluator or a Guardian for an AIP, Counsel for an AIP does have an attorney-client relationship with the AIP. Consequently, it is important to determine whether the AIP and Care Facility have "differing interests" in the guardianship proceedings under Rule 1.7(a)(1) and whether the lawyer's professional judgment on behalf of the AIP will be adversely affected by the lawyer's personal interests in remaining in the good graces of his or her firm's regular client, the Care Facility, under Rule 1.7(a)(2). It is irrelevant that the lawyer does not represent the AIP and the Care Facility in the same matter. *See* Rule 1.7, Comment [6] ("a lawyer may not advocate on one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated.")

Differing interests

14. Guardianship proceedings are not typical adversarial court proceedings and the interests of the AIP and the Care Facility are not always differing. The guardianship proceeding often is commenced by the Care Facility for the purpose of providing financial assistance to the AIP to remain in the Care Facility. These proceedings are rarely contested. Consequently, although the interests of the petitioner in a guardianship proceeding theoretically conflict with those of the AIP, we have concluded that, where the AIP does not oppose the guardianship, or is incapacitated and cannot express an opinion, the lawyer does not represent such a differing interest. *See* N.Y. State 986 (2013) (lawyer may serve as the petitioner), N.Y. State 746 (2001) (same). On the other hand, if the AIP has requested independent counsel, or if the court has appointed counsel for the AIP after determining that there is a potential conflict between the court evaluator's role and the advocacy needs of the AIP, then it is quite possible there are more than theoretically differing interests. Because determining whether the interests of the AIP and the Care Facility are "differing interests" raises questions of fact, such determination is beyond the jurisdiction of this Committee.

4 In the role of Court Evaluator or Guardian, a lawyer will receive information of a sensitive nature from the individual. This information is not "confidential information" covered by Rule 1.6(a) because it is not received from a client, although the Mental Hygiene Law or other law may create other responsibilities of confidentiality.

The Lawyer's Personal Financial Interests

15. Where the lawyer or the lawyer's firm have a continuing relationship with the Care Facility that is the petitioner in a guardianship proceeding, or into which a Guardian might place the AIP, the relationship between the law firm and the Care Facility could adversely affect the independent professional judgment of the lawyer in representing the AIP, thus creating a personal interest conflict for the lawyer.

Consent to Conflicts of Interest

16. If the court appointment as counsel for the AIP creates a differing interest conflict or a personal interest conflict under Rule 1.7(a), the next step is to determine whether the conflict is consentable under Rule 1.7(b), and, if so, whether the lawyer may obtain informed consent from both the Care Facility and the AIP.

17. The process of obtaining consent to a conflict under Rule 1.7(a) requires a lawyer to satisfy the four subparagraphs of Rule 1.7(b). Specifically, the lawyer must determine that (i) he or she can provide competent and diligent representation to each affected client, (ii) the representation is not prohibited by law, and (iii) the representation does not involve the assertion of a claim by the Care Facility against the AIP (or vice versa). Rule 1.7(b)(1), (2) and (3). Finally, each client must give "informed consent, confirmed in writing." Rule 1.7(b)(4). In N.Y. State 986, we applied Rule 1.7(b)(1)-(3), concluding that the inquirer could not represent both the AIP and his sister, who wished to be appointed guardian, because their positions as to the AIP's living arrangements were inconsistent. However, we did not reach the issue of consent.

18. In N.Y. State 836 (2010), we concluded that a conflict analogous to the one here was consentable. There, the lawyer had represented an incapacitated client in connection with the appointment of a guardian (one of the client's adult children). However, the client had subsequently been living independently and no longer needed a guardian. In addition, the guardian was planning to move across the country. Accordingly, the client and the guardian wanted the lawyer to represent them jointly in applying for termination of the guardianship. We noted that the interests of the client and the guardian were potentially differing, although we determined that the lawyer could reasonably believe that the lawyer could provide competent and diligent representation to both parties. Consequently, because the representation would not be adversarial and because the matter would be supervised by the court, we concluded that the conflict was consentable.

19. Before accepting a court appointment to represent the AIP in the proceeding here, the inquirer must obtain the informed consent of both the Care Facility and the AIP. Obtaining consent of the Care Facility ordinarily will not be problematical (even after explaining that the lawyer's obligation is to provide diligent representation to the AIP). However, obtaining informed consent of the AIP is more complicated.

20. In N.Y. State 836 (2010), we discussed the ability of an AIP to give consent. We noted that a lawyer must take special care when obtaining consent from a person who may be, or has been deemed to be, incapacitated and under guardianship. This careful assessment was necessary because, if the client's capacity to make reasoned decisions was so diminished that the client could not give informed

consent, then the lawyer could not satisfy the informed consent requirement of Rule 1.7(b)(4). There, however, we concluded that a client may consent to dual representation despite the possible determination of incapacity. We relied on Rule 1.14(a) (which directs the lawyer to maintain a conventional relationship with the client to the extent possible), on the Mental Hygiene Law (which states that an incapacitated person retains all powers and rights except those that are specifically granted to the Guardian), and on our opinion in N.Y. State 746 (2001) (which stated "there is generally no bar to representing a client whose decision making capacity is impaired, but who is capable of making decisions and participating in the representation").

21. Because the inquirer needs to obtain consent before accepting a court appointment to act as counsel to an AIP where the lawyer's firm also represents the Care Facility in other matters, the lawyer should make sure that the court is aware that the firm represents the Care Facility in unrelated matters, and that the lawyer will need to obtain consent to a potential conflict from both the Care Facility and the AIP before proceeding.

CONCLUSION:

A lawyer may accept court appointments to serve as Court Evaluator or Guardian for an Alleged Incapacitated Person in a guardianship proceeding under the Mental Hygiene Law for an individual who is a resident of a health care facility represented by the law firm in matters unrelated to AIP. The lawyer does not represent the AIP as counsel and Rule 1.7(a) is not implicated. Whether a lawyer may accept a court appointment to serve as counsel for the AIP in a guardianship proceeding in which the petitioner is the health care facility depends on (1) whether the interests of the AIP and the health care facility are "differing interests" and whether the lawyer has a disabling personal interest, which are questions of fact beyond the jurisdiction of this Committee, and (2) whether the lawyer can obtain consent to the potential conflict, which requires a careful assessment by the lawyer of whether the AIP is capable of giving informed consent.

(47-14)

OPINION 1047 (02/17/2015)

TOPIC: Government Lawyer; No contact rule

DIGEST: A government lawyer whose duties include investigation of fraud is subject to Rule 4.2. Whether the government lawyer may interview a party to a proceeding before the agency about the conduct of his or her private lawyer in that proceeding as part of an investigation of the private lawyer depends on whether the investigation is part of a separate matter and, if so, whether the government lawyer knows that the interviewee is represented by counsel in the separate matter. Even if the matter is the same, or, if it is not the same but the lawyer knows that the interviewee is represented in the separate matter, the government lawyer may interview the private lawyer's clients without the consent of the private lawyer if the contact is "authorized by law." That is a question of law beyond our jurisdiction.

RULES: 1.7, 4.2, 4.3

FACTS:

1. A lawyer for a government agency (the "Government Lawyer") is performing an investigation involving accusations of fraud against a private lawyer (the "Private Lawyer") relating to claims submitted to the agency. The accusation may have been made in a number of different ways: (i) by the Private Lawyer's client; (ii) by one of the agency's administrative law judges; or (iii) by an anonymous tip on the agency's website. In some cases, the accusation will affect only the Private Lawyer, *e.g.*, a claim that the Private Lawyer has left the law firm that is counsel of record, and has fraudulently signed a consent to change attorneys and therefore is not the person entitled to counsel fees. But in other cases the accusation may involve charges that will affect the rights of the Private Lawyer's client (the "Client"), *e.g.*, by reducing the amount to which the Client is entitled or voiding the Client's claim.

2. The Government Lawyer's duties include investigating such accusations. If, as a result of the investigation, the agency believes there has been fraud or a violation of law, the agency will report the violation to the attorney general or another appropriate law enforcement agency. As part of the investigation, the Government Lawyer would like to interview one or more of the Private Lawyer's Clients. Each Client has a pending administrative case before the agency, but the inquirer states they are not targets of the investigation.

3. The agency has the statutory authority to investigate violations of the laws and regulations enforced by the agency. That includes the authority to conduct investigations of possible fraud and other violations of laws and regulations enforced by the agency. Nothing in the statute or regulations specifically authorizes the agency to interview witnesses represented by counsel when that counsel is not present and has not consented to the interview.

QUESTION:

4. May a government lawyer interview the clients of a Private Lawyer alleged to have committed fraud in connection with a proceeding before the government lawyer's agency, without the consent of the Private Lawyer?

OPINION:

5. This inquiry turns on Rule 4.2 of the New York Rules of Professional Conduct (the "Rules"), known as the "no-contact" rule, which concerns communication with a person represented by counsel. Rule 4.2(a) provides as follows:

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

6. Comment [1] to Rule 4.2 explains that the Rule "contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship, and uncounseled disclosure of information relating to the representation."

7. The issues under Rule 4.2 are evident from the language of the Rule. The rule prohibits a lawyer who represents a client in a matter (Lawyer A) from communicating with (1) a "party," (2) who Lawyer A "knows" is "represented by another lawyer" in the matter (Lawyer B), (3) about the subject of Lawyer A's representation, (4) unless Lawyer A has the prior consent of Lawyer B, or (5) Lawyer A is "authorized by law" to engage in the communication without the consent of Lawyer B.

Is the Client a "Party" Within the Meaning of Rule 4.2?

8. To determine the application of Rule 4.2 to this inquiry, we must also determine whether the Client is a "party" in connection with the investigation of the Private Lawyer. A number of federal courts in the Second Circuit interpreting Rule 4.2 or its predecessor in the Code of Professional Responsibility – DR 7-104 – in a criminal context have held that a "party" must be a party to a litigation. *See, e.g., In re* Chan, 271 F. Supp. 2d 539, 544 (S.D.N.Y. 2003); Grievance *Comm. for S. Dist. of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995) (criminal defense attorney not subject to discipline for interviewing a cooperating witness who was represented in another matter but was not a "party" to the matter for which he was interviewed; court holds that narrow reading of "party" and "matter" is critical to allow the investigation essential to a defense attorney's preparation for trial.) *But see United States v. Hammad*, 846 F.2d 854, *amended*, 858 F.2d 834 (2d Cir. 1988) (court assumes the disciplinary rule would otherwise apply, but determines that the prosecutor was "authorized by law" to employ legitimate investigative techniques, including the use of an informant).

9. As we noted in N.Y. State 735 (2001), the scope and application of the no-contact rule have been hotly debated in the criminal context.[5] However, in the non-criminal context, we have uniformly interpreted the rule to apply to any represented party. Indeed, the legal definition of "party" is much broader than the plaintiff or defendant in pending litigation. *See* Black's Law Dictionary (9th ed.

5 In N.Y. State 735, we cited Bruce A. Green, *A Prosecutor's Communications with Defendants: What Are the Limits?*, 24 Crim. L. Bull. 283 (1988). The debate has continued since then. *See, e.g.*, Bruce A. Green, *Prosecutors and Professional Regulation*, 25 Geo. J. of Legal Ethics 873 (2012) (citing authorities expressing various opinions). *See also* Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. Pitt. L. Rev. 291, 325 n. 4 (1992).

2009) (a party is "1. One who takes part in a transaction. 2. One by or against whom a lawsuit is brought"); Black's Law Dictionary (4th ed. 1968) (a party is "a person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually"). As we said in N.Y. State 904 (2012):

> In the narrowest sense, the term "party" means a plaintiff or defendant (or the equivalent) in pending litigation. But this Committee has never read the term "party" so narrowly. Rather, in civil matters, the definition of "party" as used in Rule 4.2 – and in the definition of "matter" in Rule 1.0(l) – is not limited to formal parties to litigation. In N.Y. State 735 (2001), which addressed "noncriminal matters," we stated that the no-contact rule "applies to one who retains counsel in connection with a dispute even prior to the filing of a lawsuit; and during a civil lawsuit it applies to represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties to the lawsuit."

A number of other bar associations, interpreting Rule 4.2 or its predecessor in the Code of Professional Responsibility (DR 7-104) also have read the rule as applying absent a pending litigation. *See, e.g.,* Indiana Opin. 2008-02 (2008); Illinois Opin. 04-02 (2005); Utah Opin. 95-05 (1995); ABA Formal Opin. 95-396 (1995).[6] The adoption of the Rules effective in 2009 has not changed our opinion on the scope of the term "party."[7] Consequently, we believe the Client is a "party" within the meaning of Rule 4.2, even if the investigation of the Private Lawyer is a separate matter, and even if the Client is only a witness.

Is the Client Represented in the Matter?

10. Rule 4.2(a) by its terms prohibits a lawyer from communicating about a matter with a party that the lawyer "knows" is represented by another lawyer in the same matter. Comment [2] to the Rule explains that paragraph (a) applies to communications with any party who is "represented by counsel *concerning the matter to which the communication relates*" (emphasis supplied). Although the Definition Section of the Rules contains a definition of "matter," it does not define the scope of a single matter, but rather lists more than a dozen different types of matter that are included within the term. *See* Rule 1.0(*l*). Significantly, the term "matter" is not limited to litigation, but includes an investigation, an application, a contract, a negotiation or "any other representation involving a specific party or parties."

11. The term "matter" is also discussed in the comments to other Rules, and they make clear that the scope of the term is not defined mechanically but is sensitive to the particular facts and context of the inquiry. For example, Rule 1.9(a), the former-client conflict rule, prohibits a lawyer who has rep-

6 Many of the non-New York ethics opinions and court cases arose before the ABA amended Rule 4.2 of the Model Rules of Professional Conduct in 1995 to change the term "party" to "person." While a handful of states, including New York, retained the reference to "party," most changed the term "party" to "person," thus eliminating any argument about the meaning of "party," and making it more likely that future disagreements with law enforcement officers in these states would center on the scope of the "provided by law" exception rather than the scope of the term "party."

7 We noted in N.Y. State 884 (2011) that the Committee had applied the no-contact rule more broadly in the past, but we concluded that Rule 4.2 does not apply to a non-party witness in a criminal matters, citing *Grievance Committee for the Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995), while stressing that this conclusion did not extend to civil matters.

resented one client in a matter from representing another person in the same or a substantially related matter. Comment [2] to Rule 1.9 states: "The scope of a 'matter' for purposes of this Rule depends on the facts of a particular situation or transaction. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited." Rule 1.11(a) prohibits a lawyer who has formerly served as a public officer or employee from thereafter representing a client in connection with a matter in which the lawyer participated personally and substantially as a public officer. Comment [10] to Rule 1.11 provides: "[A] 'matter' may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which (i) the matters involve the same basic facts, (ii) the matters involve the same or related parties, and (iii) time has elapsed between the matters." *See* N.Y. State 1029 (2014) (discussing the facts, parties and time tests); N.Y. State 904 (2012) (asking whether representation in the first matter necessarily would include representation in the second matter).

12. In N.Y. State 904, we discussed whether two matters were the same, so as to determine whether representation in one demonstrated representation in the other for purposes of Rule 4.2. One was a criminal investigation and the other was a civil suit. Although they involved the same underlying conduct and were inextricably intertwined, we determined they were different matters, because the parties, processes and issues were different. Thus, we have determined that the same underlying conduct is not, on its own, sufficient to constitute the same "matter." Rather the extent of a matter depends on a variety of factors, including whether the two matters involve (i) the same underlying events or alleged actions, (ii) the same or related parties, (iii) the same or related issues (which includes whether the matters involve the same interests that the Client has hired the lawyer to protect and whether the outcome of the second matter can affect the outcome of the first matter), and (iv) whether the matters are ongoing at the same time or close in time.

13. Here, the Government Lawyer knows that the Private Lawyer represents the Client in a claim before the government agency. Whether a communication in connection with the Government Lawyer's investigation (which is going on at the same time as the Client's claim proceeding and involves the same or related parties) involves the same "matter" in which the Government Lawyer knows the Private Lawyer represents the Client will depend on the extent to which the central events and issues of the claim proceeding are the same and on whether the communication may have an effect on the outcome of the claim proceeding.

14. We believe the overlap between the Client's claim before the agency and the Government Lawyer's investigation will often be greater than the overlap we analyzed in N.Y. State 904. If the investigation concerns an allegation of fraud in the prosecution of the Client's claim before the agency, the central facts underlying the claim are also likely to be at the center of the investigation, even if the issues are somewhat different. (For example, the issues in the investigation would include not only whether the facts as presented were true but also the circumstances leading to any misstatement in the application and who participated in that misstatement.) In that case, the investigation would likely constitute the same "matter" as the Client's claim proceeding before the agency, and the Client should be considered represented in the investigation for purposes of Rule 4.2. This is particularly true if the Client's claim is still pending and the investigation may materially affect the amount or validity of the Client's claim or if a prosecutor who receives the results of the investigation may decide to bring charges against the Client, whether or not the Client currently is a "target" of the

investigation. In that circumstance, the Client and the Private Lawyer would ordinarily expect the Private Lawyer hired in connection with the Client's claim to protect the Client's interests, at least until the Client retained other counsel to defend the Client against those charges. If, however, the fraud did not involve the Client's claim before the agency, and the investigation cannot affect the outcome of the Client's claim – for example, where the agency is investigating whether the Lawyer fraudulently forged a consent to change of attorney form – then the agency's investigation of the Private Lawyer's conduct and the Client's claim before the agency would be different "matters," in which case representation of the client in one of those matters would not imply representation in the other.

15. Even if the investigation of the Private Lawyer's conduct is a separate matter, there is still a question of whether the Government Lawyer "knows" in some other way that the Client is represented in the second matter. The definition of "knows" requires actual knowledge of the fact in question, although a person's knowledge may be inferred from the circumstances. *See* Rule 1.0(k). We concluded in N.Y. State 904 that, where two matters are closely related and there is a strong possibility that the lawyer represents the client in both, then the lawyer must ask the client if he or she is represented in the matter, because "when a lawyer has a reasonable basis to believe that a party may be represented by counsel, then the lawyer has a duty of inquiry to ascertain whether that party is in fact represented by counsel in connection with a particular matter." N.Y. State 904 (2012), (*citing* N.Y. State 768 (2003), which in turn cites N.Y. State 735 (2001), N.Y. State 728 (2000) and N.Y. State 663 (1994)). *See also* N.Y. State 607 (1990) (when it is unclear whether a party is represented by counsel in a matter, the safest approach is to inform the party that, if he or she is represented by counsel, the communication should be referred to counsel). N.Y. State 904 added that the "necessary extent of such an inquiry will depend on the circumstances of a particular matter."

16. If the investigation into the Private Lawyer's actions is part of the same matter as the Client's claim before the agency, then the Government Lawyer will know that the Client is represented by the Private Lawyer in the matter. If, however, the investigation into the Private Lawyer's conduct involves different facts and issues, and cannot affect the outcome of the Client's claim, then it is a separate matter, and it is likely that Government Lawyer would not "know" that the Client was represented by the Private Lawyer with respect to the investigation. The two are especially likely to be separate matters if the Private Lawyer's Client, rather than a third party, made the allegation of fraud that the Government Lawyer is now investigating. In that case, it would be unlikely that the Private Lawyer also represented a witness in the investigation. Indeed, representing the Client as the complaining witness would probably involve a personal interest conflict for the Private Lawyer under Rule 1.7(a)(2) (A lawyer may not represent a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own personal interests.)

17. If the Client is not represented in connection with the investigation, the Government Lawyer may treat the Client as an unrepresented person with respect to the investigation. *See* Comment [4] to Rule 4.2 ("This Rule does not prohibit communication with a represented party or person . . . concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person . . . does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter."). In doing so, the Government Lawyer must observe the requirements of Rule 4.3 ("Communicating with Unrepresented Persons"), which provides:

> In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. . . . The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Is the Government Lawyer Authorized by Law to Communicate with the Represented Person?

18. Rule 4.2 by its terms authorizes a lawyer to communicate about a matter, even with a party that the lawyer knows is represented by another lawyer in the matter, if the lawyer is "authorized to do so by law."

19. A number of courts have held that contacts between prosecutors or their agents and represented persons in criminal matters are an investigative technique "authorized by law." *See United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988). In a Report and Recommendation in *In re Amgen Inc.*, 2011 WL 2442047, *adopted in its entirety*, 2011 WL 2418815 (E.D.N.Y. 2011), U.S. Magistrate Judge James Orenstein points out that neither *Hammad* nor subsequent cases identify the specific "law" that authorizes the uncounseled contact. Magistrate Judge Orenstein finds that a statute that authorizes prosecutors to enforce the law does not authorize specific investigative techniques, but that the part of *Hammad* that held a Federal prosecutor's communication with a represented target to be "authorized by law" continued to be good law in the Second Circuit.

20. We have issued only one prior opinion based on the "authorized by law" exception. That opinion involved a statute that specifically authorized a limited form of communication with a party that the lawyer knew to be represented by counsel in the matter. *See* N.Y. State 894 (2011) (because the Real Property Actions and Proceedings Law provides for process to be personally served upon the respondent, a lawyer may personally serve process on a represented party and ask certain related questions, but may not go beyond service of process to communicate on the subject of the representation without the consent of such party's lawyer). The ABA ethics committee, in ABA 95-396 (1995), approved such service of process and also additional interactions "authorized . . . by law," including "a constitutional provision, statute or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel, such as court rules providing for service of process on a party, or a statute authorizing a government agency to inspect certain regulated premises."

21. Ultimately, what is "authorized by law" is a legal question beyond the jurisdiction of this Committee. Comment [5] to Rule 4.2 states: "Communications authorized by law *may* . . . include investigative activities of lawyers representing governmental entities . . . prior to the commencement (as defined by law) of criminal or civil enforcement proceedings." (emphasis added). In our opinion, this statement does not constitute a blanket exemption from Rule 4.2 for government lawyers conducting investigations in criminal and non-criminal proceedings, unless the communications are indeed authorized by law.

CONCLUSION:

22. A government lawyer whose duties include investigation of fraud is subject to Rule 4.2. Whether the government lawyer may interview a party to a proceeding before the agency about the conduct of his or her private lawyer in that proceeding as part of an investigation of the private lawyer depends on whether the investigation is part of a separate matter and, if so, whether the government lawyer knows that the interviewee is represented by counsel in the separate matter. Even if the matter is the same, or, if it is not the same but the lawyer knows the interviewee is represented in the separate matter, then the government lawyer may interview the private lawyer's clients without the consent of the private lawyer if the contact is "authorized by law," but that is a question of law beyond our jurisdiction.

(12-14)

OPINION 1048 (03/03/2015)

TOPIC: Waiver of appeal on grounds of ineffective assistance of counsel as part of plea bargain

DIGEST: A defense lawyer may advise the defendant as to a proposed plea agreement including waiver of challenges to the conviction based on ineffective assistance of counsel unless a reasonable lawyer would find a personal interest conflict of interest, i.e. a significant risk that the lawyer's professional judgment on behalf of the defendant would be adversely affected by the lawyer's own interest in avoiding an allegation of ineffective assistance of counsel. In case of such conflict, the lawyer may continue in the representation if the conflict is waivable and properly waived by the defendant, but otherwise must seek the court's permission to withdraw from the representation.

RULES: Scope ¶7, 1.0(j), 1.2(c), 1.4(a) 1.7(a) & (b), 1.16(d), 1.8(h), 8.4 (a) & (d)

FACTS:

1. The inquirer is a criminal defense attorney practicing in a county in which the District Attorney's Office conditions certain plea bargains on the defendant's execution of a form in which the defendant waives challenges to the judgment of conviction (the "Waiver"). The Waiver is signed during the plea proceedings, in court, by the defendant and the defense attorney.

2. The Waiver states that the defendant, in consideration for the plea agreement, waives all rights to appeal from the judgment of conviction; waives all right to make post-conviction motions challenging the judgment of conviction; and waives and withdraws all pre-trial motions that may have been made. It states that the defendant understands and intends that the plea agreement will be a complete and final disposition of the matter, and that the defendant understands that the terms of the plea agreement and the Court's sentence promise are conditioned upon the defendant's waiver of rights to challenge the judgment of conviction.

3. The inquiry focuses on one potential ground for challenging a conviction by plea: ineffective assistance of counsel (an "IAC" challenge). The inquirer claims that the Waiver would on its face preclude such challenges by waiving "any and all rights to make post-conviction motions challenging the underlying judgment of conviction," and cites various authorities for the proposition that it is unethical for prosecutors and defense attorneys to participate in a defendant's waiver of the right to challenge a conviction on grounds of ineffective assistance.

QUESTION:

4. May a defense lawyer participate in a plea bargain process in which the lawyer advises the defendant as to a waiver of the defendant's right to challenge the conviction on grounds including ineffective assistance of counsel?

OPINION:

5. This question has been the subject of much attention. Ethics opinions in at least twelve jurisdictions have answered it in the negative.[8] Opinions in two other jurisdictions have concluded that a defense attorney is not necessarily barred from participating in a plea agreement including an IAC waiver.[9]

6. Many of these opinions also address the question whether *a prosecutor* may ethically condition a plea offer on an IAC waiver, and that question also has been addressed recently by the Department of Justice.[10] The inquiry before us, however, is from a defense attorney and we limit our analysis accordingly. Thus we do not here opine as to whether a prosecutor may ethically condition a plea offer on an IAC waiver; we analyze only whether, if a prosecutor does condition a plea offer in that way, the defense lawyer may ethically participate in the plea bargain process.

Would the Waiver preclude challenges based on ineffective assistance of counsel?

7. As the inquirer points out, the Waiver *on its face* would apply to IAC challenges, given its broad language precluding all challenges to the conviction whether through appeal or post-conviction motion. There is nevertheless a threshold question as to whether the Waiver would *actually* bar IAC challenges. A subsidiary question is whether, in New York, a defendant may lawfully waive an IAC challenge as part of a plea proceeding. Whether a pleading defendant may effectively waive an IAC challenge is a question of law beyond our jurisdiction; we briefly survey case law only because the answer to the question could render the ethical analysis unnecessary.

8 Alabama Opinion 2011-02; Florida Opinion 12-1; Kentucky Opinion E-435 (2012), *aff'd*, *United States v. Kentucky Bar Ass'n*, 439 S.W.3d 136 (Ky. 2014); Missouri Opinion 126 (2009); Nevada Opinion 48 (2011); North Carolina Opinion 129 (1993); Ohio Opinion 2001-06; Pennsylvania Opinion 2004-100; Tennessee Opinion 94-A-549; Utah Opinion 13-04; Vermont Opinion 95-04; Virginia Opinion 1857 (2011). Some of these opinions conclude that participation is barred by a personal-interest conflict of interest; some conclude that a participating defense lawyer is impermissibly seeking to limit malpractice liability; and others rely on both theories.

9 Arizona Opinion 95-08 (concluding that a defense lawyer may participate in a plea agreement with an IAC waiver without violating the rule against limiting malpractice liability "or any other ethical rule"); Texas Opinion 571 (2006) (concluding that, depending on the facts of a given case, a criminal defense lawyer "may or may not have a conflict of interest" in advising defendant about a plea waiver of IAC claims, and that the rule against malpractice limitation does not prohibit such advice, assuming that a court would not interpret the plea agreement to limit malpractice liability).

10 The Department of Justice has stated that it perceives no ethical bar to the practice, but has nonetheless adopted a policy providing that United States Attorneys will no longer seek plea waivers of challenges based on ineffective assistance of counsel. The new policy states:

> While the Department is confident that a waiver of a claim of ineffective assistance of counsel is both legal and ethical, in order to bring consistency to this practice, and in support of the underlying Sixth Amendment right, we now set forth uniform Department of Justice policies relating to waivers of claims of ineffective assistance of counsel.
>
> Federal prosecutors should no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel . . . .

Deputy Attorney General James Cole, Memorandum for All Federal Prosecutors (Oct. 14, 2014). Prior to the new policy, 35 of 94 U.S. Attorney's Offices had been seeking plea waivers extending to IAC claims. Press Release, "Attorney General Holder Announces New Policy to Enhance Justice Department's Commitment to Support Defendants' Right to Counsel" (Oct. 14, 2014), available at http://www.justice.gov/justice-news.

8. It is settled in New York that plea waivers are valid, subject to certain exceptions:

> A criminal defendant's waiver of the right to appeal, obtained as a condition of a sentence or plea bargain, will be upheld if it is voluntary, knowing and intelligent, **and implicates no larger societal interest or important public policy concern**. As long as those conditions are satisfied, the scope of the waiver of the right to appeal can be fully comprehensive, and is enforceable consistent with the actual intent underlying its execution.

People v. Muniz, 91 N.Y.2d 570, 573 (1998) (citations omitted and emphasis added). Barring an exception, a general waiver "will be upheld completely even if the underlying claim has not yet reached full maturation," and even if the kind of underlying claim is not explicitly named in the waiver. 91 N.Y.2d at 574-75 (citations omitted).

9. The *Muniz* opinion states that the exceptions are:

> certain defects in the proceedings leading to a conviction which are unwaivable as part of a plea bargain. This narrow class of appellate claims, grounded in the integrity of our criminal justice system and "the reality of fairness in the process," implicate either an infirmity in the waiver itself or a public policy consideration that transcends the individual concerns of a particular defendant to obtain appellate review.

Muniz, 91 N.Y.2d at 573 (1998) (citations omitted). The opinion cites three kinds of challenges that may be asserted despite a general waiver: constitutional speedy trial rights, illegality of a sentence, and lack of competency to stand trial. 91 N.Y.2d at 574. But the opinion does not state that this list is exhaustive, and it does not address whether there is another exception for IAC challenges. There are Appellate Division cases indicating that there is an exception for *some* IAC challenges.[11] The question has also been addressed by courts in other jurisdictions, which have often declined to enforce waivers when the alleged ineffective assistance relates to the plea proceedings or the waiver itself.[12]

10. If New York law clearly excluded all IAC challenges from the Waiver, then the inquirer could advise the defendant as to the merits of the Waiver and the ethical issues discussed below would not even arise. But it appears from the case law to date that New York might deny enforcement of only

11 *See People v. Abdullah*, 122 A.D.3d 958 (3rd Dept. 2014) (appeal waiver foreclosed an IAC claim that did not "impact the voluntariness" of the plea); *People v. Smith*, 119 A.D.3d 1088 (3d Dept. 2014) (same); *People v. Montalvo*, 105 A.D.3d 774 (2d Dept. 2013) ("Because the defendant voluntarily waived his right to appeal, his claim that he was deprived of his right to effective assistance of counsel is precluded, except to the extent that the alleged ineffective assistance may have affected the voluntariness of his plea.").

12 *See*, *e.g.*, *United States v. Craig,* 985 F.2d 175, 178 (4th Cir.1993) (waiver does not foreclose "a claim that the waiver of appeal as well as the guilty plea itself was tainted" by ineffectiveness); *United States v. White*, 307 F.3d 336, 343 (5th Cir. 2002) (following "wealth of authority" that IAC challenges survive a waiver of appeal only when the claimed assistance directly affected the validity of that waiver or the plea itself"); *Davila v. United States,* 258 F.3d 448, 451 (6th Cir.2001) (enforcing waiver as to IAC claim relating to sentencing rather than plea or waiver); *Hurlow v. United States***,** 726 F.3d 958, 964 (7th Cir. 2013) ("[A]ppellate and collateral review waivers cannot be invoked against claims that counsel was ineffective in the negotiation of the plea agreement."); *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994) (doubting "that a plea agreement could waive a claim of ineffective assistance of counsel based on counsel's erroneously unprofessional inducement of the defendant to plead guilty or accept a particular plea bargain"); *United States v. Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001) (holding that a plea waiver does not bar IAC claims "challenging the validity of the plea or the waiver" but does bar other IAC claims), *cert. denied*, 534 U.S. 1085 (2002).

those challenges that relate to ineffective assistance in connection with the voluntariness of the plea. Since New York courts may enforce waivers at least as to other kinds of IAC challenges, the ethical issues cited in the inquiry do arise for a defense lawyer confronted with a blanket IAC waiver, and we turn to an analysis of those issues.

Rule 1.7: Personal-interest conflicts

11. Some of the ethics opinions cited in footnote 8 above conclude that a *per se* and unwaivable conflict bars a defense counsel from ever advising a defendant as to waiver of IAC challenges. We believe, however, that the personal interests at stake are not so invariably strong as to justify such a *per se* rule. Instead, the potential conflict should be analyzed based on the facts and circumstances of each case. *See, e.g.*, Texas Opinion 571 (2006).

Rule 1.7(a)(2): Existence of a conflict

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

13. An IAC challenge is meant to result in favorable consequences for the defendant (such as vacating a conviction, resulting in a trial) that typically would not be directly contrary to the personal interests of the defense lawyer. But there also may be indirect effects of such a challenge. For that reason, a criminal defense lawyer no doubt has a personal interest in avoiding challenges to the effectiveness and propriety of his or her professional services. Even a challenge that is neither meritorious nor successful could require the lawyer to spend time responding, and could cause the lawyer reputational damage. Stronger challenges could lead to more concrete harms like malpractice awards[13] or professional discipline. The *degree* of the lawyer's personal interest will be a factor in determining whether that interest gives rise to a Rule 1.7 conflict and, if so, in determining whether the conflict is waivable.

14. The degree of personal interest implicated by a lawyer's advice as to the Waiver here will in turn depend on a number of factors including the likelihood that, in the absence of such a waiver, the defendant would make a subsequent IAC challenge;[14] the various negative consequences likely to

13 *But see Dumbrowski v. Bulson*, 19 N.Y.3d 347, 971 N.E.2d 338, 948 N.Y.S.2d 208 (2012) (limiting damages in legal malpractice cases based on negligent representation in a criminal matter to pecuniary damages, such as lost wages, which often are negligible in indigent criminal representation).

14 In *Strickland* v. *Washington*, 466 U. S. 668 (1984), the U.S. Supreme Court ruled that, before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." It also established a two-prong inquiry into determining whether the defendant has received such effective assistance: (1) counsel's representation must fall "below an objective standard of reasonableness," 466 U. S., at 688, and (2) there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694. The Court in *Strickland* recognized some of the drawbacks in winning an IAC claim: (a) judicial scrutiny of counsel's performance must be highly deferential, since attorney errors are as likely to be harmless as they are to be prejudicial, (b) to obtain relief on an IAC claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances (*citing Roe* v. *Flores-Ortega*, 528 U. S. 470, 480, 486 (2000)), and (b) it is difficult for petitioners to satisfy *Strickland*'s prejudice prong if they have acknowledged their guilt. The Court also commented that collateral challenges at the plea stage are made less frequently than those after trial (e.g. pleas account for nearly 95% of all criminal convictions, but only approximately 30% of the habeas petitions filed.)

result directly or indirectly from such a challenge; the seriousness of the personal detriment that each of those consequences would be likely to cause the lawyer; and the chance that the waiver would avoid such consequences.

15. In a given case, a reasonable lawyer could perceive low risk or high risk that the defense lawyer's professional judgment on behalf of the defendant would be adversely affected by the prospect of an IAC challenge. For example, a reasonable lawyer could conclude that the likelihood of an IAC challenge is low if the client has acknowledged guilt, if the conviction involves a minimal sentence for a minor charge, or if it resulted from a plea bargain very favorable to the defendant. The likelihood of such a challenge may be much greater in case of a severe sentence or significant collateral consequences such as deportation. Even then, other factors may limit the risk of an adverse effect on professional judgment. If the defense lawyer has provided highly skilled representation, a reasonable lawyer may find that an IAC challenge is less likely to be made, or at least less likely to be successful. When the evidence of skilled representation is highly visible, such as when a defendant fares substantially better than similarly situated codefendants, then there may be a low likelihood of an IAC challenge even being asserted. But if the defense lawyer has provided deficient representation, especially of a nature that might well lead to severe reputational, financial or disciplinary consequences, then a reasonable lawyer might well find a significant risk of adverse effect on professional judgment.[15]

16. We cannot give a blanket answer to the fact-specific question of whether, in a particular case, a reasonable lawyer would find a significant risk that the prospect of an IAC waiver would adversely affect a defense lawyer's professional judgment on behalf of the defendant. The defense lawyer in a particular case will be aware of the relevant facts bearing on personal interest. The decision of the Kentucky Supreme court affirming Kentucky Opinion E-435 (cited in footnote 8 above) argues that it will be hard for the lawyer to answer this question fairly, given studies in the field of behavioral economics showing that it is "extremely difficult for professionals . . . to appreciate the deleterious consequences of conflicts of interest," and that "people tend to overestimate their ability to act ethically." *United States v. Kentucky Bar Ass'n*, 439 S.W.3d 136, 154-55 (Ky. 2014) (citations omitted) (*aff'g* Kentucky Opinion E-435 (2012)). We agree that it may be hard to be objective, but lawyers routinely need to assess the ethics of their own potential conduct even when, as with Rule 1.7(a)(2), their personal interests may be implicated. To the extent that conflict analysis is conducted case by case rather than based on broad *per se* rules, such assessments are, even if difficult, unavoidable.

17. When a reasonable lawyer would conclude that the risk of adverse effect on professional judgment is not a significant one, then there is no conflict under Rule 1.7(a)(2) that would preclude the defense lawyer from advising the defendant as to the Waiver. On the other hand, when a reasonable lawyer would conclude that the risk is significant, then there is a personal-interest conflict, and the next step in the analysis is to consider waivability. Of course even when a defense lawyer is *inclined* to think that there is no conflict, the lawyer may choose to seek a conflict waiver as a matter of precaution and prudence. A lawyer who continues a representation in the absence of informed consent could face discipline if it later is determined that there actually was a conflict.

15 We are analyzing conflicts of interest, but we note also that deficient representation may give rise to a disclosure obligation whether or not the lawyer will continue to represent the client. *See* N.Y. State 789 ¶13 (2005); N.Y. State 734 (2000) (noting obligation to inform client of "significant error or omission that may give rise to a possible malpractice claim").

Rule 1.7(b): Waiver of a conflict

18. Under Rule 1.7(b), even if there is a significant risk that the lawyer's professional judgment on behalf of the client would be adversely affected by the lawyer's personal interest in the client agreeing to an IAC waiver, the lawyer may continue the representation if the criteria of Rule 1.7(b) are met.

19. Rule 1.7(b) lists four criteria that must be met for effective waiver of a lawyer's personal-interest conflict. Two of them – requiring that the representation not be prohibited by law and not involve assertion of a claim by one client against another in the same proceeding – are not applicable to the current inquiry. Waivability of any conflict will therefore turn on the other two criteria: A defense lawyer with a personal-interest conflict may nonetheless represent a defendant and provide advice on an IAC waiver if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation" to the defendant, Rule 1.7(b)(1), and the defendant "gives informed consent, confirmed in writing," Rule 1.7(b)(4).

20. The first criterion – that the lawyer reasonably believes he or she will be able to provide competent and diligent representation – has both a subjective and an objective component. The defense lawyer must believe that the lawyer will be able to give the defendant competent and diligent representation despite the conflict, and that belief must be reasonable. Whether such a belief is reasonable will depend on some of the same factors that bear on whether there is a conflict in the first place, as discussed in paragraphs 13–15 above. That is, the stronger the potential challenge to the lawyer's ineffective assistance prior to the negotiation of the plea agreement, the less likely that the lawyer could reasonably believe he or she will be able to provide competent and diligent representation in advising the defendant on the accepting a plea agreement with an IAC waiver.

21. If there is a fairly limited likelihood that an IAC challenge would result in serious detriment to the lawyer, then the lawyer may reasonably conclude that the lawyer can provide competent and diligent representation. For example, depending on the circumstances, such as the strength of the prosecution's case, the terms of the plea offer, and whether the defendant has admitted guilt to the lawyer, it might be quite clear that it would be in the interest of the defendant to accept the offer. On the other hand, if the defense lawyer believes that the defendant has a colorable claim of legal malpractice arising from defense services already provided, then it may not be reasonable to believe that the lawyer could provide competent and diligent representation. *Cf.* N.Y. State 865 (2011) (noting "manifestly untenable position of having to counsel the [client] executor on whether to sue himself (the lawyer)"). The inquiry is fact-specific, so we identify the relevant analysis but do not undertake to apply it to each kind of circumstance that could be covered by the current inquiry.

22. If the defense lawyer reasonably expects to provide competent and diligent representation, then the lawyer may continue the representation and advise the defendant as to the Waiver if the defendant "gives informed consent [to the conflict], confirmed in writing." Rule 1.7(b)(4). It is a prerequisite of informed consent that a lawyer "has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." Rule 1.0(j). Here, again, whether the lawyer will be able to provide such an adequate explanation may depend on the strength of the defendant's IAC claim. *See* Rule 1.7, Cmt. [10] ("if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.")

23. If the defendant chooses not to waive the conflict, or if it is unwaivable – whether because the conflict is so stark that a belief in the possibility of competent and diligent representation would not be reasonable, or because serious questions about the probity of the lawyer's conduct preclude the kind of advice necessary for informed consent – then the lawyer would generally be required to withdraw from the representation.[16] There is an exception, however, if the lawyer needs, but cannot obtain, permission of court to withdraw. Rule 1.16(d).

24. If a defense lawyer's conflict results in withdrawal, another lawyer can be retained or appointed to represent the defendant. The new lawyer, having not previously represented the defendant and having no exposure for deficient representation up to that point, will likely be able to provide conflict-free representation.[17]

Rule 1.8(h): Limitation of liability

25. Rule 1.8(h)(1) provides that a lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice." Some ethics opinions in other states have concluded that such provisions bar a defense lawyer's participation in a defendant's plea waiver of potential IAC challenges. We discuss first whether this Rule bars such participation by its literal terms, and then whether waiver of IAC challenges impermissibly violates the Rule's policy or spirit.

26. For several reasons, the literal terms of Rule 1.8(h)(1) do not bar a defense lawyer's participation in a plea process that includes a waiver of IAC challenges. First, the lawyer's participation typically will not constitute "mak[ing] an agreement" of the described type. A plea agreement is between the defendant and the prosecution; the defense lawyer may advise and may document that advice, but is not a party to the agreement.[18] Theoretically there could be a case in which the defense lawyer induces the prosecutor to require a plea waiver, in which case the defense lawyer's own conduct could be at issue. *See* Rule 8.4(a) (providing that a lawyer shall not violate the Rules "through the acts of another"). But we do not opine as to this unlikely situation of a defense lawyer proposing an IAC

16 Rule 1.16(b)(1) (providing that a lawyer who "knows that the representation will result in a violation of the Rules" generally must withdraw). Some of the prior ethics opinions finding an unwaivable conflict seem to assume that the remedy is for the lawyer merely to refrain from advising the defendant as to the waiver. But since the waiver is an integral part of a plea offer, the defense lawyer's duties would seem to require such advice. *See*, *e.g.*, Rule 1.4(a)(1)(iii) (requiring lawyer to promptly inform client of plea offers), Rule 1.4(a)(2) (requiring reasonable consultation about means to obtain objectives) and Cmts. [1] – [3]. In some circumstances, a lawyer may limit the scope of the representation with the client's informed consent, Rule 1.2(c), and such a limitation may serve to avoid conflicts, *see* N.Y. City 2001-3. But a criminal defense lawyer contemplating this approach would have to consider whether refraining from advice as to plea offers would be a limitation "reasonable under the circumstances," as required under Rule 1.2(c), and how it would comport with the defendant's right to effective assistance of counsel.

17 The reason we do not adopt a *per se* conflict rule against defense lawyers participating in IAC waivers is that we see no circumstances to justify a departure from case-by-case analysis. But our discussion of withdrawal leads us to note an additional benefit of the case-by-case approach. A *per se* and unwaivable conflict rule would mean that when a prosecutor requires a plea bargain to include an IAC waiver, not only would the existing defense attorney have to withdraw, but so would every replacement defense attorney. Because defendants do need lawyers, the resolution might be for the court to order continued representation, despite the conflict, under Rule 1.16(d). A *per se* approach thus prevents any real solution to the claimed personal-interest conflict, while the case-by-case approach allows for a conflicted lawyer to be replaced by one without a conflict.

18 *See* Arizona Opinion 95-08 (noting that in plea context, "the defense lawyer is not entering into an agreement with his client" to limit liability, because generally the government is seeking to put end to proceedings in consideration for plea to lesser charge, and "[t]he government, not the defense lawyer, is requiring the waiver"); Virginia Opinion 1857 (2011) (opining that rule does not apply "because the defense lawyer is not making the agreement in this case – he is advising his client whether to enter into an agreement sought by the government").

waiver as part of a plea agreement. In the usual case, it is the prosecutor who seeks a waiver of appeal as part of a plea agreement.

27. Second, an instrument such as the Waiver is not, literally speaking, one "limiting the lawyer's liability to a client for malpractice."[19] It may limit the client's ability to pursue in criminal court a challenge to the conviction, but the client would remain legally entitled to sue the lawyer in civil court for any perceived malpractice.[20] Some ethics opinions have argued that the waiver nevertheless "limit[s]" the lawyer's malpractice liability in a practical sense. If this were a valid argument, it could well apply in New York, which precludes IAC malpractice claims by defendants whose criminal convictions remain intact.[21] But the argument is not valid. The Rule cannot mean that a plea agreement's indirect, preclusive effect on malpractice liability bars the defense lawyer from participating in its negotiation. If that were the case, it would lead to the absurd result that a defense lawyer could not negotiate any plea agreement or counsel any guilty plea, whether or not involving a waiver of appeal.

28. Some ethics opinions have reasoned that even if an IAC waiver does not violate the letter of Rule 1.8, it is nevertheless violates the Rule's policy or spirit. Even if there is some merit to that concern, we find it too attenuated to bar a defense lawyer from performing the crucial function of providing comprehensive and useful advice to a defendant who has been offered a potentially beneficial plea agreement.[22]

Rule 8.4(d): Conduct prejudicial to the administration of justice

29. The inquirer has also asked whether advising a defendant as to a plea waiver of IAC claims would violate Rule 8.4(d), which provides that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice." But this provision is generally meant to address flagrantly improper kinds of conduct.[23] In considering prejudice to the administration of justice as a matter of

19 If the waiver were an agreement limiting the lawyer's liability to the client for malpractice, it would apply to a large extent retrospectively, rather than prospectively, and, to that extent, would not be prohibited by Rule 1.8(h).

20 *See* Arizona Opinion 95-08 (stating that Rule 1.8(h) is "specific and unambiguous" and that there is a "significant difference" between an IAC challenge to a conviction and a malpractice claim); Texas Opinion 571 (2006) (stating that plea waiver of IAC challenges "does not expressly limit the defense counsel's liability to the defendant for malpractice," and assuming that in a malpractice dispute, a court "would not allow a waiver in the plea agreement to be used or interpreted as an agreement limiting a defendant's malpractice claim").

21 *See Carmel v. Lunney*, 70 N.Y.2d 169, 173 (1987); *Kaplan v. Sachs*, 224 A.D.2d 666, 667 (2d Dept. 1996) (stating that "plaintiff's plea of guilty in the criminal proceeding bars recovery for legal malpractice allegedly committed by the defendant in that proceeding"); *accord McClinton v. Suffolk County Police 3rd Precinct*, 2014 WL 1028993 (E.D.N.Y. 2014) (applying New York law).

22 *See* Rule 1.4(a)(1)(iii) (requiring a lawyer to promptly inform client of "material developments in the matter including settlement or plea offers"); *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."); *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) ("[T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.").

23 Comment [3] to Rule 8.4 provides: "The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding."

ethics, it is relevant to bear in mind rules that guide the justice system as a matter of law.[24] We have noted certain ethics and policy issues as to IAC waivers, but the fact that such waivers are accepted to a significant extent in case law belies any claim that advising a defendant as to a waiver would afoul of Rule 8.4(d). *See* cases cited in footnotes 11 and 12.

CONCLUSION:

30. A defense lawyer may advise the defendant as to a proposed plea agreement including waiver of challenges to the conviction based on ineffective assistance of counsel unless a reasonable lawyer would find a personal interest conflict of interest, i.e. a significant risk that the lawyer's professional judgment on behalf of the defendant would be adversely affected by the lawyer's own interest in avoiding an allegation of ineffective assistance of counsel. In case of such conflict, the lawyer may continue in the representation if the conflict is waivable and properly waived by the defendant, but otherwise must seek the court's permission to withdraw from the representation.

(50-14)

24 Rules Scope ¶7 ("The Rules presuppose a larger legal context shaping the lawyer's role. That context includes . . . substantive and procedural law in general.").

OPINION 1049 (03/02/2015)

TOPIC: Solicitation

DIGEST: A. Where a potential client posts a message on a website asking to be contacted by a lawyer about a particular legal problem, a New York lawyer may respond in the manner invited by the potential client. A response invited by the potential client does not constitute "solicitation," but a communication about the services of the lawyer or law firm for the purposes of securing retention would constitute "advertising." B. An attorney may post on a website to solicit plaintiffs for a case, unless the post relates to a specific incident involving potential claims for personal injury or wrongful death and is disseminated before the end of the cooling off period in Rule 7.3(e). The communication is subject to the Rules on attorney advertising. If the post referred to a specific incident, it also would constitute a solicitation and Rule 7.3, including the filing requirements of Rule 7.3(c), would apply as well.

RULES: 1.0(a) & (c), 7.1, 7.1(f), (h) & (k), 7.3(a), (b), (c) & (e)

FACTS:

1. An attorney frequents internet websites, such as Reddit and Twitter, which allow members to post questions about a variety of issues. A non-lawyer has posted a message on such a website describing a legal problem, and asking to be contacted by a lawyer who can help with the problem.

2. Our understanding of such social networking sites is that they are forums where registered community members can submit content, such as text posts. For example, in the case of Reddit, content is divided into categories, including a subcategory called "discussion based" that enables members to submit questions to other community members. Members can post comments about the submission, and respond back and forth in a thread or conversation-tree of written comments. Similarly, in the case of Twitter, users may post and read short messages posted by users, but members receive messages directly only from those they are "following," that is, from those with whom they have signed up to receive such messages.

QUESTIONS

3. A. May an attorney respond by email or through a social media website to an individual who posts about a specific problem on an internet forum or other similar website and who asks to be contacted by a lawyer about that problem to discuss undertaking a representation?

B. May an attorney who wishes to find plaintiffs for a potential case post an invitation on a third-party website, such as Reddit or Twitter, for individuals to contact him if they experienced a particular problem? If so, what requirements must be followed?

OPINION:

Responding to a Request from a Potential Client Seeking Counsel

4. The first question asks whether an attorney may contact an individual by email or through a social media website, such as on Twitter or Reddit, to discuss undertaking a representation, based on

the individual's posting on the internet site, which includes a request to be contacted by a lawyer about the individual's problem.

5. The threshold issue is whether such a contact would constitute "solicitation" of, or "advertising" directed to, the potential client by the lawyer. If the contact constitutes an "advertisement" as defined in Rule 1.0(a), then the contents must comply with Rule 7.1 of the New York Rules of Professional Conduct (the "Rules"), including the requirements for labeling as "advertising," retention of copies for specified periods and inclusion of the address and telephone number of the lawyer's "principal law office." *See* Rule 7.1(f), (h), (k). If the advertisement has additional characteristics that transform it into a "solicitation" as defined in Rule 7.3(b), then (1) the lawyer may not solicit the potential client by in-person or telephone contact, or by "real-time or interactive computer-accessed communication,"[25] unless the recipient is a close friend, relative, former client or existing client, *see* Rule 7.3(a)(1), and (2) the solicitation must comply with Rule 7.3(c), including the restrictions on communications relating to a specific incident involving potential claims for personal injury or wrongful death. Moreover, the lawyer must file a copy of the solicitation at the time of its dissemination with the attorney disciplinary committee of the judicial district or department where the lawyer or law firm maintains its principal office, *see* Rule 7.3(c)(1).

6. Rule 7.3(b) defines "solicitation" for purposes of Rule 7.3 as:

> [A]ny advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients . . . the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

Thus, in order to constitute a solicitation, the communication must first be an advertisement.

7. The term "advertisement" is defined in Rule 1.0(a) as:

> [A]ny public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

A communication to discuss the lawyer or law firm's services (as opposed to merely discussing the client's legal problem, as set forth below in paragraphs 12 and 13) is advertising, as long as the primary purpose of the communication is to secure retention of the lawyer or law firm and the potential

25 The term "computer-accessed communication" is defined in Rule 1.0(c) as:

> [A]ny communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

The terms "real time" and "interactive" are explained in Rule 7.3, Comment [9], which states that "[o]rdinary email and web sites are not considered to be real-time and interactive communication," but "[i]nstant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication."

client is not an existing client of the lawyer or law firm. Since we have been told that the purpose of contacting the potential client would be to secure retention, any discussion of the lawyer or law firm's services would constitute an "advertisement." But would it also constitute "solicitation" as defined in Rule 7.3(b), quoted above?[26]

8. The definition of "solicitation" in Rule 7.3(b) makes an important distinction between communications initiated by the lawyer and those initiated by a potential client. That is, solicitation is an advertisement directed at a specific recipient that is *initiated by or on behalf of* a lawyer or law firm. Where a potential client contacts the lawyer to discuss a possible engagement, any response the lawyer makes to the contact does not constitute "solicitation." This distinction is made clear in Comment [2] to Rule 7.3, which says: "A 'solicitation' means any advertisement . . . that is initiated by a lawyer or law firm (as opposed to a communication made in response to any inquiry initiated by a potential client)". This distinction also existed in the former Code of Professional Responsibility between 1970 and 1999. *See* DR 2-103 (prohibiting a lawyer from seeking professional employment from a person *who has not sought advice regarding employment of the lawyer*).

9. We note that the final sentence of Rule 7.3(b) states that a lawyer's proposal or other writing in response to a specific request of a prospective client does not constitute "solicitation." We believe the reference to written responses to "requests for proposals" provides a safe harbor, and is not the exclusive means of responding to a request for communication initiated by the client.

10. When a potential client requests contact by a lawyer, either by contacting a particular lawyer or by broadcasting a more general request to unknown persons who may include lawyers, any ensuing communication by a lawyer that complies with the terms of the invitation was not initiated by the lawyer within the meaning of Rule 7.3(b).[27] Thus, if the potential client invites contact by Twitter or email, the lawyer may respond by Twitter or email. But the lawyer could not respond by telephone, since such contact would not have been initiated by the potential client. See N.Y. State 1014 (2014). If the potential client invites contact by telephone or in person, the lawyer's response in the manner invited by the potential client would not constitute "solicitation."

11. In N.Y. State 1014, the inquirer was contacted by a current client (a detainee in a detention center), was given the name and telephone number of a potential client (another detainee), and was told that the potential client would like the lawyer to contact him to discuss his defense. We opined that the prohibition of Rule 7.3 against in-person or telephone solicitation was not applicable, since the contact had been initiated by the potential client. We said:

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26 The rules of lawyer ethics have long disfavored certain types of solicitation, because they pose serious dangers to potential clients. As Comment [9] to Rule 7.3 explains:

> [I]n person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and are regulated in the same manner.

27 *See* N.Y. City 2000-1, which involved an internet-based system in which law firms could respond to requests for proposals of representation, and which concluded that, since the request had been initiated by the potential client, not the lawyer, the lawyer's response would constitute neither advertising nor solicitation. That opinion predates the issuance of the current rules on advertising and solicitation that were promulgated in 2007 and that are discussed in this opinion.

> The provisions of Rule 7.3(a)(1) which prohibit "in-person or telephone" solicitation (with exceptions not here pertinent) are also inapplicable. Solicitation is advertising initiated by or on behalf of a lawyer. Comment 2 to Rule 7.3 further emphasizes the point that to be solicitation the contact must be initiated by the lawyer. The Comment provides that solicitation means an advertisement "that is initiated by a lawyer or law firm (*as opposed to a communication made in response to an inquiry initiated by a potential client*.)". . . . If upon the initial contact with the potential client it is apparent that the potential client did not request to be contacted by the lawyer, the lawyer must cease the conversation as further contact would constitute proscribed solicitation under Rule 7.3(a)(1).

12. Here, since the potential client initiated the communication through a posting on the internet, any response by the inquirer in the manner invited by the potential client would not constitute "solicitation." We further conclude that a communication that merely discussed the client's legal problem would not constitute advertising either. However, a communication by the lawyer that went on to describe the services of the lawyer or his or her law firm for the purposes of securing retention would constitute "advertising." In that case, the lawyer would need to comply with Rule 7.1, including the requirements for labeling as "advertising" on the "first page" of the post or in the subject line, retention for one-year (in the case of a computer-accessed communication) and inclusion of the law office address and phone number. *See* Rule 7.1(f), (h), (k).

13. The definition of "advertising" must be applied with some measure of common sense. In a strict sense, every communication between a lawyer and a potential client prior to actual retention is for the "primary purpose" of being retained. But not every email in the back-and- forth between the potential client and the lawyer, such as a discussion of the steps the lawyer would take in a particular case, a response to a particular question from the potential client about the lawyer's experience or the negotiation of the fees that the lawyer would charge in that case, needs to be labeled "Attorney Advertising" and contain the lawyer's law office address. For example, Comment [7] to Rule 7.1 states:

> Communications, such as proposed retainer agreements or ordinary correspondence with a prospective client who has expressed interest in, and requested information about, a lawyer's services, are not advertising. Accordingly, the special restrictions on advertising and solicitation would not apply to a lawyer's response to a prospective client who has asked the lawyer to outline the lawyer's qualifications to undertake a proposed retention or the terms of a potential retention.

In this case, however, we believe that the initial communication between lawyer and client in which the lawyer describes his or her capabilities and experience in response to a broadly disseminated request by the potential client meets both the express terms and the purpose of the definition.

14. Since the inquiry here asks whether the lawyer may reply using the internet website or email, the reply would be in writing and thus compliance with the labeling, retention and address requirements described above in paragraph 12 would be straight-forward. We do not address how those requirements might be applied to a permitted non-written reply in response to the client's request.

Soliciting Clients on Twitter or Reddit

15. The second question asks whether the inquirer may post an invitation on a third-party website, such as Twitter or Reddit, for individuals to contact the lawyer if they have experienced a particular problem. In N.Y. State 1009 we held that a post on a third-party website, such as Twitter or Reddit, is not a real-time or interactive computer-accessed communication. Since that type of invitation does not generally constitute solicitation, the issue is whether the content of the attorney's post could transform it into a solicitation under Rule 7.3(b), thus subjecting the post to the requirements of Rule 7.3.

16. As noted above, Rule 7.3(b) defines "solicitation" as an "advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients . . . the primary purpose of which is the retention of the lawyer or law firm." Comment [4] to Rule 7.3 explains that an advertisement in a public medium, seeking retention and pecuniary gain, does not become a solicitation simply because it is intended to attract potential clients with needs in a specified area of law. But it *does* become a solicitation if it "makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers."

17. Here, the inquiring attorney has "become aware of a potential case, and wants to find plaintiffs," and the message the attorney intends to post will be directed to, or intended to be of interest only to, individuals who have experienced the specified problem. If the post referred to a particular incident, it would constitute a solicitation under the Rules, and the attorney would be required to follow the Rules regarding attorney advertising and solicitation, s*ee* Rules 7.1 & 7.3. In addition, depending on the nature of the potential case, the inquirer's post might be subject to the blackout period (*i.e.,* cooling off period) on solicitations relating to "a specific incident involving potential claims for personal injury or wrongful death," *see* Rule 7.3(e).

CONCLUSION:

18. A. Where a potential client posts a message on a website asking to be contacted by a lawyer about a particular legal problem, a New York lawyer may respond in the manner invited by the potential client. A response invited by the potential client does not constitute "solicitation," but a communication about the services of the lawyer or law firm for the purposes of securing retention would constitute "advertising." B. An attorney may post on a website to solicit plaintiffs for a case, unless the post relates to a specific incident involving potential claims for personal injury or wrongful death and is disseminated before the end of the cooling off period in Rule 7.3(e). The communication is subject to the Rules on attorney advertising. If the post referred to a specific incident, it also would constitute a solicitation and Rule 7.3, including the filing requirements of Rule 7.3(c), would apply as well.

(31-14)

OPINION 1050 (03/25/2015)

TOPIC: Legal expenses; Credit Card Processing Fees

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

RULES: 1.5(a) & (b)

FACTS:

1. A law firm wishes to accommodate clients who want to pay the firm's advance payment retainers by credit card. (For a description of advance payment retainers, see N.Y. State 816 (2007), ¶3.) The law firm wishes to have its clients pay the credit card company's processing fee for such credit card payments. Those processing fees vary from 2.75% to 3.2% of the amount paid. The law firm is concerned that it will not be able to recoup the entirety of the processing fee if it passes along to the client the precise amount of the initial processing fee, since the client is likely to want to pay even the processing fee by credit card.

2. For example, if the client pays an advance payment retainer of $10,000 by credit card, the law firm would pass along to the client for payment the credit card processing fee of 2.75%, *i.e.*, $275.00. If the client wants to pay the amount of that processing fee by credit card as well, then there will be a 2.75% credit card processing fee on the payment of that fee, *i.e.*, $7.56. If the client wants to pay that processing fee on the processing fee by credit card, there will be another processing fee passed along to the client, and so on.

3. The law firm wants to know whether it can charge a single charge for credit card payment of its advance payment retainer that is slightly higher than the actual credit card processing fee. Specifically, it wants to know whether it is ethically permissible to charge its clients a single fee of 3% to cover the credit card company's processing fee of 2.75% and a flat fee of 3.5% to cover the credit card company processing fee of 3.2%. In the example above, the application of that single fee of 3% instead of the triple application of 2.75% would result in the law firm's receiving $300.00 instead of a reimbursement of approximately $283.00 ($275.00, plus $7.56, plus $.21), roughly a $17.00 up-charge ($300.00 payment from client minus $283.00 charged by the credit card company).

QUESTION:

4. May a law firm charge its clients who wish to pay its advance payment retainer by credit card an amount that is greater than the processing fee the credit card company actually imposes on the law firm?

OPINION:

5. For more than 40 years, it has been recognized that in certain circumstances New York lawyers may allow their clients to pay their attorneys' fees by credit card. *See, e.g.*, N.Y. City 2014-3; Nassau County 13-5 (2013); N.Y. State 763 (2003); N.Y. State 362 (1974), as modified by N.Y. State 763 (2003). Those opinions establish that lawyers may accept credit card payments of their fees as long as (i) the amount of the fees is reasonable, (ii) the lawyer complies with the duty to protect the confidentiality of client information, (iii) the lawyer does not allow the credit card company to compromise the lawyer's independent professional judgment on behalf of the client, (iv) the lawyer notifies the client before charges are billed to the credit card and offers the client the opportunity to question any billing errors, and (v) in the event of any dispute regarding the lawyer's fee, the lawyer attempts to resolve all disputes amicably and promptly and, if applicable, complies with the fee dispute resolution program set forth in 22 N.Y.C.R.R., Part 137. *See* N.Y. State 763 (2003) and nn. 3 & 4.

6. In N.Y. State 763 (2003), this Committee considered whether a collection lawyer could deduct, from a settlement payment due the lawyer's client, charges imposed by a merchant credit card bank on the lawyer when the third party debtor made the settlement payment by credit card. The Committee stated: "With regard to charges by the merchant credit card bank incurred in consequence of the firm's credit card program, such charges may be deducted from the sum remitted to the client if this arrangement is part of the understanding with the client; otherwise these charges should be deducted from the firm's operating account and not passed on the client." N.Y. State 763 also noted South Carolina Opinion 98-08 for the proposition that the attorney may pass on the administrative fee as long as the total fee is "objectively reasonable." *See* New York Rules of Professional Conduct (the "Rules") 1.5(a) ("A lawyer shall not . . . charge . . . an excessive . . . fee or expense"); Rule 1.5(b) ("A lawyer shall communicate to a client . . . the basis or rate of the fee and expenses for which the client will be responsible").

7. Since 2003, ethics opinions from bar associations in other states have reached similar conclusions. *See, e.g.*, Hawaii Opinion 45 (2003); Kentucky Opinion 426 (2007); District of Columbia Opinion 348 (2009).

8. Thus, with respect to the credit card company processing fees at issue here, it is clear that the lawyer may pass along for payment by the client the actual amount of the processing fees imposed on the lawyer by the credit card company as long as (i) the client has been advised of those charges and has agreed to pay them in advance of their imposition, and (ii) the processing fees, along with the amount of attorneys' fees paid, are reasonable in amount.

9. Neither N.Y. State 763 (2003) nor the out-of-state ethics opinions cited above have addressed the specific question raised here: If a client wants to pay an advance payment retainer by credit card, may the law firm charge the client more than the processing fee that the credit card company charges the lawyer. We perceive reasons for and against allowing a lawyer to charge the client an "up-charge" exceeding the credit card company's processing fee to the lawyer. On one hand, the additional processing fee may be determined to the penny mathematically, so the lawyer is not compelled to estimate the total out-of-pocket cost to the lawyer. On the other hand, calculating the processing fee (including the processing fee on any financed processing fee) will cause the lawyer to incur an administrative expense.

10. A number of ethics committees have addressed the question of lawyer billing of expenses. In ABA 93-379 (1993), the ABA Committee concluded that the lawyer may recoup expenses reasonably incurred in connection with the client's matter for services performed in-house (such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services) if the charge reasonably reflects the lawyer's actual cost for the services rendered, plus a reasonable allocation of related overhead. ABA 93-379 stated, however, that it is impermissible for a lawyer to charge more than the actual cost of such disbursements, plus overhead, unless the lawyer makes full disclosure to and obtains the agreement of the client to the higher charge and the total charge is reasonable. Similarly, in N.Y. City 2006-3, the New York City Bar ethics committee concluded that, unless the client agrees otherwise in the retainer agreement, a lawyer may not charge the client more than the direct cost associated with the outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service.

11. The conclusions of the ABA and New York City opinions are reflected in New York's Comment to Rule 1.5. *See* Rule 1.5, Cmt. [1] ("A lawyer may seek payment for services performed in-house, such as copying . . . either by charging an amount to which the client has agreed in advance or by charging an amount that reflects the cost incurred by the lawyer, provided in either case that the amount charged is not excessive.")

12. We believe that a similar Rule 1.5 analysis also applies to the lawyer's proposed up-charge. Thus, a lawyer may charge the client more than the processing fee the credit card company imposes on the lawyer as long as (i) the client receives disclosure of the up-charge and consents to it before the lawyer imposes it, (ii) the amount of the up-charge is nominal, and (iii) the total amount of the advance payment retainer and the processing fees charged (including the up-charge) are reasonable in the circumstances. At what point the up-charge becomes excessive is a matter of fact that depends upon, among other things, the amount of the up-charge, the amount of the advance payment retainer, and the client's opportunity to avoid the up-charge entirely by paying the advance retainer by cash or check.

13. The Committee is aware of at least three prior opinions that have disapproved of interest charges in certain circumstances. In N.Y. City 1997-1, the New York City Bar ethics committee opined that, when a lawyer representing a client in a contingency fee matter borrowed money to pay for the client's litigation expenses, the lawyer was prohibited from charging the client interest in an amount greater than the interest charges the lawyer actually incurred. In N.Y. State 729 (2000), which concerned a lawyer's imposition of an interest charge on disbursements the lawyer was advancing on the client's behalf in a contingency fee matter, this Committee said that a lawyer could not pass along to a client a charge for interest that is greater than the charge the lawyer actually incurred (or, if the lawyer did not borrow funds, greater than the lawyer's actual or putative cost of funds). In N.Y. State 754 (2002), this Committee concluded that a lawyer borrowing funds to advance expenses in a contingent fee litigation may pass on to the client the interest the lawyer incurs in such borrowing (implying that the lawyer may not charge more than the actual cost incurred). Both N.Y. State 729 and N.Y. State 754 cited N.Y. City 1997-1.

14. These three opinions do not affect the conclusion here that the lawyer may charge the client a nominal amount over the actual processing fee charged by the credit card company as a matter of administrative convenience, as long as (i) the lawyer discloses the up-charge and the client consents to

it in advance of its imposition, (ii) the amount of the up-charge is nominal, and (iii) the total amount of the advance payment retainer and the processing fees charged (including the up-charge) are reasonable in the circumstances.

15. In reaching this conclusion, the Committee assumes three things. First, we assume that up-charging the client for the credit card company's processing fee does not in itself violate the law or the credit card contract between the lawyer, on the one hand, and the credit card company or the bank issuing the credit card, on the other. We are aware that the use of credit cards may subject lawyers to regulations under certain federal and state laws, such as consumer protection and data breach notification statutes, but such requirements of law are outside the scope of this Committee's jurisdiction. *See* N.Y. City 2014-3 n.1.

16. Second, we assume that the lawyer satisfies the general ethical conditions for accepting credit card payments by clients (*see* ¶ 5, above).

17. Third, insofar as the lawyer is passing along to the client an up-charge based on the credit card company's processing fee to the lawyer, we assume that an explanation of this up-charge will be included as part of any required written engagement letter under 22 N.Y.C.R.R. § 1215.1. *See* Rule 1.5(b) and N.Y. State 763, n. 6. This disclosure is especially important with respect to the payment of credit card company processing fees, because the lawyer's imposition of such a charge on the client reverses what we understand to be the normal mercantile practice in New York, when the merchant, not the customer, pays the credit card company's processing fee.

CONCLUSION:

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

(48-14)

OPINION 1051 (03/25/2015)

TOPIC: Attorney's fees, amending fee agreement, litigation funding

DIGEST: Where a contingent fee agreement provides for the fee to be calculated on the amount of the recovery "by settlement or judgment," whether the lawyer may take a percentage of the amount loaned to the client by a third party is a question of law beyond the jurisdiction of the Committee. A retainer agreement may ethically provide for such a payment *ab initio*. If it does not, the lawyer may ask the client to amend the retainer agreement to provide specifically for such payment. However any such amendment would be subject to scrutiny under Rule 1.8(a) as a business transaction with a client, because (1) there has been no apparent change of circumstances, other than the fact that the client has determined to pay a litigation funding firm for earlier access to funds, (2) the lawyer apparently would be taking funds from property other than that recovered through the lawyer's efforts in the litigation, (3) the amendment would benefit solely the lawyer, (4) the advance would likely come at a significant cost to the client, and (5) it is likely that the client would be looking to the lawyer to exercise professional judgment on behalf of the client in connection with the amendment.

RULES: 1.5, 1.8(a).

FACTS:

1. The inquirer represents numerous plaintiffs in a mass tort action that has been settled. The settlement establishes a fund to which the various plaintiffs may apply in the future if they should meet specific criteria regarding damages.

2. The settlement fund might not pay out to a particular member of the plaintiff class for years because the settlement covers many currently asymptomatic individuals, and will pay out only if they develop the defined symptoms under the settlement. Some class members may not want to wait to see if they develop the defined symptoms. They are interested in taking an "advance" settlement, rather than risking that they will never qualify for a payout under the settlement.

3. One company is offering an immediate payment to individuals covered by the settlement. That company would lend money to a client (an "advance"), in exchange for any of the proceeds the individual recovers under the settlement, up to the amount of the advance, plus interest. Amounts due under the advance would be secured with a lien on the individual plaintiff's monetary recovery, if any. If the individual never recovered under the settlement, he or she would not owe anything to the lender and could keep the advance.

4. The inquirer's engagement agreement states, "If a monetary recovery is obtained for CLIENT by settlement or judgment, ATTORNEYS will be entitled to compensation for their services in the amount of 25% of the recovery and attorneys shall also be entitled to recovery of costs."

QUESTION:

5. Where an attorney has a retainer agreement with a plaintiff in a lawsuit giving the lawyer a contingent fee based on any recovery "by settlement or judgment," may the attorney take the contin-

gent fee from an advance the client has received in exchange for a lien on the plaintiff's monetary recovery?

OPINION:

6. At the outset, we note that this inquiry does not raise, and we do not opine on, the ethical issues that arise in connection with litigation funding. This Committee has addressed such issues in the past. *See* N.Y. State 666 (1994) (addressing whether a lawyer could properly refer a client to a litigation funding firm); N.Y. State 769 (2003) (addressing whether the attorney could represent a client in negotiating and carrying out a litigation funding agreement and charge the client an additional fee for this service). *See also* N.Y. City 2011-2 (2011) (concluding that it is not unethical *per se* for a lawyer to represent a client who enters into a non-recourse litigation financing arrangement with a third party lender, but discussing a number of ethical issues that may arise, including the possible compromise of confidentiality and waiver of attorney-client privilege, and the potential impact on a lawyer's exercise of independent judgment).[28]

7. Rule 1.5 of the New York Rules of Professional Conduct (the "Rules") provides as follows: "A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense." Rule 1.8(e) prohibits a lawyer from acquiring a proprietary interest in a cause of action the lawyer is conducting, except that the lawyer may "contract with a client for a reasonable contingent fee in a civil matter."

8. Rule 1.5(c) contains detailed requirements with respect to contingent fee agreements. It provides:

> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

9. Contingent fees in claims and actions for personal injury are also governed by court rules. *See, e.g.,* 22 NYCRR § 603.7 (First Dep't), 22 NYCRR § 806.13 (Third Dep't) (where an attorney's fee depends in whole or in part upon the amount of the recovery, and is equal to or less than the amount contained in the rule's schedule of fees, the fee is deemed to be fair and reasonable).

28 See generally ABA, Commission on Ethics 20/20, Informational Report to the House of Delegates on Alternative Litigation Finance, available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf.

10. The inquirer's retainer agreement entitles the inquirer to payment when "a monetary recovery is obtained for client by settlement or judgment." The interpretation of a fee agreement and the interpretation of the applicable court rules – including whether a monetary recovery through an advance qualifies as "a monetary recovery by settlement or judgment" – are matters of law. This Committee does not answer questions of law. *But cf.*, *Knight v. Aqui*, 966 F. Supp.2d 989 (N.D. Cal. 2013) (attorney whose fee agreement is silent as to how attorneys' fees shall be paid in the event of a structured settlement is permitted to receive fees only on the same pro rata basis that the client receives compensation); American Law Institute, Restatement of the Law Governing Lawyers, § 35, cmt. *e* (when a client will receive a structured settlement providing for regular payments over the client's lifetime, a lawyer with a contingent fee agreement is entitled to receive the stated share of each such payment if and when it is made to the client, unless the client-lawyer contract provides otherwise).

11. Any attempt to collect a legal fee that is not authorized is an ethical issue. Any fee that is not authorized by a retainer agreement would be "excessive." *See* Rule 1.5(a)(prohibiting an "excessive or illegal fee"). Moreover, agreements regarding legal fees are strictly construed against the lawyer. *See, e.g.*, *Matter of Kuneicki*, 35 A.D. 3d 742, (2d Dep't 2006) ("In cases of doubt and ambiguity, an agreement between a client and the attorney must be construed most favorably to the client".)

12. If the retainer agreement as currently drafted would not be interpreted as including, in the phrase "monetary recovery by settlement or judgment," a loan or advance offered by a third party, then the question is whether the retainer agreement could ethically be amended to authorize such payment.

13. If the inquirer's retainer agreement had provided *ab initio* for payment of the lawyer's fees and expenses out of a loan or advance secured by an interest in the client's legal claim, such agreement would not have violated Rule 1.5, as long as the fee was not excessive within the meaning of Rule 1.5(a). Whether such a fee would be considered a contingency fee and entitled to the presumption of reasonableness contained in the court rules is a matter of law about which we do not opine.

14. In many instances, it is possible to amend a fee agreement with the concurrence of the lawyer and client. "However, such an amendment raises ethical concerns, because [a] lawyer is often in a position to take unfair advantage of the client." N.Y. State 910 (2012).

15. As we noted in N.Y. State 910, while some amendments to fee agreements may be subject only to Rule 1.5's prohibition against excessive or illegal fees, other amendments are considered a "business transaction with a client" and are also subject to Rule 1.8. In N.Y. State 910, we set out a number of factors that will determine whether the higher scrutiny of Rule 1.8 is warranted.

16. First, we noted that, since the lawyer is the drafter of the fee contract and should be expected to anticipate most changes in circumstances that may occur during the representation, one consideration is whether there has been a material change in circumstances. A second and related factor is the length of time since the contract was entered into, which will affect the reasonableness of the lawyer's failure to anticipate the changed circumstances in the original contract. For example, in N.Y. State 910 we noted that if the representation was expected to be completed within a year, and the contract therefore did not make provision for the law firm's customary annual increases in billable rates, an amendment a year later would be tested under Rule 1.5, and not Rule 1.8. A third factor is the sophis-

tication of the client, and whether the client is a frequent user of legal services and thus is in a position to determine the reasonableness of the proposed amendment. A fourth factor is whether the amendment benefits the client. For example, we noted in N.Y. State 910 that, if the client is no longer able to pay an agreed-upon hourly rate and the contract is amended to provide for a contingent fee, the amendment has been held to be subject to Rule 1.5 rather than Rule 1.8. ABA 11-458 (2011). New York case law often applies higher scrutiny to modifications of retainer agreements that are beneficial to the attorney. *See, e.g.*, *Baye v. Grindlinger*, 78 A.D.2d 60, 432 N.Y.S.2d 624 (2d Dep't 1989) (as to contracts made between the attorney and the client subsequent to employment which are beneficial to the attorney, it is incumbent on the attorney to show that the terms are fair and reasonable and fully known and understood by the client), *Naiman v. N.Y. Univ. Hosps Ctr.*, 351 F. Supp.2d 257, 264 (S.D.N.Y. 2005) (midstream modifications of retainer agreements must be carefully scrutinized and attorney must show that the terms are fair and reasonable to the client).

17. Applying these factors, we believe a retainer agreement amendment to require that the client pay the lawyer out of the proceeds of any loan taken out by the client should be scrutinized under Rule 1.8(a) as a business transaction between the lawyer and client. First, it is not clear there has been any change of circumstances, other than the fact that the client has determined to pay a litigation funding firm for earlier access to funds. Second, Rule 1.8, Cmt. [16] provides that when a lawyer negotiates a contractual security interest in property other than that recovered through the lawyer's efforts in the litigation, the acquisition of the security interest is a business or financial transaction with a client that is governed by Rule 1.8(a). Similarly, the amendment here would give the lawyer access to the proceeds of the client's advance, which appear to be different from the moneys recovered through the lawyers efforts. Third, the amendment here would benefit solely the lawyer. Moreover, it might come at a significant cost to the client, both because a client who never develops symptoms meriting an award from the settlement fund might otherwise never have to pay the lawyer, and because, if the client does later develop symptoms and obtains an award from the settlement fund, the client will have to pay interest on the amount taken by the attorney as his fee under the amended agreement.

18. The inquiry here does not specify the terms on which the funding firm would make advances to individuals covered by the settlement. Literature on litigation funding firms indicates that such firms often charge 3-5 percent *monthly* for such advances (and sometimes more).[29] Because many litigation funding firms style their funding as a purchase of an interest in the eventual judgment rather than as a loan, most litigation funding loans are not considered to be "loans" under state law, and the effective interest rate generally is not considered to be "interest" for purposes of state usury laws. Thus, where the retainer agreement provides that the lawyer is entitled to take the contingency fee proportion of any advance arranged from a litigation funding firm, the agreement is essentially requiring the client to pay a high rate of interest in order to provide the lawyer with a portion of the legal fee at an earlier time than might otherwise be the case. For this reason, at least one state that regulates the provision of litigation funding services prohibits the proceeds of the litigation funding from being used for attorneys' fees or costs of litigation. *See* Okla. S. Supp. 2013, 14A-3-814(A)(8).

29 *See* Jonathan T. Molot, "A Market Approach to Litigation Accuracy," 2009, paper presented at "Third Party Litigation Funding and Claim Transfer—Trends and Implications for the Civil Justice System," RAND Institute for Civil Justice and UCLA Law policy symposium, RAND Corporation, June 2, 2009; see also *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217 (Ohio 2003)(financing transaction had return exceeding 180 percent per year). *See generally* Steven Garber, Alternative Litigation Funding in the United States: Issues, Knowns and Unknowns (Rand Corp. 2010).

19. A key question under Rule 1.8(a) is whether the client "expects the lawyer to exercise professional judgment [in the transaction] for the benefit of the client." That question can turn on a number of factors, including the sophistication of the client and the complexity of the transaction. Here, a critical question for the client in assessing the proposed amendment to the fee agreement is whether the existing fee agreement already permits such a deduction of the fee from the proceeds of the advance, and, if not, whether agreeing to the amendment is in the client's best interest. When the lawyer explains to the client how a court would interpret the existing contract and whether the amendment benefits the client, the client will likely expect the lawyer to be exercising professional judgment for the benefit of the client. In addition, if the fee agreement does not already provide for taking the fee out of the loan proceeds – and the lawyer presumably would be seeking an amendment only if the lawyer concludes that the fee agreement does not already so provide or is not sufficiently clear – the client clearly needs the protections provided by Rule 1.8(a).

20. When Section 1.8(a) is applicable, the amendment must be fair and reasonable to the client and the terms of the transaction must be fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; the client must be advised in a writing of the desirability of seeking (and be given a reasonable opportunity to seek) the advice of independent legal counsel, and the client must give informed consent, in a writing signed by the client, to the essential terms of the transaction, including whether the lawyer is representing the client in the transaction and whether the lawyer is receiving a referral fee or other compensation from the litigation funding firm. In addition, the lawyer has the burden of demonstrating that the terms of the amendment are fair and reasonable.

CONCLUSION:

21. Where a contingent fee agreement provides for the fee to be calculated on the amount of the recovery "by settlement or judgment," whether the lawyer may take a percentage of the amount loaned to the client by a third party is a question of law beyond the jurisdiction of the Committee. A retainer agreement may ethically provide for such a payment *ab initio*. If it does not, the lawyer may ask the client to amend the retainer agreement to provide specifically for such payment. However any such amendment would be subject to scrutiny under Rule 1.8(a) as a business transaction with a client, because (1) there has been no apparent change of circumstances, other than the fact that the client has determined to pay a litigation funding firm for earlier access to funds, (2) the lawyer apparently would be taking funds from property other than that recovered through the lawyer's efforts in the litigation, (3) the amendment would benefit solely the lawyer, (4) the advance would likely come at a significant cost to the client, and (5) it is likely that the client would be looking to the lawyer to exercise professional judgment on behalf of the client in connection with the amendment.

(52-14)

OPINION 1052 (03/25/2015)

TOPIC: Compensating clients to rate lawyer on Internet website

DIGEST: A lawyer may give clients a $50 credit on their legal bills if they rate the lawyer on an Internet website such as Avvo that allows clients to evaluate their lawyers, provided the credit against the lawyer's bill is not contingent on the content of the rating, the client is not coerced or compelled to rate the lawyer, and the ratings and reviews are done by the clients and not by the lawyer.

RULES: 7.1(a)-(d), 7.2(a), and 8.4(c)

FACTS:

1. A lawyer would like more of his clients to rate him on Avvo, a website that allows clients to rate their lawyers with one to five stars. To rate a lawyer, a client would visit the Avvo website, look up the lawyer by name, and submit a review. A sample review might say, "I could not be more pleased with Ms. X. She is thorough, honest, caring and available. Her prices are reasonable compared to others. She specializes in elder law and knows her specialty," or "Attorney Z did a great job on my case. He was very upfront about what to expect and he got very good results. Highly recommended." (Many reviews are longer.) Clients also rate the lawyer on a scale of 1 to 5 for five categories: "Overall rating," "Trustworthy," "Responsive," "Knowledgeable," and "Kept me informed," and clients either check or do not check a box saying that they would "recommend" the lawyer. (For more information about Avvo ratings and how they are calculated, see http://www.avvo.com/support/avvo_rating.)

2. After a client writes a review online, the review is read internally at Avvo before it is posted on the website. Once Avvo has approved a review, it will be posted under the heading "Client Reviews" on the attorney's page on the Avvo website and will become part of the attorney's profile. The inquiring attorney is apparently confident that if clients take the time to rate him, he will receive high ratings and positive reviews, which will help to boost his reputation and encourage other clients to hire him. The inquirer therefore wants to offer clients a $50 credit on their bills for legal fees if they rate him on Avvo. The credit would not be contingent on the content of a review, the scores in the ratings, or whether a client checks the box recommending the lawyer to others.

QUESTION:

3. May a lawyer give clients a $50 credit on their legal bills if they rate the lawyer on an Internet website that allows clients to evaluate their lawyers?

OPINION:

4. The inquiry raises issues under several provisions of the New York Rules of Professional Conduct (the "Rules"). We take these issues in turn.

A. Rule 7.2(a): Giving a person something of value to recommend the lawyer

5. The first issue is whether giving clients a $50 credit against their legal bills if they rate the lawyer would violate Rule 7.2(a), which provides, in pertinent part, as follows:

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

Rule 7.2(a) also has certain exceptions that do not apply here.

6. Rule 7.2(a) does not apply because the inquirer is asking for a rating, not a recommendation. The inquirer says he will give a $50 credit to any client who rates the lawyer, without regard to the content of the rating and without regard to whether the client recommends the lawyer to others. A client thus remains free to give the lawyer a bad rating and remains free not to check the box saying that she would recommend the lawyer to others. Moreover, the inquirer is not making the $50 credit contingent on whether some future person retains the lawyer as a result of the rating. Thus, the credit is not a "reward" for making a recommendation "resulting in employment by a client."

7. If the inquirer made the credit contingent on receiving a positive review or high scores, or if the inquirer made the credit contingent on being retained by a new client as a result of the rating, then the credit would violate Rule 7.2(a). Those are not the facts before us.

B. Rules 7.1(a), (d) and (e) and Rule 8.4(c): Testimonials from clients

8. Rule 7.1(d)(3) allows lawyers to advertise testimonials from current and former clients – but Rule 7.1(e)(4) requires that "in the case of a testimonial or endorsement from a client with respect to a matter still pending, the client gives informed consent confirmed in writing." The term "testimonial" is not defined in the Rules of Professional Conduct, but the term "advertisement" is defined in Rule 1.0(a) as follows:

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

9. A client's freely given review or rating is not an "advertisement" within the definition in Rule 1.0(a) because the review is not made "by or on behalf" of the lawyer.

10. If the inquirer were to coerce or compel a client to rate the lawyer with respect to a pending matter, then the rating (*i.e.,* testimonial) would be "on behalf of the lawyer, and would hence be an "advertisement" subject to Rule 7.1(e)(4). And if the lawyer, rather than the client, were to write the review or fill in the ratings, then they would be "by . . . the lawyer," and would be advertisements under Rule 1.0(a) subject to Rule 7.1(a), which prohibits advertisements that are "false, deceptive or misleading." A rating that purports to be made by a client but was actually made by the lawyer would be deceptive and misleading (and perhaps false as well). *See* N.Y. State 661 (1994) ("a dramatization

using a fictional client testimonial is unethical because it is inherently false, deceptive and misleading").

11. Moreover, a coerced rating would violate Rule 7.1(e)(4) because the lawyer would lack the client's "consent." Consent must be voluntary – it cannot be compelled. But according to the inquirer, clients can freely choose whether to rate the lawyer. The only inducement is a $50 credit to those who do so. That is not coercion or compulsion; it is an incentive. *Cf.* N.Y. State 873 (2011) (Rules of Professional Conduct do not prohibit an attorney from offering a prize to join the attorney's social network as long as the prize offer is not illegal).

12. Furthermore, Rule 8.4(c) provides that a lawyer or law firm shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Even as to testimonials from former clients – which are not subject to Rule 7.1(e)(4)'s requirement of informed consent – a coerced rating, or one written by the lawyer, would constitute not only an advertisement subject to Rule 7.1(a) but also conduct involving deceit and misrepresentation in violation of Rule 8.4(c), attempting to pass off the lawyer's words and opinions as the former client's. *See* Rule 7.1, Cmt. [6] ("all communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); N.Y. State 873 ¶ 15 (2011) ("Whether or not the prize offer is an advertisement, the inquirer must be honest").

13. Since the inquirer has not asked about advertising the Avvo rating, we do not address whether Avvo ratings are "bona fide professional ratings" within the meaning of Rule 7.1(b)(1), or how other advertising provisions might apply if the inquirer were to advertise his Avvo rating. Nor do we address whether Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, requires the inquirer to disclose that he has given certain clients a $50 inducement to rate him on Avvo. Finally, we do not address whether the inquirer's plan complies with the Federal Trade Commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255. (The FTC Guides are available online at http://1.usa.gov/1CikwjJ.) Whether a lawyer's conduct complies with FTC guidelines is a question of law beyond our jurisdiction.

CONCLUSION:

14. A lawyer may give clients a $50 credit on their legal bills if they rate the lawyer on an Internet website such as Avvo that allows clients to evaluate their lawyers, provided the credit against the lawyer's bill is not contingent on the content of the rating, the client is not coerced or compelled to rate the lawyer, and the ratings and reviews are done by the clients and not by the lawyer.

(2-15)

OPINION 1053 (04/10/2015)

TOPIC: Attorney-Client Privilege; Sign Language Interpreters; Communication; Competence

DIGEST: The scope and application of the attorney-client privilege is a question of law beyond the jurisdiction of this Committee, but we note that courts have repeatedly held that the privilege is not waived by a lawyer's use of an agent to facilitate communication with a client. If use of a sign-language interpreter does not waive the privilege, and use of such an interpreter is necessary for effective communication between the lawyer and client, it is ethically required.

RULES: 1.1, 1.4, 1.6

FACTS:

1. The inquirer works for an organization dedicated, in part, to assuring that persons with disabilities receive the rights afforded to them by federal and state law. In assisting deaf persons to navigate the legal system, the inquirer has encountered lawyers who contend that they cannot represent these individuals because they believe the use of sign language interpreters would violate the attorney-client privilege. The inquirer asks whether a lawyer's use of a sign language interpreter jeopardizes the confidentiality of a communication between lawyer and client.

QUESTION:

2. Is a lawyer's use of a sign language interpreter ethically permitted when it is necessary to communicate effectively with a client?

OPINION:

3. Rule 1.6(a) of the New York Rules of Professional Conduct (the "Rules") provides, with specific exceptions, that a lawyer "shall not knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person." As Comment [3] to this Rule explains, "The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes."

4. The scope and application of the attorney-client privilege is a question of law, and it is beyond the authority of this Committee to resolve questions of law. Nonetheless, the Committee notes that courts have repeatedly held that the attorney-client privilege is not waived by a lawyer's use of an agent to facilitate communication with a client. *See United States v. Ackert,* 169 F.3d 136, 139 (2d Cir. 1999) ("the inclusion of a third party in attorney-client communications does not destroy the privilege if the purpose of the third party's participation is to improve the comprehension of the communications between attorney and client"); *People v. Osorio,* 75 N.Y.2d 80 (1989) (communications made to counsel through an agent of either attorney or client to facilitate communication generally held privileged); *Stroh v. General Motors Corp.,* 213 A.D.2d 267 (1st Dept. 1995) (presence of daughter of elderly client during conversations with attorney does not vitiate privilege); *see generally* American Law Institute, Restatement of the Law Governing Lawyers § 70; *see also* N.Y. Judiciary Law, art. 12 (providing for the hiring of court interpreters and the appointment of interpreters for deaf parties or

witnesses). Nor does the use of a sign language interpreter necessarily violate Rule 1.6's general requirement that a lawyer safeguard a client's confidential information. *See* Rule 5.3 Comment [2] ("[nonlawyer] assistants, whether they are employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services.")

5. In order to maintain the privilege, the lawyer or law firm should ensure that the interpreter understands the requirement to maintain confidentiality. *See* Rule 5.3 (A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate) and Comment [2] thereto ("A law firm must ensure that such assistants [both employees and independent contractors that act for the lawyer in rendition of professional services] are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client . . . ."). Rule 5.3 notes that the lawyer may take into account factors such as the experience of the person whose work is being supervised. For example, the lawyer may need to take fewer precautions with a professional interpreter who is subject to a code of conduct than with a family member or friend of the client, who may not understand the requirements for retaining the privilege.

6. If use of a sign-language interpreter would not violate the attorney-client privilege, then when such use is necessary for effective communication between the lawyer and client, it is ethically required. Rule 1.4 governs a lawyer's duty to communicate meaningfully with a client. It includes, *inter alia,* the responsibility to apprise a client of material developments in the client's matter, to consult with the client about the means by which a client's objectives are to be accomplished, and to comply promptly with a client's reasonable requests for information. Rule 1.4 (a)(1)(iii), (2), and (4). As noted in Comment [1] to Rule 1.4, "reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation." Thus, when a lawyer has a client with whom the only means of effective communication is through a sign language interpreter, the lawyer can satisfy the requirements of Rule 1.4 only by engaging this type of interpreter. N.Y. City 1995-12 (foreign language and sign interpreters). *Accord*, Utah Opinion 96-06 (foreign language interpreters); California Opinion 1984-77 (same).

7. Finally, if a lawyer needs a sign language interpreter to communicate effectively with a client, then, unless the lawyer utilizes such an interpreter, the lawyer would be unable to provide "competent representation" to the client, as required by Rule 1.1. As noted by Comment [5] to Rule 1.1, competent handling of a particular matter includes, *inter alia,* "inquiry into and analysis of the factual . . . elements of a problem." With many hearing-impaired clients, a lawyer could not effectively engage in the required inquiry if he failed to avail himself of a sign language interpreter. N.Y. City 1995-12. Accord, Utah Opinion 96-06; California Opinion 1984-77.

CONCLUSION:

8. The scope and application of the attorney-client privilege is a question of law beyond the jurisdiction of this Committee, but we note that courts have repeatedly held that the privilege is not waived by a lawyer's use of an agent to facilitate communication with a client. If use of a sign-language interpreter does not waive the privilege, and use of such an interpreter is necessary for effective communication between the lawyer and client, it is ethically required.

(5-15)

OPINION 1054 (04/10/2015)

TOPIC: Choice of law, virtual law office.

DIGEST: If a New York lawyer has been admitted to practice (generally, or for purposes of a proceeding) before the Virginia courts, when the lawyer represents a client in a proceeding in a court in Virginia, the Rules of Professional Conduct to be applied will ordinarily be Virginia's rules. If the lawyer does not represent a client in a proceeding in a court, the rules to be applied will be those of the "admitting jurisdiction" in which the inquirer principally practices, unless the conduct "clearly" has its "predominant effect" in another jurisdiction in which the lawyer is licensed to practice. If the lawyer is permitted to practice in Virginia without being formally admitted there, the lawyer will be deemed to be "licensed to practice" in Virginia for purposes of Rule 8.5(b)(2). However, if the lawyer solicits retention by residents of New York, the lawyer's conduct in connection with such solicitation would have its principal effect in New York, and the disciplinary authorities will apply New York's ethics rules.

RULES: Rules 1.1, 1.4, 1.6(c), 1.15, 5.1, 5.3, 5.5, 7.1(h), 7.3(i), 8.5(b)(1) & (2).

FACTS:

1. The inquirer is an attorney licensed to practice in both the State of New York and the Commonwealth of Pennsylvania. He now intends to open a solo law office in Virginia, for the sole purpose of representing veterans and their dependents in the United States Court of Appeals for the Fourth Circuit, the United States District Courts in Virginia, and the Administrative Board of Veterans Appeals.

2. The inquirer seeks to practice in Virginia by using a physical office two days per month, using the street address of the office as his mailing address, having access to a private mailbox at that address five days a week; answering phone calls personally when in the office; forwarding calls to the inquirer's cell phone or to a personal voicemail account attached to the cell phone when he is not in the physical office; and using a recorded message when he is not available to answer a phone call.

3. The inquirer formerly worked for the federal government, working on rulemakings pertaining to veterans' benefits and representing the government on appellate briefs.

4. The inquirer states that he has obtained an advisory opinion from the Virginia State Bar Association's ethics committee, advising that he is permitted to practice from an office address in Virginia, as long as the inquirer (a) limits his practice to federal court and (b) indicates on his letterhead, business cards and website that he is licensed to practice law only in New York and Pennsylvania. The inquirer also states that such opinion would permit the inquirer to operate using a "virtual office."

QUESTION:

5. May a lawyer admitted only in New York and Pennsylvania practice in the federal courts in Virginia and before the Administrative Board of Veterans Affairs from a "virtual office" in Virginia?

OPINION:

6. Under Rule 8.5(a) of the New York Rules of Professional Conduct (the "Rules"), a lawyer admitted in New York is subject to the disciplinary authority of New York no matter where the lawyer's conduct occurs. However, the rules of conduct that the disciplinary authority will apply will depend on the choice of law rules set forth in Rule 8.5(b). Rule 8.5(b) provides:

> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
>
> (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
>
> (2) For any other conduct:
>
> (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
>
> (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

7. We assume for purposes of this opinion that the inquirer has been (or will be) admitted to practice, either generally or for purposes of a particular proceeding, before the federal courts in Virginia. *See* Rule 5.5 (a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction).

8. Clearly, if the inquirer has been admitted to practice before the Virginia courts (either generally or for purposes of a particular proceeding), when the inquirer represents a client in a proceeding in a court in Virginia, then Rule 8.5(b)(1) provides that Virginia's ethics rules will be applied, unless the court rules provide otherwise. For purposes of Rule 8.5(b)(1), the Administrative Board of Veterans Affairs is not a "court." As we noted in N.Y. State 968 (2013):

> As [the inquirer is] asking in part about conduct in connection with a proceeding before an administrative tribunal, the question arises whether such an administrative tribunal is a "court" within the meaning of Rule 8.5(b)(1). The Rules contain a definition of "tribunal," which includes both a "court" and an "administrative agency or other body acting in an adjudicative capacity." Rule 1.0(w). In adopting Rule 8.5, the New York Appellate Divisions declined to adopt a version of Rule 8.5 proposed by the New York State Bar Association that substituted the word "tribunal" for the word "court" in the prior version of this rule. . . . [W]e do not believe we are free to read "court" in Rule 8.5(b)(1) to include administrative tribunals. . . .

> For the same reason, in 2010, the New York State Bar Association amended Comment [4] to Rule 8.5 to replace the word "tribunal" with the word "court." See also N.Y. State 1027 (2014) (canons of statutory construction support the conclusion that the term "court" in Rule 8.5(b)(1) excludes the other types of tribunal listed in Rule 1.0(w)).

9. When the inquirer does not represent a client in a proceeding in a "court," Rule 8.5(b)(2) provides that the ethics rules to be applied will be those of the "admitting jurisdiction" in which the inquirer "principally practices," unless the conduct "clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice." Rule 8.5(b)(2) thus recognizes that New York does not have an interest in applying its own rules when the lawyer's conduct has its principal effect in another jurisdiction that has disciplinary authority over the conduct.

10. Here, the inquirer is not formally admitted to the bar in Virginia, the jurisdiction in which he intends to principally practice. However, in N.Y. State 815 (2007), we determined that, if a New York lawyer is permitted to engage in conduct in another jurisdiction without being formally admitted in that jurisdiction, then the lawyer should be deemed to be "licensed to practice" in the other jurisdiction, even though such conduct would constitute the practice of law if the lawyer were practicing in New York.[30] According to the inquirer, the Virginia State Bar Association has opined that he may practice from an office address in Virginia, as long as he limits his practice to federal court, and indicates on his letterhead, business cards and website that he is licensed to practice law only in New York and Pennsylvania. Consequently, the inquirer is deemed "licensed to practice" in Virginia, and the New York disciplinary authorities would ordinarily apply the Virginia Rules of Professional Conduct to his conduct. However, an exception will arise if the inquirer solicits business in New York or Pennsylvania. In that case, the lawyer's conduct regarding the solicitation would clearly have its "predominant effect" in the admitting jurisdiction to which the solicitations are directed, and the disciplinary authorities would apply the rules of that jurisdiction to the solicitations. *Cf.,* New York Rule 7.3(i) (the provisions of Rule 7.3 on solicitation apply to a lawyer not admitted in New York who solicits retention by residents of New York). Whether any ensuing business would also be subject to the rules of such admitting jurisdiction depends upon where such business has its "predominant effect." That is a factual question on which we do not opine.

11. Assuming the inquirer is soliciting business in New York, another question arises: must he have a local office in New York? This question is governed by law and not by the Rules. In N.Y. State 1025 (2014), we noted that Judiciary Law §470 has been interpreted by New York courts to require that attorneys have an office in New York if they practice, but do not live, in New York. *See Lichtenstein*, 251 A.D.2d 64; *Haas*, 237 A.D.2d 729; *Matter of Larsen*, 182 A.D.2d 149 (2d Dept 1992). We also determined that Rule 7.1(h), which requires that every lawyer advertisement include the "principal law office address and telephone number of the lawyer or law firm whose services are being offered," does not provide an independent basis for requiring a physical office in New York.

12. In N.Y. State 1025, we noted the case of *Schoenefeld v. New York*, 748 F.3d 464 (2d Cir. 2014). There, the Northern District of New York found unconstitutional the interpretation of § 470 requiring

30 N.Y. State 815 was decided under former DR 1-105(B)(2)(b), but the language of that provision is the same as the language of Rule 8.5(b)(2)(ii), so our conclusion would remain the same today. *See* N.Y. State 1042 (2014); N.Y. State 1041 (2014) (both applying this principle of N.Y. State 815 under Rule 8.5(b)(2)).

a physical office. On appeal, the Second Circuit referred a certified question to the New York Court of Appeals, asking about the minimum requirements necessary to satisfy the requirement for a local office for the transaction of law business. Although the Court of Appeals had not responded when we published N.Y. State 1025, on March 31, 2015, it issued its response, confirming that the statute requires a physical office for the conduct of business. The Second Circuit must now decide whether enforcement of §470 as so interpreted would be constitutional.

13. Assuming the inquirer is soliciting business from New York residents, the inquirer must comply with various duties imposed by the Rules. *See* N.Y. State 1025 (2014) (listing duties under various Rules, and noting that there is no "virtual law office exception" to any of the Rules).

CONCLUSION:

14. If a New York lawyer has been admitted to practice (generally, or for purposes of a proceeding) before the Virginia courts, when the lawyer represents a client in a proceeding in a court in Virginia, the rules to be applied ordinarily will be the rules of Virginia, unless the court rules provide otherwise. If the lawyer does not represent a client in a proceeding in a court, the rules to be applied will be those of the "admitting jurisdiction" in which the inquirer principally practices, unless the conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice. If the lawyer is permitted to practice in Virginia without being formally admitted there, the lawyer should be deemed to be "licensed to practice" in Virginia for purposes of Rule 8.5(b)(2). However, if the lawyer solicits business in New York, the lawyer's conduct in connection with such solicitation would have its principal effect in New York and the disciplinary authorities would apply the rules of New York.

(6-15)

OPINION 1055 (05/27/2015)

TOPIC: Municipal employee, business transaction with client, personal conflict of interest

DIGEST: The Rules do not prohibit a city's lawyer from purchasing from that city or the city's Urban Renewal Agency (acting as agent for the city) real property owned by the city, if (1) the proposed purchase transaction complies with any applicable statute or regulation governing conflicts of interest of government employees, (2) the lawyer is not responsible for advising the city or the Urban Renewal Agency on legal matters arising in property sales or for supervising other lawyers who are responsible for that advice, and (3) the lawyer is not in a position to use confidential information of the city in connection with the transaction. If the lawyer is (1) responsible for advising the city or the Urban Renewal Agency on legal matters arising in property sales or for supervising other lawyers who are responsible for that advice and/or (2) in a position to use confidential information of the city in connection with the transaction, the lawyer may nevertheless ethically purchase the property and/or use such information with the informed consent of the city-client if the lawyer is reasonably certain that the city is legally authorized to waive a conflict of interest (or consent to the use of confidential information, as applicable) and the city gives informed consent through a process sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust.

RULES: 1.6(a) & (b), 1.7(a)(2), 1.8(a), 8.4(b), 1.11

FACTS:

1. The inquirer is an Assistant Corporation Counsel for a city in New York State (the "City"). As part of the inquirer's job duties the inquirer appears on the City's tax foreclosure matters. Typically, the inquirer files a motion in Supreme Court under Article 11 of the New York Real Property Tax Law, and, once an order is granted, the inquirer enters the order and records a City tax deed. After the City becomes the legal owner of certain properties as a result of the non-payment of taxes, the City markets the property either through the City's Urban Renewal Agency ("URA") or through a public auction. The URA is a public benefit corporation created by the New York State Legislature under Section 553 of the New York General Municipal Law. It provides access to individuals, community organizations and other developers interested in redeveloping properties that have been tax-foreclosed or abandoned or are distressed properties acquired by the City.

2. The inquirer is interested in purchasing a piece of property being sold by the URA. We assume that the URA has its own counsel and is not looking to the inquirer to exercise professional judgment with respect to sale transactions. The inquiry does not state whether the URA has complete discretion with respect to the sale or whether the City has any role regarding the sale or the negotiation of sale terms, and, if so, whether it would be within the inquirer's job duties to advise the City.

QUESTION:

3. May an Assistant Corporation Counsel whose job duties include appearing on the City's tax foreclosure matters purchase a piece of property that was acquired by the City in a tax foreclosure proceeding and that is being sold on behalf of the City by the City's Urban Renewal Agency?

OPINION:

4. At the outset, we note that we do not rule on matters of law. For example, the General Municipal Law contains provisions on conflicts of interest of municipal officers and employees, and authorizes a city to have a code of ethics as well as a board of ethics to render advisory opinions to officers and employees regarding their obligations under the law and any code of ethics adopted by the city. *See* General Municipal Law, Art. 18. We take no position here on whether the proposed transaction would violate the law. In the event the transaction is illegal and reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, it would violate Rule 8.4(b) of the New York Rules of Professional Conduct (the "Rules"). *See* N.Y. State 845 (2010). In discussing the applicable provisions of the Rules, the remainder of this opinion assumes that the proposed purchase transaction does not violate any applicable law.

If the Real Property is Being Sold By or on Behalf of the City

5. The answer to the question posed may differ, depending on whether the Urban Renewal Agency is acting as agent for the City or as owner of the property. We will assume, first, that the URA is acting as agent for the City and that the inquirer would be purchasing the property from the City.

Conflicts of Interest

6. Business transactions between a lawyer and client are governed by Rule 1.8(a), which provides:

> (a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:
>
> > (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
> >
> > (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
> >
> > (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

7. Rule 1.7(a)(2) more generally governs a lawyer's personal conflicts of interests. It provides:

> (a) Except as provided in paragraph (b) [which contains a number conditions under which an exception may be available, including the informed consent of the client], a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . (2) there is a significant risk that the lawyer's professional judgment on behalf of a cli-

ent will be adversely affected by the lawyer's own financial, business, property or other personal interests.

8. We believe that when Rule 1.8 applies, Rule 1.7(a)(2) is not applicable. This is consistent with the principle of statutory construction that rules governing specific matters supersede more generally applicable rules. *See D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) ("General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment."). Rule 1.7 contains the general rules on conflicts of interest, while Rule 1.8, as its title – "Current Clients: Specific Conflict of Interest Rules" – indicates, contains rules governing specific conflicts of interest. In any event, the requirements for client consent to conflicts under Section 1.8(a) are at least as stringent as those under Rule 1.7(b).

9. Purchasing real property from the City constitutes a business transaction with the client. Moreover, the City and the lawyer have differing interests in the transaction, in that the City is interested in receiving the highest price for the transaction, while the lawyer-purchaser is interested in paying the lowest price. Consequently, a key issue in determining whether Rule 1.8 applies is whether the City expects the inquirer to exercise professional judgment for the protection of the client – and we believe the answer to that question depends upon whether the lawyer is responsible for legal advice regarding property sales or supervises other lawyers who are responsible for that advice. If the inquirer is responsible for such advice, or supervises other lawyers who are responsible for that advice, it puts into question whether the client's consent is fully informed. If the inquirer supervises such other lawyers, it also raises the question whether the inquirer would be doing indirectly through subordinates what a lawyer cannot do directly. *See* Rule 8.4(a).

10. If other lawyers in the City's law department or the URA are responsible for giving legal advice to the City regarding property sales, and if the inquirer does not supervise those lawyers regarding property sales, then Rule 1.8(a) by its terms should not apply.[31]

11. But if the inquirer is responsible for giving legal advice to the City regarding property sales, or supervises other lawyers responsible for giving legal advice to the City regarding property sales, then Rule 1.8(a) prohibits the lawyer from entering into a purchase transaction unless (1) the terms are fair and reasonable to the client, (2) the client is advised to seek the advice of independent legal counsel and (3) the client gives informed consent in writing. Comment [1] to Rule 1.11 warns that statutes and regulations governing government ethics may circumscribe the extent to which a government agency may give consent under Rule 1.11. The inquirer should determine whether the same legal impediment applies to consents under Rule 1.8(a).

31 Rule 1.8(a) applies where the client expects the lawyer to exercise professional judgment in the transaction for the protection of the client. Comment [1] to Rule 1.8 states: "If a lawyer elects . . . to enter into a business transaction with a current client, the requirements of [Rule 1.8(a)] must be met if the client and lawyer have differing interests in the transaction and the client expects the lawyer to exercise professional judgment therein for the benefit of the client. This will ordinarily be the case even when the transaction is not related to the subject matter of the representation . . . ." We believe that a number of factors will determine whether the client expects the lawyer to exercise professional judgment on the client's behalf. These include (i) whether the client has other counsel in the matter, for example, because it is a corporation or other entity with a legal department, (ii) whether the lawyer is responsible for client matters in the subject area, and (iii) whether the client is an individual or an entity and the client's level of sophistication in legal matters. We believe it is more likely that an individual client or one that is not sophisticated in legal matters is more likely to rely on a lawyer that does not represent the client in that matter than would be the case with an institutional client.

12. The requirements of informed consent are set forth in Rule 1.0(j). Until 1992, a long line of ethics opinions had held that the "government" could not consent to a conflict of interest. However, in N.Y. State 629 (1992), we determined that the question of whether the government can consent to a conflict is one of law and that the lawyer may accept consent by a government entity if he or she is reasonably certain that the entity is legally authorized to waive a conflict of interest and the process by which the consent was granted was sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust.

13. If Rule 1.8(a) does not apply, Rule 1.7(a)(2) is implicated. The question under Rule 1.7(a)(2) is whether the lawyer's purchase of property from the City creates a significant risk of adversely affecting the lawyer's professional judgment on behalf of the City in matters within the realm of the lawyer's job as Assistant Corporation Counsel. This is a question of fact that is beyond the jurisdiction of our Committee. The inquirer must make that determination. If the property purchase would result in such a significant risk, then the lawyer must consider the applicability of Rule 1.7(b)(1)-(3), all of which describe circumstances under which a conflict is non-consentable (i.e. cannot be waived by the client). If the conflict is consentable, then the lawyer must obtain the client's informed consent to the conflict pursuant to Rule 1.7(b)(4).

Our Prior Opinions

14. Two prior opinions of the Committee – both decided under the former Code of Professional Responsibility – are consistent with the analysis above. In N.Y. State 470 (1977), we held it to be improper for a city attorney to purchase a city-owned building when (i) the lawyer's official duties include giving legal advice to the chairman of that city's urban renewal agency and the common council, and (ii) the common council must approve the sale. N.Y. State 470 cites DR 5-104(A) – the predecessor to Rule 1.8(a) – although the gravamen of that opinion, as well as of two additional opinions that it cites, was that the nature of the inquiring attorney's public duties was such that the attorney appeared to have some influence upon the work of the urban renewal agency. Consequently, we opined that the attorney could not be involved in a transaction that would require any action of the agency.

15. Similarly, in N.Y. State 558 (1988), the inquirer was employed by the Department of Social Services, which proposed to sell some property that the agency had acquired, in a public sale by sealed bids that would be reviewed by the Commissioner of Social Services. We opined that, because the statute gave discretion in the bid process to the Social Services Department, which might be looking to the lawyer for the exercise of professional judgment, the lawyer could not participate in the bid process. We also stated that the city could not consent to the conflict, because, as noted in paragraph 12 above, at that time a long line of ethics opinions had held that a government entity could not consent to a conflict of interest. Finally, in N.Y. State 558, we found that the lawyer's interest in purchasing the property would conflict with those of the municipality because the lawyer had access to the municipality's appraisal of the property and therefore had information that would undermine the fairness of the bidding process.

If the Real Property is Being Sold on Behalf of the Urban Renewal Agency

16. If the City has transferred the lien to the URA, then the purchase transaction would not be with the client – the City – and neither Rule 1.8(a) or Rule 1.7(a)(2) would apply.

Use of Confidential Client Information

17. Rule 1.6(a) prohibits a lawyer from knowingly using confidential information of the client to the disadvantage of a client or for the advantage of the lawyer, except as specifically authorized in section 1.6. The inquirer here represents the City in tax foreclosure matters. The inquiry notes that the inquirer files a motion in Supreme Court under Article 11 of the New York Real Property Tax Law, and, after an order is granted, enters the order and records a City tax deed. The inquiry does not state whether, as a result of that role, the inquirer gains any information about the property that would give the inquirer an advantage in an eventual purchase transaction. If that were the case, then the lawyer could use such information only with the informed consent of the client under Rule 1.6(a)(1), and it would be irrelevant whether the seller of the property were the City or the URA.

CONCLUSION:

18. The Rules would not prohibit a city's lawyer from purchasing from that city or the City's Urban Renewal Agency (acting as agent for the city), real property owned by the city, as long as (1) the proposed purchase transaction complies with any applicable statute or regulation governing conflicts of interest of government employees, (2) the lawyer is not responsible for advising the city or the Urban Renewal Agency on legal matters arising in property sales or for supervising other lawyers who are responsible for that advice, and (3) the lawyer is not in a position to use confidential information of the city in connection with the transaction. If the lawyer is responsible for advising the city or the Urban Renewal Agency on legal matters arising in property sales or for supervising other lawyers who are responsible for that advice and/or in a position to use confidential information of the city in connection with the transaction, the lawyer may nevertheless ethically purchase the property and/or use such information with the informed consent of the city-client if the lawyer is reasonably certain that the city is legally authorized to waive a conflict of interest (or consent to the use of confidential information, as applicable) and the City gives informed consent through a process sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust.

(1-15)

OPINION 1056 (06/02/2015)

TOPIC: County clerk; law practice; conflict of interest

DIGEST: Subject to any overriding law or regulation governing the office, a county clerk may engage in the private practice of law provided the clerk does not participate in any way in any matter before the clerk's office in which the clerk is personally and substantially involved in private practice, and avoids use of the public office to obtain special treatment for a private client, to influence a tribunal in favor of a client, or to receive consideration from anyone in the guise of legal fees to influence official conduct.

RULES: 1.11(d) & (f)

FACTS:

1. The inquirer is an elected county clerk who intends to continue practicing law while serving in that position. His law practice consists exclusively of representing parties to transactions involving real property. He confines his practice to counties adjacent to the county where he serves as clerk; he does not represent parties in transactions in the county where he serves as clerk.

2. Section 525 of the New York County Law defines the duties of a county clerk as follows:

> 1. The county clerk shall perform the duties prescribed by law as register, and be the clerk of the supreme court and clerk of the county court within his county. He shall perform such additional and related duties as may be prescribed by law and directed by the board of supervisors. 2. He shall provide at the expense of the county, all books, files and other necessary equipment for the filing, recording and depositing of documents, maps, papers in actions, and special proceedings of both civil and criminal nature, judgment and lien dockets and books for the indexing of same as directed or authorized by law.

3. Section 806 of the New York General Municipal Law provides that a county may adopt a code of ethics:

> setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them. Such code shall provide standards for officers and employees with respect to disclosure of interest in legislation before the local governing body, holding of investments in conflict with official duties, private employment in conflict with official duties, future employment and such other standards relating to the conduct of officers and employees as may be deemed advisable. Such codes may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited. Such codes may provide for the prohibition of conduct or disclosure of information and the classification of employees or officers.

4. Section 808 of the New York State General Municipal Law also permits a county to establish boards of ethics to promulgate standards and to issue advisory opinions to elected officials on the consistency of proposed actions with the county's ethical norms.

QUESTION:

5. Do the New York Rules of Professional Conduct (the "Rules") circumscribe the inquirer's legal practice while serving as county clerk?

OPINION:

6. Rule 1.11(d) states:

> Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:
>
> (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
>
> (2) negotiate for private employment with any person who is involved as a party or as a lawyer in a matter in which the lawyer is participating personally and substantially.

7. The opening phrase of Rule 1.11(d) makes clear that any law or regulation governing the conduct of a current government official has priority over the Rules. The provisions of the General Municipal Law that authorize counties to regulate the conduct of officials are one example of the type of law or regulation that would override any inconsistent provisions of the Rules. Provisions regulating the extent of outside employment by a county official may also appear in the Public Officers Law, the County Law and the Municipal Home Rule Law. This list is not intended to be exhaustive of potentially applicable rules; others may bear on the clerk's ability to engage in law practice. *See, e.g.,* Rules Governing Conduct of Nonjudicial Court Employees, 22 N.Y.C.R.R. §§ 50.1-50.6. Our jurisdiction is limited to opinions on the Rules, and thus we do not address the applicability of these or any other provisions of law to this inquiry.

8. Another provision of Rule 1.11 applies specifically to current government employees. Rule 1.11(f) states:

> A lawyer who holds public office shall not:
>
> (1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;
>
> (2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

> (3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's actions as a public official.

9. In N.Y. State 966 (2013), we discussed Rule 1.11(f)(2) in a situation in which the town clerk of Town A wished to represent a client in the court of Town B at a time when the client also had a matter pending in the Town A court. There we said:

> The applicability of Rule 1.11(f)(2) does not mean that in all cases, the inquirer would be precluded from representing the client's matter before Town Court B. *If the inquiring clerk's duties as court clerk would not include any duties in connection with the client's matter before Town Court A (and if the inquirer did not seek in any way other than performance of assigned duties to influence Town Court A)*, then the Rule would not prohibit representation of the private client in the matter before Town Court B.

[emphasis supplied] Of significance, we then added:

> Moreover, the representation may be permissible even if the inquirer had very limited duties in connection with the client's matter before Town Court A. If the inquiring clerk's duties are solely ministerial, such as assigning docket number to cases, then we believe the clerk would generally not be in a position to influence the tribunal in Town Court A to act in favor of the client represented by the clerk in Town Court B.

10. This reasoning is equally applicable here. The inquirer is clerk of County A and engages in practice solely in transactional matters in Counties B, C, D, and E. The inquirer's work on behalf of clients in those latter counties would not include any matter in County A. Although not precisely posed by the inquiry, by analogy to N.Y. State 966, if the inquirer is counsel in a matter, say, in County C, to a client who also has a matter pending in County A, the inquirer must not seek in any way other than performance of ministerial duties to influence the client's matter in County A.

11. The prohibitions in Rule 1.11(f)(1) and 1.11(f)(3) are straightforward. For instance, a lawyer's use of a county clerk's position, on behalf of a client, to obtain special treatment for a private client before the county board of supervisors would run afoul of Rule 1.11(f)(1) unless the official could make a good faith judgment that the client's interests accord with the public interest. Likewise, under Rule 1.11(f)(3), the maintenance of a private business, whether in law or otherwise, as a vehicle to receive anything of value to influence an official judgment would be inconsistent with Rule 1.11(f)(3).

CONCLUSION:

12. Subject to any overriding law or regulation governing the office, a county clerk may engage in the private practice of law provided the clerk does not participate in any way in any matter before the clerk's office in which the clerk is personally and substantially involved in private practice, and avoids use of the public office to obtain special treatment for a private client, to influence a tribunal in favor of a client, or to receive consideration from anyone in the guise of legal fees to influence official conduct.

(3-15)

OPINION 1057 (06/05/2015)

TOPIC: Withdrawal from representation; confidential information; disclosure to court

DIGEST: The nature and extent of information about a client that a lawyer may ethically reveal on a motion to withdraw as counsel depend on whether the information is protected as confidential information under Rule 1.6. The lawyer should also consider (1) whether withdrawal is mandatory or permissive; (2) whether withdrawal may be accomplished without significant disclosure to the court; (3) whether disclosure is ordered by the court; (4) the circumstances under which the information is to be disclosed (*e.g.,* in open court or *in camera*); and (5) whether the client consents to the disclosure. The lawyer may test on appeal the validity of a court's order to disclose. Client documents filed with another court in other proceedings will be deemed confidential unless their existence is generally known in the community or in the legal profession.

RULES: 1.2(a) & (d), 1.4(a)(5), 1.6, 1.16(b)(1), (c) & (e), 3.1, 3.3

FACTS:

1. The inquiring lawyer represents a client in pending litigation in state court. The lawyer's client insists that he file what the lawyer considers frivolous petitions, based on allegations made in other litigation filed by the client in federal court against members of the judiciary and another lawyer. The inquirer believes these allegations are not relevant to the matter on which he is providing representation. The inquirer is preparing a request to be relieved as counsel, and asks whether he may use the documents filed by his client in federal court, although the documents may reveal his client to be "incompetent or unstable" and thereby prejudice his client.

QUESTION:

2. When a lawyer is moving to withdraw from representing a client, may the lawyer support the motion to withdraw with documents that the client has filed in a different court, even if using those documents may prejudice the client?

OPINION:

3. In this opinion, we address the information a lawyer may reveal to the court when requesting withdrawal under Rule 1.16 of the New York Rules of Professional Conduct (the "Rules"). We assume for purposes of this opinion that the lawyer has grounds for withdrawal. If the allegations the client is urging the lawyer to make are indeed frivolous, then filing them would violate Rule 3.1(a), which prohibits a lawyer from asserting an "issue" absent a basis for doing so that is not frivolous, and Rule 3.4(d)(1), which provides that a lawyer appearing before a tribunal shall not "state or allude to any matter that the lawyer does not reasonably believe is relevant . . . ." Rule 1.2(a) requires a lawyer to abide by the client's decisions concerning the objectives of the representation, and to consult with the client as to the means by which they are to be pursued. However, in discussing a client's suggestion that the lawyer engage in conduct that violates the Rules, Comment [2] to Rule 1.16 states: "The lawyer is not obliged to decline [representation] or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation."

4. Rule 1.6(a) prohibits a lawyer from knowingly revealing confidential information unless the client gives informed consent or the disclosure is permitted by Rule 1.6(b), including when permitted or required under the Rules or to comply with other law or a court order.

5. The nature and extent of information about a client that a lawyer may ethically reveal on a motion to withdraw as counsel depend on whether the information is protected as confidential information under Rule 1.6. The lawyer should also consider the following:

(1) whether withdrawal is mandatory or permissive;

(2) whether withdrawal may be accomplished without significant disclosure to the court;

(3) whether disclosure is ordered by the court;

(4) under what circumstances the information is to be disclosed (*e.g.,* in open court or *in camera*); and

(5) whether the client consents to the disclosure.

Whether the Information Is Protected as "Confidential"

6. Rule 1.6(a) defines and protects certain information as "confidential":

> (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
>
> (1) the client gives informed consent, as defined in Rule 1.0(j);
>
> (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
>
> (3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

7. The information at issue here was gained during the representation of the client. It is not clear that the information is protected by the attorney-client privilege, which generally protects only information that the client discloses in seeking legal advice (or that the lawyer discloses in giving legal advice). However, the inquirer believes that its disclosure would be embarrassing or detrimental to the client; consequently, the information falls within part (b) of the definition. The issue here is whether

the documents filed in federal court by the client in other proceedings fall within the exception in the second sentence of the definition.

8. The definition of "confidential information" does not include "information that is generally known in the local community or in the . . . profession to which the information relates." Comment [4A] to Rule 1.6 states: "Information is not 'generally known' simply because it is in the public domain or available in a public file." *See* Rule 1.0(k) (the term "known" denotes actual knowledge, but a person's knowledge may be inferred from circumstances). In N.Y. State 991 (2013) we explained that sentence: "In our view, information is generally known only if it is known to a sizeable percentage of people in 'the local community or in the trade, field or profession to which the information relates.'" *But see Jamaica Pub. Serv. v. AIU Ins*., 92 N.Y.2d 631 (1998) (Court of Appeals, interpreting DR 5-108(A)(2) [the predecessor to current Rule 1.9(c)(1)], holds that information is "generally known" when it is readily available in such public materials as trade periodicals and filings with State and Federal regulators).

9. Here, we believe that, unless the allegations in the client's other lawsuits were reported in the public media, or unless the client himself has widely publicized the allegations, the documents in the client's other cases do not fall within the exception and therefore constitute confidential information of the client.

Whether Withdrawal Is Mandatory

10. In certain circumstances, withdrawal from a representation is mandatory. *See* Rule 1.16(b). In others, withdrawal is permissive – the lawyer may but is not required to withdraw from the representation. *See* Rule 1.16(c). In either case, as required by Rule 1.16(e), the lawyer must take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client.

11. Where withdrawal is not mandatory, there is less of a justification for revealing client confidences. *See* N.Y. State 681 (1996) (having a basis for permissive withdrawal may not allow the lawyer to withdraw if confidentiality obligations prevent the lawyer from obtaining required court approval).

Whether Withdrawal May Be Accomplished Without Significant Disclosure

12. Comment [3] to Rule 1.16 discusses the extent of disclosure which ordinarily should be required of counsel seeking to withdraw:

> Court approval or notice to the court is often required by applicable law, and when so required by applicable law is also required by paragraph (d), before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. <u>The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.</u> Lawyers should be mindful of their obligations to both clients and the court under Rule 1.6 and Rule 3.3. (Emphasis supplied)

13. Hence, the Rules anticipate that the court usually will not demand the disclosure of confidential information if the lawyer advises the court that "professional considerations" require withdrawal. But that may not always be the case. Particularly when withdrawal is sought on the eve of trial or there has been a history of dilatory tactics, the court may demand more information about the reason counsel believes that "professional considerations require termination of the representation."

14. Where withdrawal may be accomplished simply on the basis of counsel's statement that professional considerations require it, no more should be disclosed. Accordingly, even where the information would not be deemed "confidential" as defined by Rule 1.6, it should not be disclosed if withdrawal can be accomplished without disclosure.

15. Where withdrawal may not be accomplished simply on the basis of counsel's statement that professional considerations require it, but disclosing more would not be permitted under Rule 1.6(b), the lawyer could not disclose that the client has requested that he file papers that the lawyer believes are frivolous, let alone copies of the client's prior frivolous filings.

Whether Disclosure Is Ordered by the Court

16. In some circumstances, the court may press the lawyer for further explanation that "professional considerations" require the withdrawal. If the court orders the lawyer to disclose information the lawyer believes is confidential, Rule 1.6(b) permits the lawyer to comply to the extent the lawyer reasonably believes necessary without violating his ethical obligation to protect a client's confidential information. Rule 1.6 states in relevant part:

> (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary: * * * (6) when permitted or required under these Rules or to comply with other law or court order.

17. But even where Rule 1.6 authorizes disclosure of client confidential information as a result of a court order, Comment [14] to Rule 1.6 suggests that disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. Moreover, if the court does not order disclosure (for example, if it merely states that permission to withdraw will not be granted without more information about the reasons for the motion to withdraw) then the exception in Rule 1.6(b)(6) does not apply.

18. Where a court orders that confidential information be disclosed, the lawyer should seek to protect the information by asking for an *in camera* examination by the court. In many cases, this will limit the adverse effects of disclosure on the client.

19. Alternatively, the lawyer may ethically decide not to comply immediately with the court's order. Instead, the lawyer may test the validity of the order by appealing. An appeal is not mandatory, but if the lawyer believes the information to be disclosed is protected by the attorney-client privilege, the lawyer should appeal the court order. *See, e.g.,* N.Y. State 681 (1996) (lawyer may disclose "secrets" [such as information embarrassing or detrimental to the client] if ordered by a court to do so, but if information is protected by the privilege, lawyer may have an ethical obligation to appeal court's ruling); N.Y. State 528 (1981) (where lawyer's claim of privilege is rejected by a court ruling or order, lawyer may postpone disclosure until validity of adverse ruling is determined on appeal).

Whether the Client Consents to the Disclosure

20. The final consideration is whether the client gives informed consent to any disclosure. The lawyer cannot meet this element until after the lawyer has adequately explained the material risks of disclosure. If the lawyer does so and the client nevertheless consents to disclosure, then the lawyer may disclose the information in the course of moving to withdraw.

CONCLUSION:

21. The nature and extent of information about a client which a lawyer may ethically reveal on a motion to withdraw as counsel depend on whether the information is protected as confidential information under Rule 1.6. The lawyer should also consider (1) whether withdrawal is mandatory or permissive; (2) whether withdrawal may be accomplished without significant disclosure to the court; (3) whether disclosure is ordered by the court; (4) the circumstances under which the information is to be disclosed (*e.g.,* in open court or *in camera*); and (5) whether the client consents to the disclosure. The lawyer may test on appeal the validity of a court's order to disclose. Client documents filed with another court in other proceedings will be deemed confidential unless their existence is generally known in the community or in the legal profession.

[7-15]

OPINION 1058 (06/10/2015)

TOPIC: Choice of law; immigration practice

DIGEST: If a lawyer is admitted solely in New York but is authorized by Federal law to practice immigration law in another state, and if the lawyer practices only immigration law and practices only in another state, then the lawyer is not required to maintain an attorney trust account in a New York banking institution unless the other state's Rules of Professional Conduct require the lawyer to do so.

RULES: 1.0(w), 1.15(b); 7.3(i), 8.5(a) & (b)

FACTS:

1. The inquirer was recently admitted to practice in New York but plans to reside and practice solely in Illinois and will engage in a practice limited to immigration law. She inquires about her obligations under Rule 1.15(b) of the New York Rules of Professional Conduct (the "Rules") regarding client trust accounts.

QUESTION:

2. If a lawyer is admitted in New York but practices solely in Illinois and limits her practice to immigration law, is the lawyer bound by the requirements in New York Rule 1.15(b) to maintain client funds in a banking institution within New York State?

OPINION:

Attorney Trust Accounts

3. Rule 1.15(a) of the New York Rules of Professional Conduct (the "Rules") provides that a lawyer who "is in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own." Rule 1.15(b)(1) provides that, where the lawyer is in possession of funds or property of another person, the lawyer must maintain the funds in a banking institution as defined in the Rule and 22 N.Y.C.R.R. Part 1300.

4. We assume for purposes of this opinion that the lawyer has or will receive funds belonging to the client incident to her practice of law.

Federal Regulations Governing Immigration Practice

5. Federal immigration regulations provide that a person entitled to representation may be represented by a member in good standing of the bar of the highest court of any state, who is not under suspension or otherwise restricted in his or her practice of law, as long as the lawyer is registered to practice with the Executive Office for Immigration Review. *See* 8 C.F.R. §§ 1001.1(f), 1292.1(a)(1); *see also* Anna Marie Gallagher, "A primer on immigration court practice," 08–12 Immigration Briefings 1 (2008) (hereinafter "Gallagher") (noting six categories of persons who are permitted to represent parties in the immigration courts); N.Y. State 863 (2011) (discussing lawyer licensed only in Texas

who works at law firm in New York State that "exclusively" practices immigration law). The cited federal regulations apparently apply to appearances before the U.S. Citizenship and Immigration Service, the Board of Immigration Appeals, and an Immigration Court or Judge, including any related application, proceeding, practice, and preparation. The full scope of federal law permitting lawyers to practice immigration law is a question of law beyond this Committee's jurisdiction. *See* N.Y. State 863 (2011).

The New York Choice of Law Rule: Rule 8.5(b)

6. Under Rule 8.5(a), a lawyer admitted in New York is subject to the disciplinary authority of this state no matter where the lawyer's conduct occurs – but that does not necessarily mean that the New York Rules will apply. Rather, the rules of conduct that a New York disciplinary authority will apply will depend on the choice of law rules set forth in Rule 8.5(b). Rule 8.5(b) provides:

> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
>
> (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
>
> (2) For any other conduct:
>
> (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
>
> (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Proceedings Before a Court

7. If the inquirer receives client funds in connection with a proceeding in a court before which the inquirer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied will be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise. *See* Rule 8.5, Comment [2] (observing that a lawyer "may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice"). *See also* Gallagher, *supra,* at 1 ("There are over 50 immigration courts nationwide where immigration hearings are held").

8. We do not opine on the specific ethical obligations governing immigration lawyers, but we note that the rules governing practice before the United States Citizenship and Immigration Services ("USCIS") state several grounds for imposing discipline on any practitioner who appears before the Board of Immigration Appeals and the Immigration Courts. *See* 8 CFR Part 1003, Subpart G, entitled "Professional Conduct for Practitioners - Rules and Procedures". However, such rules do not contain

any requirements for establishing and maintaining escrow accounts. Consequently, we believe that the escrow rules of the State of Illinois (*i.e*. the jurisdiction in which the Court sits) would apply.

9. For purposes of applying New York's Rule 8.5(b), the Board of Immigration Appeals is not a "court." As we noted in N.Y. State 968 (2013):

> As [the inquirer is] asking in part about conduct in connection with a proceeding before an administrative tribunal, the question arises whether such an administrative tribunal is a "court" within the meaning of Rule 8.5(b)(1). The Rules contain a definition of "tribunal," which includes both a "court" and an "administrative agency or other body acting in an adjudicative capacity." Rule 1.0(w). In adopting Rule 8.5, the New York Appellate Divisions declined to adopt a version of Rule 8.5 proposed by the New York State Bar Association that substituted the word "tribunal" for the word "court" in the prior version of this rule. . . . [W]e do not believe we are free to read "court" in Rule 8.5(b)(1) to include administrative tribunals. . . .
>
> For the same reason, in 2010, the New York State Bar Association amended Comment [4] to Rule 8.5 to replace the word "tribunal" with the word "court." See also N.Y. State 1027 (2014) (canons of statutory construction support the conclusion that the term "court" in Rule 8.5(b)(1) excludes the other types of tribunal listed in Rule 1.0(w)).

Matters Not Involving Court Proceedings

10. When the inquirer does not represent a client in a proceeding in a court, Rule 8.5(b)(2) provides that the rules to be applied will be those of the "admitting jurisdiction" in which the inquirer "principally practices," unless the conduct clearly has its "predominant effect" in another jurisdiction in which the lawyer is "licensed to practice." This rule recognizes that New York does not have an interest in applying its own rules where the lawyer's conduct clearly has its predominant effect in another jurisdiction that has disciplinary authority over the conduct.

11. Here, the inquirer is not admitted to the bar in Illinois, the jurisdiction in which the inquirer principally practices. However, in N.Y. State 815 (2007), we determined that, if a New York lawyer is permitted to engage in conduct in another jurisdiction without being formally admitted in that jurisdiction, the lawyer should be deemed to be "licensed to practice" in the other jurisdiction for purposes of DR 1-105(B)(2)(b), the predecessor to Rule 8.5(b)(2)(ii). See also N.Y. State 1054 (2015), N.Y. State 1042 (2014), N.Y. State 1041 (2014) (all applying this principle). If Federal law authorizes the inquirer to practice immigration law from an office address in Illinois, even if not in connection with a "court" proceeding, we believe the New York disciplinary authorities would apply the Illinois Rules of Professional Conduct, unless the inquirer solicits business in New York, in which case the lawyer's conduct in making the solicitation would usually have its predominant effect in New York, which is an admitting jurisdiction, and the disciplinary authorities would apply the New York Rules of Professional Conduct. *Cf.,* Rule 7.3(i) (the provisions of Rule 7.3 on solicitation apply to a lawyer not admitted in New York who solicits retention by residents of New York).

The Illinois Rules of Professional Conduct

12. Our conclusion that New York would apply the escrow provisions of the Illinois Rules of Professional Conduct is consistent with Rule 8.5 of the Illinois Rules of Professional Conduct, which provides as follows:

> (a) *Disciplinary Authority*. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
>
> (b) *Choice of Law.* In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
>
> > (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
> >
> > (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

13. Thus, under the Illinois rules, the inquirer is subject to discipline in Illinois because the lawyer provides legal services in Illinois, and the Illinois disciplinary authority will apply the Illinois Rules of Professional Conduct if the conduct occurred in Illinois – whether or not in connection with a proceeding before a tribunal in Illinois – unless the predominant effect of the conduct is in a different jurisdiction. Unless the Illinois Rules of Professional Conduct require a lawyer to maintain client funds in a banking institution in a state where she is formally licensed to practice (here, New York), the inquirer need not maintain an attorney trust account in a New York banking institution. (Whether the Illinois Rules of Professional Conduct so require is a question of law beyond our jurisdiction.)

14. There could, however, be disciplinary proceedings in both jurisdictions, because both the New York and Illinois versions of Rule 8.5(a) provide that a lawyer may be subject to the disciplinary authority of more than one jurisdiction for the same conduct. Thus, if the inquirer were to violate the Illinois Rules of Professional Conduct, she could be disciplined by New York, by Illinois or by both states.

CONCLUSION:

15. If a lawyer is admitted solely in New York but is authorized by Federal law to practice immigration law in another state, and if the lawyer practices only immigration law and practices only in another state, then the lawyer is not required to maintain an attorney trust account in a New York banking institution unless the other state's Rules of Professional Conduct require her to do so. (9-15)

OPINION 1059 (06/12/2015)

TOPIC: Disclosure of confidential information, consent by minor clients

DIGEST: Lawyers for minor clients in immigration proceedings may disclose the names and certain procedural information regarding the clients' cases to granting organizations where (1) the information is not privileged and the disclosure would not be embarrassing or detrimental to the clients or (2) the clients or their legal representatives (*e.g.,* parents or guardians) give voluntary, informed consent to the disclosure.

RULES: 1.0(j), 1.6, 1.14

FACTS:

1. The inquirers are legal assistance organizations that receive government grants to represent unaccompanied children in immigration removal proceedings. "Unaccompanied children" for this purpose are persons under sixteen years old who were apprehended by the Department of Homeland Security and were not in the care or custody of a legal guardian or parent at the time of arrest. The governmental granting organizations require that grantees provide data on their clients' cases in an online database created and managed by the Vera Institute of Justice, a private, not-for-profit corporation that carries out research and other projects designed to improve the functioning of the criminal justice system.

2. The data to be entered include the name of the children accepted as clients, the number of hours spent on each client's case, where the attorney represented the child, and various procedural details regarding the conduct of those cases (such as the number of charges that were admitted and that were contested, the relief requested, the types of motions filed, and whether expert testimony was adduced). The term "charges" refers to alleged violations of immigration statutes, such as entering the country without inspection or without possessing a visa at the time of entry. Grantees are also required to input in a narrative field the "results of interviews designed to capture an Unaccompanied Child's understanding of Immigration Proceedings before and after receiving program services."[32]

32 The precise information requested is as follows:

- number of children accepted as clients, identified by name, gender, date of birth, and alien number;
- number of hours spent on each Unaccompanied Child client's case;
- fora in which the attorney represented each Unaccompanied Child (immigration court, the Board of Immigration Appeals, state court, the U.S. Citizenship and Immigration Services);
- number of cases in which the Unaccompanied Child did not contest the allegations in the Notice to Appear;
- number of charges contested and the outcome;
- whether the Unaccompanied Child requested immigration relief or relief from removal and the disposition of any such applications;
- number of other court/agency orders sought and the disposition of the orders;
- type of motions filed and disposition of those motions;
- disposition of any appeals filed;
- whether any expert testimony was proffered and/or allowed;
- whether the attorney sought or obtained the appointment of a child advocate for an Unaccompanied Child,
- whether special accommodations (such as testimonial aids, closed hearings, or other means to facilitate the adjudication) were sought or utilized;
- results of interviews designed to capture an Unaccompanied Child's understanding of Immigration proceedings before and after receiving program services.

3. Under the terms of the contract between each governmental granting organization and Vera, Vera is responsible for ensuring that the case-specific data is "redacted and/or anonymized" in order not to disclose any information protected by the attorney-client privilege or by the ethical duty of confidentiality.

QUESTIONS:

4. May attorneys representing children in removal proceedings disclose to the governmental granting organization specified information about each client and matter without violating the duty of client confidentiality?

5. If disclosure requires client consent, may grantee organizations obtain informed consent to disclosure of this information from an immigrant child who is under sixteen years of age?

OPINION:

Disclosing Confidential Information

6. Rule 1.6 of the New York Rules of Professional Conduct (the "Rules") bars a lawyer from knowingly revealing "confidential information" or using such information for the advantage of the lawyer or a third person, unless the client gives informed consent. There are exceptions, none of which are applicable here.[33]

7. "Confidential information" is defined as information gained during or relating to the representation of a client (a) that is "protected by the attorney-client privilege," (b) that is "likely to be embarrassing or detrimental to the client if disclosed," or (c) that the client has requested be kept confidential.[34]

8. This Committee and others have concluded that the disclosure of non-anonymized information about client representations for similar purposes is barred, absent client consent, if the information consists of confidential information. For example, in N.Y. State 485 (1978), we opined that the attorneys in the Juvenile Rights Division of the Legal Aid Society, which represented persons in juvenile delinquency and other Family Court proceedings, could not participate in Vera studies that called for in-depth interviews with defense attorneys that would reveal the clients' confidences or secrets, absent client consent, "even for so worthy a purpose as the Vera study." We cited, among other authorities, ABA Inf. 1287 (1974), which held that a Legal Services Office providing legal representation to poor persons could not reveal the names, addresses and phone numbers of its clients so that they could

33 One of the exceptions is if "the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community." The disclosures contemplated here, while they are in the interest of the grantee organizations, which wish to receive payment for the services rendered, are not thereby impliedly authorized to advance the best interests of the client for this purpose. That exception implies a closer connection between the interests of the client and the interests advanced by the disclosure. Another exception is disclosure "to establish or collect a fee," but that does not permit a lawyer to enter into a contract with a third party for payment of fees where the contract requires disclosure, and then rely on this exception to justify the disclosure. *See* N.Y. State 716 (1999) ("the fact that the insurance company has agreed to pay the lawyers fee does not in itself authorize the lawyer to disclose information to the [insurance company] auditor that would otherwise be protected by DR 4-101 [the predecessor to Rule 1.6]").

34 We will assume in the discussion that follows that the clients have not specifically requested that any of the information at issue be kept confidential.

be interviewed for a research study by an outside non-profit group. The ABA committee noted that the names, addresses and telephone numbers of clients were protected from disclosure "since it might be an embarrassment to the client for any number of reasons to have it revealed that he was a client of the Legal Services Office."

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

10. The final item is quite different. Depending on the level of detail required for the answers, reports of interviews designed to capture the client's understanding of immigration proceedings may reveal information that is embarrassing or detrimental to the child (*e.g.,* the child's ignorance or lack of sophistication) and possibly information protected by the attorney-client privilege (*e.g.,* the tactical considerations that counsel discussed with the client). That information would be "confidential information" within the meaning of Rule 1.6(a), so disclosure is barred, absent informed consent. We turn to whether and how a grant recipient can obtain that consent.

Client Consent to Disclosure

11. A minor can consent to disclosure of confidential information if the minor is capable of understanding the risks of disclosure and of making a reasoned judgment. *See*, *e.g*., N.Y. City 1997-2; N.Y. State 485; Connecticut Opinion 03-07 (2003); North Carolina Opinion 18 (1998). *See also* Rule 1.14, Cmt. [1] ("[A] client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being.").

12. It is not always appropriate to seek consent for disclosure in order to promote interests other than the interests of the client. In this case, the disclosures would primarily promote the research, and presumably monitoring, interests of the governmental granting organizations. But we and other ethics committees have concluded that it is reasonable to seek consent for disclosure of some information to third parties that is necessary for the lawyer to obtain funding or to further research, depending on the nature of the information and the confidentiality protections in place. As the New York City Bar ethics committee has observed, a lawyer may seek consent for disclosure of confidential information to a social services organization if the lawyer "reasonably believes that such disclosures are either in the client's best interests or likely to be a matter of indifference to the client." N.Y. City 1997-2 (information related to the client's expressed intention to harm herself or possible abuse of the child). Similarly, in N.Y. State 69 (1968) we opined that an attorney could, with consent, disclose to the

administrator of the county department of social services that paid for the attorney's services information necessary to obtain payment, including the facts of the case and the services proposed for the client, where the administrator made undertakings of confidentiality. Likewise, in N.Y. State 716 (1999) we concluded that it was permissible to obtain client consent to disclose bills and supporting documentation to insurance company auditors responsible for approving the lawyer's bills. *Cf. Restatement Third, The Law Governing Lawyers* § 60, cmt. h (2000) ("A lawyer may cooperate with reasonable efforts to obtain information about clients and law practice for public purposes, such as historical research, when no material risk to a client is entailed, such as financial or reputational harm.").

13. Here, in the typical case, the information sought would appear to be of relatively limited sensitivity and it will be redacted and/or anonymized before transmission to the granting agencies. To the extent the information qualifies as "confidential information" at all, a lawyer could in most cases reasonably conclude that the risks of harm are very small or nonexistent, so the inquirers would be free to seek consent to disclosure.

14. Even if it is permissible to seek consent for disclosure of information that the lawyer concludes is confidential, however, it may not be possible for the child to give consent. First, very young children will be incapable of giving consent. There is no particular age when children can be said to have capacity to give consent. The New York City Bar ethics committee observed in an opinion dealing with "verbal minors ages twelve or older who affirmatively seek a lawyer's assistance" that such clients "generally will be capable of making considered judgments concerning the representation." N.Y. City 1997-2 (citing, *inter alia*, Standard for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings § 2.2 (Am. Academy of Matrimonial Lawyers 1995) for the proposition that there is "a rebuttable presumption that children above the age of twelve are competent"). But the children that are the inquirers' clients may be less capable of making considered judgments than the clients in N.Y. City 1997-2, given that the unaccompanied children who are the inquirers clients are likely to be unfamiliar with American society, or may be more capable of making considered judgments, given their experiences in their home countries and during their unaccompanied trip to the United States. If the children have been released to the custody of a parent or guardian – the inquiry states that "approximately 45% of the children are not released to a parent," leaving approximately 55% who are – the parent or guardian may be able to consent. *See* Rule 1.14, Cmt. [4] (discussing possibility of looking to parents to make decisions for minor clients, and noting that whether the lawyer should do so may depend on the nature of the matter).

15. Second, the consent must not be accepted until the lawyer has made full disclosure of "information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." Rule 1.0(j) (definition of "informed consent"). The extent of the information needed and risks to be addressed will vary both with the nature of the information being disclosed and the sophistication of the child, parent or guardian whose consent is sought. Where the information is relatively innocuous, it may be possible to delegate the task of obtaining consent to nonlegal personnel; but where the information is more sensitive, that may not be possible.

16. Third, the client's consent must be voluntary. As this Committee observed in N.Y. State 490 (1978), lawyers providing services to indigent clients "should be particularly sensitive to any element

of submissiveness on the part of their indigent clients; and, such requests should be made only under circumstances where the staff is satisfied that their clients could refuse to consent without any sense of guilt or embarrassment."

CONCLUSION:

17. Whether the inquirers can disclose the information sought by the granting organizations depends, first, on whether the information is protected by the attorney-client privilege or disclosure in a particular case would likely to be embarrassing or detrimental to the clients. If the lawyer concludes that the information is protected but that disclosure would not be adverse to the interests of the child, the lawyer may seek the consent of the child or, in some circumstances, the child's parent or guardian, but the consent must be preceded by full disclosure of any risks and benefits and must be fully voluntary.

(12-15)

OPINION 1060 (06/12/2015)

TOPIC: Escrow account; attorney special account; delegation to nonlawyer employee

DIGEST: Law firm may authorize a non-legal staff member to direct its bank to open law firm escrow sub-accounts, and to transfer funds from a sub-account to the master escrow account, in name of a lawyer admitted in New York State and under that lawyer's direction, provided that the lawyer or law firm exercises close supervision over the nonlawyer, and withdrawals from the master escrow account can only be authorized by a lawyer admitted in New York State. In any event, the supervising lawyer retains professional responsibility for the nonlawyer's conduct.

RULES: 1.15(b), (c), (d) & (e); 5.3.

FACTS:

1. A law firm wishes to have a staff member of the law firm, who is not a lawyer, direct a bank to open individual sub-accounts under a master lawyer escrow account maintained by that bank for the law firm. The law firm also wishes to authorize the nonlawyer staff member to direct the bank to transfer funds from any sub-account to the master escrow account.

2. The law firm would permit distributions from the master escrow account to be initiated and authorized only by a lawyer in the law firm licensed to practice in New York. Authority of the nonlawyer staff would be limited to transferring funds from a sub-account to the master escrow account, and the nonlawyer could only make such transfers at the direction of a lawyer licensed to practice in New York. Transfers from the sub-accounts may be made only to the master escrow account. The only authorized method to withdraw funds from the master escrow account or any of the sub-accounts would be at the express direction of a lawyer in the law firm admitted to practice in New York, and upon the signature of a lawyer in the firm admitted to practice in New York. The nonlawyer would have no authority to move funds out of the master escrow account.

QUESTIONS:

3. May a law firm or lawyer ethically authorize and instruct a nonlawyer staff member of the law firm to direct its bank to open individual sub-accounts under a master lawyer escrow account maintained by the bank for the law firm?

4. May the law firm or lawyer ethically instruct the nonlawyer staff member to direct a bank to transfer funds from a sub-account to a master escrow account, from which the funds would be distributed by a lawyer in the law firm, who would execute the checks?

OPINION:

Rule 1.15(e): Requirements for Authorized Signatories on Lawyer Special Accounts

5. Rule 1.15 of the New York Rules of Professional Conduct (the "Rules") governs the obligations of lawyers with respect to the funds of others that the lawyer has received "incident to the lawyer's practice of law." This includes the following obligations:

- Not to misappropriate such funds. Rule 1.15(a).
- To maintain such funds in one or more special bank accounts. Rule 1.15(b).
- To maintain records of all deposits in and withdrawals from the special bank accounts, that identify the date, source and description of each item deposited, and the date, payee and purpose of each withdrawal or disbursement. Rule 1.15(d)(1)(i)
- To maintain records of the special accounts, including the source of all funds deposited and the persons for whom the funds are or were held. Rule 1.15(d)(1)(ii).
- To make accurate entries in their records of receipts and disbursements, special accounts and ledger books or similar records. Rule 1.15(d)(2).
- To ensure that special account withdrawals (i) are made only to a named payee and not to cash, (ii) are made by check or (with the approval of the party entitled to the proceeds) by bank transfer and – most important here – (iii) that all authorized signatories of a special account are lawyers admitted to practice law in New York State. Rule 1.15(e).

6. There are no comments to Rule 1.15 relevant to the questions presented.

Non-Lawyer employees of law firms

7. Rule 5.3(a) provides that "A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate." Rule 5.3(a) further provides that "the degree of supervision required is that which is reasonable under the circumstances," taking into account such factors as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter. However, what is reasonable in the circumstances of holding funds under Rule 1.15 may involve a higher standard of care than that required under other rules. For example, Rule 1.15(a) states that a lawyer in possession of funds belong to another person incident to his or her law practice is a fiduciary and Comment [1] to Rule 1.15 explains that the lawyer should hold such funds using the care required of a professional fiduciary. Moreover, as noted in paragraph 9, the lawyer may be responsible for the conduct of a nonlawyer employee that would be a violation of the Rules if engaged in by a lawyer. As noted in paragraph 13, we warned in N.Y. State 693 that, since the responsibility for client funds may not be delegated, the lawyer remains responsible to the client for errors. Finally, the courts, in evaluating the lawyer's care of client funds for disciplinary purposes, may use an exacting standard. *See* Matter of Galasso, *infra* (lawyer must use a *high degree of vigilance* to ensure that the funds [the clients] entrusted are returned to them upon request.)

8. Comment [2] to Rule 5.3 states that a law firm must ensure that nonlawyer assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, and that a law firm "should make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with these Rules."

9. Violations of the Rules by a nonlawyer employee may subject certain firm lawyers to professional discipline. Rule 5.3(b) provides that a "lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer" where the lawyer either (i) has "managerial responsibility in a law firm" or (ii) has supervisory authority over the nonlawyer and knew or should have known of the conduct at issue in time to take reasonable remedial action.

10. These principles were affirmed in *Matter of Galasso*, 19 N.Y.3d 688 (2012), which involved a disciplinary proceeding against a lawyer for failing to properly supervise a bookkeeper, resulting in the misappropriation of the funds of several clients from an escrow account and the firm's IOLA account. Although Galasso and one of his partners were the only authorized signatories on the special account application, the bookkeeper apparently altered the account documentation to permit electronic funds transfers and to include himself as an authorized signatory.

11. The Court of Appeals in *Galasso* found several deficiencies in the firm's policies and procedures regarding client funds. For example, the lawyer's practice had been to review monthly financial reports generated by the bookkeeper rather than to review the account statements themselves (which might have disclosed that the bookkeeper was forging checks). In addition, the lawyer did not have personal contact with the bank and did not exercise sufficient oversight of the firm's books and records. Finally, the lawyer ceded an unacceptable level of control over the firm accounts to the bookkeeper, thereby creating the opportunity for misuse of client funds. Indeed, when a client's accountant pointed out a discrepancy in the escrow account, the lawyer did not resolve the discrepancy himself but rather allowed the bookkeeper to resolve it with the bank. The *Galasso* court stressed that attorneys are not prohibited from delegating tasks to firm employees, but also stressed that any delegation must be accompanied by an appropriate degree of oversight by a lawyer.

Establishing Sub-Accounts in the Special Account

12. No opinions of this Committee directly address the questions presented, but N.Y. State 693 (1997) is instructive. N.Y. State 693 discusses whether a lawyer may allow a paralegal to use a stamp bearing the lawyer's signature to execute checks drawn on a client escrow account. N.Y. State 693 notes that DR 9-102(E) of the Code of Professional Responsibility, the predecessor to Rule 1.15(e), explicitly states that only a lawyer may be a signatory to such a special account. Even so, the opinion notes that the Code "contemplates that lawyers will delegate tasks to nonlawyers," and that, despite restrictive holdings from case authorities that lawyers may not give signatory authority to nonlawyers, a lawyer could ethically authorize a nonlawyer to use the lawyer's signature stamp. Opinion 693 said:

> [W]e believe that it is ethically permissible for a lawyer to authorize a paralegal to make use of the lawyer's signature stamp on checks drawn from a special account at closings *under certain conditions and with proper controls*. As with the rest of a paralegal's duties at a real estate closing . . . the lawyer must consider in advance how the paralegal will use the signature stamp – including approving the purpose of the anticipated payments to be made by such checks, the nature of the payee and the authorized dollar amount range for each check to be issued – and review afterwards what actually happened to assure that the delegation of authority has been utilized property. [Emphasis added.]

13. N.Y. State 693 warns that the "responsibility for client funds may not be delegated," and that lawyers who authorize nonlawyers to use their signatures thus remain responsible to the client for any errors or misuse of the signature stamp. The opinion concludes that the delegation is permissible despite DR 9-102(E) "so long as the lawyer supervises the delegated work closely" and "exercises complete professional responsibility for the acts" of the nonlawyer.

14. In the inquiry here, the inquirer has assured us that transfers from sub-accounts can be made only to the master escrow account, not outside it, and that withdrawals can only be made by a lawyer licensed to practice in New York. In these circumstances, we believe a lawyer may delegate the two tasks described in the inquiry. Specifically, under procedures approved and closely supervised by the lawyer or law firm, the law firm may authorize a nonlawyer to direct the bank to set up the requested sub-accounts and to transfer funds from a sub-account to the master escrow account. Of course, pursuant to Rule 5.3(b), the supervising lawyer remains professionally responsible for any ethical violations by the nonlawyer.

CONCLUSION:

15. A lawyer or law firm may authorize a non-legal staff member to direct its bank to open law firm escrow sub-accounts and to transfer funds from such an account to the master escrow account in the name and under the direction of a firm lawyer admitted in New York State, provided that the lawyer or law firm exercises close supervision over the nonlawyer, and withdrawals from the master escrow account can only be authorized by a lawyer admitted in New York State. In any event, the supervising lawyer retains professional responsibility for the nonlawyer's conduct.

(8-15)

OPINION 1061 (06/15/2015)

TOPIC: Duty of Confidentiality; Informed Consent; Client Payment History; Law Firm Reporting Client's payment history to database with Client's Informed Consent

DIGEST: Subject to certain conditions, a lawyer may report a client's payment history on a database system that allows lawyers to report on the timeliness of payment of legal bills and gives access to such information to subscribing law firms and their staff members. Such reporting does not violate the Rules of Professional Conduct provided that (i) the lawyer has obtained the client's informed consent, and (ii) the client's consent is not coerced. To obtain the client's uncoerced informed consent, the lawyer should fully explain the material risks of consenting, including the uses to which the information may be put, and the lawyer should take into consideration the sophistication of the client. The lawyer should also inform the client of his/her right to have independent counsel advise on whether the client should consent. A client who has given informed consent to disclose confidential information may later revoke the consent at any time.

RULES: 1.0(j), 1.6(a) & (b), 1.7(b), 1.9(c), 1.16(b) & (c)

FACTS:

1. The inquirer proposes a subscription-based database system or information clearinghouse (the "System"), akin to a credit reporting system, in which lawyers would report information about the payment status of legal bills of a commercial (i.e. non-consumer, non-household use) client.[135] The System would be accessible through a secure website solely to subscribing law firms ("Subscribers") and their constituent lawyers and staff members. Subscribers would be allowed to file reports on the payment histories of their consenting clients and to review reports filed by other lawyers. The purposes of the System are to allow Subscribers to predict a potential client's timeliness of payment of fees (*i.e.,* assess the credit-worthiness of a prospective client) and to incentivize clients to pay legal bills as agreed. The System would identify not only potential problematic credit risks but also good credit risks. Under the System's business model, the Subscriber would have the client sign a consent, allowing the law firm to report the client's timeliness in payment.

2. The System, as proposed, would enable law firms to report a client's payment history using such categories as non-payments, late payments, disputed payments and prompt payments, but it would not report the amount owed by the client. The reporting Subscriber would be required to notify the client when the Subscriber files an adverse report about an unpaid invoice with the System, and the client would be entitled to notify the System if the client disputes the amount or validity of the unpaid invoice.

3. Subscribers would be obligated to treat the payment histories in the System's database as confidential, but would be authorized to use the information in the System in determining whether to

35 The inquirer may have chosen the term "commercial" to avoid the application of consumer protection laws such as the Fair Credit Reporting Act. The distinction made by ethics rules, particularly those involving informed consent, is not the same as that made by consumer protection laws. Rather, as noted below, it is based on the sophistication and experience of the client, and all "commercial" clients will not have the same degree of sophistication in, and experience with, legal matters.

accept an engagement or in establishing the financial terms of the engagement, including whether to request or require an advance retainer and in what amount.

4. Subscribers would be required to notify the System if a client disputes an invoice, or if a dispute with a client has been settled. The inquirer has indicated that a negative payment history will not be reported until after an attorney-client relationship has ended.[362]

5. The inquirer has advised that the System's rules mandate that, before accepting an engagement, the System's subscriber must obtain the client's informed, written consent and a limited waiver of confidentiality. The form of consent to be provided to the client upon engagement informs the client that by executing the consent, the client authorizes the lawyer to file a report with the System that contains (a) the client's name, address, state of incorporation, names of principals, officers and directors; (b) dates services were rendered and dates payment were due; and (c) the length of time the invoice was outstanding (with notations such as: "paid as agreed" or "invoice was 60, 90, 120 or 120+ days past due"). In addition, the form of consent informs the client to "feel free" to consult with other counsel regarding the implications of the consent.

QUESTION:

6. May a lawyer participate in a system that reports the payment histories of the law firm's clients to other system subscribers, if the client gives informed consent for the lawyer to make such reports to the system?

OPINION:

7. Rule 1.6 of the New York Rules of Professional Conduct (the "Rules") describes a lawyer's duty of confidentiality to a current client. Rule 1.6 provides as follows:

> (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or third person, unless:
>
> (1) the client gives informed consent, as defined in Rule 1.0(j);
>
> (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
>
> (3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (a) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept

36 The inquirer apparently changed the method of operation of the System after another state's ethics committee opined that, under the ethical rules in its state, a lawyer could not make reports on current clients. Because the inquirer has told us that lawyers would make reports only with respect to former clients, we have not examined whether our Rules would permit such reports with respect to current clients.

confidential. "Confidential information" does not ordinarily include (1) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

8. Comment [2] to Rule 1.6, headed "Scope of the Professional Duty of Confidentiality," underscores the importance of a lawyer's duty of confidentiality. It states, in pertinent part:

> [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source. . . . The lawyer's duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. . . .

9. Rule 1.9 addresses a lawyer's duties to former clients, including the duty of confidentiality. Paragraph (c) of this rule states in pertinent part:

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

The confidentiality obligation to a former client is thus the same as that to a current client, and the same exceptions apply.

Payment History as Confidential Information

10. We have previously addressed whether a client's payment status constitutes confidential information. In N.Y. State 684 (1996), interpreting DR 4-101(B), the predecessor to Rule 1.6(a), the Committee concluded that a client's unpaid account status will almost always constitute a "secret"[337] within the meaning of DR 4-101(B) because it is information "gained in the professional relationship" and because its "is likely to be embarrassing or detrimental to the client if disclosed." We therefore found that reporting the client's payment status to a credit bureau would plainly violate the prohibition on using a client secret "to the disadvantage of the client" and for the "advantage of the lawyer."

11. Our conclusion under Rule 1.6 on the facts before us is the same. We see no practical difference between a credit bureau and the System proposed here.

37 The Code defined "secret" as information gained in the professional relationship that is not protected by the attorney-client privilege, but that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. Although the Rules do not use the term "secret," the term "confidential information" includes information gained during or relating to the representation that is likely to be embarrassing or detrimental to the client and information that the client has requested to be kept confidential. Thus, the term "confidential information" is similar to and slightly broader than the terms "confidences" and "secrets" under the Code.

12. The analysis, however, does not end there, since the Rules contain certain exceptions to confidentiality. Rule 1.6, and therefore Rule 1.9, contains two potentially applicable exceptions to the proscription against disclosure or use of confidential information – information necessary to collect a fee, and information a client has given informed consent to disclose. We will address each exception.

Information Necessary to Collect a Fee

13. Under Rule 1.6(b)(5)(ii), the lawyer may disclose confidential information to the extent the disclosure is "reasonably necessary" to "establish or collect a fee." In N.Y. State 684 (1996), we concluded that reporting the client's delinquent status to a credit bureau did not qualify as the type of disclosure that was "reasonably necessary" to "establish or collect the lawyer's fee" within the meaning of the similar exception under the Code, because the fee can be collected without making such a report. We said:

> [T]o the extent it aids the collection process at all, it would appear to do so only by virtue of its *in terrorem* effect on the client, arising from the likely adverse impact on the client's credit rating. Such use of a client's secret by a lawyer would plainly violate DR 4-101(B)'s prohibitions on the use of a client's secret "to the disadvantage of the client" and "for the advantage of the lawyer."

14. See also Rule 1.6, Cmt. [14] (disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose); N.Y. State 980 (2013) (Rule 1.6(b)(5) is no license for counsel to reveal any confidential information beyond what is "reasonably believe[d] necessary" to collect the fee.)

15. The inquirer argues that the System is consistent with the principle described in Comment [11] to Rule 1.6, which explains the exception for disclosures necessary to collect a fee, and states: "A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary." For example, we have long recognized that lawyers are not compelled to provide free legal services to all clients. See N.Y. State 598 (1989) (client's knowing and substantial failure to satisfy his or her financial obligations to a lawyer would justify lawyer's withdrawal from employment in accordance with DR 2-110(C)(1)(f) – the predecessor to Rule 1.16(c)(5) – which allows a lawyer to withdraw from representation where the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees). However, our interpretations of the withdrawal rule make it clear that mere nonpayment or late payment is not enough. The client's failure must be conscious rather than inadvertent, and must not be *de minimis* in either amount or duration. Conversely, a lawyer may withdraw from representing a client who deliberately disregards an obligation to pay a lawyer more than a *de minimis* amount for more than a *de minimis* length of time.

Client Consent to Disclosure or Use

16. The duty of confidentiality owed to a client or former client may be waived if a client or former client gives informed consent to disclose the confidential information, confirmed in writing. See Rule 1.6(a)(i) (disclosure permitted if client gives informed consent); Rule 1.9(c)(1)&(2) (disclosure prohibited except as these Rules would permit with respect to a current client); Rule 1.9, Cmt. [9]

("The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent . . .").

17. The definition of "informed consent" is pertinent to the inquiry, because Rules 1.6 and 1.9 both refer to it. Rule 1.0(j) defines "informed consent" as:

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

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

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

See also Rule 1.7, Cmt. [18] (informed consent requires that the client be aware of the material and foreseeable ways that the conflict could adversely affect the interests of the client).

19. This Committee declines to opine whether any particular form of disclosure is adequate to obtain informed consent from any particular population of clients. At a minimum, however, informed consent in the circumstances before us would require disclosing that (i) the client's payment history would be available to Subscribers, and that (ii) Subscribers might use the client's payment history to determine whether to accept an engagement or to establish the financial terms of the engagement, including whether to request an advance retainer. Full disclosure may also require informing the client that the waiver would authorize the lawyer to report the client's non-payment pending a dispute over the legal bill (although we are told that the report to the system would note that the bill was disputed).[384] In the event of a later challenge, the burden is on the lawyer to demonstrate that consent was informed.

20. In prior opinions involving collection of fees, this Committee has commented on informed consent to the use of a collection agency, and cautioned that the "lawyer must take care to ensure that the client's consent is uncoerced as well as informed." We have some concern that, as in N.Y. State

38 Under New York's Attorney-Client Dispute Resolution Program, 22 N.Y.C.R.R. Part 137, the lawyer could not sue the client for the unpaid fee without giving the client 30 days' notice of the right to demand fee arbitration. Thus New York disfavors unilateral actions by lawyers to collect legal fees.

684, the lawyer's ability to disclose the client's payment history to the System will have an *in terrorem* effect on the client, arising from the likely adverse impact of a history of slow or contested payments on the client's ability to hire other counsel on favorable credit terms. But we think that this *in terrorem* effect simply makes it less likely that the client will consent, rather than indicating that the client's consent is coerced. Coercion may be present, however, if the lawyer refused an engagement unless the client consented to use of the System.

Advance Consent

21. The consent being proposed here is an advance consent. That is, the client is not being asked to consent to a known current disclosure or known use of confidences, but rather is being asked to consent to the lawyer's possible future disclosure or use of those confidences. In N.Y. City 1997-2, the City Bar ethics committee held that "consent to disclosure under particular circumstances for particular purposes may generally be obtained in advance of obtaining client confidences." In determining the effectiveness of the consent, the City Bar said that the client's consent must be given after "full disclosure" and must be "voluntary." N.Y. City 1997-2. Those two factors are also helpful here.

22. Advance consent to disclosure of confidential information is analogous to advance consent to waive a conflict. Comment [22] to Rule 1.7 provides guidance about what information a lawyer must provide to a client to obtain valid consent to a future conflict:

> The effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. At a minimum, the client should be advised generally of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts. The more comprehensive the explanation and disclosure of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the understanding necessary to make the consent "informed" and the waiver effective. . . . The adequacy of the disclosure necessary to obtain valid advance consent to conflicts may also depend on the sophistication and experience of the client. [Emphasis added.]

See generally Restatement Third, The Law Governing Lawyers ("Restatement of the Law Governing Lawyers") §62 Cmt. c ("When the question concerns the lawyer's duty to the client, the client's consent is effective only if it is given on the basis of information and consultation reasonably appropriate under the circumstances.") A lawyer cannot assume that all "commercial" clients are sophisticated. Many small business clients may not be sophisticated consumers of legal services and may not have experience in negotiating retainer agreements or negotiating waivers of rights bestowed upon them by the Rules.

23. Applying those concepts here, once the client consents in advance to the lawyer's providing otherwise confidential payment information to the System, the question arises whether the client may, at some point thereafter, revoke the consent. Comment [21] to Rule 1.7 states that "a client who has given consent to a conflict may revoke the consent at any time." Similarly, the Restatement of the Law Governing Lawyers takes the view that consent to a conflict can be revoked at any time. Restatement,

§122, Cmt f. ("A client who has given informed consent to an otherwise conflicted representation may at any time revoke the consent."). See N.Y. State 903 (2012) (client who has given consent to a conflict may revoke the consent). In the case of conflicts, the client's revocation of consent enables the client to terminate the lawyer's representation of the client from that point forward.[39]

24. We believe the same restriction applies to a client's advance consent to a lawyer's disclosure of confidential information. If the client revokes consent, the revocation will prohibit the lawyer from making future reports of the client's payment status to the System, but will not require the lawyer to remove any past reports to the System. See N.Y. City 1997-2 ("If the minor client consents in advance to the lawyer's reporting of confidences or secrets concerning abuse or mistreatment, the client may later change his mind and revoke consent, in which event the lawyer must maintain confidentiality."). The City Bar further opined that whether the lawyer may withdraw from representing the revoking client or a conflicting client upon the client's revocation of consent is governed by the rule on withdrawal from representation (now Rule 1.16). Similarly, whether the inquiring lawyer here would have grounds to withdraw from representing a client who revoked consent to allow the lawyer to report the client's late payments would depend on Rule 1.16(b)-(c).

25. Aside from complying with the requirements of the aforementioned Rules, the lawyer must also comply with applicable law, including laws such as the Fair Credit Reporting Act. (We offer no opinion on whether the FCRA or any other law is applicable in these circumstances.)

CONCLUSION:

26. A lawyer may report a client's payment history to a database system that allows lawyers to report on the timeliness of payment of legal bills and gives access to such information to subscribing law firms and their staff members, provided that lawyer has obtained the client's informed consent, and provided that the client's consent is not coerced. In order to obtain the client's informed consent, the lawyer should fully explain the material risks of consenting, including the uses to which the information may be put. In formulating that explanation the lawyer should take into consideration the sophistication of the client, and should inform the client of his/her right to have independent counsel review the consent. In addition, the client who has given informed consent to disclose confidential information may revoke the consent at any time.

(54-14)

39 In the context of conflicts, whether the client's revocation and firing of the lawyer results in the lawyer's disqualification from representing the other client depends on the circumstances, including whether the parties have agreed to permit continued representation adverse to the withdrawing client after a conflict has arisen. See N.Y. 903 (2012) ("When a lawyer jointly represents two co-defendants pursuant to a validly obtained consent to the dual representation and to any future conflicts that might arise between the joint clients, and one of the clients later revokes consent, whether the lawyer may continue to represent the non-revoking client depends upon the circumstances, unless an advance agreement specifies what happens upon revocation of consent."); D.C. Bar Opinion 317 (2002).

OPINION 1062 (06/29/2015)

TOPIC: Financing a law practice; crowdfunding websites.

DIGEST: A law firm may engage in certain types of crowdfunding but not others. Any form of fundraising that gives the investor an interest in a law firm or a share of its revenue would be prohibited. However, in some circumstances a law firm may give the funding source some kind of reward. For example, a law firm may send a funder non-confidential memoranda discussing legal issues (provided the law firm complies with any applicable advertising rules), or may agree that the law firm will provide pro bono legal services to certain charitable organizations, provided that the lawyer complies with Rule 1.1 regarding competence and the representation does not involve conflicts in violation of Rule 1.7 or Rule 1.9.

RULES: 1.1(b), 1.7, 1.9, 5.4(a) & (d), 7.1.

FACTS:

1. The inquiring lawyers, who are recent law school graduates, plan to start a small firm. They need to raise capital to fund the start-up expenses of the new firm for the first few months of operations, such as rent, website development, professional liability insurance, and office supplies.

2. The inquiring lawyers have accumulated substantial student loan debt and aim to avoid further borrowing. They ask whether they may ethically raise start-up funds via internet websites through a method known generally as "crowdfunding."

3. "Crowdfunding" is defined generally as funding a project or venture by raising small amounts of money from a large number of people. It is often used in product development to test a market and refine a product. Philanthropic organizations also use crowdfunding to raise funds. We are aware of five basic approaches to crowdfunding: (1) Donation, (2) Reward, (3) Lending, (4) Equity, and (5) Royalty. In each of the models, the user uses the funding website of a crowdfunding "platform," which charges fees based on the amount of money raised. The platforms have varying focuses, models and fee structures. *See generally* Crowds Unite, *What is Crowd Funding?*, *available at* http://crowdsunite.com/what-is-crowdfunding.

4. The first of the five approaches to fundraising – the lending model – is close to the traditional working capital loan.

5. The second approach, the equity model, is often used for new ventures and provides the funding source an ownership interest in the venture.

6. Similarly, the third approach, the royalty model, which often is used for specific product development and rollout, rewards the investor with a percentage of the sales proceeds from that particular product.

7. The donation model is used most often for philanthropic causes where there is no material or financial return to the contributor.

8. The reward model typically provides the funder with a sample of the product or service being supported by the fundraising effort. It is often used by private ventures to pre-sell product or create a large following for the product.

QUESTION:

9. What are the ethical limitations on using internet-based crowdfunding to raise working capital for a law firm?

OPINION:

10. This Committee expresses no opinion on the business merits of any of the five crowdfunding methods or whether any might succeed in reaching the law firm's fundraising goals. But we comment briefly on each model.

11. The lending model would only increase debt and therefore would not meet the law firm's goal.

12. The donation model may be unattractive to potential donors (since they receive nothing in return and may not wish to support an enterprise designed to make a profit). The donation model might also be unattractive to the law firm, since friends and relatives of the lawyers might be inclined to donate directly to the law firm even if the lawyers were not using crowdfunding, whereas under the donation model their contributions will be diminished by the platform's fees. But we see no ethical issues with the donation model, as long as the lawyers make clear that donors will receive nothing in return and that the law firm is designed to be a profit-making enterprise.

13. Two of the models – the royalty model and the equity model – would clearly violate the Rules of Professional Conduct. The royalty model contemplates the investor receiving a percentage of revenues, and would therefore violate Rule 5.4(a) ("A lawyer shall not share legal fees with a nonlawyer"). Similarly, the equity model violates Rule 5.4(d) (lawyer shall not practice law in a for-profit entity if a non-lawyer owns any interest therein.).

14. The remaining model, the reward model, might fit the law firm's business needs, and the inquiring lawyers have suggested several examples of rewards, including (i) informational pamphlets, (ii) reports on the progress of the firm and (iii) the lawyers' performance of pro bono work for a third-party non-profit legal organization. Whether these rewards would be attractive enough to raise capital requires a judgment that is beyond the jurisdiction of this Committee, but we can comment on the ethical implications of the suggested rewards.

15. ***Informational pamphlets and progress reports.*** Informational pamphlets, whitepapers or reports on the firm's progress may be governed by Rule 7.1 ("Advertising"). Materials may not be considered advertising as defined in Rule 1.0(a) if they are "topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law . . . ." Rule 7.1, Cmt. [7]; N.Y. State 967 (2013) (blog written by an attorney is not an "advertisement" if the primary purpose of the blog is not retention of the attorney). However, the lawyers should take care that their writings on legal topics do not give individual legal advice. *See* Rule 7.1(r) (without affecting the right to accept employment, lawyer may write for publication on legal topics "so long as the lawyer does not undertake to give individual advice").

16. ***Pro bono hours.*** The proposal to offer pro bono hours to a third-party non-profit legal organization raises several issues. In N.Y. State 971 (2013), a lawyer proposed to donate legal services to a charitable organization for auction as a fund-raising device. We discussed the requirement of Rule 1.1(b) that a lawyer accept employment only if the lawyer is, or intends to become, competent to handle the matter. Opinion 971 also discussed the prohibition on undertaking a matter that would involve an impermissible conflict of interest under Rule 1.7 or Rule 1.9. We therefore concluded that the firm's offer of pro bono services must be conditioned on the firm's ability to comply with these ethical constraints. We stressed, however, that the fact these limitations apply does not mean that the lawyer cannot participate. *See also* N.Y. State 897 (2011) (lawyer may market legal services on a "deal" of the day" or "group coupon" website provided that the advertising is not misleading or deceptive and makes clear that no lawyer-client relationship will be formed until the lawyer can check for conflicts and assess competence to provide the services). The same principles apply to the reward model that the inquiring lawyers are considering here.

CONCLUSION:

17. A law firm may engage in certain types of crowdfunding but not others. Any form of fundraising that gives the investor an interest in a law firm or a share of its revenue would be prohibited. However, in some circumstances a law firm may give the funding source some kind of reward. For example, a law firm may send a funder non-confidential memoranda discussing legal issues (provided the law firm complies with any applicable advertising rules), or may agree that the law firm will provide pro bono legal services to certain charitable organizations, provided that the lawyer complies with Rule 1.1 regarding competence and the representation does not involve conflicts in violation of Rule 1.7 or Rule 1.9.

(13-15)

OPINION 1063 (06/29/2015)

TOPIC: Conflicts; fees paid by third-party payors

DIGEST: When a lawyer accepts payment of legal fees from a third party, the third-party payor is not a client merely by virtue of paying the lawyer's fee. Where the lawyer's fee for representing a son was paid by the client's father and mother, and the lawyer did not give father reason to believe he was a client, the lawyer's representation of mother would not constitute a conflict of interest unless a reasonable lawyer would conclude that the lawyer's interest in continuing to receive fees from the father for representing the son would create a significant risk of adversely affecting the lawyer's professional judgment on behalf of the mother. But even if such a conflict exists, the lawyer could cure the conflict by obtaining the mother's informed consent to the conflict as long as the lawyer satisfies the terms of Rule 1.7(b).

RULES: 1.7(a) & (b), 1.8(f)

FACTS:

1. The inquirer agreed to represent an 18-year old client ("Son") in a criminal defense matter. When the inquirer initially met the Son at the Town Court, the Son's divorced parents ("Mother" and "Father") were present. Although only Son signed a retainer agreement, each of the client's parents paid one-half of the retainer. The inquirer continues to represent Son.

2. Recently, inquirer agreed to represent Mother in two matters against Father. One is a custody dispute against Father (not involving Son). The other is a support matter against Father in which Son is among the subjects of the support sought. Opposing counsel has protested that, having taken money from Father, it is a conflict of interest for inquirer to represent Mother adverse to Father.

QUESTION:

3. When a lawyer has accepted payment of a legal fee from a client's relative, may the lawyer later accept a representation adverse to the interests of the payor?

OPINION:

4. Many lawyers occasionally accept payment of their clients' legal fees from third-party payors. *See* New York Rules of Professional Conduct (the "Rules"), Rule 1.8(f), Cmt. [11] ("Lawyers are frequently asked to represents clients under circumstances in which a third person will compensate them, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees)").

5. It is well-established that when a lawyer accepts payment from a third party to represent a client, the third-party payor is not a client merely by virtue of paying the lawyer's fee. See N.Y. State 716 (1999) (when an insurance company retains a lawyer to represent a policyholder, the client is the policyholder, not the insurance company). *See generally* American Law Institute, Restatement Third, *The Law Governing Lawyers*, §14, cmt. c (2000) (paying a lawyer does not by itself create a client-

lawyer relationship with the payor if the circumstances indicate that the lawyer was to represent someone else).

6. If a third-party payor is present at an intake interview, the lawyer may sometimes give the impression that the third party is also a client. Many factors might contribute to such an impression by the third party. A lawyer who accepts payment from third parties may therefore wish to inform such persons that the lawyer does not represent them and has no duties to them. The lawyer should also avoid giving legal advice to the third-party payor, and should make clear that the lawyer will not share confidential information with the third-party payor absent informed consent from the client. S*ee* Rule 1.8(f)(3) (lawyer shall not accept fees from third party unless "the client's confidential information is protected as required by Rule 1.6").

7. The remainder of this opinion assumes that the lawyer has not given Father grounds to believe he is a client.

8. Rule 1.8(f) recognizes that, when the lawyer accepts payment of his or her fee from a third party, the interest in being paid might affect the lawyer's independent professional judgment on behalf of the client. Consequently, it prohibits the lawyer from accepting such compensation unless:

> (1) the client gives informed consent;
>
> (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and
>
> (3) the client's confidential information is protected as required by Rule 1.6.

9. If these three conditions are fulfilled, the Rules permit the third party payment. *See* N.Y. State 1000 (2014), in which compliance with Rule 1.8(f) operates to permit payment even by one whose interests are adverse or potentially adverse to those of the client. (Indeed, Opinion 1000 points out that, where legal fees are paid by an indemnitor such as an insurance company, the interests of the indemnitor are often contrary to those of the client.)

10. Unless the inquirer has given the Father reason to believe that he represents the parents as well as the Son, the Father is not a client of the lawyer, by virtue of paying part of the lawyer's fee. Assuming that the lawyer has not indicated to the Father that he is a co-client, and has not otherwise given the Father the impression that he is a client, then the Father is not a client.

11. Conflicts of interest with current clients are governed by Rule 1.7. Rule 1.7(a) prohibits a lawyer from representing a client if a reasonable lawyer would conclude that (i) the representation will involve the lawyer in representing differing interests, or (ii) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests. If there is a conflict of interest under Rule 1.7(a), the client may consent to the conflict if the requirements of Rule 1.7(b) are met.

12. Since we assume the Father is not a client, accepting a retainer from the Mother adverse to the Father does not involve "representing" differing interests. Thus is no conflict of interest under Rule 1.7(a)(1). However, a conflict could exist under Rule 1.7(a)(2) if a reasonable lawyer would conclude

that the inquirer's interest in continuing to receive fees from the Father for representing the Son would create a "significant risk" of adversely affecting the inquirer's professional judgment on behalf of the Mother. Even if such a personal interest conflict exists, which depends on questions of fact, the inquirer could still represent the Mother if he reasonably believes within the meaning of Rule 1.7(b)(1) that he could provide competent and diligent representation to the Mother, and if he obtains informed consent from the Mother, confirmed in writing, pursuant to Rule 1.7(b)(4). See Rule 1.7, Cmts. [18]-[20].

CONCLUSION:

13. When a lawyer accepts payment of legal fees from a third party, the third-party payor is not a client merely by virtue of paying the lawyer's fee. Where a lawyer's fee for representing a son was paid by the client's father and mother, and the lawyer did not give the father reason to believe he himself was a client, the lawyer's representation of mother would not constitute a conflict of interest unless a reasonable lawyer would conclude that the lawyer's interest in continuing to receive fees from the father for representing the son would create a significant risk of adversely affecting the lawyer's professional judgment on behalf of the mother. But even if such a conflict exists, the lawyer could cure the conflict by obtaining the mother's informed consent to the conflict as long as the lawyer satisfies the terms of Rule 1.7(b).

(14-15)

OPINION 1064 (07/10/2015)

TOPIC: Former Judge; Conflicts

DIGEST: A lawyer who is a former family court judge is prohibited by Rule 1.12(a) from privately representing a client in a permanent neglect action when the same client appeared before the judge in a previous neglect action and the judge issued an order "upon the merits" to put the subject child in foster care. For the same reason, the former judge is prohibited by Rule 1.12(a) from privately representing a client in a proceeding to modify child support when, as a judge, he or she issued orders upon the merits related to custody and visitation in the same matter and custody and visitation issues will be revisited as part of the application to amend child support. A conflict arising under Rule 1.12(a) cannot be waived even with consent of all parties. However, the Rule 1.12(a) conflict is not imputed to other members of the lawyer's firm if the firm acts promptly and reasonably to implement certain screening measures and no other circumstances in the particular representation create an appearance of impropriety.

RULES: 1.0(l); 1.12(a); 1.12(d)

FACTS:

1. The inquirer is a retired Family Court Judge and Acting Supreme Court Justice who is now in private practice. A client has asked the inquirer to undertake representation in a permanent neglect action ("permanent neglect action") involving the client's two children. Approximately two years ago, the client made one appearance before the inquirer as a judge in a neglect case ("neglect action") involving one of the client's two children in this same permanent neglect action. The inquirer as judge issued one consent order where the parties before him, including the person who is now his client, stipulated to put the subject child in foster care. The inquirer was the emergency judge that week and the assigned judge was unavailable. Recently, the Department of Social Services ("DSS") filed a petition seeking to terminate the client's parental rights.

2. Separately, the inquirer has been asked to represent an individual (the "Potential Client") in a pending child support proceeding ("support proceeding") in Family Court. The inquirer, as a judge, rendered multiple decisions over a period of two to three years concerning custody and visitation of the Potential Client's children. The inquirer did not issue any orders regarding child support. The non-custodial parent is now attempting to reduce the support award. As a result of the issues raised by the non-custodial parent, the custody/visitation orders issued by the inquirer as judge will now be revisited in the child support determination.

QUESTION:

3. a. May a lawyer ethically represent a client in a permanent neglect action when the client previously appeared before the inquirer, who was then sitting as a family court judge in a neglect proceeding, where the inquirer issued a stipulated order to put the subject child in foster care?

b. May a lawyer ethically represent a client in a child support proceeding (the "support proceeding") when the inquirer, as judge, issued numerous orders related to custody and visitation that will now be revisited as part of the child support determination?

OPINION:

4. Former judges are governed by Rule 1.12 of the New York Rules of Professional Conduct (the "Rules"). Rule 1.12(a) provides:

> (a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.

5. A conflict under Rule 1.12(a) is a non-waivable conflict. A lawyer who has such a conflict must be disqualified from the representation, regardless of consent from the client or the adversary. *See* Rule 1.12, Cmt. [1] ("A former judge or adjudicative officer may not, however, accept private employment in a matter upon the merits of which the judge or adjudicative officer has acted in a judicial capacity and – unlike conflicts for lawyers who have acted in a capacity listed in Rule 1.12(b) – a conflict arising under paragraph (a) cannot be waived.").

6. In order to analyze a former judge's obligations under Rule 1.12, it is necessary to define three terms used in the Rule – "judicial capacity," "matter" and "merits."

"Judicial Capacity"

7. According to Rule 1.12, Cmt. [1], a lawyer acts in a "judicial capacity" within the meaning of paragraph (a) when the lawyer "serves as a judge or other adjudicative officer." However, a judge or adjudicative officer "is not prohibited from acting as a lawyer in a matter where he or she exercised remote or incidental administrative responsibility that did not affect the merits."

8. Comment [1] to Rule 1.12 thus distinguishes between a former judge who has exercised remote or incidental administrative responsibility in a matter that did not affect the merits and a former judge who has acted in a judicial capacity that did affect the merits of a matter. A judge who acted on the merits in the matter is prohibited by New York Rule 1.12(a) from representing a client whether or not the judge participated "personally and substantially" in the matter. This Rule is different from New York's Rule 1.11(a) – applicable to a former government lawyer – and ABA Model Rule 1.12(a) – applicable to a former judge – both of which require personal and substantial participation in the matter.

"Matter"

9. In order to determine whether a Rule 1.12(a) conflict exists in this inquiry, we must consider the definition of "matter," and whether the new representations are part of the same "matter." Under the definition in Rule 1.0(*l*), the term "matter" includes:

> any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

10. Some guidance can be obtained from the comments to Rules 1.9 and 1.11 and the prior ethics opinions of this Committee.

11. The term "matter" is discussed in the comments to both Rule 1.9 and Rule 1.11. Comment [2] to Rule 1.9 states in part that "the scope of a 'matter' for purposes of this Rule depends on the facts of a particular situation or transaction." Comment [10] to Rule 1.11 provides:

> . . . [A] "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which (i) the matters involve the same basic ***facts***, (ii) the matters involve the same or related ***parties***, and (iii) ***time*** has elapsed between the matters. [Emphasis added.]

Several of our prior opinions have followed these "facts, parties, and time" tests. *See* N.Y. State 1029 (2014) (discussing the facts, parties and time tests); N.Y. State 904 (same underlying conduct was not, on its own, sufficient to constitute the same "matter"; rather, the extent of a matter depends on a variety of factors, including whether two matters involve the same underlying events, the same or related parties, the same underlying events or related issues, and whether the matters are ongoing at the same time or close in time).

12. In N.Y. State 1047 (2015), the Committee stated: "Although the Definition Section of the Rules contains a definition of 'matter,' it does not define the scope of a single matter, but rather lists more than a dozen different types of matters that are included within the term. *See* Rule 1.0(*l*)."

13. In N.Y. State 800 (2006) we provided examples of matters that are heard in the Family Court: "The Family Court hears matters involving children and families, including child protective proceedings, adoption, custody and visitation, support, family offense, guardianship, delinquency, paternity, persons in need of supervision (PINS), and foster care approval and review." *See also* N.Y. State 894 (2011) ("Rule 1.0(*l*) defined 'matter' to include a claim or controversy as well as a proceeding.").

14. Applying the facts, parties and time tests to the neglect action and the permanent neglect action, the neglect and the permanent neglect actions appear to be the same matter for purposes of Rule 1.12(a). In terms of "facts," the same underlying events or alleged actions setting forth the grounds for neglect and permanent neglect may be present. Regarding the parties, the client, DSS and the other parent are the same in both the neglect and the permanent neglect proceedings. Regarding time, the petitions are not ongoing at the same time or close in time, but we understand that a permanent neglect petition will typically be commenced after there has been an initial finding of neglect, and that the neglect finding is often referenced in (and a basis for) the permanent neglect petition. These factors taken together suggest that the neglect and permanent neglect actions are the same matter for purposes of Rule 1.12(a).

15. Applying the facts, parties and time tests to the support proceeding and the custody/visitation proceeding, while the parties are the same, at first blush, facts would appear to be different because the judge rendered decisions involving custody and visitation, and not child support. However, we are told that the custody and visitation issues will be revisited in determining the application for reduced child support due to allegations raised by the non-custodial parent. Finally, while at least three years have passed since the former judge's earliest involvement with the custody/child support proceeding, it seems clear that modifying an order in a prior proceeding constitutes part of the same proceeding.

"Merits"

16. The term "merits" is not defined in the Rules, and neither New York courts nor New York ethics opinions have interpreted the term "merits" in the context of Rule 1.12. However, New York courts have interpreted the term "merits" in the context of the doctrine of *res judicata*, which operates only if there has been a judgment "on the merits." For example, in *Pizzuto v. Soriano,* 2011 WL 1991964, 2011 NY Slip Op 31287(U) (Sup. Ct. Richmond County 2011), the court said:

> The word "merits", as a legal term, has acquired no precise technical meaning and admits to some latitude of interpretation, but is to be regarded as referring to the strict legal rights of the parties, as contradistinguished from those mere questions of practice which every court regulates for itself and from all matters which depend upon the discretion or favor of the court.

(citing *Mink v. Keim*, 266 AD 184, 186 (1st Dept. 1943); reversed on other grounds, *Mink v. Keim*, 291 NY 300 (1943)). In our opinion, that definition is too narrow for Rule 1.12, which should be read to encompass any decision affecting the legal rights of the parties, whether based on substantive law, procedural rules, or matters depending on the court's discretion. Here, we believe that approving a consent order constitutes a determination of the legal rights of the parties, and thus is acting "on the merits."

Interpretations of "On the Merits" in Ohio

17. Our conclusion is supported by authority from another state. The Ohio Board of Commissioners on Grievances and Discipline ("Board of Commissioners") in its Opinion 2005-5 (2005) held that "a divorce or dissolution and any subsequent post-decree matters (such as a modification of child custody, parenting time, child support or defending or initiating a contempt order to enforce a prior court order) are the same matter for purposes of DR 9-101(A) [the predecessor to Rule 1.12]." The Board of Commissioners concluded that it was "improper under DR 9-101(A) of the Ohio Code of Professional Responsibility for a former magistrate, now privately practicing law, to represent a person in post-decree matters (such as modifying child custody, parenting time, or child support, or defending or initiating a contempt order to enforce a prior court order) when he or she served as magistrate in the person's original divorce or dissolution action." After noting that "the words 'matter' or 'merits' were not defined in the Ohio Code of Professional Responsibility," the Board of Commissioners turned to Ohio caselaw. In *Disciplinary Counsel v. Christ*, 74 Ohio St.3d 308 (1996), a former judge had received a public reprimand for violating DR 9-101(A) when, seven years after granting an uncontested divorce as judge, he privately represented one of the parties to the divorce, filing a Motion to Modify Parental Rights and Responsibilities on the client's behalf. When he was charged with violating DR 9-101(A), the former judge argued that his judicial involvement in the uncontested divorce had been limited to signing the final judgment, an act which the judge considered "perfunctory" rather than "on the merits." However, the Board of Commissioners concluded that the judge had violated DR 9-101(A) because he "did act in his official capacity as a judge, [he] signed the entry, and . . . seven years later [he] represented one of the litigants in a . . . Motion to Modify custody in the same case." Id at 309.

18. Although the Ohio Code of Professional Responsibility has been superseded by the Ohio Rules of Professional Conduct, Opinion 2005-5 is instructive because the language under the Ohio DR 9-101(A) is substantively identical to the language in New York Rule 1.12(a): "A lawyer shall not accept private employment in a matter upon the merits of which he (she) has acted in a judicial capacity."

Screening the Former Judge to Avoid Imputed Disqualification

19. If Rule 1.12(a) disqualifies a former judge from representing a private client, the other lawyers in the firm may nevertheless work on the matter if they are properly screened pursuant to Rule 1.12(d). Rule 1.12(d) provides as follows:

> (d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> (1) the firm acts promptly and reasonably to:
>
> (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
>
> (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;
>
> (iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and
>
> (iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and
>
> (2) there are no other circumstances in the particular representation that create an appearance of impropriety.

In order for the former judge's firm not to be disqualified, the firm must timely and effectively screen the former judge pursuant to Rule 1.12(d)(1), and must also consider whether the circumstances give rise to any appearance of impropriety pursuant to Rule 1.12(d)(2).

20. Whether the inquirer would violate the Code of Judicial Conduct or any applicable statutes and regulations is beyond the jurisdiction of this Committee. We therefore do not discuss requirements in any of those sources that might apply to the inquiry here.

CONCLUSION:

21. A lawyer who is a former family court judge is prohibited by Rule 1.12(a) from privately representing a client in a permanent neglect action when the same client appeared before the judge in a

previous neglect action and the judge issued an order "upon the merits" to put the subject child in foster care. For the same reason, the former judge is prohibited by Rule 1.12(a) from privately representing a client in a proceeding to modify child support when, as a judge, he or she issued orders upon the merits related to custody and visitation in the same matter and custody and visitation issues will be revisited as part of the application to amend child support. A conflict arising under Rule 1.12(a) cannot be waived even with consent of all parties. However, the Rule 1.12(a) conflict is not imputed to other members of the lawyer's firm if the firm acts promptly and reasonably to implement certain screening measures and no other circumstances in the particular representation create an appearance of impropriety.

(21-15)

OPINION 1065 (07/10/2015)

TOPIC: Imputed Conflicts of Interest; Part-time Prosecutor

DIGEST: The law firm of a part-time prosecutor for Town may represent a client in an Article 78 proceeding against Village, involving actions of Village zoning board or Village planning board, where (i) the Town and Village are separate legal entities and have separate legal departments, (ii) the Town Attorney and his or her staff, including the part-time prosecutor, have no responsibility for prosecuting Village zoning and planning laws, and (iii) the proceeding would not involve Village law enforcement personnel, even though the Town and Village courts have been merged and the Village provides police protection services to both the Village and Town.

RULES: 1.7(a), 1.10(a), 1.11(f)

FACTS:

1. The inquirer is an attorney in private practice and a part-time Deputy Town Attorney. As Deputy Town Attorney, his duties include prosecuting violations of the Town Code and Vehicle and Traffic Law (including prosecuting traffic violations written primarily by the Village police force), assisting the Town Council in drafting and interpreting its statutes, and providing legal advice to the Town. The Village has its own Village Prosecutor who is responsible for prosecuting Village zoning laws, building codes and the Village Code, and is supervised by Corporation Counsel. The Town's attorneys, including inquirer, have no responsibilities relating to Village zoning or planning laws. The scope of the Village Prosecutor's work on behalf of the Village is entirely distinct from the scope of the Town Attorney's work on behalf of the Town, and the Town and Village are distinct legal entities. However, the Town and Village have an inter-municipal agreement, which has, in effect, merged the Town and Village courts, and under another such agreement the Village provides police protection services to the Village and Town.

2. The inquirer's firm was asked to represent an individual in an Article 78 proceeding against the Village based upon allegedly improper actions taken by the zoning board or the planning board. The inquirer asks if there is any conflict of interest in his firm's representation of the plaintiff against the Village.

QUESTION:

3. May the law firm of a part-time prosecutor for a Town represent a client in an Article 78 proceeding against a Village to challenge actions of the Village zoning board or Village planning board where the town and village are separate legal entities and have separate legal departments and the Town Attorney and his or her staff, including the part-time prosecutor, have no responsibility for prosecuting Village zoning or planning laws, even though the Town and Village courts have been merged and the Village provides police protection services to both the Village and Town?

OPINION:

4. This Committee interprets the New York Rules of Professional Conduct (the "Rules"). We assume for purposes of this opinion that the proposed representation would not violate any applicable

law governing Town officers and their firms. We express no opinion on that issue and urge the inquirer to verify our assumption.

5. Rule 1.7(a) prohibits concurrent representations where a reasonable attorney would conclude that either (1) "the representation will involve the lawyer in representing differing interests" or (2) "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." In addition, while lawyers are associated in a firm none of them may knowingly represent a client when any one of them practicing alone would be prohibited from doing so. Rule 1.10(a). Thus, if the inquirer would be prohibited under Rule 1.7 from representing the new client in a proceeding against the Village because he is a part-time Town prosecutor, then, without the consent of the Town and the private client, the inquirer's conflict would be imputed to all the lawyers in the firm such that no lawyer at the firm could represent this individual in a proceeding against the Village.

6. The threshold question here is whether the firm's representation of an individual in a lawsuit adverse to the Village conflicts with the inquirer's representation of the Town. The inquirer makes clear that the attorneys for the Town represent the Town, not the Village. The Village is represented by a Village Prosecutor who is separately supervised by the Corporation Counsel. Further, the scope of the inquirer's duties as a part-time Town attorney (prosecuting Town Code and Vehicle and Traffic law violations, drafting and interpreting Town statutes, and general legal advice and representation of the Town) are distinct from the duties of the Village Prosecutor (prosecuting violations of Village zoning laws, building codes and the Village Code).

7. We recognize that there may be instances where the inquirer's actions on behalf of the Town may further the interests of the Village or may rely on resources that are shared with Village prosecutors. For example, the inquirer prosecutes traffic violations written primarily by Village Police, and litigates on behalf of the Town in the merged Town and Village courts. Such shared resources alone are not, in our opinion, sufficient to give the inquirer a conflict of interest.

8. However, this Committee has issued many opinions setting conditions on the private practice of law by part-time prosecutors. For example, a part-time prosecutor is prohibited from representing criminal defendants in matters where (i) the lawyer is required to appear before a judicial or other official of the locality he or she publicly represents, (ii) the government unit where the lawyer is employed or one of its ordinances is involved, (iii) the charges are similar to those the lawyer prosecutes or (iv) the investigating officers or law enforcement personnel involved are those with whom the lawyer associates as a prosecutor. See N.Y. State 874 (2011); N.Y. State 544 (1982) and the opinions cited therein.

9. Here, the matter is not a criminal matter. Moreover, the lawyer would not be required to appear before a Town judge or official. See C.P.L.R. § 7804(b) (an Article 78 proceeding "shall be brought in the supreme court in the county specified in subdivision (b) of section 506," with exceptions not applicable here). The governmental unit involved is the Village, and the ordinances involved are those of the Village, not the Town. Moreover, the subject matter is not similar to matters the lawyer prosecutes.

10. In N.Y. State 800 (2006), this Committee concluded that a part-time prosecutor was barred from accepting Family Court appointed counsel assignments where the matters involved investigating officers or law enforcement personnel with whom the lawyer was currently working or had previously worked as a part-time prosecutor, because of the possible effect on the lawyer's professional judgment and on the lawyer's future working relationships with such law enforcement personnel.

11. Following the reasoning of Opinion 800, it would be impermissible for the inquirer to represent a client in a matter in which he is likely to be adverse to law enforcement personnel with whom he had worked or is likely to work in connection with his role as a Town prosecutor, and such a conflict would be non-consentable. Ordinarily, however, we would expect that representing a client in a zoning or planning board matter adverse to the Village would not involve adversity to Village law enforcement personnel. Yet even assuming there is no conflict under Rule 1.7(a), the inquirer is prohibited from using any influence he may have as a public official to influence, or attempt to influence, any tribunal to act in favor of the firm's proposed client. Rule 1.11(f).

12. Assuming that the zoning or planning board matter would not involve adversity to Village law enforcement personnel, representation of the private client and the Town would not involve representation of differing interests, and there is no conflict to impute to other lawyers at the inquirer's firm.

CONCLUSION:

13. The law firm of a part-time prosecutor for Town may represent a client in an Article 78 proceeding against Village, concerning actions taken by Village's zoning board or planning board, where (i) the Town and Village are separate legal entities and have separate legal departments, (ii) the Town Attorney and his or her staff, including the part-time prosecutor, have no responsibility for prosecuting Village zoning laws, and (iii) the proceeding would not involve Village law enforcement personnel, even though the Town and Village courts have, in effect, been merged and the Village provides police protection services to both the Village and Town.

(20-15)

OPINION 1066 (07/13/2015)

TOPIC: Loan to client (making or guaranteeing); legal fees

DIGEST: A lawyer may not guarantee repayment of a loan made to a client for the purpose of paying legal fees.

RULES: 1.8(e)

FACTS:

1. The inquirer represents individuals who are charged with drunk driving offenses. Many of the clients have difficulty obtaining funds to pay the firm's required retainer. The inquirer proposes to introduce each such client to a bank to lend the funds. However, many of the clients' credit scores are too low to qualify for a loan.

QUESTION:

2. May the lawyer's firm guaranty the client's obligation to repay a bank for financing, where the financing was incurred to pay the lawyer's retainer?

OPINION:

3. Rule 1.8(e) of the New York Rules of Professional Conduct (the "Rules") provides: "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client" except as provided in subparagraphs (1) – (3). The rule's three exceptions are discussed below.

4. Traditionally there have been two reasons for prohibiting a lawyer representing a client in connection with contemplated or pending litigation from providing financial assistance to the client: (1) such assistance would encourage clients to pursue lawsuits that might not otherwise be brought, and (2) such assistance gives the lawyer a financial stake in the litigation. *See* Rule 1.8, Cmt. [10]:

> Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses . . . because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts.

5. The first reason for the prohibition derives from the common law of champerty and maintenance, which prohibited lawyers from acquiring an interest in the client's litigation because such interests were thought to breed needless litigation. *See* American Law Institute, Restatement of the Law Governing Lawyers, § 36, Cmt. b. The second is designed to ensure that the lawyer's independent professional judgment on behalf of the client is not affected by a personal stake in the client's

matter. It is not clear that either rationale should apply to criminal defense work. Enabling a criminal defendant to defend himself will not result in litigation that would not otherwise be brought. Moreover, the exceptions to Rule 1.8(e) authorize the lawyer to have a financial stake in the litigation to a certain extent.

6. The first issue raised by the inquiry is whether a criminal case is considered to be "litigation" within the meaning of Rule 1.8(e), which prohibits a lawyer from advancing or guaranteeing financial assistance to a client while representing a client in connection with contemplated or pending litigation.

7. The Rules do not define "litigation." Black's Law Dictionary defines "litigation" as a "contest in a Court of Justice for the for the purpose of enforcing a right." Such a right could include that of the People of the State of New York to prosecute a criminal defendant and the right of the defendant not to be summarily punished. Indeed, Comment [23] to Rule 1.7, in discussing the conflict analysis of representing multiple clients in "litigation" notes among its examples "co-defendants in a criminal case."

8. Rule 1.8(e) contains three exceptions:

> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
>
> (2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and
>
> (3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

9. The first exception allows the lawyer to advance court costs and expenses of litigation the repayment of which may be contingent on the outcome of the matter. We believe this would include advances of expenses in a criminal matter, even if repayment is contingent on the outcome of the matter. Rule 1.5(d)(1) prohibits a lawyer from charging a contingent *fee* for representing a defendant in a criminal matter. As EC 2-20 to the former Code of Professional Responsibility explained, the prohibition resulted from the fact that criminal representation does not create a *res* with which to pay the fee. However, there is no reason to believe that the drafters of Rule 1.8(e)(1) intended to distinguish between civil and criminal matters. Thus we believe that the first exception allows the lawyer to advance court costs and expenses of litigation, whether the client remains liable for them or repayment is contingent on the outcome of the matter.

10. Rule 1.8(e)(1), however, does not authorize a guarantee of such court costs. Although the drafters did not explain the rationale for this omission, the introductory language of the rule clearly prohibits both advances and guarantees, and Rule 1.8(e)(1) permits only advances of court costs and expenses of litigation and does not specifically authorize guarantees of such costs and expenses. The language of the exceptions in Rule 1.8(e) is the same as that contained in Section 488 of the New York Judiciary Law, which generally prohibits a lawyer from giving valuable consideration to any

person as an inducement for hiring the lawyer, except as provided therein. Section 488(2)(c) includes advancing court costs and expenses of litigation on behalf of the client.

11. The second exception applies only in the case of an indigent or pro bono client and the inquiry does not state that the client here is indigent or pro bono.

12. The third exception applies where the fee is a contingency fee, which cannot apply in a criminal matter.

13. Because the introduction to Rule 1.8(e) prohibits a lawyer from advancing or guaranteeing costs and expenses and none of the three exceptions authorizes the guarantee at issue here, the inquirer is prohibited from guaranteeing a loan to the client to pay a bank loan incurred by the lawyer's client to pay the lawyer's fees.

14. If the inquirer helps the client to negotiate a loan from the lender to the client, there are a number of other ethical issues. *See* N.Y. State 769 (2003) (if a proposed transaction with a litigation financing company is legal, the lawyer may represent a client in negotiating and carrying it out); N.Y. State 666 (1994) (lawyer may refer a client to a lender who would provide economic support to the client during the pendency of the case, provided the lawyer had no interest in the lender, received no payment for the referral, and did not compromise client confidentiality in making the referral); N.Y. City 2011-2 (2011) (when client enters into litigation financing arrangement with a third party lender, lawyer must be cognizant of ethical issues, including compromise of confidentiality, waiver of attorney-client privilege and potential impact on lawyer's exercise of independent professional judgment).

CONCLUSION:

15. A lawyer may not guaranty repayment of a loan made to a client for the purpose of paying legal fees.

(4-15)

OPINION 1067 (07/27/2015)

TOPIC: Prospective clients; confidentiality; duty to inform client of material developments

DIGEST: When a person consults with a lawyer in good faith about possible representation in a matter, the lawyer owes a duty of confidentiality pursuant to Rule 1.18(b) with respect to information the lawyer learns in the consultation, absent the prospective client's consent to disclosure or use. Whether the prospective client's identity, the fact of the consultation, and the subject matter of the consultation constitute confidential information turns on whether the information is protected by the attorney-client privilege, on whether disclosure likely would be embarrassing or detrimental to the prospective client, and on whether the prospective client has asked the lawyer not to disclose the information. Whether the consultation precludes or restricts the lawyer from undertaking representation of another client or continuing to represent another client depends on whether the matters are the same or substantially related and on whether the information the lawyer learned from the prospective client could be "significantly harmful" to the prospective client in the matter.

RULES: 1.4(a), 1.6(a), 1.9(c), and 1.18(a)-(d)

FACTS:

1. Inquirer is a small law firm of three named partners X, Y and Z (the "Law Firm") practicing primarily in the fields of estate planning and administration, trusts and elder law, and related fields. Two partners in the firm, X and Y, have long represented a client ("Father") in a variety of matters, including a protracted and vigorously contested Article 81 proceeding brought by Father's adult child ("Child") over the guardianship of Father's wife. That litigation concluded in Father's favor. The firm continues to represent Father. Z, the third named partner in the Law Firm, took no part in the representation of Father in the guardianship proceeding and was not aware of it until the consultation that lies at the center of the inquiry.

2. Some six months after the guardianship proceeding concluded, Child sought a meeting with Z, ostensibly to discuss possible representation in connection with estate planning for Child. Z holds public seminars on elder law and estate planning from time to time and invites members of the audience to schedule a one-hour meeting with him to discuss individual concerns after the seminar. Child apparently was responding to such an invitation.

3. Z apparently did not check for conflicts before discussing the substance of Child's concerns, and Child did not mention until the end of the consultation that the Law Firm had represented Father in a guardianship proceeding in which Child was Father's adversary (*i.e.,* adverse to the Law Firm's client).

4. Without revealing any information beyond the fact that he had met with Child to discuss possible representation, Z then inquired of his partners whether there had been such a guardianship matter. X and Y confirmed that there had been such a matter involving heated and protracted litigation. The three attorneys agreed that, even if there were no conflict with undertaking planning for Child, they should not accept the representation, and they declined it.

QUESTION:

5. Do the New York Rules of Professional Conduct (the "Rules") require the Law Firm to disclose to Father that his Child had sought to retain the Law Firm in connection with a matter unrelated to the Law Firm's representation of Father? Do the Rules permit such disclosure?

6. Under the Rule, does Z's consultation with Child preclude or restrict the Law Firm from continuing to represent Father?

7. Do the Rules require or permit the Law Firm to inform Child's lawyer in the guardianship proceeding ("W") that Child sought to retain the Law Firm for estate planning?

OPINION:

Law Firm's Duties to a Prospective Client

8. Before addressing the Law Firm's obligations and authority with respect to Father and to Child's own lawyer (W), we must first examine the Law Firm's duties to Child, because Child's information is at the center of this inquiry. Unless Child was acting in bad faith when consulting Z concerning the possibility of representation (a possibility discussed below), Child became a "prospective client" of Z and his firm at the outset of that consultation, see Rule 1.18(a), and is thus entitled to some (albeit not all) of the protections that inure to clients in any client-attorney relationship. In particular, a prospective client benefits from the protection of confidential information, Rule 1.18(b), and protection against the lawyer representing another client with interests materially adverse to those of the prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to the prospective client in the matter, Rule 1.18(c).

9. Our discussion of the Law Firm's duties to Child as a prospective client is premised on the assumption that Child was acting in good faith when consulting Z. Had Child communicated information to Z "unilaterally . . . without any reasonable expectation that . . . [Z was] willing to discuss the possibility of forming a client-lawyer relationship; or . . . for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter," Child would not be deemed to be a prospective client and the Law Firm would not owe Child any duties that a lawyer owes to a prospective client. *See* Rule 1.18(e) (describing two categories of people who are not prospective clients).

10. Rule 1.18(a) defines a prospective client as one "who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter."

11. Rule 1.18(b) provides that a lawyer who engages in discussion about possible representation with a prospective client "shall not *use or reveal information learned in the consultation*, except as Rule 1.9 would permit with respect to information of a former client," even if no client-lawyer relationship ensues. [Emphasis added.] Rule 1.9, in turn, provides in pertinent part that a lawyer shall not reveal any "confidential information" of a former client protected by Rule 1.6 except as allowed or required by the Rules with respect to a current client, but Rule 1.9(c) places no restriction upon the revelation or use of non-confidential or "generally known" information. In this regard, it is similar to

Rule 1.6(a) (defining "confidential information" to exclude, among other things, "information that is generally known in the local community or in the trade, field or profession to which the information relates"). Thus, Rule 1.18(b) prohibits a lawyer from using or disclosing prospective client information only if the information is "confidential information" as defined in Rule 1.6, and even then only if the information was "learned in the consultation."

12. Under Rule 1.18(c), a lawyer may also be subject to *conflict of interest rules* with respect to a prospective client:

> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that *could be significantly harmful* to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d) [stating conditions necessary for screening to be effective]. [Emphasis added.]

13. In the remainder of this opinion, we will first discuss the use of a prospective client's confidential information and then discuss whether the consultation with the prospective client creates a conflict of interest.

Identity of Client and Fact of Consultation as Confidential Information

14. In this inquiry, the identity of the prospective client (Child), the fact of Child's consultation with Z about representation, and the general subject matter of the consultation were all "learned [by Z] in the consultation." Are they pieces of confidential information of the prospective client? Applying the definition of "confidential information" in Rule 1.6, information protected by Rule 1.18(b) may be of three types: (i) information "protected by the client-attorney privilege"; (ii) information that is "likely to be embarrassing or detrimental to the [prospective] client if disclosed"; or (iii) "information that the [prospective] client has requested be kept confidential."

15. Whether information is protected by the attorney-client privilege is an issue of law on which we offer no opinion because issues of law are beyond our jurisdiction. For a general discussion of privilege in relation to the identity of a client, the fact of consultation and related matters, see American Law Institute, Restatement of the Law Third, *The Law Governing Lawyers,* §69, *comment g*, and Reporter's Note to *comment g*.

16. Whether use or disclosure of the information concerning the identity of a prospective client, the fact of consultation, and the general subject matter of the consultation would be embarrassing or detrimental to the prospective client, and whether the prospective client has requested or been assured by the lawyer of confidentiality with respect to such information, are questions dependent upon the relevant facts and circumstances. We cannot answer such questions in a particular case. Each lawyer confronted with the issue of whether the identity of a prospective client, the fact of a consultation concerning possible representation, the general subject matter of the representation and like information

is confidential will need to make his or her own judgment based on whether the relevant facts satisfy the criteria defining confidentiality.

17. However, if Z concludes that information about Child's identity, consultation with Z about possible representation, and the general subject matter of that consultation, fits under any of the rubrics of confidential information, then Z and, by extension, the other lawyers associated with the Law Firm, are duty bound under the Rules not to disclose such information in whole or in part. We are unable to conclude on the basis of the inquiry that any exception to the general rule of confidentiality contained in Rule 1.6 is applicable to the information at issue in this inquiry.[40]

Law Firm's Disclosure Obligations to its Existing Client

18. We turn now to whether the Law Firm has any disclosure obligations to its client, Father. If the information concerning Child's consultation is ***not*** confidential, the Law Firm may, at will, share that information with Father. Rule 1.6(a) – and the derivative Rules 1.9(c) and 1.18(b) – prohibit a lawyer from using or revealing only "confidential information" as defined in Rule 1.6(a). Those Rules do not govern information that is not confidential.

19. A more difficult question is what the Law Firm must do if any of the information disclosed by Child during the consultation ***is*** confidential information. If any of it is confidential information, then the inquirer must determine whether any of Child's confidential information would be material to the representation of Father in the matter in which the Firm represents or comes to represent Father. Rule 1.4(a)(1)(iii) obligates a lawyer to inform the client of "material developments in the matter." As the City Bar ethics committee stated in N.Y. City 2005-2 (2005), one client does not have any legitimate expectation that the lawyer will use confidential information of a second client for the benefit of the first client. However, if the information the lawyer has from the second client is so material to the matter in which the firm represents the first client that the lawyer cannot avoid using the information, then the firm will be faced with a dilemma. Here, the firm would have an obligation of confidentiality to the Child under Rule 1.18 with respect to material information that the Law Firm is required under Rule 1.4 to disclose to Father.

20. If, as stated in the Inquiry, the matter upon which Child consulted Z is, in fact, unrelated to the representation of Father, then the information learned by Z in the consultation is unlikely to be material to matters within the scope of the Law Firm's representation of Father, and the Law Firm would have no obligation under the Rules to inform Father of Child's consultation and the representation of the Father would not be affected.

40 Rule 1.6(a)(1) authorizes disclosure or use when the client has given informed consent. Some lawyers routinely ask prospective clients who are exploring the possibility of an engagement to agree to an advance waiver of any conflict that might result from the prospective client sharing confidential information. See Rule 1.7, Cmts. [22]-[22A] (discussing circumstances making it more or less likely that an advance conflict waiver will be deemed valid and effective). *See also* N.Y. City 2006-2 (2006) (discussing advance conflict waivers, imputation of conflicts and ethical screens under the former Code of Professional Responsibility); Rule 1.18, Cmt. [5] (lawyer may condition conversations with a prospective client on the person's informed consent (i) that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter and (ii) that the lawyer may subsequently use information received from the prospective client). Such an advance waiver apparently does not exist here – and even if it did, an advance waiver of conflicts of interest would not necessarily constitute advance consent to disclosure of confidential information to a conflicting client.

Law Firm's Disclosure Obligations to Prospective Client's Lawyer

21. With respect to Child's lawyer (W), the Law Firm has no duty of disclosure. Indeed, if disclosure would undermine Child's relationship with W, then the information would be confidential because disclosure would be detrimental or embarrassing to Child. If the information is confidential, Rule 1.18(b) prohibits the Law Firm from disclosing it to W without Child's informed consent.

Conflicts of Interest Between Prospective Client and Existing Client

22. As noted above, Rule 1.18(c) would apply if (i) the Firm represents or comes to represent the Father in a matter that is the same as, or substantially related to, the matter about which Child sought representation, (ii) the interests of Child in that matter are "materially adverse" to those of Father in the matter in which the Firm represents (or comes to represent) him, and (iii) the information Z obtained from Child in the consultation could be "significantly harmful" to Child in the matter. *See* N.Y. State 960 (2013) (discussing the meaning of "materially adverse," "substantially related" and "significantly harmful.")

23. Here, the Firm has represented Father in connection with a guardianship proceeding with respect to the Father's wife. The Child apparently sought representation in connection with the Child's own estate planning. Clearly the representations do not concern the same matter. The question is whether a reasonable lawyer would conclude that there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation [in this case, Z's consultation with Child] would materially advance the position of the client [in this case, Father] in the subsequent matter [in this case, the Firm's continuing representation of Father].

24. In N.Y. State 960 (2013), the inquirer had met with a prospective client who had recently purchased a home to discuss filing suit against the seller over substantial structural damage throughout the home, which required repairs by a contractor. Although the prospective client did not hire the lawyer, the contractor later sought to hire the lawyer to bring a lawsuit against the homeowner for the balance due for the repair work. We concluded that the facts presented did not enable us to determine whether any confidences received from the homeowner in the initial consultation were relevant to the contractor's claim for non-payment or to any potential counterclaim by the homeowner against the contractor. Here, since Child was consulting Z about estate planning, it seems less likely that Child would have imparted confidences relevant to the Firm's representation of Father. However, the relevance of confidences imparted by Child are a factual question that is beyond the jurisdiction of this Committee and can only be made by Z.

25. If the interests of Child in any matters in which the Firm represents Father are materially adverse to those of Father, the question under Rule 1.18 is whether the information Z obtained from Child in the consultation could be "significantly harmful" to Child in the matter. We pointed out in N.Y. State 960 (2013) that, even if confidential information obtained by the lawyer in the consultation by the prospective client is somewhat harmful to the prospective client, the information does not disqualify the lawyer from representation against the prospective client. As Professor Simon notes:

> The "significantly harmful" qualification is a radical twist. Whereas a lawyer must not oppose a former actual client in a substantially related matter without obtaining the

> former client's informed consent, a lawyer may oppose a former prospective client in a substantially related matter without even seeking the former client's consent as long as the lawyer did not receive information from the prospective client that "could be significantly harmful to that person in the matter." Under Rule 1.9(a), we presume – almost irrebuttably – that a lawyer who formerly represented a client received information from the former client that "could be significantly harmful" to that person in any substantially related matter. Under Rule 1.18(c), we reject that presumption and turn it into a question, an "if" clause, a rebuttable presumption.

Simon's New York Rules of Professional Conduct Annotated 954 (2015 ed.). As in the case of whether the prospective client imparted relevant factual information, the degree of harmfulness of such information is a factual question beyond the jurisdiction of this Committee.

CONCLUSION:

26. When a person consults with a lawyer in good faith about possible representation in a matter, the lawyer owes a duty of confidentiality pursuant to Rule 1.18(b) with respect to information the lawyer learns in the consultation, absent the prospective client's consent to disclosure or use. Whether the prospective client's identity, the fact of the consultation, and the subject matter of the consultation constitute confidential information turns on whether the information is protected by the attorney-client privilege, on whether disclosure likely would be embarrassing or detrimental to the prospective client, and on whether the prospective client has asked the lawyer not to disclose the information. Here, if the Child's consultation with the Law Firm was unrelated to the Law Firm's representation of the Father, then the information learned from Child is unlikely to be material to the firm's representation of Father, but this is a factual determination that can be made only by the lawyer. In that case, the firm would have no obligation to disclose it (and, if it is confidential to Child, no ability to do so without the consent of Child). Moreover, if the information is confidential to Child, then the Law Firm has no obligation to disclose it to Child's lawyer in an unrelated matter, or the ability to do so without the consent of Child. Whether the consultation precludes or restricts the lawyer from undertaking representation of another client or continuing to represent another client depends on whether the matters are the same or substantially related and on whether the information the lawyer learned from the prospective client could be "significantly harmful" to the prospective client in the matter.

(17-15)

OPINION 1068 (08/10/2015)

TOPIC: Aiding Unauthorized Practice of Law; Accepting Referrals from Nonlawyers; Fee-Splitting

DIGEST: Lawyer may not join with a claims recovery firm in an agreement to offer legal services to the public to be performed by the lawyer and by the claims recovery firm if it is to be done on a systematic and continuing basis, because claims recovery firms are not on the Appellate Division list of approved nonlegal professionals within the meaning of Rule 5.8. Even if the relationship is a "non-exclusive reciprocal referral agreement" within the meaning of Rule 5.8(c), the lawyer must ensure that the relationship does not interfere with the lawyer's independent professional judgment, does not involve improper solicitation of clients, does not involve aiding in the unauthorized practice of law, and does not involve the improper sharing of legal fees. Lawyer may share in contingent fee paid by client to lawyer and nonlawyer but only if (i) the nonlawyer provides substantial assistance in the proceedings (*i.e*. does not merely sign up clients and pass them on to the lawyer), (ii) the nonlawyer's compensation is commensurate with the nonlawyer's services, and (iii) the lawyer's fee is also commensurate with the lawyer's services (*i.e*. is not reduced so that the reduction is in effect a referral fee to the nonlawyer).

RULES: 1.0(j), 1.2, 1.4(a), 1.5(a), 5.4(a), (b) & (c), 5.5(b), 5.8(a), 7.2, 8.4(a)

FACTS:

1. A nonlawyer claims recovery firm (the "Claims Recovery Firm") seeks out and provides assistance to businesses that potentially are entitled to class action recoveries based on class actions that have already been settled or otherwise resolved.-

2. After a settlement has been announced, the Claims Recovery Firm provides multiple services. It identifies potential class members and contacts them to make them aware of the settlement. It enters into an agreement with each client and helps the clients assure that all of their eligible business units participate in the claims process. It gives advice to its clients on the documents required in the claims process. When required documents are not available, it negotiates with the claims administrator to use alternative documentation. It prepares, assembles, and submits the client claim packages and documentation. It works with the clients to address any questions raised by claims administrators, and provides responses to the claims administrators. It monitors the claims process and keeps its clients advised with updates on the recovery process and its developments. Upon receipt of payments, it performs an audit to ensure that the payments have not been under-calculated. Finally, it follows up with clients to assure the recovery checks have been deposited. For all these services, the claims recovery firm receives a contingent commission of 33%, which the inquirer believes is "industry-standard" for such services.

3. Under the inquiry here, in the course of identifying class-action settlement recovery opportunities for its clients and potential clients, the Claims Recovery Firm has identified what it believes may be colorable antitrust damages claims, and it proposes to assist its clients in making those claims. It would engage in activities similar to the services it provides in the class action claims context. It would enter into a written agreement with each client under which the Claims Recovery Firm would (1) act as an agent for the antitrust claimant to engage legal counsel (including, perhaps exclusively,

the inquirer here) to represent the client, (2) provide services in connection with the antitrust claim, including gathering client documents relevant to analyzing the potential damages sustained as a result of the alleged antitrust violations, (3) receive a contingent commission of one-third of the client's recovery, and (4) pay the law firm's fees, which would be a percentage of the Claims Recovery Firm's contingent commission.

QUESTION:

4. May a lawyer enter into an arrangement with a nonlawyer Claims Recovery Firm in which the Claims Recovery Firm (i) hires the lawyer to represent a client corporation to bring an antitrust claim, (ii) receives a one-third contingent commission out of any recovery, and (iii) pays the lawyer a portion of its commission?

OPINION:

5. Our prior opinions have identified a number of concerns with similar relationships between a lawyer and a nonlawyer firm in the provision of legal services, sometimes known as "multi-disciplinary practice." These issues include compliance with Rule 5.8(a) and the potential for (1) interference with the lawyer-client relationship; (2) improper solicitation of legal business; (3) aiding a nonlawyer in the unauthorized practice of law; and (4) improper sharing legal fees between a lawyer and a nonlawyer. We will analyze each of these potential issues here.

Multi-Disciplinary Practice

6. First, we review the proposed relationship between the Claims Recovery Firm and the law firm. As proposed, the claims recovery firm will refer the client to the law firm and play an essential role in various steps of the representation, subject to an agreement about the respective work obligations and the sharing of a contingent fee of a percentage of the recovery. The inquiry suggests that this will occur for more than one client, that is, it may be conducted on a systematic or continuing basis.

7. Rule 5.8(a) of the New York Rules of Professional Conduct (the "Rules") prohibits "a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services," unless:

> (1) *the profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules;*
>
> (2) the lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm, nor, as provided in Rule 7.2(a)(1), shares legal fees with a nonlawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral; and

> (3) the fact that the contractual relationship exists is disclosed by the lawyer or law firm to any client of the lawyer or law firm before the client is referred to the nonlegal professional service firm, or to any client of the nonlegal professional service firm before that client receives legal services from the lawyer or law firm. . . . [Emphasis added.]

8. The second paragraph of Rule 5.8(a)explains that "[m]ulti-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values." Nevertheless, under the three conditions set forth in Rule 5.8(a) and set forth above, a lawyer may have a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services. The first such condition is that the profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions. Claims recovery firms are not included on the Appellate Division list. Consequently, an exclusive relationship with a claims recovery firm is prohibited by Rule 5.8(a). *See* N.Y. State 992 (2013) (lawyer may not effectively form a partnership with a nonlawyer disability office[41]); N.Y. State. 976 (2013) (lawyer may not enter into an exclusive contractual agreement with a marketing company to provide clients with a forensic mortgage analysis, to pay for referred clients, or to share legal fees); N.Y. State 930 (2012) (lawyer may not enter into an exclusive contractual arrangement with an insurance agency under which the agency would offer its customers both legal and nonlegal services, even if the agency and lawyers are separately paid and do not share in each other's fees, because insurance agencies are not on the professional service provider firms listed under Section 1205.3).

9. Under Rule 5.8(c), however, Rule 5.8(a) does not apply to relationships consisting solely of "non-exclusive reciprocal referral agreements or undertakings" between a lawyer and a nonlegal professional or nonlegal professional services firm. Although this does not seem to be such a relationship, we do not have sufficient facts to rule it out. We have previously opined that a lawyer may enter into a non-exclusive reciprocal referral agreement with a nonlawyer whose profession is not on the list in Section 1205.3. Nevertheless, the issues identified in the opinions cited in paragraph 5 above may apply to such non-exclusive referral relationships.

Interference with the Lawyer-Client Relationship

10. Rule 5.8(a) stresses that one of the reasons for the limitations on multi-disciplinary practice is the risk that it will undermine the tradition of complete professional independence and uncompromised loyalty of lawyers to their clients ("a lawyer must remain completely responsible for his or her own independent professional judgment). This principle is also reflected in Rule 5.4 (Professional Independence of a Lawyer). Rue 5.4(c) warns "Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render services for another to direct or regulate the lawyer's professional judgment in rendering such legal services . . . ." Thus, our prior opinions on multi-disciplinary practice stress the importance of the nonlawyer not imposing conditions on the

41 Rule 5.4(b) prohibits a lawyer from forming a partnership with a nonlawyer for the purpose of engaging in the practice of law.

representation that would require the lawyer to compromise his or her exercise of independent professional judgment on behalf of the client. *See* N.Y. State 705 (1998).

Improper Solicitation of Legal Business

11. One of the concerns when a lawyer has a relationship with a nonlawyer is that the nonlawyer will engage in improper solicitation of the lawyer's services. A lawyer may not allow, assist, or induce a nonlawyer to engage in conduct that the lawyer could not engage in directly. Rule 8.4(a). Thus, since a lawyer may not engage in in-person solicitation of a non-client, so a lawyer may not allow, induce, or assist a nonlawyer to engage in in-person solicitation of business for the lawyer. *See* N.Y. State 885 ¶ 12 (2011). In N.Y. State 885, we said:

> Non-attorneys are not subject to the New York Rules of Professional Conduct, but a lawyer cannot circumvent either the solicitation or the advertising rules through the indirect use of the nonlawyer's communications. *See* Rule 8.4(a) ("A lawyer or law firm shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or *do so through the acts of another* . . ." (Emphasis added.) For example, if the lawyer had control over the non-attorney or control over the solicitation or advertising, the lawyer might be said to be accomplishing through indirect means what the lawyer could not accomplish directly. The level of control the attorney has depends on many factors, including the amount of business the attorney conducts with the non-attorney and any other connections between the two.

12. The inquirer argues that the arrangement with the recovery agent here is similar to that of an insurer, which engages law firms to represent policyholders. However, the relationship between insurance companies and the lawyers for their insureds has long been authorized by New York's ethics rules because the insurance company is liable under the insurance policy and the insured, under the insurance policy, has expressly authorized the insurer to hire counsel on the insured's behalf to defend covered claims. *See* N.Y. State 73 (1968) (the assured is the client of the retained attorney and the attorney is obligated to represent him with undivided fidelity regardless of the fact that his fee for legal services is being paid by the insurance company); N.Y. State 109 (a lawyer employed by an insurance company is not violating the spirit or the letter of the provisions of Canons 6 and 35 (pre-1970 predecessors to the Rules concerning conflicting interests and intermediaries); N.Y. State 716 (1999) (when a lawyer defends a policyholder in civil litigation, the client is the policyholder, not the insurance company, even though the insurance company has retained the lawyer pursuant to its contractual duty to defend the policyholder).

13. With respect to solicitation, the lawyer is authorized to accept a retainer from an insurance company under Rule 7.2(b), which authorizes a lawyer to be recommended, employed or paid by a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, as long as certain specified conditions are satisfied. Two conditions are that (i) the lawyer must treat the member or beneficiary to whom the legal services are furnished, and not the organization, as the client, and (ii) the legal service plan must provide appropriate relief for any member or beneficiary who believes that representation by the counsel furnished by the organization would be unethical. Although the Comments to this Rule refer only to prepaid legal service plans and group

legal plans, the rule by its terms applies to counsel furnished by insurance companies to its beneficiaries. *See also* Rule 1.8, Comment [11].

Aiding in the Unauthorized Practice of Law

14. Rule 5.5(b), which is closely related to Rule 5.8, provides that a lawyer may not aid a nonlawyer in the unauthorized practice of law. The Claims Recovery Firm here, like any business owned by a nonlawyer, is considered a "nonlawyer" with the meaning of Rule 5.5(b).

15. Whether particular conduct constitutes the unauthorized practice of law, which is a crime in New York, is a legal question. *See* Rule 5.5, Cmt. [2] (definition of "practice of law" is established by law); Judiciary Law §485-a (making certain violations of §§ 478, 474, 486 and 495 a class E felony); Judiciary Law § 495 (No corporation or voluntary association shall (i) practice or appear as an attorney-at-law for any person in any court in this state, (ii) hold itself out to the public as being entitled to practice law, or (iii) furnish attorneys or counsel); Judiciary Law § 478 (unlawful for any natural person (i) to practice or appear as an attorney-at-law in a court of record in this state, (ii) to furnish attorneys or to render legal services, or (iii) to hold himself out in such manner as to convey the impression that he or she either alone or together with any other persons maintains a law office); § 484 (no natural person shall ask or receive compensation for preparing pleadings of any kind in any action brought before any court of record in this state).

16. We do not interpret statutes, so we do not express opinions on what constitutes the unauthorized practice of law. This Committee limits itself to interpreting the Rules of Professional Conduct. When judging whether a lawyer is aiding someone in the unauthorized practice of law, we look at the lawyer's conduct, not the nonlawyer's conduct. Thus, we do not express any opinion on whether the Claims Recovery Firm's conduct would be unauthorized practice of law, either in the class action setting where the firm handles post-liability claims or in the antitrust setting, where the claims recovery firm proposes to identify potential antitrust claims, to engage counsel for the client, and perform other services. However, in our view the activities of the Claims Recovery Firm, particularly in identifying potential antitrust claims, raise serious questions about unauthorized practice of law, and the inquirer should consider them carefully. If the Claims Recovery Firm's activities would constitute the unauthorized practice of law, then there is a question of whether the lawyer's conduct would "aid" the unauthorized practice of law. We conclude that it would.

17. Opinions of this Committee on aiding the unauthorized practice of law have focused on the extent to which the lawyer facilitates the activities of the intermediary. Some opinions have approved the intermediary's role as long as certain conditions are met. In N.Y. State 705 (1998), for example, a nonlawyer tax reduction company's role was to represent property owners in legal proceedings for property tax relief, and to obtain the property owner's written authorization for the tax reduction company to engage counsel to represent the property owner if the first stage of proceedings did not produce a sufficient tax reduction. We held that a lawyer was not barred from accepting an engagement from the tax reduction company pursuant to the property owner's authorization as long as (i) the lawyer's client is the property owner, not the tax reduction company, (ii) the company does not impose conditions on the representation that would require compromising the lawyer's exercise of independent professional judgment on behalf of the property owner, (iii) the property owner, and not the com-

pany, makes decisions affecting the merits of the cause, such as whether to settle the action,[42] (iv) the lawyer, not the tax reduction company, makes those decisions that are for the lawyer's determination in the handling of a legal matter, and (v) the arrangement with the tax reduction company does not involve improper solicitation or fee-splitting. Similarly, in N.Y. State 885 (2011), we opined that a lawyer may accept referrals from a nonlawyer property tax reduction firm, but must be retained by the client, not by the tax reduction company. We expressed concern that Section 495(d) of the Judiciary Law (prohibiting the "furnishing" of attorneys or counsel) would prohibit a lawyer from being retained by the non-attorney to provide services to the property owner.

18. Other opinions analyzing the role of an intermediary between lawyers and clients have also warned that a lawyer might be aiding in unauthorized practice. *See* N.Y. State 976 (2013) (nonlawyer business would provide lien services, including a "forensic" analysis to determine whether clients had legal claims, in which case, they would be referred to the law firm; Committee warns that Company's activities are sufficiently near the borders of legal practice that law firm "should reflect on these matters"); N.Y. State 957 (2013) (nonprofit credit counseling agency proposed to offer legal services programs including filing for bankruptcy protection and advising seniors concerning whether they should join supplemental needs pooled income trusts; Committee warns that if agency is providing legal services, lawyer would be assisting it in the authorized practice of law); N.Y. City 2014-1 (2014) (to determine whether the nonlegal organization is engaged in the unauthorized practice of law, the lawyer would need to evaluate the types of services it provides to its clients in light of the relevant legal authorities that define what it means to engage in the practice of law; if the nonlegal organization is engaged in the unauthorized practice of law, the lawyer's involvement in the contemplated relationship would likely violate Rule 5.5(b)). *See also In re Lefkowitz*, 47 A.D.3d 326 (lst Dep't 2007) (attorney aided the unauthorized practice of law by representing immigration clients at hearings and interviews where (1) lawyer was paid by nonlawyer entity to represent clients; (2) nonlawyer entity prepared the immigration applications and had the "primary financial and substantial relationship with" the clients; and (3) the work done by the nonlawyer entity "involved some legal analysis").

19. In essence, our litmus test under Rule 5.5(b) is whether a lawyer provides substantial assistance to the nonlawyer engaging in unauthorized practice. See N.Y. State 809 (2007) ("aid" requires a purpose and intent to *substantially* assist or cause another to commit an act that constitutes the unauthorized practice of law, as opposed to doing something for one's own purposes that *incidentally* permits the other person to commit that act); N.Y. State 705 (1998) (law firm may be "aid[ing] a nonlawyer in the unauthorized practice of law" if its willingness to accept referrals from a tax reduction company on a regular basis may aid the company's business by giving it assurance that, if a grievance is denied, the company will be able to engage counsel to represent the property owner in

42 The Rules of Professional Conduct provide for independence in the lawyer's professional judgment and control of the lawyer's work by the client; third parties are not permitted to invade either role. Thus, it is for the client and lawyer alone to determine whether a claim should be brought and how; the lawyer may not permit third parties to affect the lawyer's professional judgment. "A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6." Rule 5.4(c). The lawyer must abide the "*client's* decisions concerning the objectives of the representation," and "shall abide a *client's* decisions whether to settle a matter." Rule 1.2 (emphasis added). The lawyer is bound to inform the *client* of any "decision or circumstance with respect to which the client's informed consent as defined in Rule 1.0(j) is required by these Rules; any information required by court rule or other law to be communicated to a client; and material developments in the matter including settlement . . . ." Rule 1.4(a)(1) (emphasis added). The lawyer is required to "consult with the *client* about the means by which the client's objectives are to be accomplished and keep the client reasonably informed about the status of the matter." Rule 1.4(a)(2) and (3) (emphasis added).

Supreme Court proceedings, which may be integral to the company's ability to solicit clients or otherwise to do business).

20. If this were merely a "one-off" referral where the inquirer assumed complete control of the engagement upon receiving the referral, and if the lawyer had an attorney-client relationship only with the referred client, not the claims recovery firm, then there would not be a violation of Rule 5.5. However, if the Claims Recovery Firm's conduct constitutes the unauthorized practice of law, then the lawyer's proposed relationship with the Claims Recovery Firm here would violate Rule 5.5(b). It appears the Claims Recovery Firm's actions would not be possible here absent the active participation of a lawyer. More than merely making the referral, the nonlawyer would provide significant services in connection with handling the legal matter. The lawyer's proposed conduct here would thus cross the line into aiding the Claim Recovery Firm's conduct in violation of Rule 5.5(b).

Fee Splitting with a Nonlawyer

21. Our third concern is potential fee-splitting with a nonlawyer. With three exceptions not applicable here, Rule 5.4(a) states that a "lawyer or law firm shall not share legal fees with a nonlawyer." Our prior opinions regarding fee sharing in situations resembling the one here reach varying results.

22. In N.Y. State 705 (1998), we concluded that a lawyer "may enter into an agreement to represent the property owner for a fee that is paid by the [nonlawyer] agency from funds obtained from the client if the lawyer' fee is allocable to the lawyer's services." We said it followed that "if the lawyer may receive a fee contingent on the amount by which taxes are reduced, the lawyer may receive a fee that is a percentage of the tax reduction company's fee, where that fee is itself a percentage of the amount by which taxes are reduced."

23. In N.Y. State 698 (1998), in contrast, we said that an attorney may not accept a referral of a medical malpractice case from a medical consultant if the consultant required the attorney to agree to a contingent consultant's fee in addition to the attorney's fee (*i.e.,* required the attorney to hire the medical consultant) as a precondition to the referral. The consultant proposed to assist in evaluating and preparing the case, and would charge more than the lawyer's regular consultant, who charged on an hourly basis. We held that this "package deal" violated the rules requiring the lawyer's independence in matters of professional judgment and was a payment for referral. We also stressed the importance of informing the client about the fee arrangement with the medical consultant and the availability of lower-cost alternatives. We cautioned that the lawyer might be obligated to reduce his own fee to avoid charging an excessive fee or unreasonable expenses to the client (which was subject to a statutory limit on medical malpractice fees).

24. A "package deal" may or may not result in charging an excessive fee, but the lawyer cannot reduce the lawyer's normal fee if doing so would be equivalent to paying for a referral. In N.Y. State 885, we opined that an attorney may not reduce the fees the lawyer would ordinarily be paid as part of an arrangement to accept referrals from a nonlawyer who would perform some services if the funds to be received by the nonlawyer significantly exceeded the value of the services actually performed. In essence, the nonlawyer's compensation was an improper fee for the referral, which was prohibited by Rule 7.2(b). Just as a lawyer could not collect a full fee and share part of it with the nonlawyer, so the lawyer could not reduce the fee to free up funds for the client to pay the nonlawyer unless the nonlaw-

yer was performing services worth the amount of the reduced fee. *See* N.Y. State 705 (1998), *citing* Kenneth L. Gartner, "Acceptance of Referrals from Non-Attorney Firms," 217 N.Y.L.J. 1, 4 (Mar. 25, 1997) (ethics rules do not permit lawyers to accept referrals from nonlawyers who are "signing up clients and passing them on to lawyers, with a fee skimmed off the top").

25. If the Claims Recovery Firm provides substantial assistance in the proceedings and the compensation of the Claims Recovery Firm is commensurate with the services it provides, then the lawyer would not be sharing legal fees with a nonlawyer in violation of Rule 5.4(a) even if the lawyer reduces his fee by the amount of the Claims Recovery Firm's compensation. Likewise, if the Claims Recovery Firm's compensation does not exceed the reasonable value of its services, then the lawyer would not be paying a prohibited referral fee and thus would not be violating Rule 7.2(b). Of course, regardless of the nonlawyer's compensation, the fee for the lawyer's services, whether calculated based on an hourly fee, a contingent fee, or some other formula, and expenses must not be excessive when analyzed using the criteria set forth in Rule 1.5(a). If the client will be compensating the Claims Recovery Firm for services that the lawyer would ordinarily be expected to perform, and if the lawyer is charging a contingent or other non-hourly fee, then the lawyer may have to reduce his fee to avoid an excessive fee. *See* N.Y. State 885 ("This is especially so where some of the consultant's services may involve work that 'the lawyer himself is professionally obligated to do at no extra cost to the client'"). A lawyer cannot simultaneously charge a full contingent or flat fee and slough off work to a nonlawyer who is also charging for those services.

CONCLUSION:

26. A lawyer may not join with a claims recovery firm in an agreement to offer legal services to the public to be performed by the lawyer and by the claims recovery firm if it is to be done on a systematic and continuing basis, because claims recovery firms are not on the Appellate Division list of approved nonlegal professionals within the meaning of Rule 5.8. Even if the relationship is a "non-exclusive reciprocal referral agreement" within the meaning of Rule 5.8(c), the lawyer must ensure that the relationship does not interfere with the lawyer's independent professional judgment, does not involve improper solicitation of clients, does not involve aiding in the unauthorized practice of law, and does not involve the improper sharing of legal fees. The lawyer may share in a contingent fee paid by the client to the lawyer and nonlawyer but only if (i) the nonlawyer provides substantial assistance in the proceedings (*i.e*. does not merely sign up clients and pass them on to the lawyer), (ii) the nonlawyer's compensation is commensurate with the nonlawyer's services, and (iii) the lawyer's fee is also commensurate with the lawyer's services (*i.e*. is not reduced so that the reduction is in effect a referral fee to the nonlawyer).

(46-14)

OPINION 1069 (08/19/2015)

TOPIC: Conflict of interest; simultaneous representation.

DIGEST: Despite the potential for conflict, a lawyer who represents an immigrant child in federal administrative removal proceedings may simultaneously represent the proposed guardian in a state family court proceeding provided that the lawyer reasonably believes he can competently and diligently represent both clients simultaneously, and the lawyer obtains informed consent from each client, confirmed in writing. The lawyer may accept the consent of the child if the lawyer believes (i) the child has the capacity to understand the conflict and to make a reasoned decision to consent, and (ii) the consent is voluntary. While there is no particular age when a child may be said to have such capacity, verbal children aged 12 and older will generally be capable of making such reasoned decisions after the lawyer makes full disclosure of the material risks and reasonably available alternatives.

RULES: 1.0(e), (f) & (j), 1.7(a) & (b), 1.14, 4.2, 4.3

MODIFIES: N.Y. State 274 (1972), N.Y. State 256 (1972)

FACTS:

1. A lawyer represents an immigrant child (the "child") in administrative removal proceedings before a federal Immigration Judge in New York. The object of this representation is to prevent the child from being deported to the child's country of origin.

2. To prevent the child's deportation, the lawyer is assisting the child in pursuing a form of relief from removal known as Special Immigrant Juvenile Status ("SIJS"), defined under 8 U.S.C. § 1101(a)(27)(J)(i)-(iii)(2009).[43] The statute provides that an immigrant who is present in the United States and is under the age of 21 and unmarried can achieve lawful permanent residency by fulfilling the following requirements:

- the immigrant has been declared dependent on a juvenile court located in the United States;
- administrative or judicial proceedings have determined that
  - reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law; and
  - it would not be in the immigrant's best interest to be returned to the immigrant's or parent's previous country of nationality or country of last habitual residence.

3. In New York, the most common way to have a child declared "dependent on a juvenile court" and to seek an administrative or judicial determination on the SIJS requirements of "reunification" and "immigrant's best interest" is to file a petition pursuant to Article 6 of the New York Family Court

43 Avoiding deportation is not the only reason for applying for SIJS status. Without legal immigration status, the immigrant-minor cannot receive working papers, and is ineligible for college financial aid and other government benefits.

Act proposing the appointment of a guardian. The proposed guardian may be a relative, family friend, or anyone who is willing to care for the child and look out for the child's best interests until the child has reached the age of twenty-one. The proposed guardian often is already the caretaker for the child, but needs a court order to have complete control over the care and best interests of the child. *See In Re Diaz v. Munoz*, 118 A.D.3d 989, 990-991, 989 N.Y.S.2d 52, 54 (2d Dep't 2014).

4. When a proposed guardian retains a lawyer, the lawyer assists the proposed guardian by advising in the preparation of the Family Court petition, filing the petition and other required documentation with the Family Court, and representing the proposed guardian during the Family Court proceedings. The Family Court proceedings often require testimony from both the proposed guardian and the child. The testimony typically revolves around whether the proposed guardian is suitable to be appointed as the guardian.

5. During the guardianship proceedings, the proposed guardian is potentially adverse to the child's parent(s). The proposed guardian is seeking to gain control over decision-making for the child, while the child's parents will be giving up their parental rights. In these proceedings the child is called the "subject child," and is not considered an adverse party. However, the child's interests may be inconsistent with those of the parents or the proposed guardian, or both. To protect the interests of the child, the Court will sometimes appoint an attorney for the child.

6. After the Family Court decides whether to appoint the proposed guardian, the guardian (if the guardian has been approved) or the appointed lawyer for the child (whether or not the guardian has been approved) may make a motion to the Family Court to request a determination called "Special Findings" regarding the child's eligibility for SIJS. If the Family Court determines that the child meets the statutory requirements, the court will issue an Order of Special Findings.

7. After the Family Court proceedings have concluded, the lawyer representing the child before the federal Immigration Judge then takes the final Order of Guardianship and Order of Special Findings from the Family Court and files Form I-360 (Petition for Special Immigrant) with U.S. Citizenship and Immigration Services ("USCIS"), a branch of the Department of Homeland Security. If the application is approved by USCIS, the child will receive lawful permanent residency in the United States and the administrative removal proceedings will be terminated.

QUESTION:

8. May a lawyer who represents a child in an administrative removal proceeding in federal Immigration Court act as the lawyer for a proposed guardian of the child in an Article 6 guardianship proceeding in New York Family Court?

OPINION:

9. The focus of the question is whether representing both the proposed guardian in Family Court and the child in Immigration Court would create an impermissible conflict of interest. Conflicts of interest with current clients are governed by Rule 1.7, which provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

10. The issues raised under this inquiry are therefore (1) whether representing the child in one proceeding and the prospective guardian in another would involve the lawyer in representing "differing interests" and, if so, (2) whether the lawyer "reasonably believes" the lawyer can "provide competent and diligent representation" to each client (the child and the proposed guardian), and, if so, (3) whether it is possible to obtain informed consent from the child, who is a minor.

Would the Lawyer be Representing "Differing Interests"?

11. Under the definition of "differing interests" in Rule 1.0(f), "differing interests" include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest." Differing interests can arise even if the lawyer does not represent the guardian and the child in the same proceeding.

12. Differing interests may arise in many ways. For example, if the child does not want a guardian appointed, or if the child wants someone other than the proposed guardian to be appointed, then differing interests exist between the child and the proposed guardian, and the lawyer has a conflict of interest under Rule 1.7(a)(1).

13. In many guardianship proceedings, however, we understand that the child and the proposed guardian will share a common goal – the child wishes to have the proposed guardian appointed by the court in order to help defend the immigration proceeding[44] and the proposed guardian desires to be the legally appointed guardian for the child. However, despite the common goal, the child and the proposed guardian may have differing interests that would adversely affect the lawyer's professional judgment.

44 The lawyer must determine that this is truly the child's wish. The lawyer may not substitute his or her judgment for that of the child. See N.Y.S.B.A. Standards, *infra*, ¶ 26.

14. For example, one potential source of conflict is that the Family Court may require an investigation of the guardian, including the guardian's relationship with the child, the guardian's criminal history, and any allegations of abuse. It is in the child's best interest for this investigation to be thorough, whereas the proposed guardian my want to limit the investigation. Another potential source of conflict is that, as counsel to the guardian, the lawyer needs to advise the guardian of the legal responsibilities that accompany guardianship (e.g. potential responsibility for the costs of the child's health care, or potential liability for damages if the child vandalizes the property of others). The child may want the lawyer to downplay the risks so that the proposed guardian does not become frightened and back out, whereas the proposed guardian presumably wants to understand all of the risks in light of his or her own personal and financial circumstances.

15. In some cases, a reasonable lawyer may conclude that differing interests do not exist (for example, if the proposed guardian has been caring for the child for a long time, and both the child and the proposed guardian want to formalize the existing relationship by obtaining a court appointment for the guardian). Even when the interests of the guardian and the child appear to be consistent, circumstances may change. The family court proceeding currently appears to be one undertaken to advance the child's interests in the federal immigration proceeding. However, this proceeding involves factors upon which the child may have strong and changeable opinions – in particular, allegations of abuse, neglect, abandonment, or similar conduct, against one or both of the child's parents. The possibility of a desired change of course in the future by a child cannot be dismissed out of hand. The lawyer thus must be sensitive to changes that might create differing interests. Such potential changes will be addressed if the family court appoints separate counsel for the child in the family court proceeding.

16. In N.Y. State 836 (2010), we addressed whether a single lawyer could represent both an incapacitated person and his guardian in a proceeding to terminate the guardianship. The attorney had previously represented the incapacitated person (then an "alleged incapacitated person") in connection with the appointment of a guardian. At the time of the inquiry, the parties' interests seemed to be aligned, since both parties said they believed that the guardianship should be terminated. However, we expressed a concern that the guardian might be seeking to escape the responsibilities of the guardianship because he wished to move across the country, even though the incapacitated person would be better served by continuing the guardianship. Consequently, we determined that, in order to undertake the joint representation, the lawyer had to meet the conditions of Rule 1.7(b). We opined that the lawyer could reasonably conclude that he could provide competent and diligent representation to both parties, and that the lawyer could therefore undertake the dual representation, as long as he obtained informed consent from each client, confirmed in writing. Finally, in N.Y. State 836, we warned that obtaining informed consent would require the lawyer to fully inform each party of the possible risks of the dual representation.

17. We reach the same conclusion in this opinion that we did in N.Y. State 836, *i.e.* in many cases representing the immigrant-child and the prospective guardian will involve representing potentially differing interests, and the lawyer must consider whether he or she can adequately represent both and obtain informed consent.

18. If the inquirer here believes he can adequately represent both the prospective guardian in the family court proceeding and the child in the immigration proceeding, then, in order to undertake the

joint representation, the lawyer must comply with the conditions of Rule 1.7(b), including obtaining the consent of both clients, confirmed in writing.

19. We note that some courts and advocacy groups believe that the lawyer should not represent both the guardian and the child in the same proceeding. See *Special Immigrant Juvenile Status, A Step-By-Step Guide for Safe Passage Project Volunteer Attorneys* (Updated November 23, 2014) ("*Safe Passage Project Guide"*)[45] (taking the position that the same attorney cannot represent both the prospective guardian and the child in the state court guardianship proceeding);[46] Westchester County Family Court, "Frequently Asked Questions" regarding SIJS-related guardianship applications, available on the website of the Office of Court Administration (Court views representation of both the child and the guardian as a conflict of interest. Lawyer for child may assist the guardian in preparing the petition for guardianship, but cannot represent both child and guardian in the guardianship proceeding.[47]). While these groups and courts may believe that it is best practice for the lawyer not to represent both the child and the guardian, and while the conditions in Rule 1.7 may be difficult to meet, the only *per se* conflict of interest in Rule 1.7 is that in subparagraph (b)(3), which prohibits a lawyer from representing a client who has a claim against another client the lawyer represents in the same proceeding before a tribunal. Representing the child and the guardian does not fall under that *per se* prohibition; thus the simultaneous representation of the child and the guardian is non-consentable only if it falls under subparagraph (b)(1). This opinion applies in those situations where the lawyer can meet the conditions in Rule 1.7(b)(1), and sets forth additional requirements that apply because the child is a client with "diminished capacity" In our view, if the child has a separate lawyer for the guardianship proceeding, then the impact of any differing interests will be diminished, and a reasonable lawyer could conclude that the lawyer can provide competent and diligent representation to the proposed guardian in the Family Court and to the immigrant-child in the Immigration Court. However, if such representation violated any court rules, it might violate Rule 8.4(d) (lawyer shall not engage in conduct that is prejudicial to the administration of justice).

45 The Safe Passage Project is a 26 U.S.C. § 501(c)(3) not-for-profit corporation housed within New York Law School, which trains pro bono attorneys to represent children in need of immigration assistance. *Safe Passage Project Guide*, p. 5.

46 The Safe Passage Project Guide states recommends only representing the child, and helping the guardian to fill out certain forms: "It is important to understand is [sic] that you, as an attorney, do not represent the proposed guardian in this proceeding. However, you should talk to the proposed guardian about the process, assist him or her in filling out the paperwork, and discuss what to expect when filing the petition and appearing in Family Court. Nonetheless, the proposed guardian is not your client. If you would like to represent the proposed guardian in the family court proceedings you can choose to do so but you will not be able to represent the youth in the family court. An attorney will be appointed for the youth. But note that you may find your communication and access to the youth is now severely restricted because you will have to communicate through the attorney for the child. We recommend that you remain solely counsel for the youth." Safe Passage Project Guide at p. 19. We note, without opining on the applicability here, that Rule 4.3 prohibits a lawyer from giving legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

47 The questions include whether the lawyer may represent the child and prepare the petition on behalf of the proposed guardian. This apparently refers to dual representation in the guardianship proceeding and not to simultaneous representation of the child in the immigration proceeding and the guardian in the family court proceeding. The court answers that it views representation of both the child and the guardian as a conflict of interest: "Although it may be a practice or service of your organization to assist the guardian in preparing the petition for guardianship, you cannot represent both parties. You must make it clear to the Court who you are representing. Therefore, the Court will always assign an attorney for the subject child from the attorneys for children panel. If you choose to act as co-counsel with such attorney, an attorney for the proposed guardian will be assigned."

May a Minor Consent to a Conflict of Interest?

20. Some of our older opinions concluded that a minor cannot consent to dual representation. *See* N.Y. State 274 (1972) (consent cannot be obtained where one of the parties is an infant); N.Y. State 256 (1972) (an infant cannot consent to dual representation, so if a conflict of interest exists, then dual representation would violate DR 5-101(A)). The opinions do not explain why a minor cannot give consent. Presumably, the principle stems from an assumption that a child does not have the ability to make reasoned decisions. We do not give opinions on matters of law, but we understand that consent by a minor may be voidable at the request of the minor. This is no different from other advance consents to conflicts under the Rules. *See* Rule 1.7, Cmt. [21] (client who has consented to a conflict may revoke the consent and terminate the lawyer's representation at any time).

21. Nevertheless, when the Rules were adopted in 2009, they included, for the first time, special provisions on clients with "diminished capacity," including as a result of minority. *See* Rule 1.14. Rule 1.14 does not assume that a child cannot consent to conflicts. *See, e.g.* Cmt. [1] ("When the client is a minor . . . maintaining the conventional client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being."); Comment [4] ("whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.")

22. In N.Y. State 836 ¶¶ 11-12 (2010), we concluded that the lawyer could obtain consent from the incapacitated person to a dual representation if such person could make a reasoned decision to consent. We said:

> When obtaining informed consent from Client, Lawyer must take special care because Client is presently deemed to be incapacitated and under guardianship. However, three sources – Rule 1.14 [of] our Rules of Professional Conduct, our prior opinion in N.Y. State 746, and New York's Mental Hygiene Law – all support the conclusion that Client may consent to this dual representation despite Client's present legal designation of incapacity. Of course, Lawyer must carefully assess Client's capacity to understand the conflict and to make a reasoned decision whether to consent to the representation despite the conflict. This careful assessment is necessary because if Client's capacity to make reasoned decisions is so diminished that she cannot give informed consent to the dual representation, then Lawyer cannot satisfy the informed consent requirement of Rule 1.7(b)(4). If a lawyer cannot satisfy the informed consent requirement of Rule 1.7(b)(4), then the lawyer cannot undertake the dual representation.

[Footnotes and paragraph numbers omitted.]

23. Similarly, in N.Y. State 1059 (2015), where we were considering whether a lawyer may disclose certain confidential information of an unaccompanied child, we held that a minor can consent to disclosure of confidential information if the minor is capable of understanding the risks of disclosure and of making a reasoned judgment. Nevertheless, we warned that it may not be possible for all children to give consent:

> First, very young children will be incapable of giving consent. There is no particular age when children can be said to have capacity to give consent. The New York City Bar ethics committee observed in an opinion dealing with "verbal minors ages twelve or older who affirmatively seek a lawyer's assistance" that such clients "generally will be capable of making considered judgments concerning the representation." N.Y. City 1997-2 (citing, *inter alia*, Standard for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings § 2.2 (Am. Academy of Matrimonial Lawyers 1995) for the proposition that there is "a rebuttable presumption that children above the age of twelve are competent"). But the children that are the inquirers' clients may be less capable of making considered judgments than the clients in N.Y. City 1997-2, given that the unaccompanied children who are the inquirers clients are likely to be unfamiliar with American society, or may be more capable of making considered judgments, given their experiences in their home countries and during their unaccompanied trip to the United States.

24. We stressed in that opinion that the lawyer must make full disclosure of information adequate for the child to make an informed decision, and must adequately explain the material risks of the proposed course of conduct and reasonably available alternatives. We also advised that the extent of the information needed and risks to be addressed would vary both with the nature of the information being disclosed and the sophistication of the child. Finally, we warned that the client's consent must be voluntary. As this Committee observed in N.Y. State 490 (1978), lawyers providing services to indigent clients "should be particularly sensitive to any element of submissiveness on the part of their indigent clients," and such requests should be made only under circumstances where the lawyer is satisfied that the client could refuse to consent without any sense of guilt or embarrassment.

25. We are aware of a number of opinions of New York courts holding that a child may not consent to dual representations. *See, e.g. Key v. Arrow Limo Inc*., 2014 W.L. 3583893 (Sup. Ct., Kings Co. 2014); *Christie v. Kramer*, 2012 WL 5898054 (Sup. Ct., Kings Co. 2012). However, these cases involve whether a lawyer may represent both a parent-driver and a child involved in an automobile accident, under circumstances where the lawyer will have to sue the parent on behalf of the child (to benefit from the parent's auto insurance policy) or waive the right to sue the parent. In such cases, the courts have found that the differing interests of the parent and child are so severe that the conflict of interest is non-consentable. We do not believe such is the case here.

26. Even before the adoption of Rule 1.14, the courts recognized the ability of children to make decisions affecting their own interests. In 2007 the Chief Judge of New York made it clear that unless a child is incapable of expressing a preference or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions, or the child's articulated position would place the child at imminent risk of serious harm, the attorney must not "substitute judgment" in determining and advocating the child's position, even if the attorney believes that what the child wants is not in the child's best interests. Rules of the Chief Judge, § 7.2. *See* NYSBA Standards for Attorneys Representing Children in New York Child Protective, Foster Care, Destitute Child and Termination of Parental Rights Proceedings (2014) at p. 46:

> The attorney may not use substituted judgment merely because the attorney believes that another course of action would be "better" for the child. Thus, each child should

> be assessed individually to determine if he or she has the capacity to make decisions that bind the attorney with respect to fundamental issues such as whether the child wishes to be adopted.

27. The same analysis applies here. The lawyer must assess whether the child has the capacity to make a reasoned decision regarding the potential conflict. Comment [6] to Rule 1.14 advises that the lawyer should consider and balance such factors as (i) the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; and (ii) the consistence of a decision with known long-term commitments and values of the client. With a child, the age of the child will also be a factor. If the lawyer concludes that the immigrant-child is capable of making a reasoned decision, the lawyer must provide the child with information and explanations suitable to the child's level of understanding.

CONCLUSION:

28. A lawyer who represents an immigrant child in a federal administrative removal proceeding may simultaneously represent a proposed guardian in a state Family Court proceeding provided the lawyer reasonably believes he can competently and diligently represent both clients, and obtains informed consent from each client, confirmed in writing. The lawyer may accept the consent of the child if the lawyer believes (i) the child has the capacity to understand the conflict and to make a reasoned decision to consent, and (ii) the consent is voluntary. While there is no particular age when a child may be said to have such capacity, verbal children aged 12 and older will generally be capable of making such reasoned decisions after the lawyer makes full disclosure of the material risks and reasonably available alternatives.

[10-15]

OPINION 1070 (10/09/2015)

TOPIC: Confidentiality; joint clients; client's file

DIGEST: In a joint representation, there is a presumption that the lawyer will share material information disclosed by one co-client in the matter with the other co-clients. But there are exceptions to this presumption, including where disclosure would violate an obligation to a third party or where the lawyer has promised confidentiality with respect to a disclosure. Normally, a client is entitled to full access to the attorney's file on the matter, with narrow exceptions. However, if the co-client requesting the file asks the lawyer not to disclose the request to the co-clients, and the lawyer believes the request for the file is material to the other co-clients, then the lawyer may not comply and should counsel the requesting client that the lawyer may not honor the request for the file unless the requester authorizes disclosure to the co-clients. Keeping the request confidential is inconsistent with the expectation of joint clients that the lawyer will keep all of them informed of material developments in the case and with the lawyer's duty of loyalty to the other joint clients.

RULES: 1.4, 1.7(a) & (b), 1.15(c)(4)

FACTS:

1. Lawyer A represents four defendants in a litigated contract matter involving real property. One of the joint clients has requested, in writing, that Lawyer A provide to Lawyer B (who is advising the requestor) copies of the client file, including billing statements and records of payments. The written request directed Lawyer A to keep the request in confidence and not to disclose the request to the other joint clients in the matter. There is no express agreement, in the retainer agreement or otherwise, addressing the confidentiality of communications from any joint client vis-à-vis the others.

QUESTIONS:

2. Is a client who is one of several joint clients in a matter entitled to copies of the client file upon request?

3. May lawyer A provide the requested file to the requesting client without advising the other joint clients?

OPINION:

4. The New York Rules of Professional Conduct (the "Rules") specifically contemplate that a lawyer may represent multiple clients in the same matter, as long as the representation will not involve the lawyer in representing differing interests (unless each client consents to the conflict under Rule 1.7(b)). The potential benefits of multiple representation include reduced legal fees, avoidance of future conflicts, and, in litigation, the opportunity to present a united front.

Confidentiality Among Joint Clients

5. There is a presumption that information disclosed by one co-client in a joint representation matter will be shared by the lawyer with all other clients represented jointly. *See* Rule 1.7, Cmt. [31]:

> [31] . . . [T]he lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. At the outset of the common representation and as part of the process of obtaining each client's informed consent, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential even as among the commonly represented clients.

See also N.Y. State 761 (2003) (stating that the attorney for co-clients must share all material information relating to the representation with the co-clients, unless the co-clients have consented to an alternative arrangement); N.Y. State 778 (2004) (concluding that, in seeking consent to a joint representation, the lawyer should explain the lawyer's obligation, absent each client's agreement to other arrangements, to disclose to one client any confidences and secrets communicated to the lawyer by the other client); *Restatement Third, The Law Governing Lawyers* §60 cmt. *l* (sharing of information among co-clients with respect to the matter involved in the representation is normal and typically expected), §75 cmt. d (2000) (presumed intent that there should be no confidentiality between co-clients but co-clients may agree otherwise).

6. The presumption that confidences will be shared among co-clients in a matter is subject to exceptions. For example, in N.Y. State 555 (1984), we noted that disclosure to all joint clients was part of the duty of the lawyer, as a fiduciary, to impart to the client information that the lawyer possesses that is relevant to the affairs as to which the lawyer is employed and that might reasonably affect the client's conduct with respect to such affairs. We warned, however, that there was a recognized exception to this duty of disclosure where disclosure would violate a duty to a third person, citing the Restatement (Second) of Agency § 381 (1957). We found that exception applicable where disclosure would violate a duty undertaken to another client in the same representation. In that case, the lawyer jointly represented two clients, A and B, in connection with partnership affairs. B, in a conversation with the lawyer, advised the lawyer that B was breaching the partnership agreement, but preceded this disclosure with the statement that he proposed to tell the lawyer something "in confidence." The lawyer did not warn B that the lawyer could not receive information from B in confidence. We therefore found that the lawyer had a duty of confidence with respect to the disclosed information.[48] *See also* N.Y. State 761 (2003) (discussing lawyer's obligation when lawyer receives from one co-client "relevant information that the lawyer is unable to share").

7. In this case, the inquirer apparently did not warn the clients either orally or in the retainer agreement or in a separate consent to joint representation that all confidences would be shared. Since the request for confidentiality of the request for the file was made in writing, the lawyer had no opportunity to prevent the client from giving the information. Consequently, we believe the lawyer is obligated to maintain the confidentiality of the request, unless the communicating client agrees otherwise.

48 N.Y. State 555 also found an exception where disclosure to a co-client "would obviously be detrimental to the communicating client." In N.Y. State 778 n.4 (2004), however, we expressly overruled N.Y. State 555 on that point.

The Client's File

8. Rule 1.15(c)(4) provides that "a lawyer shall . . . promptly . . . deliver to the client . . . the funds, securities or other properties in the possession of the lawyer that the client . . . is *entitled* to receive." (Emphasis added.) Regarding the property to which the client is entitled, N.Y. State 766 (2010) noted that this is a question of law, but pointed out that, in *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelson*, 91 N.Y. 30, 34 (1997), the Court of Appeals held that, upon termination of an attorney-client relationship, a client is "presumptively accord[ed] . . . full access to the entire attorney's file on a represented matter with narrow exceptions." *See also* N.Y. State 970 (2013) (right of executrix of the estate of a deceased client to the client's files). The cost of copying the file is to be borne by the client. *Sage Realty*, 91 N.Y.2d at 38. The exceptions to entitlement to particular documents in the file are a question of law about which we do not opine.

9. Although N.Y. State 766 was based upon a request from a former client and N.Y. State 970 was based upon a request from a representative of a deceased client, the reasoning is equally applicable to a request from a current client.

10. Under *Sage Realty*, however, an exception to the general rule of full access to the file arises when the attorney can make "a substantial showing . . . of good cause to refuse." *Sage Realty*, 91 N.Y.2d at 37. For example, the attorney "should not be required to disclose documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law," or "firm documents intended for internal law office review and use." *Id. See also* ABA 471 (2015)(although a client normally is not entitled to papers and property that the lawyer generated for the lawyer's own purpose in working on the client's matter, when the lawyer's representation of the client in a matter is terminated before the matter is completed, protection of the former client's interest may require that certain materials the lawyer generated for the lawyer's own purpose be provided to the client).

11. Here, one joint client has requested that Lawyer A deliver the client file to Lawyer B, and that the request not be disclosed to the Lawyer A's other joint clients.

12. We concluded in the preceding section that, where the lawyer accepted information from one co-client on the condition of non-disclosure to other co-clients, the lawyer must honor that condition. However, if the requesting client asked the lawyer not to disclose the request that a copy of the file be sent to another lawyer, and the lawyer in good faith believes that the request for the file is information that would be material to the remaining co-clients (so that not disclosing the request to them would entail a breach of loyalty to those clients), then the requesting client is no longer entitled to a copy of the file. Complying with the request would entail a breach of a duty to the other joint clients to keep them informed of material developments. Rule 1.15(c)(4) applies only to property to which the client is *entitled* and the communicating client is not entitled to cause a breach by the lawyer of duties to the other co-clients. Thus, we conclude that the inquirer would not be obligated to comply with the request for the file if the request were conditioned on the lawyer's not disclosing the request to the other clients.

13. Consequently, the inquirer should inform the requesting client that, if he or she does not withdraw the request for confidentiality, the lawyer will not be able to provide a copy of the file, but that,

if the client authorizes the lawyer to disclose the requesting client's request for the file to the co-clients, the lawyer will provide the file to the requester.

CONCLUSION:

14. In a joint representation, there is a presumption that the lawyer will share material information disclosed by one co-client in the matter with the other co-clients. But there are exceptions to this presumption, including where disclosure would violate an obligation to a third party or where the lawyer has promised confidentiality with respect to a disclosure. Normally, a client is entitled to full access to the client file, with narrow exceptions. However, if the co-client requesting the file asks the lawyer not to disclose the request to the co-clients, and the lawyer believes the request for the file is material to the other co-clients, then the lawyer may not comply and should counsel the requesting client that the lawyer may not honor the request unless the lawyer is permitted to disclose it to the co-clients. Keeping the request confidential is inconsistent with the expectation of joint clients that the lawyer will keep all of them informed of material developments in the case and with the lawyer's duty of loyalty to the other joint clients.

(11-15)

OPINION 1071 (10/09/2015)

TOPIC: Partisan political activities by municipal attorney charged with investigating police misconduct

DIGEST: A municipal attorney may not engage in partisan political activity while employed by an agency that is charged by law to investigate police misconduct, is given the power to compel attendance of witnesses and the production of documents, and is authorized to refer misconduct to the Police Department for administrative prosecution or referral to criminal prosecutors.

RULES: Rule 8.4(d)

FACTS:

1. A municipal charter establishes a Civilian Complaint Review Board, or "CCRB," to investigate complaints against specific types of police misconduct, including the use of excessive or unnecessary force or the abuse of authority. The charter mandates that the mayor appoint members of the public to the CCRB, of which the municipal legislature designates a certain number, and the police department a certain number, with the mayor designating the rest, such that the CCRB majority consists of mayoral or legislative designees. A member of the CCRB need not be a lawyer, but may hold no other public office. Only the police department designees may have a law enforcement background, a restriction that does not apply to the CCRB's staff.

2. The municipal charter requires the police department to cooperate with the CCRB's investigations. The municipal charter and the rules of the CCRB allow the CCRB to investigate complaints against police officers, including the right to review all pertinent documents, to interview witnesses, including the subject(s) of the investigation, and to compel, through compulsory process, the appearance of witnesses and the production of documents. Upon conclusion of its investigation, a panel of the CCRB issues findings and recommendations based on a "preponderance of the evidence" standard. The CCRB's rules provide that the findings may range from "Substantiated," which means that the alleged acts did occur and did constitute misconduct, to other categories such as "Unsubstantiated," "Exonerated," "Unfounded," "Complaint Withdrawn," and the like. A finding that a complaint is "Substantiated" is accompanied by the CCRB's recommendation on disciplinary action, including any interim actions such as suspension or reassignment pending further proceedings.

3. The CCRB has no power to impose a sanction on a police officer; only the mayor- appointed head of the Police Department may do so. The CCRB also has no power to refer misconduct to prosecutorial authorities; again, only the Police Department may do so. When examining a police officer who is the subject of an investigation, the CCRB rules require that the CCRB investigator must notify the subject of his or her constitutional rights, including the right not to testify (which the CCRB must report to the Police Department), and, if the officer chooses to testify, that his or her statements cannot be used in any subsequent criminal proceeding. If during the course of its investigation the CCRB uncovers misconduct outside the scope of the CCRB's jurisdiction (for example, an alleged false statement under oath), then the CCRB may not investigate that misconduct but instead must report the misconduct to the Police Department.

4. By reason of a Memorandum of Understanding ("MOU") between the CCRB and the Police Department, the CCRB administratively prosecutes any "Substantiated" complaint before a Police Department tribunal unless the head of the Police Department determines that such prosecution would be "detrimental" to the Department's disciplinary process. The MOU limits the Department head in making such a determination to those instances in which there are parallel or related criminal investigations or when he or she decides that the "interests of justice" require no further action in light of the absence of any prior disciplinary history on the part of the police officer.

5. CCRB attorneys, who must be trained in the "policies and procedures" of the Police Department's disciplinary standards, prepare the "Charges and Specifications" against the subject officer, and present the evidence in support of a Substantiated complaint at an administrative hearing. The CCRB is required to provide status reports to the Department concerning the prosecution, including any plea bargains, which the CCRB is permitted to negotiate subject to approval of the Department. The tribunal, conducted by a Department hearing officer, may or may not issue a report. Whether or not the hearing officer does so, the CCRB may provide the Police Department with its own report and recommendation.

QUESTION:

6. May an attorney employee of the CCRB engage in partisan political activities?

OPINION:

7. In N.Y. State 675 (1995), we concluded that an Assistant District Attorney may not ethically engage in campaign activities on behalf of an incumbent District Attorney who is seeking re-election. Such prohibited activities included circulating nominating petitions, campaigning at public events, writing letters to the editor and speaking with the media in support of the District Attorney's candidacy. In N.Y. State 683 (1996), upon a request for reconsideration of that opinion, we re-affirmed our conclusion that partisan political activity would be inconsistent with Disciplinary Rule 1-102(A)(5) of the then-applicable N.Y. Code of Professional Responsibility, which is the forerunner of Rule 8.4(d) of the New York Rules of Professional Conduct (the "Rules"). Both DR 1-102(A)(5) and Rule 8.4(d), in identical terms, forbid a lawyer to "engage in conduct that is prejudicial to the administration of justice." In N.Y. State 683, we reasoned that, unlike lawyers representing private clients, "prosecutors have a duty to seek justice," and that, in pursuing that duty, "individual prosecutors have a responsibility both to exercise their discretion in a disinterested, nonpartisan fashion and to avoid appearances that they are doing otherwise."

8. In N.Y. State 696 (1997), we concluded that this same restriction is applicable to lawyers employed by a municipality's Department of Investigation, or "DOI." There, the municipal charter required that the DOI Commissioner be a lawyer with at least five years of law enforcement experience. The charter empowered the Commissioner to investigate the "affairs, functions, accounts, methods, personnel or efficiency" of any municipal agency. The duties of an attorney employed by the DOI included issuing subpoenas to compel the attendance of witnesses and the production of records; conducting examinations of individual witnesses and subjects; reviewing relevant records; drafting reports; and coordinating non-legal staff members. The charter required the DOI to refer any alleged criminal misconduct to prosecutorial authorities. We stated:

> Just as is the case with a prosecutor, the actions and non-actions of an Examining Attorney can similarly be perceived as being influenced by partisan political interests if the Examining Attorney is also engaged in partisan political activities.

9. In likening the ethical issues raised in N.Y. State 696 to those of concern in the context of Assistant District Attorneys, we said that, "[a]lthough DOI attorneys do not have the authority to commence criminal proceedings, they are charged with performing investigative functions, including an investigation of criminal activity, and they have been given the subpoena power to compel the production of witnesses and documents. Moreover, if the DOI investigation concerns criminal conduct, it is mandatory that the results of the investigation be forwarded to a prosecuting attorney."

10. Other than in this last respect – that is, the obligation to refer criminal conduct to a prosecutor – the powers of the CCRB attorneys are substantially similar to those of the DOI attorneys at issue in N.Y. State 696. We do not believe that this distinction between the CCRB and DOI attorneys impacts the applicability of our prior opinions here. A CCRB attorney enjoys the same significant investigatory powers as an attorney at the DOI, including the powers to compel testimony, to subpoena documents, to review pertinent records, and to draft reports and recommendations on the products of the inquiry. Like the DOI, the CCRB has no power to impose a penalty, but the charter mandates the CCRB to report its conclusions to the Police Department, which does have the power to impose sanctions and may refer matters of criminal concern to the prosecutorial authorities. The words of N.Y. State 696 are thus equally applicable here: "As an active participant in the incipient but critical stage of the prosecutorial process, particularly in cases where public corruption is concerned, we consider an Examining Attorney at DOI to play a substantial criminal law enforcement role such that the ethical concerns we expressed in Opinion 683 apply to him or her with equal vigor."

11. We recognize that the scope of the CCRB's jurisdiction is narrower than that of a prosecutor or a DOI attorney. Nevertheless, the relationship between the police and members of society is at the core of law enforcement. Although the ultimate authority to regulate that relationship resides in the Police Department and the municipal government, the CCRB plays a critical role in influencing the judgments of those with the final say, and the checks and balances that the charter, rules, and the MOU create are not fully adequate to safeguard against the potential or the perception that political attitudes may affect the decision-making of attorneys who have within their power the ability to instigate (or not) further investigations and to affect (whether adversely or not) the careers and reputations of individuals they are charged with monitoring.

12. Of course, this opinion is subject to applicable law, including the First Amendment.

CONCLUSION:

13. An attorney employed by a municipal agency that is (i) charged by law to investigate police misconduct, (ii) given the power to compel attendance of witnesses and the production of documents, and (iii) authorized to refer misconduct to the Police Department for administrative prosecution or referral to criminal prosecutors, may not engage in partisan political activity.

(22-15)

OPINION 1072 (11/13/2015)

TOPIC: Partnership, multi-jurisdiction

DIGEST: Before entering into a partnership with a foreign lawyer, a New York lawyer must engage in an independent inquiry to confirm that the educational requirements for the foreign lawyer are equivalent to those for a New York lawyer and that such a partnership would not compromise the New York lawyer's ability to uphold the ethical requirements of this State, including those governing attorney-client confidentiality. Both determinations are beyond the jurisdiction of this Committee.

RULES: 5.4(b), 5.8(a), 7.5(d)

FACTS:

Background

1. The inquiring lawyer would like to form a partnership with a Japanese "benrishi," a professional licensed to practice intellectual property law under Japan's Patent Attorney Act (the "Act"). A benrishi may practice patent, copyright, trademark, unfair competition and trade secret law. They may represent clients in administrative and some court proceedings, custom seizure matters, the prosecution of trademark applications and negotiations regarding intellectual property rights.

2. Benrishi differ from patent *attorneys* licensed to practice patent law in the United States. One significant difference is that benrishi do not need to have a law school degree. The bar exam they must pass focuses on intellectual property law.[49]

3. Benrishi also differ from patent *agents* in the United States. They may represent clients in court in certain matters, including before the Tokyo High Court concerning appeals from the Japan Patent Office. Further benrishi do not need to have technical backgrounds, although many do.

The Patent Attorney Act

4. The Patent Attorney Act establishes the requirements for benrishi. As translated in an unofficial transaction,[50] the Act describes the role of benrishi (translated as "patent attorneys"[51]) as engaging "in the business of representing others regarding procedures with the Japan Patent Office as pertaining to patents, utility models, designs or trademarks, or international applications or international applications for registration, and procedures with the Minister of Economy, Trade and Industry with regard to application[,] an objection or to any award pertaining to patents, utility models, designs or trademarks, giving expert opinions and handling other affairs pertaining to matters relating to the said procedures," representing clients in certain customs matters, and representing clients in certain alternative dispute resolution procedures. Act, Article 4. Further, benrishi may represent clients in

49 Japanese lawyers, or bengoshi, may become benrishi without taking the benrishi exam.

50 www.japaneselawtranslation.go.jp.

51 This Committee is not controlled by the definitions of others. We will therefore use the term "benrishi" rather than "patent attorney."

court in certain matters specified by the Act, in some cases only with an attorney,[52] unless otherwise allowed by the court. *See* Act, Articles 5 & 6.

5. To qualify to become a benrishi, an individual must (i) complete the practical training and (ii) pass the benrishi exam, be an attorney at law or have worked as an examiner or trial examiner at the Japan Patent Office for a total of seven or more years. *See* Act, Article 7.

6. The practical training consists of a three-month course offered by the Minister of Economy, Trade and Industry (or the designated training agency), on the laws, regulations and practices relating to the business of benrishi. The trainer or leader of the practical training is an experienced benrishi. *See* Act, Article 16.

7. The benrishi exam consists of a (i) a short answer examination on the law and regulations relating to patents, utility models, designs and trademarks (referred to as "industrial property rights"), treaties on industrial property rights and other laws and regulations necessary for performing the business of a benrishi; (ii) an essay examination on laws and regulations relating to industrial property rights and another topic selected by the examinee from those prescribed by the government; and (iii) an oral examination on the laws and regulations relating to industrial property rights. *See* Act, Article 10. According to the inquirer, the pass rate on the exam has ranged from under three percent to approximately seven percent. There are also continuing education requirements.

8. Once qualified, an individual submits an application for registration with the Japan Patent Attorneys Association. *See* Act, Article 18.

9. The Act also regulates certain conduct of benrishi. Relevant here, for example, the Act prohibits disclosure and misappropriation of client secrets without any "justifiable grounds," although the Act does not provide any further guidance on what constitutes justifiable grounds. *See* Act, Articles 30 & 77.

10. The Act further prohibits a benrishi from taking certain cases that would result in a conflict of interest, including cases in which the benrishi has been consulted by and retained by the adverse party, cases in which the benrishi has been consulted by the adverse party and formed a "relationship of mutual trust" and cases in which the prospective client is adverse to a current client in another matter, unless the current client consents. *See* Act, Article 31.

11. Violations of the Patent Attorney Act may result in admonition, suspension or prohibition of all business. *See* Act, Article 32.

12. The Patent Attorney Act also establishes the Japan Patent Attorney Association, and benrishi automatically become members of the Association. The Association's purpose is to guide, communicate with and supervise its members in order to maintain the dignity of benrishi, advance and improve the business of benrishi in consideration of the missions and duties of benrishi, and to engage in the registration of benrishi. *See* Act, Articles 56 & 60. Further, the Association maintains a Registration Screening Board, responsible for overseeing registration, including denying registration and rescinding or cancelling registration, of benrishi. *See* Act, Article 70.

52 Although not specified in the text, this reference would appear to be to a Japanese "bengoshi."

QUESTION:

13. May a member of the New York State bar enter into a partnership with a Japanese benrishi?

OPINION:

14. The New York Rules of Professional Conduct (the "Rules") prohibit partnerships between lawyers and nonlawyers if any of the activities of the partnership consist of the practice of law. *See* Rule 5.4(b); *see also* Rule 5.8(a) (noting that multi-disciplinary practice between lawyers and non-lawyers is incompatible with the core values of the legal profession and allowing only for contractual relationships between New York lawyers and non-legal professionals under specific circumstances not applicable here).

15. We previously have noted that this prohibition, seemingly disallowing a partnership with any lawyer not admitted to practice in New York, is tempered by Rule 7.5(d), which recognizes partnerships "between or among lawyers licensed in different jurisdictions." *See* N.Y. State 658 (1993); *see also* N.Y. State 542 (1982). We also previously have noted that the reference in Rule 7.5(d) to "lawyers licensed in different jurisdictions" includes lawyers licensed in foreign countries. *See* N.Y. State 542.

16. However, the mere fact that a foreign "lawyer" is licensed in another country is not by itself sufficient to reach the conclusion that a New York lawyer may permissibly form a partnership with the foreign lawyer. We have previously opined that an inquiry must also be made into (i) whether the foreign country's educational requirements for admission are generally similar to those for New York attorneys and (ii) whether the standards of professional conduct and discipline governing the foreign attorney are essentially compatible with New York's standards. *See* N.Y. State 542 (1982); N.Y. State 658 (1993).

Educational Requirements for Benrishi

17. In N.Y. State 646, dealing with Japanese bengoshi, we noted that, if a foreign lawyer's educational training is of insufficient rigor, the New York lawyer's partnership with the foreign lawyer might compromise the New York lawyer's ability to uphold the standards of professional conduct applicable in this state. At the time we issued N.Y. State 646, there was no requirement that bengoshi have a law school degree, although they were required to complete a two-year training period and legal apprenticeship at the Legal Training and Research Institute.[53] As noted above, benrishi need not have a law school degree. They must complete a three-month practical training course, and, if they are not bengoshi, must pass the benrishi exam or have worked as an examiner or trial examiner at the Japan Patent Office for seven or more years.

18. In N.Y. State 646, we concluded that the educational requirements for admission to practice law appeared to be no less rigorous in Japan than in the United State. Nevertheless, given the Committee's limited familiarity with Japanese legal practice, we held that "a New York lawyer proposing

53 In N.Y. State 646, we noted that there were various classes of "legal professionals" licensed in Japan to perform different types of work that lawyers perform in the United States, including those that engage in parent and tax practice However, we did not address those other legal professionals in that opinion.

to enter into a partnership with a Japanese lawyer should undertake an independent inquiry to confirm that the partnership will not compromise the New York lawyer's ability to uphold ethical standards."

19. We reach the same conclusion here. When conducting that independent inquiry, the New York lawyer should consider the educational requirements for admission of benrishi and determine whether they are essentially compatible with New York's standards. *Cf.* 22 NYCRR 521.1 (Regulation as to Licensing of Foreign Legal Consultants) (Appellate Division may license as a foreign legal consultant an applicant who is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority).

Standards of Professional Conduct for Benrishi

20. Before a New York lawyer may ethically form a partnership with the foreign lawyer, the New York lawyer must conclude that the partnership would not be likely to compromise the New York lawyer's ability to uphold the standards of professional conduct in this State. *See* N.Y. State 646 (1993). As we said in N.Y. State 646, of particular concern is the New York lawyer's duty of confidentiality under the Rules: "A New York lawyer's sharing of client confidences with a foreign partner could result in inappropriate disclosures or misuse of those confidences if the foreign partner lacked adequate understanding of, or respect for, this ethical obligation. *See id.*

21. As noted above, the Act prohibits benrishi from disclosing or misappropriating client secrets without any "justifiable grounds," although the Act does not provide any further guidance on what constitutes justifiable grounds. *See* Act, Articles 30 & 77.

22. Although it is beyond our jurisdiction to determine whether the ethical standards that apply to benrishi are equivalent to those applicable in New York, we are aware that courts in the U.S. have upheld the application of the attorney-client privilege to benrishi. *See Eisai Ltd. v. Dr. Reddy's Laboratories, Inc.*, 406 F.Supp.2d 341 (S.D.N.Y. 2005)(upholding lower court ruling that American courts should respect as a matter of comity the privilege accorded by Japanese law to benrishi). See also *Knoll Pharms. Co. v. Teva Pharms. USA, Inc.,* No. 01 C 1646, 2004 WL 2966964, at *3 (N.D.Ill. Nov.22, 2004) (holding documents privileged because "under Japanese law, documents reflecting communications between patent agents and clients are exempt from production"); *VLT Corp. v. Unitrode Corp.,* 194 F.R.D. 8, 17-18 (D.Mass. 2000) (holding letter to *benrishi* privileged where "Japanese law would treat the [letter] as privileged" and where application of the privilege "would not be clearly inconsistent with important policies embodied in federal law" (quotation omitted)); *see also Murata Mfg. Co., Ltd. v. Bel Fuse Inc.,* No. 03 C 2394, 2005 WL 281217, at *2-*3 (N.D.Ill. Feb.3, 2005) (holding, where parties stipulated that Japanese law controlled privilege issue, that Japanese law accorded privilege to *benrishi*-client communications).

23. Ultimately, however, the New York lawyer who proposes to enter into a partnership with a Japanese benrishi must reach his or her own conclusion that the partnership will not compromise the New York lawyer's ability to uphold New York ethical standards: "[T]he New York lawyer who enters into a partnership with lawyers licensed in Japan or any other foreign country has an obligation to

ensure that participation in the law partnership does not compromise the lawyer's ability to abide by the ethical standards of this State, including the standards governing attorney-client confidentiality."

24. If the New York lawyer concludes that the educational requirements for admission are generally similar to those for New York attorneys and that the standards of professional conduct and discipline governing benrishi are essentially compatible to New York's standards, such that a partnership with a Japanese benrishi would not compromise the New York lawyer's ability to uphold the ethical requirements of this State, then the New York lawyer may form a partnership with the benrishi.

25. Finally, any partnership between the New York lawyer and a benrishi would also need to be in conformity with the substantive law of New York and the ethical codes and laws of Japan. *See* N.Y. State 646 (1993).

CONCLUSION:

26. Before entering into a partnership with a foreign lawyer, a New York lawyer must engage in an independent inquiry to confirm that the educational requirements for the foreign lawyer are equivalent to those for a New York lawyer and that such a partnership would not compromise the New York lawyer's ability to uphold the ethical requirements of this State, including those governing attorney-client confidentiality. Both determinations are beyond the jurisdiction of this Committee.

(18-15)

OPINION 1073 (11/13/2015)

TOPIC: Conflict of interest; defense attorneys serving on a District Attorney's conviction integrity committee

DIGEST: A defense attorney serving on a District Attorney's conviction integrity committee is not prohibited from continuing to engage in the practice of criminal law since that defense attorney is not a member of the District Attorney's firm and is not assuming a prosecutorial role.

RULES: Rules 1.0(h), 1.7(a) & (b), 1.10, 6.4

FACTS:

1. Two criminal defense attorneys have been asked to serve on a committee of a conviction integrity unit established by a county District Attorney. The committee, which also includes members of the District Attorney's office and county police, reviews wrongful conviction claims and then recommends a course of action to the District Attorney. The District Attorney ultimately decides what action to take. The criminal defense attorneys on the committee are unpaid volunteers invited to participate by the District Attorney. They are not under the control of the District Attorney, and they do not have access to information about cases other than those they are reviewing. No member of the committee is permitted to participate in the review of a claim related to a case in which the member was previously involved.

QUESTION:

2. Is a defense attorney serving on a District Attorney's conviction integrity committee permitted to continue to practice criminal law?

OPINION:

3. This Committee has repeatedly opined, under both the current New York Rules of Professional Conduct (the "Rules") and the prior Code of Professional Responsibility, that a part-time prosecutor who is also in private practice is barred from representing criminal defendants in any New York state court. *See, e.g.,* N.Y. State 859 (2011); N.Y. State 544 (1982). The Committee reasoned "that prosecutors have special responsibilities to the public that render the roles of prosecutor and defense counsel 'inherently incompatible.'" N.Y. State 859. The Committee additionally expressed the concern that the public might perceive that a District Attorney would show favoritism to the clients of a part-time prosecutor. N.Y. State 859; N.Y. State 683 (1996). This Committee has further expanded the part-time prosecutor ban to cover "matters involving law enforcement personnel with whom the lawyer works (or has worked) as a part-time prosecutor." N.Y. State 859.

4. The rationales underlying the part-time prosecutor rule are not sensibly applied to the inquirers' situation. A conviction integrity committee does not carry out the type of prosecutorial function that is "inherently incompatible" with criminal defense practice. Unlike the prosecution of a new case, the task of evaluating the weaknesses in a past conviction is not at odds with the defense function. Indeed, a criminal defense attorney's skills should be well suited to evaluating the strength of a prior conviction. In the same vein, this Committee has previously limited the application of its part-

time prosecutor rule to lawyers who serve in a prosecutorial capacity on an *ad hoc* basis, recognizing that functioning temporarily in a prosecutorial function does not trigger the same inherent incompatibility as a long term assumption of prosecutorial responsibilities. N.Y. State 564 (1984) ("a special district attorney, whose appointment is limited to a particular matter, has only a limited identification with the state, and does not present the same potential for public distrust and suspicion as would a regularly employed prosecutor representing criminal defendants in private practice"); *see also* N.Y. City Bar Op. 1996-4 (exempting *pro bono* prosecutorial work from categorical application of part-time prosecutor rule).[54]

5. Even though the inquirers' work on the conviction integrity committee is not prosecutorial in nature, their participation on the committee would, nonetheless, be problematic if it rendered them members of the District Attorney's "firm." For were the inquirers members of that firm, any conflict arising from the more traditional prosecutorial work of the District Attorney's office would be imputed to them. *See* Rule 1.10(a). But not every association constitutes membership in a firm. *See* Comment [2] to Rule 1.0(h)(whether an individual is a member of a firm is a fact-specific inquiry); N.Y. City Bar Op. 1996-4 (*pro bono* attorneys handling appeal for District Attorney's office are not members of the District Attorney's firm); N.Y. State 1036 (2014) (focusing on whether the lawyers in question (1) were presented to the public in a way that suggested they were members of a firm and (2) had mutual access to client information). The inquirers here are unpaid volunteers, they are not under the control of the District Attorney, the decisions of the committee on which they serve are non-binding recommendations, and the inquirers do not have access to information about cases other than those the committee is investigating. Given those facts, the inquirers cannot be considered members of the District Attorney's firm.

6. Based on the above, the Committee concludes that the inquirers are not categorically prohibited from serving on the conviction integrity committee and continuing to represent criminal defendants. Nonetheless, the inquirers must be on the lookout for particular conflicts that may arise from their work on the committee.

CONCLUSION:

7. A defense attorney serving on a District Attorney's conviction integrity committee is not prohibited from continuing to engage in the practice of criminal law since that defense attorney is not a member of the District Attorney's firm and is not assuming a prosecutorial position.

(24-15)

54 Some of the work done by the committee may constitute "law reform activities" and thus be governed by Rule 6.4 ("A lawyer may serve as a . . . member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interests of a client of the lawyer."). For any such work that would "materially benefit" the interests of a client of the inquirers, they "shall disclose that fact to the organization, but need not identify the client." Rule 6.4.

OPINION 1074 (11/13/2015)

TOPIC: Conflict of interest; part-time lawyers working for a Department of Social Services

DIGEST: A part-time lawyer for a county Department of Social Services may not accept appointments as assigned counsel for indigent persons in which the Department of Social Services is involved.

RULES: Rules 1.0(h), 1.7(a) & (b), 1.8(f), 1.10(a)

FACTS:

1. A county Department of Social Services has a legal unit that employs a part-time attorney. In this capacity, the attorney handles paternity and child support matters, liens, Medicaid issues, and guardianships, and on occasion is able to assist others on the Department's legal staff in child abuse and neglect cases. In addition to part-time work at the Social Services Department, the attorney maintains a solo practice in which, among other things, the attorney participates in the County's Assigned Counsel Program representing indigent individuals in criminal matters as well as Family Court proceedings. The attorney wishes to continue to accept assignments in criminal and Family Court matters from the County's Assigned Counsel Program, for which the County pays. The attorney does not intend to accept any such assignments in child abuse and neglect cases.

QUESTION:

2. May a part-time attorney for a county Department of Social Services accept assignments from the same county's Assigned Counsel Program to represent clients at the County's expense in criminal and Family Court matters?

OPINION:

3. In N.Y. State 859 (2011), a part-time lawyer at the Department of Social Services wished to represent, in a criminal proceeding, a private client who was also simultaneously a respondent in what the inquirer described as "unrelated" proceedings involving allegations of child abuse and neglect. Citing a long line of decisions in which this Committee opined that a part-time prosecutor who engages in private practice is ethically barred from representing criminal defendants in any New York state court, we said that a Department of Social Services attorney "is subject to these same principles." N.Y. State 859 (2011). We reasoned that the "role of the Social Services attorney when prosecuting child abuse and neglect proceedings is comparable to the role of the D.A.'s office in criminal prosecutions," because in both "the attorney represents the interests of the state in matters with grave consequences," including the possible loss of liberty. Accordingly, we determined that the proposed representation presented a non-waivable conflict of interest under Rule 1.7 of the N.Y. Rules of Professional Conduct (the "Rules").

4. Earlier, in N.Y. State 800 (2006), we addressed whether a part-time prosecutor could accept an assignment to represent indigent persons in Family Court proceedings in an adjacent county. There, we concluded that no *per se* rule prohibited all such assignments, but identified three types of proceedings in which the neighboring part-time prosecutor should not be involved: matters in which the prosecutor was then working or had previously worked with the law enforcement officials involved; juvenile delinquency

proceedings; and cases involving Persons in Need of Supervision (known as "PINS" actions). The first of these concerns arose from prior opinions that a currently-serving prosecutor should not accept defense work in which "'investigating officers and law enforcement personnel are those with whom the attorney associates as prosecutor.'" N.Y. State 800 (2006) (quoting N.Y. State 544 (1970)). The other two related to our view that such proceedings were "functionally indistinguishable" from adult criminal proceedings, and thus occasioned the same conflicts that animated the opinions underlying N.Y. State 859. *See, e.g.,* N.Y. State 788 (2005); N.Y. State 657 (1993); N.Y. State 184 (1971); N.Y. State 171 (1970). We also mentioned the special sensitivity required in child abuse and neglect cases. Nevertheless, in the context of part-time prosecutor accepting assignments in a different county, and providing appropriately stringent caveats, we adopted a "facts and circumstances" test to assess whether a conflict exists.

5. We conclude that the same test ought to apply here, with many of the same caveats. We cannot say that the Rules invariably forbid a lawyer to accept the representation of, say, an indigent defendant in a traffic violation merely by virtue of the lawyer's role as a part-time lawyer handling Medicaid, paternity, or child support issues for the Department of Social Services. Likewise, we cannot say that the Rules invariably forbid a lawyer to accept a representation in a Family Court proceeding between, say, two private individuals in which the Department of Social Services has no involvement.

6. The inquiring lawyer does not intend to accept child abuse and neglect cases from the County Assigned Counsel Program. We believe that this decision is well-advised and compelled by the rationale of N.Y. State 800 as falling within the areas that are off-limits to a non-resident part-time prosecutor, which are equally applicable to a resident part-time Department of Social Services attorney. This accords not only with N.Y. State 859 but also with the imputation rules of Rule 1.10, which imputes the conflicts of the lawyer to the entire legal unit of the Department by virtue of the lawyer's part-time affiliation with it. N.Y. State 975 (2013) (imputation in Public Defender's Office); N.Y. State 788 (2004) (same with respect to a DA's office); Rule 1.0(h) (the term "law firm" includes lawyers in "the legal department of a corporation of other organization"); Rule 1.10 (lawyers associated in a firm shall not knowingly represent a client when one of them practicing alone would be prohibited from doing so by Rule 1.7). Thus, the lawyer's involvement in such matters as a private lawyer could lead to the disqualification of the entire legal unit of the Social Services Department.

7. The attorney's work in other Family Court matters depends on the facts and circumstances. The Family Court is the central venue for resolution of disputes that fall within the jurisdiction of the Department of Social Services. The interaction among the Department of Social Services, law enforcement, and the Family Court is a constant fact of life. In N.Y. State 800, we noted:

> The Family Court hears matters involving children and families, including child protective proceedings, adoption, custody and visitation, support, family offense, guardianship, delinquency, paternity, persons in need of supervision (PINS), and foster care approval and review. While certain Family Court matters are more likely to involve related criminal matters, virtually all types of proceedings heard by the Family Court are likely to have some involvement of law enforcement or similar government entities. . . . The local child protective service investigates allegations and the county attorneys present ("prosecute") the case in Family Court. Family offense cases by their nature pose a great risk of criminal charges being brought. In custody and visitation cases, the practices may vary by county, but many Family Courts request reports from

> probation departments, in addition to (or instead of) reports from local child welfare officials [*i.e.,* the Department of Social Services]. Child support cases, too, could involve law enforcement and/or prosecution. In these and other cases, the Family Court may also request reports from other governmental agencies. . . .

8. Consistent with N.Y. State 800, we do not see the need to adopt a *per se* ban on the inquirer's participation in Family Court provided that the matter there does not implicate the concerns set out above. Although it is true that many Family Court proceedings implicate the Department of Social Services, there are certain proceedings there that typically do not. For instance, a couple in a dispute over custody, or the occupancy or possession of marital assets, would not ordinarily excite the interest of the Department of Social Services. This is why we believe that the issue is best left to the facts and circumstances of particular matter, in which the lawyer may assess whether the lawyer's part-time employment in the Department of Social Services would be an issue. If the Department is to play any meaningful role in the Family Court proceeding, then the lawyer should decline the assignment; if not, then we see no reason why the lawyer may not appear in the Family Court on matters in which the Department plays no meaningful role.

9. This same reasoning applies when the County Assigned Counsel Program selects a part-time lawyer for the Social Services Department to defend an indigent person in a criminal case. We can envision certain criminal cases that implicate none of the issues that cause us concern or implicate the conflicts issues that engendered the opinions cited above. Rule 1.7(a)(1) prohibits concurrent representations – that is, here, the lawyer's role at the Department of Social Services and the lawyer's role as assigned counsel in criminal cases – only when the representations involve "differing interests." The question, then, is whether the lawyer's representation qualifies for exemption under Rule 1.7(b).

10. The most important element of the analysis is the lawyer's reasonable belief "that the lawyer may provide competent and diligent representation to each affected client." We cannot negate the possibility that a part-time lawyer for the Department of Social Services may reach such a reasonable belief in undertaking the defense of a criminal defendant provided that the matter is one in which the lawyer is not then working or has not recently worked with the law enforcement officials involved, and does not involve any issue within the jurisdiction of the Department of Social Services. For example, a DWI or a larceny charge against a stranger to the Department, in which none of the law enforcement officials with whom the lawyer works or has recently worked, cannot readily be said to entail the serious issues that a lawyer in the inquirer's position might otherwise raise. But for the lawyer to be engaged in matters within the Department's jurisdiction, which a Family Court appearance would inevitably invoke, or for the lawyer to be required to cross-examine law enforcement officials with whom the lawyer is now engaged as a part-time lawyer at the Department of Social Services or has recently done so, would present exactly the problems that our earlier opinions found impermissible. In all events, the informed consent of the Department of Social Services and of the lawyer's client, confirmed in writing, is essential to the undertaking.

CONCLUSION:

11. A part-time lawyer for a county Department of Social Services may accept appointments as assigned counsel for indigent persons in Family Court and in criminal matters provided that the Department or others in law enforcement with whom the lawyer works are not materially involved. (25-15)

OPINION 1075 (12/01/2015)

TOPIC: Firm Name; Trade Name

DIGEST: A business formed by a retired judge to help lawyers prepare arguments for court may not use a trade name.

RULES: Rules 1.6, 1.7, 7.5(b)

FACTS:

1. Inquirer is a retired judge beginning a new business venture that provides legal consulting services to lawyers preparing arguments for court or other proceedings. Inquirer plans to use her experience to critique and hone a lawyer's presentation prior to his or her appearance in court. She would like to use a trade name for her business.

QUESTION:

2. Do the New York Rules of Professional Conduct (the "Rules") forbid the use of a trade name by a former judge who is beginning a business that will help lawyers prepare their arguments for court or other proceedings?

OPINION:

3. Rule 7.5(b), which is part of the advertising rules, states:

> A lawyer in private practice shall not practice under a trade name . . . or a firm name containing names other than those of one or more of the lawyers in the firm.

4. As we commented in N.Y. State 869 (2011), "The prohibition against trade names is broad, permitting use of little beyond the names of lawyers presently or previously associated with the firm." *See In re Shephard*, 459 N.Y.S.2d 632, 633 (3rd Dep't 1983) (finding "The People's Law Firm" was a prohibited trade name). *Cf. In re von Wiegen*, 63 N.Y.2d 163; 470 N.E.2d 838, 481 N.Y.S.2d 40 (Ct. App. 1984), cert. denied, 105 S.Ct. 2701 (1985) (use of phrase "the Country Lawyer" immediately below the lawyer's name constitutes a "motto," not a "trade name"); N.Y. State 948 (2012) (firm name may not include the phrase "The Business Dispute Clinic," but use of the phrase as a motto separate from the firm name may be permissible); N.Y. State 869 (2011) (lawyer's advertising may disclose an area of law in which the lawyer practices, such as tax, but lawyer may not include an area of law in the law firm name).

5. The term "private practice" used in 7.5(b) refers to the "practice of law." The scope of what constitutes the "practice of law" – for example in connection with the unauthorized practice of law – is a legal question, which this Committee is not authorized to answer. *See* N.Y. State 636 (1992) (business of selling standard will forms is not practice of law unless the forms are individualized). Nonetheless, we are comfortable assuming that the business of advising lawyers how to best prepare for arguments in court in specific cases is the practice of law. *See, e.g.*, N.Y. State 636 (noting, under analogous provision of prior Code of Professional Responsibility, that when a lawyer holding himself

out as such performs services or activities that a lawyer might provide to or conduct on behalf of a client, the lawyer will be held to all professional standards).

6. The application of all professional standards to the practice of law means that the inquirer could not advise both sides of a litigation on how best to prepare a specific argument for court without running afoul of Rule 1.7 ("Conflict of Interest; Current Clients") and could not reveal confidences obtained while consulting with each side without running afoul of Rule 1.6 ("Confidentiality of Information"). As we assume that the inquirer's proposed business model involves the practice of law, it is our opinion that she cannot use a trade name for that business.[55]

CONCLUSION:

7. The Rules forbid the use of a trade name by a former judge who is beginning a business that will help lawyers prepare their arguments for court or other proceedings.

(15-15)

55 We do not express an opinion about whether informal consultations between lawyers are likely to involve the practice of law. Cf. ABA 98-411 (concluding that when one lawyer consults with another lawyer and *where there is no intent to engage the consulted lawyer's services,* no client-lawyer relationship arises and consulted lawyer will not necessarily be bound by Rule 1.6).

OPINION 1076 (12/08/2015)

TOPIC: Email; blind copy of correspondence; communication with client.

DIGEST: A lawyer may blind copy a client on e-mail correspondence with opposing counsel, despite the objection of opposing counsel. Because a lawyer is the agent of the client, sending such a blind copy is not deceptive. However, there are practical reasons why the lawyer should consider forwarding the e-mail correspondence to the client rather than using "bcc".

RULES: 1.4(c) & (b), 4.1, 4.2, 8.4 (b) & (c)

FACTS:

1. Opposing counsel has sent the inquiring attorney an email stating that opposing counsel does not consent to inquiring attorney blind copying inquiring attorney's client on inquiring attorney's emails to opposing counsel.

QUESTION:

2. May a lawyer ethically send the lawyer's client a blind copy of an email to opposing counsel where opposing counsel has objected to such practice?

DISCUSSION:

3. Two opposing lawyers do not have a relationship of confidentiality. Consequently, a lawyer who receives correspondence from opposing counsel is not obligated under the Rules of Professional Conduct (the "Rules") to maintain the confidentiality of those communications. A lawyer does not need the "consent" of opposing counsel to send the client copies of correspondence between the inquirer and opposing counsel. Since a lawyer is an agent of the lawyer's client, opposing counsel should expect that the lawyer may share correspondence relating to the representation with the client.

4. A lawyer is required to communicate regularly with the client on the status of the matter for which the lawyer has been retained. Rule 1.4 (a)(i)(iii) requires the lawyer to inform a client promptly of material developments in the matter. Rule 1.4 (a)(3) requires the lawyer to keep the client reasonably informed about the status of the matter. Finally, Rule 1.4(b) requires the lawyer to provide information that is reasonably necessary for the client to make informed decisions regarding the representation. *See also* Rule 1.4, Cmt. [4] (lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation) and Cmt. [5] (client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued).

5. Traditionally, one method lawyers have used to keep clients reasonably informed of the progress of the matter is to send the client a copy of the correspondence from the lawyer and providing a copy of correspondence received by the lawyer. Before modern technology, the lawyer's own typewritten correspondence was copied by means of a carbon copy. Subsequently, carbon copies were replaced with photocopies. With the advent of e-mail, lawyers also gained the ability to send copies electronically.

6. When the sender of a communication copies others, it is possible to inform the principal recipient of all recipients of copies of the communication. This is often done by indicating the names of recipients at the top or bottom of the communication under the abbreviation "cc:" – which formerly indicated a "carbon copy," but now is often described as a "courtesy copy." It is also possible for the sender to provide copies to others without indicating to the principal recipient that such other recipients exist. This can be done with a "blind copy" or "bcc" on either hard copy communications or e-mails or by forwarding the original e-mail.

Is a Blind Copy Deceptive within the Meaning of Rule 8.4(c)?

7. Under Rule 8.4(c), a lawyer may not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." The term "deceit" is not defined in the Rules, and thus we believe it should be interpreted under common usage, i.e. having a purpose to deceive or give a false impression. *See* Webster's Third New International Dictionary (unabridged) (2002). The question here is whether the lawyer's failure to indicate to opposing counsel that the lawyer's client is the recipient of a blind copy of correspondence between the lawyer and opposing counsel is intended to or is likely to give opposing counsel the false impression that he or she is the only recipient of the communication.

8. Because the lawyer is the agent of the client,[56] we do not believe that it is deceptive for a lawyer to send to his or her own client copies of correspondence with opposing counsel.[57] Opposing counsel may not reasonably assume that the lawyer will not share communications with his or her principal, the client.

9. Moreover, in the context of e-mails, there are good reasons for the lawyer not to send the client a "cc." E-mails sent as a "cc" indicate the e-mail address of the person copied, and neither the inquirer nor the client may wish to provide this information to opposing counsel. See also the discussion below under *Reasons Not to Use either "cc:" or "bcc:" When Copying e-mails to the Client*.

Reasons Not to Use Either "cc:" or "bcc:" When Copying e-mails to the Client

10. Although it is not deceptive for a lawyer to send to his or her client blind copies of communications with opposing counsel, there are other reasons why use of the either "cc:" or "bcc:" when e-mailing the client is not a best practice.

11. As noted above, "cc:" risks disclosing the client's e-mail address. It also could be deemed by opposing counsel to be an invitation to send communications to the inquirer's client. *But see* Rule 4.2, Cmt. [3] (Rule 4.2(a) applies even though the represented party initiates or consents to the communication).

12. Although sending the client a "bcc:" may initially avoid the problem of disclosing the client's email address, it raises other problems if the client mistakenly responds to the e-mail by hitting "reply all." For example, if the inquirer and opposing counsel are communicating about a possible settlement

56 See ALI, *Restatement, The Law Governing Lawyers* ("a lawyer is an agent, to whom clients entrust matters").

57 This is not a case where one lawyer proposes to send a copy of correspondence to the other lawyer's client without the consent of the other lawyer, which would violate Rule 4.2 (the "no contact" rule). *See* N.Y. City 2009-1 (if lawyer sent correspondence to opposing counsel with a copy to opposing counsel's client, it would violate the no contact rule).

of litigation, the inquirer bccs his or her client, and the client hits "reply all" when commenting on the proposal, the client may inadvertently disclose to opposing counsel confidential information otherwise protected by Rule 1.6. *See Charm v. Kohn*, 27 Mass L. Rep. 421, 2010 (Mass. Super. Sept. 30, 2010) (stating that blind copying a client on lawyer's email to adversary "gave rise to the foreseeable risk" that client would respond without "tak[ing] careful note of the list of addressees to which he directed his reply").

CONCLUSION:

13. A lawyer may blind copy a client on e-mail correspondence with opposing counsel, despite the objection of opposing counsel. Because a lawyer is the agent of the client, sending such a blind copy is not deceptive. However, there are practical reasons why the lawyer should consider forwarding the e-mail correspondence to the client rather than using "bcc".

(28-15)

OPINION 1077 (12/09/2015)

TOPIC: Record retention and electronic storage

DIGEST: A law firm may scan original signed retainer agreements into the firm computer system and then destroy the original agreements, provided that the firm maintains the scanned copies for seven years after the events they record.

RULE: 1.15(d)

QUESTION:

1. The inquiring lawyers are in a firm that "has a high volume practice" and receives "thousands of signed retainer agreements" every year. They ask whether they may ethically scan each retainer agreement into the firm's computer system and then destroy the original signed agreement.

OPINION:

2. Rule 1.15(d)(1) of the New York Rules of Professional Conduct (the "Rules") requires lawyers to maintain certain records for seven years after the events that they record. As to some categories of records, the Rule states that lawyers shall maintain "copies" of those records. *See* Rule 1.15(d)(1)(iii)-(vii). As to other categories, including certain bank records, the Rule requires that the records be maintained but makes no reference to copies. *See* Rule 1.15(d)(1)(i), (ii) & (viii).

3. We addressed issues of record retention and electronic storage in N.Y. State 680 (1996). There we interpreted provisions in the Code of Professional Responsibility that were identical to those now applicable under the Rules. We concluded that, as to records for which a lawyer is required to maintain "copies," the lawyer may maintain the records in certain alternative forms, but that, under the provisions not making reference to copies, the lawyer must retain the records in their original form. *See also* N.Y. State 950 (2012) (storing mail in electronic rather than paper form), N.Y. State 940 (obligation to retain certain documents in original form).

4. The current inquiry relates specifically to retainer agreements. Lawyers are obligated only to maintain "copies" of such agreements. *See* Rule 1.15(d)(1)(iii) (lawyers must maintain "copies of all retainer and compensation agreements with clients"). Rule 1.15(d)(3) effectively defines the word "copies" for purposes of Rule 1.15(d). Subparagraph (d)(3) states:

> For purposes of Rule 1.15(d), a lawyer may satisfy the requirement of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

5. The inquirer proposes to maintain copies of the agreements by scanning them into the firm computer. May the law firm use such a scanning system without being assured that a scanned image of a retainer agreement "cannot be altered without detection"? For the reasons below, we think that complete assurance of that kind is neither available using many standard technologies, nor required by subparagraph (d)(3).

6. In N.Y. 680, we stated that before determining to change the form in which records are maintained, "the lawyer must make certain that the new storage means to be used safeguards the records from inadvertent destruction or alteration at least as effectively as the traditional paper record, and that the new technique will permit the prompt production of accurate, unaltered copies" upon request in connection with disciplinary proceedings. But we acknowledged that "stored electronic data is susceptible of being transferred from an unalterable format to a readily manipulable one," and that even paper copies "are also susceptible of being intentionally altered." Despite that acknowledgement, we concluded that "those documents for which the Rule explicitly permits 'copies' to be retained may be stored in the form of computer images."

7. In any event, we read Rule 1.15(d)(3) to mean that if a lawyer maintains records in some medium *other* than the specific ones listed – that is, other than original records, photocopies, microfilm, or optical imaging – then that other medium must preserve an image of the document that cannot be altered without detection. But a lawyer using one of the specifically listed forms – "original records, photocopies, microfilm, [or] optical imaging," which would include scanning as proposed in the inquiry here – satisfies the Rule even in the absence of special measures to ensure visibility of alteration.

8. We note two cautions. First, even if scanning or some other optical imaging technology does not preclude all possibility of undetectable alteration, the very requirement that the saved record be a "copy" imposes some standard of fidelity to the original. *See* N.Y. State 680 (recognizing permissibility of storage by "reliable" electronic means). Second, the obligation imposed by Rule 1.15(d)(3) does not end with the creation of the copy; the storage system must be reliable enough so that the copy is maintained for the required seven years.

CONCLUSION:

9. Lawyers are required to maintain "copies" of all retainer and compensation agreements with clients. A law firm does not violate that requirement if it destroys original retainer agreements after scanning the original signed agreements into its computer system and then maintains the scanned images for the requisite period.

(27-15)

OPINION 1078 (12/16/2015)

TOPIC: Confidentiality

DIGEST: A lawyer does not violate the duty of confidentiality by advising the son of a former client that the lawyer did not draft a will for his deceased father or refer the father to another law firm for will services, and that the lawyer does not possess an original will for the father.

RULES: 1.6(a)

FACTS:

1. The inquiring lawyer represented a father and son in legal matters some years ago. Recently, the son contacted the lawyer and advised that his father died several years ago, leaving a surviving spouse (who is not the son's mother). The son also stated that no estate proceedings had been commenced, no one had been appointed as administrator or executor, and he does not know whether his father left a will. He asked if the lawyer had either drafted a will for his father or referred his father to other counsel to draft a will.

2. The lawyer's records indicate that the lawyer never drafted a will for the deceased father and did not refer the father to other counsel for such purpose. Nor is there an original will in the father's closed file.

QUESTIONS:

3. May the inquiring lawyer advise the son of a former client that the lawyer has no record of drafting a will for the deceased father or of referring him to another law office for such purpose, and that the lawyer does not possess an original will for the father?

4. If the inquiring lawyer may provide this information to the former client's son, must the lawyer require proof of the son's identity and/or a death certificate of the father before providing the information?

OPINION:

5. Rule 1.6(a) of the New York Rules of Professional Conduct (the "Rules") provides that:

> (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
>
> > . . . (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community.

The Rule defines "confidential information" as consisting of:

> information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.

6. In the specific circumstances in this inquiry, the information that the son is requesting is not "confidential information" as defined by Rule 1.6(a). The lawyer's knowledge that the lawyer did not draft a will for a former client, and did not refer him to other counsel for that purpose, may or may not be "information gained during or relating to the representation of a client." However, the requested information is not protected by the attorney-client privilege, which protects communications, not non-communications; it is not "likely to be embarrassing or detrimental to the client if disclosed"; and the inquirer has not suggested that it is "information that the client has requested be kept confidential." Therefore, in these limited circumstances, the lawyer may disclose to the former client's son the fact that the lawyer did not draft a will for the former client or refer him to other counsel for that purpose.

7. Even if the information that the lawyer did not draft a will for the deceased father was considered to be "confidential information" within the purview of Rule 1.6(a), it could be disclosed to the surviving son if disclosure is "impliedly authorized to advance the best interests of the client" and is "reasonable under the circumstances." Rule 1.6(a)(2). Here, it may advance the best interests of the former client for the lawyer to make disclosures to the son, because the disclosures may assist the son in ensuring that any final wishes of his father are brought to light, and the disclosures may save the estate further time and expense of investigating in a futile search for a will.

8. If the information being requested is not confidential information, then the lawyer is not obligated to protect it. However, as a matter of prudence, the lawyer may wish to require satisfactory confirmation of the father's death before advising the son that he does not have the father's will and did not draft one for him. The lawyer may also request confirmation of the son's identity if the lawyer never met or does not remember the son from the lawyer's prior representation of the son. Requiring confirmation of the father's death and the son's identity is not mandatory under the Rules but may be prudent under the circumstances.

CONCLUSION:

9. A lawyer may advise the son of a former client that the lawyer did not draft a will for his deceased father or refer the father to another law firm for will services, and that the lawyer's files do not contain an original will for the father.

(31-15)

OPINION 1079 (12/16/2015)

TOPIC: Paralegal; legal assistant; billing

DIGEST: Because New York State does not require paralegals to be certified, the term "paralegal" does not imply certification. Consequently, it is not deceptive for a lawyer to use the title "paralegal" to describe a layperson who assists the lawyer with substantive legal work for which bar admission is not necessary but who is not a graduate of a paralegal program or certified by any certifying body. Nor is it improper to charge for the time of such paralegal in accordance with the lawyer's engagement letter.

RULES: 1.5(a) & (b), 5.3(a), 8.4(c)

FACTS:

1. The inquirer is a lawyer who discloses to clients in the retainer agreement that they will be billed for work performed by a "paralegal." The work is performed by a legal assistant who is not a graduate of a paralegal program and is not certified by any certifying body.

QUESTION:

2. May a lawyer who discloses to clients that they will be billed for tasks performed by a paralegal bill clients for work performed by a lay person who is neither a graduate of a paralegal program nor certified by any certifying body?

OPINION:

3. The answer to this inquiry depends on whether it is deceptive to bill for "paralegal" services when the services are performed by a layperson who is not a graduate of a paralegal program or certified by any certifying body. Rule 8.4(c) of the New York Rules of Professional Conduct (the "Rules") provides that: "A lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Terminology

4. Comment [2] to Rule 5.3 explains that lawyers "generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals." The only use of the term "paralegal" in the Rules is in Comment [4] to Rule 1.10, on vicarious disqualification, and the term is not defined anywhere in the Rules. In N.Y. State 255 (1972), however, this Committee defined "paralegal" as "a lay person employed by a lawyer to perform certain law office functions for which legal training and bar admission are not necessary." We also stated that "a lawyer's secretary can be a paralegal employee." See also Rule 5.3, Cmt. [2] (nonlawyer assistants act for the lawyer in the rendition of the lawyer's professional services); ABA Inf. 1185 (1971) (the term "legal assistant" is generally used as connoting a lay assistant to a lawyer). Thus, the Rules do not contain a requirement that a paralegal have any particular training or experience. See also ABA, *Model Guidelines for the Utilization of Paralegal Services* (2004) (hereafter, the "ABA Guidelines"). According to the *ABA Guidelines*, the ABA Board of Governors approved a de• nition for the term "legal assistant" in 1986 and

amended it in 1997 to read: "A legal assistant or paralegal is a person quali• ed by education, training or work experience who is employed or retained by a lawyer, law of• ce, corporation, governmental agency or other entity who performs speci• cally delegated substantive legal work for which a lawyer is responsible."

5. The ABA Guidelines state that, to comport with current usage in the profession, they will use the term "paralegal" rather than "legal assistant" – but the Guidelines also tell lawyers to be aware that the terms "legal assistant" and "paralegal" often are used interchangeably. The use of the term "paraprofessionals" in Comment [2] to Rule 5.3 indicates that the Rules place greater importance on the role these individuals play than on the name applied to them. Consequently, although the inquiry asks about using the term "paralegal," our answer would apply equally to "legal assistants" and similar terms, and even to a legal secretary performing similar functions.

Lawyer Responsibilities Regarding Paralegals

6. The only requirement in the Rules pertaining to the work of paralegals is that an employing law firm must ensure that the work of nonlawyers who work for the firm is "adequately supervised, as appropriate." Rule 5.3(a). The degree of supervision required is that which is "reasonable under the circumstances, taking into account such factors as the experience of the person whose work is being supervised, the amount of work involved and the likelihood that ethical problems might arise in the course of working on the matter." *Id. See also* N.Y. State 393 (1975) (degree of responsibility that may be entrusted to individual legal assistants may vary according to their education and experience).

Charging for Paralegal Time

7. Rule 1.5(a) provides that a lawyer may not make an agreement for, charge or collect an excessive fee or expense. Rule 1.5(a) also lists factors that the lawyer should consider in determining what is excessive, including the fee customarily charged in the locality for similar legal services.

8. Nothing in the Rules prohibits charging for the time of paralegals. *See* ABA Guidelines, Guideline 8 (lawyer may include a charge for the work performed by a paralegal in setting a charge and/or billing for legal services). *Cf. Missouri v. Jenkins*, 491 U.S. 274 (1989) (in a case under the Federal fee-shifting statute, U.S. Supreme Court upholds awarding fees for the work of paralegals, law clerks, and recent law graduates, because the statutory phrase "a reasonable attorney's fee," must refer to a reasonable fee for an attorney's work product, and thus must take into account the work of paralegals as well as attorneys).

Certification of Paralegals

9. Although many institutions certify paralegals, and some are even approved by the ABA, New York State is among the majority of states that do not require paralegals to be certified. Consequently, in New York, use of the term "paralegal" does not imply certification. It follows that using the title "paralegal" to describe a layperson who is neither a graduate of a paralegal program nor certified by any certifying body is not deceptive. In the past, we have expressed concern about whether the term "paralegal" provides appropriate notice to the public that the work is being or will be performed by a nonlawyer. In past opinions, we have concluded that it does provide appropriate notice. *See* N.Y. State

640 (1992) (term "paralegal" is sufficient without further qualification to make clear the employee's non-lawyer status). We remain of that view.

CONCLUSION:

10. Because New York State does not require paralegals to be certified, the term "paralegal" does not imply certification. Consequently, it is not deceptive for a lawyer to use the title "paralegal" to describe a layperson who assists the lawyer with substantive legal work for which bar admission is not necessary but who is not a graduate of a paralegal program or certified by any certifying body. Nor is it improper to charge for the time of such paralegal in accordance with the lawyer's engagement letter.

(33-15)

OPINION 1080 (12/22/2015)

TOPIC: Communication with public officials

DIGEST: A lawyer who has been communicating with counsel for a municipality on a matter may not thereafter communicate with a public official with respect to the matter, even if the public official requests such communication, unless the lawyer obtains the prior consent of the municipality's counsel.

RULES: 4.2(a)

FACTS:

1. The inquiring lawyer has represented various clients in the past regarding contested real property assessments. On those prior contested matters the lawyer communicated directly with the municipal assessor (the public official responsible for real property assessments) up to the point at which the attorney for the municipality became involved.

2. Now the inquiring attorney is handling a similar matter involving a contested real property assessment. Because the lawyer and the public official had substantial differences in the similar prior matters, the lawyer in the current matter decided to begin negotiations by communicating initially with the attorney for the municipality. Counsel for the municipality thereafter has made an appearance in the matter. None of the communications involved or will involve matters of policy relating to real property assessments. The assessor has the authority to bind the municipality, including the authority to settle the matter.

3. After the lawyer began the matter by communicating with the attorney for the municipality, the public official contacted the lawyer directly and requested the lawyer to communicate directly with him (the public official) on administrative matters even though the lawyer had already communicated with the attorney for the municipality.

QUESTION:

4. Absent the prior consent of an attorney representing a municipality in a contested real property appraisal, may a lawyer communicate with a public official who is represented by counsel for the municipality once he has communicated about the matter with the municipality's counsel even though the public official has requested direct communication?

OPINION

5. Rule 4.2(a) of the Rules of Professional Conduct (the "Rules") prohibits a lawyer from communicating "about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." This is commonly known as the "no-contact" rule. Rule 4.2(a) is substantially the same as former DR 7-104(A)(1) of the Code of Professional Responsibility.

6. This Committee first dealt with communications with public officials in N.Y. State 160 (1970). Applying DR 7-104(A)(1), we said that a "governmental unit has the same rights and respon-

sibilities in a controversy as any other corporation or individual." We concluded that "once there is an indication that counsel has been designated by a party, whether a governmental unit or otherwise, with regard to a particular matter, all communications concerning the matter must thereafter be made with the designated counsel, except as provided by law."

7. This apparently unambiguous interpretation of DR 7-104(A)(1) received some gloss in N.Y. State 404 (1975). There, the question was whether the lawyer for the petitioner before a board of education that was split on the matter being reviewed could contact the minority members of the board without the consent of the board's attorney. We noted that the crucial issue was whether an individual member of a public body must be considered an adverse party in connection with a decision he or she opposed. We concluded that they should not, and stated that the "overriding public interest compels that an opportunity be afforded to the public and their authorized representatives to obtain views of, and pertinent facts from, public officials representing them." Absent consent from opposing counsel, however, Opinion 404 said that "communications with members of a public body in an adversary proceeding should be made only in instances where the public official has indicated his or her desire to speak to opposing counsel."

8. Further gloss was added to our interpretation of the no-contact rule in N.Y. State 812 (2007). There, a developer had applied to a planning board for approval of a new shopping center. The planning board had power to issue binding determinations. The developer's attorney asked if he could communicate with members of the planning board about the shopping center, even though the planning board's counsel had not consented to such communication. We said that the no-contact rule prohibited the developer's attorney from communicating with planning board members unless either (1) the planning board members were not "parties" within the meaning of the no-contact rule or (2) the communication was otherwise "authorized by law."

9. As to whether the planning board members were "parties" we applied the standard set out in *Niesig v. Team I,* 76 N.Y. 2d 363, 374-75 (1990), which had interpreted the no-contact rule in the context of communications between a lawyer and employees of an opposing corporation. Judge Kaye, writing for the majority said:

> The test that best balances the competing interests, and incorporates the most desirable elements of the other approaches, is the one that defines "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel.

10. Based on *Niesig*, we concluded in N.Y. State 812 that the no-contact rule prohibits communications with government officials who have authority, individually or as part of a larger body, to bind the government or to settle a litigable matter, or whose acts or omissions gave rise to the matter in controversy. Because the planning board in N.Y. State 812 had the power to issue binding decisions, we concluded that members of the planning board were parties under the no-contact rule.

11. As to whether the communications were "authorized by law," N.Y. State 812 explored the First Amendment right to petition the government. We adopted the approach taken in ABA 97-408 (1997), which had concluded that the "authorized by law" exception permitted counsel to engage in unconsented communications with government officials despite the no-contact rule if three conditions

were satisfied: (1) the official has the authority to take or recommend action in the controversy; (2) the sole purpose of the communication is to address a policy issue; and (3) the lawyer seeking to communicate with the government official gives advance notice of the proposed communication to the lawyer representing the government so that the government lawyer has the opportunity to advise his or her client with respect to the communication, including whether to entertain it the communication at all. Rule 4.2, Comment [5] also addresses this issue. For a thorough discussion of ethics opinions relating to communications with public officials under Rule 4.2(a), see Roy D. Simon, Simon's *New York Rules of Profession Conduct Annotated* 1228-1233 (Thomson Reuters 2015 ed.).

12. Under the facts of N.Y. State 812, we concluded that that the proposed communication fell within the protection of the First Amendment and therefore was permitted.

13. We now apply Rule 4.2(a) and the opinions discussed above to the facts raised in this inquiry.

14. N.Y. State 160 teaches that "once there is an indication that counsel has been designated by a party, whether a governmental unit or otherwise, with regard to a particular matter, all communications concerning the matter must thereafter be made with the designated counsel except as provided by law." Here, counsel for the municipality has been designated by the municipality, and has filed an appearance in the matter. Consequently, all further communications must be with the municipality's counsel (or with the consent of such counsel) except as authorized by law. It does not matter whether the first contact with the government's attorney was initiated by the adverse party's attorney or whether the government official has expressly requested the adverse party to contact him directly.

15. N.Y. State 404 generally creates a narrow exception to the "prior consent" element of the no-contact rule where a public official has indicated his desire to have the lawyer communicate with him directly, and the public official is not an "adverse party" in the matter. But that exception does not apply here as the municipal assessor is an adverse party in the matter. The lawyer for the real property owner must therefore obtain prior consent from the municipality's lawyer before communicating directly with the assessor. In the absence of such consent the lawyer may not communicate with the assessor even though the assessor requests such communication. As noted in Rule 4.2, Comment [2], the no-contact rule "applies even though the represented party initiates or consents to the communication."

16. Because the matter here does not involve municipal policy, N.Y. State 812 does not permit the communications at issue. The real property owner is not attempting to exercise a First Amendment right to petition the government. He is attempting to challenge the assessment of his real property as determined by the municipal assessor and perhaps to settle the matter directly with the assessor who has authority to bind the municipality. N.Y. State 812's three prong test (reflecting the exception for First Amendment rights discussed in paragraph 11 above) is not met here because, even if the property owner's attorney gives advance notice to the municipality's attorney, the "sole purpose of the communication" would not be to address a policy matter.

CONCLUSION:

17. A lawyer who has been communicating with counsel for a municipality on a matter not involving policy may not thereafter communicate with a public official with respect to the matter, even if the public official requests such communication, unless counsel for the municipality gives prior consent. (30-15)

2016

OPINION 1081 (01/08/2016)

TOPIC: Unauthorized practice of law; professional independence; fee splitting.

DIGEST: Lawyers employed by a debt management company may not provide legal services to the company's customers. Whether services are legal services is a question of law that we cannot answer, but if the services *are* legal services, then the inquirers may be aiding a nonlawyer in the practice of law, allowing a nonlawyer to interfere with their independent professional judgment, sharing legal fees with a nonlawyer, and providing incompetent representation to clients, and they may have a personal conflict of interest. If the services *are not* legal services and the clients do not believe they are legal services, then the only applicable ethical rules would be those that apply even where the lawyer does not have an attorney-client relationship, such as the prohibition against conduct involving dishonesty.

RULES: 1.1(a), (b) & (c), 1.7(a), 5.2(b), 5.4(a), (c) & (d), 5.5(b), 5.7(a) & (c), 8.4

Modifies N.Y. State 992

FACTS:

1. Two lawyers are employed by a debt management company (the "Company"). The lawyers work under the direction of a nonlawyer who is the managing director of the Company. The main responsibilities of the lawyers are (i) to provide advice to and answer questions from the Company's customers (whom the inquiring lawyers describe as their "clients"); (ii) to contact banks and other credit institutions in an effort to settle customers' outstanding debt for less than the full amount owed; and (iii) counseling customers regarding their rights in litigation. The Company has approximately 700 clients. The lawyers are concerned that they are not able to handle that volume of work, and that consequently their clients will be brought into litigation and risk having judgments taken against them.

2. The Company also has proposed that the salaries of the inquirers be augmented by $100 for each account settled for more than $10,000.

3. The inquirers express concern that they will be unable properly to counsel the Company's clients regarding litigation because of their limited resources and the large number of clients.

QUESTIONS:

4. May a lawyer work for a debt management company where the ratio of debt management clients to debt management company lawyers means that the lawyers may not be able properly to counsel the company's clients?

5. May a lawyer working for a debt management company accept a proposed salary structure in which the lawyer will receive an extra payment for each larger account that the lawyer settles? In particular, would that salary structure constitute impermissible fee sharing?

OPINION:

Are the Debt Management Company's Services Legal Services?

6. Before we can answer the questions posed, it is important to know whether the services provided by the Debt Management Company are legal services, non-legal services, or a combination of the two. *See* N.Y. State 860 (2011). If any of the services are legal services, then the New York Rules of Professional Conduct (the "Rules") apply. If they are nonlegal services, then some of the Rules may apply, *e.g.,* Rule 8.4 (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation), but others may not, *e.g.,* rules that specifically require an attorney-client relationship. And if the services are a combination of legal and nonlegal services, then Rule 5.7(a) determines whether the Rules apply. If the services are a combination and the nonlegal services are not distinct from legal services, then the Rules would apply to the nonlegal services as well as the legal services. *See* Rule 5.7(a)(1).

7. The Rules do not define "legal services." Comment [2] to Rule 5.5, dealing with the unauthorized practice of law, states, in part: "The definition of the 'practice of law' is established by law and varies from one jurisdiction to another." As we noted in N.Y. State 860 (2011):

> We do not render opinions on matters of law (and defining unauthorized practice is a matter of law), but we note that Ethical Consideration 3-5 of the former Code of Professional Responsibility gave the following helpful guidance: "Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client . . . ."

8. Rule 5.7 contains a definition of "nonlegal services" that applies when lawyers or law firms provide "nonlegal services" to clients. Rule 5.7(c) provides:

> (c) For the purposes of this Rule, "nonlegal services" shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.

9. As we noted in N.Y. State 860, this definition begs the question of what constitutes the unauthorized practice of law, a question of law we cannot answer. It seems likely that some of the activities of the debt management firm, such as negotiating a reduction in the client's indebtedness based on the client's ability to pay (and not on the legal validity of the obligation), do not constitute legal services. Other activities, such as advising clients about legal rights, collections litigation, and litigation risks, probably are legal services. In either case, the inquirers must make the determination. In this connection, the inquirers should consider (among other things) whether the Company's clients are informed (or otherwise are made aware, either expressly or implicitly) that the inquirers are lawyers, whether the advice given to the clients is legal advice, whether the clients believe that they are receiving legal

advice, and whether the clients believe that their communications with the inquirers are protected by attorney-client confidentiality. The inquirers should also consider whether they themselves and/or the Company expressly or impliedly inform the credit institutions that they contact on the Company's behalf that they are lawyers.

May the Inquirers Disclaim that They are Providing Legal Services?

10. A second question is whether the Company or the inquirers may disclaim that the Company is providing legal services. N.Y. State 992 (2013) explored business structures in which a lawyer may work with a nonlawyer business person. The lawyer in Opinion 992 was seeking to work with a nonlawyer who planned to establish a "disability office" to help persons with government benefit matters (most of which did not require representation by legal counsel). We concluded that, even if a nonlawyer could perform services without engaging in the unauthorized practice of law, those same services constitute the practice of law when they are performed by a lawyer. *See also* N.Y. State 938 n.2 (2012) (although disability services may be performed by a nonlawyer, different questions would arise if a lawyer were to participate in providing the services, for example by meeting with customers or editing documents drafted by a licensed hearing representative).

11. N.Y. State 992 also said that a lawyer may not circumvent the Rules of Professional Conduct by performing legal services under a designation indicating that the lawyer is employed in a "nonlegal capacity" even if a nonlawyer may perform the same services. Specifically, Opinion 992 said:

> Where an attorney is engaged, the client has a reasonable expectation that the attorney has the skills and qualifications beyond that of a non attorney representative, is governed by professional conduct rules, and is subject to civil liability for the representation.

12. We believe that the rationale of N.Y. State 992 would not apply, however, if the client understands that the services being provided are nonlegal services and is not aware that such services are being provided by a lawyer. *See* N.Y. State 832 (2009) (if the shelf corporations were sold over the internet and the attorney was not identified anywhere on the website as a lawyer, and purchasers never communicated with the lawyer directly and had no opportunity to ask for advice, then the lawyer would not be giving legal advice to purchasers); N.Y. State 557 (1984) (when services are performed by a lawyer *who holds himself out as a lawyer*, they constitute the practice of law). *Cf.* Rule 5.7 (which recognizes that lawyers may provide legal services in one entity and nonlegal services in a separate entity, and that the nonlegal entity will not be subject to the Rules of Professional Conduct if the legal services and nonlegal services are "distinct" and the lawyer gives an appropriate disclaimer or the disclaimer is unnecessary). Of course, if the services would constitute legal services when performed by a nonlawyer, the Company could not avoid the unauthorized practice of law by disclaiming that they are legal services.

Consequences if the Debt Management Company's Services to Clients are Legal Services

13. If the debt management company's services to clients are legal services, then the Company would be providing legal services in violation of the Judiciary Law, which is a crime in New York. *See* Judiciary Law § 485-a (making certain violations of Judiciary Law §§478, 484, 486 and 495 a

class E felony); Judiciary Law §495 (providing that no corporation or voluntary association shall (i) practice or appear as an attorney-at-law for any person in any court in this state, (ii) hold itself out to the public as being entitled to practice law, or (iii) furnish attorneys or counsel); Judiciary Law §478 (unlawful for any natural person to furnish attorneys or to render legal services); Judiciary Law §484 (no natural person shall ask or receive compensation for preparing pleadings of any kind in any action brought before any court of record in this state).

14. If the Company's services include legal services, the inquirers may also be in violation of several provisions of the Rules, discussed below.

Aiding Unauthorized Practice; Interference with Professional Judgment

15. Rule 5.5(b) prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law. If the Company is violating statutes or common law prohibiting the unauthorized practice of law, then the lawyers would be violating Rule 5.5(b).

16. Rule 5.4 contains a number of provisions intended to ensure the professional independence of a lawyer. *See* Rule 5.4, cmt. [1]. Rule 5.4(a) provides that a lawyer "shall not share legal fees with a nonlawyer," with exceptions not applicable here. If the Company's clients are paying the Company for legal services rendered by the inquirers, then the inquirers would be violating Rule 5.4(a). Rule 5.4(c) provides that "a lawyer shall not permit a person who . . . employs . . . the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services . . . ." If the lawyers here work under the direction of a nonlawyer, they may be violating Rule 5.4(c). *See* N.Y. State 1068 (2015) (discussing whether a lawyer could join with a claims recovery firm in an agreement to offer legal services to the public to be performed by the lawyer and the claims recovery firm on a systematic and continuing basis).

Lawyer Workload

17. Rule 1.1 contains provisions to protect clients against incompetence. Rule 1.1(a) states that a lawyer should provide competent representation to a client; Rule 1.1(b), prohibits a lawyer from handling a legal matter that the lawyer knows or should know he or she is not competent to handle; and Rule 1.1(c) prohibits a lawyer from intentionally failing to seek the objectives of the client through reasonably available means permitted by law and the Rules, and from prejudicing or damaging the client during the course of the representation. In N.Y. State 751 (2002), an opinion decided under the former Code of Professional Responsibility, we responded to an attorney for a government agency who believed that more matters were being assigned to individual attorneys than could be competently handled by those attorneys. We cited the Code provisions equivalent to those now in Rule 1.1 and concluded that it was a lawyer's duty to avoid accepting more matters than the lawyer could competently handle and to reduce his or her workload if it had become unmanageable. *See also* ABA 347 (1981). The obligation of a lawyer to act competently has not changed under the Rules.

18. In N.Y. State 751, we noted that, if the question of whether the lawyer could provide competent representation in light of the lawyer's workload was an arguable question of professional duty, then under the Code's equivalent of Rule 5.2(b), the lawyer could act in accordance with a supervisory lawyer's reasonable resolution of that question. If the supervisor is a nonlawyer, then Rule 5.2(b)

would not apply, and the inquirers would need to make their own judgment as to whether they can represent all of their 700 clients competently.

Bonus Compensation

19. If the services provided are legal services, then the proposed bonus compensation proposal also raises questions about conflicts of interest. Under that proposal, the lawyers would receive $100 in additional compensation for each account settled for more than $10,000. That arrangement would create a potential personal conflict of interest for the lawyers under Rule 1.7(a)(2), which prohibits a lawyer from representing a client if "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial . . . interests." If the additional $100 would encourage the lawyer to settle a matter on terms less favorable to the client in order to qualify for the bonus, then the compensation arrangement would violate Rule 1.7 unless the conflict is consentable under Rule 1.7(b) and the lawyer obtains the client's informed consent, confirmed in writing.

Consequences If the Debt Management Company's Services to Clients are Not Legal Services

20. If the services to the clients of the Company are not legal services, and if neither the inquirers nor the Company holds the lawyers out as providing legal services to the Company's clients, then the provisions of the Rules on aiding in the unauthorized practice of law, fee sharing, interference with professional independence, competence and personal conflicts of interest would not apply. Nevertheless, the lawyers would remain subject to all Rules that do not depend on the existence of a legal representation or an attorney-client relationship. For example, the lawyers could not engage in illegal, dishonest, fraudulent or deceptive conduct and could not state or imply an ability to achieve results using means that violate the Rules or other law. See Rule 8.4(c), (e).

CONCLUSION:

21. Lawyers employed by a debt management company under the direction of a nonlawyer managing director may not provide legal services to the company's customers. If the services *are* legal services, the inquirers may be aiding a nonlawyer in the practice of law, allowing a nonlawyer to interfere with their independent professional judgment, sharing legal fees with nonlawyers, and providing incompetent representation to clients, and they may have personal conflicts of interest. If the services *are not* legal services and the clients do not believe they are legal services, then the only applicable ethical rules would be those that apply even where the lawyer does not have an attorney-client relationship, such as the prohibition against conduct involving dishonesty.

(26-15)

OPINION 1082 (01/08/2016)

TOPIC: Unauthorized practice of law

DIGEST: A lawyer may not provide legal services to individuals through a for-profit company in which a nonlawyer has an ownership or controlling interest.

RULES: 1.2(d), 5.4(a) & (b), 5.5(b), 8.4(c)

FACTS:

1. Inquiring lawyer is employed by a for-profit finance company (the "Company") and performs litigation services for the Company, including taking steps to enforce accounts receivable purchased by the Company from third parties.

2. The owner of the Company is a nonlawyer. The owner wants to ensure that in-house lawyers are fully utilized by providing their services to third party debtors, to perform legal services including drafting pleadings, and perhaps appearing in court. The names of the lawyers may or may not appear on the pleadings. None of the prospective defendants will be debtors on any accounts receivable owned by the Company.

3. The Company would charge debtors for these legal services.

QUESTIONS:

4. May a lawyer employed by a company owned by a nonlawyer provide legal services to debtors through the company?

5. May the lawyer "ghost-write" pleadings and other litigation documents, *i.e*. where the lawyer's name does not appear on the documents?

DISCUSSION:

6. As we noted in N.Y. State 1081 [26-15], several provisions of the New York Judiciary Law prohibit a corporation or voluntary association from practicing law in New York or furnishing legal services. *See* Judiciary Law §485-a (making certain violations of Judiciary Law §§478, 484, 486 and 495 a class E felony); Judiciary Law §495 (no corporation or voluntary association shall (i) practice or appear as an attorney-at-law for any person in any court in this state, (ii) hold itself out to the public as being entitled to practice law, or (iii) furnish attorneys or counsel); Judiciary Law §478 (unlawful for any natural person to furnish attorneys or to render legal services); Judiciary Law §484 (no natural person shall ask or receive compensation for preparing pleadings of any kind in any action brought before any court of record in this state).

7. What constitutes the practice of law or legal services is a legal question that is beyond our jurisdiction to answer. Here, however, the inquirer has already concluded that drafting pleadings and appearing in court constitute legal services, a conclusion we note is supported by the Judiciary Law.

8. Rule 5.5(b) of the New York Rules of Professional Conduct (the "Rules") prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law. The inquirer's employer constitutes a nonlawyer for this purpose. In addition, aiding the Company in the unauthorized practice of law would also violate Rule 1.2(d), which provides that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal . . . ."

9. Rule 5.4(a) prohibits a lawyer from sharing legal fees with a nonlawyer. The in-house lawyers here would be sharing legal fees with a nonlawyer, since clients of the Company would pay the Company for the legal services, and the Company would pay the lawyers. *See* N.Y. State 942 (2012) (concluding that, if the amount paid by the customer to the non-legal firm is more than the non-legal firm pays the lawyer, it would violate Rule 5.4(a)'s prohibition against sharing legal fees with a nonlawyer). Similarly, Rule 5.4(b) prohibits a lawyer from forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

10. If an in-house lawyer were to provide legal services to third parties through the Company, it would make no difference whether the lawyer's name appeared on the documents. The problem would be that the Company is engaging in the unauthorized practice of law. Omitting the lawyer's name from any documents would not cure the problem.

11. Failure to disclose the participation of the lawyer might also violate the lawyer's obligation to be truthful. *See* Rule 8.4(c) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); N.Y. State 613 (1990) (a lawyer may advise a pro se litigant by preparing pleadings for the litigant to sign and file in an action, but disclosure to the court is required).

12. There may be an alternative structure in which the lawyers could provide legal services to clients and the company could provide nonlegal services. Our Committee has issued opinions involving non-lawyers marketing on behalf of a lawyer. *See, e.g.* N.Y. State 902 (2012), 976 (2013). We also have issued opinions involving referral relationships between nonlawyers and lawyers. *See, e.g*. N.Y. State 1068 (2015) (lawyer may not join with a claims recovery firm in an agreement to offer legal services to the public to be performed by the lawyer and nonlegal services by the claims recovery firm if it is to be done on a systematic and continuing basis, because claims recovery firms are not on the list of approved nonlegal professionals established and maintained by the Appellate Divisions within the meaning of Rule 5.8(a). Even if the relationship were a "non-exclusive reciprocal referral agreement" within the meaning of Rule 5.8(c), the lawyers would have to ensure that the relationship did not interfere with the lawyers' independent professional judgment, did not involve improper solicitation of clients, did not involve aiding in the unauthorized practice of law, and did not involve the improper sharing of legal fees.) We will not speculate here on whether there is such alternative structure in which the inquirers could ethically provide services to customers of the finance company.

CONCLUSION:

13. A lawyer may not provide legal services to individuals through a for-profit corporation in which a nonlawyer has an ownership or controlling interest.

(34-15)

OPINION 1083 (01/21/2016)

TOPIC: Conflict of interest; differing interests

DIGEST: A lawyer whose firm represents nursing homes may form a nonprofit corporation for the purpose of accepting judicial guardianship appointments for low-asset nursing home residents who lack the capacity to document their eligibility for Medicaid. But representing the nonprofit in certain matters might present conflicts of interest. Consent to a conflict of interest by both the nonprofit and the nursing home may be possible, but if the matter involved a claim (*e.g*. regarding quality of care issues) by the guardian against a nursing home that is represented by the inquirer's firm in the matter, the firm could not represent both the guardian and the nursing home, because the conflict would be non-consentable.

RULES: Rules 1.0(f), 1.7(a) & (b), 1.9(a), 1.10(a), 8.4(c).

FACTS:

1. The inquirer is a member of a law firm that represents many nursing home clients. The inquirer proposes to form a nonprofit organization (the "Nonprofit") to accept judicial guardianship appointments for low-asset, long-term nursing home residents ("Incapacitated Persons" or "IPs") who lack the necessary capacity to authorize release of the financial records that are needed to document their eligibility for Medicaid, who do not have family members or others holding a power of attorney to manage the Medicaid application process, and who might be at risk of discharge from the facility for non-payment.[1]

2. The inquirer states that the nonprofit organization would be independent from the inquirer's law firm. Neither the inquirer nor any lawyer or employee in the inquirer's firm would be officers, directors or employees of the Nonprofit. The Nonprofit would be staffed by an administrator, who would oversee the Nonprofit's financial obligations. The Nonprofit also would partner with schools or community organizations that could provide social workers or social work students to perform on-site visits with Incapacitated Persons.

3. The inquirer's representation regarding the Nonprofit's independence from the inquirer's law firm is critical to our analysis. Based on that representation, we assume that the Nonprofit's board of directors, its administrator and its staff will not be controlled, directly or indirectly, by the law firm or any of the firm's nursing home clients and that the employees and agents of the Nonprofit will always act in what they perceive to be the best interests of the Nonprofit and those IP clients for whom it serves as guardian, regardless of the impact their actions might have upon the inquirer's law firm or its nursing home clients.

4. The inquirer states that the petitioner seeking the appointment of a guardian for an Incapacitated Person would be the nursing home where the IP resides. The inquirer's firm would represent the nursing home in seeking appointment of a guardian and be paid by the nursing home for that representation.

1 A not-for-profit corporation organized to act as guardian is eligible for such appointment. *See* Mental Hygiene Law, §81.19.

5. Guardianships may involve two type of responsibilities – guardianship for property management or guardianship to provide for personal needs. As either property management or personal needs guardian, the guardian must act with the utmost care and diligence and the utmost degree of trust, loyalty and fidelity in relation to the IP.[2]

6. Where the incapacitated person has assets, the Mental Hygiene Law gives the property management guardian a number of powers regarding the management of the IP's property.[3] The property management guardian also has the power to apply for government benefits and to authorize access to or release of confidential records. Access to the IP's financial records is necessary to document that the IP meets the income and asset eligibility requirements for Medicaid benefits in connection with an application to the County Department of Social Services ("DSS") for such benefits.

7. Personal needs guardianship involves providing for the personal needs of the IP, including determining who shall provide personal care or assistance to the IP, choosing the IP's place of abode and making health care decisions where there is no health care proxy.[4] The guardian must visit the IP at least four times a year.

8. The inquirer states that the nursing home petitioner would not "nominate" the Nonprofit as guardian, but would "make the judge aware" that the Nonprofit is available to act as guardian. The Nonprofit would charge the nursing home petitioner a one-time flat fee for accepting an appointment to serve as property management and personal needs guardian for the IP. The fee would be based on the anticipated cost of securing a payment source for the IP's nursing home care (primarily the fees due to the law firm retained to prepare the Medicaid application) plus an amount estimated to be necessary to cover the cost of addressing personal needs issues.

9. We assume that the law firm will advise the judge of the capabilities of the Nonprofit and of potential conflicts of interest between the petitioning nursing home and the Nonprofit, including (i) the Nonprofit's capabilities to act as personal needs guardian, and (ii) how the proposed fee structure provides for personal needs issues. *See* Rule 8.4(c) (a lawyer or law firm shall not engage in conduct involving deceit or misrepresentation).

10. If the Nonprofit is appointed property management guardian, it might opt to, but would not be required to, hire the inquirer's law firm to prepare and file the IP's application to the DSS for Medicaid benefits.

11. The inquirer identifies three reasons for forming the Nonprofit – one practical and two financial. The practical reason, the inquirer states, is that guardianship judges have complained that they have difficulty finding persons who will accept guardianship appointments in low-asset cases, and the appointments therefore are being made to non-profit organizations. According to the inquirer, the nonprofit organizations accepting such appointments in the inquirer's geographic practice area often do not have the staffing or expertise to fulfill their duties to successfully prosecute a Medicaid application. In these cases, the burden and expense of securing Medicaid funding falls to the nursing home

2 *See* Mental Hygiene Law § 81.20.

3 *See* Mental Hygiene Law § 81.21

4 *See* Mental Hygiene Law § 81.22

where the IP resides, while the designated non-profit guardian receives court-awarded guardianship fees for performing little or no work.

12. The financial reasons both stem from the negative economic effects on the inquirer's nursing home clients that result from the current financing system. The first arises from the way the DSS is required to treat, for the purpose of establishing an IP's Medicaid budget, the monthly payment amounts typically awarded to non-profit organization guardians that are paid out of the IP's Social Security benefit payments. Medicaid recipients in nursing homes are responsible for paying the nursing home a certain amount of the nursing home costs each month out of their income, usually out of the monthly Social Security benefit. This amount is termed the recipient's Net Available Monthly Income (NAMI). Medicaid benefits are paid to the nursing home in an amount equal to the difference between the facility's approved Medicaid rate and the NAMI amount. However, the DSS does not disregard guardianship fees that are paid out of the IP's Social Security benefits in determining the Medicaid budget. According to the inquirer, the monthly guardian's fee is typically $450. Thus, on an annualized basis, the nursing home may receive $5,400 (i.e. 12 x $450) less for an IP for whom a guardian has been appointed, compared to nursing home residents whose cost of care is being paid by Medicaid but who do not have guardians.

13. The second financial reason is that, according to the inquirer, where a nonprofit organization guardian is appointed, the social security benefit payment and other income is often paid directly to the non-profit organization, so that it may deduct its monthly court-awarded fee. The non-profit organization is then expected to remit the balance to the nursing home. However, many of the existing non-profit organizations accepting guardianship appointments often fail to pay over or are late in paying over the excess to the nursing home, to the home's financial detriment.

QUESTIONS:

14. If the Nonprofit were appointed property management guardian for an Incapacitated Person who is a resident of a nursing home represented by the inquirer's firm, could the inquiring lawyer or the lawyer's firm accept an engagement from the Nonprofit to prepare and file the Medicaid application for an Incapacitated Person? Does the fact that the inquirer formed the Nonprofit or regularly represents the nursing home constitute a conflict of interest?

15. If the Nonprofit were appointed personal needs guardian for an Incapacitated Person who is a resident of a nursing home represented by the inquirer's firm, could the Inquirer's firm represent the Nonprofit? Would the fact that the firm formed the Nonprofit or regularly represents the nursing home constitute a conflict of interest?

OPINION:

16. The jurisdiction of our Committee is to interpret the New York Rules of Professional Conduct (the "Rules") as they apply to the conduct of lawyers. We therefore make no determinations here on whether the Nonprofit meets the requirements of the Mental Hygiene Law for a guardian of IPs, the provisions of the tax law governing not-for-profits, including their eligibility to receive and retain non-profit status under the Internal Revenue Code, or the provisions of any business corporation law with respect to the governance of the Nonprofit.

Conflicts of Interest

17. The principal conflict rule in the New York Rules of Professional Conduct (the "Rules") governing concurrent representations is Rule 1.7. Rule 1.7(a) provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
>
> (1) the representation will involve the lawyer in representing differing interests; or
>
> (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

18. Under the definition of "differing interests" in Rule 1.0(f), "differing interests" include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest." Comment [8] to Rule 1.7 explains the meaning of "differing interests":

> [8] Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. . . . The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Moreover, differing interests can arise even if the lawyer does not represent the two clients in the same proceeding. *See* Rule 1.7, Cmt. [6] ("a lawyer may not advocate on one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated").

19. Finally, while lawyers are associated in a firm none of them may knowingly represent a client when any one of them practicing alone would be prohibited from doing so. Rule 1.10(a).

20. We assume for purposes of this opinion that each of the inquirer's nursing home clients is a continuing client. Once the inquirer forms the Nonprofit, if the inquirer continues to represent the Nonprofit, the Nonprofit and the nursing homes will be concurrent clients. Similarly, once the Nonprofit has been formed, if the Nonprofit has been named guardian and the Nonprofit seeks to hire the inquirer's firm to prepare a Medicaid application or to pursue matters involving personal care, the Nonprofit and the nursing home would be concurrent clients.

21. If the Nonprofit has not selected the law firm to prepare the Medicaid application, and if the law firm were to do no other work for the Nonprofit, then the Nonprofit would be a former client. The lawyer's ethical duties to a former client are found in Rule 1.9(a), which prohibits a lawyer who for-

merly has represented a client in a matter from thereafter representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing. For example, another client would have a substantially related matter if the other client sought to challenge the creation or tax exemption of the Nonprofit.

The Formation of the Nonprofit

22. As we understand the inquiry, in forming the Nonprofit, the law firm is acting on its own and not on behalf of a client. Consequently the terms of Rule 1.7(a)(1) and 1.9 do not apply. If the firm were construed to be representing the to-be-formed organization, then such Rules would apply. *See* Scope ¶ [9] ("Whether a client-lawyer relationship exists for any specific purpose can depend in the circumstances and may be a question of fact.").

23. If the law firm has no client in connection with the formation of the Nonprofit, or if the Nonprofit is its only client, the issue under Rule 1.7(a)(2) is whether there is a significant risk the lawyer's representation of the Nonprofit would be adversely affected by the lawyer's interest in remaining in the good graces of his or her nursing home clients. Since we accept the inquirer's representation that the creation of the Nonprofit would be in the interest of nursing home clients, such risk does not arise.

24. It is possible that the law firm could be deemed to be acting on behalf of a nursing home client in forming the Nonprofit. Although the inquirer states that the law firm is acting solely on a pro bono basis in forming the Nonprofit, the objective of forming the Nonprofit is, at least in part, to benefit financially the firm's nursing home clients. If the law firm is deemed to represent one or more nursing home clients in the formation of the Nonprofit, the issue under Rule 1.7(a) would be whether representing one nursing home client in the formation of the Nonprofit and representing other nursing home clients in other matters constituted representation of interests that are "differing." See Rule 1.0(f) (definition of "differing interests"). While this is a question of fact, it seems unlikely that representing one client in the formation of the Nonprofit would involve differing interests from those of the firm's other clients.

Representation of the Nonprofit in Property Guardianship Matters

25. If the law firm is asked to represent the Nonprofit in connection with property management guardianship matters involving a resident of a nursing home represented by the law firm, including preparing and filing a Medicaid application, there is a potential conflict under Rule 1.7(a)(1), in that a reasonable lawyer might conclude that the representation involves the law firm in representing differing interests. The guardian of an incapacitated person must act in the best interests of the incapacitated person, whereas the nursing home may have financial interests that differ from those of the incapacitated person. Whether a reasonable lawyer might so conclude will clearly depend on the factual circumstances. If the IP has limited assets, *e.g.,* below the Medicaid threshold, the interests of the resident and the nursing home in the appointment of a guardian and the successful completion of a Medicaid application would seem to be the same. *See* N.Y. State 1046 (2015) (the interests of the incapacitated person

and the care facility are not always differing).[5] Ultimately, however, the question whether there are differing interests is one of fact that is beyond the jurisdiction of this Committee.

26. Even if there were no differing interests in the matter, there is still a question of whether the lawyer has a personal interest conflict under Rule 1.7(a)(2). As we said in N.Y. State 1046:

> Where the lawyer or the lawyer's firm have a continuing relationship with the Care Facility that is the petitioner under the guardianship proceeding, or into which the Guardian might place the AIP [alleged incapacitated person], the relationship between the law firm and the Care Facility could adversely affect the independent professional judgment of the lawyer in representing the AIP, thus creating a personal interest conflict for the lawyer.

This question is also a factual one that is beyond the jurisdiction of this Committee.

Representation of the Nonprofit in Personal Needs Matters

27. Personal needs matters, such as quality of care issues, treatment decisions and decisions about the IP's place of abode, are more likely to involve differing interests between the guardian, which must exercise the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person, and the law firm's nursing home client. This question, too, is one of fact that is beyond our jurisdiction. But if a facility's violations may lead to substantial monetary penalties or disenrollment from the Medicare or Medicaid programs, or if facilities compete for residents to fill empty beds, and if an injury sustained by a resident caused even in part by noncompliance with government standards and procedures may lead to litigation, then the prospect of conflicting loyalties between the lawyer's nursing home clients and the guardian with respect to personal needs issues would seem to be not insubstantial.

Client Consents to Conflicts

28. A lawyer may sometimes represent a client despite the existence of a conflict, if the conditions set forth in Rule 1.7(b) are met:

> (a) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

5 In N.Y. State 1046, we were asked whether a law firm that regularly represented nursing homes could represent an alleged incapacitated person in the guardianship proceeding where the firm did not represent the nursing home in the guardianship proceeding. Because the guardianship proceeding here would have ended when the Nonprofit has been appointed guardian, the posture is slightly different and the special consent issues discussed there do not arise here. But because the guardian has the duty to act in the best interests of the IP, many of the conflict issues are the same. For example, if, during its research into the IP's finances in connection with the Medicaid application, the law firm discovered that the IP had assets above the Medicaid threshold, there would be a conflict of interest between the Nonprofit as Guardian and the nursing home. The interests of the nursing home in being paid by the resident as a "private pay" patient and the interest of the resident in preserving assets, or even the interest of the guardian in being paid sufficient guardianship fees to cover the costs of serving as guardian, may be differing. *See* Nina Bernstein, *To Collect Debts, Nursing Homes are Seizing Control Over Patients*, N.Y. Times, Jan. 25, 2015; Nancy Levitan, *Nursing Home Petitioners and Guardianship*, N.Y. State Bar Ass'n J. (Sept. 2015).

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Under Rule 1.7(b), client consent does not cure a conflict of interest if the representation is prohibited by law, if the lawyer could not reasonably believe that he or she will be able to provide competent and diligent representation to each affected client, or if the representation involves one client asserting a claim against another client represented by the lawyer in the same litigation or other before a tribunal.

29. Thus, the inquirer and the inquirer's law firm clearly could not represent the guardian with respect to a guardianship matter involving a resident of a client nursing home if (i) the firm did not believe it could provide competent and diligent representation to both the nursing home and the IP, (ii) if the dual representation were prohibited by law, such as the Mental Hygiene Law, or (iii) if the firm represented both the nursing home and the guardian in the same matter and the dual representations involved the assertion of a claim by the guardian against the nursing home or by the nursing home against the guardian, as guardian for the IP. In any such case, the conflict would be non-consentable.

30. Even if the inquirer's firm did not represent the nursing home in such matter, there would still be a question under Rule 1.7(a)(2) whether there is a significant risk that the lawyer's professional judgment on behalf of the guardian might be adversely affected by the lawyer's personal financial interest in remaining in the good graces of the nursing home client. Thus, if the matter involved the assertion of a claim by the guardian against a nursing home client of the law firm, even if the law firm represented only the guardian and not the nursing home in the matter, the question remains (and we do not opine) whether the lawyer could reasonably believe that he or she could provide competent and diligent representation to the guardian.

CONCLUSION:

31. A lawyer whose firm represents nursing homes may form a nonprofit corporation for the purpose of accepting judicial guardianship appointments for low-asset nursing home residents who lack the capacity to document their eligibility for Medicaid. But representing the nonprofit in certain matters might present conflicts of interest. For example, if the nonprofit is appointed property management guardian for an incapacitated person who resides in a nursing home client of the firm and the firm is asked to provide services for the guardian (such as preparing the Medicaid application) there is a potential conflict of interest between the guardian and the nursing home client, but if the incapacitated person has limited assets, the interests of the two clients are unlikely to differ. If the nonprofit is appointed personal care guardian for an incapacitated person who resides in a nursing home client of the law firm, the interests of the guardian and nursing home clients are more likely to differ. Consent to a conflict of interest by both the nonprofit and the nursing home may be possible, but if the matter involved a claim by the guardian against a nursing home client (i.e. regarding quality of care issues) that is represented by the inquirer's firm in the matter, the firm could not also represent the nursing home, because the conflict would be non-consentable.
(19-15)

OPINION 1084 (01/22/2016)

TOPIC: Confidential information; defense attorney's knowledge of co-defendant's innocence; consent to disclose confidential information of deceased former client; implied authorization to disclose

DIGEST: Where a defense attorney obtained information from a deceased client that appears to exonerate a co-defendant, that information is protected as confidential, notwithstanding that the client was convicted and there are no pending proceedings against the client or in which the attorney has appeared. Authorization to disclose confidential information may have been expressed by the client, or may be implied when the disclosure is consistent with the client's best interests and is reasonable under the circumstances.

RULES: 1.6(a) & (b) and 1.9(c)

FACTS:

1. While the inquiring attorney was representing a client charged with fraud, the client revealed information to the inquiring attorney that would seem to exonerate a co-defendant. The client was convicted and has since died in prison. There are no pending proceedings in which the attorney has appeared on the client's behalf. The co-defendant has pled guilty, but is now in the process of seeking to vacate her plea and has asked if the inquirer knows anything that could help her. Prior to his death, the client told the inquiring attorney that if he was convicted, he wanted to exonerate his co-defendant.

QUESTION:

2. May an attorney disclose, to a co-defendant of the attorney's now-deceased client information imparted by the client that might exculpate the co-defendant?

OPINION:

3. The nature and extent of information about a non-client that a lawyer may ethically reveal in connection with that non-client's motion to vacate a plea depends on a number of factors, including: (a) whether the information is protected as "confidential" by Rule 1.6; (b) whether, as a matter of law, there is anyone who can waive the privilege or provide an informed consent to disclose the information; and (c) whether such consent was impliedly authorized by the now deceased client.

Whether the Information Is Protected as "Confidential"

4. Rule 1.6(a) defines and protects certain information as "confidential." It provides:

> (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
>
> (1) the client gives informed consent, as defined in Rule 1.0(j);

> (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
>
> (3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

5. Rule 1.6(b)(1) authorizes disclosure of a client's confidential information "to prevent reasonably certain death or substantial bodily harm." Comment [6B] to Rule 1.6 explains that this paragraph recognizes the overriding value of life and physical integrity. As an example, Comment [6B] says: "Wrongful execution of a person is a life-threatening and imminent harm under paragraph (b)(1) once the person has been convicted and sentenced to death." Incarceration as a result of a fraud conviction is not covered by this exception.

6. Rule 1.9(c) speaks to the confidential information of a former client and states in relevant part:

> (c) A lawyer who has formerly represented a client . . . shall not thereafter . . .
>
> (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

7. In criminal proceedings, the relative culpability of the defendants is often a matter of great significance when negotiating a plea. Hence, a statement tending to negate the guilt of a co-defendant may well prove disadvantageous to any other defendants who are more culpable. Because the information exonerating the co-defendant was "gained during . . . the representation of a client" and is protected by the attorney-client privilege there can be no doubt that it should be deemed "confidential" within the meaning and protection of Rules 1.6(a) and 1.9(c)(2). *See* N.Y. State 1057 (2015).[6]

Whether Disclosure Is Expressly Authorized

8. On the facts presented – *i.e.*, that the client at one time expressed a desire to exonerate the co-defendant – it is possible to discern an authorization to disclose on the happening of some future event which would conclude the client's case, or at least place the client in a situation where disclosure would not redound to the client's detriment. Whether the client gave such express authorization is a question of fact beyond the jurisdiction of this Committee to resolve. If, in fact, the client instructed the inquiring attorney to reveal information necessary to exonerate the co-defendant, and if the client persisted in this instruction after he had been "informed" of the relevant considerations, the lawyer could disclose the information pursuant to the exception in Rule 1.6(a)(1) for "informed consent."

6 If disclosure would be "detrimental to the client" it would be confidential for that reason (even if not privileged) under Rule 1.6.

9. Even if the client did not personally and explicitly provide informed consent to the disclosure, the inquiring attorney may still disclose the information if informed consent is given by someone who is legally entitled to waive the deceased client's attorney-client privilege and has legal authority to provide informed consent to waive the attorney's ethical obligation of confidentiality. *Cf.* N.Y. State 970 (2013) ("If the executrix is legally entitled to the same access that the decedent had when alive, then the former attorney should ordinarily provide the executrix access to all the files"). Whether and under what circumstances this authority can be exercised by the deceased client's personal representative is uncertain. The issue is, however, ultimately a matter of law beyond the jurisdiction of this Committee.

Whether Disclosure Is Impliedly Authorized

10. Rule 1.6(a)(2) adopts the concept of implied authorization to disclose client confidential information. Comment [5] to Rule 1.6 explains:

> Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer may make disclosures of confidential information that are impliedly authorized by a client if the disclosures (i) advance the best interests of the client and (ii) are either reasonable under the circumstances or customary in the professional community. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. In addition, lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers. Lawyers are also impliedly authorized to reveal information about a client with diminished capacity when necessary to take protective action to safeguard the client's interests.

11. Where there is reason to believe that the now-deceased client would have wanted the co-defendant to be exonerated under the current circumstances, the concept of implied authorization to disclose in Rule 1.6(a)(2) would permit the lawyer to make such disclosures as may be necessary to accomplish that end.

CONCLUSION:

12. Statements made by a deceased client that may exonerate a co-defendant are protected as confidential information. The client may have expressly authorized disclosure of the information by personally giving informed consent to the disclosure, or authorization to disclose it may be implied if the disclosure is consistent with the client's best interests and is reasonable under the circumstances.

(29-15)

OPINION 1085 (02/16/2016)

TOPIC: Conflict checks

DIGEST: When a firm is aware of parties adverse to a prospective client but has only incomplete identifying information for those parties, such as street names, it may be necessary for the firm's conflict check to go beyond checking its written records of engagements, by consulting its lawyers who may have represented those adverse parties. A lawyer's duty to avoid conflicts is not limited to the requirement of an adequate conflict-checking system. Thus when a lawyer acquires new information about adverse parties during the course of a representation, it may be advisable, even though not required by the rule on conflict-checking systems, for the lawyer to perform a new conflict check based on that new information.

RULE: 1.0(h), 1.7(a), 1.9(a), 1.10(a), (e) & (g), 5.1(a)

FACTS:

1. The inquirer is a law student permitted to practice, pursuant to court order, under the supervision of a law school clinic (the "Clinic"). The Clinic represents a person who was convicted of a crime (the "Client"), and the Clinic wishes to seek post-conviction relief on the ground that the Client was a victim of human trafficking. To that end, the Clinic has gathered information on the alleged traffickers, but has not been able to determine their legal names; the information is limited to their "street names" and general areas of residence.

2. The inquirer believes that the Client's alleged traffickers potentially constitute "adverse parties," because they may be adversely affected by (and potentially subjected to further prosecution based on) the Clinic's motion for post-conviction relief. Consequently, the inquirer believes it is necessary to include the alleged traffickers in a conflict check.

3. The inquirer also notes that the issue of street names "may arise in other situations where a party's legal name is not available," such as when attorneys represent parties in cases involving drugs, gangs, or organized crime, and other groups where the use of street names is common.

QUESTION:

4. In representing the Client, is it sufficient to run a conflict check with the "street names" of human traffickers who are potentially adverse parties and to repeat the check if the inquirer later discovers more information about the traffickers?

OPINION:

5. The inquiry appears motivated by concern that certain kinds of conflicts of interest could arise without being detected by the Clinic's existing conflict-checking procedures. In particular, the Clinic might currently be representing, or might have represented in the past, an alleged human trafficker of the Client. If so, the Clinic may have a record of that alleged trafficker's legal name but not informal identifiers such as the trafficker's street names. The interests of the Client and the alleged trafficker are likely to be sharply adverse. Thus, if the Clinic is currently representing the alleged trafficker,

even in an unrelated matter, that would give rise to a conflict.[7] And a conflict would arise even from a past representation of the alleged trafficker in a matter that was the same as or substantially related to the matter in which the Clinic will be representing the new Client.[8]

6. The New York Rules of Professional Conduct (the "Rules") limit the ability of a lawyer to represent a client when the lawyer has a conflict of interest. The Rules also impose two requirements of affirmative measures to help detect potential conflicts before a lawyer or law firm accepts a new engagement, or as soon as possible thereafter. Those requirements are imposed on a "law firm," and that term would include the Clinic. *See* Rule 1.0(h) (defining "law firm" to include "lawyers employed in a qualified legal assistance organization") and Cmts. [2] & [4] (explaining definition of "firm"); N.Y. State 794 ¶ 2 (2006) (interpreting predecessor provisions to the Rules and opining that "[s]o long as the clinic's students work in a common space and have shared access to physical files, the entire legal clinic, including the project in question, is a law firm" within the meaning of the Code of Professional Responsibility).

7. The two affirmative requirements for detecting conflicts are set forth in Rule 1.10(e). First, a law firm "shall make a written record of its engagements, at or near the time of each new engagement."

8. Second, a law firm "shall implement and maintain a system by which proposed engagements are checked against current and previous engagements" upon any of four triggering events. The triggering events occur when "(1) the firm agrees to represent a new client; (2) the firm agrees to represent an existing client in a new matter; (3) the firm hires or associates with another lawyer; or (4) an additional party is named or appears in a pending matter."

9. Under Rule 1.10(g), if a violation of Rule 1.10(e) by a law firm is a substantial factor in causing a violation Rule 1.10 (a)[9] by a lawyer in the firm, the law firm, as well as the individual lawyer, is responsible for the violation of Rule 1.10(a).

10. The purpose of the system required by Rule 1.10(e) is to "render effective assistance to lawyers in the firm in avoiding conflicts of interest," and the system "must be adequate to detect conflicts that will or reasonably may arise" upon any of the four triggering events. Rule 1.10, Cmt. [9].

11. The required records of engagements must be in written form, but in some cases, the lawyer performing the conflict check may have reason to believe that the written records are insufficient to allow an adequate check. Thus, for a conflict-checking system to be effective, it "may also need to supplement written information with recourse to the memory of the firm's lawyers through in-person,

7 *See* Rule 1.7(a)(1) (unless the conflict is properly waived, a lawyer shall not represent a client if a reasonable lawyer would conclude that "the representation will involve the lawyer in representing differing interests"); Rule 1.7, Cmt. [6] ("The duty to avoid the representation of differing interest prohibits, among other things, undertaking representation adverse to a current client without that client's informed consent.").

8 *See* Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.").

9 "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein."

telephonic, or electronic communications." Rule 1.10, Cmt. [9B]. "At a minimum . . . a firm must record information that will enable the firm to identify (i) each client that the firm represents, (ii) *each party in a litigated, transactional or other matter whose interests are materially adverse to the firm's clients*, and (iii) the general nature of each matter." Rule 1.10, Cmt. [9C] (emphasis added).

12. A law firm must check for conflicts before initially agreeing to represent a new client in a matter (and before agreeing to represent an existing client in a new matter). The firm may also need to check for conflicts after agreeing to represent a client if relevant new information is obtained in the course of the representation. We analyze both these requirements in turn.

Checking for conflicts before accepting a new matter

13. First, before agreeing to represent a new client, a firm must check that proposed engagement against current and previous engagements. If the firm discovers current or previous clients whose interests may be adverse, the firm may have to conduct further inquiry into the nature of the possibly conflicting representations to determine whether a conflict really exists and, if so, whether the conflict is waivable.

14. Checking the proposed engagement against current and previous engagements must include a check against the written records of such engagements that Rule 1.10(e) requires the firm to maintain. The firm should check the names of all known materially adverse parties. When the materially adverse parties are known only by street name, then the effectiveness of the check against written records will depend on whether the records include the street names of current and previous clients. As noted in paragraph 20 below, there is a question as to whether a firm's conflict checking system should contain not only the legal names but also the street names of current and previous clients. But the inquiry at hand concerns the conflict check that the firm needs to undertake when considering representation of the particular new client at issue here.

15. Determining the required scope of a conflicts check turns on whether the check against written records is sufficient by itself, or whether the check against written records must be supplemented with other information (such as recourse to the memory of the firm's lawyers, or to client files not reflected in the firm's standard conflict-checking database). We believe that the answer depends on circumstances. Law firms and lawyers checking for conflicts are not routinely required to go beyond checking the written records in their conflict-checking system. If there is no reason to believe that the firm has ever represented clients with interests materially adverse to those of the prospective client, then there may be no need to supplement the check of written records. For example, the firm may know it has never represented a human trafficker. On the other hand, a lawyer or law firm checking for conflicts in a particular case could be aware of facts raising a substantial prospect that current or prior engagements might involve clients with materially adverse interests. In that case, for the conflict-checking system to be effective, the law firm should make reasonable efforts to contact lawyers and students who were involved in those current or prior engagements to inquire about street names of potentially adverse parties. But such further inquiry may not be feasible if, for example, those involved in prior engagements were students who no longer attend the school, for whom the school has no forwarding addresses.

Checking for conflicts after accepting a new matter

16. The second part of the analysis is about whether the Clinic, having a conflict system that contains only legal names of clients and having already agreed to represent the Client, has any continuing conflict-checking obligations if relevant new information is obtained in the course of the representation, or if information already in the Clinic's possession unexpectedly turns out to be useful in the matter.

17. This question does not appear to involve any of the four events that trigger a requirement to check for conflicts. The acquisition of new information during the course of a representation is not one of those events. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 728 (Thomson Reuters, 2016 ed.) (stating that the Rule "does not require law firms to devise a system for detecting conflicts that arise between two or more current clients *after* engagements are accepted," even though "individual lawyers remain responsible for any improper conflicts even if the conflicts arise during a representation").

18. Nor would a new conflict check be necessitated by the plan to use the new information in a motion for post-conviction relief. It is true that a triggering event occurs when a lawyer names an additional party or when an additional party otherwise appears in a pending matter. But when a lawyer files motion papers in the Client's post-conviction proceedings alleging that an identified person is a human trafficker, the lawyer is not naming that person as a party, and it does not mean that the person has appeared.

Helpful practices in checking for conflicts

19. While acquiring new information such as the legal names of the alleged human traffickers does not trigger a Rule 1.10(e) requirement to perform a new conflicts check, it may nevertheless be advisable for the Clinic to do so. Performing a new conflict check may help the assigned lawyers comply with their ethical duty to avoid conflicts. *See* Rule 1.10, Cmt. [9A] ("a lawyer who knows or should know of a conflict in a matter that the lawyer is handling remains individually responsible for the violation of these rules, whether or not the firm's conflict-checking system has identified the conflict"). It may also be an appropriate way for the Clinic to discharge its own responsibility to help those lawyers avoid such conflicts. *See* Rule 5.1(a) ("A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules."); Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 728 (Thomson Reuters, 2016 ed.) (opining that in light of underlying conflict rules, a law firm system ought "to continue monitoring possible conflicts that arise during a representation," and that a firm's records should "ideally" include the names of all adverse parties "who become involved in the matter as it actually develops").

20. Finally, we note that steps may be taken to minimize the kinds of potential problems that motivated the inquiry. As set forth above, a law firm is required to "make a written record of its engagements, at or near the time of each new engagement," and part of that requirement is to record information that will enable the firm to identify "each client that the firm represents." At the time of new engagements, the firm could seek to learn and record not only legal names but also more informal identifiers such as street names. The more names the Clinic has recorded for its clients, the more effective its conflict-checking system is likely to be. We were not asked, and we do not address,

whether Rule 1.10(e) requires a law firm to obtain and record informal identifiers in addition to legal names. But it is fair to say that including such information in the records of engagements may be of substantial assistance in checking for conflicts in a law firm whose matters sometimes involve human traffickers, gang members, or others who use street names.

CONCLUSION:

21. When a firm is aware of parties adverse to a prospective client but has only incomplete identifying information for those parties, such as street names, it may be necessary, depending on circumstances, for the firm's conflict check to go beyond checking its written records of engagements, by consulting its lawyers who may have represented those adverse parties.

22. A lawyer's duty to avoid conflicts is not limited to the requirement of an adequate conflict-checking system. Thus when a lawyer acquires new information about adverse parties during the course of a representation, it may be advisable, even though not required by the rule on conflict-checking systems, for the lawyer to perform a new conflict check based on that new information.

(37-15)

OPINION 1086 (03/07/2016)

TOPIC: Referral fee from investment advisor

DIGEST: An attorney may not accept a fee or commission from an investment firm for referring the client to such firm where the money to be invested arises from an engagement in which the lawyer represented the client because the fee creates a non-consentable conflict.

RULES: 1.7(a)(2), 1.7(b), 1.8(f)

FACTS:

1. The inquiring attorney represents clients in workers' compensation and personal injury matters. Some of the attorney's clients receive large sums of money as a result of their cases, and when that happens, clients commonly ask the attorney for advice regarding how to manage the settlement funds.

2. When clients ask about managing their settlement funds, the inquiring attorney would like to refer them to a licensed investment professional with whom he has a relationship and receive a fee or commission from the investment firm. The inquirer represents that he may receive such a fee or commission because he holds a number of securities and insurance licenses.

3. The inquirer states he would make the referral only after all legal work has concluded, the client's case has closed and the inquirer has fully disclosed to the client that the inquirer will financially benefit from the referral.

QUESTION:

4. May an attorney refer clients to an investment firm with whom the attorney has a professional relationship and receive a fee or commission from the investment firm for the referral?

OPINION:

5. We note at the outset that the Committee does not opine on questions of law, and thus, does not opine on whether the proposed fee or commission violates any statute or regulation. In the event the proposed fee or commission is illegal and reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, it would violate Rule 8.4(b). *See also* N.Y. State 845 (2010); N.Y. State 667 (1994); N.Y. State 595 (1988); N.Y. State 576 (1986); N.Y. State 461 (1977). For purposes of the following analysis, we assume that the investment firm may legally pay the attorney a fee or commission and that such payment is not otherwise illegal.

Applicable Rules Provisions

6. Whether a lawyer may accept a referral fee from a third party service provider generally involves analysis of New York Rules of Professional Conduct (the "Rules") 1.7(a)(2) and 1.8(f).

7. Rule 1.7(a)(2) governs conflicts involving a lawyer's personal interests and generally prohibits a representation in which there is a significant risk that the lawyer's personal interests would have an adverse effect on the lawyer's exercise of professional judgment, unless the conflict can be and is waived under Rule 1.7(b).

8. Rule 1.8(f) provides that "a lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and (3) the client's confidential information is protected as required by Rule 1.6."

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

10. On the other hand, a number of our prior opinions have prohibited a lawyer from accepting a referral fee or commission from a third-party service provider for referring a client to the service provider. Where our opinions have held that a lawyer may not accept a fee from a third-party service provider, we often have found that the lawyer's personal conflict of interest is so great that disclosure to and consent from the client will not cure the conflict. *See, e.g.*, N.Y. State 682 (1996) (lawyer may not accept a fee from an investment adviser for referring a client under predecessor to Rule 1.7 because disclosure and consent would not cure the lawyer's direct and substantial conflict); N.Y. State 671 (1994) (lawyer engaged in estate planning may not accept referral fee from insurance company for referring client under predecessor to Rule 1.7 because disclosure and consent could not cure the direct and substantial conflict between the client's and the lawyer's interests); N.Y. State 619 (1991) (where estate planning lawyer's remuneration from the third party would vary with the quantity of the product or services recommended, receipt of the referral fee was impermissible under predecessors to Rules 1.7 and 1.8(a) [business transaction with client] because the lawyer's substantial financial interest conflict could not be cured by disclosure and consent).

11. N.Y. State 682 identifies two factors that determine whether the lawyer's financial interest in a referral fee[10] is so great that disclosure and client consent will be ineffective. A client may give informed consent for a referral fee when (1) the transaction at issue concerns a product or service that is fairly uniform among providers and is required in an objectively determinable quantity or (2) when the product or service is fairly uniform among providers and is unconnected to any particular legal services.

Application to the Inquirer's Proposal

12. The first questions under our prior opinions are (i) whether the products or services that are the subject of the referral are fungible in nature, (ii) whether the required amount is objectively determinable, and (iii) whether the product or service is unconnected to the legal services provided by the lawyer.

13. In N.Y. State 682 (1996) we determined that an attorney may not accept a fee from an investment advisor for referring a client to the advisor, because the services of advisors vary substantially among different providers and the amount of funds that should ideally be entrusted to any particular adviser is not objectively determinable. Consequently, we said, the potential exists that "the attorney might increase the referral fee by recommending that more of the client's funds be entrusted to the advisor without appropriate regard to the client's interests." Accordingly, we found that meaningful consent was not possible, even where the client is offered the choice to claim the referral fee and the attorney purports to exercise independent judgment in framing the initial recommendation to consult an advisor.

14. Similarly, in N.Y. State 1043 (2015), we opined that a lawyer representing a client in a real estate transaction could not ethically accept a referral fee from the real estate broker in lieu of charging legal fees. Opinion 1043 followed from our prior opinions generally holding that a lawyer may not act as a lawyer and a broker in the same real estate transaction because the "lawyer's pecuniary interest in the broker's success and attendant commission . . . irredeemably interferes with the lawyer's distinct obligation to exercise independent professional judgment on the client's behalf."

15. Here, as in N.Y. State 682, the services of the investment advisors are not uniform nor is the amount of funds that should ideally be entrusted to any particular adviser objectively determinable. The lawyer here, when asked by the client to recommend an investment advisor, should be making that recommendation based on the needs of the client. That means recommending an advisor based on the services the advisor provides or even recommending more than one advisor in order to meet the client's needs. However, under these circumstances, we do not believe that the lawyer will be able to exercise independent judgment in making a recommendation given the prospect of receiving a referral fee based on recommending a particular advisor. Further, under these circumstances, our prior opinions provide that disclosure to and consent of the client is impermissible because the interests of the client and attorney are in such direct conflict that the client cannot give meaningful consent.

10 We see no distinction between the fee or commission proposed here and a "referral fee". The proposed fee or commission would result from the attorney recommending that the client consult with an investment professional with whom the lawyer has a professional relationship.

16. Thus, a non-waivable conflict under Rule 1.7(b) exists here. Accordingly, we need not reach the issue of whether the lawyer could meet the requirements of Rule 1.8(f), which include both informed consent and the absence of interference with the lawyer's independent professional judgment, in order to accept a payment in connection with representing a client from one other than the client.

17. Additional facts present under the circumstances here also support our conclusion that a non-waivable conflict exists. For example, in the course of the representation, the attorney might decide to recommend a settlement rather than risk going to trial because a settlement will not only produce a definite legal fee, but also is likely to produce a referral fee from the investment advisor. Conversely, if the attorney sees the possibility of a large jury verdict but the client prefers the "bird in the hand" of a settlement, the attorney might steer the client toward trial in hopes of generating a larger pool of funds on which to collect a commission from the investment advisor. Thus, where the lawyer is counseling (or should be counseling) a client on whether the client should settle or proceed to trial, the prospect of a larger referral fee from an investment advisor produces exactly the kind of conflict that we have said is non-consentable in other contexts.

18. Similarly, when counseling a client about the payment options for a potential settlement, the attorney may be likely to steer the client toward a lump sum payment rather than another option, such as a structured settlement, in order to maximize the opportunity for a referral fee. Again, the lawyer's advice to a client would be affected by the prospect of a referral fee, rather than the course that is in the best interest of the client.

19. We recognize that the inquiring attorney has stated that the referral to the investment firm would only be made after the representation of the client concluded. However, if clients frequently ask the lawyer to recommend an investment adviser, the lawyer's judgment in structuring a settlement may be affected even if the recommendation is not made until after the settlement has been agreed upon. Moreover, in some instances, particularly, as we understand it, in workers' compensation matters, the client's case remains subject to review at future proceedings, and the client therefore may require representation on an ongoing basis over an extended period of time. Under these circumstances, it would be difficult to identify a particular moment when the representation concludes. Thus, our holding in N.Y. State 1043, that a conflict exists regardless of whether the referral fee is offered before or after the representation concludes, also applies to the facts here.

CONCLUSION:

20. An attorney may not accept a fee or commission from an investment firm for referring the client to such firm where the money to be invested arises from an engagement in which the lawyer represented the client because the fee creates a non-consentable conflict.

(56-14)

OPINION 1087 (03/23/2016)

TOPIC: Charge for cancelling meeting with lawyer

DIGEST: A lawyer may ethically charge a nominal amount to a person who cancels an appointment for an initial consultation without reasonable notice, provided the lawyer informs the person (orally or in writing) what will trigger the cancellation charge and the charge either represents the cost incurred by the lawyer as a result of the late cancellation or the client has given advance consent to the amount of the charge.

RULES: 1.5(a) & (d)

FACTS:

1. A law firm wishes to discourage the cancellation of initial consultation appointments (usually by potential divorce or Family Court clients), without reasonable advance notice, and the resulting reduction of its ability to schedule appointments for and meet with other clients and prospective clients. The firm, which charges $150 for initial consultation appointments, proposes to take a credit card account number upon scheduling the appointment, and to explain that it will charge $25 if the potential client cancels the appointment without reasonable notice.

QUESTION:

2. May a law firm ethically charge $25 if a potential client cancels an initial appointment without reasonable advance notice?

3. If it is permissible, must the law firm communicate the policy to the potential client in writing?

OPINION:

4. Under the facts here, a lawyer-client relationship has not yet been formed. Thus it may not be obvious that the rules respecting a lawyer's fees and expenses, as provided in Rule 1.5 of the New York Rules of Professional Conduct (the "Rules") are applicable to the relationship between the lawyer and the potential client. However, Rule 1.5(a) does not reference a "client;" it simply says: "A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense."

What Constitutes an Excessive Fee or Expense

5. The question here is whether the proposed $25 charge to a person who cancels an initial appointment without reasonable advance notice is "excessive." That question is highly fact specific. For a fee, relevant considerations include review of the factors enumerated in Rule 1.5(a)(1) – (8), among others. *See* Rule 1.5, Cmt. [1] (the factors specified in paragraphs (a)(1) though (a)(8) are not exclusive.) For an expense, the lawyer is authorized to charge the client only the actual cost incurred, plus administrative expenses, unless the client consents and the amount is not excessive. *See* Rule 1.5, Cmt. [1] ("lawyer may seek payment for services performed in-house . . . either by charging an amount to which the client has agreed in advance or by charging an amount that reflects the cost

incurred by the lawyer, provided in either case that the amount charged is not excessive"); N.Y. State 1050 (2015) (*citing* Rule 1.5, Cmt. [1] and other bar association opinions); N.Y. City 2006-3 (regarding expenses, lawyers may charge only the direct cost and a reasonable allocation of overhead expense); ABA 93-379 (1993) (same).

6. A person's cancellation of an initial consultation without adequate notice may cause the lawyer to forego other opportunities for gainful employment, as well as creating administrative expense. If the cancellation charge is deemed a fee, the factors for determining whether it is excessive include "the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer." Rule 1.5(a)(2). We think it is apparent to any person that cancelling an appointment without reasonable advance notice may deprive the lawyer of the ability to fill the time slot.

7. If the cancellation charge is deemed an expense, as noted above, the amount must either reflect the cost to the lawyer or be agreed to by the client and in either case not be excessive. In the facts posed by the inquirer, the inquirer would explain the proposed cancellation charge and request a credit card, so that the giving of the credit card number may be deemed consent to the charge.

8. Moreover, the proposed cancellation charge – $25 – is nominal. Rule 1.5(a) provides: "A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the proposed charge is excessive." We have no such definite and firm conviction. On the contrary, the proposed cancellation charge is less than 17% of the lawyer's usual $150 charge for a consultation.

Must the Cancellation Charge be Communicated in Writing?

9. The fact that some of the potential clients that are the subject of this inquiry have divorce matters may have special significance to whether the communication is oral or in writing. Rule 1.5(d) provides that a lawyer may not enter into an arrangement for, charge or collect a fee in a domestic relations matter if "a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement." Thus, if the cancellation charge is a "fee," it would seem to be prohibited by Rule 1.5(d) in a domestic relations matter before a written agreement has been signed.

10. There are also court rules that require retainer agreements in domestic relations matters (22 NYCRR 1400.3) and certain non-domestic relations matters (22 NYCRR 1215). Interpreting the court rules is a question law that is beyond the scope of our jurisdiction. We note, however, that in each case the court rule applies when an attorney "undertakes to represent a client" and, in a non-domestic relations matter, if the fee is expected to be $3,000 or greater and the services are not of the same kind that the client has previously received and paid for.

11. Comment [2] to Rule 1.5 advises that, "[e]ven where not required, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses or disbursements

in the course of the representation." Nevertheless, where the matter involved is not a domestic relations matter, the Rules do not require that agreements as to fees be in writing.

12. As noted above, in the case of expenses, the amount must either reflect the cost to the lawyer or be agreed to by the client. The Rules do not require such agreement to be in writing unless law otherwise requires.

CONCLUSION:

13. A lawyer may ethically charge a nominal amount to a person who cancels an appointment for an initial consultation without reasonable notice, provided the lawyer informs the person (orally or in writing) what will trigger the cancellation charge and the charge either represents the cost incurred by the lawyer as a result of the late cancellation or the client has given advance consent to the amount of the charge.

35-15

OPINION 1088 (03/31/2016)

TOPIC: Confidentiality; Identifying clients

DIGEST: A lawyer may include in advertising the names of clients regularly represented by the attorney provided each client has given prior written consent. Absent prior consent after full disclosure to the client, a lawyer may not disclose the identity of a client or the fact of representation, if this information constitutes "confidential information" under Rule 1.6(a). If the client has not requested that the lawyer keep the client's name and the fact of representation confidential, then the lawyer must determine whether such information is publicly known and, if not, whether disclosing the information is likely to be embarrassing or detrimental to the client. This will depend on the client and the specific facts and circumstances of the representation, and, if the lawyer is not reasonably confident of the client's views, it may require the lawyer to consult with the client.

RULES: 1.6(a), 7.1(b)(2),

FACTS:

1. The inquirer has been asked by a potential client, a co-op board, to disclose the names of other co-op apartment building boards that the inquirer has represented to assist the potential client in deciding whether to retain the inquirer.

QUESTION:

2. May a lawyer disclose to a potential client the names of other current or past clients?

OPINION:

3. The New York Rules of Professional Conduct (the "Rules") provide that an attorney may include in advertising the names of clients regularly represented by the attorney provided the client has given prior written consent. Rule 7.1(b)(2). The attorney may have obtained a client's consent to advertise the lawyer's representation of the client as part of the original engagement letter, during the representation, or after the conclusion of the representation. If so, the inquirer may rely on Rule 7.1 to make the requested disclosures. But Rule 7.1(b) is only an illustrative list of examples of permissible advertising content. It does not exhaust the circumstances under which a lawyer may disclose client names.[11]

4. Absent specific client consent, a lawyer must consider whether a client's name and the fact of representation is confidential information under Rule 1.6(a), which ordinarily prohibits a lawyer from knowingly revealing confidential information, or using confidential information to the disadvantage of the client or the advantage of the lawyer or a third person, unless the client gives informed consent. (Various exceptions to this general rule are not relevant here). "Confidential information" is defined in Rule 1.6(a) as "information gained during or relating to the representation of a client, whatever its

11 See N.Y. City Bar Committees on Professional & Judicial Ethics and Professional Responsibility, Commentary on New York's Ethics Rules Governing Lawyer Advertising and Solicitation (March 2009) at 43 (noting that Rule 7.1(b)(2) is a safe harbor for listing client names in attorney advertising with written permission but does not preclude listing client names without written permission under other circumstances).

source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." Under the definition, "confidential information" does not include information that is "generally known in the local community or in the trade, field or profession to which the information relates."

5. The identity of a client is information gained during the representation of the client. The client's identity generally is not information protected by the attorney-client privilege. In N.Y. State 720 (1999), we addressed whether the identities of former clients must be disclosed by a moving attorney in the course of performing a conflict check at the new law firm. We stated:

> Although the fact that the client consulted a lawyer and the general nature of the consultation will not usually be privileged, . . . the client's name, the fact that the client consulted a lawyer and the general nature of the consultation may nevertheless constitute 'secrets' of the client which the lawyer may not disclose."[12]

Accord N.Y. State 645 (1993) (the identity of the client generally is not deemed attorney-client privileged because disclosure does not reveal the content of any communications and the identity was not provided for the purpose of obtaining legal advice, but the client's identity may constitute a secret because disclosure may be embarrassing or detrimental to the client).

6. If a client has requested that lawyer keep the client's identity confidential, then the lawyer is duty-bound not to disclose the client's name to potential clients.

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

8. In N.Y. State 991 (2013), we stated that information is "generally known" within the meaning of Rule 1.6(a) only if it is known to a sizeable percentage of people in the local community or in the trade, field or profession to which the information relates. *See* also *Jamaica Pub. Serv. v. AIU Ins., 92 N.Y. 631* (1998) (information is "generally known" when it is "readily available in such public materials as trade periodicals and filings with State and Federal regulators"). If the lawyer has represented the client in publicly reported litigation or is identified on client websites as representing them, the fact of representation may be readily available in public materials. More broadly, if the fact that the law firm represents its co-op board clients is widely known in the local real estate industry, then the information would be considered to be generally known. If information is generally known, then it is not confidential and the lawyer may freely disclose it. If the information is not generally known, however, then the law firm may disclose it only if it concludes that the information would not be embarrassing or detrimental to the client. This determination is necessarily fact specific.

12 As support for the lack of privilege, Opinion 720 cited *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963). Opinion 720 construed Disciplinary Rule 4-101(A) in the New York Code of Professional Responsibility, which is the predecessor to current Rule 1.6(a) in the Rules of Professional Conduct. DR 4-101(A) defined "confidences" to include information protected by the evidentiary privilege, and "secrets" to include information likely to be embarrassing or detrimental to the client if disclosed, or that the client has requested by held inviolate. The definitions of "confidences' and "secrets" under former DR 4-101(A) have been incorporated into the definition of "confidential information" under Rule 1.6(a).

9. The client is more likely to find that disclosure of the fact of a current or prior representation by a lawyer is embarrassing or detrimental where the representation involves or involved criminal law, bankruptcy, debt collection, or family law. The instant inquiry concerns representations of co-op boards and does not immediately suggest a reason that current or prior clients may deem the representation by the inquirer to be embarrassing or detrimental. However, unless the lawyer is reasonably confident that he or she knows that the co-op board clients would not consider disclosure of their identities and/or the fact of representation to be embarrassing or detrimental, the lawyer must consult with these clients before disclosing their names to the potential client. *See* Nassau County 98-5 (where lawyer receives government subpoena for client names, lawyer should consult with client "unless the lawyer is justifiably confident that he or she already know[s] all of the pertinent facts and already is sensitive to all of the possible nuances of the client's circumstances").

10. A number of factors other than the subject matter of the representation may enable the lawyer to determine that the client would not object to being identified as the lawyer's client. For example, the client may have identified the lawyer to individuals who were not involved in the representation as the lawyer who represented the client in a matter, or the lawyer may hear from individuals not involved in the client representation that the client has given the lawyer's name as the person who had represented him or her in a matter.

CONCLUSION:

11. A lawyer may include in advertising the names of clients regularly represented by the attorney provided that each client has given prior written consent. Absent prior consent after full disclosure to the client, a lawyer may not disclose the identity of a client or the fact of representation, if this information constitutes "confidential information" under Rule 1.6(a). If the client has not requested that the lawyer keep the client's name and the fact of representation confidential, then the lawyer must determine whether such information is publicly known and, if not, whether disclosing the information is likely to be embarrassing or detrimental to the client. This will depend on the client and the specific facts and circumstances of the representation, and, if the lawyer is not reasonably confident of the client's views, it may require the lawyer to consult with the client.

[3-16]

OPINION 1089 (03/31/2016)

TOPIC: Retired lawyer's use of "Esq."

DIGEST: A lawyer who is retired from the practice of law under Section 118.1(g) of the Rules of the Chief Administrative Judge and who therefore may render legal services only without compensation may use the title "Esq.", but must indicate the retired status or the limitations on his or her right to practice if there is a risk of confusion regarding his or her role.

RULES: 8.4(c).

FACTS:

1. The inquirer is retired from the practice of law. Pursuant to Section 118.1(g) of the Rules of the Chief Administrative Judge of the State of New York, the inquirer qualifies for an exemption from payment of the annual registration fee for attorneys. Under that rule, a retired lawyer may render legal services only without compensation.

QUESTION:

2. May a retired attorney use the term "Esq." after his or her name on business cards and stationery in connection with a non-legal business?

OPINION:

May a retired lawyer use the term "Esq."?

3. Under Section 118.1(g) of the Rules of the Chief Administrative Judge, 22 NYCRR § 118.1(g), an attorney who certifies that he or she is retired from the practice of law is exempt from the biennial registration fee (currently, $375). A retired attorney also is exempt from the continuing legal education requirements applicable to practicing lawyers. 22 NYCRR § 1500.5(b)(4). An attorney is "retired" for this purpose "when, *other than the performance of legal services without compensation*, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law." 22 NYCRR § 118.1(g) (emphasis added). As the definition indicates, a retired attorney may continue to render legal services without compensation.[13]

4. As the ethics committee of the New York City Bar Association observed in N.Y. City 1994-5:

> The title "esquire" does not legally designate an individual as a lawyer because it is not conferred in this country as an academic degree or license. It has, however, been adopted by lawyers by convention as a form of designation. Thus, one using the title in the United States is identifying himself or herself as a lawyer.

13 An alternative to claiming "retired" status is voluntary resignation from the Bar. *See generally* App. Div., 2d Jud. Dept., Attorney Matters: Voluntary Resignation from the Bar of the State of New York, *available at* http://www.nycourts.gov/courts/ad2/attorney-matters_VoluntaryResignation.shtml. A lawyer who has not resigned from the bar remains subject to the Rules of Professional Conduct. We express no opinion about whether a person who has resigned from the Bar entirely can use the term "Esq."

5. At the same time, Opinion 1994-5 noted that the term "Esq." does not have precisely the same connotation as, for example, "Attorney-at-Law." Opinion 1994-5 also opined that lawyers acting in a nonlegal capacity—there, at a nonprofit organization in public relations, administration or communicating with members about the organization's positions—could use the term "Esq." without qualification, but identifying themselves as "Attorney-at-Law" might lead the recipient of a communication to conclude that the lawyer was acting in a legal capacity.

6. Rule 8.4(c) of the New York Rules of Professional Conduct prohibits lawyers from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." A New York lawyer is bound by the New York Rules of Professional Conduct, not only with respect to law practice but also with respect to nonlegal activities, both personal and professional. The ethical question thus is whether a retired lawyer's use of the term "Esq." violates Rule 8.4(c). Under New York's regulatory scheme, a lawyer who has opted for "retired" status remains a lawyer, even if his or her practice must be limited to unpaid legal work. Thus, to that extent at least, the use of the term "Esq." after his or her name is accurate.

Must a retired lawyer indicate limitations on the right to practice law?

7. A related question is whether a retired lawyer who uses the term "Esq." must indicate the restrictions on his or her right to practice or must indicate that he or she is "retired." In Rhode Island Opinion 96-24, the Rhode Island Ethics Advisory Panel opined that a retired lawyer placed on "inactive" status could use "Attorney at Law" or "Esquire" on letterhead "as long as the notation 'Retired' is included." New York's regulatory regime is different; New York has no "inactive" status. In any case, we conclude that whether a retired lawyer must indicate the limitations on his or her status, and how the lawyer must indicate those limitations, depends on the particular circumstances and, in particular, whether there is risk that the lawyer's clients or the public will be confused regarding that status.

8. This Committee and others have opined that when a lawyer engages in a non-legal business, it is not misleading for the lawyer to identify himself or herself as a lawyer – but a lawyer who does so must take care to avoid confusion. The lawyer must ensure that any relevant audience is not misled to believe that the lawyer is acting as a lawyer. Ethics committees have recognized various ways to dispel any such confusion.

9. In N.Y. State 170 (1970), for example, this Committee opined that it was not improper for an employee of a professional search organization dealing primarily with placement of lawyers to use the term "esquire," on his or her business card, but we "recommended" that the card also indicate the employee's position with the business "so as to negate any possible interpretation that he is a practicing attorney or general counsel to his employer." In N.Y. State 832 ¶ 9 (2009), the Committee concluded that where a lawyer sold shelf corporations to persons who were not law-firm clients and advertised his or her status as a lawyer (such as by use of the term "Esq."), there was "a substantial risk that the purchaser of the shelf corporations will be misled as to whether an attorney-client relationship exists." The Committee also opined that "one way for a lawyer to avoid application of the Rules to the sale of nonlegal services would be to give the purchaser in writing [a] . . . disclaimer stating that no legal services are being rendered and that the protection of an attorney-client relationship does not exist."

10. Our opinion is consistent with the ethics opinions of several other committees outside New York. *See, e.g.,* California Opinion 1999-154 (lawyer acting as investment adviser and not rendering legal advice," but who used "Esq." on her promotional material and stationery, could avoid confusion by "an express disclaimer that [she] is not offering and does not intend to provide legal services or legal advice"); Maine Opinion 91 (1988) (the use of "Esq." after name of attorney shareholder on the letterhead of a business corporation did not suggest "an intent to mislead or deceive the public" and was permissible "for whatever prestige value it may hold"); D.C. Opinion 149 (1985) (lawyer employed by nonlegal governmental-affairs consulting business could use "Esq." provided no reasonable likelihood the public would be misled that the business is a law firm).

11. Here, we do not think the use of the term "Esq." by a retired lawyer indicates that he or she is acting as an attorney. Nor do we think a retired lawyer's use of the term "Esq." necessarily leads to any confusion about his or her status or role and thus a clarifying term or disclaimer is not always required. In many circumstances, such as in social interactions, a lawyer using the term is simply invoking "whatever prestige value [the term] may hold," as the Maine ethics committee put it. *Cf.* N.Y. State 105(a) (1969) (lawyer may identify his or her professional degree in a social context). There is nothing misleading in that context: the precise limitations on the lawyer's right to practice just do not matter. The same is true in many business contexts far removed from the rendition of legal advice.

12. In sum, just as a lawyer engaged in a non-legal business who may not provide legal advice to the customers of that business need only qualify the use of the term "Esq." if there is a risk of confusion, so here we do not think a retired lawyer needs to qualify his or her use of the term unless there is risk of confusion.

13. That risk could take a number of forms, including, for example, confusion over whether the lawyer is rendering legal advice to the customers of the business and confusion over whether the lawyer is acting as in-house counsel to the business. In each case, if a risk of such confusion arises, the lawyer must take steps to indicate the limited nature of his or her practice. This could include, for example, using the term "retired" in conjunction with "Esq." or indicating that his or her practice is limited to performing legal services without compensation.

CONCLUSION:

14. A lawyer who has taken "retired" status may use the term "Esq." on business cards and letterhead, but if there is a risk of confusion about his or her role, the lawyer must indicate the retired status or the limitations on his or her ability to practice.

(5-16)

OPINION 1090 (03/31/2016)

TOPIC: Billing client for work performed by an unpaid student-intern

DIGEST: A law firm may bill a client for work performed by a student-intern despite the fact that the law firm does not pay the intern, because the intern receives academic credit for the work, as long as (i) the internship program complies with applicable law, (ii) the educational institution does not object to the client charges, and (iii) the charge is not excessive.

RULES: 1.5(a) & (b)

FACTS:

1. A law school has a student-intern program in which student interns work for local law firms and receive academic credit for their work in lieu of monetary compensation. A law firm asks whether it may bill clients for work performed for its clients by student-interns, despite the fact that the law firm does not pay the interns.

QUESTION:

2. May a law firm bill a client for work performed by a student-intern despite the fact that the law firm does not pay the interns, because they receive academic credit for their work?

OPINION:

3. Our jurisdiction extends only to interpretations of the Rules of Professional Conduct. We do not interpret otherwise applicable laws or render factual determinations. Consequently, we assume that the proposals of the law firm to bill clients for the services of the interns and to hire those interns without compensation comply with applicable laws. (In that latter regard, we note that the 2010 standards of the U.S. Department of Labor concerning internship programs prohibited a private sector employer from deriving an immediate advantage from the activities of the intern. However, that standard was rejected by the Second Circuit Court of Appeals in *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2d Cir. 2015) in favor of a non-exhaustive set of considerations that focus on the what the intern receives in exchange for his work.) We also assume that the educational institution that sponsors the internship program allows the law firm to charge its clients for the services of the intern.

4. Rule 1.5(b) of the New York Rules of Professional Conduct (the "Rules") enjoins a lawyer to communicate to a client not only the scope of a representation but also "the basis or rate of the fee and expenses for which the client will be responsible." (Whether that communication must be in writing is a question of law dependent upon the provisions of Part 1500 of the Rules of the Judiciary, 22 N.Y.C.R.R. Part 1215. *See also*, 22 N.Y.C.R.R. Part 1400, governing fee and retainer arrangements in matrimonial matters.)

5. A lawyer is further enjoined by Rule 1.5(a) not to "make an agreement for, charge, or collect an excessive or illegal fee or expense." The test of whether a fee is excessive is whether "a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive." While expenses are not specified in the definition of "excessive," Comment [1] to Rule 1.5 makes clear the New York

State Bar Association's intent that expenses should be subject to the same limitation. *See* N.Y. State 1087 (2016). *See also* N.Y. State 1050 (2015) (relating to credit card processing fees as a client-reimbursable expenses).

6. Whether the charge for a given service, such as the service of a paralegal, recent law school graduate or law clerk, to all of which a student-intern may be likened, is a fee or an expense is a question that need not be resolved in order to answer the present inquiry. We note, however, that courts have in some instances treated the charges for the services of paralegals as fees. *See Missouri v. Jenkins*, *491 US. 274* (1989) (in fee shifting, it is proper to pay for the time of paralegals, law clerks and recent law graduates at market rates rather than at cost).

7. We find nothing in the Rules that would prohibit a sponsoring law firm from billing for the services of a law student-intern on a fee basis, even if the sponsoring firm is compensating neither the intern nor the sending law school, provided that the client has been advised of the firm's intent to charge for the intern's services and the basis of the charge (e.g., per task or per hour or some fraction thereof) and provided, further, that the fee is neither excessive nor illegal.

8. If the cost of a student-intern is charged as an expense, the lawyer may charge the client "either . . . an amount to which the client has agreed in advance or . . . an amount that reflects the cost incurred by the lawyer" to sponsor the intern (e.g. the cost of supervising the intern), subject to the same provisos. *See* Rule 1.5(a) and (b) and Rule 1.5, Comment [1]; N.Y. State 1087 [35-15], *supra*, N.Y, State 1050, *supra*.

CONCLUSION:

9. A law firm may bill a client for work performed by a student-intern despite the fact that the law firm does not pay the intern, because the intern receives academic credit for the work, as long as (i) the internship program complies with applicable law, (ii) the educational institution does not object to the client charges, and (iii) the charge is not excessive.

(38-15)

OPINION 1091 (04/18/2016)

TOPIC: Misconduct – Duty to Report

DIGEST: A New York lawyer who knows that a person admitted to the bar in another state, but not admitted or authorized to practice law in New York, has represented clients in the courts of New York must report that knowledge to a tribunal or other authority empowered to act if the lawyer concludes that the other person's failure raises a substantial question as to the other person's honesty, trustworthiness or fitness as a lawyer. Rule 8.3 applies even though the other person is neither admitted nor authorized to practice law in New York and even if the conduct is no longer occurring. Failure of the other person to comply with applicable rules on authorization to practice – whether generally, temporarily, or *pro hac vice* – ordinarily will raise a substantial question as to the other lawyer's honesty, trustworthiness or fitness as a lawyer. A good faith belief is not enough to trigger the reporting obligation.

RULES: 3.4(c), 5.4, 5.5 (a) & (b), 7.3, 8.3

FACTS:

1. A lawyer admitted in New York State "believes" that an individual admitted to the practice of law in another state has appeared before New York courts without being admitted or authorized to practice law in New York. The Inquirer also "believes" that the individual lawyer is no longer appearing in New York Courts.

QUESTION:

2. (a) Does a New York lawyer have an obligation to report the belief that an individual admitted to practice outside New York but not admitted or authorized to practice (whether generally, temporarily or *pro hac vice*) in New York State has improperly appeared in the past in New York Courts?

(b) Does it matter that the conduct is no longer occurring?

OPINION:

3. At the outset, we note that our jurisdiction extends only to interpreting the New York Rules of Professional Conduct (the "Rules"). We do not opine on any duties that a lawyer may have to the courts

under the rules of individual courts or under new Part 523 of the Rules of the Court of Appeals ("Part 523") authorizing the temporary practice of law in New York by out-of-state and foreign attorneys.[14]

4. Two Rules may be relevant in examining the question: Rule 8.3 and Rule 5.5.

5. Rule 8.3 sets forth the standards for reporting professional misconduct by another lawyer. It provides:

> A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

6. Rule 5.5 states:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.
>
> (b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

Meaning of "Lawyer" in "Another Lawyer has Committed a Violation"

7. The term "lawyer" is used throughout the Rules but is not defined. Does it mean "a person admitted or authorized to practice in New York," or is it broader than that? Certain rules and our prior opinions indicate that the term "lawyer" may mean different things in different rules.

8. For example, Rule 7.5(d) permits partnerships between "lawyers" licensed in different jurisdictions as long as the firm's letterhead notes their jurisdictional practice limitations. *See also* N.Y. State 806 (2007). Rule 7.3(i) specifically applies the solicitation provisions of Rule 7.3 to "a lawyer . . . not admitted to practice in this State who shall solicit retention by residents of this State". In N.Y. State 864 (2011), we held that a lawyer admitted in another state is not a "nonlawyer" for purposes of Rule 5.4(a), which prohibits a lawyer from sharing legal fees with a nonlawyer. Rule 1.15(e) specifies that only a lawyer admitted to practice in New York State may be an authorized signatory of an attorney trust account.

14 Effective December 30, 2015, the New York Court of Appeals adopted a new Part 523 of the Rules of the Court of Appeals, which authorized the temporary practice of law in New York by out-of-state and foreign attorneys. Part 523 is similar to the American Bar Association's Model Rule 5.5, which permits temporary practice of law by attorneys licensed in other U.S. jurisdictions under certain prescribed circumstances. (The ABA's Model Rule 5.5, or substantially equivalent language, has been adopted in more than 45 other jurisdictions but not as part of the Rules of Professional Conduct in New York.) Under Part 523.2, a non-New York lawyer in good standing where he or she is admitted may provide legal sevices in New York on a temporary basis where such services (i) are undertaken in association with a lawyer admitted to practice in New York who actively participates in and assumes joint responsibility for the matter, (ii) are in or reasonably related to a pending or potential proceeding before a tribunal in New York if the lawyer or a person the lawyer is assisting is authorized to appear in such proceeding or reasonably expects to be so authorized; or (iii) are not within the preceding paragraph and arises out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Because the inquiry before us is dated shortly after the Part 523 Rules became effective and refers to the other lawyer's past conduct, we assume that the other lawyer was not relying on the Part 523 Rules.

9. In other Rules, it is less clear that the rule was intended to apply to a person not admitted in New York. For example, Rule 8.5 – the choice of law rule for disciplinary matters – addresses lawyers admitted elsewhere only if they are also admitted in New York.

10. Consequently, the answer to the first question posed here depends on whether the definition of "another lawyer" in Rule 8.3 – which requires a lawyer who knows that "another lawyer" has committed a violation of the Rules of Professional Conduct that raises a "substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer" must report that knowledge to a tribunal or other authority authorized to investigate or act upon such violation – includes a person admitted to practice law in one or more other jurisdictions but not admitted or authorized to practice law in New York (a "non-New York lawyer").

11. Comment [1] to Rule 8.3 explains the rationale for the Rule: "Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. . . . An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover." Since the courts control whether an out-of-state lawyer may be admitted *pro hac vice*, and since New York disciplinary authorities can always refer violations by a non-New York lawyer to the disciplinary authorities in the admitting jurisdiction or jurisdictions outside New York, we believe that violations of the Rules by a non-New York lawyer that raise a substantial question as to the lawyer's honesty, trustworthiness or fitness implicate the policy goals articulated in Comment [1] to Rule 8.3. Consequently, we believe the term "another lawyer" in Rule 8.3 should be read to include a lawyer not admitted in New York who engages in misconduct in New York.

12. This conclusion is supported by 22 NYCRR § 523.3, which expressly refers to "complaints" against non-New York lawyers. Section 523.3 provides as follows:

> A [non-New York] lawyer who practices law temporarily in this State pursuant to this Part [523] shall be subject to the New York Rules of Professional Conduct and to the disciplinary authority of this State in connection with such temporary practice to the same extent as if the lawyer were admitted or authorized to practice in New York. A grievance committee may report *complaints and evidence of a disciplinary violation* against a lawyer practicing temporarily pursuant to this Part to the appropriate disciplinary authority of any jurisdiction in which the attorney is admitted or authorized to practice law. [Emphasis added.]

13. Our conclusion is also supported by court rules governing disciplinary matters that pre-dated Part 523, some of which applied misconduct rules not only to lawyers admitted in New York but also to lawyers who "commit acts," or "in any way participate in any action or proceeding," or "transact business" or "practice" in New York. *See, e.g.,* 22 N.Y.C.R.R. Part 603.1(a) (First Dep't), 22 N.Y.C.R.R. Part 691(a) (Second Dep't), 22 N.Y.C.R.R. Part 806.1 (Third Dep't), 22 N.Y.C.R.R. Part 1022.17 (Fourth Dep't).

Must the Inquirer Report on the Other Lawyer?

14. Although we have concluded that the term "another lawyer" in Rule 8.3 applies to a non-New York lawyer, there is still a question whether the inquiring lawyer has a reporting obligation under Rule 8.3 in the particular circumstances posed in this inquiry. That depends on two independent factors.

15. First, the inquirer must "know" that the other lawyer has committed a violation of the Rules – here a violation of Rule 5.5(a) – by practicing without being admitted generally in New York or without being authorized *pro hac vice* by a New York state or federal court. For this purpose, "know" means actual knowledge, although knowledge may be inferred from circumstances. Rule 1.0(k). A good faith belief falling short of knowledge is not enough to trigger the reporting obligation.

16. Assuming that the inquirer has the requisite knowledge under the reporting rule, the inquirer must conclude that the other lawyer's conduct raises a substantial question as to the other lawyer's "honesty, trustworthiness or fitness as a lawyer." Comment [3] to Rule 8.3 explains this phrase: "The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." We believe that, in most circumstances, representation of a client in New York by a non-New York lawyer without becoming authorized or associating with a New York lawyer will implicate the honesty, trustworthiness or fitness of the non-New York lawyer.[15] Although it is true that over 45 other jurisdictions have adopted some version of ABA Model Rule 5.5, neither that rule nor any state equivalent authorizes lawyers to appear in the courts in jurisdictions where they are not admitted or authorized to practice. Every lawyer knows or should know that appearing in court requires either general admission in that jurisdiction, *pro hac vice* admission, or authorization under the jurisdiction's temporary practice rules. A lawyer who appears in a New York court without any authorization either has failed to research the rules or has deliberately flouted those rules. Consequently, we believe that appearing in court in a jurisdiction without being authorized generally, temporarily, or *pro hac vice* evinces a lack of trustworthiness or fitness. *See* Rule 3.4(c) (a lawyer shall not disregard a standing rule of a tribunal).

17. If the inquirer has the requisite knowledge of a violation and concludes that the violation raises the required "substantial question," the inquirer's belief that the violation has ceased is immaterial. *See* Rule 8.1, Cmt. [1] ("An apparently isolated violation may indicate a pattern of misconduct").

18. Because we have concluded that Rule 8.3 applies to misconduct in New York by a lawyer who is not admitted or authorized to practice in New York, we need not reach the issue of whether the inquirer is obligated to report the non-New York lawyer's unauthorized practice under Rule 5.5. In any event, whether particular conduct constitutes the unauthorized practice of law, which is a crime in New York (*see* New York Judiciary Law §§ 478, 484, and 485-a), is a legal question.

CONCLUSION:

19. A New York lawyer who knows that a person admitted to the bar in another state, but not admitted or authorized to practice law in New York, has represented clients in the courts of New York

15 We generally do not give opinions about the conduct of lawyers other than the inquirer, since applying the Rules usually depends on the facts and circumstances and we cannot make an informed determination without all the facts.

must report that knowledge to a tribunal or other authority empowered to act if the lawyer concludes that the other person's failure raises a substantial question as to the other person's honesty, trustworthiness or fitness as a lawyer. Rule 8.3 applies even though the other person is neither admitted nor authorized to practice law in New York and even if the conduct is no longer occurring. Failure of the other person to comply with applicable rules on authorization to practice – whether generally, temporarily, or *pro hac vice* – ordinarily will raise a substantial question as to the other lawyer's honesty, trustworthiness or fitness as a lawyer. A good faith belief is not enough to trigger the reporting obligation.

(2-16)

OPINION 1092 (05/11/2016)

TOPIC: Duty to Disclose Malpractice of Co-Counsel

DIGEST: A lawyer must disclose to the client information that the lawyer reasonably believes reveals that another lawyer, also representing the client, has committed a significant error or omission that may give rise to a malpractice claim.

RULES: 1.4(a) & (b), 1.7(a), 1.16(b), 8.4(c)

FACTS:

1. The inquirer was engaged to represent a client on the eve of trial. The client's prior counsel is serving as co-counsel. In preparing the case, the inquirer has learned that co-counsel conducted virtually no discovery and made no document requests, although the inquirer believes correspondence and emails between the parties could be critical to the case. The inquirer believes this was a significant error or omission that may give rise to a malpractice claim against co-counsel. The outcome of the case, however, has yet to be decided. The inquirer is concerned about disclosing this situation to the client because it would undermine inquirer's relationship with co-counsel, but the inquirer also believes it is in the client's best interests to disclose the facts as soon as possible.

QUESTION:

2. Is a lawyer ethically obligated to disclose to a current client the lawyer's belief that a current co-counsel to the client has engaged in a significant error or omission in representing the client?

OPINION:

3. Our opinions have consistently held that a lawyer must report to a client a significant error or omission *by the lawyer* in his or her rendition of legal services. *See* N.Y. State 734 (2000), N.Y. State 295 (1973), N.Y. State 275 (1972). *See also* ABA Informal Op. 1010 (1967).

4. Most of these opinions are based on two principles in the former Code of Professional Responsibility – the lawyer's obligation to keep the client fully informed, and the lawyer's obligation to withdraw from representation where the lawyer has a personal conflict of interest. Those two principles are now embodied in Rule 1.4 and Rule 1.7.[16]

5. Rule 1.4 governs the ethical obligations of a lawyer regarding communication with the client:

16 *In re Tallon*, 447 N.Y.S.2d 50 (App. Div. 1982), a case often cited for the principle that a lawyer must disclose the lawyer's errors and omissions to the client, also cites the predecessor to Rule 8.4(c), which provided that "a lawyer must not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." However, in *Tallon*, the lawyer had not only failed to disclose to the client the fact that he had let the statute of limitations run on her claim, but also obtained a general release from the client without advising the client of the claim against him. Other courts and ethics committees that have addressed the issue have also based their conclusions on the two principles cited here. *See* the authorities cited in notes accompanying ¶ 10 *infra*.

> (a) A lawyer shall (1) promptly inform the client of . . . (iii) any *material developments* in the matter . . . ; (3) keep the client reasonably informed about the status of the matter; and
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> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[Emphasis added.]

6. Comment [1] to Rule 1.4 reveals the touchstone for the lawyer's obligation: client autonomy in decision-making. Comment [1] says: "Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation." *See also* Comment [3] ("paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation").

7. The second principle reflected in our opinions on the lawyer's own malpractice is whether the significant error or omission results in an inherent conflict between the interest of the client and the lawyer's own interest. In that case, Rule 1.16(b) may require the lawyer to withdraw. Rule 1.7(a)(2) provides:

> Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.[17]

8. Although the personal conflict of interest may be more obvious in the case of a lawyer dealing with his or her own malpractice, here there may be a personal conflict concern because the inquirer notes that "exposing counsel's malpractice would undermine our relationship with co-counsel." The inquirer does not state whether the inquirer was brought into the case by the client or by co-counsel, or whether co-counsel has referred matters to the inquirer in the past, or the inquirer expects co-counsel to be a potential source of referrals in the future. The desire to maintain a good relationship with co-counsel would only implicate a personal conflict of interest under Rule 1.7(a) if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected" by the lawyer's financial or personal interests. For example, if the desire for harmony with co-counsel is motivated by the goal of avoiding harm to this client's case, such desire would clearly not be a "personal interest" within the meaning of Rule 1.7(a)(2). That is an issue that the inquirer must determine in the first instance.

9. In N.Y. State 734 (2000), this Committee opined that a lawyer "must report to the client a significant error or omission by the lawyer that may give rise to a possible malpractice claim . . . ." We

17 For a discussion of personal conflicts of interest arising from a lawyer's possible malpractice, *see* Cooper, *infra* n. 6, at 182. *See also* Vincent R. Johnson, *Absolute and Perfect Candor to Clients*, 34 St. Mary's L.J. 737, 773 (2003). When a lawyer confronts the issue whether to disclose his or her own potential malpractice, it gives rise to personal conflict of interest issues under Rule 1.7. *See* Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 24:5 (ThomsonWest 2008); *In re Hoffman*, 700 N.E.2d 1138, 1139 (Ill. 1998); *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509, 514 (N.J. 1995) (under New Jersey Rules 1.4 and 1.7, an attorney has an ethical obligation to advise a client that the client might have a claim against that attorney, even if such advice flies in the face of that attorney's own interests).

cited N.Y. State 275 (1972), which said that a lawyer who failed to file a claim within the statute of limitations period "had a professional duty to notify the client promptly that the lawyer had committed a serious and irremediable error, and of the possible claim the client may have against the lawyer for damages." Opinion 734 also pointed out, however, that not every possible error creates a possible claim for malpractice:

> Some errors can be corrected during the course of the representation. Others are not particularly harmful to the client's cause. In some cases, it may be questionable whether the lawyer acted erroneously at all. Therefore, when a lawyer makes a mistake in the representation of a client, the likelihood that the lawyer's representation will be affected adversely because of the lawyer's interest in avoiding civil liability will depend upon all the relevant facts.

10. Several bar association ethics opinions have opined that lawyers have an ethical obligation to disclose their own malpractice.[18] Numerous court cases and disciplinary opinions concur.[19] Legal writers have also discussed the obligation.[20] Finally, a lawyer's duty to inform the client of his or her own malpractice is also supported by the Restatement (Third) of The Law Governing Lawyers § 20 cmt. c (2000) (Am. Law Inst. 1998) ("If the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client," *citing In re Tallon,* 447 N.Y.S.2d 50 (App. Div. 1982)).

11. The lawyer's obligation to keep the client fully informed under Rule 1.4(a) applies equally to a significant error or omission by co-counsel that may give rise to a malpractice claim. *See Estate of Spencer v. Gavin*, 946 A.2d 1051 (N.J. Super. A.D. 2008). In *Estate of Spencer* the New Jersey court

18 *See, e.g.*, New Jersey Supreme Court Advisory Committee on Professional Ethics Opinion 684, 7 N.J.L. 544, 151 N.J.L.J. 994, 1998 WL 111131 *1 (March 9, 1998) ("Clearly RPC 1.4 requires prompt disclosure in the interest of allowing the client to make informed decisions. Disclosure should therefore occur when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted"); Colo. Bar Ass'n, Ethics Comm. Formal Op. 113 (2005) (concluding that Colorado Rule 1.4 requires a lawyer to tell the client if the lawyer makes an error).

19 *See, e.g.*, *People v. Greene*, 276 P.3d 94, 99 (Colo. 2011); *Beal Bank v. Arter & Hadden*, 167 P.3d 666, 672 (Cal. 2007) (stating in *dicta* that attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice); *DeLuna v. Burciaga*, 223 Ill.2d 49 (Ill., 2006) (lawyer improperly concealed facts resulting in the running of the statute of limitations on the client's malpractice claim against the lawyer, in violation of Illinois Rule 1.4); *Attorney Grievance Comm'n of Maryland v. Pennington*, 387 Md. 565, 876 A.2d 642, 650 (Md. 2005) (lawyer violated Rule 1.4 by failing to disclose a mistake and concealing it); *Olds v. Donnelly*, 150 N.J. 424 (N.J., 1997) (New Jersey Rules of Professional Conduct "require an attorney to notify the client that he or she may have a legal-malpractice claim even if notification is against the attorney's own interest"); *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509, 514 (N.J. 1995) (under New Jersey Rules 1.4 and 1.7, an attorney has an ethical obligation to advise a client that he or she might have a claim against that attorney.

20 For additional discussion of a lawyer's duty to disclose malpractice, *see* 2 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 15:22 (2008 ed.); Dolores Dorsainvil, *et al*., *My Bad: Creating a Culture of Owning Up to Lawyer Missteps and Resisting the Temptation to Bury Professional Error*, Report to Annual Conference of the Litigation Section of the American Bar Association, April 16, 2015, available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-sac/written_materials/18_1_my_bad_creating_a_culture_of_owning_up_to_lawyer_missteps.authcheckdam.pdf; Thomas P. McGarry and Thomas P. Sukowicz, *Ethics: Disclosing Malpractice to Clients*, CHICAGO LAWYER, Dec. 2011, *available* at http://www.chicagolawyermagazine.com/Archives/2011/12/McGarry-Sukowicz-Ethics.aspx; David D. Dodge, *Front Eye On Ethics, Owning Up To Your Own Mistakes*, ARIZONA ATTORNEY, 46 Ariz. Att'y 10 (May 2010); Timothy J. Pierce & Sally E. Anderson, *What To Do After Making A Serious Error*, WISCONSIN LAWYER, 83-FEB Wis. Law. 6, 7-8 (February 2010); Brian Pollock, *Second Chance Surviving A Screwup*, 34 No. 2 Litigation 19, 20 (Winter 2008); Charles E. Lundberg, *Self-Reporting Malpractice or Ethics Problems*, 60 Bench & B. Minn. 24 (Sept. 2003); Lazar Emanuel, *Duty to Disclose Error That May Constitute Malpractice*, N.Y. Prof. Resp. Rep. (Feb 1, 2001).

held that a lawyer who did not report co-counsel's theft of client funds could be liable for malpractice. The court in *Estate of Spencer* based its decision in part on New Jersey Rule 1.4(a).

12. As in the case of the lawyer's own malpractice, the inquirer has a duty to inform the client of co-counsel's malpractice if the inquirer concludes that co-counsel's error or omission was significant. It is not clear from the inquiry whether the inquirer has spoken to the co-counsel to determine his or her strategy for the matter (*i.e.,* why co-counsel took "virtually no" discovery and made no document requests). Co-counsel's decision may have been negligent, but it may have been strategic. In any event, determining whether co-counsel's actions indicate a significant error or omission that may give rise to a malpractice claim involves questions of fact and law that are beyond the jurisdiction of this Committee.

13. If the inquirer determines that co-counsel has engaged in a significant error or omission that may give rise to a malpractice claim, then the lawyer must inform the client. This is particularly so because the client needs the information when the lawyer who has committed the significant error or omission is continuing to represent the client. As one writer has described it:

> Among the most critical decisions that the client has to make regarding the representation in that situation are (1) whether the client has a viable malpractice claim arising out of the representation, and, if so, whether to pursue it now or later, and (2) whether to continue the current representation.[21]

14. Here, if co-counsel has committed a significant error or omission that may give rise to a malpractice claim, the client may choose among many options, such as (i) continuing the attorney-client relationship with co-counsel and reserving any possible malpractice claim for later, (ii) terminating co-counsel while keeping the inquirer (or hiring a different lawyer), or (iii) bringing a malpractice action against co-counsel now. The client may want to seek independent advice regarding these options. Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." However, the client can only make an informed choice among those options if the lawyer gives the client the relevant information about co-counsel's past conduct. Accordingly, Rule 1.4(b) requires that the lawyer disclose to the client the facts that the lawyer has learned about co-counsel.

15. The Bar has traditionally been leery of situations where the client seeks to replace one lawyer with another (sometimes referred to as "encroaching on professional employment of other lawyers"). *See* N.Y. State 305 (1973) ("A prospective substitute lawyer should . . . take special care to avoid suspicion that he may be using improper means to have himself substituted for the previously retained attorney. Thus he must not wrongfully or improperly disparage the other lawyer in an endeavor to supplant him . . . ."); N.Y. State 310 (1973) (lawyer retained to review work of another lawyer must have sufficient information respecting the work being evaluated to give a good faith opinion which will be completely fair to the other lawyer"). The source of this reticence may have been a concern over "solicitation" of employment, which does not apply with the same force to co-counsel whom the client has already employed. Nevertheless, the overriding concern of these opinions is fairness to other lawyers, including co-counsel, so Rule 1.4's concern with the best interests of the client indi-

21 Benjamin Cooper, *The Lawyer's Duty to Inform His Client of His Own Malpractice*, 61 Baylor L. Rev. 174, 184 (2009), *citing* Frances Patricia Solari, *Malpractice and Ethical Considerations*, 19 N.C. Cent. L.J. 165, 175 (1991).

cates that the inquirer should not report misgivings about co-counsel to the client unless the inquirer reasonably believes co-counsel has committed a significant error or omission that may give rise to a malpractice claim. This standard is lower than the "knowledge" standard that triggers a lawyer's duty under Rule 8.3(a) to report another lawyer's disciplinary violation, but we do not think a lawyer should report co-counsel's shortcomings absent a well-grounded belief that the client needs the information to make informed decisions about the representation.

16. In N.Y. State 275 (1972), the error was not only significant, but irremediable, since the statute of limitations had passed. We do not believe the action of co-counsel must be irremediable before the inquirer should report it to the client.

CONCLUSION:

17. A lawyer must disclose to the client information that the lawyer reasonably believes reveals that another lawyer, who is currently co-counsel to the client, has committed a significant error or omission that may give rise to a malpractice claim.

(36-15)

OPINION 1093 (05/20/2016)

TOPIC: Foreign jurisdiction practice; separate partnership with non-lawyer

DIGEST: A New York lawyer who is also admitted in a foreign jurisdiction and is practicing with non-lawyer partners in that jurisdiction may also practice in a separate New York law firm without violating the New York Rules of Professional Conduct as long as the lawyer (i) principally practices in the foreign jurisdiction or (ii) the predominant effect of the lawyer's practice with the foreign firm is in the foreign jurisdiction and (iii) the New York firm includes representations by the UK firm in its conflict of interest system.

RULES: 1.10(a) & (e), 5.4(b) & (d), and 8.5(b)(2)

FACTS:

1. The inquirer is a lawyer resident in the United Kingdom ("UK") and admitted to practice law both in England and New York. He serves as chief executive officer ("CEO"), director, and majority shareholder of an English law firm regulated by the Solicitors Registration Authority as an alternative business structure (the "UK ABS"). Consistent with English law, the UK ABS has a non-lawyer director and non-lawyer shareholders. The inquirer practices English law and has not practiced New York law since the UK ABS was formed.

2. The inquirer wishes to become a partner of a New York law firm, in addition to continuing with the UK ABS. The inquirer will continue to serve as CEO of the UK ABS, and will practice English law in the UK for that firm, representing primarily UK-based clients. The inquirer represents that the role with the New York law firm will be limited to management and administrative activities, and asserts that these activities do not involve practicing either New York or English law with the New York law firm. The inquirer asserts that the UK ABS and the New York law firm will be separate law firms; the New York law firm will not hold shares in the UK firm, and the UK firm will not be a member of the New York law firm.

QUESTION:

3. May a lawyer with a UK firm that has non-lawyer partners and shareholders also become a partner of a New York law firm?

OPINION:

4. Rule 5.4 of the New York Rules of Professional Conduct (the "Rules") addresses the professional independence of a lawyer. Rule 5.4(b) provides that "A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." Rule 5.4(d) also provides that "a lawyer shall not practice with or in the form of an entity authorized to practice law for profit if . . . (1) a nonlawyer owns any interest therein . . . (2) a nonlawyer is a member, corporate director or officer thereof . . . or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer."

5. Comment [2] to Rule 5.4 explains that the rationale for these prohibitions – they express the "traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another."

Practice Solely in a UK Alternative Business Structure

6. To answer the question posed, we must determine whether Rule 5.4 applies to the inquirer's conduct. This, in turn, depends on Rule 8.5, entitled "Disciplinary Authority and Choice of Law," which provides as follows:

> (a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.
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> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
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> (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
>
> (2) For any other conduct:
>
> (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
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> (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction *in which the lawyer principally practices*; provided, however, that *if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.* [Emphasis added.]

7. In N.Y. State 889 (2011), we concluded that a New York lawyer who "principally practices" in another jurisdiction that allows partnership with a non-lawyer may ordinarily conduct litigation in New York because the other jurisdiction's ethics rules, rather than New York's ethics rules, would govern the fee sharing with respect to the New York matter:

> The inquirer principally practices in the District of Columbia. Unless the formation of the [D.C.] partnership or the division of compensation arising from New York litigation clearly have their predominant effect in New York those matters are subject only to the District of Columbia ethics rules.

8. Similarly, in N.Y. State 1041 (2014), we concluded that a New York lawyer based in the UK, who is not formally admitted to practice in the UK, may ethically practice there with an entity that

includes non-lawyer owners or supervisors provided that such conduct is permitted under the rules of that country and "the predominant effect of the lawyer's practice is not in New York." Our conclusion was based on Rule 8.5(b)(2)(ii).

9. In N.Y. State 911 (2012), in contrast, we held that a New York lawyer may not practice law principally in New York as an employee of an out-of-state entity that has non-lawyer owners or managers. That conclusion was also based on Rule 8.5(b)(2)(ii), but in Opinion 911 New York's ethics rules applied because the inquirer was practicing principally in New York. The implication of Opinion 911 is that a foreign law firm with non-lawyer members or managers may not have a branch in New York.

10. Here, the inquirer is admitted to practice both in New York and the UK. Currently, the inquirer is practicing principally (and apparently exclusively) in England, with a UK ABS. The inquirer's UK law firm has non-lawyer directors and shareholders, but non-lawyer directors and shareholders are lawful there. Accordingly, under the present circumstances, the UK rules apply to the inquirer's practice with the UK ABS.

Partnership in a New York law firm

11. If the inquirer becomes a partner in a New York firm, the inquirer must once again determine which rules will apply. This requires determining the jurisdiction in which the lawyer "principally practices" within the meaning of Rule 8.5(b)(2)(ii). Unlike the case in N.Y. State 911, the inquirer is not seeking to practice in a New York branch of the UK firm. (We assume that the New York law firm will not be managed in such a way as to operate as a branch of the UK ABS. We also assume that the two firms do not have a profit-sharing arrangement, which would implicate many of the same concerns.)

12. The inquirer says that the inquirer's role with the New York law firm will be limited to management and administrative activities, and maintains that this will not be "practicing" New York law. Determining what constitutes the practice of law is a question of law that is outside our jurisdiction. Even if we had jurisdiction to decide the issue, the inquirer has not provided us with enough information about this management and administrative role for us to determine the extent to which the role involves the practice of law. While some law firms hire managers who are non-lawyers and whose role is limited to purely administrative matters, many other law firms employ full-time managing partners who are lawyers admitted to practice in New York. Although some of these managing partners do not represent any clients, they may play active roles in determining which clients their firms should represent, including assessing whether representation would involve conflicts of interest and evaluating the merits of cases, and they may actively oversee the conduct of matters being handled by the firm to ensure that the firm complies with law and professional standards. We therefore cannot rule out the possibility that a New York lawyer managing a New York law firm will be exercising legal judgment. This is one plausible reason that the New York firm would make the person handling management and administrative activities a partner rather than an employee.

13. Consequently, after becoming a partner in the New York firm, the inquirer will need to determine whether the inquirer still "principally practices" in the UK. *See* N.Y. State 1027 ¶14 (2014) (setting forth factors for determining where a dual-licensed lawyer principally practices); N.Y. State 1041 (2014) (applying factors from Opinion 1027). In N.Y. State 1041 and N.Y. State 1027, we stated:

> Given the increase in law practice over the internet and the corresponding decrease in the importance of a lawyer's physical location, the jurisdiction in which a lawyer "principally practices" for purposes of Rule 8.5(b)(2)(ii) is becoming less certain and we should consider a lawyer's significant contacts with all jurisdictions, not solely the jurisdiction in which the lawyer is most often physically present.

14. N.Y. State 1027 and N.Y. State 1041 also state that one of the factors in determining where a dually-admitted lawyer "principally practices" is whether the activities the lawyer performs in each jurisdiction constitute "legal work for clients," as opposed to "administrative work for the law firm." We believe there is a difference between purely administrative work (e.g., handling personnel matters, hiring and managing clerical staff, and ordering office equipment) and other management work for the firm that may involve legal judgment (e.g. determining what matters to accept, including whether a new matter would create a conflict of interest and evaluating the merits of cases; supervising legal work; and evaluating whether a given legal claim or motion would be frivolous). *See* Rule 5.1(b)(1) ("A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules."). Managerial work that involves legal judgment should be counted in determining the place where the lawyer "principally practices."

15. If the inquirer is still practicing principally in the UK, then the UK ethics rules will continue to apply to the inquirer's activities, unless particular conduct clearly has its predominant effect in New York. *See* N.Y. State 889 (2011) (When a New York-admitted lawyer principally practices in the District of Columbia, unless the formation of the DC partnership or the division of compensation arising from New York litigation clearly have their predominant effect in NY, those matters are subject only to the District of Columbia ethics rules.) For example, the "predominant effect" of the inquirer's work as a manager and administrator of the New York firm will clearly be in New York.

16. Conversely, if the inquirer's managerial duties as a partner in the New York firm constitute the practice of law in New York, and if that law practice is substantial enough that the inquirer is deemed to be principally practicing in New York, then the New York Rules will apply to all of the lawyer's activities globally, unless particular conduct of the inquirer "clearly has its predominant effect" in the UK. Thus, the New York Rules would apply to the "conduct" of managing the New York law firm, but if the predominant effect of being a partner of the UK ABS is in the UK, then Rule 5.4 would not prohibit the lawyer from being a partner in the UK ABS because that "conduct" would be governed by UK Rules.

17. Determining whether the conduct of the inquirer in serving as a partner of the UK ABS has its predominant effect in the UK is a factual question that is beyond the jurisdiction of the Committee to determine. Rule 5.4(d) prohibits a member of a New York law firm from permitting nonlawyers to affect the members of the New York firm or jeopardize their independent professional judgment. We see no indication that any of the non-lawyer directors and shareholders in the inquirer's UK ABS would (1) own any interest in the New York law firm, (2) be a member, corporate director or officer thereof, (3) share legal fees with the New York law firm, or (4) have the right to direct or control the professional judgment of the inquirer or any other lawyer in the New York firm. However, this is a determination that the inquirer must make.

Conflict implications of practicing in two law firms simultaneously

18. The inquirer has told us, and we assume, that the New York and UK offices will be "unrelated." However, the two firms must still comply with the conflict provisions of Rule 1.10(a), which will impute conflicts of each firm to the other. Rule 1.10(a) provides:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

19. We described the effect of Rule 1.10(a) in N.Y. State 876 (2011):

> For decades, both this Committee and various New York courts have consistently stated that where a lawyer is "associated" with more than one law firm within the meaning of the imputation rule, all of the law firms with whom that lawyer is associated are treated as one law firm for purposes of conflicts of interest. Accordingly, under Rule 1.10(a), all conflicts in each firm are imputed to all lawyers in all of the firms associated with a common lawyer. *See, e.g*. N.Y. State 807 (2007) (lawyer working part-time at two firms); N.Y. State 794 (2006) (lawyer working at law firm and law school clinic); N.Y. State 793 (2006) (lawyer with "of counsel" relationship with two firms at the same time); N.Y. State 715 (1999) (contract lawyer for two firms); N.Y. State 388 (1975) (sole practitioner and member of partnership) N.Y. City 2000-4 (2000) (affiliated law firms*); Cinema 5, Ltd. v. Cinerama, Inc*., 528 F.2d 1384 (2d Cir. 1976).

20. Rule 1.10(e) requires a New York law firm to check all proposed engagements against current and previous engagements. As N.Y. State 876 indicates, when two firms share a common partner or other member, they are treated as one for conflicts purposes. Consequently, in order to comply with Rule 1.10(e), the New York firm must include engagements of the UK firm in its conflict checking system.

CONCLUSION:

21. A New York lawyer who is also admitted in a foreign jurisdiction and is practicing with non-lawyer partners in that jurisdiction may also practice in a separate New York law firm without violating the New York Rules of Professional Conduct as long as the lawyer (i) principally practices in the foreign jurisdiction or (ii) the predominant effect of the lawyer's practice with the foreign firm is in the foreign jurisdiction and (iii) the New York firm includes representations by the UK firm in its conflict of interest system.

(6-16)

OPINION 1094 (05/06/2016)

TOPIC: Client file – Access by lawyer to file of former client

DIGEST: Lawyer may not provide a copy of client's file to previous counsel if the client objects, unless an exception to the duty of confidentiality applies.

RULES: 1.2(g), 1.6(a) & (b), 1.15(c)

FACTS:

1. The inquiring lawyer represents an alien who is attempting to reopen removal proceedings on the grounds of ineffective assistance by the client's former counsel. The client has brought an ethics complaint against the former counsel. The former counsel has asked the inquiring lawyer to give him access to the file in order to respond to the client's ethics complaint, but the inquirer's client has refused to grant consent. (The former counsel previously turned over the client file to the inquiring lawyer, apparently without retaining a copy of the file.)

QUESTION:

2. May a lawyer give a client's former counsel access to the client's file so that the former counsel may defend against an ethics complaint by the client if client has refused consent to allow the inquiring lawyer to provide access?

OPINION:

3. The question of a lawyer's access to a file is generally a question of law and not a question of ethics under the New York Rules of Professional Conduct (the "Rules"). *See* N.Y. State 766 (1993); *Sage Realty Corp. v. Proskauer Rose Goetz and Mendelsohn*, 91 N.Y.2d 30 (1997). This Committee generally does not have jurisdiction to decide matters of law.

4. In New York State 780 (2004), which interpreted the former Code of Professional Responsibility, we stated, "Nothing in the Code prohibits a lawyer from retaining copies of the file." That proposition is still true under the Rules. Here, it appears that the previous lawyer did not retain a copy of the file.

5. A client's file ordinarily constitutes "confidential information" of the client within the meaning of Rule 1.6(a) because it consists of "information gained during or relating to the representation" of the client that the client "has requested be kept confidential." *See* N.Y. State 1032 (2014). The fact that the client's former counsel previously had access to the client's file does not take the file out of the definition of "confidential information."

6. The former counsel now needs access to the file to defend against an ethics complaint made by the former client. Under Rule 1.6(b)(5)(i), a lawyer may reveal or use confidential information to defend the lawyer against an accusation of wrongful conduct. "Implicit in that rule is the lawyer's right to retain copies of the file . . . to defend against an accusation of wrongful conduct." N.Y. State 780 (construing former DR 4-101(C)(4)). Had the former counsel retained a copy of the file, there is

no question that he/she would have had the right to access that file for purposes of defending against the ethics complaint. See N.Y. State 1032 (2014) (explaining limits of the "self-defense" exception to the duty of confidentiality). But Rule 1.6(b)(5) gives a lawyer only the right to *retain* the client's file – it does not give a former counsel an independent right to *obtain* the file after relinquishing it.

7. Here, the client has refused consent to allow the former counsel access to the file. The situation thus falls squarely within the definition of "confidential information" in Rule 1.6(a), which includes information that the client "has requested be kept confidential." Absent an applicable exception to confidentiality under Rule 1.6, the entire file remains confidential and the inquirer therefore may not turn over the file.

8. Rule 1.6(b)(6) articulates one of the exceptions to the duty of confidentiality: a lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary "to comply with other law or court order." Thus, the inquirer could ethically allow access to the file, even over the client's objection, if other law or a court order required him/her to do so. Because what is necessary to comply with other law or a court order raises questions of law beyond our jurisdiction, we will not speculate on whether a subpoena or other law would qualify for the exception in Rule 1.6(b)(6) and allow the inquirer to give previous counsel access to the file.

9. So far we have focused exclusively on Rule 1.6. For the sake of completeness, we add that no other provision of the Rules requires the inquirer to turn over the file without the client's consent. Rule 1.2(g) provides "a lawyer does not violate these rules by . . . treating with courtesy and consideration all persons involved in the legal process," but it does not obligate the inquiring lawyer to share the file in the face of the client's refusal. Similarly, Rule 1.15(c)(4) requires a lawyer to "promptly pay or deliver to the client . . . properties in the possession of the lawyer that the client . . . is entitled to receive," but it contains no reciprocal language requiring the client to deliver anything to the lawyer.

CONCLUSION:

10. Nothing in the Rules of Professional Conduct permits or requires a lawyer to provide a client's file to the client's former lawyer in the face of the client's instructions to the contrary, unless an exception to the duty of confidentiality applies.

(8-16)

OPINION 1095 (05/06/2016)

TOPIC: Advertising; firm name

DIGEST: When a law firm changes its name by adding the name of a partner, it has a reasonable time to change its existing advertising to the new firm name. What is a reasonable time depends on multiple factors, including whether the existing ads are misleading, and on the cost and ease of making the changes. Website domain names are not required to reflect the legal name of the firm, and large building signs that constitute branding rather than advertising are not subject to the advertising rules.

RULES: 7.1(a) & (h), 7.5(a), (b), & (e)

FACTS:

1. A law firm changed its name from A & B to A, B & C by adding the name of C, an existing partner.

2. Some of the firm's existing advertising – including television commercials and bus shelter advertisements – uses A & B, the firm's old name. The firm also uses the firm's old name on large signs on two sides of the firm's office building, and the domain name of the firm's website continues to reflect the firm's old name.

QUESTION:

3. When a law firm changes its name must it immediately change all of its advertising and branding material to the new firm name?

OPINION:

4. Rule 7.1(a)(1) of the New York Rules of Professional Conduct (the "Rules") prohibits a lawyer or law firm from using an advertisement that contains statements "that are false, deceptive or misleading." Rule 7.1(h) requires that all advertising, among other matters, include "the name of the lawyer or law firm whose services are being offered." Rule 7.5(a) permits a lawyer or law firm to "use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1." Rule 7.5(b) prohibits a lawyer from practicing under "a name that is misleading as to the identity of the lawyer or lawyers practicing under such name."

5. Having these Rules in mind, we turn to their application to the facts here – that the firm has added an existing partner's name to the firm name. (For the purposes of this opinion we assume that the law firm as a partnership or LLC has complied with any provisions of law that apply to the firm's change of name.)

Television Commercials and Bus Shelter Advertisements

6. Television commercials and bus shelter advertisements are both advertisements within the meaning of Rule 1.0(a) because they are public communications made by a lawyer about the law

firm's services, the primary purpose of which is for the retention of the lawyer. Thus, they are subject to the requirements of Rule 7.1, including the requirement in Rule 7.1(a)(1) that they not contain statements that are false, deceptive or misleading, and the requirement in Rule 7.1(h) that they include the name of the lawyer or law firm whose services are being offered.

7. Here, the law firm's television and bus shelter advertisements do not contain the full and current name of the firm. In N.Y. State 1030 (2014), we held that a law firm that changed its firm name by adding the name of a new partner could continue to use its old letterhead and old checks while the remaining stock was being depleted, as long as the firm was either the same firm (with a new name) or a legal successor to the business and property of the original firm. We said: "[W]e do not believe use of the old letterhead would be misleading while the remaining stock is being depleted merely because it does not reflect the new name of the firm." We believe a similar grace period applies here, and that the firm has a reasonable period to change its advertising to reflect its new name.

8. A law firm with a changed name should take into account a number of factors in determining what is a reasonable time to change its advertising to reflect its new name. The first factor is whether the existing advertising is misleading. *See* N.Y. State 1030 (quoting Rule 7.5's prohibition against a law firm practicing under a name that is misleading as to the identity of the lawyer or lawyers practicing under the name). Law firm names are not required to contain the names of all the firm's partners, so the fact that a given partner's name does not appear in the firm name is not itself misleading. *See* N.Y. State 1030 (use of old letterhead while old stock is being depleted would not be misleading because it is common for law firm names not to include the name of all partners in the firm).

9. A different situation may exist if a name partner leaves the firm to practice in another firm or to go into the government; in that case, continuing to use the old name may mislead the public as to the lawyers who practice in the firm, making it unreasonable to fail to correct the firm's advertising as soon as possible.

10. Another factor is the ease of correcting the firm name. For example, in N.Y. State 1030, we were asked if the firm could continue to use checks from its general account and its trust account. We opined that, as long as the firm was the same or a successor firm, the firm could continue to use the old checks until they ran out. We also said that it would be desirable to indicate the change in the firm name on the old checks, but we recognized that changing bus shelter advertisements and television commercials is significantly more difficult than making a simple written or rubber-stamped change on a check, and the law firm cannot simply make those changes itself as it can on a check. Accordingly, a reasonable time to change bus shelter advertisements or television advertisements will depend on how long it takes to create and arrange to substitute new advertisements.

11. A related factor is the cost of making the changes on the firm's advertising. Here, using the old commercials and bus shelter advertisements is somewhat analogous to using the old letterhead and checks. We believe a reasonable period to make the change will ordinarily be measured by the period covered in the advertising contract. For example, if the period for which the bus shelter ads will run is 90 days, then the firm should correct the firm name in its ads at the end of the 90-day period. If the firm makes new television commercials or bus shelter advertisements before the contractual period ends, the new ads clearly should use the new name.

Large Building signs.

12. Comment [6] to Rule 7.1 points out that not all communications made by a lawyer or law firm are advertising. Comment [8] to Rule 7.1 explains:

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

We believe that the large building signs with the old firm name do not constitute "advertisements." Rather, they are for the purpose of general awareness and branding and thus are not subject to Rule 7.1. Accordingly, the firm may continue to use its old name on branding materials. We recognize that Rule 7.5(a) permits a firm to use "office signs" as long as they comply with Rule 7.1, but we think that refers to small office signs on or near a firm's entrance. Those small office signs must be changed within a reasonable time. But large signs on the side of a building are mere branding, not advertising, and need not be changed to reflect the firm's new name.

Firm's Internet Domain Name

13. Similarly, a law firm domain name need not be the firm's full legal name. Under Rule 7.5(e) "[a] lawyer or law firm may utilize a domain name for an internet website that does not include the name of the lawyer or law firm" provided certain conditions are met. As further explained in Cmt. [2] to Rule 7.5: "As long as a law firm name complies with other Rules, it is always proper for a law firm to use its own name or its initials or some abbreviation or variation of its own name as its domain name." *See also* N.Y. State 1003 ¶ 12 (2014) (concluding that a lawyer who practices under his full name "may use a law firm name that includes only the lawyer's middle name initials and last name, without including his first name."). Accordingly, we conclude on the facts here that the law firm is permitted to use A & B, which is the firm's old name, as the firm's domain website name. It need not change the domain name to reflect the new name.

CONCLUSION:

14. When a law firm changes its name by adding the name of a partner, it has a reasonable time to change its existing advertising to the new firm name. What is a reasonable time depends on whether the old ads are misleading, and on the cost and ease of making the corrections. Website domain names are not required to reflect the legal name of the firm and large building signs that constitute branding rather than advertisements are not subject to the advertising rules.

(12-16)

OPINION 1096 (05/20/2016)

TOPIC: Lawyer declining attorney fees awarded to client

DIGEST: A lawyer may allow a civil rights client to keep some or all of the statutory attorney fees awarded to the client even if the client is not a lawyer. Because statutory attorney fees in civil rights cases are awarded to the "prevailing party" (*i.e.,* to the client) rather than to the lawyer, allowing a civil rights client to keep part of the court-awarded fees does not fall within the prohibition against sharing legal fees with a nonlawyer.

RULES: 5.4(a) and 8.5(b)(1)

FACTS:

1. The inquirer is a lawyer who is admitted to practice law in Florida but has been admitted *pro hac vice* to represent a client (the plaintiff) in a civil rights suit pending in a court in New York. The client is not a lawyer. The client prevailed in the suit on the merits, so the court ordered the defendant to pay statutory civil rights attorney fees to the client. The inquirer believes that the damages award to the client is too low. To make up for the low damages award, the lawyer would like to let the client keep some of the court-awarded attorney fees.

QUESTION:

2. May a lawyer allow a civil rights client who is not a lawyer to keep some or all of the court-awarded statutory attorney fees when the client is the prevailing party in a civil rights suit?

OPINION:

A. Which Jurisdiction's Rules of Professional Conduct Apply?

3. A preliminary question is which jurisdiction's Rules of Professional Conduct apply to this inquiry. The inquirer is admitted to practice law generally in Florida, but has been admitted *pro hac vice* in a New York court. With respect to the Rules of Professional Conduct, Rule 8.5(b)(1) of the New York Rules of Professional Conduct (the "Rules") provides as follows:

> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
>
> > (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise . . . .

4. The inquiry before us involves "conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice . . . for purposes of that proceeding" (*i.e., pro hac vice*). Consequently, the rules to be applied are the rules of the jurisdiction in which the court sits (*i.e.,* New York), "unless the rules of the court provide otherwise" (which they do not, since all New York state

and federal courts apply the New York Rules of Professional Conduct). Thus, the applicable ethics rules are the New York Rules of Professional Conduct.

B. The Prohibition Against Sharing Fees with a Nonlawyer

5. For centuries, the legal profession has prohibited lawyers from sharing legal fees with nonlawyers. *See* Roy D. Simon, *Fee Sharing Between Lawyers and Public Interest Groups,* 98 Yale L.J. 1069, 1076 (1989) ("The rule against sharing legal fees with nonlawyers traces back to a 1729 English Act of Parliament"). In New York, as in most jurisdictions, the prohibition against sharing legal fees with nonlawyers is contained in Rule 5.4 ("Professional Independence of a Lawyer"). Specifically, Rule 5.4(a) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer, with three exceptions not relevant here.

6. Since none of the express exceptions to Rule 5.4 apply to the facts of the present inquiry, the situation might at first glance appear to be governed by the general rule prohibiting lawyers from sharing legal fees with nonlawyers. However, the reach of the rule against fee sharing with nonlawyers is not unlimited, and a lawyer declining to accept some or all of the statutory fees the court has awarded directly to a client who is a nonlawyer is not the type of fee sharing encompassed in Rule 5.4(a)'s command not to "share legal fees with a nonlawyer" who is a stranger to the attorney-client relationship.

7. The dispositive point in our analysis is that most statutory fee awards are to the prevailing "party," not directly to the lawyer. That is the case in federal civil rights cases. *See, e.g., Evans v. Jeff D.,* 475 U.S. 717 (1986) ("Congress bestowed on the 'prevailing *party*' a statutory eligibility for a discretionary award of attorney's fees in specified civil rights actions") (emphasis by the Court). The same is true of New York State fee-shifting statutes. *See, e.g.,* N.Y. Gen. Bus. Law § 349(h) (court may award reasonable attorney fees to a "prevailing plaintiff"); N.Y. State Finance Law §§ 187-194 ("prevailing plaintiff" in a False Claims Act case is entitled to recover attorney fees and costs).[22] The statutory fees are awarded to the party, not to the lawyer. Accordingly, the party (the client) would be "sharing" the fee award with the lawyer, not the other way around. Accordingly, we believe that the prohibition against sharing fees with a nonlawyer does not bar a lawyer from allowing a civil rights client to keep some or all of the legal fees awarded by the court to the prevailing party (*i.e.,* to the client) in a civil rights case.

8. We understand that a lawyer's retainer agreement in a civil rights case typically contains a clause assigning the client's statutory fee award to the lawyer, but the award is still made in the first instance to the client, not the lawyer. Even if the retainer agreement assigns the fee award to the lawyer, the lawyer may ethically waive that assignment, in whole or in part. Waiving the assignment of fees is equivalent to offering the client a discount on fees, a practice that is undoubtedly permitted because it does not implicate the underlying concern of Rule 5.4, which is to avoid interference with the lawyer's professional judgement. *See* Rule 5.4, Cmt. [1] ("limitations on sharing fees" with nonlawyers "protect the lawyer's professional independence of judgment").

22 For a chart listing various federal and New York statutes permitting a court to award attorney's fees to a successful litigant, see http://www.empirejustice.org/assets/pdf/litigation/federal-attorney-fee-statutes.pdf.

9. Our opinion in N.Y. State 906 (2012) does not require a different conclusion. There, a lawyer employed by a not-for-profit organization that was not a law firm asked if it would be ethical to share legal fees with the not-for-profit employer. We responded that to do so would violate Rule 5.4(a). That situation is distinguishable from the one presented here. In Opinion 906, the lawyer employed by the not-for-profit organization was apparently representing third parties, such as civil rights plaintiffs, and was not representing the not-for-profit organization itself. The not-for-profit corporation was the lawyer's *employer*, not the lawyer's *client*. Thus, the lawyer in Opinion 906 wanted to share statutory fee awards not with the client but instead with a nonlawyer not-for-profit corporation that sponsored litigation to advance the public interest. Here, the lawyer wants to allow a civil rights client to keep some or all of the court-awarded statutory attorney's fees. Opinion 906 does not govern that scenario.

CONCLUSION:

10. A lawyer may allow a civil rights client to keep some or all of the statutory attorney fees that are awarded to the client, even if the client is not a lawyer.

(9-16)

OPINION 1097 (05/26/2016)

TOPIC: Non-legal employment; misrepresentation of lawyer's professional status.

DIGEST: If a lawyer is hired as a debt collector, and not as a lawyer, to make phone calls to collect commercial debts, the lawyer is not required to disclose his or her status as a lawyer. But if a debtor asks whether the caller is a lawyer and the lawyer answers the question, the response must be truthful and not misleading.

RULES: 8.4(c)

FACTS:

1. The inquirer is a New York lawyer employed by a debt collection agency as a commercial debt collector. The inquirer is responsible for making routine phone calls to collect debts on behalf of the agency. The inquirer is admitted to practice law but is not engaged as a lawyer on behalf of the agency.

2. During these phone calls, a debtor often asks whether the inquirer is a lawyer. Currently, the inquirer responds, truthfully, "I happen to be a lawyer but I am neither acting in a legal capacity nor representing either the collection agency or the client who owns the debt."

3. The collection agency prefers that the inquirer not disclose the inquirer's status as an attorney or even deny that the inquirer is an attorney (since the inquirer is not acting as one).

QUESTION:

4. May a lawyer who is hired by a debt collection agency to make collection calls to debtors but who is not retained as a lawyer refuse to identify his or her status as an attorney when asked by the debtor?

OPINION:

5. Lawyers often work for businesses that provide nonlegal services[23] but whose activities may trigger legal questions. *See, e.g*. N.Y. State 1081 (2016) (debt management company), N.Y. State 951 (2012) (letter writing service), N.Y. State 832 (2009) (selling shelf corporations over the Internet); N.Y. State 803 (Lawyer may engage in debt collection activities outside New York that do not constitute the unauthorized practice of law, as long as the firm avoids misleading debtors); *cf.,* N.Y. State 898 (2011) (lawyer who sends a legally mandated notice regarding the expiration of the statute of limitations on a debt is not giving legal advice to an unrepresented person in violation of Rule 4.3).

6. We assume for purposes of this opinion that the debt collection agency is not providing legal services. We also assume that the debt collection agency does not represent to its customers that it is providing legal services, does not appear in court on behalf of the customers and does not provide

23 Rule 5.7(c), which applies when lawyers or law firms provide "nonlegal services" to clients, defines "nonlegal services" as "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer."

lawyers for its customers. We have no authority to determine whether the services of the debt collection agency are legal services because what constitutes the practice of law is a legal question that is beyond this committee's jurisdiction to answer.

7. As we noted in N.Y. State 1081, if a lawyer is providing nonlegal services (and the clients do not believe they are legal services) then the only applicable ethical rules in the New York Rules of Professional Conduct (the "Rules") would be the rules that apply even where the lawyer is not representing a client, such as Rule 8.4(c), which prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." This obligation exists whether or not the activities of the lawyer constitute the practice of law. *Compare* Rule 4.1 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact to a third person.")

8. When the debtor specifically asks if the inquirer is a lawyer, the inquirer is not obligated to answer the question. The inquirer may, for example, decline to answer or avoid responding to the question by changing the subject or ignoring the question. However, if the inquirer answers the question, the answer must be truthful and not misleading. A truthful statement should make clear that the lawyer is a lawyer but is acting as a debt collector only and not as a lawyer. *Cf.,* N.Y. State 803 (2006) (a lawyer providing non-legal debt collection services must avoid suggesting to debtors in such communications that the firm or its representatives are functioning as lawyers engaged in the representation of the creditor-client or that the firm or its representatives might undertake legal action on the creditor-client's behalf.)

CONCLUSION:

9. If a lawyer is hired as a debt collector, and not as a lawyer, to make phone calls to collect commercial debts, the lawyer is not required to disclose his or her status as a lawyer. But if a debtor asks whether the caller is a lawyer and the lawyer answers the question, the response must be truthful and not misleading.

(17-16)

OPINION 1098 (06/10/2016)

TOPIC: Criminal law; prosecutor conditioning plea bargain on defendant's waiver of ineffective assistance of counsel claims

DIGEST: A prosecutor may not ethically require, as a routine condition of a plea bargain, that a defendant waive ineffective assistance of counsel claims.

RULES: Rule 8.4(d)

FACTS:

1. In N.Y. State 1048 (2015) we considered whether a defense lawyer may ethically advise a defendant whether to accept a plea bargain that includes a waiver of future claims of ineffective assistance of counsel ("IAC"). We concluded that a *per se* personal-interest conflict under Rule 1.7(a) does not arise. Instead, we concluded that determining whether advising as to an IAC waiver creates a personal-interest conflict for the defense lawyer – and whether any such conflict is waivable – requires a case-by-case inquiry. We expressly left open the question, however, whether a prosecutor is ethically prohibited from routinely requiring IAC waivers as a condition of a plea bargain. We now consider that open question.

QUESTION:

2. May a prosecutor ethically require, as a routine condition of a plea bargain, that a defendant waive IAC claims against a defense lawyer?

OPINION:

3. At the outset, we note that prosecutors often insert into a plea bargain agreement a general waiver of any right to appeal or otherwise make a collateral attack on the conviction. Although such a waiver does not specify an appeal based on ineffective assistance of counsel, the courts have read such general waivers as including at least some IAC claims. *See People v. Abdullah*, 122 A.D.3d 958 (3d Dept. 2014) (appeal waiver foreclosed an IAC claim that did not "impact the voluntariness" of the plea). Consequently, when this opinion refers to IAC waivers, it includes a general waiver of the right to appeal, unless it specifically excludes an appeal based on a claim of ineffective assistance of counsel.

4. Rule 8.4(d) provides that a lawyer or law firm shall not "engage in conduct that is prejudicial to the administration of justice." Comment [3] to Rule 8.4 states that this prohibition generally is applicable when the conduct at issue "results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation." While the examples provided by the comment all involve willful malfeasance, we have not interpreted Rule 8.4(d) to apply only to instances involving bad faith. Instead, if the conduct in question is likely to cause substantial individual or systemic harm to the administration of justice, regardless of the motivation of the party, we have interpreted Rule 8.4(d) to apply. Rule 8.4(d), of course, applies to all lawyers, including prosecutors. Examples of the rule's par-

ticular application to prosecutors are useful. Thus, for example, we have repeatedly interpreted Rule 8.4(d) – and its predecessor under the former N.Y. Code of Professional Responsibility, Disciplinary Rule 1-102(A)(5) – to prohibit prosecutors from engaging in partisan political activity. *See* N.Y. State 1071 (2015) (municipal attorney employed by Civilian Complaint Review Board); N.Y. State 696 (1997) (examining attorney for Department of Investigations); N.Y. State 675 (1995) (Assistant District Attorney or Assistant County Attorney); and N.Y. State 568 (1985) (District Attorneys and their assistants). The result reached in those opinions was supported by the recognition that "prosecutors have a duty to seek justice," *see* N.Y. State 683, and by the conclusion that partisan political activity by prosecutors has the potential to cause systemic harm to the administration of justice because such activity risks creating the appearance that prosecutors are not exercising their discretion in an independent, disinterested fashion.

5. Other jurisdictions have applied their 8.4(d) analog, in the context of plea proceedings, to the conduct of prosecutors that, while not motivated by bad faith, risked harming the administration of justice. For example, in *In the Matter of Nancy J. Flatt-Moore,* 959 N.E.2d 241 (Ind. 2012), the Indiana Supreme Court concluded that a prosecutor violated 8.4(d) by allowing the victim of a crime to have unfettered veto power in plea negotiations, including insisting on terms the court would not be authorized to impose. The *Flatt-Moore* Court concluded that, at the very least, this practice gave the appearance that the resolution of the case would not turn on the equities of the case. *Id.* at 245. The Court reached this result notwithstanding its conclusion that the prosecutor "did not act out of any selfish or dishonest motive . . . ." *Id.* at 246.

6. Similarly, in *In re Complaint as to the Conduct of Roger Rook,* 556 P. 2d 1351 (Ore. 1976), the Oregon Supreme Court concluded that it was prejudicial to the administration of justice for a prosecutor to refuse to offer a plea bargain to a group of criminal defendants as long as they remained represented by either of two particular criminal defense attorneys. The Court concluded that, while the prosecutor did not act out of any motive for personal gain or profit, the prosecutor's conduct risked unduly burdening the plea bargaining process, and was therefore prejudicial to the administration of justice. *Id.* at 1356. *Cf. United States ex rel. United States Attorneys v. Kentucky Bar Ass'n*, 439 S.W.3d 136 (Ky. 2014) (finding that routine use of IAC waivers by prosecutors violates Rule 3.8 because a prosecutor is charged with seeing that the defendant is accorded procedural justice, "and we simply do not believe the use of IAC waivers lives up to that lofty expectation").

7. Various ethics opinions from state bars around the country have concluded that a *per se* personal conflict of interest arises when defense attorneys are asked to advise their clients as to an IAC waiver. A number of those opinions have also concluded that a prosecutor derivatively violates Rule 8.4(d) by requiring an IAC waiver because the demand for an IAC waiver creates a conflict of interest for the defense lawyer. *See, e.g.,* Ariz. Op. 15-01 (2015); Fla. Op. 12-1 (2012); Mo. Op. 126 (2009). Although N.Y. State 1048 rejected the *per se* rule adopted by those other state bars, we nonetheless now conclude that the harms attributable to a prosecutor's routine conditioning of plea bargains on the waiver of IAC claims are sufficiently substantial as to prejudice the administration of justice in violation of Rule 8.4(d). Those harms are chiefly associated with the undue burdens on defense lawyers, defendants, and the court system that arise from a prosecutor's routine use of IAC waivers in an already overburdened criminal justice system.

8. We concluded in N.Y. State 1048 that a personal-interest conflict does not automatically arise every time a defense lawyer counsels a defendant as to the waiver of an IAC claim, but we also recognized that ascertaining whether or a not a conflict of interest exists in a particular case (and whether any such conflict is waivable) is often a difficult, complex task. First, a defense lawyer must review the representation and assess the likelihood that a successful IAC claim exists. Critically, when a lawyer actually did provide ineffective assistance of counsel, the lawyer will typically be unaware of the deficient performance. After making this initial, performance-based assessment, the defense lawyer will need to assess the likelihood that continued representation will be adversely affected by the defense lawyer's self-interest in securing an IAC waiver. While many lawyers may be relatively unconcerned about the risk of an IAC claim, other lawyers will be concerned about the time and anxiety that would be involved in defending against any IAC claim.

9. The routine insistence on IAC waivers by prosecutors similarly burdens the courts. When a defense lawyer concludes that a personal conflict exists but is waivable (and has been waived), the court will have to conduct its own independent inquiry to ascertain whether the defendant's waiver of the conflict is knowing, intelligent, and voluntary. *See, e.g., People v. Gomberg,* 38 N.Y.2d 307 (1975) (holding that a defendant's waiver of any conflict must be "knowing and intelligent"). When a defense lawyer concludes that the conflict created by a prosecutor's demand for an IAC waiver is not a waivable conflict, the defense lawyer will have to move to withdraw. In that situation as well, the court will have to expend resources to ascertain whether a conflict exists, and the court typically will need to balance the defendant's right to counsel of choice against defense counsel's duty to avoid potential conflicts of interest. *See People v. Watson,* 26 N.Y.3d 620 (2016) (noting that when potential conflicts of interest arise in criminal cases, courts often must engage in sensitive inquiries and weigh competing interests). If the court concludes that the danger of the conflict outweighs the defendant's right to choice of counsel, the court will need to allow time for the defendant to locate substitute counsel. Substitution of counsel usually will delay the proceedings and cause additional financial costs. But if the court denies the defense lawyer's motion to withdraw, then the defense lawyer will be forced to proceed despite a belief that there is an unwaivable (or unwaived) conflict of interest. That result may undermine public confidence in the fairness of the proceedings and often will trigger further litigation.

10. Given the large volume of cases in the criminal justice system, and the high caseloads carried by many defense lawyers (*see, e.g., Hurrell-Harring v. State of New York*, 15 N.Y.3d 8 (2015)), a prosecutor's routine insistence on IAC waivers carries a substantial cost in time and money. Even more worrisome, these costs create enormous pressure for courts and defense lawyers to ignore the potential conflicts created by IAC waiver demands. Defense lawyers will reasonably fear that raising the conflict-of-interest issue at the point where a plea deal is about to be consummated will aggravate the court (or the prosecutor). Moreover, courts undoubtedly will be confused as to why the IAC waiver does not present a conflict as to some of the cases before it but does present a conflict as to other cases. To avoid aggravating and confusing the courts, defense lawyers will be sorely tempted to ignore conflicts they believe exist. (Indeed, we are concerned that, given the current, widespread use of these waivers, that is exactly what is going on now.) And, if a defense lawyer believes that raising the conflict-of-interest issue will jeopardize a beneficial plea bargain for the client, the defense lawyer will be placed in the untenable position of deciding between ignoring ethical obligations and undermining the client's interests.

11. IAC waivers also cause substantial, unacceptable harms to criminal defendants. The Sixth Amendment entitles criminal defendants to the effective assistance of counsel. But when defense lawyers unwittingly have provided ineffective assistance of counsel (*i.e.,* when defense lawyers have been ineffective but do not know it), IAC waivers effectively leave these defendants without counsel as to the impact of the as-yet-undiscovered ineffectiveness.

12. Another problem is that the scope and impact of IAC waivers are uncertain. *See, e.g., People v. Abdullah*, 122 A.D.3d 958 (3d Dept. 2014) (appeal waiver foreclosed an IAC claim that did not "impact the voluntariness" of the plea). Accordingly, defendants are unlikely to comprehend the effect of these waivers. And, defendants who are informed that the waiver will foreclose all future claims of ineffectiveness may mistakenly believe that they will be unable to bring any IAC claim even when cases like *Abdullah* might allow them to do so. Finally, in contrast to parties suing for malpractice in civil litigation, criminal defendants who waive IAC claims but who were harmed by their lawyers have little recourse to malpractice litigation, both because the very conviction that resulted from the ineffectiveness will usually bar any relief at all – and because even in the rare instances when criminal defendants succeed in proving malpractice, nonpecuniary damages are not available. *See Dombrowski v. Bulson,* 19 N.Y.3d 347 (2012) (when a convicted criminal defendant sues the former criminal defense attorney for legal malpractice, nonpecuniary damages are not available).

13. One final harm caused by IAC waivers is that they create an incentive for prosecutors to employ them to conceal IAC claims that are known to prosecutors but unknown to defendants and their lawyers. An experienced prosecutor may well witness an inexperienced defense lawyer's unwitting ineffectiveness. A prosecutor's use of an IAC waiver to cover up an IAC claim would result in a substantial injustice.

14. These substantial harms that the routine use of IAC waivers cause to the administration of justice are not outweighed by any identifiable benefits. While appeal waivers that apply to other issues may promote finality, IAC waivers do not achieve finality because the scope of an IAC waiver is so uncertain. As suggested earlier, IAC waivers that "impact the voluntariness" of the plea are not waivable (*see People v. Abdullah,* 122 A.D.3d 958). But almost all IAC claims arising from plea cases *arguably* impact the voluntariness of the plea. Consequently, most IAC claims will be subject to future litigation, notwithstanding the presence of a waiver. That the cost of foregoing IAC waivers is not substantial is demonstrated by the United States Department of Justice's 2014 decision to prohibit federal prosecutors from using IAC waivers. *See* Deputy Attorney General James Cole, Memorandum for All Federal Prosecutors (Oct. 14, 2014). No negative effects have been reported as a result of the nationwide implementation of this policy.

15. Notably, the Massachusetts Supreme Court, apparently drawing the same conclusion about the impact of IAC waivers that the United States Department of Justice drew, amended the Massachusetts Rules of Professional Conduct effective April 1, 2016 explicitly to prohibit prosecutors from seeking IAC waivers. *See* Mass. R. Prof. C. 3.8(h) ("The prosecutor in a criminal case shall: . . . (h) refrain from seeking, as a condition of a disposition agreement in a criminal matter, the defendant's waiver of claims of ineffective assistance of counsel or prosecutorial misconduct."). While the New York Rules of Professional Conduct do not contain an *explicit* bar against IAC waivers, we believe that, under the

totality of the circumstances, these waivers are prohibited under Rule 8.4(d) because of the substantial harms they cause to the administration of justice.[24]

16. In this opinion, we have considered whether the "routine" requirement of IAC waivers is prejudicial to the administration of justice. Because many of the harms that we have identified are connected with the broad use of IAC waivers in an already over-burdened criminal justice system, we believe that there may well be case-specific scenarios in which a bargained-for waiver of IAC claims does not raise the same concerns. The ABA House of Delegates Resolution and Report 113E (2013), which also condemned the general use of IAC waivers in criminal cases, noted one such example: a defendant who has been advised by an independent lawyer may waive an identified instance of ineffectiveness. Similarly, when a particularly sophisticated client has retained a lawyer of the client's choosing, a negotiated disposition that includes an IAC waiver would not necessarily implicate the same concerns as those addressed in this opinion.

CONCLUSION:

17. A prosecutor may not ethically require, as a routine condition of a plea bargain, that a defendant waive ineffective assistance of counsel claims.

24 Because, prior to this opinion, prosecutors were not on notice that Rule 8.4(d) prohibits prosecutors from routinely conditioning a plea bargain on the waiver of ineffective assistance of counsel claims, we do not believe that a prosecutor's prior use of this practice should be subject to discipline.

OPINION 1099 (07/12/2016)

TOPIC: Obligation to Report Judicial Misconduct

DIGEST: A New York lawyer is not required to report a violation by a judge of the Rules of Judicial Conduct, but is free to do so if it is consistent with the lawyer's duty of confidentiality to the lawyer's client.

RULES: 1.6, 8.3(a), (b) & (c), 8.4(f)

FACTS:

The inquirer believes that he has knowledge that a judge who sits in, and is a member of the bar of, New York has engaged in unethical conduct in a judicial capacity. The inquirer seeks advice on whether this knowledge obligates the inquirer to report the judge to the New York State Commission on Judicial Conduct (or "CJC").

QUESTION:

1. Must a lawyer report to the Commission on Judicial Conduct knowledge of a judge's violation of the Rules of Judicial Conduct?

OPINION:

2. We assume, for purposes of this opinion, that the judge's unethical conduct constitutes a violation of the Rules of the Chief Administrative Judge Regarding Judicial Conduct, 22 N.Y.C.R.R. Part 100 (the "Rules of Judicial Conduct" or "RJC") and does not also violate the New York Rules of Professional Conduct (the "RPC"), which are applicable to all New York lawyers.

3. The question is an issue of first impression for this Committee. Rule 8.3 of the RPC, entitled "Reporting Professional Misconduct," provides in part:

> (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
>
> (b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

4. Rule 8.3(a) imposes a duty to report; Rule 8.3(b) imposes a duty to cooperate. Rule 8.3's duty to report arises when a lawyer knows of conduct by another lawyer which violates the Rules and raises a substantial question about that other lawyer's honesty, trustworthiness or fitness. Rule 8.3(b)'s duty to cooperate arises when a lawyer has knowledge or evidence that a tribunal or other authority lawfully demands concerning another lawyer or a judge. Had the drafters intended the duty to report to include conduct by a judge that violates the Rules of Judicial Conduct, they easily could have said

so. That 8.3(a) does not refer to judges, while Rule 8.3(b) does, suggests an intention not to impose an *obligation* to report alleged judicial misconduct. Rule 8.3(a) contrasts with the analogous provision of the RJC. *See* RJC Part 100.3(D)(1) ("A judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation of this Part shall take appropriate action.")

5. To characterize the omission from the RPC as an oversight is difficult. Rule 8.3 is substantially the same as Disciplinary Rule ("DR") 1-103 of the former Code of Professional Responsibility ("the Code"). When the New York State Bar Association's Committee on Standards of Attorney Conduct, known as COSAC, proposed a revision of the Code to conform to the format, and in many instances the substance, of the American Bar Association's Model Rules of Professional Conduct ("Model Rules"), COSAC recommended that DR 1-103, which was to become Rule 8.3, be amended to extend the duty to report to a lawyer who "knows that a judge has committed a violation of the applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office." *See* L. Emanuel, "Major Differences Between COSAC Proposals & Current N.Y. Lawyer's Code of Professional Responsibility," New York Legal Ethics Reporter (April 1, 2006) (quoting the COSAC report). In adopting the RPC, the courts did not accept this recommendation.

6. Of the 51 jurisdictions in the United States that regulate lawyer conduct, 48 explicitly address a lawyer's duty to report alleged judicial misconduct, in most instances with language either tracking Model Rule 8.3(b), *e.g.*, N.J. Rule 8.3(b); Ill. Rule 8.3(b), or tailored to the judicial oversight committee authority of a particular jurisdiction, *e.g.*, Ark. Rule 8.3(b). At least two states – Washington and Georgia – provide that a lawyer "should" do so; Georgia is express in saying that a violation of this suggestion is not a disciplinary violation, *see* Ga. Rule 8.3. In addition to New York, two other states do not address the matter: California has no parallel to Rule 8.3, even in regard to reporting lawyer misconduct. *See* D. Karpman, "New Professional Rules Generate Plenty of Disagreement," Cal. L.J. (September 2010) (California rules impose no duty to report misconduct by other lawyers). Alabama requires lawyers to report any violation of its Rule 8.4, which, like New York's, refers only to lawyers, not judges, and yet contains a provision identical to New York's 8.3(b). These comparisons indicate that, when regulators want to impose a whistleblower provision, they know how to phrase it.

7. In this State, at least above the municipal court level, judges are invariably lawyers, which invites the possibility of interpreting Rule 8.3(a)'s reference to the conduct of "another lawyer" to include judges. Certainly the temptation exists to impose a duty to report serious ethical violations by members of the judiciary who are central to the fair administration of justice. Yet for this Committee to do so would require us to ignore (1) Rule 8.3's predecessor (DR 1-103), (2) the evolution of Rule 8.3 from COSAC (which believed an amendment was desirable if not necessary) to the courts that adopted the Rules (which did not agree), and (3) the rules in most other jurisdictions that adopted variations of Model Rule 8.3 specifically imposing an obligation, on pain of disciplinary sanction, for failing to report judicial misconduct. We believe that ignoring these considerations would be overreaching. In any event, we have assumed for purposes of this opinion that the judge's conduct does not violate the RPC.

8. To say that a lawyer is not subject to discipline for failure to report judicial misconduct is not to say that a lawyer should not make such a report. Subject only to the following caveat, nothing in the Rules may be read to discourage a lawyer from reporting to an appropriate authority (including the

CJC) knowledge that a judge has engaged in conduct raising substantial questions about the judge's fitness to occupy a judicial post. The most important restraint on a lawyer's right to report is Rule 1.6, which obligates a lawyer to preserve confidential information acquired in the course of an attorney-client relationship, which includes not only privileged communications but any information the disclosure of which would be embarrassing or detrimental to the client or is inconsistent with the client's wishes. Rule 8.3(c) makes clear that a lawyer's duty to report does not require disclosure of information that Rule 1.6 protects (or is obtained by a lawyer or judge while participating in a bona fide lawyer assistance program). These constraints exist regardless whether the lawyer has a duty to report. Thus, when a lawyer's knowledge of judicial misconduct consists of confidential information within the meaning of Rule 1.6, a lawyer wishing to report the misconduct may require the consent of the client to do so.

9. It bears noting that the Constitution of New York authorizes the CJC to "receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system." N.Y. Const., Art. VI, § 22, subd. a. To this end, the Legislature has provided the CJC with broad investigatory and enforcement powers. *See* Judiciary Law §§ 41, 42, 44. Although our State Constitution vests the CJC with this power, a lawyer has the right, subject to any restrictions that Rule 1.6 imposes, to report the alleged judicial misconduct to the CJC or to other authorities, such as a district attorney (for violations of law) or to a grievance committee (for violations of applicable Rules of Professional Conduct).

10. This opinion does not address a lawyer's obligation to report criminal conduct by a judge. Such conduct involves questions of law, such as misprision of a felony, which are beyond our jurisdiction to confront. *See* Rule 8.4(f) (a lawyer may not knowingly assist a judge "in conduct that is a violation of the rules of judicial conduct or other law").

CONCLUSION:

11. A New York lawyer has no duty, at risk of disciplinary sanction, to report a violation by a judge of the Rules of Judicial Conduct, but the lawyer is free to do so consistent with the lawyer's duty of confidentiality to the lawyer's client.

(10-16)

OPINION 1100 (07/12/2016)

TOPIC: Specialization; Use of the designation "Accredited Estate Planner®" on an attorney's website and business cards

DIGEST: An attorney who obtains the designation "Accredited Estate Planner®" from the National Association of Estate Planners & Councils may not use that designation on the attorney's website or business cards because, even though the American Bar Association has approved a different specialization program of the sponsoring organization, the ABA has not approved its "Accredited Estate Planner®" program.

RULES: 7.4(a) & (c)

FACTS:

1. The inquirer is pursuing the designation "Accredited Estate Planner®" ("AEP") through the National Association of Estate Planners & Councils ("NAEPC"). Both attorneys and non-attorney professionals (such as Chartered Life Underwriters® and Certified Public Accountants) may earn this designation. According to the inquirer, the designation reflects a commitment to a "team approach" to estate planning and does not connote being a "specialist" in estate law. The inquirer says he would not hold himself out as a specialist, but wishes to use the designation on his website and business cards.

QUESTION:

2. May a lawyer's website and business cards use the designation "Accredited Estate Planner®" if the lawyer obtains that designation through the National Association of Estate Planners & Councils?

OPINION:

3. The question involves the permissible ways for an attorney to claim to be certified as a specialist in a particular practice area of law. Rule 7.4 of the New York Rules of Professional Conduct (the "Rules"), which addresses identification of practice areas and specialization, states:

> (a) A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).
>
> * * *
>
> (c) A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:
>
> > (1) A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar

> Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "This certification is not granted by any governmental authority."
>
> (2) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "This certification is not granted by any governmental authority within the State of New York."
>
> (3) A statement is prominently made if:
>
> (i) when written, it is clearly legible and capable of being read by the average person, and is in a font size at least two font sizes larger than the largest text used to state the fact of certification; and
>
> (ii) when spoken aloud, it is intelligible to the average person, and is at a cadence no faster, and a level of audibility no lower, than the cadence and level of audibility used to state the fact of certification.

4. The inquirer states that the designation "Accredited Estate Planner®" does not connote being a "specialist," but we do not agree. The terms "accredited" and "certified" imply expertise. We have previously held that a lawyer may not claim to be an "expert" in any area of the law, other than as permitted by Rule 7.4(c). *See* N.Y. State 1021 (the word "expert" is an obvious synonym for the word "specialist"); N.Y. State 757 (no support in rules for use of "expert"); N.Y. State 722 (if membership in a professional organization implies certification in a legal field, the reference must comply with [the former Code's equivalent to Rule 7.4(c)]). When used in conjunction with "a particular area of law or law practice," the term "accredited" is a synonym for specialist.

5. This conclusion is supported by the NAEPC website, which asserts that one of its goals is to "encourage specialization programs to increase recognition and acceptance of estate planning as a *specialty*. . . . NAEPC administers two separate and distinct *specialization* programs." (Emphasis added.) One of the programs NAEPC administers is the AEP program, and the other program is the "Estate Planning Law Specialist (EPLS)" program. The EPLS program has been approved by the ABA, but the AEP program has not received such approval.

6. We do not opine here on whether enforcement of Rule 7.4 would pass constitutional muster, since that question is one of law that is beyond the jurisdiction of this Committee. The U.S. Supreme Court held in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 (1990), that States may not categorically restrict attorneys from making claims of certification and specialization, but the Court also said that "[t]o the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organizations or standards of specialty."

7. In Rule 7.4, New York has created criteria for screening certifying agencies. Specifically, Rule 7.4(c) prohibits a lawyer from claiming specialty certification unless the certification is issued by

either (i) a private organization approved for the purpose of certifying attorneys in particular practice areas by the American Bar Association ("ABA"), or (ii) an authority having jurisdiction to do so in another state or territory. The inquirer has not met either of these standards. According to the ABA's website, the ABA has approved the NAEPC's Estate Planning Law Specialist program, but the ABA has not approved the NAEPC's Accredited Estate Planner program. Moreover, to our knowledge, the AEP program has not been certified by any authority with jurisdiction to certify estate planners in another state or jurisdiction.

CONCLUSION:

8. An attorney may not use the term "Accredited Estate Planner®" on the attorney's website or business cards. The issuer of the designation is a private organization and its AEP program has not been approved by the ABA for the purpose of accrediting specialization as required by Rule 7.4(c)(1).

(16-16)

OPINION 1101 (07/12/2016)

TOPIC: Advertising; dual practice; link from law firm's website to real estate brokerage information

DIGEST: A lawyer may place a link on the lawyer's website to a page describing the lawyer's separate status as a real estate broker, as long as the content of the lawyer's website and of the page reached by the link comply with the advertising rules. The lawyer also should be mindful of Rule 5.7, which addresses lawyer involvement in ancillary nonlegal businesses.

RULES: 1.0(a) & (c), 5.7(a), 7.1(a) & (f)

FACTS:

1. The inquirer is both a lawyer and real estate broker, pursuing the latter as a part-time associate broker through a separate real estate brokerage firm. The inquirer wishes to create a link on the inquirer's law firm website to a real estate profile page that would display (i) the inquirer's real estate background, (ii) real estate listings, and (iii) contact information for the real estate agency.

QUESTION:

2. May a lawyer who is also a real estate broker create a link on the lawyer's website to a real estate profile page that would display (i) the inquirer's real estate background, (ii) real estate listings, and (iii) contact information for the real estate office?

OPINION:

3. Our opinions since the late 1970s have permitted a lawyer to advertise a law practice and a business as a real estate broker together. *See, e.g.,* N.Y. State 933 (2012) (lawyer may conduct law practice and real estate brokerage in same office and advertise them together if the ads are not false or misleading); N.Y. State 493 (1978) (lawyer may conduct law practice and real estate brokerage from same office, but may not solicit employment as a lawyer in violation of any statute or court rule and may not act as lawyer and broker in the same transaction). This contrasts with our opinions before the Supreme Court's lawyer advertising opinion in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). *See, e.g*., N.Y. State 206 (1971) (lawyer may not publicize a law practice together with a non-legal occupation, since such publicity might involve improper solicitation or the use of the non-legal business as a "feeder" to the law practice).

4. N.Y. State 933 concerned only mailing advertising material (such as greeting cards, business cards, refrigerator magnets and the like) to both law firm and brokerage clients, but nothing in the New York Rules of Professional Conduct (the "Rules") prohibits the link proposed here, as long as it complies with the advertising rules. *See* N.Y. State 915 (2012) (if relevant advertising rules are adhered to, a law firm's website may link to the website of a related nonlegal entity); N.Y. State 888 (2011) (lawyer website may include links to other businesses if neither the link nor the linked material involves misrepresentation or causes confusion).

5. In N.Y. State 915, we noted that the definitions of "advertisement" and "computer-accessed communication" in Rule 1.0(a) and (c) were broad enough that, if the primary purpose of a particular

link were to facilitate the retention of the services of the lawyer or law firm, the link and the related text would be "advertisements" under the Rules and therefore must comply with Rule 7.1, governing advertisements. Thus, for example, the linked website must not contain "false, deceptive, or misleading" statements, see Rule 7.1(a)(1), and the notation "Attorney Advertising" must appear on the home page of the website, see Rule 7.1(f).

6. In addition, our prior opinions have pointed out a number of restrictions that apply when a lawyer provides both legal and nonlegal services to a client. While it seems unlikely that the inquirer could provide both legal and nonlegal services to the same client, it is useful to repeat some of those restrictions here.

7. First, the lawyer's personal interest in receiving a brokerage commission has led us to point out that a lawyer-broker may not in most instances act as both a lawyer and a real estate broker in the same transaction. *See* N.Y. State 1043 (2015) (lawyer who represented client in selling real estate may not accept a referral fee from the real estate broker even if the lawyer does not charge a legal fee); N.Y. State 1015 (2014) (lawyer may serve as both a lawyer and real estate broker only if the brokerage services are compensated by a flat fee paid in advance rather than in a commission-based payment contingent upon closing); N.Y. State 933 (lawyer may not act as a lawyer and broker in the same transaction); N.Y. State 919 (lawyer may not act as attorney for any party to a real estate transaction in which the lawyer is acting as a broker); N.Y. State 493 (1978) (lawyer may not act as a lawyer and a real estate broker in the same transaction). The personal interest conflict of a lawyer acting in receiving the brokerage commission is ordinarily not a consentable conflict. *See* N.Y. State 933 at ¶ 7.

8. Second, Rule 5.7 applies to lawyers or law firms providing nonlegal services to clients or other persons, such as the inquirer here. In particular, Rule 5.7(a) provides that the nonlegal services are subject to the Rules of Professional Conduct where (1) the nonlegal services provided to a person are not distinct from legal services being provided to that person by the lawyer or law firm, (2) the nonlegal services are distinct from the legal services being provided by the lawyer but the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship, or (3) the lawyer is an owner or agent of, or otherwise affiliated with, the provider of nonlegal services, and the persons receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

9. Under Rule 5.7(a)(4), for purposes of paragraphs (a)(2) and (a)(3) of Rule 5.7:

> [I]t will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is *de minimis*.

10. The inquirer is unlikely to provide both legal and nonlegal services to the same client (because, as noted, a lawyer may not serve as lawyer and real estate broker in the same transaction). However, if the inquirer plans to link the legal and brokerage web pages, the inquirer may wish to avoid confusion about whether the brokerage services are subject to a client-attorney relationship by

providing, on the linked pages describing the nonlegal services, the warning quoted above from Rule 5.7(a)(4). Opinion 933 ¶ 8, which draws upon Rule 5.7, explains the problem:

> If the brokerage services provided to a . . . brokerage client are not distinct from legal services provided to that same client, albeit in different matters, or could be perceived by that client to be the subject of a client-lawyer relationship, those [brokerage] services will be subject to the Rules of Professional Conduct. Moreover, 'it will be presumed that the person receiving [the brokerage] services believes' them to be the subject of a client-lawyer relationship 'unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services . . . ."

CONCLUSION:

11. If the content of the lawyer's website and of the page reached by a link therein comply with the advertising rules, a lawyer may place a link on a law firm website to a page describing the lawyer's separate status as a real estate broker. The lawyer, however, should also be mindful of the restrictions of Rule 5.7(a) on ancillary businesses.

(18-16)

OPINION 1102 (07/15/2016)

TOPIC: Insurance counsel; sharing office space with nonlawyers

DIGEST: The lawyers in an insurance company's in-house department who provide legal services to the insurance company's policy holders must take reasonable steps to protect client confidential information of the insureds and to avoid conflicts of interest, and must comply with other applicable Rules.

RULES: Rule 1.0(h), 1.1, 1.6(a) & (c), 1.8(f), 5.3

FACTS:

1. The inquirer is a salaried employee of an insurance company. The inquirer's practice is limited to the defense of the insurance company's policy holders. The lawyers in the inquirer's department are setting up an office within the building that houses the insurance company and have asked if there are any ethical requirements regarding the layout and function of the office.

QUESTION:

2. What ethical rules govern the office of an insurance company's in-house department that provides legal services to the insurance company's policy holders?

OPINION:

3. This Committee has long held that a lawyer may be retained or employed as "house counsel" to an insurance company to defend the insurance company's assureds. *See* N.Y. State 519 (1980); N.Y. State 109 (1969) (citing ABA Opinion 282). N.Y. State 109 notes that the contract of insurance gives the insurance company control over the defense of any action brought against the assured. Opinion 109 also notes that, since the interests of the insurance company and the assured are usually the same (*i.e.,* to defeat claims that the insurance company might be required to pay), an insurance company's in-house lawyer's representation of an insured normally does not present a conflict of interest.[25] *But see* N.Y. State 519 (1980) (insurance company's staff counsel may not represent assured when company disclaims coverage). When the insurance company designates counsel for the assured, whether the designated counsel is inside or outside counsel, the lawyer's client is the insured and not the insurance company. *See* N.Y. State 716 (1999) (the lawyer's primary allegiance is to the client, the insured); N.Y. State 73 (1968) (attorney employed by carrier has superior duty to assured, the client); *American Employers Insurance Co. v. Goble Aircraft Specialties, Inc*., 205 Misc. 1066, 131 N.Y.S.2d 393 (1954) (although the insurance company has retained the lawyer under its contractual duty to defend the policyholder, the client is the policyholder, not the insurance company). *Cf.* Rule 1.8(f) (lawyer shall not accept compensation for representing a client from one other than the client unless there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship).

25 In N.Y. State 109, the inquirer also asked whether such an arrangement would constitute the unauthorized practice of law by the insurance company. We declined to answer that question, on the grounds that identifying the unauthorized practice of law is a question of law, and thus is outside the jurisdiction of this Committee. *See generally* Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 Fordham L. Rev. 2581 (1999), available at: http://ir.lawnet.fordham.edu/flr/vol67/iss5/32.

4. In N.Y. State 726 (2000), we held that a group of lawyers who are salaried employees of an insurance company and whose practice is exclusively to defend the company's policyholders may hold themselves out as a law firm, as long as (i) they undertake to act consistently with the professional responsibilities of a law firm and (ii) they disclose to insureds and others they are employees of the insurance company. We noted there that these responsibilities include compliance with the rules on confidentiality and conflicts of interest. However, all of the New York Rules of Professional Conduct (the "Rules") would apply to the lawyers in the legal department, since the department constitutes a "law firm" under the Rules, whether or not the lawyers in the department hold themselves out as such. *See* Rule 1.0(h) (the term "firm" or "law firm" includes the legal department of a corporation or other organization).

5. Regarding the design of the office space of the in-house department (the "Department"), the requirement to safeguard the confidentiality of client information informs that issue. Rule 1.6(a) provides: "A lawyer shall not knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person" unless the client gives informed consent. Rule 1.6(c) provides: "A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, *and others* whose services are utilized by the lawyer from disclosing or using confidential information of a client . . . ." (Emphasis added.) Here, the "others" include employees of the insurance company outside the Department, including the management of the insurance company and the insurance company's claims investigators. *See* N.Y. State 987 (2013) (absent consent from the insured, staff counsel may not permit review of the confidential information in the client's file by non-attorney employees of the insurance company); N.Y. State 716 (1999) (lawyer representing insured may not submit legal bills to an independent audit company employed by the insurance carrier without the consent of the insured after full disclosure because legal bills may contain confidential information of the client).

6. We have previously opined on the requirement of confidentiality where a lawyer shares office space with non-lawyers or lawyers not in the lawyer's own firm. *See* N.Y. State 643 (1993) (where a bar association provides volunteer lawyers to a legal service organization, client files may be kept at the offices of the bar association as long as client confidential information is protected from unauthorized disclosure and the files are stored in a secure location available only to (i) the client, (ii) the client's present or former lawyer, or (iii) another person for whom the client has given informed consent); N.Y. State 939 (2012) (independent lawyers who share office space must take reasonable measures to ensure the confidentiality of client confidential information).

7. We believe the requirement of confidentiality mandates that the work space of the lawyers who represent assureds must be separated from the work space of other insurance company managers and employees, so that conversations about clients of the Department may not be overheard by persons outside the Department. In addition, client papers should be secured so that persons outside the Department cannot access them absent the client's informed consent.

8. The inquirer must determine whether use of the insurance company's computer system would adequately safeguard confidential information of the assureds. For example, in N.Y. State 939 (2012), we discussed lawyers who shared office space as well as a single computer. Each of the lawyers had a separate administrative password to the computer that was not known to the other. We said:

> The fact that the lawyers have separate computer passwords is certainly an appropriate precaution. Whether it is sufficient would depend on further factors. Some password systems may be more resistant to unauthorized access than others. Protection of the password is also important; for example, a password kept on a piece of paper stuck to the computer and readily visible to any user does not provide much protection. On the other hand, if a robust password system provides a degree of protection similar to that of locked file cabinets, then its proper and consistent use may well constitute reasonable care.

See also Rule 1.1, Cmt. [8] (a lawyer should "keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients").

9. Here, if the insurance company's technical administrators have access to the Department's client files and are not prohibited from sharing them with persons outside the Department, the lawyers in the Department will be violating their duty to preserve the confidentiality of client information.

10. Finally, the lawyers in the Department have an obligation under Rule 1.6(c) and Rule 5.3 to supervise the work of nonlawyers in the Department to ensure that it is consistent with the lawyers' responsibilities under Rule 1.6. *See* Rule 5.3, Cmt. [2] (law firm must ensure that assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client.)

CONCLUSION:

11. The lawyers in an insurance company's in-house department who provide legal services to the insurance company's policy holders must take reasonable steps to protect client confidential information of the insureds and to avoid conflicts of interest, and must comply with other applicable Rules.

(19-16)

OPINION 1103 (07/15/2016)

TOPIC: Conflicting interests; representation of competing enterprises; substantial relationship

DIGEST: An attorney who previously represented Corporation A may undertake the representation of Corporation B in litigation with Corporation X that is unrelated to the attorney's prior representation of Corporation A, notwithstanding that Corporations A and B are competitors in the same industry and that it is in Corporation A's economic interest for Corporation B to lose the litigation with Corporation X. Corporation A's threat to sue Corporation B in a matter unrelated to the attorney's prior representation of Corporation A similarly does not bar the attorney from representing Corporation B in the threatened litigation.

RULES: 1.0(*l*), 1.7(a) and 1.9(a) & (c)

FACTS:

1. Corporation A and Corporation B are competitors. They are engaged in the same industry, in the same geographic area, providing similar services to the same customer base. The inquirer previously represented Corporation A in a matter that has been concluded ("Matter 1"). The inquirer now proposes to represent Corporation B in litigation with Corporation X ("Matter 2"). The inquirer states, and we assume for purposes of this opinion, that Matter 1 and Matter 2 are not factually related. However, if Corporation B is unsuccessful in this suit, it might be forced to cease operations, which would benefit Corporation A.

2. Also, Corporation A has recently threatened to sue Corporation B on a matter ("Matter 3") that is not factually related to Matter 1.

QUESTIONS:

3. May a lawyer undertake to represent a client, Corporation B, in litigation with Corporation X, where it is in the economic interest of a former client, Corporation A, for Corporation B to lose the litigation?

4. May a lawyer undertake to represent a client, Corporation B, in litigation threatened against it by the lawyer's former client, Corporation A, when the threatened litigation is not related to the lawyer's former representation of Corporation A?

OPINION:

Applicable Rules

5. The inquirer states that Matter 1 has concluded. Consequently, we assume that Corporation A is a former client of the inquirer. *But see* N.Y. State 1008 (2014) for an example where the client argues it is a current client despite the fact that the matter has concluded. Whether the client is a current or former client is a mixed question of fact and law that is outside our jurisdiction to determine.

6. We have held that a lawyer's duty of loyalty to a client ends with the termination of the representation. *See* N.Y. State 638 (1992), N.Y. State 628 (1992) (although the duty to preserve confidences remains, the duty of loyalty ends with the termination of the lawyer-client relationship).

7. The limitations on a lawyer's right to oppose a former client are defined mainly by Rule 1.9(a), which provides:

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

Thus, even assuming that the former client has not consented, Rule 1.9(a) does not prohibit a lawyer from representing a new client unless both prongs of Rule 1.9(a) are satisfied – (i) the new matter must be the "same" matter or "substantially related" to the prior matter, *and* (ii) the new client's interests must be "materially adverse" to the interests of the former client.

8. The term "matter" is defined in Rule 1.0(*l*):

> "Matter" includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

9. Comment [2] to Rule 1.9 helps to understand the meaning of the terms "matter" and "materially adverse":

> [2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with *materially adverse interests in that transaction* clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type, even though the subsequent representation involves a position *adverse* to the prior client. . . . [Emphasis added]

10. Comment [3] to Rule 1.9 explains what is meant by "substantially related":

> [3] Matters are "substantially related" for purposes of this Rule if they involve *the same transaction or legal dispute* or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a *substantial risk that confidential factual information that would normally have been obtained in the prior representation* would materially advance the client's position in the subsequent matter. . . . [Emphasis added]

11. Even if the legal issues involved in two matters are the same, it would not make the matters substantially related. As we noted in N.Y. State 1029 (2014):

> The mere circumstance that the current representation may involve legal issues that were also involved in the Litigation does not make the matters substantially related. Interpretations of the ethical rules have long distinguished between conflicts involving the same matter and conflicts involving the same legal issue. Such "issue" (or "positional") conflicts tend to be more problematic in the case of concurrent representation than in the case of former representation. Even as to concurrent representation, a lawyer may ordinarily "take inconsistent legal positions in different tribunals at different tribunals at different times on behalf of different client," although there can be circumstances in which an issue conflict arises because "there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's representation of another client in a different case."

See also Rule 1.9, Cmt. [2] (quoted in ¶ 8 above).

12. The fact that the current client and the former client have competing economic interests does not create a conflict of interest under Rule 1.9(a). Even if Corporations A and B were both current clients of the inquirer, their economic competition would not prohibit the inquirer from representing both of them. As Comment [6] to Rule 1.7 explains, with respect to simultaneous representation of two clients:

> [S]imultaneous representation in unrelated matters of clients whose interests are only economically adverse, *such as representation of competing economic enterprises in unrelated litigation*, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. [Emphasis added.]

See also, Charles W. Wolfram, *Competitor and Other "Finite Pie" Conflicts*, 36 Hofstra L. Rev. 539, 550-55 (2007) (discussing cases in which lawyers represent economic competitors). Since a lawyer may simultaneously represent *current* clients who are economic competitors, then *a fortiori* a lawyer may represent a client whose interests are contrary to the interests of a *former* client who competes economically with the current client.

May the inquirer represent Corporation B in Matter 2?

13. The inquirer has told us, and we are assuming, that Matter 1 (the completed matter in which the inquirer previously represented Corporation A) is not "substantially related" to Matter 2 (Corporation B's contemplated suit against Corporation X). We thus assume that Matter 1 and Matter 2 do not involve the same transaction or legal dispute. Because the contemplated and former matters are not the same or substantially related, Rule 1.9 would not bar the inquirer from undertaking the proposed representation. We therefore do not need to determine whether Corporation B's interests in Matter 2 are materially adverse to the interests of Corporation A. Rule 1.9(a) requires that both prongs of the test be met – same or substantially related, and materially adverse – and here the first prong is not met.

14. Nevertheless, it is worth noting that Corporation B's interests in Matter 2 would not be materially adverse to the interests of Corporation A under Rule 1.9. Just as competing economic interests do not create "differing interests" within the meaning of Rule 1.7(a)(1), so they do not create a "materially adverse" interest within the meaning of Rule 1.9(a). Here, the fact that Corporation A will benefit

if Corporation B is unsuccessful in Matter 2 (because Corporation B is likely to be forced to go out of business if it loses, thus eliminating a competitor), does not create a materially adverse interest under Rule 1.9(a). That would stretch the meaning of "materially adverse" too far.

15. However, the inquirer remains bound by Rule 1.9(c) even if Rule 1.9(a) does not apply. Rule 1.9(c) prohibits a lawyer from using or revealing a former client's confidential information that is protected by Rule 1.6 except as the Rules would permit or require with respect to a current client.

May the inquirer represent Corporation B in Matter 3?

16. Corporation A's threat to sue Corporation B, even if the threat matures into a lawsuit, does not disqualify the inquirer from representing Corporation B in Matter 3, as long as Corporation A remains a former client and Matter 1 and Matter 3 are not the same or substantially related. *See, e.g.*, N.Y. State 1008 (2014) (discussing whether a client is a current or former client as well as the conflicts rules applicable in each situation). Since the inquirer has stated and we are assuming that Corporation A is a former client and that Matter 3 is not substantially related to Matter 1, Rule 1.9(a) does not bar the inquirer's representation of Corporation B in Matter 3 because the first prong of the test in Rule 1.9(a) is not met. In addition the second prong of the Rule 1.9(a) test is not met. The fact that Corporations A and B have generally competing economic interests does not create a "materially adverse" interest within the meaning of Rule 1.9(a).

17. If the inquirer's representation of Corporation B in Matter 3 were substantially related to the former representation of Corporation A in Matter 1, then Rule 1.9(a) would prohibit the inquirer from defending Corporation B in the litigation brought by Corporation A unless the inquirer obtained Corporation A's informed consent, because the "materially adverse" prong of Rule 1.9(a) is always met when a former client is on the opposite side of a lawsuit involving the same or a substantially related matter, whether as plaintiff or defendant.

CONCLUSION:

18. Where an attorney had previously represented Corporation A, the attorney may undertake the representation of Corporation B in litigation unrelated to the attorney's representation of Corporation A, notwithstanding that the two corporations are competitors in the same industry and that Corporation B's failure in the litigation would indirectly benefit Corporation A by eliminating a competitor. Corporation A's bringing suit against Corporation B in a matter unrelated to the attorney's prior representation of Corporation A is similarly not barred by Rule 1.9(a).

(20-16)

OPINION 1104 (10/05/2016)

TOPIC: Legal fees; lien; mortgage; securing legal fees by having client sign promissory note secured by a mortgage against the client's property.

DIGEST: A lawyer may secure legal fees by having the client sign a promissory note or other instrument, secured by a mortgage against the client's property, provided that (i) the promissory note or instrument and mortgage are fair and reasonable to the client, (ii) the terms of the transaction are fully disclosed to the client in language that the client reasonably can understand, (iii) the client provides informed consent to the essential terms of the note and mortgage and the lawyer's role in the transaction, and (iv) the client is advised in writing to seek independent legal advice and given sufficient opportunity to obtain such advice.

RULES: 1.8(a)

FACTS:

1. The inquirer's law firm wishes to secure legal fees for estate planning and Medicaid planning legal services by having the client sign a promissory note secured by a mortgage against the client's property.

QUESTION:

2. May a law firm secure legal fees for estate planning and Medicaid planning by having the client sign a promissory note secured by a mortgage against the client's property?

OPINION:

3. Rule 1.8(a) of the New York Rules of Professional Conduct (the "Rules") prohibits a lawyer from entering into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment for the protection of the client, unless:

> (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

See also Rule 1.0(j) (explaining "informed consent").

4. Comment [4C] to Rule 1.8(a) explains that the Rule does not apply to ordinary fee arrangements between a client and a lawyer entered into at the inception of the lawyer-client relationship, but that it will apply "when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee." The Comment explains that Rule 1.8(a) applies in this situation because of the risk that the lawyer's judgment will be skewed by the financial interest in a way that may affect the lawyer's professional judgment on behalf of the client. *See also* ABA Formal Op. 02-427 (lawyer who acquires a contractual security interest in a client's property to secure payment of fees earned or to be earned must comply with Rule 1.8(a)), N.Y. City 1988-7 (July 14, 1988) (finding that securing a fee with a mortgage on a client's home was a business transaction governed by DR 5-104(A), the predecessor to Rule 1.8(a)); *cf.* Rule 1.8(i) (prohibiting a lawyer from acquiring a proprietary interest in a cause of action or subject matter of a litigation the lawyer is conducting for a client, but permitting the lawyer to "acquire a lien authorized by law to secure the lawyer's fees and expenses").

5. Rule 1.8(a) by its terms applies only if the client expects the lawyer to exercise professional judgment for the benefit of the client in the matter. The determination of this issue turns on several factors, including the sophistication and expectations of the client, the complexity of the proposed promissory note and mortgage, and the relationship of those instruments to the estate and Medicaid planning services to be provided (for example, whether the purpose of the planning services is to ensure that the real property passes to the client's heirs). *See* N.Y. State 1051 (2015) (where contingent fee agreement provides for the fee to be calculated on the amount of the recovery "by settlement or judgment" and the lawyer wishes to amend the agreement to allow taking a percentage of an amount loaned to the client by a third party, the amendment would be subject to scrutiny under Rule 1.8(a); N.Y. State 910 (2012) (setting forth factors that determine whether an amendment to a fee agreement warrants scrutiny as a business transaction under Rule 1.8(a)).

6. Here, the client may be looking to the lawyer's professional judgment to understand the significance of the proposed mortgage and promissory note to the services for which the lawyer is being engaged. Further, although the mortgage that will secure the promissory note will not, in the first instance, be relied upon to pay legal fees, the attorney may seek to foreclose on the mortgage in order to recover legal fees if the client fails to make timely and complete payment. The lawyer and client have conflicting interests in the promissory note and associated mortgage because, if the client fails to pay legal fees on a timely basis, the client would want to prevent the lawyer from enforcing rights against the client under the promissory note and mortgage. Accordingly, the lawyer ordinarily will have to comply with Rule 1.8(a) in connection with entering into the promissory note and mortgage.

7. We note also that Rule 1.5(d)(5)(ii) prohibits a lawyer from entering into an arrangement to collect a fee in a domestic relations matter if "the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary." However, this Rule is applicable only to domestic relations matters, and has no bearing on an engagement to provide Medicaid and estate planning services.

8. Because the inquirer has not asked, we do not in this opinion discuss the ethical considerations with respect to executing on the note and mortgage. *See* Rule 1.5(f) ("Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration pro-

gram . . . approved by the Administrative Board of the Courts"); 22 N.Y.C.R.R. Part 137; N.Y. State 684 (1996) (reporting a client to a credit bureau); N.Y. State 608 (1990) (lawyer may use a collection agent after determining that fee is justly owed and considering other factors); N.Y. State 591 (1988) (before engaging a collection agent, lawyer must first determine that fees billed are justly owed for services properly rendered); N.Y. State 567 (1984) (lawyer may protect the right to retain papers or property until the client pays the fees or provides adequate security with a statutory retaining lien, subject to the need to protect against immediate harm to the client).

CONCLUSION:

9. A lawyer may secure legal fees for Medicaid and estate planning services by having the client sign a promissory note or other instrument, secured by a mortgage against the client's property, provided that (i) the promissory note or instrument and mortgage are fair and reasonable to the client, (ii) the terms of the transaction are fully disclosed to the client in language that the client reasonably can understand, (iii) the client provides informed consent to the essential terms of the note and mortgage and the lawyer's role in the transaction, and (iv) the client is advised in writing to seek independent legal advice and given sufficient opportunity to obtain such advice.

(25-16)

OPINION 1105 (10/05/2016)

TOPIC: Imputed conflict of interest

DIGEST: Conflicts of a partner in a private law firm are imputed to all of the lawyers associated with the private law firm. Consequently, absent informed, written consent, if the public defender's office in which the lawyer is a part-time public defender is prevented by a conflict from representing a person, then neither the part-time defender nor any lawyer in the part-time defender's private law firm may represent the person.

RULES: 1.0(t), 1.7(a) & (b), 1.10(a) & (b)

FACTS:

1. The inquiring lawyer ("Lawyer A") is "of counsel" to a law firm and maintains a large caseload of family court assignments and criminal court assignments, including misdemeanors and felonies, from the local county and city courts. Lawyer A handles exclusively assigned matters and does not discuss them with any other lawyer in the firm.

2. Lawyer A does not accept assignments from town or justice courts that hold court in the evening. Lawyer A receives case assignments from the local courts when the public defender's office has a conflict of interest.

3. Recently, one of the partners of the firm ("Lawyer B") accepted a part time position with the county public defender's office. Lawyer B's caseload for that office consists of misdemeanors and violation level offenses, but not felonies, before town and justice courts with evening appearances.

QUESTION:

4. May the inquiring lawyer continue to receive assigned family court and criminal court matters when (i) the public defender's office has a conflict of interest and (ii) a partner in the firm where the inquiring attorney is "of counsel" is also a part-time public defender?

OPINION:

Applicable Rules

5. This inquiry directly implicates Rules 1.7 and 1.10(a) of the New York Rules of Professional Conduct (the "Rules").

6. Rule 1.7 provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
>
> > (1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

7. Rule 1.10(a) provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided herein." (emphasis added)

Imputation Within the Public Defender's Office

8. Under Rule 1.10, when lawyers are associated in a firm, none of them may undertake a representation when any of them practicing alone would be prohibited from undertaking the representation as a result of a conflict of interest. Comment [2] to Rule 1.10 explains that the rule of imputed disqualification gives effect to the duty of loyalty to the client, as applied to lawyers who practice in law firms. Some courts, for purposes of disqualification motions, will allow this presumption to be rebutted. See, e.g. Hempstead Video, Inc. v. Incorporated Village of Valley Stream, 409 F.3d 127 (2d Cir. 2005). But imputation under Rule 1.10(a) is absolute unless waived by the client.

9. Therefore, the initial questions under Rule 1.10 are (i) whether the public defender's office constitutes a law firm and (ii) whether a part-time public defender is "associated" with the firm. Regarding the first question, Comment [1] to Rule 1.10 states that the term "firm" includes lawyers employed in a legal services organization. Comment [4] to Rule 1.0 notes that, with respect to lawyers in legal aid and legal services organizations, depending upon the structure of the organization, the entire organization or components of it may constitute a firm or firms for purposes of the Rules. This is a factual question that is beyond the jurisdiction of our Committee. However, for purposes of this opinion, we assume that the public defender's office is structured in such a way that the entire office is considered a single law firm. See N.Y. State 1036 (2014) (local sections of a national legal services project are considered a single law firm for conflict of interest purposes where, among other things, the local sections share a single case management system and there is supervision across the local sections); N.Y. State 862 (2011) (public defender's office is a "firm" for purposes of Rule 1.10); N.Y. State 975 (2013) (county public defender office is a firm for imputation purposes even if its lawyers work independently).

10. Regarding the second question, we have previously held that a part-time attorney is "associated" with a firm for purposes of the conflict rules. See N.Y. State 862 (2011) (a part-time assistant public defender is "associated" with that firm). In N. Y. State 862, we noted that the imputation rule applies to all lawyers in a firm, regardless of practice area or department.

Imputation from the Public Defender's Office to Lawyer B's Private Practice

11. Where two "law firms" have a common lawyer, a conflict of interest is imputed to both firms. See Cinema 5, Ltd. V. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976) (counsel disqualified from representing client because a partner in his NYC law firm is also a partner in a Buffalo firm that represents the client's opponent). Thus, in N.Y. State 862 (2011), we opined that a lawyer who was a part-time assistant public defender could not, in the lawyer's private practice, represent a client that another full-time or part-time assistant public defender in the same public defender's office could not represent because of a conflict of interest, unless the conflict could be and was waived.

12. N.Y. State 862 makes it clear that Lawyer B – the part-time public defender – cannot represent a client in private practice where another lawyer in the public defender's office is disqualified from undertaking the representation, unless the conflict may be and is waived.

Imputation from the Lawyer B to Lawyer A

13. Under Rule 1.10(a), if Lawyer B is disqualified from a representation, then, unless the conflict may be and is waived, the conflict is imputed to all lawyers who are "associated" in Lawyer B's firm. We have long held that a lawyer who is "of counsel" with a firm is "associated" with that firm. See N.Y. State 615 (1991); cf. Rule 7.3(a)(2)(v) (affiliated as a partner, associate or of counsel). Thus, if Lawyer B is disqualified from the representation, then Lawyer A is disqualified by imputation. Consequently, absent a waiver, if the public defender's office has a conflict that prevents it from undertaking a representation, then neither Lawyer B nor Lawyer A may undertake the representation in their private practice.

Exceptions to Imputation

14. The inquirer notes that Lawyer B's cases as a part-time public defender involve solely misdemeanors and violation level offenses before town and justice courts with evening appearances and that Lawyer A does not handle any cases in such courts. Rule 1.10 applies to law firms. Consequently, unless the public defender's office is organized so that matters heard in daytime and evening session or in different courts were handled by different "firms," the fact that Lawyer A and Lawyer B practice in different courts would be irrelevant.

15. Even if the public defender work of Lawyer A and Lawyer B are effectively screened from the work of the other lawyer, New York does not recognize screening to eliminate conflicts of interest, except where the original disqualification occurs under Rule 1.11, 1.12 or 1.18. See Rule 1.0, Cmt. [8]. This inquiry does not arise under one of those Rules.

16. Finally, Rule 6.5 contains an exception to the application of Rules 1.7, 1.8 and 1.10 for lawyers who participate in "limited pro bono legal services programs," which involve short-term limited

legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter. See N.Y. State 1012 (2014). This inquiry does not involve such a program.

Consent

17. In N.Y. State 862 (2011) we concluded that a conflict of interest could be waived if the conditions set forth in Rule 1.7(b) were met. Assuming that the representation was not prohibited by law and that the lawyer reasonably believed the lawyer would be able to provide competent and diligent representation to the assigned client, we provided additional guidance on obtaining consent:

> To cure a conflict, Rule 1.7(b) requires informed consent from "each affected client." Which clients are affected depends on why the conflict arises. If the imputed conflict arises under Rule 1.7(a)(1) because of another current client, then the inquirer (or some other attorney in the Public Defender's office) must obtain informed consent, confirmed in writing, from both the inquirer's assigned client and the conflicted Assistant Public Defender's current client. If the conflict arises under Rule 1.7(a)(2) because of the conflicted Assistant Public Defender's personal interests, then consent is required only from the inquirer's own assigned client, because no other client is affected. If the conflict arises under Rule 1.9 because of the conflicted Assistant Public Defender's former client, then the inquirer must obtain consent from the conflicting former client. (Since the inquirer did not personally represent the former client, we assume that the inquirer does not personally possess any confidential information of the former client. If the inquirer were in possession of any of the former client's confidential information that has not become generally known, further analysis would be necessary.)

18. However, when the lawyer seeks consent from a client who is receiving free legal services, the lawyer must consider whether such consent would be freely given. See N.Y. State 490 (1978) (when a legal aid office seeks consent to share client confidential information with board members of the organization, "the staff should be particularly sensitive to any element of submissiveness on the part of their indigent clients; and . . . the staff [must be] satisfied that their clients could refuse to consent without any sense of guilt or embarrassment.")

CONCLUSION:

19. Conflicts of a partner in a private law firm are imputed to all of the lawyers associated with the private law firm. Consequently, absent informed, written consent, if the public defender's office in which the lawyer is a part-time public defender is prevented by a conflict from representing a person, then neither the part-time defender nor any lawyer in the part-time defender's private law firm may represent the person.

(23-16)

OPINION 1106 (10/14/2016)

TOPIC: Advice on non-legal issues; allocation of authority

DIGEST: An attorney may render advice that includes considerations such as the benefits and risks of entering a drug treatment program. The attorney must act competently and must adequately explain to the client the material risks of the proposed course of conduct and reasonably available alternatives. However, once the client decides to take a certain course of action, the attorney must follow the directives of the client even if the client's directive conflicts with what the lawyer believes to be in the best interest of the client. If the client is eligible for a diversion program, the attorney must be mindful of confidentiality concerns since treatment records may be provided to judges, prosecutors and program staff. The attorney must provide the client with full disclosure and obtain informed consent before asking the client to execute any release authorizing disclosure of confidential information to the judge or prosecutors.

RULES: 1.1(a), 1.2(a), 1.4(a) & (b), 1.6, 2.1

FACTS:

1. The inquirer is a criminal defense attorney whose clients sometimes have underlying substance abuse issues. The inquirer is concerned that a failure to address the client's substance abuse issues could result in recidivism, or even the client's death.

2. The client may be eligible to participate in a court-sponsored diversion program. In an effort to break the cycle of addiction, criminal activity and recidivism, New York State has instituted judicial diversion programs and has set up drug courts to address the issues emanating from drug abuse.[26] The mission of drug courts is to end the abuse of alcohol and other drugs and related criminal activity. *See* Problem Solving Courts – Drug Treatment Courts – Overview, *available at* http://www.nycourts.gov/courts/problem_solving/drugcourts/overview.shtml. Specifically, pursuant to Criminal Procedure Law Article 216, courts are authorized to divert eligible felony offenders into substance abuse treatment programs. The defense lawyer's traditional role as zealous advocate for the client may be at odds with the focus of drug courts and diversion programs, which utilize a "nonadversarial, collaborative approach" among the prosecutor, defense attorney, judge and others. *See* National Association of Criminal Defense Lawyers, *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*, September 2009 p.30.

3. Often, the defendant may receive two plea offers from the prosecution. One involves diversion to a treatment program, and the other does not involve diversion. The penalty for failure to complete the treatment program successfully may be greater than the sentence offered for conviction without diversion.

26 Drug courts combine drug treatment with ongoing judicial supervision. In this way, drug courts seek to break the cycle of addiction, crime, and repeat incarceration. While practice varies widely from state to state (and county to county), the outlines of the drug court model are that: addicted offenders are linked to treatment; their progress is monitored by a drug court team composed of the judge, attorneys, and program staff; participants interact directly with the judge, who responds to progress and setbacks by providing a range of rewards and sanctions; and successful participants generally have the charges against them dismissed or reduced, while unsuccessful participants are generally convicted and incarcerated. *See* The New York State Drug Court Evaluation – Center for Court Innovation 2003 page ix.

4. For purposes of this opinion, we will assume that the procedures detailed in CPL Article 216 regarding the judicial diversion program apply:

- At any time before the entry of a guilty plea or commencement of trial, the court, at the defendant's request, may order an alcohol and substance abuse evaluation.

- The defendant must, in writing, authorize disclosure of the results of such evaluation to the defense attorney, the prosecutor, the local probation department, the court, and authorized court personnel.

- After receipt of the evaluation, the court may hold a hearing on the issue of whether the defendant should be offered treatment pursuant to Article 216, and, upon completion of such a hearing, will make findings about whether the defendant's participation in judicial diversion could effectively address the defendant's substance abuse or dependence.

- Before the court issues an order granting judicial diversion and releasing the defendant into the diversion program, unless an exception applies, the eligible defendant must plead guilty to the charge or charges.

- The defendant must agree on the record or in writing to abide by the release conditions set by the court, which will include participation in a specified period of treatment, and may include periodic court appearances and urinalysis, to enable the court to monitor the defendant's progress in treatment.

- If the court determines that the defendant has violated a condition of his or her release under the judicial diversion program, the court may impose any sentence authorized for the crime for which the defendant has been convicted in accordance with the plea agreement, although the court will consider the extent to which persons who ultimately successfully complete a treatment regimen sometimes relapse by not abstaining from alcohol or substance abuse or by failing to comply fully with all requirements imposed by a treatment program and may use graduated and appropriate responses or sanctions designed to address inappropriate behaviors. *See* CPL Article 216.

QUESTIONS:

5. Under this backdrop, the inquirer raises several questions:

a. May a defense attorney ethically counsel the client regarding the client's drug addiction? In particular, may the defense attorney suggest that the client enter a drug rehabilitation program, even if such participation is not required to resolve the client's criminal case?

b. May defense counsel advise a client to request a substance abuse evaluation and enter a rehabilitation program in connection with a court-sponsored diversion program, even if there are negative consequences if the client is not successfully discharged?

c. May a defense attorney permit a client to sign a release authorizing a court-supervised program to receive information regarding the client's performance in treatment?

OPINION:

Rendering advice on non-legal matters, such as drug addiction

6. The initial question is addressed by Rule 2.1 of the New York Rules of Professional Conduct (the "Rules"). Rule 2.1 ("Advisor") reads:

> In representing a client, a lawyer *shall* exercise independent professional judgment and render candid advice. In rendering advice, a lawyer *may* refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation. [Emphasis added.]

7. The Comments to Rule 2.1 provide further guidance. Comment [2] to Rule 2.1 specifically states that "[it] is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice."

8. Comment [5] to Rule 2.1 states: "In general, a lawyer is not expected to give advice until asked by the client. However, . . . it may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."

9. A lawyer is not required to give advice on medical or other non-legal matters. However, when rendering "candid advice" as required by Rule 2.1, the lawyer "may" refer to considerations beyond the law. Thus, a lawyer may discuss with the client the client's substance abuse/addiction and provide advice regarding the pros and cons of entering a treatment program. If the lawyer believes that continued substance abuse may lead to adverse legal consequences for the client, such as subsequent charges or arrest, the lawyer should discuss the consequences with the client. See Rule 2.1, Cmt. [5]; Rule 1.4. As advisor, the lawyer may point out the potential consequences of the client's actions or inaction related to the treatment of the underlying substance abuse, including recidivism and death.

10. This Committee has previously addressed the lawyer's role as advisor and has said that a lawyer's advice need not be confined to purely legal considerations. In N.Y. State 769 (2003), quoting EC 7-8, the Committee said:

> A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to the client need not be confined to purely legal considerations. A lawyer should advise the client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer's objective viewpoint.

11. N.Y. City 2011-2 (2011) also discussed the lawyer's role as advisor, saying: "In providing candid advice, a lawyer should advise the client to consider the costs and benefits [of a course of action], as well as possible alternatives." Opinion 2011-2 added that "lawyers must be cognizant of the various ethical issues . . . and should advise clients accordingly. The issues may include the com-

promise of confidentiality and waiver of attorney-client privilege, and the potential impact on a lawyer's exercise of independent judgment."

12. In sum, the inquirer ethically may counsel the client regarding the client's drug addiction, including recommending that the client enter a drug rehabilitation program.

The Duty to Advise the Client About Diversion Programs

13. If the client has been charged with a drug-related crime and is eligible for a court-sponsored diversion program, then the lawyer must advise the client about the pros and cons of entering such a program. *See* Rule 1.4(a)(2) ("A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished."); Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

14. This mandated consultation requires that the lawyer be familiar with the procedures of the diversion program or drug court, the sanctions that may apply for failure to complete the program, as well as the options and alternatives available to the client, so that the lawyer can explain to the client the options, alternatives, and possible consequences. *See* Rule 1.1(a) ("[t]he lawyer should provide the client with competent representation," which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"; *see also* Rule 1.1, Cmt. [5] ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem"); *Cf. Padilla v. Kentucky*, 559 U.S. 356 (2010) (lawyer advising a non-U.S. citizen whether to plead guilty to a felony must advise that felony conviction would make client subject to deportation).

15. The objective of most individuals charged with a drug offense may be to avoid a criminal conviction or to minimize or avoid incarceration or other penalties. A diversion program may achieve those objectives. However, one risk of a diversion program (which may include progressive sanctions or incarceration) is that sanctions for violating the terms of the program may be more severe than the penalty offered by the prosecutor for conviction without participation in a diversion program. Thus, entering into a diversion program may conflict with the client's stated objective of minimizing penalties. The attorney must therefore advise the client of the nature of the drug court or diversion program, the consequences of abiding or failing to abide by the rules, and how participation in a diversion program will affect the client's interests. In addition, the lawyer should provide information and advice on alternative courses of action, including legal and treatment alternatives available outside of the drug court program, the opportunity to plea bargain, and the right to go to trial. The lawyer should then discuss these options with the client.

16. The inquirer asks if it is ethical to recommend a diversion program that would include the imposition of sanctions against the lawyer's client. If the lawyer believes there is a reasonable possibility that the client will succeed in the rehabilitation program, the lawyer may not only explain but may actually recommend a rehabilitation program even though the program could result in the imposition of harsh sanctions against the client if the client fails in the program.

Determining Client's Best Interest

17. The ultimate decision whether to enter a program with sanctions, to which the client will be subject if the client violates the terms of the program, rests with the client. Rule 1.2(a) states:

> (a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

18. Comment [1] to Rule 1.2 states: "Paragraph (a) confers upon the client the ultimate authority to determine the purpose to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." Once the lawyer presents the relevant considerations and alternatives pursuant to Rule 1.4 and the client makes a decision as to the desired course of action, Rule 1.2 compels the lawyer to pursue the client's stated objective.

19. As this Committee stated in N.Y. State 1037 (2014), "Rule 1.2(a) requires a lawyer to abide by a client's decisions concerning the 'objectives' of a representation, and to consult with the client as to the 'means' by which those objectives are to be pursued. Rule 1.4(a)(2) reinforces that provision by providing that a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished." Thus, the lawyer must sufficiently explain a matter to a client so that the client can make informed decisions.

20. Where the sanctions for failing the rehabilitation program may be more severe than the criminal penalties offered to the client for pleading guilty to a drug charge, the client may prefer a criminal penalty rather than being monitored for upwards of a year in a drug treatment program. Even if the lawyer believes it would be in the 'best interests of the client' to obtain treatment for addiction, the decision is not the lawyer's to make. Under Rule 1.2(a), a lawyer must abide by the client's decision concerning the objectives of representation, and, in a criminal case, must abide by the client's decision (after consultation with the lawyer) as to the "plea to be entered, whether to waive jury trial and whether the client will testify." Once the client makes his or her choice, whether it be to attend a treatment program or to go through the traditional criminal justice system, the lawyer must abide by that decision.

Confidentiality

21. Typically, as a condition of entry into a diversion program, the client is required to consent to the release of health and treatment information to the judge, attorneys and other personnel of the court.[27] This treatment and monitoring information raises confidentiality concerns.

22. Rule 1.6 generally bars a lawyer from knowingly revealing "confidential information" unless the client gives "informed consent." *See* Rule 1.6(a)(1). The Rule defines "confidential information" as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or information that the client has requested be kept confidential." The client's treatment

27 Whether the contract or release signed by the client complies with the Health Insurance Portability and Accountability Act of 1997 ("HIPAA"), which prohibits release of health information by certain agencies, and whether the contract or release complies with 42 CFR Part 2, which prohibits the release of alcohol or drug use information, is a matter outside the jurisdiction of this committee – but pursuant to Rule 1.4, a lawyer advising a client about a drug rehabilitation program, whether in response to criminal charges or otherwise, should counsel the client about the client's rights under those laws.

information would be "confidential information," as it is likely to be embarrassing or detrimental to the client if disclosed. Although it would not be the lawyer who discloses it, by recommending that the client agree to be diverted to a drug program, the lawyer is in effect asking the client's consent to the disclosure of confidential information. Thus, the defense lawyer must counsel the client on how those disclosures could undermine the attorney client privilege or otherwise be detrimental to the client, and must ensure that the client has enough information to give informed consent before executing confidentiality waiver forms.[28]

23. The lawyer, where possible, should also seek to limit the scope of the release, such as specifying the persons to whom information will be provided, the uses to which such disclosures may be put, the nature of the information that will be disclosed and the time period in which disclosures may be made. See also N.Y. State 1059 (2015) (lawyers for clients in immigration proceedings may disclose the names and certain procedural information regarding the clients' cases where the clients give voluntary, informed consent to the disclosure). Whether the lawyer should recommend the client to sign a release for the court/attorneys to receive the client's treatment information depends on the client's stated objectives.

Other Considerations

24. Finally, whether, the plea agreement signed by the client as a condition for diversion may be used as evidence against the client in future criminal or civil proceedings is an evidentiary question that is beyond the jurisdiction of this committee.

CONCLUSION:

25. An attorney may render advice that includes considerations such as the benefits and risks of entering a drug treatment program. The attorney must act competently and must adequately explain to the client the material risks of the proposed course of conduct and reasonably available alternatives. However, once the client decides to take a certain course of action, the attorney must follow the directives of the client even if the client's directive conflicts with what the lawyer believes to be in the best interest of the client. If the client is eligible for a diversion program, the attorney must be mindful of confidentiality concerns since treatment records may be provided to judges, prosecutors and program staff. The attorney must provide the client with full disclosure and obtain informed consent before requesting the client to execute any release authorizing disclosure of confidential information to the judge or prosecutors.

(28-16)

28 *See* Richard C. Boldt, Rehabilitative Punishment and the Drug Treatment Court Movement, 76 WASH U.L.Q. 1205, 1289-1290 (1998) ("[I]f the choice to enter treatment is to be genuine, defendants must be helped to understand the potential costs and benefits involved, including the potentially harmful consequences that can result from the disclosure to judges or prosecutors of personal and sometimes incriminating information gained in the course of substance abuse treatment. Defendants must be informed of the considerable benefits in terms of confidentiality to which defendants are entitled if they enter treatment on their own without mandate from the criminal justice system. In other words, a genuine choice with respect to the waiver of confidentiality requires that defendants be informed of the unusually generous privacy protections already in place, which their consent will extinguish.")

OPINION 1107 (10/21/2016)

TOPIC: Law firm name; use of "legal services" in firm name.

DIGEST: A law firm that is not a qualified legal assistance organization may not use the name "Jane Doe Legal Services, PLLC" without violating Rule 7.5(b), which prohibits law firms from using certain names that are associated with legal assistance organizations.

RULES: Rule 7.5(b)

FACTS:

1. The inquirer, a lawyer we will call "Jane Doe", is an attorney who is forming a new law firm and wants to know if she can use her name in the title together with the phrase "Legal Services, PLLC."

QUESTION:

2. May a private law firm use the name "Jane Doe Legal Services, PLLC?"

OPINION:

3. Rule 7.5(b) contains prohibitions relating to the naming of law firms engaged in private practice. Relevant to the current inquiry, the rule states that "[s]uch terms as 'legal clinic', 'legal aid', 'legal service office', 'legal assistance office', 'defender office' *and the like* may be used only by qualified legal assistance organizations, except that the term 'legal clinic' may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein." [emphasis added] The question then is whether the title "legal services" is "like" the terms "legal aid," "legal service office," "legal assistance office," or "defender office."

4. The title "legal services" is almost identical to the title "legal service office." *Cf.* N.Y. State 869 (2011) (use of the title "Smith Law Firm" does not violate Rule 7.5); N.Y. State 732 (2000) (use of the title "The [Attorney Name] Group" does not violate Rule 7.5). In addition to this facial similarity, the term "legal services," like the other terms on the list, is often used by qualified legal assistance organizations *(e.g.,* "Bronx Legal Services", "Legal Services of Central New York", "Prisoner's Legal Services of New York", "MFY Legal Services", "Neighborhood Legal Services"). Thus, the use of the term "legal services" in a title is likely to cause the public to believe that the law firm at issue is a legal assistance organization. Preventing this type of misunderstanding by the public is the very purpose of Rule 7.5(b).

5. That the term "legal services" is joined with the name of one of the lawyers in the firm does not save the title. Notably, Rule 7.5(b) allows one term – "legal clinic" – to be used by private law firms when it is joined with the name of one of the lawyers in the firm, but this safe harbor does not apply to any of the other terms. Thus, any term that is "like" the other terms cannot take advantage of the legal clinic safe harbor. Moreover, since legal assistance organizations sometimes use one of the terms on the Rule 7.5(b) list together with the name of an individual as their title – either in memo-

riam or to recognize a sponsoring donor (*e.g.,* "Hiscock Legal Aid Society", "Jerome N. Frank Legal Services Organization", "WilmerHale Legal Services Center"), the risk of confusion remains.[29]

6. Although Rule 7.5(b) prohibits the use of "legal services" in the name of a law firm, the provision of legal services is, of course, central to what lawyers do. Consequently, nothing in this opinion is meant to prohibit a lawyer from indicating, other than as part of the name of a firm, that the lawyer renders legal services.

CONCLUSION:

7. A law firm that is not a qualified legal assistance organization may not use the name "Jane Doe Legal Services, PLLC" without violating Rule 7.5(b), which prohibits law firms from using certain names that are associated with legal assistance organizations.

(27-16)

29 We recognize that restrictions on a law firm's use of a trade name may raise constitutional issues. *Compare Friedman v. Rogers*, 440 U.S. 1 (1979) (upholding a Texas law prohibiting optometry trade names), with *Alexander v. Cahill*, 598 F.3d 79, 95 (2d Cir.), *cert. denied*, 131 S. Ct. 820 (2010) (distinguishing Friedman on its facts but also noting doubt as to Friedman's continued validity). As of now, however, the courts have not struck down Rule 7.5(b). Nor was that provision challenged in Alexander v. Cahill. If the constitutionality of the prohibition on the use of trade names by private lawyers is someday litigated, one of the issues may be the potential for deception that we have mentioned above. Ultimately the courts may or may not see that potential as sufficient to justify the restriction, but the constitutionality of the prohibition on trade names is a question of law beyond our Committee's jurisdiction.

OPINION 1108 (11/15/2016)

TOPIC: Financing legal fees in litigation, third-party funding

DIGEST: A lawyer representing clients in criminal defense matters may refer potential clients to third-party financing for the lawyer's legal fees and expenses, even though the lawyer pays certain fees to the lender in connection with that financing program and is informed by the lender whether the client has qualified for a loan and in what amount, as long as the lawyer obtains informed consent from the client and otherwise complies with Rule 1.8(f), and as long as the fees the lawyer pays to the lender do not constitute financial assistance to the client. If the lawyer is not advising on the risks and benefits of procuring such financing, the lawyer should so inform clients.

RULES: 1.2(c), 1.4(b), 1.8(e) & (f)

FACTS:

1. The inquirer is a sole practitioner exclusively engaged in criminal defense work. Some potential clients ask for payment plans to pay the inquirer's legal fees and expenses. The inquirer would like to refer such clients to a particular third-party financing company.

2. The inquirer would either give potential clients a link to the financing company or post the link on his website, which would lead clients to the financing company's loan application forms. The inquirer might also put a banner on the website indicating that potential clients can finance the fees for legal representation. If a client completes the application, the financing company would decide whether to lend the client money and on what terms. The loan funds would be disbursed directly to the client, but the inquirer would be provided with a "portal" on which to find out whether a potential client had applied for a loan, and when and in what amount funds were disbursed to the client. The financing company's website advertises maximum lines of credit of varying lengths in amounts ranging from $10,000 to $25,000, with interest rates ranging from 10.9% to 29.99%, depending on the borrower's credit score. The loans would be based on the creditworthiness of the client (and any co-signer) and would not be non-recourse (i.e., the client would be responsible to repay the loan whether or not the client prevailed in the case).

3. In order to participate in these programs, the inquirer would pay fees to the financing company of several hundred dollars either in the form of one-time "registration fees" or in the form of monthly "subscription fees."

QUESTION:

4. May a lawyer bring a third-party lender to the attention of potential clients by giving the link directly to clients or by posting the link on the lawyer's website, in order to assist potential clients in obtaining funding for legal fees and expenses?

OPINION:

5. This Committee has previously opined that a lawyer may refer clients to third-party sources to finance legal fees under certain conditions, including that (1) the confidentiality of client information

provided to the lawyer is maintained, (2) the lawyer does not own an interest in the financing company, (3) the lawyer does not receive any referral fee (except under certain circumstances), and (4) the transaction is not illegal. N.Y. State 769 (2003); N.Y. State 666 (1994). *See also* N.Y. City 2011-2 (addressing issues raised by non-recourse litigation financing arrangements).[30]

6. The proposed financing arrangements here raise three particular issues that we discuss below.

Advice on financing alternatives and related conflicts of interest

7. The first issue is the extent to which the inquirer should or must advise the client on the costs and benefits of the financing arrangements and the alternatives. In N.Y. State 769, which dealt with non-recourse litigation financing in which a financing company takes an interest in the proceeds of litigation, we noted that a lawyer facilitating such a transaction should ensure that the client is informed of relevant considerations. N.Y. City 2011-2 cautioned that the lawyer may have a personal conflict of interest in rendering such advice where, for example, "the client cannot afford to commence or continue litigation absent a third party advance of the lawyer's fees," because of the lawyer's personal interest in being paid.

8. This situation is different, and these concerns are considerably diminished, because these are *not* non-recourse loans. In non-recourse litigation financing, the financing company generally needs to know a great deal about the litigation in order to determine whether to take the lending risk, and the involvement of the financing company with the litigation raises significant legal questions on which clients generally need advice. By contrast, the financing at issue here is a relatively straightforward lending transaction based on ordinary commercial terms. Further, the lawyer's involvement here is less than in the typical case of non-recourse litigation financing.

9. Nonetheless, the lawyer does owe the client a certain level of disclosure. Rule 1.8(f) says:

> A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless:
>
> (1) the client gives informed consent;

30 As in those opinions, we express no opinion as to whether the proposed financing here would be a violation of usury or other laws. If the lawyer knows that the financing arrangements are illegal, the lawyer must not facilitate them. See N.Y. Rules of Professional Conduct (the "Rules") Rule 1.2(d) (a lawyer shall not "assist a client, in conduct that the lawyer knows is illegal"); N.Y. City 2011-2; N.Y. State 769 (2003). Under New York law, charging interest rates of more than 16% per year on loans to an individual of less than $250,000 constitutes civil usury. N.Y. Gen. Oblig. L. § 5-501(1), (6); N.Y. Banking L. § 14-a. Charging interest or taking any money or other property as interest on a loan of any money, at a rate exceeding 25% per year is a criminal offense. N.Y. Penal L. § 190.40. Some lenders take a position that a non-recourse extension of credit is not a loan. See *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767, 777 (N.C. Ct. App. 2008 ("[A] transaction in which the borrower's repayment of the principal is subject to a contingency is not considered a loan because the terms of the transaction do not necessarily require that the borrower repay the sum lent"); *Plaintiff Funding Corporation d/b/a LawCash v. Echeverria,* No. 1014040/2005 (N.Y. Sup. Ct. 2005) (declaratory judgment that contract was valid and not covered by New York's usury statutes). It is our understanding that the loans at issue here are based on the creditworthiness of the client and are not non-recourse. Although any illegality might be on the part of the lender and not the client, the lawyer's providing of the information about the lender might be viewed as a recommendation of the transaction and the lawyer's payment of registration or subscription fees might be viewed as participation in the loan transaction.

> (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and
>
> (3) the client's confidential information is protected as required by Rule 1.6.

Here, while the money advanced is a loan, it is closely tied to the representation. For all practical purposes, the lawyer is accepting fees "from one other than the client" (the lender). Moreover, although the funds are not paid directly to the lawyer, the lender informs the lawyer when the funds are disbursed, presumably to help ensure that the lawyer gets paid. When the lender gives the lawyer information about disbursement, that information is something "of value" that triggers Rule 1.8(f). As part of obtaining the client's "informed consent" to the funding arrangement pursuant to Rule 1.8(f)(1), the lawyer should ordinarily ensure that the client understands the pros and cons of the funding arrangement and understands that the client may have alternatives to obtaining funds from this particular litigation funding company.

10. However, if a potential client might believe that the lawyer is exercising professional judgment in recommending a funding source appropriate for that particular client, or if the client might believe that lawyer has evaluated the loan terms, the lawyer should ensure that the client understands the limited role the lawyer is playing. As provided in Rule 1.2(c): "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances [and] the client gives informed consent. . . ." Rule 1.2(c) is consistent with N.Y. State 769, where we said that a lawyer may limit the scope of the engagement to exclude advice with respect to litigation financing. We stated:

> The lawyer should consider that an unsophisticated client may reasonably assume that by facilitating the [non-recourse litigation financing] transaction, the lawyer is also endorsing the entering into of the proposed transaction and/or the terms thereof. To address this possibility, the lawyer must either disclaim such responsibility, see N.Y. City 2001-3 ("[T]he scope of a lawyer's representation of a client may be limited in order to avoid a conflict"), or advise the client of the costs and benefits of the proposed transaction, as well as possible alternative courses of action.

Similarly here, the inquirer may limit the scope of the engagement to exclude advising on financing options. For example, the lawyer could state on the website near the link to the financing company's application page, and in the initial discussion with the client about financing, that the lawyer has not evaluated the loan terms and is not recommending the loan or advising clients on whether the loan is appropriate for any particular client.

Disclosure to lawyer of loan status

11. The second issue we address is raised by the proposal for the funding company to give the lawyer access to a portal to inform the lawyer whether a potential client has applied for and whether and in what amount the funding company has extended a loan. This portal presumably is important to the lawyer because the lawyer's purpose in referring the client to the financing source is to provide a source of funds for the lawyer to be paid, so the lawyer needs to know whether the funds are available. This provision does not concern the lawyer's disclosure to a third party of client confidential information, so it does not implicate Rule 1.6 or other Rules regulating confidentiality. Nevertheless, a client's financial and banking affairs usually are protected by privacy laws. Because a potential client might

believe that dealings with the third-party financing company will be kept confidential, the lawyer should inform the client that the finance company will give the lawyer access to information about the status of the loan application and timing and amount of the loan. *See* Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

Fee payments by lawyer

12. The lawyer's payment of "registration fees" or "subscription fees" raises questions under Rule 1.8(e), which prohibits advancing or guaranteeing financial assistance to clients in litigation matters, with certain exceptions. That Rule provides:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
>
> (2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and
>
> (3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

In this case, none of the exceptions applies. Paying registration or subscription fees does not involve contingent fees or advancing of costs and expenses of litigation that are repayable only upon success, so Rule 1.8(e)(1) and (3) do not apply. *See generally* Rule 1.5(d) (barring contingent fees in criminal defense matters). The inquirer advises that the clients who inquire about payment plans do not qualify to be represented by a public defender, so we assume that they are not "indigent" within the meaning of Rule 1.8(e)(2).

13. Whether the registration or subscription fees constitute "financial assistance" to the client depends on the purpose of the registration or subscription fees. If these fees compensate the financing company for the risk of lending to the attorney's potential clients, the lawyer's payment of the fees would appear to be financial assistance to the clients: the fees may be seen as in the nature of "points" that mortgage companies charge or as a way for the finance company to charge extra interest. On the other hand, if the purpose of the fees is to pay for the "portal" by which the lawyer can track the financing status of potential clients, that is something in which the client has no particular interest, and the financing company's fees would not be financial assistance to clients. We do not have sufficient facts to resolve this factual question definitively, so we opine only that if the fees do constitute financial assistance to clients in obtaining financing, the lawyer is barred from participating in the programs unless the lender waives the fees or the client pays the fees.

CONCLUSION:

14. A lawyer may bring a third-party financing program to the attention of clients to assist them in funding the lawyer's legal fees and expenses, as long as the fees the lawyer pays to the lender do not constitute financial assistance to the client and the lawyer complies with the other conditions set forth herein.

(30-16)

OPINION 1109 (11/15/2016)

TOPIC: Use of Pre-Paid Debit Cards to Transmit Funds to Clients

DIGEST: A lawyer may use a fully-loaded pre-paid debit card to pay a client funds to which the client is entitled, provided that the lawyer, upon adequate disclosure of the relative merits of the payment method, follows the client's instructions.

RULES: 1.15(c)(4), 1.15(e), 1.4(a), 1.4(b), 1.0(j).

FACTS:

1. The inquirer represents clients in personal injury actions under contingency fee arrangements. The amounts in controversy in many of the lawyer's matters tend to be small, as are the amounts obtained in those cases in which the lawyer achieves a settlement. The majority of the lawyer's clientele consists of unsophisticated consumers of legal and financial services lacking in both economic wherewithal and any sustained relationship with a financial institution such as a banking or checking account. As a result, the inquirer explains, the clients resort to check-cashing service companies, which, for a fee, will redeem the check and pay the client-customer.

2. The inquirer would like to offer clients the choice between receiving the client's settlement (or judgment) proceeds by a pre-paid debit card rather than by check. If the client opts for the card, then the client would receive a card fully loaded with the total amount owed the client. The firm would charge no fee for this option, nor retain any amount due the client. The law firm would remit the entire amount due the client to the account of the card-issuing entity.

QUESTION:

3. May a lawyer give a client the option of receiving payment of money due the client by a fully-loaded pre-paid debit card rather than by check?

OPINION:

4. Judgment and settlement checks often are made out to the lawyer and the client. In many cases, the lawyer deposits the check in an attorney trust account, withdraws the amount to which the lawyer is entitled and issues a check in favor of the client in the amount to which the client is entitled. The client then must cash the check to gain access to the funds. Clients who do not have a banking relationship often use a check-cashing service. They may then maintain funds on a pre-paid debit card.

5. A study by the Federal Deposit Insurance Corporation (FDIC) found that approximately 28% of U.S. households either do not have bank accounts or are underbanked. FDIC, *2013 National Survey of Unbanked and Underbanked Households* (Oct. 2014). Although in the past, the demographic of these households tended to be economically challenged, the increasing popularity of technological options has attracted many younger adherents to supplant conventional cash for other forms of currency. *See* K. S. Rogoff, *The Curse of Cash* (Princeton U. Press 2016). We make these observations not to endorse any trend but to recognize its existence.

Alternative Financial Services

6. A very brief and general description of the alternatives may be useful to place the inquiry in context.

7. The New York Department of Financial Services ("DFS") describes cash-checking as a "business that charges consumers a fee for cashing a check, draft or money order." In New York, the providers of these services must be registered and are subject to assorted regulations. NY Banking L §367 (2012). The DFS has regulations on the amounts that may be charged. See 3 NYCRR §400.11. As of March 2016, the maximum check cashing fee that may be charged to an individual is 2.01% of the face amount of the check.

8. According to the Consumer Financial Protection Bureau ("CFPB"), a pre-paid debit card is a card used to access money a consumer has loaded onto the card in advance. Most cards allow the consumer to spend money on the card at merchants that accept the card or to withdraw cash from an ATM. *See* CFPB website, at http://www.consumerfinance.gov/askcfpb/search/?selected_facets=category_exact:prepaid-cards. Each card has its own set of rules and fees. It often is difficult to ascertain the terms of the cards before purchase. Some issuers offer no-fee cards; many charge fees that may be opaque to the consumer, especially those unsophisticated in their use. Fees include some or all of the following: monthly usage or transaction fees, reload fees, bill payment fees, ATM withdrawal fees, balance inquiry fees and inactivity fees. Even where the issuer provides for free ATM withdrawals at certain ATMs, these may not be the locations most convenient to the holder.

9. Pre-paid cards may be issued by firms that are not financial institutions. Although the DFS licenses non-bank issuers of prepaid debit cards, many widely used debit cards are issued by banks that are not New York State-chartered and therefore are not regulated by the DFS. Although the CFPB recently finalized regulations that will provide added protections to consumers of prepaid debit cards, those regulations will not become effective until October 1, 2017. http://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/prepaid-accounts-under-electronic-fund-transfer-act-regulation-e-and-truth-lending-act-regulation-z/. At present, these cards offer consumers fewer safeguards than bank-issued debit cards linked to a checking account.

The Rules of Professional Conduct

10. The issue, then, is simple: Is there anything wrong with a lawyer using a fully-loaded pre-paid debit card to disburse client funds to a client if the client gives informed consent?

11. We do not think so. Rule 1.15(c)(4) of the New York Rules of Professional Conduct (the "Rules") says that a lawyer must "promptly pay or deliver to the client or a third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive." The inquiry here does not implicate any issues about third parties, client entitlement, or other questions that Rule 1.15(c)(4) may occasionally raise. The lawyer is holding money that unquestionably belongs to the client, and the sole issue, one of first impression, is whether the lawyer may transfer those funds to the client with a fully-loaded pre-paid debit card rather than a check.

12. We believe that Rule 1.15(c)(4)'s direction that the lawyer pay funds due the client "as requested by the client" obligates the lawyer to seek the client's consent before using a pre-paid debit card to do so, as the inquirer intends to do. We believe, too, that Rules 1.4(a)(1)(i) & 1.4 (a)(2), and Rule 1.4(b) – each concerned with communicating with the client about matters material to the representation which require the client's informed consent as defined in Rule 1.0(j), including matters relating to settlement – obligate the lawyer to explain to the client, in the words of Rule 1.0(j), "the material risks of the proposed course of action and reasonably available alternatives." This means, at a minimum, that the lawyer should be prepared to explain to the client the options available for payment, and the relative risks and rewards of each, including the charges associated with each option. If the client is thus informed, we see nothing in the Rules that would prohibit a lawyer from remitting settlement funds to a client by means of a fully-loaded pre-paid debit card.

13. We note that Rule 1.15(e) says that all "special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party, by bank transfer." Thus the lawyer is obligated to assure that the card issuer will accept transfers by one of these means, and, if a wire transfer is used, then the client must approve of the transfer in writing.

14. We also are aware that some issuers of prepaid debit cards may compensate persons who assist in the issuance of cards. *See* J. Silver-Greenberg and S. Clifford, "Paid via Card, Workers Feel Sting of Fees," N.Y. Times (July 1, 2013) at p. A1. If the lawyer were being compensated by the card issuer for steering customers, the lawyer would have a personal conflict of interest within the meaning of Rule 1.7(a). *See* N.Y. State 1086 (2016) (an attorney may not accept a fee or commission from an investment firm for referring the client to such firm where the money to be invested arises from an engagement in which the lawyer represented the client because the fee creates a non-consentable conflict.)

CONCLUSION:

15. A New York lawyer may use a fully-loaded pre-paid debit card to pay a client funds to which the client is entitled, provided that the lawyer, upon disclosure of the relative merits of the payment method, follows the client's instructions.

(33-16)

OPINION 1110 (11/23/2016)

TOPIC: Advertising; solicitation; educating lay persons

DIGEST: Lawyer may (i) organize and participate in online webinars and live seminars for non-lawyers on topics within lawyer's fields of competence, (ii) publicize the same by individual invitation, social media or other lawful means, and, (iii) following a webinar/seminar, discuss representation with participants, all subject to compliance with applicable rules on advertising and solicitation.

RULES: 1.0(a); 7.1; 7.3

FACTS:

1. The inquirer, an intellectual property lawyer practicing in New York, plans to conduct online webinars and live seminars on topics within his principal fields of practice for persons who may have a business interest in those topics and a need for legal services. Inquirer contemplates identifying persons fitting that description by use of commercially available business listings, including such listings on government agency web sites, such as business entity lists. Admission to the webinars and seminars may be free or may be for a fee.

QUESTIONS:

2. The inquirer asks a number of questions:

   A. May the lawyer attract possible attendees to seminars and webinars by sending invitations to addresses found on commercially available business entity lists?

   B. May the lawyer advertise the seminars on social media using social media-provided filters to target a specific audience?

   C. Does it matter whether the lawyer charges a fee for the seminars and webinars?

   D. May the lawyer solicit prospective clients to register for the seminars?

   E. May the lawyer notify webinar/seminar participants of future webinars/seminars?

   F. May the lawyer solicit webinar/seminar participants for legal representation after the program ends?

OPINION:

Sponsoring Seminars for Non-lawyers

3. This Committee has explained that, under both the current Rules of Professional Conduct (the "Rules") and the former Code of Professional Responsibility (the "Code"), lawyers may participate in legal seminars designed for non-lawyers. *See* N.Y. State 918 (2012), *citing* N.Y. State 830 (2009) (under the Rules) and N.Y. State 508 (1979) (under the Code). We noted in N.Y. State 918 that "participation in such programs is not only permitted but encouraged." *Id*. *See* Rule 7.1, Cmt. [9]. Under

the Rules, there is no difference in this regard between seminars conducted in person and those conducted over a website. Consequently, in this opinion, we will refer generically to "seminars" to include both live programs and web-based programs.

4. Before the Supreme Court's holding in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which extended First Amendment protection to lawyer advertising, the Code prohibited lawyers and law firms from organizing legal seminars for nonlawyers. Rather, sponsorship was allowed only by a "bar association, school or other responsible public or private organization." N.Y. State 508, *supra*. The post-*Bates* amendments to the Code removed restrictions on lawyer sponsorship of such seminars and programs. *Id.*

5. If such seminars were to be available and useful to significant numbers of people, lawyers needed to publicize them. Therefore, we held that a lawyer may ethically mail notices of such seminars. *See* N.Y. State 508 (1979) (absent a judicial holding that mailing of advertisements violates §479 of the Judiciary Law, law firm may organize and promote by mail a legal seminar designed for non-lawyers).

Publicizing the Seminars – Does the Seminar or the Publicity for the Seminar Constitute Advertising?

6. The inquirer's questions regarding the means a lawyer may use to publicize proposed seminars involve more than just the mail. Under the Rules, the answers to the inquirer's questions depend on whether the seminar itself (or the advertising for the seminar) would constitute "advertising" within the meaning of Rule 1.0(a) that is subject to Rule 7.1 or "solicitation" within the meaning of Rule 7.3(b) that is subject to Rule 7.3. If the seminar (or the publicity for the seminar) does not constitute advertising, then the provisions of Rule 7.1 will not apply (and, since solicitation is a subset of advertising, neither will the prohibitions of Rule 7.3). If the seminars (or the publicity for the seminars) do constitute advertising, the inquirer must adhere to Rule 7.1. If the seminar constitutes solicitation, then the provisions of Rule 7.3 will apply, and if it also involves in-person or telephone contact or interactive computer-accessed communication, then the seminar will be prohibited unless it is advertised only to current and former clients and close friends or relatives of the inquirer.

7. We begin with what constitutes advertising and what constitutes solicitation under the Rules. Rule 1.0(a) defines an "advertisement" as follows:

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

8. A solicitation is a particular kind of advertisement defined in Rule 7.3(b) as follows:

> (b) For purposes of this Rule, "solicitation" means *any advertisement* initiated by or on behalf of a lawyer or law firm that is *directed to, or targeted at, a specific recipient or group of recipients*, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for

> which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client. [Emphasis added.]

Significantly, under this definition, what differentiates a solicitation from a garden variety advertisement is that a solicitation is "directed to, or targeted at, a specific recipient or group of recipients." Furthermore, if a communication is not an advertisement, it is not a solicitation. Thus the first issue to resolve here is whether the inquirer's proposed publicity constitutes advertising subject to Rule 7.1.

9. In order to answer the questions posed, we must address whether the proposed seminars constitute advertising. In N.Y. State 848 (2010), which considered whether an educational newsletter constituted advertising, we weighed three factors: (1) the intent of the communication, *i.e.*, whether it is primarily educational or whether instead a substantial or significant purpose is to secure the retention of the lawyer or law firm publishing the newsletter; (2) the content of the communication; and (3) the targeted audience of the communication.

10. Scholars have suggested that, in determining the primary purpose of publicity, courts are likely to interpret the "primary purpose" to mean "substantial" or "significant." Roy Simon & Nicole Hyland, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 23 (Thompson Reuters 2016 ed). The determination of the "primary purpose" of publicity is subjective and judged in light of all the circumstances. *See* N.Y. State 1009 (2014), *citing* N.Y. State 873 (2011); *see also* N.Y. City 2015-7 (2015) ("We conclude that the 'primary purpose' standard refers to the subjective intent of the lawyer who makes the communication, but that this intent may be inferred – at least in certain instances – from other factors, including the content of the communication and the audience for the communication.").

11. To determine whether retention of the lawyer is the primary purpose of a communication, we must consider what other purpose the lawyer might have. The comments to Rule 7.1 address the application of the primary-purpose test to educational programs:

> A lawyer's participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients. Such a program might be considered advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm. Rule 7.1, Cmt. [9].

12. In N.Y. State 918 (2012), we discussed the primary purpose test in the context of educational programs as follows:

> [I]f a program goes beyond education to discuss the lawyer's skills or reputation, or give other reasons to hire that lawyer, then the lawyer may need to comply with the rules on advertising. But absent the inclusion of some such hiring pitch, a legal seminar will generally not be considered advertising as long as it is a bona fide educational program. N.Y. State 918, ¶5.

On the other hand, in N.Y. State 848 ¶9 we said, "Contact or biographical information about the lawyers or the law firm . . . does not, without more, transform an otherwise educational communication

into advertising." *See* Rule 7.1, Cmt. [8]; *cf.*, Rule 7.1, Cmt. [10]. The same reasoning would apply to publicity about a legal seminar or webinar.

13. The second factor considered in N.Y. State 848 is the "content" of the communication. The Committee pointed to Comment [7] to Rule 7.1, to the effect that newsletters or blogs focused on current developments in the law generally are not considered advertising, but that one that discusses developments in the law primarily as a vector for delivering information about the lawyer or law firm's personnel, clients, skills and achievements "would be considered advertising."

14. The third factor considered in N.Y. State 848 is the "audience." Communications that might otherwise be considered advertising subject to Rule 7.1 are excluded from the ambit of that Rule if directed to a close friend, a relative, an existing or former client, or a lawyer.

15. Assuming that the seminar and the communications used to publicize the seminar do not go beyond education to discuss the lawyer's skills or reputation, or give other reasons to hire the inquirer, we believe they would not constitute advertising, and, therefore, would not involve solicitation. In that case, the inquirer could use any of the methods proposed in questions to publicize the seminar.

16. The remainder of this Opinion, however, assumes that the seminar and the publicity for the seminar is not so limited, but that a substantial or significant purpose of the seminar or the publicity for the seminar is to encourage prospective participants to retain the inquirer. They therefore would constitute advertising.

Publicizing the Seminars for Non-Lawyers – Does the Seminar or the Publicity for the Seminar Constitute Solicitation?

17. If a communication constitutes an "advertisement" subject to the requirements set forth in Rule 7.1, the question then arises whether it also constitutes a "solicitation" subject to Rule 7.3.

18. As noted above, an advertisement constitutes "solicitation" under Rule 7.3(b) if it "is directed to, or targeted at, a specific recipient or group of recipients". Two Comments to Rule 7.3 – Comments [3] and [4] – provide gloss on the interpretation of the phrase "directed to, or targeted at, a specific recipient or group of recipients."

19. Comment [3] states that an advertisement may be considered to be "directed to, or targeted at, a specific recipient or group of recipients" in two different ways: (1) if it is made by in-person or telephone contact or by real-time or interactive computer-accessed communication, or (2) if it is addressed so that it will be delivered to the specific recipient or recipients, as in the case of letters, emails and express packages. The Comment points out that advertisements made by in-person or telephone contact or by real-time or interactive computer-accessed communication are prohibited unless the recipient is a close friend, relative, former client or current client. Advertisements not delivered by those means, but addressed so that they will be delivered to a specific recipient or recipients, may be sent to a broader group of recipients, but they are subject to additional rules, including a filing requirement, to make them more easily subject to disciplinary oversight and review.

20. Comment [4] makes clear that, unless an advertisement falls within Comment [3], if it appears in public media such as newspapers, television, billboards, web sites or the like is presumed not to be

directed to or targeted at a specific recipient or group of recipients, simply because it is intended to attract potential clients with needs in a specified area of the law. For example, the Comment notes that an advertisement by a patent lawyer is not directed or targeted within the meaning of the definition solely because the magazine where it is placed is geared toward inventors.

21. With this background, we now turn to the inquirer's questions on the method of conducting and publicizing the seminars, assuming that the seminar and the materials used to publicize it are advertising.

Seminars and Webinars

22. A seminar is conducted in person. A webinar is usually conducted via real-time or interactive computer-accessed media. In each case, if the inquirer included a pitch for his own services, it would constitute solicitation that is in-person or using real-time or interactive computer-accessed media. *See* Rule 7.3(a); Comment [3] to Rule 7.3. For guidance on what constitutes real-time or interactive computer-accessed communication, see Rule 1.0(c); Simon and Hyland, *supra* at 1769-1770. Thus, Rule 7.3(a) would limit participants to close friends, relatives and former or existing clients of the inquirer.

23. If the webinar were not real-time or interactive, then the inquirer would not be limited in the invitees, but the seminar would be considered solicitation and subject to the filing and other requirements of Rule 7.3(c).

Invitations Addressed to Particular Persons

24. The inquirer proposes to send seminar invitations to prospective attendees whose contact information appears on government lists.[31] Simon and Hyland state:

> As a quick rule of thumb, letters and emails are always "directed to, or targeted at" specific recipients — they have an address on them. . . . Likewise, every advertisement delivered in-person to an individual known in advance, and every telephone call (live or recorded), is to a "specific recipient."

Simon and Hyland, *supra* at 1791. Thus, if the communications contain a "hiring pitch" or other advertising, they constitute solicitation and must comply with Rule 7.3.

Soliciting Prospective Participants by Other Means

25. The inquirer asks about "soliciting" prospective clients to register for the seminars, without defining "soliciting." As in the case of sending communications to prospective attendees on commercially available mailing lists, if the communication constitutes an advertisement, any form of solicitation must comply with Rule 7.3.

31 Questions of law are outside our jurisdiction, so we do not opine on whether using government agency or commercial business lists to develop a list of invitees may violate any federal or state law, e.g., with respect to privacy. Cf., Driver's Privacy Protection Act 18 U.S.C.A. §§2721-2725; Maracich v. Spears, 133 Sup. Ct. 2191 (2013).

Communications to Former Seminar Participants

26. The answer does not differ where the recipients are former seminar participants, whether the inquirer wishes (i) to send notices of future seminars that constitute advertising or (ii) to offer former participants legal representation on IP matters. Thus, the inquirer may not solicit in person or by real-time or interactive computer-accessed communications unless the recipient is a close friend, relative, former client or existing client – and the fact that a person participated in a webinar does not turn the participant into a client or close friend. And any solicitation not involving personal or real-time or interactive computer-access communications would have to comply with Rule 7.3.

Charging for Seminars

27. The inquirer asks if it makes a difference if the lawyer charges those who attend the seminars. There is nothing inherently unethical about charging for educational seminars. However, when a lawyer charges for seminars targeted at lay people, the lawyer should make clear that the seminar cannot give individualized legal advice. As expressed in Rule 7.1, Cmt. [9]:

> A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for nonlawyers should caution them not to attempt to solve individual problems on the basis of the information contained therein.

Otherwise, the attendees may believe that their payments entitle them to receive legal advice.

Communications Using Social Media with Target Filters

28. The inquirer asks whether it is ethically permissible "to advertise the webinars/seminars on social media, using social media provided filters to target a specific audience." In N.Y. State 1016 (2014), we discussed a lawyer's sending advertisements through internet message boards for specific groups, such as parenting groups, neighborhood specific groups and parents of children with special needs and concluded that advertisements sent through such message boards would not constitute solicitation. We assumed that such messages would not be individually addressed, but rather would be posted on the message board. We therefore concluded that the advertisements were akin to public media and would not be deemed to be directed to or targeted at a specific recipient. We also concluded that the internet message boards did not involve real time or interactive computer-accessed communications. Because the proposed advertisement was not directed to, or targeted at, a specific recipient or group of recipients, and was not sent using real time or interactive computer communications, we concluded it would not be a solicitation.

29. Here, the inquirer has not provided information on the nature of the social media that the inquirer would use in the proposed communications. Consequently, we cannot determine whether the advertisements would be individually addressed or sent using real time or interactive computer-accessed media.

CONCLUSION:

30. A lawyer may organize and participate in online webinars and live seminars for non-lawyers on topics within the lawyer's fields of competence, publicize the same by individual invitation, social media or other lawful means, and following a webinar or seminar discuss representation with webinar/seminar participants, all subject to compliance with applicable rules on advertising and solicitation as discussed in the body of this opinion.

(22-16)

2017

OPINION 1111 (01/07/2017)

TOPIC: Client representation; discrimination

DIGEST: A lawyer is under no obligation to accept every person who may wish to become a client unless the refusal to accept a representation amounts to unlawful discrimination.

RULES: 8.4(g)

FACTS:

1. A lawyer has been requested to represent a person desiring to bring a childhood sex abuse claim against a religious institution. The lawyer is of the same religion as the institution against which the claim is to be made. Because of this religious affiliation, the lawyer is unwilling to represent the claimant against the institution.

QUESTIONS:

2. Is a lawyer ethically required to accept every request for representation?

3. Does the refusal to accept a representation under the facts of this inquiry amount to illegal discrimination?

OPINION:

Lawyer's Freedom to Decide Which Clients to Represent

4. It has long been a principle of the practice of law that a "lawyer is under no obligation to act as advisor or advocate for every person who may wish to become a client . . ." EC 2-35 [formerly EC 2-26] of the former Code of Professional Responsibility (the "Code"). Although this language was not carried over to the current Rules of Professional Conduct (the "Rules"), the principle remains sound. The principle that lawyers have discretion to determine whether to accept a client has been "espoused so repeatedly and over such a long period of time that it has virtually reached the level of dogma." Robert T. Begg, *Revoking the Lawyer's License to Discriminate in New York*, 7 Geo. J. Legal Ethics 280, 280-81 (1993). *See also Restatement (Third), The Law Governing Lawyers* §14 cmt. b (Am. Law Inst. 2000) ("The client-lawyer relationship ordinarily is a consensual one. Lawyers generally are as free as other persons to decide with whom to deal, subject to generally applicable statutes such as those prohibiting certain kinds of discrimination"); Henry S. Drinker, Legal Ethics 139 (1953) ("[T]he lawyer may choose his own cases and for any reason or without reason may decline any employment which he does not fancy"); Canon 31, ABA Canons of Professional Ethics (1908) ("No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment."); George Sharswood, *An Essay on Professional Eth-*

ics 84 (5th ed. 1884) (stating, in one of the earliest American works on legal ethics, that a lawyer "has an undoubted right to refuse a retainer, and decline to be concerned in any cause, at his discretion").

5. We applied this principle in N.Y. State 833 (2009), where we held that a lawyer ethically was not required to respond to an unsolicited written request for representation sent by a person in prison.

Prohibition Against Unlawful Discrimination

6. However, a lawyer's unfettered ethical right to decline a representation is subject to federal, state and local anti-discrimination statutes.

7. For example, N.Y. Exec. Law §296(2)(a) provides: "It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation . . . because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . . ." In *Cahill v. Rosa*, 674 N.E.2d 274, 277 (N.Y. 1996), a case involving a dentist in private practice who refused to treat patients whom he suspected of being HIV positive, the Court of Appeals held that a dental practice is a "place of public accommodation" for purposes of the Executive Law. At least one scholar has argued that *Cahill v. Rosa* prohibits lawyers from discriminating as well. *See* Robert T. Begg, *The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-Discrimination Disciplinary Rule*, 64 Albany L. Rev 153 (2000) (discussing whether discrimination by New York lawyers is illegal after *Cahill*); *but see* G. Chin, *Do You Really Want a Lawyer Who Doesn't Want You?,* 20 W. New Eng. L. Rev. 9 (1998) (arguing that a lawyer should not be required to undertake representation where the lawyer cannot provide zealous representation).

8. Rule 8.4(g) recognizes that anti-discrimination statutes may limit a lawyer's freedom to decline representation, stating that a lawyer or law firm "shall not . . . unlawfully discriminate in the practice of law . . . on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. . . ." What constitutes "unlawful discrimination" within the meaning of Rule 8.4(g) is a question of law beyond the jurisdiction of this Committee. Consequently, we do not opine on whether a lawyer's refusal to represent a prospective client in a suit against the lawyer's own religious institution constitutes "unlawful discrimination."

CONCLUSION:

9. A lawyer is under no obligation to accept every person who may wish to become a client unless the refusal to accept a person amounts to unlawful discrimination. Whether a lawyer's refusal to represent a particular client amounts to unlawful discrimination is a question of law beyond this Committee's jurisdiction.

(34-16)

OPINION 1112 (01/07/2017)

TOPIC: Attorneys' Fees: Credit Card Payments

DIGEST: A lawyer's retainer agreement may provide that (i) the client secures payment of the lawyer's fees by credit card, and (ii) the lawyer will bill the client's credit card the amount of any legal fees, costs or disbursements that the client has failed to pay within 20 days from the date of the lawyer's bill for such amount, as long as the credit card charge complies with the requirements previously set forth in our opinions, including that the client is expressly informed of the right to dispute any invoice of the lawyer (and to request fee arbitration) before the lawyer charges such amount, and the lawyer does not charge the client's credit card account for any disputed portion of the lawyer's bill.

RULES: 1.5(a) & (b); 1.15

FACTS:

1. A firm wishes to add to its retainer agreement the following provision:

> "In the event of your failure to pay any bill for legal fees, costs and/or disbursements in excess of 20-days from the date of the bill, you hereby authorize the undersigned attorney to bill your credit card for the full amount of the unpaid balance of the bill, without further notice to you. Your credit card information is as follows: ."

QUESTION:

2. May a law firm impose through its retainer agreement a 20-day time limit for payment upon clients, after which the law firm may automatically bill the client's credit card for the full amount of the unpaid balance of the moneys outstanding?

OPINION:

3. It is well-established that, in certain circumstances, New York lawyers may allow their clients to pay their attorneys' fees by credit card. *See, e.g.,* N.Y. State 1050 (2015); N.Y. City 2014-3; Nassau County 13-5 (2013); N.Y. State 763 (2003); N.Y. State 362 (1974), as modified by N.Y. State 763 (2003).

4. A lawyer may accept credit card payments of legal fees so long as: (i) the amount of the fee is reasonable; (ii) the lawyer complies with the duty to protect the confidentiality of client information; (iii) the lawyer does not allow the credit card company to compromise the lawyer's independent professional judgment on behalf of the client; (iv) the lawyer notifies the client before the charges are billed to the credit card and offers the client the opportunity to question any billing errors; and (v) in the event of any dispute regarding the lawyer's fee, the lawyer attempts to resolve all disputes amicably and promptly and, if applicable, complies with the fee dispute resolution program set forth in 22 N.Y.C.R.R. Part 137. *Id. See also* N.Y. State 763 (2003) and nn. 3&4.

5. It is not appropriate for a lawyer to charge a credit card for any disputed portion of the lawyer's bill. *See* N.Y. City 2014-3; Nassau County 13-5 (2013); cf. Rule 1.15(b)(4) of the New York

Rules of Professional Conduct (the "Rules") (if the client disputes the lawyer's right to funds, the lawyer may not withdraw the disputed funds from the lawyer's special account until the dispute is finally resolved). Consequently, the proposed 20-day provision would be consistent with the Rules only if the retainer agreement also expressly informed the client of the right to dispute any invoice (and to request fee arbitration in accord with applicable court rules, prior to the imposition of any disputed credit card charges).

CONCLUSION:

6. A lawyer's retainer agreement may provide that (i) the client secures payment of the lawyer's fees by credit card, and (ii) the lawyer will bill the client's credit card the amount of any legal fees, costs or disbursements that the client has failed to pay within 20 days from the date of the lawyer's bill for such amount, as long as the credit card charge complies with the requirements previously set forth in our opinions, including that the client is expressly informed of the right to dispute any invoice of the lawyer (and to request fee arbitration) before the lawyer charges such amount and that the lawyer does not charge the client's credit card for any disputed portion of the lawyer's bill.

(37-16)

OPINION 1113 (01/10/2017)

TOPIC: Per diem lawyers; online legal directories

DIGEST: A lawyer may participate in a non-lawyer owned online legal directory that permits lawyers needing per diem lawyer services to select lawyers available to provide those services, where the directory does not recommend or select the participating lawyers, the service is available only to lawyers (not to prospective non-lawyer clients) and the participating lawyers pay a flat fee for listing their availability in and having access to the lawyers listed in the online directory. Client consent is not necessary if the purpose of the per diem representation is routine and non-substantive. Both the hiring lawyer and the per diem lawyer are responsible for checking for conflicts.

RULES: 1.1, 1.2(c), 1.3(a), 1.4(a), 1.5(b), (c) & (g), 1.6(a), 1.7, 1.8, 1.9, 1.10(a) & (e), 3.3(f), 4.1, 4.2, 5.1, 7.1, 7.2(a) & (b)

FACTS:

1. The inquirer wishes to use the services of an online service that connects litigators to per diem lawyers (the "Service"). The Service provides users (referred to herein as "hiring lawyers") with a list of lawyers who are available to handle court appearances and calendar calls on a per diem basis ("per diem lawyers"). (We refer to both the hiring lawyers and the per diem lawyers as "participating lawyers").

2. The Service is operated by non-lawyers. It charges a flat fee to participating lawyers, whether as hiring lawyers or per diem lawyers.

3. Participating per diem lawyers provide their rates, availability and areas of practice to the Service. A hiring lawyer sends a request to the Service indicating the date, time and location of the requested appearance, as well as the case caption. The Service generates a list of attorneys who are available to act at the time and place specified, and sends that list to the hiring lawyer, along with information as to each per diem lawyer's rate. The hiring lawyer then may choose an attorney from the list to retain on a per diem basis. The per diem lawyers set their own rates.

4. The Service does not permit non-lawyer clients or other non-lawyers to access the listings or to hire per diem lawyers directly. The Service and the services provided by per diem lawyers in the directory are strictly lawyer-to-lawyer services.

QUESTIONS:

5. May a New York lawyer use an online service owned by non-lawyers to request and hire per diem lawyers to cover court appearances for the lawyer's clients?

6. May a prospective per diem lawyer ethically arrange to be listed in an online legal directory owned by non-lawyers and accept assignments to cover court appearances for other lawyers?

7. Must a hiring lawyer obtain client consent before hiring a per diem lawyer to cover a court appearance?

OPINION:

8. Lawyers throughout New York State sometimes need the services of per diem lawyers. Lawyers and law firms may have unavoidable scheduling conflicts or may be obliged to appear in distant courts for routine, non-substantive calendar calls. While some courts permit telephone appearances by counsel for ministerial or routine matters, courts do not permit telephone participation in all circumstances.

9. One solution has been the creation of a market for per diem lawyers to appear on behalf of the attorneys of record. Some providers of per diem legal services are law firms. This inquiry, however, involves a service that would be provided by an entity owned by non-lawyers. The inquirer asks whether a hiring lawyer or a per diem lawyer seeking assignments may use the Service.

Background: **The Per Diem Relationship**

10. Per diem lawyers are hired by the attorneys of record, not by the clients. Per diem lawyers typically do not have client contact and are unlikely to have ongoing involvement in the pending matter after appearing on the specific date for which they are hired. They may or may not be privy to confidential client information. Per diem lawyers may be hired to cover a court appearance to assure that record counsel is not defaulted or to ensure that the client is not prejudiced for failing to appear on a scheduled date. Sometimes, per diem lawyers are hired for more substantive appearances, including for status conferences or for arguments on particular motions.

11. Although per diem lawyers are hired by the attorney of record, they represent the client and are being hired to "appear" on behalf of the client. *See* N.Y. City 1988-3 (the relationship between the temporary lawyer and the client is no different from the traditional lawyer-client relationship); ABA 88-356 (temporary lawyer who works on a matter for a client of a firm "represents" that client for purposes of the conflicts rules). As such, they have professional obligations under the Rules of Professional Conduct and other court rules. Per diem lawyers, although hired for a limited purpose, owe duties to clients, adversaries, and courts. The nature and extent of those duties depends on the circumstances.

12. We will not attempt to catalog all of the ethical duties of per diem lawyers, but we will suggest several. Under Rule 1.1, they should be competent, and thus should obtain whatever knowledge is necessary to handle an appearance. Under Rule 1.3(a), they must be diligent, and must be on time for the matters they have been retained to handle. Under Rule 1.4(a)(3), they must keep the client (through the client's agent, the hiring lawyer) reasonably informed about the status of the matter. Under Rule 1.6, they must preserve the confidentiality of any client confidential information to which they are privy. As further explained below, under Rule 1.10(e) they must check for conflicts and, if consentable, obtain consent or decline the proffered representation. *See generally* D.C. Op. 284 (1998) (a temporary lawyer has the same ethical obligations as any other lawyer to be competent to handle the matter tendered, to exercise independent professional judgment, to devote undivided loyalty to the client, and to preserve the client's confidences and secrets, and temporary lawyers and their employing lawyers each have an obligation to ensure that the appropriate standards are met); ABA 88-356.

13. Per diem lawyers also owe duties to adversaries. For example, under Rule 4.1, they must not make a false statement of fact or law to an adversary or other third person. Under Rule 4.2, they must not communicate on the subject of the representation with a party they know to be represented by counsel unless they have that counsel's prior consent.

14. In addition, per diem lawyers owe duties to courts. Rule 3.3(f)(1) provides that, in appearing before a tribunal, a lawyer shall not fail to comply with local customs of practice of a particular tribunal, so per diem lawyers must comply with the relevant court rules for the courts and parts in which they appear. As noted below, court rules may impose additional obligations, but interpreting those rules is beyond our jurisdiction.

Distinction Between an Online Directory and a Legal Referral Service

15. The answer to the questions posed here depends on whether the Service is a "directory" or a "referral service." This matters because Rule 7.2(b)(3) generally prohibits a lawyer from being recommended by or cooperating with a "lawyer referral service" unless the service is "operated, sponsored or approved by a bar association or authorized by law or court rule."

16. In N.Y. State 799 (2006), this Committee discussed the differences between a legal "directory" and a legal "referral service" and attempted to determine at what point an online directory becomes a referral service. For example, we said that an online version of the "yellow pages" that was available to ultimate clients could provide tools by which a potential client can filter a list of attorneys by geography and/or practice area (*e.g.,* to create a list of attorneys in a particular geographical area who do a particular kind of legal work) without becoming a referral service. We noted, however, that the line would be crossed if the website recommended a particular lawyer or lawyers for the prospective client's problem. Consistent with this distinction, we assume that the Service gives a hiring lawyer access to the names of all of the per diem lawyers who meet the requirements of the hiring lawyer (e.g., time, jurisdiction, area of expertise, and billing rate) without winnowing down the list in any manner other than using criteria supplied by the hiring lawyer. If our assumption is correct, then the Service would not be making recommendations, and would not be a referral service. *Compare* N.Y. State 976 (2013) (if payments to the non-lawyer would include not only a monthly fee but other fees that could constitute payments for recommendations, those payments would violate Rule 7.2(a)); N.Y. State 902 (2012) (lawyer may not base marketing fee on number of actual or potential clients the marketer introduces to the lawyer).

17. Even if the Service is not a "referral service," however, Rule 7.2(a) prohibits a lawyer from compensating a person or organization "to recommend or obtain employment by a client" or as a reward for having made a recommendation resulting in employment by a client. Rule 7.2 appears in a section of the Rules relating to advertising and solicitation. Although the definition of "advertisement" in Rule 1.0(a) specifically excludes communications to other lawyers, Rule 7.2 is not limited to advertisements and does not exclude communications to other lawyers. Consequently, Rule 7.2 applies to a lawyer-to-lawyer service such as the one here. But paying a fee to the Service to be listed in does not violate Rule 7.2(a) if the Service is a "directory" rather than a "referral service." As Comment [1] to Rule 7.2 points out, paragraph (a) "does not prohibit a lawyer from paying for advertising and communications permitted by these Rules, including the costs of . . . online directory listings."

Conflicts of Interest

18. We assume that in the typical case the per diem lawyer is retained by the hiring lawyer to represent a client of the hiring lawyer. Consequently, conflict of interest rules regarding current and former clients will apply. Rule 1.7, 1.8, 1.9. *See* N.Y. State 715 (1999) (contract lawyers, like other lawyers, must comply with the conflicts rules with respect to current and former clients).

19. Even if the per diem lawyer is hired solely to cover a specific appearance or to argue a specific motion, a per diem lawyer could not later appear on behalf of the other side in that case or one that is substantially related. *See* Rule 1.9 ("Duties to Former Clients"). *See also* ABA 88-356; N.Y. City 1996-8, 1989-2, 1988-3 and 1988-3A.

20. Moreover, under Rule 1.10(e), both the hiring law firm and the per diem lawyer must maintain a written record of engagements, at or near the time of each new engagement, and maintain a system by which proposed engagements are checked against current and previous engagements. Under Rule 1.10(e)(3), this conflict check must be performed by the hiring firm whenever the firm hires or associates with another lawyer. Although the Service may assist participating lawyers in identifying conflicts by obtaining information about the case caption and about the hiring lawyer, the obligation under Rule 1.10 to check for and identify conflicts falls on both the hiring lawyer and the per diem lawyer.

21. Although the direct conflict rules apply to the per diem lawyer, vicarious disqualification would not apply in the case of a one-off representation by a per diem lawyer. Rule 1.10(a) provides: "While lawyers are *associated* in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9" (Emphasis added.) In the case of a one-off representation arranged by the Service here, the per diem lawyer would not be "associated" with the hiring law firm for purposes of Rule 1.10(a). *See* N.Y. State 715 (whether vicarious disqualification applies depends upon whether the relationship of the contract lawyer to the employing law firm rises to the level of an "association" with the firm); D.C. Opinion 352 (2010) (whether a temporary contract attorney is "associated with" the hiring law firm will depend on the scope and nature of the temporary contract attorney's relationship with the firm and the potential for exposure to the confidences of the firm's clients for matters on which the temporary lawyer is not working); ALI, *Restatement, The Law Governing Lawyers,* Section 123, Comment c(iii) (co-counsel who associate for purposes of handling a particular case are not subject to vicarious disqualification). Consequently, Rule 1.10(a) does not impute to a per diem lawyer or hiring firm whatever conflicts the other may have under Rules 1.7, 1.8, or 1.9 with respect to matters not related to the per diem representation.

Sharing Fees with Non-lawyers

22. The inquirer states that the Service would charge flat fees for attorneys' participation in the Service. Assuming that the fees collected by the Service are not related to the amount of the fees charged by the per diem lawyers, the inquiry does not involve a lawyer sharing legal fees with a non-lawyer. *See* N.Y. State 976 (2013) (arrangement could constitute impermissible fee sharing if the lawyer's payment to the intermediary is insufficiently related to the value of the company's services);

N.Y. State 885 (2011) (finding improper fee sharing where there appeared to be no relation between the funds to be received by the non-lawyer company and the value of the services performed.)

Lawyer Ratings and Reviews

23. The inquiry states that hiring lawyers will choose per diem lawyers based on various factors, including "the per diem lawyer's rate, rating and reviews," but it does not state whether the Service will provide for such ratings and reviews. This Committee has issued several opinions on ratings and reviews, focusing on lawyers who advertise such ratings or reviews. *See* N.Y. State 1052 (2015) (lawyer may give clients a credit on their legal bills if they rate the lawyer on an internet website, if the credit is not contingent on the content of the rating and the ratings and reviews are done by the clients, not the lawyer); N.Y. State 1007 (2014) (lawyer may advertise inclusion in "best lawyers" publication if the lawyer's assessment of the methodology used to determine inclusion demonstrates that it is an unbiased, nondiscriminatory and defensible process); N.Y. State 877 (2011) (lawyer's website may accurately quote bona fide professional ratings or comments from any ratings publication if the ratings or comments are factually supportable when published and are not be false, deceptive or misleading). Consistent with these opinions, we believe that, if the Service publishes ratings and reviews of a per diem lawyer, the per diem lawyer should ensure that they are accurately described. *See generally* Rule 7.1, Cmt. [13] (Bona Fide Professional Ratings).

Limited Scope Representation

24. A per diem lawyer usually is hired for purposes of a single court appearance, and typically has no ongoing involvement in the matter once the court appearance is over. Rule 1.2(c) permits limited scope representations under prescribed circumstances: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel." *See* N.Y. State 856 (2011). However, we do not believe that the inquiry before us implicates Rule 1.2(c), because the per diem lawyer is contracting with the hiring lawyer, not with the client. The hiring lawyer is not entering into a limited scope representation with the client. The hiring lawyer is simply outsourcing a particular, discrete task to a lawyer outside the lawyer's own office.

Considerations Under Relevant Court Rules

25. As noted above, Rule 3.3(f)(1) provides that, in appearing before a tribunal, a lawyer shall not fail to comply with local customs of practice of a particular tribunal. Thus per diem lawyers must comply with the relevant court rules for the courts and parts in which they appear. While it is outside our jurisdiction to interpret court rules, we note that the Uniform Rules for the Supreme Court and the County Court, 22 NYCRR §202.12(b), require attorneys appearing at preliminary conferences to be "thoroughly familiar with the action and authorized to act on behalf of the party" and to be "sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery." See *also* Rule 1(a) of the Commercial Division, 22 NYCRR §202.70(g), (which requires all counsel who appear to be fully familiar with the case and authorized to enter into substantive and procedural agreements on behalf of their clients).

26. Failure to comply with these court rules may result in the imposition of sanctions and professional discipline. *See* 22 NYCRR §130-2.1(a) (imposing sanctions or awarding costs and legal fees upon attorney who, without good cause, fails to appear at a court-scheduled matter); Commercial Division Rules 1(a) & 12, 22 NYCRR §202.70(g) (authorizing sanctions, including dismissal, for failure of fully authorized counsel to appear); *Alveranga-Duran v. New Whitehall Apartments, LLC*, 40 A.D.3d 287, 836 N.Y.S.2d 24 (1st Dep't 2007) (appearance of per diem lawyer without settlement authority at conference required imposition of sanction). Such failure may also violate Rule 1.3(a) ("A lawyer shall act with reasonable diligence and promptness in representing a client").

Client Consent to Hire a Per Diem Lawyer

27. The inquirer asks whether a hiring lawyer must obtain client consent before hiring a per diem lawyer to cover a court appearance. Ethics opinions decided under the Code of Professional Responsibility were based largely on DR 2-107(A) (prohibiting a lawyer from dividing a fee for legal services with another lawyer not in the lawyer's law firm without client consent), EC 2-31 [formerly EC 2-22] (prohibiting a lawyer, without the consent of the client, from associating in a particular matter another lawyer outside the lawyer's firm) and EC 4-2 (prohibiting a lawyer from associating another lawyer outside the first lawyer's firm in the handling of a matter with client consent). Although the prohibition against dividing fees now appears in Rule 1.5(g), which also requires client consent where there will be a division of fees, we do not believe that Rule 1.5(g) applies where a hiring lawyer is hiring a per diem lawyer on an hourly or fixed fee basis that is based on the fair value of the work and that is similar to what the hiring lawyer would pay an employee of the firm. Rather, as we noted in N.Y. State 715, whether a hiring law firm needs to disclose to the client and obtain consent for the participation of a contract lawyer depends upon whether confidences will be disclosed to the lawyer, the degree of involvement of the per diem lawyer in the matter and the significance of the work the lawyer will perform.

28. In 2015, the New York State Bar Association amended the Comments to Rule 1.1 to address the outsourcing of legal work by law firms to lawyers outside the firm. As explained by Professor Simon, "To help ensure that outside lawyers perform legal work competently [the State Bar Association expanded] the Comments to New York Rule 1.1 ("Competence") to provide greater guidance and clarity regarding a lawyer's responsibilities when engaging outside lawyers to provide legal services to clients." Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 65 (Thompson Reuters 2016 ed.)

29. The most relevant new comment provision is Rule 1.1, Comment [6A], which says:

> Client consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer. For example, on one hand, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routing calendar call ordinarily would not need to obtain the client's prior informed consent. On the other hand, a lawyer who hires an

outside lawyer to argue a summary judgment motion or negotiate key points in a transaction ordinarily should seek to obtain the client's prior informed consent.

30. Thus, where the hiring lawyer reasonably expects a court appearance to involve a simple scheduling matter, the hiring lawyer need not obtain client consent. However, if the hiring lawyer knows (or reasonably should know) that a court appearance is likely to involve substantive or strategically significant issues or the sharing of client confidences, then the hiring lawyer ordinarily must obtain client consent to use a per diem lawyer. *See* Rule 1.1, Comment [7A] ("if the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client"). Comment [7A] also provides that "whenever the retaining lawyer discloses a client's confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a)." *See also* N.Y. State 715 (1999) (whether client consent is necessary before contracting to have work done by a temporary or contract lawyer depends on whether (i) the lawyer will receive confidential client information, (ii) whether the work to be done by the temporary lawyer will involve strategic decisions or other work that the client would expect of the senior lawyers working on the client's matters, and the work will not be supervised by the hiring lawyer); D.C. Op. 284 (1998) (lawyer should advise and obtain consent from client whenever proposed use of a temporary lawyer to work on client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations).

Billing the Cost of a Per Diem Lawyer.

31. Rule 1.5(b) enjoins a lawyer to communicate to a client "the basis or rate of the fee and expenses for which the client will be responsible." If the law firm wishes to bill the client for the cost of the per diem lawyer, the lawyer should communicate this possibility to the client. The issues of whether the hiring lawyer may mark up the cost of a per diem lawyer or charge the cost of a per diem lawyer as an expense in a contingent fee matter are beyond the scope of this opinion. On the other hand, the fee paid to the Service may not be included in the legal fee charged by the law firm to its client. Rather, if the law firm wishes to pass it on to the client, it must separately bill it as a disbursement. *See* N.Y. City 1989-2.

Supervising the Per Diem Lawyer

32. In N.Y. State 715, we noted several different models for using temporary lawyers. In one model, the temporary lawyer is an independent contractor with discretion on how to accomplish the assigned task. In another, the hiring lawyer provides the same type of supervision he or she would provide to an employee. In that opinion, we noted, citing ABA 88-356, that if a temporary lawyer is performing independent work for a client involving substantive or strategic issues without the close supervision of a lawyer associated with the law firm, the hiring lawyer must inform the client. As noted above, in 2015, the comments to Rule 1.1 were amended to provide that "[c]lient consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm."

33. Rule 5.1(b)(2) provides: "A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules." However, even if the work that the per diem lawyer will perform does not involve discretion and is not closely super-

vised by the hiring lawyer, we believe that the hiring lawyer must (i) determine that the per diem lawyer is competent to perform the assigned task, (ii) ensure that both the firm and the contract lawyer perform conflict checks before hiring the per diem lawyer to determine that the per diem lawyer has not formerly appeared for the opposing party in the same or a substantially-related matter, and (iii) confirm that the per diem's assignment was performed satisfactorily by obtaining a report on the assignment from the per diem lawyer.

CONCLUSION:

34. A lawyer may participate in a non-lawyer owned online legal directory that permits lawyers needing per diem lawyer services to select lawyers available to provide those services, where the directory does not recommend or select the participating lawyers, the service is available only to lawyers (not to prospective non-lawyer clients) and the participating lawyers pay flat fees for listing their availability in and having access to and hiring the lawyers listed in the online directory. Client consent is not necessary if the purpose of the per diem representation is routine and non-substantive. The hiring lawyer has direct supervisory authority over the per diem lawyer and must make reasonable efforts to ensure that the per diem lawyer conforms to the Rules, including by maintaining a system by which the proposed engagements are checked for conflicts of interest.

(14-16)

OPINION 1114 (02/09/2017)

TOPIC: Trust or special accounts; IOLA; authorized signature on special account checks

DIGEST: Attorneys may electronically sign checks issued from their law firm's "special," trust or IOLA account, provided that an authorized signatory who is a New York lawyer personally reviews and approves the issuance of the check with his or her digitized signature.

RULES: 1.15(b), (d) & (e)

FACTS:

1. A multi-state law firm with offices in New York has a centralized out-of-state location for issuing checks from the attorney special or trust account that the firm maintains in a New York bank.

2. In accordance with Rule 1.15(e) of the New York Rules of Professional Conduct (the "Rules"), the firm has designated firm lawyers who are admitted to practice law in New York and are based in its New York offices as "authorized signatories" of the special or trust account. Currently, when a check is to be issued from the account, the requested check is printed locally utilizing a MICR (magnetic ink character recognition) printer. The check is then presented to an authorized signatory, along with all supporting documentation regarding the transaction, for review and execution. After review, if the documentation complies, the authorized person manually signs the check (sometimes referred to as a "wet ink signature"). The check and supporting documentation is then given to a second authorized signatory for review and execution. Presently, all checks from the account are signed in ink by two authorized signatories.

3. The firm would like to move to an electronic approval and signing process. In the new process, the firm would notify the authorized signatories electronically of one or more pending checks to be issued from the attorney special or trust account. The authorized signatories would be provided with all supporting documentation and would conduct the same review that is currently being conducted with respect to wet ink checks. However, rather than signing the checks manually in ink, the authorized signatory would electronically approve the issuance of the check. After an authorized signatory approves, the check will be printed. Just as with the current process, checks would be printed in the firm's local office (here, the New York office) utilizing the MICR printer. The printed checks would also contain the electronically-affixed digitized (machine readable) signature of each authorizing signatory.

QUESTIONS:

4. A. May a law firm utilize MICR (magnetic ink character recognition) digitized signatures on checks issued from its IOLA account in lieu of manual (wet ink) signatures?

   B. May the approval process for checks issued from the law firm's IOLA account utilize a batch process to authorize the MICR signatures?

OPINION:

MICR Signatures on IOLA Checks

5. Rule 1.15(b) requires a lawyer who is in possession of funds belonging to another person incident to the lawyer's law practice to maintain those funds in a "special account", also known as "trust account." Under Judiciary Law Section 497(4)(b), where the lawyer receives moneys incident to the lawyer's practice that the lawyer believes are too small in amount (or will be held for too short a time) to generate sufficient interest income to justify a separate account, the lawyer is required to place them in an interest-bearing account, also known as an Interest on Lawyers Account or IOLA Account. Court rules contain several requirements regarding IOLA Accounts. *See* 21 NYCRR Part 7000. However, that rule contains no requirement regarding authorized signatories of special account checks. Only Rule 1.15(e) governs authorized signatories.

6. Rule 1.15(a) specifies that an attorney who possesses client funds has a fiduciary obligation with respect to those funds. Moreover, Rule 1.15(e) states that "[o]nly a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account." The answer to the question here thus hinges on what is encompassed by the term "signatory."

7. Recently, the State of North Carolina amended its version of Rule 1.15 to include a provision that specifically prohibits trust account checks from being signed utilizing "signature stamps, preprinted signature lines, or electronic signatures". *See* North Carolina Rules of Professional Conduct, 1.15(s). New York, however, has no such prohibition.

8. Rule 1.15(e) in New York provides that only a New York attorney may be an authorized signatory, but it does not specify how a trust or special account check may be signed. Rule 1.0(x) defines what constitutes a writing for purposes of Rules that require the client's written consent. It was amended effective January 1, 2017 to include electronic records within the meaning of a writing. As amended, Rule 1.0(x) provides: "A 'signed' writing includes an *electronic* . . . process attached to . . . a writing and executed or adopted by a person with the intent to sign the writing." (Emphasis added.) As the New York State Bar Association's Committee on Standards of Professional Conduct ("COSAC") explained when it proposed this change, "COSAC recommends clarifying the definition of 'writing' to make clear that it encompasses evolving forms of electronic communications." However, the term we must interpret here is not "writing" but "signatory." Consequently, the recent amendment is instructive but not dispositive.

9. In N.Y. State 693 (1997), this Committee stated that it was permissible for a lawyer, as part of a real estate closing, to delegate to a paralegal the task of signing the lawyer's name on an escrow account check utilizing a rubber stamp, as long as the lawyer supervised the delegated work closely. The rationale underpinning that opinion was that it was the attorney, not the paralegal, who ultimately approved the transaction – the attorney was merely delegating the task of affixing the signature for a discrete and limited purpose.

10. Here, no delegation would be involved. Therefore, if the law firm's procedures for authorizing checks from the special or trust account and for affixing the digitized signature of each authorized signatory assure that only an authorized signatory or signatories may initiate these steps, and if using the MICR signature renders the check negotiable within the meaning of banking laws and regulations,

then Rule 1.15 neither requires a law firm to use a "wet ink signature" nor prohibits a law firm from using electronic or digitized signature media such one affixed by an MICR printer.

11. The law firm also must ensure that the electronically-generated records of the special or trust account are maintained in accordance with Rule 1.15(d).

Batch Processing of IOLA Checks

12. The inquirer also asks whether the firm may utilize a "batch process" to authorize the MICR signatures. The inquiry does not define "batch processing," but we understand that the term can mean two different things. The first involves running a series of computer steps with minimum human interaction. The second involves scheduling a series of activities for the same time, so as to use computer time most efficiently. As this Committee has stated, "*responsibility* for client funds may not be delegated . . . ." *See* N.Y. State 693 (emphasis added). As long as (i) the firm's authorized signatories approve the issuance of each individual check from the firm's special or trust account, and (ii) the firm's computer system saves information about authorization of checks to be printed and signed digitally and prints out the digitally signed checks in a single batch, the firm would be in compliance with Rule 1.15.

CONCLUSION:

13. A law firm may issue electronically signed and approved checks from its trust account provided that an authorized signatory who meets the requirements of Rule 1.15(e) personally reviews and approves the issuance of each check.

(36-16)

OPINION 1115 (02/17/2017)

TOPIC: Public defender; part-time judge; conflict of interest

DIGEST: A member of a public defender office may not represent a client in the same court where another member of the public defender office serves as a part-time judge because it would violate Rule 8.4(f), which prohibits a lawyer from causing a judge to violate his or her own ethical obligations under the Rules of Judicial Conduct not to "permit his or her partners or associates to practice law in the court in which he or she is a judge".

RULES: 1.0(h), 1.0(p), 1.10(a), 7.2(b), 8.4(f)

FACTS:

1. The inquirer lives in a locality where City Court judges serve on a part-time basis. These part-time judges may also practice law. *See* 22 N.Y.C.R.R. 100.6(B) (a part-time judge may accept private employment or public employment in a Federal, State or municipal department or agency, provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge's duties). The inquirer here is a member of a public defender office. Another member of the public defender office is a part-time judge in the City Court.

QUESTION:

2. May a lawyer who is a member of a public defender office appear in the court where another member of the public defender office serves as a part-time judge?

OPINION:

Current Law and Court Rules

3. Although the jurisdiction of this Committee does not include interpreting laws or court rules, the question posed here is affected by law and court rules.

4. Section 471 of the Judiciary Law provides:

> A law partner of, or person *connected in law business with* a judge, shall not practice or act as an attorney or counsellor, in a court, of which the judge is, or is entitled to act as a member. . . . [Emphasis added]

Similarly, Section 100.6(B) of the Rules of Judicial Conduct, 22 N.Y.C.R.R. §100.6(B)(3), provides:

> A part-time judge:
>
> * * *
>
> (2) shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located, before a judge who is per-

> mitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;
>
> (3) shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law, but may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law. . . . [Emphasis added]

5. Whether a lawyer is "connected in law business" with a judge or is an "associate" of a judge within the meaning of Section 471 of the Judiciary Law or Section 100.6(B) of the Rules of Judicial Conduct are legal questions beyond the jurisdiction of this Committee.

6. Under the New York Rules of Professional Conduct (the "Rules"), attorneys who are members of the same public defender office usually are considered to be part of the same firm. Rule 1.0(h) defines the terms "firm" or "law firm" to include "lawyers employed in a qualified legal assistance organization." Rule 1.0(p) defines a "qualified legal assistance organization" as an "office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof." Finally, Rule 7.2(b)(1) lists the following types of qualified legal assistance organizations:

> a legal aid office or *public defender office*: (i) operated or sponsored by a duly accredited law school; (ii) operated or sponsored by a bona fide, non-profit community organization; (iii) operated or sponsored by a governmental agency; or (iv) operated, sponsored, or approved by a bar association. [Emphasis added.]

7. Comment [4] to Rule 1.0 indicates that the structure of a legal services organization may determine whether the entire organization, or rather some components of an organization, constitutes a "firm" for purposes of the Rules. The precise scope of a "firm" within a legal services organization is a factual question that is beyond the jurisdiction of our Committee. *See* N.Y. State 1104 (2016); N.Y. State 1036 (2014); N.Y. State 862 (2011).

8. Rule 1.10(a) provides as follows: "While lawyers are *associated* in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein." (Emphasis added.) The lawyers in a public defender office are considered "associated" even if assistant public defenders work on a part-time basis. *See* N.Y. State 862 (2011) (the phrase "associated" in Rule 1.10(a) "includes part-time attorneys as well as full-time attorneys"). This Committee has previously concluded that members of a county public defender office may be considered to be "associated" in the same firm for imputation purposes under Rule 1.10(a), even if the lawyers in the public defender office work independently. Compare N.Y. State 975 (2013) (involving a county with a single public defender having a central role in providing legal services under County Law §701 and concluding that all assistant public defenders should be considered to be associated in the office) with N.Y. State 914 (2012) (a panel of lawyers established to provide legal assistance to indigent clients when the Legal Aid Society has a conflict and whose members did not have a common supervisor or share files or confidential information with Legal Aid Society Lawyers was not part of the same "firm" as the Legal Aid Society). The

remainder of this opinion assumes that the inquiring public defender would be considered to be associated with the part-time judge because they are both members of the same public defender office.

Prior Opinions of this Committee Regarding Associates of Part-Time Judges

9. We have issued a long line of opinions dealing with the ethical constraints placed upon associates of part-time judges. *See, e.g.* N.Y. State 701 (1998) (lawyer who is co-counsel with a part-time judge in a civil case may not appear before another judge on the part-time judge's court because the public might perceive that the administration of justice is not fairly and impartially served), N.Y. State 670 (discussing practice restrictions on a part-time City Court judge and a part-time DA who are associated with each other in private practice); N.Y. State 118 (1970) (under the Canons of Judicial Ethics, a village police judge may not sit on criminal matters if his partner is an assistant district attorney); N.Y. State 65 (1967) (Judicial Canons prohibit partners of an acting village judge from appearing before a regular judge of the court); N.Y. State 29a (1967) (even if it does not violate the law, an associate in the law firm of a part time judge may not ethically appear before the other judges on that court, since it is not conducive to building public confidence in the courts). These opinions were based on various sources, including §471 of the Judiciary Law, the Code of Judicial Conduct, and the prior Canons of Judicial Ethics, as well as Canon 9 of the Code of Professional Responsibility and several Ethical Considerations in the Code of Professional Responsibility prohibiting the appearance of impropriety or the appearance of undermining the impartiality of a tribunal. N.Y. State 701 also took the position that, if an appearance before a part-time judge was illegal under §471 of the Judiciary Law, it was also unethical. That view was based on former DR 1-102(A)(4), which considered it misconduct for a lawyer to engage in "illegal" conduct.

10. Some of these bases no longer apply to opinions issued by this Committee. The Canons of Judicial Ethics were replaced by the Code of Judicial Conduct, and, later, the Rules of Judicial Conduct of the Chief Administrator of the Courts. In any case, as noted above, interpreting statutes and court rules is beyond our jurisdiction.

Application of Rule 8.4(f)

11. Rule 8.4(f) provides that a "lawyer or law firm shall not . . . knowingly assist a judge or judicial officer in conduct that is in violation of applicable rules of judicial conduct or other law." Under this provision, a lawyer may not knowingly undertake a representation when doing so would cause a judge to violate his or her own ethical obligations under the Rules of Judicial Conduct (such as the obligation in §100.6(B)(3) not to "permit his or her partners or associates to practice law in the court in which he or she is a judge").

12. For this reason, if the associated part-time City Court judge does not take steps to prevent other lawyers who are members of the same public defender office from practicing before the City Court, then the other public defenders must on their own initiative decline to make such appearances or withdraw.

13. Opinions in other jurisdictions have reached similar conclusions based upon the interplay between a Rule of Judicial Conduct and a lawyer's duty under Rule 8.4(f). *See* Phila. Op. 91-33 (1991) (holding that inquiring attorney could not appear before a member of the Tax Review Board

where a retired member of the firm was a member of the Tax Review Board, because the Code of Judicial Conduct would require the Tax Review Board member to recuse himself – and if he failed to do so, then the inquirer would be in violation of Rule 8.4(f) if the inquiring lawyer participated in the hearing because it would be assisting a judge in conduct in violation of the applicable Rules of Judicial Conduct); S.C. Op. 94-05 (1994) (considering whether a lawyer could hire a probate judge as a part-time attorney and noting that, while the question presented might be directed more appropriately to the Advisory Committee on Standards of Judicial Conduct, because the inquirer was the lawyer who would hire the judge and because the applicable South Carolina ethics rule prohibited the lawyer from knowingly assisting a judge in conduct that violated applicable rules of judicial conduct or other law, the inquiry also fell within the purview of the Ethics Committee.)

CONCLUSION:

14. A member of the public defender's office may not represent a client in the court where another public defender is a part-time judge, because to do so would violate the public defender's duties under Rule 8.4(f).

(39-16)

OPINION 1116 (03/29/2017)

TOPIC: Nonlegal services, fee-sharing with nonlawyers, payment for referrals, billing practices, disclosing use of nonlawyer assistants, multidisciplinary practice

DIGEST: A lawyer may enter into an arrangement with a nonlawyer "foreign migration agent" whereby the nonlawyer hires the lawyer on behalf of the client and assists the lawyer in communicating with the client, as well as gathering and translating documents that are required in connection with the representation, as long as (1) the relationship between the lawyer and the nonlawyer is not exclusive, (2) the nonlawyer does not interfere with the lawyer-client relationship, (3) the client consents to the potential conflict of interest resulting from the referral relationship between the lawyer and the foreign migration agent, and (4) the lawyer is not paying the foreign migration agent for referrals. The lawyer must bill the client separately for fees and expenses and must inform the client of the name and amount charged by the foreign migration agent for nonlegal services.

RULES: 1.0(i) & (j), 1.4(a), 1.5(a), (b) & (d), 1.7(a) & (b), 2.1, 5.3(a)&(b), 5.4(a), 5.5(b), 5.8(a)&(c), 7.2(a)&(b)

FACTS:

1. The inquirer is a law firm with a principal office outside New York and a small office in New York. The firm has several partners and associates admitted in NY. It practices US immigration law, and one of its services involves helping clients to obtain lawful permanent residence in the U.S. (also known as obtaining a green card), using the so-called EB-5 Program (the "EB-5 Program"). This Program allows a foreign investor ("EB-5 investor") to qualify for a green card by investing $1 million in a U.S. commercial enterprise ($500,000 if the investment is made in a targeted area with high unemployment) and creating or preserving at least 10 full-time jobs for qualifying U.S. workers.

2. Part of the EB-5 Program allows foreign investors to make passive investments in qualifying projects under the auspices of a Regional Center ("Regional Center") designated by US Citizenship and Immigration Services ("USCIS"). Regional Centers sponsor capital investment projects for investment by EB-5 Investors. Many real estate projects in New York are funded by EB-5 investors through a Regional Center.

3. In the Immigrant Visa Petition on Form I-526, the applicant must demonstrate that he or she has invested the required amount and is the legal owner of the capital invested, that the funds are from a lawful source and that the investment directly or indirectly created 10 jobs. If the Form I-526 is approved, the investor obtains conditional lawful permanent residence for two years. Prior to the end of the 2-year period, another petition must be filed to remove the conditional status of the visa by establishing that the investor has continued to meet all the conditions of the EB-5 program, including that the EB-5 investment is ongoing.

4. Many EB-5 investors who invest through Regional Centers rely upon foreign migration agents ("FMAs"), who live in such investors' country, to assist them in understanding the projects offered by various Regional Centers, and in navigating the EB-5 Program. Although the petition on Form I-526 is filed by a U.S.-licensed lawyer, an FMA may assist the EB-5 investor in establishing that the requirements of the EB-5 Program have been met, including that the investor has invested the

required amount, that the investor is the legal owner of the capital invested, and that the investment has created the requisite number of direct or indirect jobs.

5. The services provided by FMAs to investors may include the following:

a. Translating the investor's documents for the EB-5 process

b. Assisting the law firm to collect all documents required for the process from the investor, organizing the financial documentation for the initial submission to USCIS and responding to any requests for additional information

c. Monitoring the status of all processes and filings of the investor

d. Assisting the law firm in communicating with the investor and participating in calls between the investor and the law firm.

6. The FMA may also assist the EB-5 investor by advising on ancillary relocation matters, such as purchasing a home and selecting schools for children.

7. Finally, the FMA may market the projects of various Regional Centers to investors and may participate in the development of the projects. In addition, the FMA may assist a Regional Center in communicating with the investor. It may receive fees from the Regional Center when the investment is made in the Center's project, including (i) a finder's fee, (ii) a proportion of the proceeds of the deal, and (iii) part of the administrative fee paid by the EB-5 Investor.

8. The FMA does not prepare and file the Immigrant Visa Petition. Rather, it directs its clients to U.S. immigration lawyers. Depending on the size of the project and the FMA, the FMA may have dozens of EB-5 investors invest in a single project, who may all be represented by one U.S. law firm or by different law firms. The lawyer, as preparer of the Petition, affirms that he or she has prepared the petition at the request of the EB-5 investor and that it is based on all information of which he or she has knowledge. The engagement letter of the law firm often provides that the EB-5 investor consents to deal with the law firm through the FMA as the investor's agent.

9. Because the EB-5 investor is in a foreign country and may not speak English, the lawyer or the EB-5 investor must hire agents, including accountants and translators, to prepare and translate the necessary papers to document the source of the investment funds and how they were transferred from the investor's control to the project. Here, the FMA is proposing that the law firm engage the FMA to provide the services that would otherwise have to be performed by a foreign-language speaking accounting firm or staff of the law firm. The inquirer represents that the FMA would charge the same fixed fee that an outside firm or the law firm would charge. The FMA also proposes to serve as the point of contact with the client in the client's home country and to liaise with the lawyer in obtaining necessary documentation, for which the FMA would charge the lawyer an additional fee.

10. The law firm asks whether it may charge the client for such nonlegal services, whether it must disclose to the client that any portion of the fees charged to the client are being used to retain a nonlawyer to perform services in connection with the visa application, and whether it must disclose that the FMA is providing these services.

QUESTIONS:

11. May a law firm charge the client for nonlegal services?

12. May the lawyer charge the client a single fee that includes a flat fee for the lawyer's services and a flat fee for the services of the nonlawyer?

13. Must the lawyer disclose to the client either the identity of the nonlawyer or the amount paid to the nonlawyer?

14. What other considerations apply when a law firm participates in an arrangement with a nonlawyer whereby the nonlawyer assists the lawyer in communicating with the client, and manages all document gathering and translation in connection with the representation?

OPINION:

Nonlawyer Assistants

15. Lawyers often hire nonlawyers to help them provide legal services. These nonlawyers may be employees of the law firm or outside service providers. See New York Rules of Professional Conduct (the "Rules"), Rule 5.3, Comment [3] ("A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include . . . an investigative or paraprofessional service, . . . a document management company, . . . a third party for printing or scanning, and . . . an Internet-based service to store client information").

16. Ordinarily, when use of a communication agent is necessary for effective communication with a client, use of such an agent is ethically required. See N.Y. State 1053 (2015) (use of sign language interpreter to assist communication with a deaf client). As we said in N.Y. State 1053, under Rule 1.4, a lawyer must, among other things, apprise the client of material developments in the client's matter and consult with the client about the means by which the client's objectives are to be accomplished. However, there is also a danger, when the intermediary is the sole source of communication with the client without appropriate participation by the lawyer, that the intermediary could interfere with the lawyer's obligation under Rule 1.4 to communicate with the client. Consequently, the lawyer must ensure that the intermediary is facilitating and not controlling communication with the client.

17. As Rule 5.3, Comment [2] explains, the lawyer must ensure that the conduct of nonlawyers that the lawyer employs or retains is compatible with the lawyer's professional obligations:

> [2] With regard to nonlawyers, who are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by. . . the law firm . . . is compatible with the professional obligations of the lawyers and firm. Lawyers . . . may employ nonlawyers outside the firm to assist in rendering those services. . . . A law firm must ensure that such nonlawyer assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information. . . . A law firm should make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm

and nonlawyers outside the firm who work on firm matters will act in a way compatible with the professional obligations of the lawyer.

Charging the Client for Legal and Nonlegal Services

18. The inquirer asks whether the lawyer may charge a single fee for legal and nonlegal services. Even if the inquirer were willing to be liable for the nonlegal services under the Rules, we believe including the expense for nonlegal services in the fee for legal services would be inappropriate. Rule 1.5(b) enjoins a lawyer to communicate to a client "the basis or rate of the fee and expenses for which the client will be responsible." [Emphasis added]. See also 22 N.Y.C.R.R. Part 1215.1(b) (Written Letter of Engagement Rule requires that the lawyer's letter of engagement address the scope of the legal services to be provided and an explanation of attorney's fees to be charged, expenses and billing practices). This information must be communicated to the client before or within a reasonable time after commencement of the representation and must be in writing where required by statute or court rule. Consequently, in order for the inquirer to bill the client for the expense of services provided by the FMA (or, for that matter, the expenses of third-party accountants and translators), the inquirer must communicate this possibility to the client and the nature of the charges that will be billed to the client.

19. Since these expenses would not constitute legal fees of the lawyer, they would appropriately be listed separately on any legal bill as expenses of the matter. Like legal fees, expenses are subject to the requirements of Rule 1.5(a) that they not be excessive. Moreover, without the consent of the client, the lawyer may bill only the exact amount of the expenses. See N.Y. State 1050 (2015) (citing ABA 93-397 (1993) and N.Y. City 2006-3); Cf. Rule 1.5, Comment [1] (discussing in-house expenses). Since the inquirer states that the FMA would charge the same amount that would be charged by a third-party provider or by the law firm for in-house staffers, these charges may not be not clearly excessive. However, the lawyer would have to determine that the FMA provides services of the same quality as those the lawyer's firm could provide itself or through third party providers.

Must the Lawyer Disclose the Identity of the Nonlegal Services Provider?

20. The inquirer asks whether it is necessary to disclose that nonlegal services are being provided by the FMA or another nonlawyer provider. We assume this means that the nonlegal expenses (e.g. for accounting and translation) would be listed as expenses but the provider would not be identified.

21. The answer to this question is governed by Rule 1.4 on communication with the client. Rule 1.4(a)(2) requires the lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished" and Rule 1.4(a)(4) requires the lawyer to "promptly comply with a client's reasonable requests for information." Comment [5] explains that the client should have "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued" and that the lawyer must act in the client's best interests. Thus, the answer depends upon whether it is reasonable to withhold the name of the provider.

22. In any representation, outside service providers may fall within a spectrum of importance to the client. In the case of an outside photocopy service, the name of the service provider likely is unim-

portant to the client, and the lawyer could reasonably conclude that its name need not be provided on the legal bill (although the client is always entitled to request copies of the bills for nonlegal services received by the lawyer).

23. Here, for several reasons, we believe it would not be reasonable to withhold the name of the provider. First, the FMA will have significant contact with the client, both in the collection of the necessary documents and in assisting in communication with the lawyer. Consequently, we believe it is important that the client be aware that the personnel providing these services are not employees of the lawyer but rather employees of the FMA.

24. Second, since the inquiry lists services that the FMA normally provides directly to the EB-5 investor, it is not clear whether the services for which the law firm would be paying are services for which the EB-5 investor is already being charged. We believe the EB-5 investor is entitled to a listing of services for which the lawyer is charging disbursements and the identity of the service provider, so that the investor may judge whether the charges are reasonable and appropriate and are not duplicative.

25. Third, the FMA here has a potential conflict of interest, which the client is entitled to assess. According to the inquirer, the FMA may be working for itself and a Regional Center, as well as for the law firm and the investor. For itself and the Regional Center, the FMA may (i) participate in the development of Regional Center Projects, (ii) market the projects of various Regional Centers to investors, and assist a Regional Center in communicating with the investor. It may receive fees from the Regional Center when the investment is made in the Center's project, including (i) a finder's fee, (ii) a proportion of the proceeds of the deal, and (iii) part of the administrative fee paid by the EB-5 Investor to the Regional Center. The FMA may also assist the EB-5 investor by advising on ancillary relocation matters, such as purchasing a home and selecting schools for children. We assume this may also involve a fee. In addition, the FMA is proposing to provide services to the law firm, for which it will be paid additional fees. We believe the client is entitled to understand the extent of the total fees that will be paid to the FMA, and to assess whether the FMA is exerting pressure on the client to "close the deal" on a particular Regional Center investment.

26. Fourth, informing the client of the name and compensation of the FMA also enables the client to determine whether the compensation contains an element of payment for the FMA's referral of the lawyer. The client may be the only person in a position to determine whether its interests are served by having the FMA perform the many functions it would be performing in connection with the visa application.

27. Finally, if the reason for failure to disclose the fact that the nonlegal services were provided by the FMA is to hide from the client the fact that the FMA is being paid additional amounts in connection with the immigration visa application, then the bill might be fraudulent within the meaning of Rule 1.5(d)(3) (a lawyer shall not enter into an arrangement for, charge or collect "a fee based on fraudulent billing."); Rule 1.5, Cmt. [1A] ("A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information"); Rule 1.0(i) ("fraud" or "fraudulent" includes conduct that has a purpose to deceive).

28. For all these reasons, we believe the lawyer must disclose to the client the roles and compensation of the FMA.

Other Considerations When a Lawyer has a Relationship with a Nonlawyer

29. Both the Rules and our opinions note several concerns when lawyers and nonlawyers join to provide legal and non-legal services. These include ensuring that (A) the lawyer does not allow the nonlawyer to affect the lawyer's independent professional judgment on behalf of the client, (B) the client consents to any potential conflicts of interest; (C) the lawyer does not share legal fees with the nonlawyer, (D) the lawyer does not pay the nonlawyer for referrals, (E) the lawyer adequately supervises the work of nonlawyers who assist in the provision of legal services, and (F) the client understands the scope of the representation. See N.Y. State 1068 (2015) (lawyer joining with a claims recovery firm which would assemble documents necessary to file the client's claim and monitor the process of applications filed on behalf of the client); N.Y. State 992 (2013) (lawyer and nonlawyer establishing disability office to help with government benefit matters); N.Y. State 976 (2013) (lawyer and nonlawyer performing forensic mortgage analysis and legal services); N.Y. State 885 (2011) (lawyer and nonlawyer working together on property tax reductions). See also N.Y. City 2014-1. We summarize those issues below.

A. Interference with Lawyer's Independent Professional Judgment

30. Rule 5.8(a) prohibits, except in certain limited circumstances, a "contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services," (emphasis added). The exceptions provided for in Rule 5.8(a) involve relationships with firms in professions contained on a list maintained by the Appellate Divisions under Section 1205.3 of the Joint Appellate Division Rules. FMAs are not in one of those professions. Consequently, an exclusive relationship with any FMA is prohibited by Rule 5.8.

31. Under Rule 5.8(c), the provisions of Rule 5.8(a) do not apply to "relationships consisting solely of non-exclusive reciprocal referral agreements or understandings" between a lawyer and a nonlegal professional or nonlegal professional services firm. This opinion assumes that the inquirer and the FMAs with which the inquirer deals do not have an exclusive relationship. Nevertheless, since the inquiry suggests that FMAs are one of the major ways attorneys in this field obtain their clients, the inquirer must be wary of a relationship that is non-exclusive in name only. Our opinions express concern for referral relationships that are effectively exclusive. See N.Y. State 992 (2013) (lawyer may not effectively form a partnership with a nonlawyer disability office).

32. Even when Rule 5.8(a) does not apply, other Rules require complete professional independence and uncompromised loyalty of the lawyers to the client. See Rule 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice"); Rule 5.4(a) ("Unless authorized by law, a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.") Because an FMA who is entitled to fees upon closing of an investment may have an economic interest in ensuring that the closing occurs, where the FMA has a continuing role in the representation of the client, we believe there is a significant risk of interference

with the lawyer's independent judgment. Cf. Matter of Greene, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981), cert. denied, 455 U.S. 1035 (1982) (lawyer may not ask a real estate broker to solicit clients for the lawyer, because the broker has a conflict of interest that may affect the recommendation). Consequently as noted in the next paragraph, the lawyer must take steps to ensure that the lawyer's duty of loyalty will not be compromised.

B. Client Consent to Potential Conflicts of Interest.

33. Rule 1.7(a)(2) prohibits a lawyer from representing a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business or other personal interests.

34. Here, because the lawyer may receive continuing referrals from the FMA, there is a significant risk that the lawyer's judgment on behalf of the client will be affected. The FMA has an economic interest in the client's investing in a particular Regional Center project as the basis of the visa application. If the lawyer believes the investment is not in the best interests of the client, the lawyer may nevertheless be reluctant to so advise the client, because acting contrary to the interests of the FMA may affect future referrals from the FMA. See Matter of Lefkowitz, 47 AD3d 326, 328 (1st Dep't 2007) (upholding findings of liability against an immigration lawyer on conflicts grounds, among others, when referee found that lawyer was dependent on an immigration agent for case referrals, but never informed clients of this conflict).

35. Rule 1.7(b), however, allows the lawyer to represent the client as long as the lawyer reasonably believes he or she will be able to provide competent and diligent representation and the client gives informed consent, confirmed in writing. Although some of the language of Rule 1.7(b) seems more suited to representation of two clients with differing interests, Comment [2] to Rule 1.7 explains that it also applies to a client whose representation might be adversely affected by the lawyer's personal interest. Rule 1.0(j) indicates that "informed consent" denotes that the client must agree to the proposed course of conduct after the lawyer has communicated information "adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives."

36. We believe that the lawyer's potential personal conflict of interest here is consentable, as long as the lawyer believes he or she will be able to provide competent and diligent representation to the client, and the representation is not prohibited by law, within the meaning of Rule 1.7(b)(2). Consequently, we believe the lawyer must make the determination that he or she will be able to provide competent and diligent representation, and, if the lawyer is able to make such determination, must obtain the client's informed consent.

37. We note that the inquiry states that the lawyer's engagement letter often provides that the EB-5 investor consents to deal with the law firm through the FMA as the investor's agent. We do not believe the lawyer may rely on that authorization until the client has provided informed consent to the lawyer's personal conflict. Nor should the lawyer rely on the FMA to explain the conflict and obtain consent.

C. Fee-Sharing

38. Our prior opinions have identified two concerns involving the fee paid to a nonlegal services provider – whether the lawyer is sharing legal fees with the nonlawyer and whether the lawyer is paying the nonlawyer for referring legal business.

39. Subject to exceptions not applicable here, Rule 5.4(a) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer. Rule 5.4(a). The inquirer states that both the lawyer and the FMA would charge flat fees for their services. Moreover, the inquirer would pay the FMA the same fixed fee that the law firm would otherwise have to pay foreign-language speaking accounting firm or staff of the law firm speaking that language. Assuming that the fees of the FMA are not related to the amount of the fees charged by the immigration lawyer, and that the lawyer has not reduced the fees the lawyer normally charges in order to cover the fees of the nonlawyer, the inquiry would not involve a lawyer sharing legal fees with a nonlawyer. See N.Y. State 1068 (2015) (as long as the claims recovery firm provides substantial assistance in the proceedings and the compensation of the claims recovery firm is commensurate with the services it provides, then the lawyer would not be improperly sharing legal fees with a nonlawyer); N.Y. State 976 (2013) (arrangement could constitute impermissible fee sharing if the lawyer's payment to the intermediary is insufficiently related to the value of the company's services); N.Y. State 885 (2011) (finding improper fee sharing where there appeared to be no relation between the funds to be received by the nonlawyer company and the value of the services performed and stating that the lawyer may not reduce fees as part of an arrangement to accept referrals from a nonlawyer who provides services to clients).

D. Payment For Referrals

40. Rule 7.2(a) prohibits a lawyer from compensating or giving anything of value to a person to recommend or obtain employment by a client or as a reward for having made a recommendation resulting in employment by a client. As we said in N.Y. State 942 (2012), "it would violate this rule if the inquirer would be giving something of value to [the nonlawyer] in exchange for client referrals." As long as hiring the FMA is not a condition (express or implied) of the referral, and the compensation to the FMA for the services does not exceed the reasonable value of its services, the lawyer does not appear to be paying a prohibited referral fee in violation of Rule 7.2(b). On the other hand, if the lawyer chooses to hire the FMA rather than another service provider that the lawyer believes would be better at performing the required tasks, then the choice of the FMA may reflect compensation for referring the client.

E. Supervision of Nonlawyers

41. As we noted above, the lawyer must ensure that the conduct of nonlawyers employed by or retained by the law firm is compatible with the professional obligations of the lawyer. See Rule 5.3, Comment [2].

42. Rule 5.3(b) provides that "A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer" if the lawyer "orders or directs the specific conduct or with knowledge of the specific conduct, ratifies it." The immigration lawyer here is undoubtedly ordering the work and "ratifies" that work by incorporating it into the EB-5 visa application. Accord-

ingly, the lawyer must supervise the work of the FMA and ensure that the work of the FMA is consistent with the lawyer's professional obligations to the client and that the lawyer – not the FMA – is controlling the representation.

F. Scope of Representation

43. The inquiry indicates that the FMA is referring the EB-5 client for the purposes of preparing the EB-5 investor's immigration application. Since the EB-5 investment is an integral part of the immigration application, we believe a reasonable client would expect that the lawyer will give advice on whether the proposed investment meets the EB-5 visa criteria. If there is any disagreement between the lawyer and the FMA in this regard, the lawyer must ensure that his or her advice is transmitted accurately to the client.

CONCLUSION:

44. A lawyer may enter into an arrangement with a nonlawyer foreign migration agent whereby the nonlawyer hires the lawyer on behalf of the client and assists the lawyer in communicating with the client, as well as gathering and translating documents that are required in connection with the representation, as long as (1) the relationship between the lawyer and the nonlawyer is not exclusive, (2) the nonlawyer does not interfere with the lawyer-client relationship, (3) the client consents to the potential conflict of interest resulting from the referral relationship between the lawyer and the foreign migration agent, and (4) the lawyer is not paying the foreign migration agent for referrals. The lawyer must bill the client separately for fees and expenses and must inform the client of the name and amount charged by the foreign migration agent for nonlegal services.

(26-16)

OPINION 1117 (04/04/2017)

TOPIC: Conflict of interest; serving as lawyer and broker in same real estate transaction

DIGEST: A lawyer who receives a broker's commission in a real estate transaction may not also serve as the lawyer for the buyers, even if the buyers are long-time clients and friends and have requested both kinds of services

RULE: 1.7(a) & (b)

FACTS:

1. The inquirer is an attorney and licensed real estate broker. A married couple, long-standing clients and friends of the inquirer, seek to buy real estate and have asked the inquirer to represent them as both broker and attorney in that real estate purchase.

2. The inquirer proposes to serve in both of those capacities in the real estate transaction. As broker, the inquirer would receive a brokerage commission from the seller (which we assume would be a percentage of the sale price of the real estate). As attorney, however, the inquirer would provide the requested legal services pro bono, because the buyers have limited resources.

QUESTION:

3. May a lawyer who is serving as a broker in a real estate transaction also provide pro bono legal services to the buyers in that transaction?

OPINION:

4. The general provisions on conflicts of interest are set forth in Rule 1.7 of the New York Rules of Professional Conduct (the "Rules"). A lawyer with a conflict of interest under Rule 1.7(a) may not represent a client unless the conflict is waivable and is properly waived by the client under Rule 1.7(b). One kind of conflict, a "personal interest" conflict, arises when a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Rule 1.7(a)(2).

5. Such personal interest conflicts are generally present when a lawyer provides brokerage services as well as legal services in the same real estate transaction. We have opined on numerous occasions that a lawyer may not act as an attorney on behalf of any party to a real estate transaction in which the lawyer is also acting as a broker. See, e.g. N.Y. State 1013 ¶ 1 (2014); N.Y. State 933 ¶ 7 (2012); N.Y. State 919 ¶ 3 (2012). In N.Y. State 753 (2002), we explained our reasoning:

The rationale for these opinions is that a lawyer should not have a personal stake in the advice rendered, and a broker who is paid only if the transaction closes cannot be fully independent in advising the client as a lawyer.

See also N.Y. State 1015 (2014) (quoting N.Y. State 753 and citing later opinions).

6. Moreover, while many conflicts may be waived by the client, that is not the case when a lawyer serves as both broker and attorney. "[T]he personal interest of a lawyer-real estate broker in the brokerage fee that will be generated by a closing of a real estate transaction so conflicts with the lawyer's responsibility to provide independent legal judgment with respect to that transaction as to preclude the dual roles and to make the conflict non-consentable by the client." N.Y. State 933 ¶7 (2012).

7. This per se rule that serving as both broker and attorney in a real estate transaction creates a non-consentable conflict does not apply in certain situations involving non-standard arrangements for broker compensation. For example, the per se rule does not apply when the broker is to be compensated by a flat fee not dependent on the closing of the transaction,[1] or when the broker credits the full amount of the brokerage commission to the client.[2] But here, as we understand the inquiry, the broker compensation would be the usual kind of commission and would be retained by the inquirer. Accordingly, this matter is subject to our longstanding per se rule, and the conflict is non-consentable.

8. The fact that the inquirer would provide the legal services pro bono does not change this conclusion. See N.Y. State 916 (2012) ("A lawyer may not offer free legal services as an add-on bonus to a party to a real estate transaction in which the lawyer is acting as broker"). Indeed, underlying the per se rule is the materiality of a standard brokerage commission. See N.Y. State 1015 ¶7 (2014) ("The risk that legal judgment would be adversely affected is heightened by the common circumstance that the broker's contingent fee will be substantially greater than the fee of the lawyer representing the seller."). When the amount of the legal fee is zero, the relative importance of the brokerage fee becomes even greater, and so does the risk it poses to the lawyer's independent legal judgment, because the only way the lawyer can make money in this scenario is to close the real estate transaction and obtain the broker's commission.

9. Seeking to avoid application of the per se rule discussed above, the inquirer asserts certain distinctions from the facts of our prior opinions. The inquirer points out that the provision of both kinds of services would result from a request by the clients, who are long-time clients and friends of the inquirer, rather than from the attorney's suggestion. The inquirer also notes that the brokerage commission would be paid by the seller and would result in no financial burden to the inquirer's clients.

10. We do not think that these distinctions change the result. The lawyer's interest in the commission is the same no matter who suggested the provision of brokerage services and no matter who pays that commission. The fact that the broker's commission will be paid by the seller rather than by the lawyer's client (the buyer) does not diminish the risk of an adverse impact on the lawyer's independent professional judgment. A large commission is a large commission.

1 The per se rule of a nonconsentable conflict applies whenever the brokerage services are compensated in the usual way, as a commission contingent on the transaction being closed. We have also considered the context of an alternative fee arrangement in which when brokerage services are compensated by a fixed and non-refundable fee, not contingent on closing. We found that such a fee arrangement did not give rise to a conflict, and while there could be other foreseeable conflicts in such a situation, those other conflicts could be subject to waiver by informed consent. N.Y. State 1015 ¶¶ 8-10 (2014).

2 When a lawyer who is also acting as a real estate broker remits or credits the entire brokerage fee to the client, then the brokerage fee typically would not give rise to the kind of personal-interest conflict described above. See N.Y. State 845 part C (2010) (a lawyer who will be compensated as a broker may share part of her brokerage commission with a referring lawyer who represents a buyer or seller in the transaction if the referring lawyer remits or credits the referral fee to the client).

11. In N.Y. State 1043 (2015), we rejected the argument that the benefit to the client from receiving free legal services eliminates the conflict. There, the inquirer represented an estate in the sale of real property through a real estate broker the lawyer had recommended to the executors. The broker later offered to pay the lawyer a referral fee (25% of the broker's commission), which the lawyer proposed to accept in lieu of charging legal fees to the estate for services rendered in the real estate transaction. We disapproved, saying:

> The disabling conflict that [our prior] opinions identify is a lawyer's pecuniary interest in the broker's . . . commission . . . which irredeemably interferes with the lawyer's distinct obligation to exercise independent professional judgment on the client's behalf. That the estate beneficiaries may benefit from the arrangement does not remedy this circumstance, any more than a lawyer/broker's waiving a legal fee, which is also of benefit to the client, can do so.

12. Conceivably the friendship between the lawyer and the clients could be so strong as to serve as an adequate counterweight to the lawyer's interest in the commission, but the test in the Rules does not turn on so subjective an assessment. Rather, it turns on these objective standards: whether "a reasonable lawyer" would find a significant risk that personal interests would compromise professional judgment, and whether the actual lawyer "reasonably" believes there will be competent and diligent representation. We continue to believe that application of these objective standards supports the per se rule set forth in our prior opinions that renders a conflict such as this one non-consentable.

CONCLUSION:

13. In a real estate transaction, even when a lawyer provides pro bono legal services at the request of clients who have long been clients and friends of the lawyer, the lawyer may not also serve in that transaction as a broker compensated by commission. The conflict cannot be cured by the client's consent because it is non-consentable.

(5-17)

OPINION 1118 (04/04/2017)

TOPIC: Confidential information; disclosure to collect a fee

DIGEST: A lawyer may disclose confidential information reasonably necessary to collect a fee, but must take all reasonable measures to limit the disclosure to information that is objectively necessary for that purpose.

RULES: 1.6(a) & (b)

FACTS:

1. The inquirer represented a client in a court action that ended in a settlement before trial. Shortly before the settlement, the client advised the lawyer of certain facts that, if disclosed, would be detrimental or embarrassing to the client. The settlement was ultimately disbursed to successor counsel, and a litigated fee dispute arose among the client, the inquirer and other lawyers who had been engaged on the matter. In connection with the fee dispute, the inquirer believes that disclosure of some of confidential information may be necessary to show the work he did in order to support a quantum meruit recovery.

QUESTION:

2. May a lawyer disclose confidential information reflected in time sheets by providing the time sheets to support a quantum meruit recovery?

OPINION:

3. Rule 1.6(a) of the New York Rules of Professional Conduct (the "Rules") imposes a general duty on a lawyer not to knowingly reveal confidential information or use such information to the disadvantage of a client or for the advantage of the lawyer, but Rule 1.6(b) provides several exceptions to that general duty. Rule 1.6(b)(5)(ii) provides: "A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to establish or collect a fee . . . ."

4. Comment [14] to Rule 1.6 emphasizes that "a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose." Initially, the lawyer must determine how much disclosure the lawyer believes "necessary" to collect the fee, but the lawyer's determination must be reasonable. Rule 1.0(r) specifies that a lawyer "reasonably believes" something when "the lawyer believes the matter in question and . . . the circumstances are such that the belief is reasonable." While Comment [6A] to Rule 1.6 notes that the lawyer's "exercise of discretion" conferred by other exceptions in Rule 1.6(b)[1] "requires consideration of a wide range of factors and therefore should be given great weight," the Comments contain no such exhortation to defer to the lawyer's judgment in the case of disclosures to collect a fee. Recognizing the lawyer's self-interest in collecting the fee, and the potential of threatened disclosure as a bludgeon to coerce

1 Comment [6A] refers to the lawyer's exercise of discretion under subparagraphs (1) to (3) of Rule 1.6(b), which deal with disclosures to prevent bodily harm or to prevent the commission of a crime or potential injury to third persons arising out of a lawyer's prior representations.

payment, the lawyer should be particularly careful to ensure that disclosure is truly "necessary" – and objectively so – to collecting the fee. See also In re Starbrite Properties Corp., 2012 WL 2050745, at *11 (E.D.N.Y. Bankr. June 5, 2012) (court referred to Disciplinary Committee a lawyer who unnecessarily disclosed client's fraudulent conduct in seeking to enforce a subpoena to support application for fee that client had refused to pay); In re Gonzalez, 773 A.2d 1026 (D.C. 2001) (lawyer admonished for disclosing, in connection with withdrawal motion, not only that fees were owed but also extraneous and embarrassing client information).

5. In N.Y. State 980 (2013), we noted that "[t]he Rules do not define 'necessary,' but WEBSTER'S UNABRIDGED DICTIONARY at 1200 (2nd ed. 1983) says that the word means 'unavoidable, essential, indispensable, needful.'" N.Y. State 980 n.1. In that opinion, which addressed the disclosure of confidential information to collect a fee in a bankruptcy proceeding, we distilled several principles that are helpful in making that determination:

> First, a lawyer should not resort to disclosure to collect a fee except in appropriate circumstances. Second, the lawyer should try to avoid the need for disclosure. Third, disclosure must be truly necessary as part of some appropriate and not abusive process to collect the fee. Fourth, disclosure may not be broader in scope or manner than the need that justifies it, and the lawyer should consider possible means to limit damage to the client.

N.Y. State 980 ¶ 6.[1]

6. Applying these principles here, the inquirer should take all reasonable measures to limit the disclosure of confidential information to information that is objectively needed to prove entitlement to the fee (assuming that the claim to the fee is also objectively reasonable). For example, it may be that the fact that work was done at a particular time could be shown by revealing only redacted time entries or redacted communications with the client. If disclosure to the Court would not itself be harmful to the client, or would be less harmful, the inquirer should consider approaching the Court for guidance.[2] See, e.g., ABA Formal Op. 476 (2016) (noting availability of redaction and in camera submission to preserve confidentiality of information in making motion to withdraw for nonpayment of fees) (citing In re Gonzalez, 773 A.2d at 1032).

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1 N.Y. State 980 ¶ 9 also cautioned that the attorney should consider whether the information from the client was not only confidential under the rules of ethics, but also subject to the attorney-client privilege. We do not opine on the rules of privilege, but Opinion 980 noted authority for the proposition that an exception to the privilege may apply to information reasonably necessary to collect a fee. Id. n.8, citing Alexander, CPLR §4503 PRACTICE COMMENTARIES, C4503:5(b) (McKinney) (discussing, as an exception to the privilege, "the rule that permits a lawyer to reveal confidences in order to collect a fee from the client"), and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §83(1) (2000) ("attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding . . . to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer").

2 Comment [14] to Rule 1.6 advises:

> If the disclosure will be made in connection with an adjudicative proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the Court should affirmatively order disclosure, the inquirer would be permitted under Rule 1.6(b)(6) to disclose the confidential information to the extent necessary to comply with the Court's order.

CONCLUSION:

7. The inquirer may disclose confidential information reasonably necessary to collect a fee, but must take all reasonable measures, such as redaction or seeking Court guidance, to limit the disclosure of confidential information to information that is objectively reasonable to prove his entitlement to his fee.

(8-17)

OPINION 1119 (04/07/2017)

TOPIC: Former partner or associate of district attorney; criminal law; conflict of interest

DIGEST: A lawyer who is a former associate of the newly elected district attorney may represent criminal clients being prosecuted by the district attorney, provided that (i) the district attorney has severed all ties with the firm and (ii) a reasonable lawyer would not conclude that there is a significant risk that the lawyer's professional judgment on behalf of the clients will be adversely affected by the lawyer's former relationship with the district attorney (or the lawyer's personal interest conflict is consentable and the client has consented, confirmed in writing).

RULES: 1.0(e), 1.7(a) & (b), 1.11(d), 8.3

FACTS:

1. The inquirer is an attorney who works in the law firm where the newly elected district attorney of the county was once a partner. The inquirer seeks to represent defendants in criminal matters in the county.

2. The office of district attorney is a full-time position and the district attorney no longer works at the firm.

QUESTION:

3. May a lawyer who practices in the law firm where the newly elected district attorney of the county was formerly a partner represent defendants in criminal matters in that county?

OPINION:

4. The New York Rules of Professional Conduct (the "Rules") regulate the conduct of the inquirer as well as the district attorney. We answer questions only if they concern the conduct of the inquirer and do not give opinions about the conduct of third parties such as the district attorney here. Nevertheless, in representing defendants in criminal matters, the inquirer should be familiar with the rules applicable to the prosecutor.

Rules Governing the Inquirer's Conduct

5. Rule 1.7(a)(2) prohibits a lawyer from representing a client if "a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's . . . personal interests", unless, under Rule 1.7(b), the conflict is consentable and the lawyer has obtained client consent, confirmed in writing. Thus, the inquirer must determine whether a reasonable lawyer would conclude that the inquirer's personal relationship with the district attorney (by virtue of being a former associate of the district attorney) would adversely affect the representation of clients in criminal matters for which the district attorney's office is responsible.

6. If the inquirer reasonably believes that a reasonable lawyer would *not* reach such a conclusion, then there is no conflict under Rule 1.7 and the inquirer may proceed without seeking consent from any client. If the inquirer believes that a reasonable lawyer *would* conclude that the inquirer's prior personal relationship with the district attorney creates a "significant risk" that the inquirer's professional judgment on behalf of a criminal defendant in the county where the former partner is now the district attorney will be adversely affected, then a conflict exists under Rule 1.7(a)(2).

7. If a conflict exists under Rule 1.7(a)(2), then the inquirer make not undertake the representation unless the inquirer determines, under Rule 1.7(b)(1), that the conflict is consentable, because:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; [and]
>
> (2) the representation is not prohibited by law.

8. If the inquirer determines that the conflict is consentable, then the inquirer may proceed with the representation, as long as the inquirer obtains the consent of each affected client and the consent is "confirmed in writing" within the meaning of Rule 1.0(e).

Rules Governing the District Attorney's Conduct

9. Rule 1.11(d)(1) addresses the conduct of the district attorney as a public official. It provides:

> Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not . . . participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter . . . .

10. If the inquirer knows that the district attorney participated personally and substantially in a matter while in private practice, the inquirer may wish to explore the provisions of applicable law and may have an obligation or discretion under the Rules to report such knowledge to the tribunal. *See* Rule 8.3(a). However, since the inquiry does not state that the newly elected district attorney, while at the firm, was involved in any of the matters on which the inquirer proposes to work, we assume that the matters that are the subject of this inquiry do not include any matters on which the district attorney "participated personally and substantially" while at the firm. *See* N.Y. State 638 (1992) (proper for newly elected district attorney to prosecute a client of the prosecutor's former law firm in the same case if the prosecutor had no personal and substantial participation in the firm's representation and did not otherwise obtain confidential client information relevant to the matter; whether the district attorney's staff is disqualified depends upon application of the rule of necessity and on the source of the district attorney's disqualification).

11. This inquiry is distinguishable from our prior opinions concerning part-time government lawyers with prosecutorial responsibility, which are based on the rules against representing differing interests in governmental and private practice (currently found in Rule 1.7(a)). We have consistently held that a part-time prosecutor who is also engaged in private practice is barred from representing defendants in criminal matters anywhere in New York State. *See, e.g.*, N.Y. State 1073 (2015), N.Y.

State 859 (2011); N.Y. State 544 (1982). We also have extended that disqualification to a partner or associate of the part-time prosecutor. *See* N.Y. State 859 (2011), N.Y. State 40 (1966) (applying the former Canons). But those opinions do not apply here because the district attorney here is not part-time and has severed all ties with the inquirer's law firm.

CONCLUSION:

12. A lawyer may represent criminal defense clients being prosecuted by the district attorney who was once a partner at the lawyer's firm, provided that the district attorney has severed all ties with the firm and that a reasonable lawyer would not conclude there is a significant risk that the lawyer's professional judgment on behalf of the clients will be adversely affected by the former relationship with the district attorney (or the lawyer's personal interest conflict is consentable and the client has consented, confirmed in writing).

(3-17)

OPINION 1120 (04/12/2017)

TOPIC: Reporting Misconduct

DIGEST: If a lawyer for a government agency knows of a violation of the Rules by another agency lawyer, and the wrongdoer's conduct raises a substantial question as to the wrongdoer's honesty, trustworthiness or fitness to practice law, the government lawyer must report the information to a tribunal or other authority authorized to investigate and act on the conduct, unless the information constitutes confidential client information, and the agency does not consent to its disclosure. If a report to a tribunal or other authority is required, the lawyer must determine if the government agency's ethics office is a "tribunal" or "other authority empowered to investigate or act upon such violation." If the ethics office is not a tribunal or such other authority, the government lawyer may report initially to the ethics office of the government agency, but the lawyer may not defer to a decision by the ethics office not to report unless the reporting obligation involves an "arguable question of professional duty" and the decision of the ethics office not to report is a reasonable resolution.

RULES: 1.0(w), 1.6, 5.2, 8.3(a) & (b)

FACTS:

1. The inquirer represents a government agency (the "Agency") in federal administrative and court proceedings. The inquirer has come to know of a violation of the New York Rules of Professional Conduct (the "Rules") by another lawyer at the Agency that the inquirer believes raises a substantial question as to the other lawyer's honesty, trustworthiness or fitness as a lawyer.

2. The Agency has an internal process by which violations of the Rules must be reported first to an internal ethics office for review. The inquirer reported the facts to the internal ethics office but, although a reasonable period of time has elapsed, the internal ethics office has not responded to the inquirer's inquiries as to the status of its review of the report.

QUESTION:

3. If a lawyer for a government agency reports misconduct by another agency lawyer that meets the reporting requirements of Rule 8.3(a) to an internal ethics office of the lawyer's employer, has the lawyer satisfied the requirements of Rule 8.3(a)?

OPINION:

4. Rule 8.3(a) provides:

> (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

However, under Rule 8.3(c), this reporting obligation does not require the disclosure of "confidential information" otherwise protected by Rule 1.6, *i.e.*, information gained from any source during or

relating to the representation of a client (a) that is protected by the attorney-client privilege, (b) that is likely to be embarrassing or detrimental to the client if disclosed, or (c) that the client has requested to be kept confidential.

5. Thus, in determining whether the inquirer has a reporting obligation under Rule 8.3, the following elements must be satisfied:

(i) There must be a violation of the Rules by the wrongdoer,

(ii) The inquirer must know of the violation,[1]

(iii) The wrongdoer's conduct must raise a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law, and

(iv) Disclosure of the wrongdoer's conduct must not reveal client confidential information, unless the client consents to such disclosure.

6. Here, the inquirer advises that the first three elements have been satisfied. That leaves the fourth element, which raises two issues: (1) whether the facts known by the inquirer constitute confidential information of the client, and, if not (2) whether the inquirer's report to the government agency's internal ethics office satisfies the requirement of the Rule that the lawyer report knowledge of another lawyer's misconduct to a "tribunal or other authority empowered to investigate or act upon such violation."

Client Confidential Information

7. Our opinions make clear that a lawyer's obligation to report misconduct is limited by the lawyer's obligation to protect client confidential information, unless the lawyer has obtained the informed consent of the client to disclosure of otherwise confidential information. *See, e.g.,* N.Y. State 649 (1993) (where one lawyer knows that another lawyer who is executor for an estate proposes to engage or has engaged in wrongdoing, whether the first lawyer must disclose the wrongdoing depends on whether the information is legally privileged or whether applicable law requires disclosure of an otherwise protected "secret"), N.Y. State 635 (1992) (before reporting misconduct, lawyer must consider whether any knowledge that would be included in the report is a client confidence or secret). *See also* N.Y. City 2017-2 (reporting duty is limited by the lawyer's duty not to reveal client confidences without the client's informed consent after full disclosure, including disclosure that, once a report of misconduct is made to the disciplinary agency, the disciplinary agency may unilaterally decide to release the client's information without the client's knowledge or further consent).

8. Under Rule 1.6, information constitutes "confidential information" of the client if it was gained from any source (whether from the client or elsewhere) during or relating to the representation of the client and (a) the information is protected by the attorney-client privilege, (b) it is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested that it be kept confidential. Here, the client is the Agency. If disclosure of the wrongdoing would be embarrassing or

1 As we said in N.Y. State 635 (1992) and N.Y. State 480 (1978), the lawyer must possess a sufficient degree of knowledge of ostensibly wrongful conduct. A mere suspicion of misconduct is not sufficient.

detrimental to the Agency, or if the Agency has requested that the information not be disclosed, then there is an apparent tension between the goals of Rule 1.6 and 8.3: (1) the obligation of all lawyers to assist courts and disciplinary authorities in policing members of the bar, and (2) the obligation to maintain the confidentiality of client information. In addition, government lawyers (such as the inquirer here) also have a duty to seek justice. *See* Rule 3.8, Cmt. [6B]. However, since Rule 8.3 specifically exempts information protected as confidential, the Rules themselves resolve the tension in favor of confidentiality. *See* Rule 1.6, Cmt. [2] ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source. . . . The lawyer's duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship.").

9. The definition of "confidential information" allows the client to ask the lawyer to treat information as "confidential information" for any reason. However, it is not always clear in an organizational context who speaks for the client. Here, the inquirer must determine whether the ethics office has the authority to speak for the client in asking that the information be kept confidential. If the ethics office does have that authority, that determination will be binding on the inquirer. While the Agency is not required to provide the inquirer with reasons for a determination that its information should be treated as "confidential information," there are many benign reasons why the Agency might do so, at least at this point. For example, the information may be protected by law as private information; or the Agency may have referred the matter to a prosecutor, whose investigation is confidential and protected by law.

Tribunal or Other Authority Empowered to Investigate or Act on Violations

10. Under Rule 8.3(a), if a report of misconduct is required, it must be made to a tribunal or to "other authority empowered to investigate or act upon such violation."

11. The term "tribunal" is defined in Rule 1.0(w) as follows:

> (w) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an *adjudicative capacity*. A legislative body, *administrative agency* or other body acts in an adjudicative capacity when a *neutral* official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter. [Emphasis added.]

The Agency here may act in an adjudicative capacity when determining litigated matters before the Agency. That would probably be the case, for example, if an administrative law judge or similar "neutral" quasi-judicial officer in the Agency hears a matter. If so, then a report to the administrative law judge about a lawyer for a party would satisfy Rule 8.3's requirement to report to a "tribunal." However, the inquiry here does not state that the Agency's ethics office meets the definition of a tribunal, and it seems more likely that it does not constitute a tribunal within the meaning of Rule 1.0(w). However, this is a factual question that the inquirer must determine.

12. In N.Y. State 822 (2008), we discussed what might constitute "other authority" to which a report might be made, in the context of DR 1-103(A), the predecessor to Rule 8.3(a). We noted that the phrase "investigate or act" in that disciplinary rule suggested that the tribunal or authority must be a court of competent jurisdiction or a body having enforceable subpoena powers. This would include a grievance or disciplinary committee operating under the powers granted by the Appellate Division of the State Supreme Court under Section 90 of the New York Judiciary Law and related court rules. We therefore said the report could be filed with the grievance committee in the Appellate Department in which litigation is pending or with the grievance committee in the Department where the wrongdoer is admitted or where the prohibited conduct occurred. *See also* Nassau County 98-12 (if reporting is required, the lawyer may report to the court or to a grievance committee); N.Y. City 1995-5 (a lawyer should report misconduct to the appropriate disciplinary or grievance committee).

13. Here, as with the question whether the Agency's internal ethics office is a tribunal, the question whether the Agency's ethics office qualifies as "other authority empowered to investigate or act upon" a violation of the Rules is a factual question that the inquirer must determine.

Timing of Report

14. If a report under Rule 8.3 is required, the Rule does not specify the timing of the required report. In N.Y. State 822 (2008), we said: "The report need not be made immediately or without some reasonable effort at remediation, particularly where the consequences of reporting the violation may be more harmful to the lawyer's client than some alternative course of action." *See U.S. v. Cantor*, 897 F. Supp. 110 (S.D.N.Y. 1995) ("DR 1-103 must be read to require reporting . . . within a reasonable time under the circumstances"); N.Y. City 1990-3 ("While it may be permissible in certain limited circumstances to postpone reporting for a brief period of time, we reiterate our caution that 'once a lawyer decides that he or she must disclose under DR 1-103(A), any substantial delay in reporting would be improper'"). Evaluation of the timing of a required report will entail considering the facts and circumstances of the underlying misconduct, whether there is ongoing harm to any affected person, and whether the misconduct can be remedied or mitigated, among other factors.

15. Thus, we believe that the inquirer's initial reporting to the ethics office is consistent with Rule 8.3. However, making a report to the internal ethics office does not automatically relieve the inquirer of the responsibility for making the report required by Rule 8.3 or ensuring that the Agency's ethics office makes such a report when the requirements of the Rules are met.

16. Rule 5.2(b) provides that a subordinate lawyer "does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." The inquirer believes that a violation of the Rules that meets the requirements of Rule 8.3(a) has occurred, and the Agency apparently has not stated that the facts surrounding the wrongdoer's conduct constitute confidential information. Nevertheless, it is possible that the ethics office, after investigation, may conclude that the wrongdoer's conduct need not be reported to a tribunal or other authority, or may decide that the information necessary to make a report is "confidential information" within the meaning of Rule 1.6(a). In order for the inquirer to rely on the decision of the Agency's ethics office in matters of professional responsibility, the question of a duty to report must be "arguable" and the resolution by the ethics office not to report must be "reasonable."

CONCLUSION:

17. If a lawyer for a government agency knows of a violation of the Rules by another agency lawyer, and the wrongdoer's conduct raises a substantial question as to the wrongdoer's honesty, trustworthiness or fitness to practice law, the government lawyer must report the information to a tribunal or other authority authorized to investigate and act on the conduct, unless the information constitutes confidential client information, and the agency does not consent to its disclosure. If a report to a tribunal or other authority is required, the lawyer must determine if the government agency's ethics office is a "tribunal" or "other authority empowered to investigate or act upon such violation." If the ethics office is not a tribunal or such other authority, the government lawyer may report initially to the ethics office of the government agency, but the lawyer may not defer to a decision by the ethics office not to report unless the reporting obligation involves an "arguable question of professional duty" and the decision of the ethics office is a reasonable resolution.

(1-17)

OPINION 1121 (05/03/2017)

TOPIC: Fee sharing between lawyers and nonlawyers; aiding the unauthorized practice of law

DIGEST: Where an insurance carrier has paid a claimant corporation's attorney fees in an arbitration directly to the company's in-house counsel as attorney of record, and where the company is entitled to recover reasonable attorney fees under relevant New York law, the in-house counsel may remit the attorney fees to the company without violating the rule against fee-sharing.

RULES: 5.4(a), 5.5(b)

FACTS:

1. The inquirer is in-house counsel to XYZ Corporation ("XYZ"), an equipment manufacturer that provides medical equipment to individuals through prescribing physicians. The physicians typically file a claim with the patient's insurance company, seeking payment to XYZ for the cost of the prescribed equipment under provisions of New York's no-fault insurance law and the applicable regulations thereunder. The insurance company either approves the claim and pays XYZ for the prescribed equipment, or preliminarily denies the claim, in which event XYZ contests the denial at an arbitration.

2. The inquirer, an in-house lawyer at XYZ, handles general corporate matters on behalf of XYZ and also litigates arbitrations regarding denied insurance claims on behalf of XYZ. XYZ wants its in-house counsel to represent it at more of these arbitrations instead of engaging outside counsel. XYZ's in-house counsel perform no legal work on behalf of third parties. They receive a salary and do not receive any bonus or other amount relating to the volume or value of successful arbitration awards.

3. If a claimant such as XYZ recovers money as a result of an arbitration, settlement or award after litigation, the amount is paid in a bifurcated remittance: (1) principal and interest on the medical equipment cost denied incorrectly by the insurance company is paid to XYZ; and (2) attorney fees and, where applicable, reimbursement of the arbitration filing fee is paid to XYZ's counsel of record. The insurance company draws from no-fault funded accounts to pay the principal and interest, and from a separate account to cover attorney fees. The inquirer states that insurance companies generally require the attorney fee award be issued to the attorney of record, and will not pay the attorney fee portion directly to the applicant, XYZ company.

QUESTIONS:

4. A. May in-house counsel for XYZ remit the entire attorney fee portion of the arbitration award to the claimant, XYZ, or would such a remittal constitute fee-sharing?

   B. Would a remittal of attorney fees to XYZ constitute aiding a nonlawyer (XYZ) in the unauthorized practice of law?

OPINION:

Remitting Legal Fees to the Client

5. Rule 5.4(a) of the New York Rules of Professional Conduct (the "Rules") prohibits a lawyer from sharing legal fees with a nonlawyer, except under certain circumstances that are not applicable here involving deceased lawyers and retirement plans.

6. It is our understanding that, as a condition to providing medical equipment to an individual, XYZ requires the individual to assign to XYZ his or her claim against the insurance company by way of subrogation. Thus, XYZ is the owner of the claim against the insurance company and is the appropriate "party" to the claim against the insurance company.

7. This Committee has interpreted the applicability of the fee-sharing prohibition in Rule 5.4(a) in several inquiries involving remitting attorney fees to a nonlawyer client or employer. In N.Y. State 1096 (2016), we concluded that an outside lawyer could permit a non-lawyer client to keep some or all of the statutory attorney's fees awarded in a civil rights lawsuit, because the statutory fees were awarded to the "prevailing party" rather than to the lawyer and therefore did not fall within the prohibition against sharing legal fees with a nonlawyer. We observed that a lawyer's decision to decline or waive the right to some or all of the statutory fees awarded directly to a client was not the type of fee-sharing encompassed in Rule 5.4(a). The analysis in Opinion 1096 turned in large part on the fact that the statutory attorney fee award was to the "prevailing party," and thus to the client rather than directly to the lawyer. See N.Y. State 1096 ¶7 (citing various New York State fee-shifting statutes). Thus, if the client gave any part of the fee award to the lawyer, the client would be sharing attorney fees with the lawyer, rather than the other way around.

8. In N.Y. State 906 (2012), this Committee addressed whether an in-house lawyer employed by a not-for-profit organization that was not a law firm could share legal fees with the not-for-profit. We noted that New York did not adopt ABA Model Rule 5.4(a)(4), which expressly permits a lawyer to share court-awarded attorney fees with non-profit public interest organizations where the lawyer has prevailed in a litigated matter on behalf of the organization, and we therefore concluded that sharing fees with a not-for-profit is prohibited under New York's Rule 5.4(a). In distinguishing Opinion 906, N.Y. State 1096 (2016) explained that, in Opinion 906, the inquirer was a lawyer employed by a not-for-profit organization that was representing third parties, such as civil rights plaintiffs, and not representing the not-for-profit organization itself. Thus, in Opinion 906, the inquirer proposed to share fees not with the client who had won fees for itself (as in Opinion 1096), but rather with a not-for-profit organization that had sponsored the litigation on behalf of a prevailing third party.

9. The facts in this inquiry are distinguishable from those in both Opinion 1096 and Opinion 906. Here, the inquiring lawyer is an in-house counsel employed by the prevailing plaintiff (unlike the outside lawyer in Opinion 1096), and in-house counsel litigates the claim on behalf of the for-profit employer and not on behalf of third parties (unlike the staff lawyers employed by the non-profit representing prevailing third parties in Opinion 906). In addition, settlements and arbitral awards are bifurcated into a remittance of the principal and interest on the medical equipment claim to XYZ, and a separate remittance of attorney fees to the attorney of record in the proceeding. However, the statute

authorizing the attorney fee award here convinces us that the analysis in Opinion 1096, not Opinion 906, applies to this inquiry.

10. New York insurance law provides that, where the claimant proves a valid claim, "the claimant shall also be entitled to recover his attorney's reasonable fee for services necessarily performed in connection with securing payment of the overdue claim . . . ." N.Y. Ins. Law §5106: Fair Claims of Settlement (emphasis added).[1] Although the inquirer states that the arbitration panel remits payment of principal and interest to XYZ when XYZ recovers on its claims, and a separate attorney's fee check to the attorney of record, the statute provides that the claimant is "entitled" to the attorney fee award – not the attorney. Similarly, the rules of the AAA for New York no-fault claims governing the form and scope of the award (which may apply here) separately designate the portion reimbursable to the claimant for the filing fee, reasonable attorney's fees, and interest on the claim. Thus the claimant is entitled to payment of all components of the award, including the attorney fees, notwithstanding that the check for attorney fees is made out to the attorney of record. Because the claimant is entitled to the attorney fees under both New York Insurance Law and AAA rule, we conclude that in-house counsel may sign over to XYZ the attorney fee portion of the award without violating Rule 5.4(a)'s prohibition on fee-sharing.

Aiding in Unauthorized Practice of Law

11. The inquirer also asks if turning over the attorney fee awards here would aid a nonlawyer in the unauthorized practice of law. Rule 5.5(b) prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law. Section 495 of the New York Judiciary Law generally prohibits a corporation from practicing or appearing as an attorney-at-law for any person, soliciting any claim, or taking an assignment of a claim for the purpose of representing any person in the pursuit of a civil remedy.

12. Whether particular activity constitutes the unauthorized practice of law is a legal question that is beyond the jurisdiction of this Committee. However, the inquirer may wish to consider two exceptions to the prohibitions of Judiciary Law §495 that may apply here. First, Section 495(2) allows a moneyed corporation authorized to do business in New York to receive an assignment of a claim under a subrogation agreement. Second, Section 495(5) allows a corporation to employ attorneys in its own immediate affairs or in any litigation to which it is a party.

CONCLUSION:

13. Where an insurance carrier has paid a claimant corporation's attorney fees in an arbitration directly to the company's in-house counsel as attorney of record, and where the company is entitled to recover reasonable attorney fees under relevant New York law, the in-house counsel may remit the attorney fees to the company without violating the rule against fee-sharing.

(11-17)

1 See also 11 NYCRR 65-4.6 (Insurance Department regulations providing for limitations on attorney fees pursuant to section 5106 of the Insurance Law).

OPINION 1122 (05/03/2017)

TOPIC: Personal conflict of interest

DIGEST: A lawyer who serves as a foster parent may maintain a practice as an Attorney for Children and as the representative of other persons in proceedings in the Family Court of the same county. But if a reasonable lawyer would conclude, in relation to any given client, that a significant risk exists that the lawyer's professional judgment on behalf of the client will be adversely affected by his or her personal interest as a foster parent, the lawyer may not represent the affected client unless the lawyer reasonably believes that he or she can provide competent and diligent representation and the affected client gives informed consent confirmed in writing.

RULES: 1.7(a) & (b)

FACTS:

1. The inquirer, a family law practitioner, is considering serving as a foster parent under various provisions of the Family Court Act and the Social Services Law. The inquirer practices in the same county where she resides (and where she would serve as a foster parent).

2. The county commissioner of social services, as head of the county department of social services, or his or her delegate (collectively, the Commissioner) appears on behalf of the county in many of the family law actions in the inquirer's practice, including proceedings under Article 10 (Child Protective Proceedings) and Article 10-A (Permanency Hearings for Children Placed Out of Their Homes) of the Family Court Act. Consequently, both the Commissioner and the inquirer appear on behalf of their respective clients in all Article 10 and 10-A proceedings concerning children for whom inquirer has been named attorney.

3. The county also acts as the foster care agency. The Commissioner, as legal custodian of children who have been removed from their family home, has broad and continuing responsibility for the welfare of those children and, consequently, an active role with respect to the recruitment, training and licensure of foster parents, their selection and appointment as such by the court, oversight and compensation of the foster home, and termination of the foster relationship in favor of another or the conversion of the relationship to a permanency proceeding, among other duties.

QUESTION:

4. May a lawyer (i) maintain a practice as an Attorney for Children (f/k/a a Law Guardian) and as a representative of other parties in proceedings under Articles 10 and 10-A of the Family Court Act and (ii) concurrently serve as a foster parent in a jurisdiction in which the county department of social services acts as the foster care agency?

OPINION:

5. As Attorney for a Child, the inquirer's duty is to exercise professional judgment solely in the best interests of the child, both as a matter of ethics, *see* Rule 1.7 and Comment [1] thereto, and as a matter of law, *see, e.g.,* Family Court Act §§1016, 1033-b.) As a would-be foster parent, as a current

foster parent, or as a current foster parent desirous of becoming the adoptive parent of a foster child, inquirer has a personal interest in preserving and strengthening the foster relationship and in satisfying the Commissioner.

6. Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the "Rules") provides that, without the consent of the client, a lawyer may not represent a client (or, if the risk becomes apparent only after the representation has been commenced, continue the representation, if:

> a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or other personal interests.

7. Often, the inquirer's role as a foster parent will have no effect on her professional judgment on behalf of clients in her role as an Attorney for Children (or other parties to Family Court proceedings). However, from time to time, the dual roles may raise potential conflicts of interest. Although both the inquirer and the Commissioner must act in the best interests of the child in proceedings under the Family Court Act, at times, their professional interests or their views of the child's best interests may differ. In addition, there may be circumstances where the interests of the inquirer as Attorney for a Child and the inquirer's personal interests might differ. For example, such a circumstance might occur if the social worker overseeing inquirer's foster care were to testify in another proceeding adversely to inquirer's client in that other proceeding, thereby requiring inquirer to cross examine (or to forbear from cross examining) the social worker. *See* N.Y. State 790 (2005).

8. The Committee believes that, in many instances, a reasonable lawyer would deem the conflict between the inquirer's personal interests as a foster parent and her professional responsibility to a client in Article 10 and Article 10-A proceedings to be theoretical and remote and unlikely to affect the lawyer's professional judgment on behalf of the child (or another client) for which she is attorney. If there is "no significant risk" of an adverse effect, objectively determined, an attorney who is a foster parent may undertake and continue representations of children and adults in Article 10 and Article 10-A proceedings without the need to obtain informed client consent. *See* N.Y. State 790 (2005).

9. If, to the contrary, a reasonable lawyer would conclude there is a significant risk that the inquirer's professional judgment on behalf of any client will be affected by her interests as a foster parent, the inquirer would be required either to decline or to withdraw from representation of the client or, where permissible, seek client consent to the representation notwithstanding the conflict.

10. While the issue of whether an individual, adult or minor, has the capacity to give the necessary informed consent is beyond the scope of this opinion, the reader's attention is invited to the helpful discussion of the issue of a minor's capacity to give informed consent in N.Y. State 1069 (2015) ¶¶20-27. *See* also Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated (2016 ed.) pp. 467-468.

CONCLUSION:

11. A lawyer who serves as a foster parent may maintain a practice as an Attorney for Children and as the representative of other persons in proceedings in the Family Court of the same county, unless a reasonable lawyer would conclude, in relation to any given client, that a significant risk exists

that the lawyer's professional judgment will be adversely affected by his or her personal interest as a foster parent. If a reasonable lawyer would conclude that such a significant risk exists, the lawyer may, nevertheless, represent the affected client, provided that the lawyer reasonably believes that he or she can provide competent and diligent representation and the affected client gives informed consent confirmed in writing.

[6-17]

OPINION 1123 (05/15/2017)

TOPIC: False evidence; remedial measures

DIGEST: A divorce lawyer who learns that a client omitted a material asset in a sworn Statement of Net Worth has a duty to take reasonable remedial measures that are available, even after the conclusion of the proceeding. What measures are reasonable will depend on the facts and circumstances. They will begin with remonstrating with the former client to correct the Statement. If the client refuses, they may include withdrawing the lawyer's certification of the incomplete statement and withdrawing the statement. Disclosure of client confidences is required only "if necessary."

RULES: 1.0(i) & (k), 1.6(b), 3.3(a), (b) & (c)

FACTS:

1. After a divorce case resulted in a decree of divorce and property distribution, the inquiring lawyer's client revealed the existence of an asset that was omitted from the client's sworn Statement of Net Worth ("SNW"). The omitted asset was legally required to be included in the SNW and was subject to equitable distribution in the divorce. The client now wishes to use the omitted asset to pay off other obligations under the judgment of divorce. The value of the omitted asset is material to the size of the estate.

QUESTION:

2. When a lawyer who represented one of the parties in a divorce action learns, post-judgment, that the lawyer's client omitted an asset from the mandatory Statement of Net Worth, is the lawyer ethically obligated or permitted to reveal the omission?

OPINION:

Offering Material Evidence that is False

3. We begin with Rule 3.3(a)(3), which provides, in relevant part:

> If a lawyer, the lawyer's client, or a witness called by the lawyer has offered *material evidence* and the lawyer comes to *know* of its *falsity*, the lawyer shall take reasonable remedial measures, including, *if necessary*, disclosure to the tribunal. [Emphasis added.]

The language of the rule raises at least five subordinate questions: Was the SNW "evidence"? Was it "material"? Was it "false"? Does the inquirer now "know" of its falsity? What "remedial measures" are necessary?

4. The SNW plays a central role in a divorce case. Section 236 of the N.Y. Domestic Relations Law ("DRL") provides for compulsory disclosure by both parties to the divorce of their respective financial states and prohibits the concealment of any property, if demanded by the other party. DRL § 236 also requires that a completed SNW be sworn before a notary under penalty of perjury. The court

relies on the SNW in determining the equitable distribution of assets and liabilities, and in awarding maintenance. Thus, we believe the SNW is "evidence" and that the omission of an asset renders the SNW "false." Further, the inquiry states that the inquirer has knowledge of the omission. *See* Rule 1.0(k) (defining "knows" and "knowledge").

5. The question of whether evidence is "material" can be a more complicated question of law and fact. Although the term "material" or its variants is used as an adjective or adverb more than 200 times in the Rules and their Comments, it is not defined there. *Black's Law Dictionary* defines "material evidence" as evidence that "goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision in the case." In a useful discussion of Rule 3.3, the New York City Bar Committee on Professional Ethics explained the importance of the materiality standard:

> Rather than imposing a duty to remedy every possible falsity that might later be discovered after the close of a proceeding, Rule 3.3(a)(3) imposes a duty to act only when evidence that was "material" to the underlying proceeding is later discovered to be false. Determining whether the evidence is material is fact specific, depending on the factors relevant to the ruling in the particular matter, and particularly whether the evidence is of a kind that could have changed the result.

N.Y. City 2013-2.

6. We agree that evidence is material if it could have materially changed the result in the matter – *i.e*. it has a consequence and is not merely an inconsequential omission. Here, evidence is material if it would have materially changed the equitable distribution of property, which will depend on the value of the asset that was not disclosed. This is a factual question that is beyond our jurisdiction to determine. However, for purposes of the remainder of this opinion, we will assume that the value of the asset is material.

7. Rule 3.3(b) may also apply here. It states, in part, that a lawyer who represents a client before a tribunal and who knows that a person has engaged in criminal or fraudulent conduct related to the proceeding "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 1.0(i) defines "fraud" as denoting conduct that is "fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive," unless it lacks an element of scienter or a knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another. If the inquirer concludes that the client's omission was knowingly made with a purpose to deceive, Rule 3.3(b) would also be implicated.

Duty to Take Remedial Measures

8. As noted above, under Rule 3.3(a)(3), if the lawyer or the lawyer's client has offered material evidence and the lawyer comes to know of its falsity, the lawyer must take "reasonable remedial measures, including, if necessary, disclosure to the tribunal." Similarly, Rule 3.3(b) requires a lawyer who knows that a client has engaged in fraudulent conduct relating to a proceeding before a tribunal to take "reasonable remedial measures, including, if necessary, disclosure to the tribunal."

9. The rule does not contain a time limitation on the lawyer's duty to take remedial measures. In this respect, it differs from Rule 3.3(c) of the ABA Model Rules of Professional Conduct, which states "The duties stated in paragraphs (a) and (b) *continue to the conclusion of the proceeding* . . . ." (Emphasis added.) New York omits the phrase "continue to the conclusion of the proceeding," and does not specify any other time limit. Since the marital proceeding here has concluded, it is important to determine whether New York's omission of the phrase "continue to the conclusion of the proceeding" is significant.

10. In N.Y. State 837 (2010), we concluded that the difference between the NY version of Rule 3.3 and the ABA version of the same rule is significant:

> The New York State Bar Association recommended that New York Rule 3.3(c) track ABA Model Rule 3.3(c), and thus include the proviso that "[t]he duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding. . . . But the State Bar's proposal was not embodied in New York Rule 3.3(c) as adopted by the Appellate Divisions. Therefore, *the duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used*. [Emphasis added.]

Consequently, the fact that the divorce case here has concluded does not, by itself, terminate the lawyer's obligation of remediation.

11. How long does the obligation to remediate endure? We said in Opinion 837:

> [T]he endpoint of the obligation . . . cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. *See* N.Y. State 831, n.4 (2009).

See also N.Y. State 980 (2013) (a lawyer who learned in a prior proceeding that a then-client imparted material and false information about the client's finances to the tribunal has a duty to take reasonable remedial reassures that may still be available, including, if necessary, disclosure to the tribunal); N.Y. City 2013-2 ("because the rule only requires an attorney to take reasonable remedial measures, the duties imposed by Rule 3.3(a)(3) should end when a reasonable 'remedial' measure is no longer available"). *Cf.* N.Y. State 781 (2004) (matrimonial lawyer who learns that a financial statement submitted by the lawyer to family court omitted material information and perpetrated a fraud on the tribunal must call upon client to rectify and, if client refuses, lawyer must withdraw the financial statement).

12. N.Y. City 2013-2 concludes that Rule 3.3(a)(3) imposes a duty to take remedial action either before the tribunal to which the false evidence was presented, or before a tribunal that could review the decision of the tribunal to which the false evidence was submitted, as long as the tribunal is in a position to consider the new evidence and provide a basis for reopening the matter and/or amending, modifying or vacating the prior judgment. *See also* N.Y. City 2013-2, note 8 (discussing the bases for reopening a judgment under CPLR 5015(a)).

13. It is not uncommon to re-open divorce decrees due to changed circumstances. Consequently, if it is still possible here to remediate the omission, the lawyer must pursue remediation.

14. What action does remediation require? Comment [10] to Rule 3.3 sets out the contours of that obligation.

> The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation . . . .

15. In N.Y. State 837 (2010) we discussed the concept under Rule 3.3(a) and (b) that disclosure is required only "if necessary." Counsel's knowledge came from the client, constituted confidential information under Rule 1.6, and did not fall within any of the exceptions contained in Rule 1.6(b). Consequently, we stated that, if disclosure was not "necessary" under Rule 3.3, it would not be permitted under Rule 1.6. Rather, we said, "if there are any reasonable remedial measures short of disclosure, that course must be taken." Id. at ¶ 19. Moreover, we noted that, in the criminal sphere, Rule 3.3's mandate to disclose may be limited or prohibited by the Fifth Amendment (self-incrimination) and/or the Sixth Amendment (ineffective assistance of counsel) to the U.S. Constitution.

16. Here, counsel's knowledge of the falsity of the SNW also comes from the client. It may be confidential because it is protected by the attorney-client privilege or because its disclosure is likely to be embarrassing or detrimental to the client. What information is protected by the attorney-client privilege and whether any exceptions to the privilege apply are questions of law that are beyond the jurisdiction of this Committee. *See, e.g*. the discussion of continuing crimes in Rule 1.6, Cmt. [6D].

17. Because the proceeding has ended, the lawyer's withdrawal from the representation will not remediate the false evidence. Therefore, the lawyer's duty to remediate begins with remonstrating with the client to amend the SNW to disclose the unreported asset. Moreover, the lawyer should inform the client that, if the client does not voluntarily correct the false SNW, the lawyer will be required to take reasonable remedial measures.

18. If the client refuses, we believe that, consistent with N.Y. State 837, there are measures short of disclosure that may achieve remediation. For example, if the lawyer has certified the client's SNW or has referred to it in court proceedings, and the lawyer believes the SNW was materially inaccurate and is still be relied upon by the client's spouse or by the tribunal, Rule 1.6(b)(3) would allow the lawyer to withdraw the certification:

> A lawyer may reveal . . . confidential information to the extent the lawyer reasonably believes necessary . . . to withdraw a written or oral . . . representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the . . . representation was based on materially inaccurate information or is being used to further a crime or fraud.

Because withdrawing the certification or representation is likely to trigger follow-up action by the tribunal or by the former spouse, it is likely to satisfy the "reasonable remedial measure" requirement of

Rule 3.3(a)(3) and (b). It could also result in another exception to confidentiality under Rule 1.6(b)(6), which is disclosure to comply with a court order.

19. Similarly, the lawyer might withdraw the SNW or state that it should not be relied upon, which also should lead the court or former spouse to request further explanation. *See* N.Y. State 781 (2004) (where divorce proceeding apparently had not yet ended, withdrawing a false financial statement would be sufficient under the Code predecessor to Rule 3.3).

20. Because identification of remedial measures depends on the facts and circumstances of the case, we cannot set out a definitive roadmap in this opinion. We believe the inquirer is in the best position to determine what steps are "reasonable" and "necessary."

CONCLUSION:

21. A divorce lawyer who learns that a client omitted a material asset in a sworn Statement of Net Worth has a duty to take reasonable remedial measures that are available, even after the conclusion of the proceeding. What measures are reasonable will depend on the facts and circumstances. They will begin with remonstrating with the former client to correct the Statement. If the client refuses, they may include withdrawing the lawyer's certification of the incomplete statement and withdrawing the statement. Disclosure of client confidences is required only "if necessary."

(4-17)

OPINION 1124 (05/31/2017)

TOPIC: Communication with opposing counsel; communication with opposing party

DIGEST: Lawyer may ethically communicate with opposing counsel in any manner lawyer desires regardless of request of opposing counsel. But opposing counsel is not required to respond to the lawyer's chosen method. With the prior consent of opposing counsel, a lawyer may (but is not required to) send to opposing counsel's client copies of written communications to opposing counsel.

RULES: 1.2(e), 1.4(a)(3), 4.2(a) & (c)

FACTS:

1. The inquirer is representing himself in a litigated matter. Opposing counsel has advised the inquirer not to communicate with him by telephone, but rather to communicate with him only in writing, and has instructed the inquirer that all emails and writings sent to opposing counsel by the inquirer should be copied to the opposing party.

QUESTIONS:

2. The inquirer asks two questions:

A. Must a lawyer abide by opposing counsel's direction that the lawyer not communicate with him by telephone?

B. May or must a lawyer a lawyer comply with opposing counsel's direction to send copies of all emails and other writings to opposing counsel's client?

OPINION

3. As to opposing counsel's direction not to communicate by telephone, no provision in the Rules of Professional Conduct (the "Rules") mandates how lawyers must communicate with each other. Nor does any provision in the Rules either prohibit a lawyer from placing a telephone call to opposing counsel or require opposing counsel to accept a telephone call from another lawyer. Common sense dictates that lawyers, as members of an honorable profession, should work out between themselves the methods of communication that will best facilitate resolution of the matter at hand. In this era, email in many instances is the most efficient mode of communication.

4. As to opposing counsel's instruction to copy opposing counsel's client on every written communication to opposing counsel, Rule 4.2(a), sometimes called the "no-contact" rule, provides:

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

5. Rule 4.2(c) makes clear that this prohibition applies when a lawyer is representing himself *pro se*:

> (c) A lawyer who is acting pro se . . . in a matter is subject to paragraph (a), but may communicate with a represented person . . . provided the lawyer . . . gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

See also Comment [12A] to Rule 4.2 ("When a lawyer is proceeding pro se in a matter. . . , the lawyer's direct communications with a counterparty are subject to the no-contact rule, Rule 4.2.")

6. Thus a lawyer may not communicate with a party the lawyer knows to be represented by counsel without the prior consent of the represented party's counsel or without giving the notice required by Rule 4.2(c). Here, however, the opposing party's counsel has directed the lawyer to send copies of communications to the opposing party, thus furnishing the prior consent required by Rule 4.2(a). *See also* Rule 1.2(e) ("A lawyer may exercise professional judgment to . . . accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.")

7. That still leaves the question whether the lawyer is *required* as opposed to *permitted* to send copies to the represented client. We find nothing in the Rules that require a lawyer to communicate with opposing counsel's client. It is not the lawyer's responsibility to keep the opposing counsel's client "informed about the status of the matter" as required by Rule 1.4(a)(3). That is opposing counsel's obligation under that Rule. *See* N.Y. State 1076 ¶4 (2015) ("A lawyer is required to communicate regularly with the client on the status of the matter for which the lawyer has been retained. . . . Rule 1.4(a)(3) requires the lawyer to keep the client reasonably informed about the status of the matter.").

CONCLUSION:

8. A lawyer may communicate with opposing counsel in any manner he chooses, including by telephone, regardless of the instructions of opposing counsel. But opposing counsel is not required to respond to the lawyer's chosen method. With the prior consent of opposing counsel, a lawyer may (but is not required to) send to opposing counsel's client copies of written communications to opposing counsel.

(17-17)

OPINION 1125 (06/02/2017)

TOPIC: Confidential client information

DIGEST: The New York Rules of Professional Conduct do not require a lawyer to communicate with an individual who is neither a client in the matter nor a party to a document drafted by the lawyer in the matter.

RULES: Rules 1.4, 1.6, 1.9(c), 4.1, 4.2, 4.3 and 4.4.

FACTS:

1. The inquirer drafted a will in which the testator disinherited one of his sons. The disinherited son contacted the inquirer and asked her to confirm that she drafted the will, of which the son has a copy. The lawyer's signature is on the will. The inquirer asks whether she has an obligation to respond to her former client's son, who is neither an executor nor a beneficiary.

QUESTION:

2. Must a lawyer respond to a query from an individual who is neither a client in the matter nor a party to the document that is the subject of the query?

OPINION:

3. One of the lawyer's principal obligations under the New York Rules of Professional Conduct (the "Rules") when representing a client is to maintain the client's confidential information – information gained in or relating to the representation that is protected by the attorney-client privilege, or the disclosure of which would be embarrassing or detrimental to the client or that the client has asked to be maintained in confidence. *See* Rule 1.6. Although information that is generally known in the local community is not protected as confidential information, information is not "generally known" simply because it is in the public domain or available in a public file. *See* Rule 1.6, Cmt. [4]. The lawyer is also prohibited from using or revealing the confidential information of a former client that is protected by Rule 1.6, except to the extent the Rules would permit with respect to a current client. Rule 1.9(c). A deceased client is by definition a former client.

4. Several rules in the New York Rules of Professional Conduct ("the Rules") directly address a lawyer's obligations and limitations regarding communications with others.[1] For example, Rule 1.4 ("Communication") sets out a lawyer's obligations concerning communicating with clients. It contains a robust list of requirements, but they are limited to communications with clients. Rule 4.2 ("Communication with Person Represented by Counsel") strictly limits the situations in which a lawyer may communicate with represented individuals, but it contains no affirmative obligation to communicate with them. Rule 4.3 ("Communicating with Unrepresented Parties") limits, under specified circumstances, a lawyer's authority to provide legal advice to unrepresented individuals and it prohibits a lawyer, who is communicating with an individual on behalf of a client, from stating or implying that a lawyer is a disinterested party. Again, this rule establishes no affirmative obligation to commu-

1 The rules regarding advertising and solicitation also relate to attorney communications, but they are not pertinent to this inquiry.

nicate. Rule 4.1, which expressly applies to communications with "third parties," also establishes no obligation to communicate; instead, it simply requires a lawyer who represents a party to refrain from "knowingly making a false statement of fact or law" when communicating with a third party. Rule 4.4 ("Respect for Rights of Third Persons") limits a lawyer's authority to embarrass, harm or violate the rights of third parties, and it creates a very narrow communicative obligation – *i.e.,* a lawyer who "receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

5. What the above survey of the Rules regarding communications makes clear is that, absent two narrow exceptions – dispelling a third party's impression of a lawyer's disinterest and notifying a third party regarding receipt of a misdelivered document – a lawyer has no independent ethical obligation to communicate with third parties.[1]

6. Our prior opinions are consistent with this reading of the Rules. Thus, in N.Y. State 833 (2009), we concluded that a lawyer was not ethically required to respond to an unsolicited written request for representation sent by a person in prison. Specifically, we held that no provision of the Rules "imposes a general obligation upon a lawyer to promptly answer unsolicited mail – or to answer at all." *Id.* More recently, in N.Y. State 1078 (2015), we considered whether a lawyer was permitted, consistent with Rule 1.6 ("Confidentiality of Information"), to disclose to the son of a former client that the lawyer did not draft a will for the deceased client. We concluded that, under limited circumstances, the lawyer was *permitted* to disclose this information (*i.e.,* when it advanced the best interests of the former client). *Id.* Implicit in that conclusion was that the lawyer was not *required* to share information with the son of the former client.

7. Here, the disinherited son is not a client of the inquirer and is not a party to the document drafted by the inquirer.[2] Accordingly, as a survey of the relevant rules makes clear and consistent with our holding in N.Y. State 833, the inquirer has no ethical obligation to respond to the son's query. Indeed, sharing the information would likely not be in the client's best interest and therefore would not be permitted by Rule 1.6(a).

CONCLUSION:

8. The New York Rules of Professional Conduct do not require a lawyer to respond to a query – about a document previously drafted by the lawyer – from an individual who is neither a client in the matter nor a party to the drafted document.

(13-17)

1 In 1998, the Office of Court Administration adopted the New York State Standards of Civility, which set forth principles of behavior to which the bar, the bench and court employees should aspire. They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules of Professional Conduct. The first section of these Standards discusses the lawyer's duties to other lawyers, litigants and witnesses and Standard IV in this section states that "A lawyer should promptly return phone calls and answer correspondence *reasonably* requiring a response." 22 NYCRR Part 1200, app. at IV (emphasis added). These standards by their terms do not seem to apply here. In any event, their applicability is beyond the purview of our Committee.

2 We do not have occasion to address what obligation, if any, the lawyer would have to respond to a query from a party to the drafted document. *See* N.Y. State 833.

OPINION 1126 (06/19/2017)

TOPIC: Confidential information; prospective client

DIGEST: A lawyer may not disclose a prospective client's confidential information without the informed consent of the prospective client or some other exception to the Rules governing a lawyer's duty of confidentiality.

RULES: 1.0(j), 1.6(a) & (b), 1.9(a) & (c), 1.18(a) & (b)

FACTS:

1. The inquirer jointly represented Husband and Wife in drafting a joint revocable trust. The retainer agreement signed by both clients provided that the lawyer could not withhold information from either client.

2. The trust agreement provided that (i) upon Wife's death, her share of the trust estate would be distributed to a credit shelter trust for the benefit of Husband during his lifetime, and (ii) upon Husband's death, the funds in the credit shelter trust would be distributed to Wife's children from a prior marriage. After Wife died, Husband met with the inquirer to review what needed to be done to administer the trusts, but declined to retain the inquirer to assist him with the administration.

3. Recently, Husband died, and Husband's sister (Sister), who is named in the trust instrument as Husband's successor trustee, contacted the inquirer. She disclosed that Husband did not fund the credit shelter trust, but put those assets in his own name for the benefit of Sister, effectively disinheriting Wife's children.

4. The inquirer informed Sister the inquirer cannot represent her in the administration of the trust estate. The inquirer asks whether he may or must advise Wife's children that the trust established by their mother has not been administered according to the trust agreement.

QUESTION:

5. May or must the lawyer disclose, to Wife's children, who are the beneficiaries of a trust, that their step-father, as trustee of the trust, did not adhere to the provisions of the trust agreement and misappropriated trust property?

OPINION:

6. Although the inquiry does not state that Sister sought legal advice from the inquirer, the clear implication of the inquirer's informing Sister that the inquirer could not represent her is that, at the time of the call from Sister to the inquirer, Sister was a "prospective client" within the meaning of Rule 1.18(a) of the New York Rules of Professional Conduct (the "Rules"), i.e. "a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter." As Comment [2] to Rule 1.18 points out, whether a person who communicates with a lawyer is a "prospective client" depends on, among other things, whether that person is communicating unilaterally to the lawyer without any reasonable expectation that the lawyer is willing to discuss the possibil-

ity of forming a client-lawyer relationship, and thus is not a "prospective client." Nothing in the facts suggests the Sister did not have that reasonable expectation. Therefore, while the question whether Sister is a prospective client is one of fact that is beyond the jurisdiction of this Committee, the remainder of this opinion assumes that Sister was a prospective client.

7. Under Rule 1.18(b), the lawyer has confidentiality obligations to a prospective client. Rule 1.18(b) provides:

> Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

8. Rule 1.9(c) prohibits a lawyer from using confidential information of a former client that is protected by Rule 1.6 to the disadvantage of the former client, unless the Rules would permit or require disclosure with respect to a current client. Thus, the effect of Rule 1.18(b) is that the inquirer may not reveal or use the information provided by Sister unless (i) Sister gives informed consent, confirmed in writing or (ii) the disclosure is permitted by Rule 1.6(b). Neither exception applies here.

9. Central to this inquiry are the Rules of Professional Conduct concerning confidential client information. Under Rule 1.6, confidential information "consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." *See* Rule 1.6(a).

10. If Sister reasonably believed that the inquirer represented her as successor trustee to Husband – which is a factual question that we cannot resolve – then the information that she conveyed to the inquirer regarding Husband's failure to fulfill his obligations under the trust agreement may be protected by the attorney-client privilege. In any event, it is information that is likely to be embarrassing to Sister and detrimental to her, to the extent it affects her right to assets as a beneficiary of Husband's estate.[1]

11. Rule 1.6(a) further provides:

> A lawyer shall not knowingly reveal confidential information, as defined by this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
>
> (1) the client gives informed consent, as defined in Rule 1.0(j);

1 The provisions of the trust agreement and information that H did not fulfill his obligations under the trust agreement may also be confidential information of the inquirer's former client, H. However, analyzing the inquirer's confidentiality obligations to H is more difficult than analyzing the inquirer's confidentiality obligations to S. H apparently waived confidentiality *vis a vis* W. But it is not clear whether anyone stands in W's shoes in that regard and the answer to that question is one of law that is beyond the jurisdiction of this Committee. *Cf.* N.Y. State 970 (2013) (whether executrix for will of former client is entitled to lawyer's files of the former client's matter depends on whether executrix is legally entitled to the files). Moreover, it is not clear that any of the exceptions to confidentiality in Rule 1.6(b) would apply to H. Even if H's actions in failing to comply with the provisions of the trust were criminal, they would constitute a past crime. Although Comment [6D] to Rule 1.6 notes that some crimes are continuing in nature, we think it is unlikely this provision applies given that the lawyer was not involved with H's misuse of the trust assets.

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

12. The first two exceptions do not apply here. The inquirer does not say that Sister has given informed consent to the inquirer's disclosure of the information to Wife's children. Moreover, the disclosure will not advance the best interests of Sister, and thus is not "impliedly authorized." Accordingly, the inquirer may not disclose the information unless disclosure is permitted by Rule 1.6(b).

13. None of the exceptions in Rule 1.6(b) seems to apply here. For example, Rule 1.6(b)(2) allows for disclosure to prevent the client from committing a crime. But it is not clear what actions Sister intends to take or whether those actions would constitute a crime (a question of law that is beyond the jurisdiction of this Committee to determine).

14. Thus, the inquirer may not disclose the information learned from Sister to Wife's children.

CONCLUSION:

15. A lawyer who assisted a married couple with establishing a trust must not disclose information he learns about one spouse's misappropriation of trust assets, when he learns of the misappropriation from a successor trustee who was seeking legal advice as a prospective client. A lawyer may not disclose a prospective client's confidential information without the informed consent of the prospective client or some other exception to the Rules governing a lawyer's duty of confidentiality.

(7-17)

OPINION 1127 (07/07/2017)

TOPIC: Attorney Escrow Account; Attorney Special Account; Attorney Trust Account

DIGEST: Settlement proceeds must be deposited into an attorney's Special Account and must be promptly paid to clients and to third persons to the extent such persons have an ownership interest in the settlement proceeds. Where a third person does not possess such an interest, but has only a claim against the lawyer, the lawyer may choose to pay such amounts either from the Special Account or from the attorney's operating account. Payment to the law firm of legal fees and expenses must be transferred from the Special Account to the firm's operating account by check or bank transfer.

RULES: 1.15(a), (b), (c) & (e)

FACTS:

1. A lawyer has received a settlement check that includes the funds due to the client and the funds due to the firm for its legal fees and expenses. The firm may be obligated to share its legal fees with a referring attorney or to pay a portion of the fees, as a bonus, to a staff attorney who was responsible for bringing the matter to the firm. The settlement check has been deposited in the firm's Special Account. Once the check clears, the firm intends to disburse the funds to others.

QUESTIONS:

2. A. When a law firm receives settlement funds, may or must the law firm distribute, directly from the firm's Special Account, the funds over and above those owed to the client, including amounts owing (i) to the referring attorney as a referral fee, (ii) to a staff attorney as a bonus, and (iii) to the law firm in payment of the firm's legal fees and expenses, or may or must the firm instead first transfer the settlement funds to the firm's operating account for further distribution?

B. How quickly must the distributions be made?

OPINION:

3. Rule 1.15(a) prohibits a lawyer from commingling funds belonging to another person with funds of the lawyer. Rule 1.15(a) provides:

> A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

Rule 1.15(b) requires that funds belonging to the client or another person be maintained in a special account or accounts (the "Special Account"), sometimes referred to as an "attorney trust account" or "attorney escrow account." *See* Rule 1.15(b)(2).

4. Whether the funds from a settlement check that the lawyer will use to pay third persons must be paid from the Special Account depends on the meaning of the phrase "funds belonging to another person" in Rule 1.15(a). If the lawyer or the client has entered into a contract obligating the lawyer to pay a third person from the proceeds of the settlement, or if such right is granted by law, then some of the proceeds of the settlement check "belong" to such person, and the payments to such person must be made from the Special Account. *See* N.Y. State 717 (1996) (construing the phrase "entitled to receive the funds" in the predecessor to what is now Rule 1.15(c)(1) to include medical providers who have valid assignments or liens against proceeds, but excluding other unsecured creditors). They may not be transferred to the lawyer's operating account because a lawyer may not commingle funds "belonging" to others with the lawyer's own funds.

5. If the third person does not have a legal right to receive the proceeds of the settlement check, the third person may have a claim against the lawyer for the amounts owed. In this situation, where the settlement funds do not "belong" to the third person but the third person may have a claim against the lawyer for a portion of the funds, the lawyer has a choice. The lawyer may leave the amounts owed to the third person in the Special Account and pay the third person directly from that account. Alternatively, the lawyer may transfer the amount owed to the third person to the lawyer's operating account and make payments to the third person by writing checks on (or, where authorized, making bank transfers from) the operating account.

6. In many situations, a lawyer will owe money to third persons but will not have transferred an interest in the settlement proceeds. For example, amounts owed by the lawyer for rent, salaries and the expenses of third party suppliers are all legal obligations of the lawyer or law firm but do not give the landlord or employees or vendors a legal interest in specific settlement proceeds. Many lawyers will choose to pay such amounts from their operating accounts because it may be easier to keep track of payments from the operating account.

7. If a client or third person has a legal interest in funds in the Special Account, the lawyer must "promptly notify" the client or third person of the receipt of funds in which such person has an interest. Rule 1.15(c)(1). The lawyer also must "promptly pay" the funds to the person to whom the funds belong. *See* Rule 1.15(c)(4), N.Y. State 946 (2012). "Promptly" means within hours or days, not weeks. Although written notice is not required, it is the best means to ensure a record exists to confirm that the lawyer has met the requirements of Rule 1.15(c)(1). *See* Roy Simon, Simon's New York Rules of Professional Conduct Annotated 903 (Thomson Reuters 2016). If a person does not have a legal interest in the property in the Special Account, Rule 1.15(c)(1) does not apply. In that case, the timing of the lawyer's payment obligation is a matter of contract that is outside the Committee's jurisdiction.

8. Whether the lawyer pays the third person directly from the Special Account or instead first transfers the amount claimed by the third party into the lawyer's operating account, the lawyer must wait for the settlement check to clear before disbursing any of the funds. *See* N.Y. State 737 (2001) (lawyer may not draw on funds belonging to Client A for the benefit of Client B). *See also In Re Sukhdeo*, 47 A.D.3d 6 (2d Dept. 2007), *In Re Rosenberg*, 3 A.D.3d 52 (2d Dept. 2003), *In Re Rudlin*, 280 A.D.2d 200 (4th Dept. 2001). To do otherwise would result in a technical conversion because the lawyer would be using cleared funds belonging to others to cover the pending checks drawn on the uncleared settlement check.

9. As to the amount owed to the lawyer for legal fees and expenses, Rule 1.15(b)(4) states that funds belonging in part to a client or third person and in part currently or potentially to the lawyer must be kept in the Special Account, but when the portion belonging to the lawyer is not in dispute, "the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved." Transfers from the Special Account to the lawyer's operating account may be made by check or by bank transfer. Rule 1.15(e).

CONCLUSION:

10. Settlement proceeds in which a client or third person has an ownership interest must be paid to such persons from the attorney's Special Account. Where a third party does not possess such an ownership interest, but has a claim only against the lawyer personally, the lawyer may opt to pay such amounts either directly from the Special Account or from the attorney's operating account. Payment to the law firm of legal fees and expenses must be transferred to the firm's operating account by check or bank transfer.

(16-17)

OPINION 1128 (07/10/2017)

TOPIC: Referral fees; Division of fees with estate and with other attorneys

DIGEST: A lawyer who undertakes to complete unfinished legal business of a deceased attorney may pay the deceased lawyer's estate that proportion of the total compensation that fairly represents the services (if any) that the deceased lawyer rendered in the matter. If the lawyer instead refers the matter to a third attorney, the lawyer and the third attorney may share legal fees provided they comply with Rule 1.5(g).

RULES: 1.5(g), 5.4(a)(2), 7.2(a)

FACTS:

1. The inquirer's friend, also a lawyer, recently passed away. The dying attorney had not made any agreement to share fees with the inquirer, but on his deathbed the dying attorney had informed his secretary that he wanted to refer three personal injury cases – Matters A, B and C – to the inquirer. The deceased lawyer's secretary gave the inquirer's name to each of the clients, who then each called the inquirer to discuss taking over their matters. The inquirer is in the process of reviewing the matters and assessing whether he can undertake the representations, each of which is subject to a standard contingency retainer. In Matter A, the deceased attorney had conducted a preliminary investigation, obtained a copy of the police report, requested and obtained some medical records, and had taken several notes, but had not commenced suit. The inquirer is still reviewing the other matters and does not know what, if any, work the deceased attorney performed on Matters B and C.

QUESTIONS:

2. A. If the inquirer accepts any of the matters, may he pay a referral fee to the deceased attorney's estate for the matters he accepts?

B. If the inquirer decides to refer any matters to a third attorney, may the inquirer receive a referral fee?

C. If the inquirer refers any of the matters to a third attorney, may the third attorney pay the deceased attorney's estate a referral fee?

OPINION:

3. Rule 7.2(a) of the New York Rules of Professional Conduct (the "Rules") provides that a lawyer may not pay a fee for the referral of business, with certain exceptions not relevant to this inquiry. Specifically, Rule 7.2(a) provides:

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

4. Nevertheless, Rule 1.5(g) permits a division of legal fees between lawyers who are not associated in a firm when the division is in proportion to the services performed by each lawyer or the lawyers assume joint responsibility for the representation. Rule 1.5(g) provides:

> (g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:
>
> (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
>
> (3) the total fee is not excessive.

Moreover, although Rule 5.4(a) generally prohibits a lawyer from sharing legal fees with a nonlawyer, an exception in subparagraph (a)(2) allows a division of fees between a lawyer who finished the work of a deceased lawyer and the estate of that lawyer. Rule 5.4(a)(2) provides:

> (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer . . . .

Assuming a Matter from a Deceased Lawyer

5. The Rules do not specifically cover the mechanics for assuming a matter from the estate of a deceased lawyer. Rule 1.4 requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. We believe this requires the inquirer to inform the clients that they are free to choose any lawyer to represent them and to have copies of the file with respect to the matter. *Cf.* Rule 1.17(c) (where a law practice is being sold, the seller and buyer must give joint written notice to each of the seller's clients, which notice must inform the client that the client is entitled to retain other counsel or to take possession of the file). *See generally*, N.Y. State Bar Association, NYSBA Planning Ahead Guide: How to Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death (2016) (available at http://www.nysba.org/PlanningAheadGuide2016/*)*.

Division of Fees Between the Inquirer and the Deceased Lawyer

6. Rule 1.5(g), quoted above, does not apply here. As the text of Rule 1.5(g) and Comment [7] to Rule 1.5 explain, the client must agree to the arrangement, including the share that each lawyer is to receive, and the client's agreement must be confirmed in writing. Here, the deceased attorney and the inquirer did not enter into an agreement to divide fees in any fashion for Matters A, B, and C, so they cannot satisfy the elements of Rule 1.5(g). In any event, because the referring attorney is deceased, any fees to be divided by the inquirer would not be shared with an attorney, but would be shared with a nonattorney – *i.e.,* the estate of the deceased attorney. Rule 1.5(g) applies only to fee-sharing among

lawyers, so it would not be applicable to any sharing of fees between the inquirer and the decedent's estate.

Division of Fees with Estate of Deceased Lawyer

7. Rule 5.4(a) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer, with limited exceptions. The exception pertinent to this inquiry appears in subsection (a)(2) of Rule 5.4, quoted above, which permits a lawyer to pay to the estate of a deceased lawyer that portion of total compensation that fairly represents the services rendered by the deceased lawyer.

8. We apparently have never interpreted this Rule, or its predecessor in the Code of Professional Responsibility, DR 3-102(A)(2). Interpreting this provision in his book, Professor Simon quotes the language of the Rule – "pay the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer," and says:

> In the case of a contingent fee matter, Rule 5.4(a)(2) should permit the successor lawyer to agree to pay the estate either a fair proportion of the contingent fee at the conclusion of the matter or a *quantum meruit* payment at any time, before or after the matter is concluded. This parallels the law that applies to contingent fee matters when a client changes lawyers in the middle of a contingent fee matter.

Roy Simon, Simon's New York Rules of Professional Conduct Annotated 1424 (Thomson Reuters 2016) (analogizing to *Cohen v. Grainer, Tesoriero & Bell*, 81 N.Y.2d 655 (1993)). We agree with Professor Simon.

9. Regarding Matter A, in which the deceased attorney provided legal services before his death, the inquirer may ethically share legal fees with the referring lawyer's estate. Thus, under Rule 5.4(a)(2), the inquirer could, at the conclusion of Matter A, pay the estate a portion of the total compensation that represents the services rendered by the deceased attorney, or at any time pay an amount representing *quantum meruit* for those services. (As in the case of a lawyer who takes over a contingent fee case from a living attorney, the proportion of the total fees that fairly represents the services performed by the original attorney cannot be calculated until the matter ends, but the *quantum meruit* amount that represents fair compensation for those services could be calculated immediately.)

10. Regarding Matters B and C, however, if the deceased lawyer did not provide any legal "services" on those matters prior to his death, then the inquirer may not ethically pay the estate a portion of the fees. If there were such a division of fees between the inquirer and the estate when the deceased lawyer did not render any services, then the payment would constitute the payment of an improper referral fee under Rule 7.2(a) and a division of legal fees with a nonlawyer in violation of Rule 5.4(a). We do not take a position on whether merely executing and filing a retainer agreement, and thus assuming liability for a matter, constitutes "services rendered by the deceased lawyer" within the meaning of Rule 5.4(a)(2) that may be taken into account in calculating an amount that "fairly represents" the estate's reasonable share of legal fees.

Matters Referred to Another Attorney

11. If the inquirer decides to refer one or more matters to another attorney, the inquirer may ethically receive a share of the fees for such matters if the inquirer and the successor counsel comply with Rule 1.5(g).

12. To comply with Rule 1.5(g)(2), the inquirer must ensure that the clients in each particular matter agree to the employment of the other lawyer after disclosure that a division of fees will be made, including the share each lawyer will receive, confirmed by each client in writing, and the overall fee would have to be reasonable. In addition, any division of fees with the lawyer to whom a matter is referred either must be "in proportion" to the services each lawyer performs, or, in a writing given to the client, the inquirer and the new lawyer must assume "joint responsibility" for the representation. Comment [7] to Rule 1.5 provides: "Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. In N.Y. State 745 (2001), we said, without elaboration, that the joint responsibility standard in the predecessor to Rule 1.5(g) entailed more than financial accountability and malpractice liability.

13. Whether the successor lawyer (*i.e.,* the lawyer to whom the inquirer refers the matters) could ethically share fees with the estate of the deceased lawyer depends on the same analysis contained in paragraphs 7 - 10 above.

14. The situation described here indicates that it would be helpful if the Rules of Professional Conduct (or court rules) addressed the question of succession planning by sole practitioners. Proposals for court rules regarding succession planning have been made in past years but have not been adopted.

CONCLUSION:

15. A successor lawyer who undertakes to complete unfinished legal business of a deceased attorney may pay the deceased lawyer's estate that proportion of the total compensation that fairly represents the services that the deceased lawyer rendered. If the inquirer refers the matter to a third attorney, the inquirer and the third attorney may share legal fees provided they comply with Rule 1.5(g). If the inquirer and the third attorney comply with Rule 1.5(g), the division of fees would not be an improper referral fee under Rule 7.2(a).

(14-17)

OPINION 1129 (07/11/2017)

TOPIC: Attorney Newsletters

DIGEST: If the primary purpose of a law firm's newsletter is educational, it does not constitute an advertisement and may be sent to a larger audience than current and former clients without having to comply with Rules 7.1 and 7.3. However, if the primary purpose of the newsletter is to provide information or news about the lawyer or law firm (*e.g.,* the firm's cases, personnel, clients or achievements) it generally will be considered advertising to generate business, and must comply with Rules 7.1 and 7.3. The law firm may accept newsletter content from a real estate brokerage firm, may acknowledge the source of the content and may accept payments from the real estate brokerage firm to defray the cost of publishing the newsletter, as long as the law firm does not accept money for referring business to the brokerage firm.

RULES: 1.0(a), 1.7(a) & (b), 7.1(a), (f) & (k), 7.3

FACTS:

1. A residential real estate law firm wishes to create and publish a newsletter to send to former and current clients. The newsletter would contain information about changes to local laws and also would contain relevant market data provided by a real estate brokerage firm (the "Brokerage Firm").

2. The law firm has no contractual or referral relationship with the Brokerage Firm. Additionally, the law firm will not be paying the Brokerage Firm for any market information. However, the Brokerage Firm has offered to pay the law firm to offset the cost of publishing the newsletter.

3. The law firm also wants to send the newsletter to customers of certain lenders that the law firm has represented on purchase or refinance transactions. (The customers of the lenders have provided written consent for the lenders to release their contact information.)

QUESTIONS:

4. The inquirer poses several questions:

   A. May a law firm that primarily handles real estate transactions send a newsletter to the firm's current and former clients?

   B. May the law firm send the newsletter to the customers of lenders, where the firm has previously represented the lenders?

   C. May the law firm's newsletter include (i) market data provided by a real estate brokerage firm, (ii) contact information for that brokerage firm or individual brokers, and (iii) credit to the real estate brokerage firm and/or its individual brokers for providing the market data?

   D. May the law firm accept payments from the brokerage firm to offset the cost of publishing the newsletter?

OPINION:

Newsletters as Advertising

5. In N.Y. State 848 (2010), we considered whether an attorney newsletter is an "advertisement" that is subject to the requirements of Rule 7.1 of the New York Rules of Professional Conduct (the "Rules"), including the requirement that the newsletter be labeled "attorney advertising" and the requirement to maintain copies of advertisements for a specified period. *See* Rule 7.1(f) & (k). In Opinion 848, we began our analysis with the definition of "advertisement" in Rule 1.0(a):

> "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm's services, the *primary purpose of which* is for the retention of the lawyer or law firm. [Emphasis added.]

We noted that the determination of whether a newsletter constituted advertising depended on three factors: (i) the intent of the communication, (ii) the content of the communication, and (iii) the targeted audience for the communication.

6. Regarding the first factor – intent – we said that a newsletter constitutes advertising under Rule 1.0(a) only if its "primary purpose" is the retention of the lawyer or law firm. Including contact or biographical information about the lawyer or firm does not, without more, transform an otherwise educational communication into advertising. *See generally* Rule 7.1, Cmt. [8] ("Some communications by a law firm . . . are not necessarily advertisements. For example, pencils, legal pads . . . or the like with the law firm name, logo, and contact information printed on them do not constitute 'advertisements' within the definition of this Rule if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter").

7. Regarding the second factor – content – Opinion 848 cited the general rule in Comment [7] to Rule 7.1:

> Topical newsletters . . . intended to educate recipients about new developments in the law are generally not considered advertising. However, a newsletter, client alert, or blog that provides information or news *primarily* about the lawyer or law firm (for example, the lawyer or law firm's cases, personnel, clients or achievements) generally would be considered advertising." [Emphasis supplied.]

See also Rule 7.1, Cmt. [8] (distributing a report about the lawyer is "advertising" if the lawyer's primary purpose in distributing it is to obtain retentions).

8. Regarding the third factor – the audience – N.Y. State 848 noted that a newsletter directed to existing clients or to other lawyers by definition did not constitute advertising. The same would apply to communications to former clients germane to the earlier representation, and to communications to prospective clients who have expressed interest in, and requested information about, a lawyer's services.

Newsletters to Customers of Lenders for Whom the Law Office Has Performed Services

9. The facts as presented here do not provide sufficient information for us to determine whether the newsletter would be considered an advertisement if sent to persons other than the audience described above, but the questions raised by the inquiry are in many respects similar to those we discussed in N.Y. State 1110 (2016). In that opinion, we analyzed whether a lawyer could sponsor seminars and webinars in the inquirer's field and send invitations to addresses found on commercially available business entity lists. We noted that the answer to the inquirer's questions depended on whether the seminars, or the advertising for the seminars, would constitute "advertising" within the meaning of Rule 1.0(a), and "solicitation" within the meaning of Rule 7.3(b).

10. If the seminar (or the publicity for it) did not constitute advertising, we opined in N.Y. State 1110 that the provisions of Rule 7.1 would not apply. And if Rule 7.1 did not apply, then the prohibitions of Rule 7.3 would not apply either, because a communication cannot be a solicitation unless it first meets the definition of an "advertisement." However, we also opined that if the seminars (or the publicity for them) did constitute advertising, then the inquirer must adhere to Rule 7.1. Moreover, if the seminar (or the publicity) was targeted at specific recipients and a significant motive was the inquirer's pecuniary gain, then the seminars (or the publicity) constituted "solicitation" and the provisions of Rule 7.3 would also apply. If the seminar (or the publicity) also involved interactive computer-accessed communication, then they would be prohibited as in-person solicitation unless the seminar was advertised only to current and former clients and close friends or relatives of the inquirer.

11. Here, if the primary purpose of the newsletter is educational (*i.e.,* to educate recipients about new developments in the law as opposed to attracting clients), then it may be sent to a larger audience than just current and former clients. However, if the content of the newsletter is primarily about the lawyer or law firm (*e.g.,* the firm's cases, personnel, clients or achievements), then the primary purpose would be deemed to be the "retention of clients," and the newsletter generally would be considered to be advertising, so the law firm would have to comply with Rule 7.1. *See* N.Y. State 1001 (2014) (giving an example of a newsletter that we considered to be an "advertisement"). Moreover, because the newsletter would then be an "advertisement" targeted to a particular audience, it would constitute a "solicitation" within the meaning of Rule 7.3, and the law firm would also have to comply with all of the requirements and prohibitions in Rule 7.3.

Utilizing Information from a Third-Party Brokerage Firm and Providing Attribution

12. No Rule prohibits the law firm from including information in the newsletter provided by the Brokerage Firm. If the newsletter is advertising, however, the law firm must ensure that none of the content "contains statements or claims that are false, deceptive or misleading." Rule 7.1(a).

13. Similarly, the Rules do not prohibit the lawyer from truthfully identifying the source of the market data by attributing the data to the Brokerage Firm.

May the Law Firm Accept Payment from the Brokerage Firm to Offset Publication Costs?

14. In N.Y. State 1001 (2014), we determined that a law firm was permitted to sell third-party advertising in the law firm newsletter, as long as the law firm did not charge rates for the advertising

suggestive of an improper referral fee and there was no other explicit or implicit understanding between the law firm and the advertiser suggestive of a referral arrangement. Here, the Brokerage Firm is not paying for advertising *per se* in the newsletter, but it is paying to help the law firm offset the costs of publishing the newsletter. We therefore think that the basic principles stated in Opinion 1001 apply here. The law firm may accept payment to defray the costs of publishing the newsletter, but the law firm may not accept payments in exchange for referring clients to the Brokerage Firm. Similarly, the law firm should ensure that the newsletter does not contain an express or implied recommendation of the Brokerage Firm's services.

15. If the Brokerage Firm is paying the law firm to include its data, then the law firm should disclose this fact to the readers of the newsletter.

16. The law firm must also consider whether accepting money from the Brokerage Firm will affect its ability to undertake representations of clients in transactions in which the Brokerage Firm provides real estate brokerage services. Rule 1.7 prohibits a lawyer from representing a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial or personal interests. If the payment from the Brokerage Firm to offset the publication costs of the newsletter are significant, then a reasonable lawyer would conclude there is a significant risk that the lawyer's professional judgment on behalf of a client will be affected in a real estate transaction where the Brokerage Firm will receive a commission only if the transaction closes.

17. The question would then be whether the lawyer's personal conflict of interest is subject to client consent under Rule 1.7(b) with full disclosure of the lawyer's conflict. Under Rule 1.7(b) the lawyer may undertake the representation with the informed consent of the client, confirmed in writing, as long as the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation and the other conditions of Rule 1.7(b) are met. We have issued a number of opinions concluding that client consent may be obtained where the lawyer receives compensation from a third party. *See* N.Y. State 958 (2013) (lawyer receives referral fee for introducing clients to prospective investors); N.Y. State 667 (1994) (lawyer receives referral fee from a mortgage broker); N.Y. State 461 (1977) (lawyer receives referral fee from fire adjuster). The inquirer will have to determine whether he reasonably believes he can provide competent and diligent representation to clients in matters where the Brokerage Firm's interests are also implicated.

CONCLUSION:

18. If the primary purpose of a law firm's newsletter is educational, it does not constitute an advertisement and may be sent to a larger audience than current and former clients without having to comply with Rules 7.1 and 7.3. However, if the primary purpose of the newsletter is to provide information or news primarily about the lawyer or law firm (*e.g.,* the firm's cases, personnel, clients or achievements) it generally will be considered advertising to generate business, and must comply with Rules 7.1. Moreover, because copies of the newsletter sent to customers of the law firm's bank client would then be an "advertisement" targeted to a particular audience, it would constitute a "solicitation" within the meaning of Rule 7.3, and the law firm would also have to comply with all of the requirements and prohibitions in Rule 7.3. The law firm may accept newsletter content from a real estate brokerage firm, may acknowledge the source of the content and may accept payments from the real estate

brokerage firm to defray the cost of publishing the newsletter, as long as the law firm does not accept money for referring business to the brokerage firm.

(18-17)

OPINION 1130 (07/12/2017)

TOPIC: Conflicts; Town Attorney

DIGEST: A nonconsentable conflict exists when one member of a law firm acts as Town Attorney on, among other things, planning and zoning matters and another lawyer in the firm seeks to represent an applicant before the Town's planning board.

RULES: 1.0 (f), (r) & (w), 1.7(a), 1.7(b)

FACTS:

1. The inquiring law firm represents a Town. One of the firm's partners serves as Town Attorney, with principal responsibility for advising the Town Board, while another partner, as Deputy Town Attorney, chiefly advises the Planning Board and the Zoning Board of Appeals. Another lawyer affiliated with the firm ("Lawyer X") concentrates in, among other things, zoning matters for private clients.

2. The inquiry arises out of a plot of land located within the Town in close proximity to residential properties and a school. Another government entity (not the Town) once owned the plot but has since sold it. Upon this sale, the Town changed the zoning of the plot from Limited Industrial to Residential, apparently to prevent expanded industrial use of the plot owing to limited access to the plot. Apart from a railway line, the only access is over a residential street.

3. Recently, a company ("Owner") has acquired a portion of the plot and proposes to expand its existing business there in what the inquirer characterizes as a "low-intensity" use. The inquiry states that the Town Board supports this proposal as long as the Owner limits its use of the plot to the proposed low-intensity use, and therefore intends to return the plot's zoning to Limited Industrial. Lawyer X proposes to represent the Owner in the rezoning application to the Planning Board.

4. The plot cannot be rezoned unless the Town Board adopts a local law. Following referral to the County Planning Department for a review and recommendation, the matter will go to the Town Planning Board for a site plan review. The principal function of a planning board "is to approve site plans, subdivision plats, and conditionally permitted uses of property. Town Law §§ 274-a, 276." N.Y. State 630 (1992). Thus, two of the firm's lawyers would be acting for the Town and its Planning Board on the application, while another lawyer in the same firm would be acting for the Owner as applicant.

5. The inquirer expresses confidence that each lawyer will exercise independent professional judgment for the lawyer's clients, and states that each of the clients is prepared to sign a waiver of any conflict.

QUESTION:

6. May a lawyer in a firm act for a private client in applying to the Town Zoning Board for zoning changes, where other members of the firm currently serve as Town Attorney and Deputy Town Attorney, with responsibility for advising the Town on zoning and planning matters, as long as the Town and the private client each give informed consent?

OPINION:

7. This Committee interprets the New York Rules of Professional Conduct (the "Rules"). We assume for purposes of this opinion that the proposed representation would not violate any applicable law governing Town Attorneys and their firms, including, but not limited to, the Public Officers Law, General Municipal Law, the Town Law, and the Town's own Ethics Code. *See, e.g.*, General Municipal Law §§ 800 – 812 (Conflicts of Interest of Municipal Officers and Employees). We do not opine on such questions.

Concurrent Conflicts of Interest

8. Absent informed consent from each affected client, Rule 1.7(a) prohibits concurrent representations when a reasonable lawyer would conclude that either:

> (1) the representation will involve the lawyer in representing *differing interests*; or
>
> (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other *personal interests*. [Emphasis supplied.]

9. With exceptions not applicable here, when lawyers are associated in a firm, none of them may knowingly represent a client when any one of them practicing alone would be prohibited from doing so. Rule 1.10(a). This Rule applies to attorneys employed by the government, whether full-time or part-time. N.Y. State 1065 (2015) (imputing part-time prosecutor's conflict to entire firm).

10. "Differing interests" are defined in Rule 1.0(f) to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest." In N.Y. State 603 (1989) we declined to apply a *per se* rule of disqualification to all instances in which a part-time assistant city attorney represents a private client before city agencies. Instead, we employed a functional analysis of the relationship between the proposed representation and the nature of the lawyer's public function. Applying that functional test, we held in Opinion 603 that neither a part-time assistant city attorney nor any other lawyer in his private law firm could represent clients before the city agencies with which the attorney was associated. In contrast, N.Y. State 630 (1992) involved a lawyer who served a town as special counsel for particular subject matters not involving the town's planning or zoning boards. There, we said the lawyer could represent a private client before the planning and zoning boards because we were not persuaded that the interests of the private client were necessarily so conflicting, diverse or inconsistent with the interests of the town as to adversely affect the lawyer's judgment or loyalty to either client, i.e. the lawyer would not *per se* be representing "differing interests."

11. Nevertheless, in N.Y. State 630 (1992), we cautioned:

> A critical factor in our conclusion is that special counsel ordinarily has limited duties and responsibilities and does not have the town-wide responsibilities and influence of the town attorney or permanent member of his or her staff. A different rule would apply where the nature or volume of legal work handled by special counsel makes him or her the functional equivalent of a regular, ongoing member of the town attorney's

> staff, or where the subject matter of the particular representation is of such overriding importance to the town that special counsel is perceived as having significant influence with the planning or zoning board of appeals. In those situations, . . . the duty of undivided loyalty and the heightened danger of compromising confidences and secrets, coupled with the "special sensitivity" required of lawyers for the public to "take special care not to accept employment which would tend to undermine public confidence in the integrity and efficiency of the legal system," would preclude representation of private clients before agencies whose legal representation is under the umbrella of the town attorney's office. [Citations omitted.]

12. This caveat in N.Y. State 630 teaches that a lawyer who is town attorney may not concurrently represent private clients whose interests are adverse to the town – and Rule 1.10(a) imputes the town attorney's conflicts to his entire firm. The duty of undivided loyalty, and the special sensitivity required of lawyers for the public not to accept employment that would tend to undermine public confidence in the integrity of the legal system, are paramount. *See also* Rule 1.11(f)(2) ("A lawyer who holds public office shall not . . . use the public position to influence, or attempt to influence, a tribunal to act in favor of . . . a client."); Rule 1.11, Cmt. [3] (Rule 1.11(f) is designed to "prevent the lawyer from exploiting public office for the advantage of another client").

13. Opinion 630 was decided under the predecessor to the current Rules: DR 5-105(A) of the New York Lawyer's Code of Professional Responsibility, which, like Rule 1.7(a), addressed conflicts of interest in concurrent representations. The language of the two provisions is not identical but the variances are immaterial to us here. By either standard, a conflict is present here. One of the lawyers in the firm represents the planning board and the zoning board of appeals. An application for a zoning change is essentially a negotiation between the Town and the Owner whereby each party seeks to optimize its own interests in the decision of whether to grant a variance and the terms of such variance. Moreover, a personal interest conflict is present, since there is a significant risk that the independent professional judgment of the lawyers involved will be affected by the personal interest of the attorneys for the Town in continuing representation with the Town or in the interests of the firm in remaining in the good graces of the Owner.

Exceptions to the Prohibition Against Concurrent Representation of Conflicting Interests

14. Concluding that a conflict of interest exists does not end the inquiry. We must also determine whether the conflict is consentable (*i.e.,* waivable).

15. We have previously held that a governmental entity may consent to a conflict of interest as long as the conflict is consentable under the Rules. In N.Y. State 629 (1992), for example, we said that a lawyer in private practice who had previously represented a governmental entity could later represent a client with interests adverse to the government, as long as the lawyer obtained the consent of the governmental entity and (i) the lawyer was reasonably certain both that the entity was legally authorized to waive the conflict of interest and that all legal prerequisites to the consent had been satisfied, and (ii) the lawyer reasonably believed that the process by which the consent was granted was sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust. But the conflict in Opinion 629 was a conflict with the private lawyer's former client, not with a current client, and therefore did not raise the question of "differing interests"

that arises when a lawyer or law firm seeks to oppose a current client. Here, the inquiry revolves around a potential conflict between two current clients of the same law firm.

16. In Opinion 630, we did not expressly address whether informed consent could mitigate a government lawyer's conflict because we found no conflict. Here we have found a conflict, so we must analyze whether consent can cure the conflict.

17. Rule 1.7(b) provides:

> Notwithstanding the existence of a concurrent conflict of interest under Rule 1.7(a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing."

Thus, the Rule authorizes consent to a conflict by the affected clients, unless one of the three circumstances in Rule 1.7(b)(1)-(3) applies, in which case the conflict is nonconsentable. If a conflict is nonconsentable, a lawyer may not even ask for a client's consent. As explained in Comment [14] to Rule 1.7: "If a lawyer does not reasonably believe that the conditions set forth in paragraph (b) can be met, the lawyer should neither ask for the client's consent nor provide representation on the basis of the client's consent. A client's consent to a nonconsentable conflict is ineffective." We must therefore examine the three circumstances in Rule 1.7(b).

18. The first circumstance, which is set out in Rule 1.7(b)(1), is that the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." This "reasonable" belief standard is not purely subjective. *See* Rule 1.0(r) (reasonable belief, when used in reference to a lawyer, "denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.") Objective criteria, including public trust in the processes of government, are integral to the analysis. This analysis necessarily involves consideration of the public's reasonable view of a single law firm handling both sides of an issue that affects the public in a significant way, such as allowing industrial use of land abutting residential properties and an educational institution. Whether or not the issue provokes widespread controversy, we believe that our Opinion 630 correctly captures the ethical concerns that this inquiry raises. Where lawyers from a single law firm are both filing an application with a public agency on behalf of a private client and advising the government agency about the applied-for change in the town's current zoning and planning program, government decision-making is affected in ways that consent cannot ameliorate.

19. The second circumstance in Rule 1.7(b) that makes a conflict nonconsentable is that the representation is "prohibited by law." As noted above, whether the conflict here is prohibited by law is a legal question beyond the jurisdiction of this Committee, so we do not answer that question.

20. The third circumstance in Rule 1.7(b) that makes a conflict nonconsentable is that the representation involves the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal. Here, there is a question about whether the matter before the planning board involves a "claim" by one client of the firm against another client. There is also a question about whether the planning board is a "tribunal" within the meaning of Rule 1.0(w) ("'Tribunal' denotes . . . an . . . administrative agency or other body acting in an adjudicative capacity," i.e. "when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter."). *See* N.Y. State 838 (2010) (whether a rule-making or rate-making proceeding before an administrative agency should be considered as being before a "tribunal" is a question of fact; principles that would apply to the determination include whether the parties have the opportunity to present evidence and cross-examine other providers and whether the ultimate determination will be made by a person in a policy-making role or by an independent trier of fact such as an administrative law judge). Both questions involve issues of fact or law that are beyond our jurisdiction to determine. But if the representations here are prohibited by law, or if the planning board is a tribunal and the zoning application is a claim by one client against another client, then the conflict here is nonconsentable.

21. It does not matter that we lack power to resolve the issues raised by the second or third circumstances of Rule 1.7(b)(3), because Rule 1.7(b)(1) settles the question. A municipal zoning or planning board performs important functions which ordinarily involve public hearings. Typically, the advocate of any zoning change (here, presumably the counsel for the Owner) outlines the proposed change, while counsel for the board (here, a lawyer affiliated with the Owner's advocate) has the duty to question the proposal, raise concerns, and perhaps engage in direct negotiations with the party advocating the proposed change. During those negotiations, either the Owner or the Town may need to compromise or yield points. In addition, because the hearings are public, affected citizens – to whom the Town's counsel may owe duties – may voice their concerns about the proposed zoning change. The planning board must be neutral and free from bias when carrying out its duties. In these circumstances, lawyers from the same law firm who are representing potentially opposing parties could not reasonably conclude that each can provide competent and diligent representation to his or her client. This is especially true where the town attorney holds the heightened duties of counsel to the public, and the public will suffer if he provides anything less than competent and diligent representation to the Town.

22. For all these reasons, we believe the conflict here is nonconsentable.

CONCLUSION:

23. A nonconsentable conflict exists when one member of a law firm acts as Town Attorney on, among other things, planning and zoning matters while another lawyer in the same law firm seeks to represent an applicant before the Town's planning board.

(15-17)

OPINION 1131 (08/08/2017)

Overrules N.Y. State 902 (2012) (as to payment of marketing fee)

TOPIC: Lead generation; lawyer paying for-profit company for leads

DIGEST: A lawyer may pay a for-profit service for leads to potential clients obtained via a website on which potential clients provide contact information and agree to be contacted by a participating lawyer, as long as (i) the lawyer who contacts the potential client has been selected by transparent and mechanical methods that do not purport to be based on an analysis of the potential client's legal problem or the qualifications of the selected lawyer to handle that problem; (ii) the service does not explicitly or implicitly recommend any lawyer, and (iii) the website of the service complies with the requirements of Rule 7.1. A lawyer who purchases such a lead to a potential client may ethically telephone that potential client if the potential client has invited the lawyer selected by the service to make contact by telephone.

RULES: 1.0 (a) & (f), 1.5(g), 5.4, 7.1(a), (f) & (h), 7.2(a), 7.3

FACTS:

1. A lawyer wishes to pay a for-profit company that maintains an internet-based service (the "Service") directed at individuals or entities seeking a lawyer. Those who wish to be contacted by a lawyer submit their names and contact information (including the method the lawyer may use to contact them), their geographic locale, and the practice area in which they seek legal advice. The Service then searches its database of participating lawyers to identify all lawyers who state that they engage in the requested practice area in the requested locale. The Service selects a lawyer meeting the geographic and practice area criteria based on neutral (mechanical) criteria, such as the order in which the lawyers registered with the Service (the first lawyer to register gets the first lead; second lawyer gets the second lead, etc.). The selection method is clearly described to potential clients. The Service forwards the potential client's information to that lawyer.

2. The participating lawyer pays a fixed monthly fee to the Service or a fee for each such potential client, and the fee does not vary depending on whether the lead results in retention of the lawyer or the amount of the fee the lawyer charges the client if retained. If the potential client decides not to retain that lawyer or if the assigned lawyer has a conflict of interest and cannot represent the potential client, the potential client may request that the Service provide the client's information to another participating lawyer.

3. This opinion addresses the implications of this arrangement under the advertising, referral, and solicitation provisions in the New York Rules of Professional Conduct ("Rules").

QUESTIONS:

4. Does the Service's website constitute an "advertisement" by or on behalf of the lawyer for which the lawyer is responsible under the Rules?

5. Does the lawyer's payment to the Service for the names of potential clients constitute an impermissible payment for obtaining employment by the lawyer?

6. If the lawyer may use the Service, does the lawyer's outreach to the potential client constitute an impermissible "solicitation" or "advertisement' within the meaning of the Rules?

OPINION:

7. Because of the wide variation in the structure of the many web-based services operating in this area, this opinion does not attempt to address every factual permutation that may exist. This opinion also does not address whether the Service would implicate § 495(1)(d) of the Judiciary Law ("No corporation . . . shall . . . furnish attorneys or counsel"), which is a question of law beyond our jurisdiction.

Prior Committee Opinions

8. In N.Y. State 779 (2004) a lawyer wished to pay a marketing organization a fee in return for a bundle of pre-screened potential clients that might need representation regarding their federal income taxes. Applying the New York Code of Professional Responsibility (the "Code"), the predecessor to the current Rules, we concluded that accepting leads in this fashion was impermissible under DR 2-103(B), which provided, in pertinent part: "A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client."

9. In N.Y. State 799 (2006), this Committee addressed whether a lawyer could ethically pay to participate in a website that forwarded inquiries from potential clients to lawyers who then contacted the prospect by telephone, where the service purported to analyze the prospective client's problem. N.Y. State 799 opined that, subject to the rules on attorney advertising, a lawyer may pay to be included in "an online 'directory' . . . that provides tools by which a potential client can filter a list of attorneys by geography and/or practice area," and opined that such an on-line directory did not violate DR 2-103(B). The Committee stated, however, that the line between a permissible "directory" and an impermissible "recommendation" would be crossed when the service purports to analyze the prospective client's problem:

> We find that the line is crossed . . . when a website purports to recommend a particular lawyer or lawyers for the prospective client's problem, *based on an analysis of that problem*. For example, if a potential client describes a slip-and-fall incident on an intake form and the website determines that the problem calls for a personal injury lawyer and then recommends one or more lawyers in that area, the website is 'recommending' those lawyers.

(Emphasis in original.) On that basis, Opinion 799 distinguished a searchable directory from the website service addressed in N.Y. State 779.

10. Finally, in N.Y. State 902 (2012) the Committee held that a lawyer could not pay a marketing company a fixed fee each time the marketer makes an introduction to a potential client.

11. The current inquiry implicates provisions whose language is in many respects identical to the provisions addressed in Opinions 779, 799 and 902, including Rule 7.2(a), which incorporates the above-quoted restriction of its predecessor, DR 2-103(B). The questions presented here are whether a New York lawyer who uses the Service runs afoul of the principles reflected in those opinions. We believe that such a lawyer would not violate the Rules if the lawyer abides by the conditions set forth in this opinion.

Advertising and Required Disclosures

12. Rule 7.1 governs lawyer advertisements. Rule 1.0(a) defines "advertisement" for purposes of the various advertising restrictions in the Rules. It provides:

> "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or the law firm's services, the primary purpose of which is for the retention of the lawyer or law firm.

Here, the Service's website is a communication "on behalf of" a lawyer "about" the lawyer's services for the "primary purpose" of retention of the lawyer. It is therefore an "advertisement" within the meaning of Rule 1.0(a).

13. Rule 7.1(a) prohibits a lawyer from participating in an advertisement that "(1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule." Rule 7.1 also requires that certain advertisements contain prescribed disclosures, such as the label "Attorney Advertising," and information about the lawyer whose services are advertised. *See* Rules 7.1(f), 7.1(h). Even though the Service, not the lawyer, creates and disseminates the Service's website, each participating lawyer is "participat[ing] in the use and dissemination of" this advertisement within the meaning of Rule 7.1(a) and therefore has a duty to assure that the website is consistent with Rule 7.1. This means that a participating lawyer must determine that the website does not make false, misleading, or deceptive statements or claims, or otherwise violate the Rules.

14. Rule 7.1(h) requires that "[a]ll advertisements shall include the name, principal law office and telephone number of the lawyer or law firm whose services are being offered." We have previously concluded that lawyers may not engage in advertising on the internet, including "group advertising," without complying with this Rule. *See, e.g.*, N.Y. State 839 (2010) ("Group radio advertisement that does not broadcast the lawyer's name, principal law office address and telephone number, but instead directs listeners to contact an agent who provides that information, is prohibited under Rule 7.1(h).").

15. The question raised by N.Y. State 839 is how the Service's website may operate consistently with Rule 7.1(h). N.Y. State 597 (1989) provides one possible solution. In that opinion, each lawyer was assigned a specific geographical area – either a county or a zip code. Applying the Code, the Committee said that it was irrelevant that the operator of the service had no discretion in choosing lawyers for potential clients. If the client was not choosing a *particular lawyer*, the referral was prohibited. Nevertheless, the Committee stated that the conclusion would be different if an advertisement not only contains an 800 number, but also "presents in a meaningful fashion the names of the lawyers or law firms participating in the group advertisement, along with their addresses and the geographical

areas assigned to them, so that the potential client knows the identity of the lawyer to whom his call will be referred and there is no discretion in referrals on the part of the advertising agent."

16. Here, the Service can comply with Rule 7.1(h) by providing a link to either (i) a list of all participating attorneys with the required contact information or (ii) a list of all participating attorneys who fall within the geographic and practice area parameters that may be set by the potential client, along with the required contact information. In this way, the potential client will know the names and addresses of the lawyers from which the Service may designate a lawyer who will contact the potential client.

Referrals and Referral Fees

17. Rule 7.2(a) states that a lawyer shall not "compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client . . . ." The Rule contains three exceptions that are not relevant to this inquiry: (1) referrals without monetary rewards permitted by Rule 5.8, (2) referrals to another lawyer permitted by Rule 1.5(g), and (3) referrals by a qualified legal assistance organization (defined in Rule 1.0(p) as one of the types of organizations listed in Rule 7.2(b)(1) – (4)). The Service here is not operated or sponsored by a bona fide non-profit community organization or operated, sponsored or approved by a bar association and therefore does not constitute a qualified legal assistance organization.

18. Since the Service here does not qualify for any of the exceptions in Rule 7.2(a), Rule 7.2(a) is a problem if the lawyer pays the Service to "recommend" the lawyer or if the lawyer pays the Service to obtain employment by a client. Nevertheless, Comment [1] to Rule 7.2 makes clear that a lawyer may pay for advertising permitted by the Rules without violating the prohibition against "paying to obtain employment" within the meaning of Rule 7.2(a). Consequently, if the Service complies with the advertising rules and the lawyer's payment is reasonable for that form of advertising, a lawyer's using the Service will not run afoul of Rule 7.2 unless the Service is deemed to "recommend" the lawyer.

19. Comment [1] to Rule 7.2 includes a definition of the term "recommendation":

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

20. As we observed in Opinion 799, to "recommend" also includes identifying a particular lawyer or lawyers to a potential client as "a right" or "the right" lawyer for the client's situation after an analysis of either the potential client's legal problem or the lawyer's qualifications to address that problem. We believe identifying "a right" or "the right" lawyer implies some qualitative, comparative assessment of the lawyers available to perform the services the potential client requires.

21. We believe that the Service would not constitute a "recommendation" as long as the Service's advertising does not state or imply that the Service is making a recommendation and makes clear that (i) being included on its list of participating lawyers requires only a payment and the Service does not vet the qualifications of such lawyers, other than, for example, confirming the lawyer's good standing with the licensing authority, if that is the case, (ii) the Service's selection of a participating lawyer

from that list is the result of a neutral process that involves no evaluative judgment, and (iii) when a lawyer is chosen by the Service, it does not mean the selected lawyer is the "best" or "right" lawyer for the client's needs or that the lawyer is otherwise preferred over other lawyers. If these three conditions are met, a lawyer's payment to the Service to participate in its matching service as a lawyer available to contact potential clients is permissible under Rule 7.2(a).

22. These three conditions are consistent with Comment [1] to Rule 7.2, which was amended in 2015 to provide guidance on how the prohibition on paying for referrals or employment applies to paying for client leads. Comment [1] says, in part:

> [A] lawyer may pay others for generating clients leads, such as Internet-based client leads, as long as (i) the lead generator does not recommend the lawyers, (ii) any payment to the lead generator is consistent with Rules 1.5(g) (division of fees) and 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer's independent professional judgment by a person who recommends the lawyer's services), and (iv) the lead generator's communications are consistent with Rules 7.1 (Advertising) and 7.3 (Solicitation and Recommendation of Professional Employment). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. *See also* Rule 5.3 (Lawyer's Responsibility for Conduct of Nonlawyers).

The New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC"), which recommended the amendment to Comment [1], explained the amendment as follows:

> The Internet and other technologies have made it possible for lawyers to find clients in ways that did not exist five or ten years ago, and have enabled nonlawyers to develop new ways to assist lawyers in finding new clients. COSAC recommends amending Comment [1] to Rule 7.2 to clarify the situations in which a lawyer may pay others for generating client leads gathered from the Internet or elsewhere.

See New York State Bar Association, Committee on Standards of Attorney Conduct, Proposed Amendments to the New York Rules of Professional Conduct and Related Comments 3 (December 23, 2014).

23. The first condition in amended Comment [1] is that the lead generator not recommend (or imply or create a reasonable impression that it is recommending) the lawyers. Thus, a lawyer using the Service must assure that neither the Service nor the advertising for the Services states or implies that the Service is recommending any lawyer, because false, deceptive or misleading communications violate Rule 7.1(a)(1). This means that the Service must be transparent about the methodology it uses to select lawyers. To ensure that the Service does not suggest to potential clients that the Service is comparing the relative merits of lawyers in order to choose a specific lawyer to contact the potential client, the Service must provide sufficient information to make clear that (i) lawyers pay to participate in the Service, (ii) the selection of a lawyer by the system is not based on an analysis of the potential client's legal problem, (iii) the selection is not a recommendation nor does it imply that the lawyer

selected is the "right" or "best" or preferred lawyer to handle the problem, and (iv) the selection is not an evaluation of the quality of the selected lawyer's work. An element of the Service that is solely fact-based (for instance, that the Service accepts only participating lawyers who are in good standing in their jurisdiction of practice), unadorned by evaluative measures or ratings, likewise would not render the Service's selection of a lawyer a recommendation if the Service is indeed objective.

24. Another condition set out in the excerpt from Comment [1] quoted above is that any payment to the lead generator must be consistent with Rules 1.5(g) and 5.4. We see no issue under Rules 1.5(g) and 5.4 as long as the lawyer is paying the Service a fixed sum to participate, unrelated to the lawyer's retention or the amount the lawyer charges in legal fees. Paying a fixed fee to the Service is essentially paying a marketing fee. Our Opinion 902 (2012) is hereby overruled to the extent it prohibited payment of the marketing fee described in this opinion.

25. A final condition set out in Comment [1] to Rule 7.2 is that the lawyer must comply with Rule 1.8(f). Thus the lawyer must prevent interference with the lawyer's exercise of independent professional judgment. In our view, the Service's selection method and communication protocols described above raise no apparent risks in that regard.

26. Our conclusion that the Rules permit the type of arrangement at issue here also finds support in numerous ethics opinions issued by other ethics committees. *See* ABA/BNA Lawyers' Manual on Professional Conduct: Advertising and Solicitation 81:709; *Zelotes v. Rousseau*, N. 09-0412, 26 Law. Man. Prof. Conduct 134 (Conn. Statewide Grievance Comm. Feb. 8, 2010) (dismissing disciplinary complaints against Connecticut lawyers for participating in ClearBankruptcy.com and TotalBankruptcy.com, noting that the websites did not endorse participating lawyers but bore disclaimers to the contrary and required potential clients to initiate contact by visiting the websites and voluntarily providing information); Arizona Op. 11-02 (lawyer may join an internet group advertisement listing no more than one lawyer for each zip code if program does not imply endorsement, if it is labelled as advertising, and if lawyer has paid for exclusive zip code listing); District of Columbia Op. 302 (lawyers may pursue legal work through paying a fee to access web page where potential clients post requests for bids on legal work); Nassau County (N.Y.) Ethics Op. 01-4, 17 Law. Man. Prof. Conduct 123 (2001) (subject to the operational structure and content described in the opinion, a lawyer may affiliate with an online legal services website); Nebraska Op. 07-05 (lawyer may participate in internet lawyer directory which identifies itself as a directory, disclaims being a referral service and only lists basic information about lawyers without recommending specific lawyers and charges a reasonable, flat annual advertising fee); New Jersey Committee on Attorney Advertising Op. 36 (2006) (lawyer may pay flat fee to internet marketing company for exclusive website listing for particular county in specific practice area if listing includes prominent, unmistakable disclaimer stating the listings are paid advertisements and not endorsements or authorized referrals); North Carolina Op. 2004-1 (lawyer may participate in for-profit online service that is a hybrid referral service-legal directory, provided there is no fee-sharing with the service and communications are truthful); Oregon Op. 2007-180 (2007) (lawyer may pay nationwide internet referral service for listing if listing is not false or misleading and does not imply that the lawyer can represent clients outside jurisdictions of the lawyer's license, fee is not based on number of referrals, retained clients or revenue generated by listing and the service does not exercise discretion in matching clients with lawyers); Rhode Island 2005-01 (permitting website that enables lawyers to post information about their services and respond to anonymous requests for legal services in exchange for flat annual membership fee if website exercises no

discretion over which requests lawyers may access); South Carolina 01-03 (lawyer may pay internet advertising service fee determined by the number of "hits" that the service produces for the lawyer provided that the service does not steer business to any particular lawyer and the payments are not based on whether user ultimately becomes a client); Texas Op. 573 (2006) (lawyer may participate in for-profit internet service that matches potential clients and lawyers if selection process is fully automated and performed by computers without the exercise of human discretion); Virginia Advertising Op. A-0117 (2006) (lawyer may participate in online lawyer directory in which publisher does not recommend or steer business to particular lawyers).

Solicitation and Permissible Contact

27. Finally, a lawyer who purchases leads must comply with applicable restrictions on the solicitation of potential clients. A solicitation, as defined by Rule 7.3(b), is an advertisement "initiated by or on behalf of a lawyer" that is targeted at a specific recipient or group of recipients and intended to secure the lawyer's retention for pecuniary gain. However, Rule 7.3(b) also contains an exception: a solicitation "does not include a proposal or other writing prepared and delivered in response to a specific request." If the potential client (the "lead") has specifically requested or consented to a phone call, then the lawyer's phone call is not a solicitation because it is not "initiated by or on behalf of" the lawyer. Rather the phone call is initiated in response to a specific "request" by the potential client. Although the exception in Rule 7.3(b) refers to a proposal or other "writing" delivered in response to a client's request, we think a writing is just one example and that the exception also applies to a request by a potential client to be contacted in any specified manner, including by telephone, text, email or otherwise. *See* N.Y. State 1049 (2015) (where a potential client posts a message on a website asking to be contacted by a lawyer about a legal problem, a lawyer may respond in the manner invited by the client); N.Y. State 1014 (2014) (where detainee communicates through another detainee that he desires to be contacted by a particular lawyer, the lawyer's response is not a solicitation, because the communication was initiated by the prospective client).

CONCLUSION:

28. A lawyer may pay a for-profit service for leads to potential clients obtained via a website on which potential clients provide contact information and agree to be contacted by a participating lawyer, as long as (i) the lawyer who contacts the potential client has been selected by transparent and mechanical methods that do not purport to be based on an analysis of the potential client's legal problem or the qualifications of the selected lawyer to handle that problem; (ii) the service does not explicitly or implicitly recommend any lawyer, and (iii) the website of the service complies with the requirements of Rule 7.1. A lawyer who purchases such a lead to a potential client may telephone that potential client if the party has invited a telephonic communication by the lawyer selected by the service.

(9-17)

OPINION 1132 (08/08/2017)

TOPIC: Paying nonlawyers for a recommendation or referral

DIGEST: A lawyer may not pay the current marketing fee to participate in Avvo Legal Services, because the fee includes an improper payment for a recommendation in violation of Rule 7.2(a).

RULES: 1.0(a), 5.4(a), 7.1(a), 7.1(b)(1), 7.1(f). 7.1(h), 7.2(a)

FACTS:

1. The inquirer is a lawyer who wishes to participate in Avvo Legal Services, which is a service of Avvo, Inc. Avvo, Inc. is a privately-owned corporation that describes itself as an online legal services marketplace. (Avvo, Inc. and Avvo Legal Services are sometimes each referred to in this opinion as "Avvo" and lawyers who offer Avvo Legal Services are referred to as "participating lawyers"). The inquirer would offer legal services through Avvo's website and pay the marketing fees that Avvo charges to lawyers who obtain clients via the Avvo website. The inquirer asks whether the New York Rules of Professional Conduct (the "Rules") permit New York lawyers to pay Avvo's marketing fees. Because Avvo's method of operation is crucial to our response, we will devote several paragraphs to describing the Avvo Legal Services product.

2. Avvo allows potential clients to choose participating lawyers in various practice areas for a fixed (*i.e.,* flat) fee. The Avvo website (*www.avvo.com*) says: "Experienced lawyers on demand. Hire yours" and "Work with highly rated, local lawyers near you," and it contains a guide called "How to find and hire a great lawyer."

Avvo Ratings

3. Avvo assigns every lawyer in a jurisdiction an "Avvo rating." The rating is calculated based on information Avvo collects from lawyer websites and other public sources (such as the type of work the lawyer does and the number of years the lawyer has been engaged in that work), as well as on information the lawyer has chosen to add to the lawyer's Avvo profile (such as publications, CLE presentations, speaking engagements and positions with bar associations and their committees). Avvo's website says that each attorney's rating "is calculated using a mathematical model, and all lawyers are evaluated on the same set of standards. . . . At Avvo, all lawyers are treated equally." Avvo does not seek or accept any payment for an Avvo rating. However, lawyers who supply more information may receive higher ratings than lawyers who supply less information. Avvo says it scores all information objectively, and does not use subjective data such as client reviews. Although Avvo assigns a rating to all lawyers in a jurisdiction, lawyers cannot offer their services through Avvo unless they meet Avvo's minimum criteria and sign up with Avvo to be listed on the site and agree to Avvo's pricing schedule and marketing fees. According to Avvo, the criteria for participation include a minimum Avvo Rating, a minimum client review score, and a clean disciplinary history.

How a Prospective Client Chooses a Lawyer and Service

4. A prospective client seeking legal services through Avvo first chooses an area of law practice and a state or city. (Avvo lists all 50 states and the District of Columbia, and separately lists about 50

major cities.) The Avvo site says: "Choose an area of law to find top-rated attorneys near you." The site lists numerous areas of law practice, such as Business, Family, Government, Immigration, Bankruptcy and Debt, Criminal Defense, Landlord & Tenant, Employment & Labor, Real Estate, and Estate Planning.

5. Next, the prospective client chooses a type of legal service or "package." The Avvo website says: "Packages include advice sessions, document reviews, and start-to-finish support." Advice sessions (called "Avvo Advisor") come in two varieties – the prospective client may either (i) click on a specific lawyer, who is required by Avvo to call back within one business day, or (ii) click on "have a lawyer call me now," in which case Avvo sends a text message to all lawyers in the selected practice area and locale, and the first available lawyer calls the prospective client. When using the first of these varieties of advice session, the client is free to choose from the entire list of lawyers who are licensed in the client's state and who offer the service the client seeks to purchase.

6. Avvo's website does not say, "We recommend that you choose this lawyer," or "This lawyer is the best fit for your situation." Rather, Avvo furnishes information about lawyers (including client reviews, peer reviews, and Avvo ratings) and allows clients to choose the lawyer. Avvo describes its service as simply "facilitating a marketplace" where consumers can choose from among all of Avvo's participating lawyers.

7. Once the prospective client has chosen a lawyer (or opted for "have a lawyer contact me now") and selected a specified legal service, the client clicks on a button that says "Buy now." The lawyer then contacts the client. (Phone calls from a participating lawyer to a client initially go through an automated Avvo "switchboard" so that Avvo can time the calls, but Avvo asserts that it cannot listen to the calls.) Once the lawyer and client have completed a phone call of at least eight minutes, Avvo charges the client's credit card for the full amount of the fee for the selected legal service.

Avvo's Satisfaction Guarantee

8. Part of the Avvo product is that Avvo gives a "satisfaction guarantee" and will refund the fee to the client (or allow the client to choose a different participating lawyer at no additional charge) if (a) the lawyer does not deliver the services for which the client has paid, or (b) the client is not satisfied with the lawyer's services. Avvo's website describes the satisfaction guarantee as follows:

> **If you're not 100% happy with the service you purchased, we'll make it right.**
>
> We stand behind our services and expect our clients to be 100% satisfied with their experience. If you are unhappy with the service you purchased, we'll make it right. We will help you switch lawyers or services to make sure you get the legal help you need, at no cost to you. If you don't want to continue to solve your issue through Avvo Legal Services, we will fully refund your purchase.
>
> **What if I don't get the results I expect?**
>
> We guarantee the services listed on our website, but we can't guarantee any specific outcome. Every legal case is unique. The success of your case depends on many different factors.

> **How do I request a refund or file a complaint?**
>
> To file a complaint or seek a refund, contact customer care. . . . Depending on your situation, documentation may be needed. Your customer care rep will work with you to fix the situation to your satisfaction.

Avvo considers this satisfaction guarantee to be part of its marketing costs, reasoning that the satisfaction guarantee makes participating lawyers more attractive than lawyers who do not offer a satisfaction guarantee.

Avvo's Marketing Fee

9. At the beginning of each month, Avvo pays each participating attorney all of the legal fees generated through Avvo by that attorney in the previous month, and separately charges each attorney a "marketing fee" for each legal service the attorney has completed during the prior month (unless Avvo has refunded the client's payment). As an example, Avvo's website tells lawyers that "if a client purchases a $149 document review service with you, you will be paid the full $149 client payment into your deposits account. As a separate transaction, you will be charged a $40 marketing fee from your withdrawals account." *See* http://bit.ly/2fIlOxM ("Attorney FAQ for Avvo Legal Services").

10. The amount of Avvo's marketing fee depends on the service. For more expensive legal services, Avvo generally charges lawyers a higher marketing fee. An FAQ on Avvo's website explains the marketing fee as follows: "The amount depends on the service, and ranges from a $10 marketing fee for a $39 service, to $40 marketing fee for a $149 service, up to a $400 marketing fee for a $2,995 service." As these examples show, the marketing fee is not directly proportional to the price of the legal service – a $10 marketing fee is 25.6% of a $39 service and a $40 marketing fee is 26.8% of a $149 service, but a $400 marketing fee is only 13.4% of a $2995 service.[1] Thus, the marketing fee is not a fixed percentage of the legal fees, but it is generally greater for higher-priced services than for lower-priced services.

11. To understand Avvo's rationale in setting its marketing fees, this Committee posed various questions directly to Avvo. Avvo explained that the correlation between its marketing fees and the price of Avvo legal services reflects two interrelated concepts.

12. First, Avvo says that more expensive legal services cost more to market. For example, Avvo says that its ad placements on Google and on online advertising networks cost more for more expensive services, and cost more for more competitive keywords. Also, Avvo's marketing fee covers the

1 Avvo also provided this Committee with a list of many additional services, prices, and marketing fees. For example, marketing fees are generally $30 for a $99 service (33.3%); $50 for a $199 service (25.1%); $80 for a $295 service (27.1%); $125 for a $595 service (21%); and $150 for a $495 service (30.3%); and $200 for a $995 service (20%). Thus, while the marketing fee increases in absolute dollars as the price of the service increases, the marketing fee generally decreases in percentage terms as the price increases. But in a few instances, Avvo charges the same marketing fee for services of different prices – for example, filing for an uncontested divorce is $995, and creating an estate plan bundle for an individual is $795, but Avvo charges a $200 marketing fee for both. Also, Avvo charges a different marketing fee for some services of the same price – for example, Avvo charges $199 to review a non-compete agreement, to petition for an alien relative, or to create an employment offer letter, but Avvo charges $50, $55, and $60 respectively as a marketing fee for those services.

credit card processing fee, which is a fixed percentage of the total legal fee, so a higher legal fee necessarily entails a higher credit card processing fee.

13. Second, Avvo says that its customer service costs are higher for more expensive services. For example, Avvo says that its "platform usage" and "customer care" expenses are higher for more expensive services, because clients raise more questions about more expensive services. Avvo employs a team of live customer care representatives who handle client inquiries via phone, email, and electronic chat – see https://support.avvo.com/hc/en-us/requests/new. In addition, Avvo says that requests for refunds, voids, chargebacks, and other forms of what it calls "breakage" are higher for more expensive services. We have not verified any of Avvo's facts or claims regarding its marketing expenses, but we accept them as true for purposes of our analysis in this opinion.

QUESTION:

14. May a New York lawyer pay Avvo's current marketing fee to participate in Avvo Legal Services?

OPINION:

Issues Not Decided Here

15. Avvo's mode of operation raises many questions under the Rules in addition to the marketing fee issue. For example:

- Avvo markets the services of participating lawyers. Rule 7.1(a) prohibits a lawyer from participating in an advertisement that "(1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule." Rule 7.1(a) also requires that certain ads contain prescribed disclosures, such as the label "Attorney Advertising," and information about the lawyer whose services are advertised. *See* Rules 7.1(f), 7.1(h). Rule 1.0(a) defines an "advertisement" to mean "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services the primary purpose of which is for the retention of the layer or law firm." As we said in N.Y. State 1131 (2017):

  > Even though the Service, not the lawyer, creates and disseminates the Service's website, each participating lawyer is "participat[ing] in the use and dissemination of" this advertisement within the meaning of Rule 7.1(a) and therefore has a duty to assure that the website is consistent with Rule 7.1. This means that a participating lawyer must determine that the website does not make false, misleading or deceptive statements or claims, or otherwise violate the Rules.

- Under Rule 7.1(b)(1) and Comment [13] to Rule 7.1, lawyers may not use Avvo ratings (or any other ratings) in their advertising unless those ratings are "bona fide professional ratings." As noted in ¶ 19, the Avvo website constitutes advertising of lawyers who participate in Avvo Legal Services. Consequently, participating lawyers must determine whether the ratings provided by the service are bona fide. Comment [13] to Rule 7.1, headed "Bona Fide Professional Ratings," provides guidance, saying that ratings are not "bona fide" unless (among other things) the ratings "evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating

service's economic interests," and are "not subject to improper influence by lawyers who are being evaluated." If the rating is not bona fide, it would be false and misleading in violation of Rule 7.1(a)(1). We lack sufficient facts to determine (and do not decide) whether Avvo's rating system meets the criteria for a bona fide professional rating.

- Many of the services under the Avvo Legal Services program involve limited services, such as a 15-minute advice session or review of a document and a 30-minute advice session but not revision of the document. Both the Rules and our opinions have approved limited scope representations under certain conditions that we do not repeat here. *See* Rule 1.2(c) and Cmts. [6] and [7], N.Y. State 856 (2011), N.Y. State 604 (1989).

- The fact that Avvo sets the amount of the legal fee for each service raises questions about whether a participating lawyer can deliver competent legal services for Avvo's chosen price and whether a lawyer is allowing Avvo to interfere in the lawyer's independent professional judgment regarding how much time to spend on a matter.

- The marketing fee raises questions about whether lawyers who participate in Avvo Legal Services are improperly sharing legal fees with a nonlawyer.[1]

- Avvo's satisfaction guarantee raises questions about confidentiality. If clients call Avvo to complain, does the "documentation" that Avvo asks for or receives include "confidential information" within the meaning of Rule 1.6(a)? How does Avvo avoid receiving confidential information when evaluating whether to refund the legal fee a client has paid through Avvo?

16. In this opinion, we do not address or answer any of those additional issues, because we believe our answer to the question posed by the inquirer is dispositive. Similarly, we express no opinion as to whether Avvo's operations implicate § 495(1)(d) of the Judiciary Law, which provides that "[n]o corporation . . . shall . . . furnish attorneys or counsel". That is a question of law beyond our jurisdiction. Instead, we focus in this opinion only on whether the marketing fee that Avvo charges to participating lawyers constitutes an improper payment for a recommendation (*i.e.,* an improper referral fee) within the meaning of Rule 7.2(a) of the Rules.

Does the marketing fee constitute an improper payment for a recommendation?

17. Rule 7.2(a) sets forth the following general rule:

1 Several ethics opinions from other jurisdictions have concluded that lawyers working with Avvo or similar entities are engaged in improper fee sharing or are violating other Rules of Professional Conduct. For example, NJ ACPE 732 (2017) concluded that New Jersey lawyers "may not participate in the Avvo legal service programs because the programs improperly require the lawyer to share a legal fee with a nonlawyer," and Pennsylvania 2016-200 (2016) concluded that a hypothetical program similar to Avvo was engaged in "impermissible fee sharing under RPC 5.4(a)." Noting that the "primary policy underlying RPC 5.4(a) is the preservation of the lawyer's professional independence," Opinion 2016-200 said: "[T]he assumption that the lawyer's payment to a nonlawyer of marketing fees amounting to 20% to 30% of legal fees earned does not interfere with the lawyer's professional independence is, at a minimum, of questionable validity." See also Ohio 2016-3 (2016) ("A lawyer's participation in an online, nonlawyer-owned legal referral service, where the lawyer is required to pay a 'marketing fee' to a nonlawyer for each service completed for a client, is unethical," citing Rule 5.4). We express no opinion on whether those opinions reach the correct conclusions. Compare N.Y. State 1131 (2017), in which we determined that a flat fee constituted a payment for advertising and not a sharing of legal fees.

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

(Rule 7.2(a) also states two exceptions not relevant here.)

18. Whether paying Avvo's marketing fee complies with Rule 7.2(a) depends primarily on what a lawyer is purchasing when the lawyer pays Avvo's marketing fee. If the lawyer is paying the marketing fee solely to obtain advertising and marketing services from Avvo, then the lawyer is not giving Avvo something "of value" to recommend the lawyer, but is instead paying Avvo for marketing services, which does not violate Rule 7.2(a). If, however, the marketing fee also includes a payment to Avvo for recommending the lawyer, then the payment constitutes giving something "of value" for a recommendation, which does violate Rule 7.2(a).

1. Is the marketing fee solely a payment for advertising and marketing services?

19. A marketing fee is not *per se* prohibited by Rule 7.2(a). A lawyer may pay nonlawyers to advertise or market the lawyer's services. Comment [1] to Rule 7.2 says explicitly that Rule 7.2(a) "does not prohibit a lawyer from paying for advertising and communications permitted by these Rules," and that a lawyer "may also compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, marketing personnel, business development staff, and web site designers." We believe Avvo's website is an "advertisement" within the meaning of Rule 1.0(a). The Avvo website is a public communication on behalf of each participating lawyer, about that lawyer, for the primary purpose of helping the participating lawyers obtain employment by potential clients who use the Avvo website. And the participating lawyers "use or . . . participate in use" of the advertisement within the meaning of Rule 7.1(a) because they must take action to participate in Avvo Legal Services.

20. We addressed payments to nonlawyers for advertising in N.Y. State 897 (2011), which addressed a "deal-of-the-day" service similar to Groupon or Living Social. There, the deal-of-the-day service negotiated with lawyers to obtain a discounted legal fee. Potential clients who wanted the lawyer's discounted services used a credit card on the deal-of-the-day website to purchase a voucher for the lawyer's services. The website then deducted "a percentage of the gross receipts as its compensation" and paid the balance to the lawyer. (Opinion 897 does not specify the percentage.) We asked "whether the money retained by the website is merely an appropriate payment for a novel form of advertising or is a compensation for the referral of a client." We concluded that the deal-of-the-day arrangement was an appropriate payment for advertising, and was not payment for a referral, and therefore did not violate Rule 7.2(a). To explain our rationale, we said (in ¶12):

> We note that the website has no individual contact with the coupon buyers other than collecting the cost of the coupon. The website has not taken any action to refer a potential client to a particular lawyer – instead it has carried a particular lawyer's advertising message to interested consumers and has charged a fee for that service.

21. Opinion 897 did not reach a categorical conclusion, however, because we were "not privy to the percentage amount retained by these various websites . . . ." We said: "[A]ssuming that it is a reasonable payment for this form of advertising, we conclude that there is no violation of Rule 7.2." We

then qualified our opinion by saying: "Different arrangements between the lawyer and the website could lead to the opposite conclusion, *i.e.,* that the lawyer is paying for a referral in violation of Rule 7.2."

22. Here, we again lack sufficient information to determine whether Avvo's marketing fee is "a reasonable payment for this form of advertising." We therefore do not decide this question.[1]

2. Is the marketing fee a payment for a recommendation?

23. Under Rule 7.2, although lawyers may ethically pay nonlawyers for advertising and marketing services, they may not pay for a "recommendation." Therefore, we must determine whether the marketing fee is or includes a payment to Avvo to recommend the participating lawyers.

24. The term "recommendation" is not defined in the text of the Rules. However, in March 2015, after we issued N.Y. State 897 (2011), the New York State Bar Association amended Comment [1] to Rule 7.2 to address, among other things, whether a third party that connects lawyers with clients or potential clients is "recommending" the lawyer, and to define a "recommendation." Comment [1] now states, in part:

> [1] . . . A communication contains a recommendation *if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities.* [Emphasis added.]

See also N.Y. State 1131 ¶ 19 (2017), (to "recommend" includes identifying a particular lawyer or lawyers to a potential client as "a right" or "the right" lawyer for the client's situation after an analysis of either the potential client's legal problem or the lawyer's qualifications to address that problem, which implies a qualitative, comparative assessment of the lawyers available to perform the services the potential client requires).

25. Comment [1] to Rule 7.2 adds that recommendations by so-called "lead generators" are improper:

> . . . [A] lawyer may pay others for generating client leads, such as Internet-based client leads, as long as *(i) the lead generator does not recommend the lawyer*, (ii) any payment to the lead generator is consistent with Rule[] . . . 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer's independent professional judgment by a person who recommends the lawyer's services), and (iv) the lead generator's communications are consistent with Rules 7.1 (advertising) and 7.3 (solicitation and recommendation of professional employment). . . . [Emphasis added.]

1 A deal-of-the-day service differs in at least one significant respect from Avvo Legal Services. A lawyer participating in a deal-of-the-day program negotiates a discounted fee, but the fee is ultimately set by the lawyer. A lawyer who participates in Avvo, in contrast, must agree to charge the fee set by Avvo for each particular service.

Indeed, Comment [1] prohibits a lead generator not only from *stating* that it is recommending a lawyer, but also from *implying or creating a reasonable impression* that it is making such a recommendation:

> . . . To comply with Rule 7.1, a lawyer must not pay a lead generator that *states, implies, or creates a reasonable impression that it is recommending the lawyer,* is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. . . . [Emphasis added.]

We must therefore determine whether Avvo is "recommending" a lawyer or "implying or creating a reasonable impression" that it is making a recommendation.

26. As noted earlier, Avvo allows clients to choose from among all of the lawyers in a geographic area who have listed themselves as practicing the field of law in which the client wants legal services. (Avvo says lawyers are displayed randomly and the list is reshuffled at least once every hour.) Avvo says that it does not analyze (or even inquire about) a client's individual situation. No human being at Avvo talks directly to any prospective client to find out the facts or studies the prospective client's documents and then picks out a particular lawyer who is "right" for that client. Nor does Avvo's website suggest that a client hire any particular lawyer. Avvo is not "recommending" lawyers in that sense.

27. But Avvo does more than merely list lawyers, their profiles, and their contact information. Avvo also gives each lawyer an Avvo rating, on a scale from 1 to 10. As Avvo explains on its website, "**It's as simple as counting to 10**. Ratings fall on a scale of 1 (Extreme Caution) to 10 (Superb), helping you quickly assess a lawyer's background based on our rating." (Emphasis in original.) The Avvo ratings suggest mathematical precision – the rating for each lawyer is calculated to a decimal place (*e.g.,* a rating of 6.7 or 8.4).

28. Moreover, some Avvo ads expressly state that the Avvo Rating enables a potential client to find "the right" lawyer, and Avvo's website claims that its ratings enable potential clients to choose the right lawyer for their needs:

> Why the Avvo Rating can help you find the right attorney:
>
> The model used to calculate the rating was developed with input from hundreds of attorneys, thousands of consumers, and many other legal professionals who deeply understand the work attorneys do. We created the Avvo Rating to reflect the type of information people have identified as important when looking to hire an attorney.

29. Even if Avvo ratings are "bona fide," within the meaning of Rule 7.1(b)(1), we must determine whether (i) Avvo's inclusion of Avvo Ratings in Avvo's advertising on behalf of participating lawyers, or (ii) Avvo's description of its ratings in its advertising, is or implies a "recommendation," i.e. whether the rating "endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities."

30. Avvo's website never describes a rating as a recommendation, and it contains several warnings about the limitations of its ratings. The website says:

- "A rating is not an endorsement of any particular lawyer, and is not a guarantee of a lawyer's quality, competency, or character. . . . Rather, the Avvo Rating is intended to be a starting point to gather information about lawyers who may be suitable for your legal needs."

- "Keep in mind that these ratings speak to a lawyer's background, but do not evaluate their knowledge of the law, past performance on individual cases, personality, or communication skills. These are elements that the Avvo Rating cannot evaluate, but can be better described in the client reviews and peer endorsements found on an attorney's profile."

- "[W]e don't recommend the Avvo Rating as the only piece of information you use to evaluate whether an attorney is right for you. The rating is a tool that provides a snapshot assessment of a lawyer's background, and should be considered alongside other information such as client reviews and peer endorsements."

31. Nevertheless, the Avvo website also extols the benefits of being able to work with highly-rated lawyers:

- "Work with highly rated, local lawyers near you."

- "Search top-rated lawyers near you."

- "We only work with highly qualified attorneys who are licensed to practice in your state."

Through these statements and through Avvo's description of its rating system, Avvo is giving potential clients the impression that a lawyer with a rating of "10" is "superb," and is thus a better lawyer for the client's matter than a lawyer with a lower rating. Avvo is also giving potential clients the impression that Avvo's eligibility requirements for lawyers who participate in Avvo Legal Services assure that participating lawyers are "highly qualified."

32. We do not believe that a bona fide professional rating alone is a recommendation. But, even assuming that Avvo ratings are "bona fide professional ratings," we believe the way Avvo describes in its advertising material the ratings of participating lawyers either expressly states or at least implies or creates the reasonable impression that Avvo is "recommending" those lawyers.

33. In N.Y. State 799 (2011), in discussing the difference between an internet-based directory and a recommendation, we said that the line between the two was crossed when a website purports to recommend a *particular lawyer or lawyers* based on an analysis of the potential client's problem. Other jurisdictions also focus on the "particular lawyer" distinction. *See, e.g.*, South Carolina 01-03 (lawyer may pay internet advertising service fee determined by the number of "hits" that the service produces for the lawyer provided that the service does not steer business to any particular lawyer and the payments are not based on whether user ultimately becomes a client); Virginia Advertising Op. A-0117 (2006) (lawyer may participate in online lawyer directory in which publisher does not recommend or steer business to particular lawyers). We believe Avvo's advertising of its ratings, in combination with

its statements about the high qualifications of lawyers who participate in Avvo Legal Services, constitutes a recommendation of all of the participating lawyers.

34. Our conclusion is bolstered by Avvo's satisfaction guarantee, by which the full amount of the client's payment (including Avvo's portion of the fee) is refunded if the client is not satisfied. This guarantee contributes to the impression that Avvo is "recommending" the lawyers on its service because it stands behind them to the extent of refunding payment if the client is not satisfied.

35. This opinion does not preclude a lawyer from advertising bona fide professional ratings generated by third parties in advertisements, and we recognize that a lawyer may pay another party (such as a magazine or website) to include those bona fide ratings in the lawyer's advertisements. But Avvo Legal Services is different. It is not a third party, but rather the very party that will benefit financially if potential clients hire the lawyers rated by Avvo. Avvo markets the lawyers participating in the service offered under the Avvo brand, generates Avvo ratings that it uses in the advertising for the lawyers who participate in Avvo Legal Services, and effectively "vouches for" each participating lawyer's credentials, abilities, and competence by offering a full refund if the client is not satisfied. As noted earlier, Avvo says: "We stand behind our services and expect our clients to be 100% satisfied with their experience." Accordingly, we conclude that lawyers who pay Avvo's marketing fee are paying for a recommendation, and are thus violating Rule 7.2(a).

36. The questions we have addressed here have generated vigorous debate both within and outside the legal profession. The numbers of lawyers and clients who are using Avvo Legal Services suggest that the company fills a need that more traditional methods of marketing and providing legal services are not meeting. But it is not this Committee's job to decide policy issues regarding access to justice, affordability of legal fees, or lawyer quality. Our job is to interpret the New York Rules of Professional Conduct. Future changes to Avvo's mode of operation – or future changes to the Rules of Professional Conduct – could lead us to alter our conclusions, but at this point we conclude that, under Avvo's current structure, lawyers may not pay Avvo's marketing fee for participating in Avvo Legal Services.

CONCLUSION:

37. A lawyer paying Avvo's current marketing fee for Avvo Legal Services is making an improper payment for a recommendation in violation of Rule 7.2(a).

(29-16)

OPINION 1133 (10/03/2017)

TOPIC: Client Files: Lawyer's Right To Contact Prospective Clients

DIGEST: A lawyer who is the transferee and solely a custodian of client files arising from a transaction other than a sale of law practice may communicate with the prior lawyer's clients if the lawyer does not review confidential information in the files more than reasonably necessary to identify the contact information of the prior lawyer's clients and complies with the rules governing advertising and solicitation of prospective clients.

RULES: 1.0(a), 1.6(a), 1.15(c), 1.17(c), 7.1 and 7.3

FACTS:

1. The inquirer has custody of approximately eight hundred executed Last Will & Testaments, which the inquirer received when prior counsel, to accept employment elsewhere, closed his one-person private law practice. Before closing that practice, the prior attorney wrote to each affected client. In this letter, the prior attorney notified each client of the client's "right to" the client's files "in my possession," which, the letter noted, might include "your original Last Will and Testament, Power of Attorney, and/or Trust." The letter explained that the client had "the right to retrieve your files from my office – or to have them sent to another attorney of your choosing – at any time" up to a date approximately four months after the closing of the lawyer's practice, the office of which, the letter said, would remain "staffed to respond to your inquiries." The letter said that a failure to retrieve the files before this deadline would be deemed "consent to transfer of the files to" the inquirer.

2. In this same letter, counsel said that "arrangements" had been made with the inquirer "to assume responsibility for your files." The letter said that the author was "confident" that the inquirer was able to "to continue to serve you with the same level of care and expertise you have come to expect." The letter provided the address, telephone number, and email address of the inquirer. The letter also underscored that the client should retain a copy of the letter with the client's estate documents.

3. The "arrangements" between the inquirer and prior counsel included no exchange of consideration between them. No financial or other thing of value was a part of the inquirer's assumption of "responsibility" for the inquirer's custodial role in maintaining possession of those files not earlier retrieved by recipients of the prior counsel's letter, including, for instance, no arrangement for the prior counsel to share in future fees, if any, that the inquirer may receive from the prior counsel's clients. The inquirer did no more than take physical possession of client files previously held by a lawyer who was required to close an office that had held the documents and who notified clients both of their right to obtain their files and the location of the files once the prior counsel was no longer able to maintain them.

4. The inquirer now wishes to communicate with the individuals whose files the inquirer holds, and in doing so to offer the inquirer's legal services in such matters as the clients may desire.

QUESTION:

5. May a lawyer write to a prior lawyer's clients offering legal services, after the prior lawyer (a) transferred the clients' estate planning documents to the inquiring lawyer and (b) informed the clients of the transfer?

OPINION:

6. Comment is required on a number of issues that this inquiry raises.

7. One is whether the transfer of the files to the inquirer was the sale of a law practice within the meaning of Rule 1.17 of the New York Rule of Professional Conduct (the "Rules"), which regulates the transfer of a law practice through a sale. We conclude that, in the circumstances presented to us, no sale occurred. We note with approval that prior counsel's letter was consistent with various client-protection provisions of Rule 1.17, among them giving the clients the right to retain future counsel of their choosing or to take possession of their files, Rule 1.17(c)(1), providing that consent to the transfer to the second attorney would be presumed if not subject to objection within a comfortable period greater than that (90 days) set in Rule 1.17(c)(2), and providing, though incompletely, the identity and contact information of the inquirer, Rule 1.17(c)(5) (requiring information about bar admissions, years of practice, and disciplinary history). If the facts presented here amounted to a sale of a law practice, we would detect a failure of strict adherence to Rule 1.17.

8. That prior counsel complied, and in our view properly so, with many of Rule 1.17's provisions does not alter the character of the "arrangement" that prior counsel made with the inquirer. This was not a sale of a law practice but the creation of a custodial relationship. The inquirer was to hold the files pending further developments. Whether an attorney-client relationship exists is a mixed question of fact and law beyond our jurisdiction, but we can say with confidence that mere possession of files does not alone create one (a storage company does not become a person's lawyer by holding that person's client files).

9. We turn, then, to the inquirer's duties going forward. To start, ordinarily, a lawyer who comes into possession of the property of a third party has an ethical obligation under Rule 1.15(c) promptly to notify the third party; here, the prior counsel already did so, but the inquirer still has an ongoing duty to preserve that property. N.Y. State 1002 (2014). Thus, the inquirer must maintain the files unless and until a client retrieves them or the inquirer gives notice to the affected clients of some other disposition. The question remains whether the inquirer may contact these persons to offer the inquirer's legal services.

10. We conclude that the inquirer may do so if the inquirer complies with Rule 1.6(a) on protecting client confidential information, and with Rules 7.1 and 7.3, which govern, respectively, advertising and solicitation of prospective clients.

11. We have previously concluded that Rule 1.6(a), which dictates a lawyer's obligations to preserve confidential information, does not prohibit the inquirer from inspecting estate documents, but only as may be reasonably necessary to contact the affected person(s). N.Y. State 1035 (2014) (a lawyer who received wills in the sale of a law practice previously held by prior counsel, but who had not contacted the affected persons in accordance with Rule 1.17, could review the files only as reasonably

necessary to communicate with those persons for directions on the disposition of the files); N.Y. State 1002 ¶ 9 (2014) (a lawyer who received wills as executor of an estate could "access or disclose the confidential information in the wills insofar as reasonably necessary to dispose of the wills"); *see* N.Y. State 341 (1974) (an "attorney who retires from practice may transfer executed Wills and other files to another attorney, but the receiving attorney holds them only as a custodian," it being "generally unethical" for the lawyer "to examine the Wills or files without the client's consent"). Hence, the inquirer, as custodian, may examine the files as may be reasonably necessary to ascertain the identity and addresses of the individuals who should be contacted about the files, but the inquirer may not, absent informed consent from the prior lawyer's clients or successors, review the files to recommend, for example, unsolicited advice about improvements in or updates to the estate planning.

12. Here, the inquirer wishes to go beyond merely contacting the prior lawyer's clients – the prior lawyer, after all, had already provided the inquirer's information to those clients – and wishes in addition to offer the inquirer's legal services. Because the purpose of the communication would be to promote the inquirer's legal services, the communication would be an "advertisement" within the meaning of Rule 1.0(a), which defines the term to mean "any public or private communication made by or on behalf of a lawyer" about that lawyer's services, "the primary purpose of which is for the retention of the lawyer." By reason of Rule 7.1, an advertisement may not contain statements that are "false, deceptive or misleading" or otherwise violate the Rules. Among these is Rule 7.1(f), which requires that any written advertisement identify itself as "Attorney Advertising," Rule 7.1(h), which requires that the advertisement contain the name of the lawyer and the lawyer's principal office address, and Rule 7.1(k), which requires that the advertisement be maintained for a period of three years. Other components of Rule 7.1 may also apply.

13. The inquirer's proposed communication would also fall within the meaning of "solicitation" under Rule 7.3, which defines the term to mean an advertisement "directed to, or targeted at," a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer" and "a significant motive for which is pecuniary gain." Rule 7.3 sets forth various requirements on solicitations, among them the obligation to file the written solicitation with the disciplinary committee having authority over the lawyer (Rule 7.3(c)(1)), and to retain the names and addresses of all recipients for at least three years (Rule 7.3(c)(3)). If the inquirer abides by these Rules, together with those set forth above, then we conclude that the inquirer may proceed with the proposed communication with the prior lawyer's clients.

14. This opinion is intended to address only the obligations of a lawyer who receives client files in a custodial capacity other than in the course of a sale of a law practice. Nothing we say here is meant to alter the prescriptions of Rule 1.17 on such sales.

CONCLUSION:

15. A lawyer who is solely a custodian of client files arising from other a transaction than from a sale of law practice may communicate with the prior lawyer's clients if the lawyer does not review the confidential information in the files more than reasonably necessary to contact those prior clients and complies with the rules governing advertising and solicitation of prospective clients.

(19-17)

OPINION 1134 (10/06/2017)

TOPIC: Attorneys' fees: Use of credit card to secure payment in domestic relations matter

DIGEST: Whether an attorney may use a client's credit card to secure payment of fees and expenses in a domestic relations matter presents a question on the meaning of 22 NYCRR Part 1400, which is an issue of law beyond this Committee's jurisdiction.

RULES: 1.5(d)(2).

FACTS:

1. The inquiring attorney represents parties in domestic relations matters. The attorney's standard retainer agreement complies, on the inquirer's view, with the provisions of 22 NYCRR 1400, which is a court rule requiring that engagement letters in domestic relations matters contain certain features. The inquirer now wishes to add to the inquirer's standard form of engagement a provision that, if any amount for which the client has been billed remains unpaid for a period of more than twenty days, then the attorney is authorized to charge the client's credit card, the pertinent information on which the client has previously supplied the lawyer, for the full unpaid amount.

QUESTION:

2. May an attorney's retainer agreement in a domestic relations matter authorize the attorney to charge the client's credit card for any amount for which the client has been billed but which remains unpaid more than twenty days after issuance of the bill?

OPINION

3. In N.Y. State 1112 (2017), we determined that a lawyer's retainer agreement may provide (a) that the client could secure payment of the lawyer's fee by credit card, and (b) that the lawyer could bill the credit card the amount of any unpaid legal fees, costs, or disbursements that the client failed to pay within twenty days after issuance of the lawyer's bill for those amounts, as long as the charge complies with requirements set forth in our prior opinions, including that the client is expressly informed of the right to dispute any of the lawyer's bills (and to request arbitration if court rules so require) before the lawyer charges the client's credit card, and that no charge is made for any disputed portion of the lawyer's bill. We did not address the implications of this conclusion with court rules governing fee arrangements, including those that apply in domestic relations matters. We now conclude that such court rules take precedence over the New York Rules of Professional Conduct (the "Rules") as interpreted in that Opinion.

4. Our role is limited to interpreting the Rules; we do not opine on issues of law. Rule 1.5(d)(2) provides that a "lawyer shall not enter into an arrangement for, charge or collect" a fee that is, among other things, "prohibited by law or rule of court." Thus, whether the lawyer's proposed use of a credit card to secure payment in a domestic relations matter depends on whether the practice would violate a law or rule of court.

5. In domestic relations matters, the New York courts have mandated certain client protections not necessarily applicable in other matters. Most notable of these is 22 NYCRR 1400.5, which says in relevant part:

> (a) An attorney may obtain a confession of judgment of promissory note, take a lien on real property, or otherwise obtain a security interest to secure his or her fee only where:
>
> (1) the retainer agreement provides that a security interest may be sought;
>
> (2) notice of an application for a security interest has been given to the other spouse; and
>
> (3) the court grants approval for the security interest after submission of an application for counsel fees.

6. For us to resolve the lawyer's inquiry would require us to decide whether the inquirer's proposed credit card arrangement constitutes a "security interest" within the meaning of this court rule. Under Rule 1.5(d)(2), whether a lawyer may include the proposed language in an engagement letter in a domestic relations matter depends on whether the language violates 22 NYCRR 1400.5. This question is solely an issue of law beyond our jurisdiction to decide.

CONCLUSION:

7. A lawyer may secure payment of legal fees and expenses in a domestic relations matter unless doing so violates a law or rule of court, which is a question of law beyond the jurisdiction of this Committee to resolve.

20-17

OPINION 1135 (10/10/2017)

TOPIC: Limitations on solicitation by solo practitioner who is both a lawyer and certified public accountant.

DIGEST: Professional services that are not distinct from legal services are subject to the prohibition against in-person and telephonic solicitation.

RULES: 5.7(a), (c), 7.1, 7.3(a), (b), (c)

FACTS:

1. The inquiring attorney is licensed in New York as both a lawyer and a certified public accountant. The inquirer plans to open a solo practice offering a range of state and local tax services, and to offer these services, both legal and accounting, as an integrated operation.

2. According to the inquirer, the vast majority of the services to be offered are those that either a lawyer or an accountant may legally perform. Each of these professions, for instance, may handle a tax audit defense or certain administrative matters before tax authorities. Limits exist, however: For instance, an accountant may not represent a person in court proceedings, which only a lawyer may do, and a lawyer may not conduct an audit of a company's financial statements, which, we are told, only an accountant may do.

3. The inquirer wishes to communicate by telephone to offer, unsolicited, his accounting services to persons or entities lacking any prior personal or professional relationship with the inquirer. We accept for purposes here the inquirer's statement that the accounting profession does not forbid an accountant to call a stranger to offer accounting services. The inquirer is prepared to disclose on each call that the inquirer holds a law license but, for purpose of the call, is proposing to be retained solely as an accountant. Nevertheless, the inquirer acknowledges that, in many tax disputes, an early and not insignificant tactical decision is whether to address the tax controversy through administrative channels or instead through legal proceedings. The inquirer seeks guidance on whether the proposed telephone calls, even though apparently permitted by the accounting profession, conflicts with the New York Rules of Professional Conduct (the "Rules").

QUESTION:

4. May a lawyer who is also a certified public accountant make unsolicited calls to potential clients for matters that could be handled by either a lawyer or certified public accountant?

OPINION:

5. Rule 5.7 permits a lawyer to offer both legal and nonlegal services to the public. In N.Y. State 938 ¶ 5 (2012), we pointed out that Rule 5.7(c) defines "nonlegal services," for purposes of Rule 5.7, to mean "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." Questions about services comprising the unauthorized practice of law are outside the orbit of this Committee's reach, and so we offer no opinion on that subject. To analyze the question presented, however, we accept without deciding that the afore-

mentioned tax services do not constitute the unauthorized practice of law, and that a nonlawyer may lawfully provide these services.

6. Rule 5.7 distinguishes between two types of "nonlegal services." Rule 5.7(a)(1) addresses "nonlegal services" that a lawyer offers "that are not distinct from legal services" the lawyer offers to clients; Rule 5.7(a)(2) addresses "nonlegal services" that a lawyer offers "that are distinct from legal services" the lawyer offers to clients. The applicability of the Rules turns on whether the services are "not distinct" or "distinct" from each other. If the former, then the Rules apply to everything the lawyer does in performing those "not distinct" nonlegal services; if the latter, then the Rules apply only in certain circumstances with the use of disclaimers. The threshold question, then, is whether the nonlegal tax services the inquirer proposes to offer here are "not distinct" or "distinct" from the legal services the lawyer offers to potential clients.

7. The Rules do not define the word "distinct" but the dictionary does. To be "distinct" is to be "not alike, different, not the same, separate, clearly marked off." *Webster's Unabridged Dictionary* 534 (2d ed. 1979). These are terms of comparison. Rule 5.7(a)(1) identifies the subjects to compare: the service provider (the lawyer), the substance of the service to be provided (legal or nonlegal), the proposed recipient of the service (the potential client), and, by necessary implication, the manner or means by which the lawyer offers the service (the degree of integration of the two services). Our prior opinions teach that, when a substantial congruence of these factors exists, then the Rules apply to everything the lawyer does. *See* N.Y. State 1026 (2014) (services are "not distinct" when a lawyer offered nonlegal mediation services in domestic relations matters in which the retainer agreement offered to "represent the parties in drafting and filing the court papers to obtain a divorce if the mediation results in a settlement"); N.Y. State 832 ¶ 6 (2009) (even though, in offering the sale of shelf corporations, a nonlawyer may be entitled to provide advice about them without engaging in the unauthorized practice of law, "when a lawyer provides such advice it becomes the provision of legal services," in which event the Rules "would apply both to the legal advice and to the sale of the corporations"); *cf.* N.Y. State 992 ¶ 21 (2013) (a lawyer may not circumvent the Rules "and practice law by a designation that the attorney is employed in a 'non-legal capacity' even if a non attorney may perform the same legal services").

8. Here, the identity of the service provider, the substance of the services to be provided, the prospective recipient of the services, and the manner or means in which the lawyer wants to offer the services substantially overlap. In such circumstances, we read Rule 5.7(a)(1) to mean that the lawyer's accounting services are not distinct from those of the lawyer's legal services. As Comment [1] under Rule 5.7 explains, "The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provisions of nonlegal services when that may not be the case. The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter." Accordingly, we believe that all the Rules apply to the inquirer's conduct even when the inquirer is offering tax services that an accountant as well as a lawyer may properly perform.

9. This includes the Rules' prohibition on the unsolicited in-person contact with potential clients. Rule 7.3(b) defines "solicitation" as "any advertisement of behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal

representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain." Rule 7.3(a)(1) prohibits any "solicitation" by "in-person or telephone contact," with limited exceptions inapplicable here. Comment [9] to Rule 7.3 explains that, "in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients," among them "the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration," a risk equally present "in telephone contact or in real-time or interactive computer-accessed communication."

10. On the facts before us, Rule 7.3(a)(1) prohibits the inquirer's proposed offering of services that are not distinct from the inquirer's legal services by way of unrequested in-person telephone communications to potential clients lacking any personal or professional relationship with the inquirer.

11. Rule 7.3 also contains in subdivision (c) several other restrictions on solicitations, which while not the subject of this inquiry, would apply to a lawyer in the inquirer's position. Among these is the duty to file the solicitation with the relevant disciplinary authorities, Rule 7.3(c)(1), and to retain a list of the names and addresses of all recipients for at least three years, Rule 7.3(c)(3). The regulations of lawyer advertising, set out in Rule 7.1, would also apply, including the requirement of Rule 7.1(a)(1) against communications that are "false, deceptive or misleading," and of Rule 7.1(f) that any written communication qualifying as a solicitation be labeled as "Attorney Advertising."

CONCLUSION:

12. Rule 7.3 prohibits a lawyer who is also a certified public accountant from offering by telephone unsolicited tax-related services to persons with whom the lawyer lacks any pre-existing relationship when the tax-related services are not distinct from legal services and offered by the lawyer as part of the lawyer's integrated practice.

(21-17)

OPINION 1136 (10/13/2017)

TOPIC: Law Firm Marketing: Sponsorship of Events

DIGEST: Subject to legal restraints, a law firm may sponsor parties, sporting events, or games of chance provided that the law firm complies with applicable rules governing lawyer advertising and solicitation.

RULES: 7.1, 7.3

FACTS:

1. The inquiring law firm concentrates in employment law matters, including workers' compensation and personal injury cases. To promote its name, the firm wishes to embark on certain activities. Specifically, the firm wants to hold a party or reception for members of a local labor union, and, in addition, to sponsor a sporting match for union members at which the players would wear uniforms or T-shirts bearing the firm's name. During the sporting event, the playing field would display a billboard or banner featuring the firm's name and contact information, and players and spectators could avail themselves of free refreshments at the firm's expense. For the more general public, the firm wants also to conduct a lottery or raffle with a prize such as tickets to concerts or sporting events, with the winner required to pick up the prize at the firm's office.

QUESTIONS:

2. May a law firm sponsor and bear the cost of a party or sporting event for targeted potential clients in which the firm's name is prominently displayed by various means?

3. May a law firm conduct a raffle or lottery for which the law firm pays the cost of any prize on condition that the winner retrieve the prize from the law firm's office?

OPINION:

4. This Committee's charter confines us to interpreting the New York Rules of Professional Conduct (the "Rules"). We do not issue opinions on questions of law. Whether the conduct of particular sporting events, raffles, or lotteries is lawful in this State is thus beyond the scope of this opinion. For our purpose, we assume without resolving that such activities comply with law, and limit ourselves to the ethical issues that the inquiry raises.

5. These ethical issues rest mostly on the implications of the proposed activities under the regulations of advertising and solicitation set forth in Rules 7.1 and 7.3, respectively. Because by definition under Rule 7.3 (a) a "solicitation" must be an "advertisement" within the meaning of Rule 1.0(a), the preliminary question is whether any of the proposed activities qualify as an "advertisement." Rule 1.0(a) says, in relevant part, that an "advertisement" consists of "any public or private communication made by or on behalf of a lawyer of law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." Of significance here, however, is Comment [8] accompanying Rule 7.1's prescriptions on lawyer advertising, which notes that some "communications by a law firm that may constitute marketing or branding are not necessarily adver-

tisements. For example, pencils, legal pads, greeting cards, coffee mugs, T-shirts or the like with the firm name, logo, and contact information printed on them do not constitute 'advertisements' within the meaning of this Rule [7.1] if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter."

6. Our prior opinions have lent weight to this Comment in scenarios not unlike those this inquiry presents. Of particular pertinence is N.Y. State 937 (2012), in which the inquirer wished to cooperate with a local hospital to provide a promotional gift, such as a calendar or a pen branded with the law firm logo, as part of the welcoming package given to all hospital patients. Focusing on Rule 1.0(a)'s emphasis on the "primary purpose" of the communication, we said there that "when the intent of a communication is to educate recipients about legal developments or to raise general brand awareness, that intent will be considered its primary purpose. Thus, even if such communications are more fundamentally motivated by the aim of increasing the lawyer's business, they are not advertising within the meaning of the Rules." *Id.* ¶ 4. Likewise, in N.Y. State 1095 (2016), we said that "large building signs" bearing the firm's name "do not constitute 'advertisements,'" but were instead "for the purpose of general awareness and branding and thus are not subject to Rule 7.1." *Id. ¶* 12. *See also* N.Y. State 1017 ¶ 8 (2014) (use of a law firm's initials in sponsorship of a little league baseball team did not constitute an impermissible use of a trade name).

7. We have also previously considered and, subject to legal issues, approved the offering of a prize by a law firm when the primary purpose of doing so is other than retention of the lawyer in a matter. In N.Y. State 873 (2011), the inquiring lawyer proposed to give visitors connecting to the lawyer's social media outlets the chance to win a prize for doing so, untethered to any obligation to retain the lawyer. There we said that, although "business development might be the inquirer's ultimate goal in offering the prize," this alone "would not trigger the Rules on advertising any more than it would trigger those Rules if, for example, the inquirer were to join a local Chamber of Commerce, Kiwanis Club, or bar association, or if the inquirer were to take other steps to expand the inquirer's social circle with the aim of meeting potential new clients." *Id.* ¶ B1; *see* Rule 7.1, Comment [6] ("Not all communications made by lawyers about the lawyer or the law firm's services are advertising.")

8. Simply put, nothing in the Rules creates a barrier to lawyer networking among potential clients, heightening awareness of the lawyer or law firm's name in the community, conducting social events for discrete groups, or engaging in actions that may have the long-term beneficial effect of enhancing the lawyer or law firm's profile and profitability.

9. Nevertheless, Rules 7.1 and 7.3 erect boundaries on the comportment of a lawyer or law firm undertaking such activities. A law firm may hold a party or a sporting event to promote the firm's name, but its lawyers may not use those occasions to engage in in-person solicitation of its guests unless those guests fall within one of the exclusions in Rule 7.3(a)(1) (forbidding in-person or other real-time solicitation unless the recipient is "a close friend, relative, former client or existing client"). A written invitation to participate in those events, or in a lottery or raffle, may not seek the law firm's retention in a matter unless the communication complies with Rule 7.3(c)'s regulations on, among other things, submitting the written communication to local disciplinary authorities and retaining a list of the name and addresses of all recipients for a period of at least three years. The law firm may require the winner of any prize to retrieve the same from the law firm's office, but again may not use that opportunity to solicit the winner's legal matters (as opposed to, say, using the moment for a photo

opportunity with the winner for release to the press to raise public awareness of the firm). Consequently, while the proposed sponsorships are alone untroubling under the Rules, the law firm's actions in conducting them could cross the line into advertising and solicitation requiring adherence to Rules 7.1 and 7.3.

CONCLUSION:

10. A law firm's sponsorship of receptions, sporting events, and raffles or lotteries, if permitted by law, constitute permissible branding activities outside the meaning of "advertising" under the Rules, provided that the primary purpose of the activities is enhancing the firm's name recognition and the activities do not involve solicitation of potential clients or ongoing advertisement of the law firm's services.

23-17

OPINION 1137 (10/23/2017)

TOPIC: Law firm name; "of counsel" lawyers

DIGEST: A law firm with one principal and two "of counsel" lawyers may call itself "A & Associates" as long as the "of counsel" lawyers meet the test for the designation "of counsel," which requires a close, continuing, and personal relationship with the firm.

RULES: 1.10(a). 7.5(a), 7.5(b), 8.4(c)

FACTS:

1. The inquirer, Lawyer A, practices in a law firm, A&B that has two partners and two attorneys – C and D – designated "of counsel." Lawyer B plans to leave the firm at the end of the year. The inquirer asks whether it is permissible to call the new firm "A & Associates." The inquirer characterizes the relationship of the two "of counsel" lawyers as "continual day-to-day." Both are covered by the firm's malpractice insurance policy.

QUESTION:

2. May a lawyer designate the lawyer's firm "A & Associates" when the only other lawyers in the firm are designated as "of counsel" lawyers?

OPINION:

3. Rule 7.5(b) of the N.Y. Rules of Professional Conduct (the "Rules") provides that "a lawyer in private practice shall not practice under a trade name" or "a name that is misleading as to the identity of the lawyer or lawyers practicing under such name."

4. Comment [1] to Rule 7.5 says that, "to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status."

5. Rule 8.4(c) provides that "A lawyer or law firm shall not . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

6. The question raised here is whether using the firm name "A & Associates" as the name of the law firm would be a trade name or misleading when the inquirer does not have any partners, and the other lawyers who work at the firm are "of counsel" to the firm.

"Of Counsel" Lawyers

7. For purposes of this opinion, we assume that the two lawyers who are designated "of counsel" are properly so designated. *See* Rule 7.5(a)(4) ("A lawyer or law firm may be designated 'Of Counsel' on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate.") As we explained in N.Y. State 955 ¶ 6 (2005):

> Whether the relationship meets the "continuing relationship" test is fact-specific and no additional information is provided in this inquiry. Thus, as long as the inquiring firm is satisfied that the "continuing relationship" test is met, it may have an "of counsel" relationship with a lawyer.

See also N.Y. State 788 at note 5 (2005) ("We have interpreted the 'of counsel' relationship to mean that the of counsel lawyer is 'available to the firm for consultation and advice on a regular and continuing basis'"); N.Y. State 773 (2004) (*quoting* N.Y. State 262 (1972)); ABA Op. 90-357 (1990) (The use of the title "of counsel," or variants of that title, in identifying the relationship of a lawyer with another lawyer or firm is permissible as long as the relationship between the two is a close, regular, personal relationship and the use of the title is not otherwise false or misleading). *See also* Rule 7.5, Cmt. [1] ("Lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact, and thus lawyers should not hold themselves out as being a partners or associates if they only share offices.")

8. Whether lawyers C and D each have the close, regular, personal relationship required to merit the title "of counsel" is a question of fact that the inquirer must determine.

"Of Counsel" Lawyers as "Associated" with the Firm

9. If lawyers C and D are properly designated "of counsel," then the next question is whether they are "Associates" for purposes of calling the law firm "A & Associates." One objective of the Rules is to ensure that the public is not deceived about the identity, responsibility, or status of the individuals using a law firm name. *See* N.Y. State 732 (2000); N.Y. State 636 (1992); N.Y. State 459 (1977); N.Y. State 495 (1978); *Matter of Shepard*, 92 A.D.2d 978, 459 N.Y.S.2d 632, 633 (3d Dept. 1983); *see also* EC 2-11 (Ethical Considerations under the predecessor of the Rules provided that "[t]he name under which a lawyer practices may be a factor in the selection process. The use of a trade name or an assumed name could mislead non-lawyers concerning the identity, responsibility, and status of those practicing thereunder").

10. The Rules do not define the terms "associate" or "associated." The term "associate" often conveys the status of a junior lawyer who is not a partner or principal but is regularly employed by the firm. *See* ABA Formal Op. 90-357. Nevertheless, both the Rules and our prior opinions indicate that lawyers with other relationships to the firm are "associated" with the firm. For example, in N.Y. State 715 (2004), in which we considered the rules applicable to temporary lawyer working with a firm, we indicated that conflict rules apply to lawyers who are "of counsel" to a firm: "The Code does not define the term 'associated.' Although the concept extends beyond lawyers who are partners, associates or 'of counsel' in a firm, it does not apply to all lawyers who are in any way 'connected' or 'related.'"

11. Rule 1.10(a) provides that, while lawyers are associated in a firm, none of them may knowingly represent a client when any one of them, practicing alone, would be prohibited from doing so under Rule 1.7, 1.8 or 1.9. Both this Committee and the courts have concluded that "of counsel" lawyers are "associated" with a firm for purposes of the conflict of interest rules. *See* N.Y. State 876 (2004) (conflicts of interest will be imputed to all lawyers in all firms with which a lawyer is associated as a partner, associate or of counsel); N.Y. State 793 (2006) (under the former Code of Profes-

sional Responsibility, conflicts imputed to an attorney under DR 5-105(D), other than personal conflicts under DR 5-101(A), will also be imputed to all lawyers in any firm with which the attorney has an of counsel relationship); N.Y. State 788 (2005), N.Y. State 773 (2004) (lawyers who are "of counsel" to a law firm are "associated" with the law firm for purposes of former DR 5-105(D)); *Nemet v. Nemet*, 112 A.D.2d 359, 360, 491 N.Y.S.2d 810, 811 (2nd Dep't) (of counsel relationship leads to imputed disqualification), *appeal dismissed*, 66 N.Y.2d 602, 490 N.E.2d 554 (1985); Restatement (Third) of the Law Governing Lawyers § 123 cmt. c(ii) (1998) (same).

12. Accordingly, in the context of selecting a name for a law firm, we do not believe that the public would assume that the term "Associates" is limited to persons who are non-partner employees of the firm assigned the title of "associate." If, for instance, the inquirer elects to identify C and D on the firm's letterhead or website, the inquirer may fulfill the requirement of Comment [1] to Rule 7.5 to be "scrupulous in the representation of professional status" by clarifying that lawyers C and D are "of counsel." *Compare* N.Y. State 931 (2012) (name of law firm of solo practitioner cannot include "and Associates" based on employment of paralegal).

CONCLUSION:

13. A law firm with one principal and two "of counsel" lawyers may call itself "A & Associates" as long as the "of counsel" lawyers meet the test for the designation "of counsel" that they have a close, continuing, and personal relationship with the firm.

(28-17)

OPINION 1138 (11/08/2017)

TOPIC: Use of English language translation of lawyer's surname in law firm name.

DIGEST: A lawyer who is engaged in a solo practice and admitted to practice under the lawyer's given surname may not use an English language translation of that name in the name of the lawyer's law firm.

RULES: 7.5(b), 8.4(c)

FACTS:

1. The inquirer is a solo practitioner whose legal surname is the name that appears as the lawyer's name on the official roll of attorneys that the Clerk of the Court of the Appellate Division maintains. That name, is, on the inquirer's view, unduly alien to the ears and eyes of the English-speaking public whom the inquirer seeks to attract as clients. The inquirer wants to adopt an English language translation of this surname as the name of the lawyer's firm, while also identifying the lawyer, using the lawyer's real name, as an attorney "with" the firm. As a hypothetical example, if the inquirer appears on the official roll of attorneys as "Yohan Schmidt," and the English language translation of that name is John Smith, then the inquirer proposes to identify the firm as follows: "The Smith Law Office with Attorney Yohan Schmidt."

QUESTION:

2. May an attorney substitute an English language translation of the lawyer's surname in the name of the lawyer's firm when the lawyer is admitted to practice and listed on the roll of attorneys under the lawyer's actual surname?

OPINION:

3. Rule 7.5(b) of the New York Rules of Professional Conduct (the "Rules") provides in pertinent part that a "lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer, or lawyers practicing under such name, or firm name containing names other than those of one or more of the lawyers in the firm." This Rule serves to protect the public from being deceived about the identity, responsibility, or status of those who use the firm name. N.Y. State 732 (2000) (principal goal of predecessor of Rule 7.5(b) is to avoid misleading the public); Cmt. [1] to Rule 7.5 ("to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status. Lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact"); see Rule 8.4(c) (prohibiting conduct involving "deceit or misrepresentation").

4. In N.Y. State 740 (2001), this Committee concluded that "using a name that is not the legal name of one or more partners or former partners in the law firm constitutes use of a trade name" within the meaning of Rule 7.5(b). In N.Y. State 869 ¶ 7 (2011), we noted also that "the prohibition against tradenames is broad, permitting use of little beyond the names of lawyers presently or previously associated with the firm." In keeping with these opinions, this Committee has said that firm names may not include a variant on the lawyer's name created by conjoining the lawyer's initials with

an abbreviation of the lawyer's surname because the proposed firm name deviated substantially from the lawyer's actual name and was therefore impermissible. N.Y. State 948 ¶ 4 (2012) (a lawyer may not use AbDoe Law as the firm name for a lawyer enrolled as Ann-Bonnie Doe).

5. N.Y. State 948 nevertheless recognized that some variations on names may deviate so slightly from the original as not to offend Rule 7.5(b). Thus, in N.Y. State 1003 ¶ 9 (2014), we concluded that a lawyer who practiced under the lawyer's full name may use a law firm name that includes only the lawyer's middle initials and last name, without including the lawyer's first name, provided that the proposed firm name does not violate the additional prohibition contained in Rule 7.5(b) against practicing under a firm name that is "misleading as to the identity of the lawyer or lawyers practicing under such name." Likewise, in, N.Y. State 872 ¶ 9 (2011), we said that a lawyer may use the English language translation of the lawyer's surname on business cards, in informal communications, and on the lawyer's website, if doing so was not misleading and was compliant with other applicable statutes and court rules regarding attorney firm names and name changes.

6. Here we face a different issue – whether an English language translation of the inquirer's surname, even if juxtaposed to the inquirer's actual surname to identify the lawyer individually – is a permissible proxy for the name of the law firm. We have little doubt that a law firm may in advertising accurately describe its lawyers, their names, and their areas of concentration in languages other than English. But these matters are not the issue here. The sole issue here is whether it is misleading for a law firm to use as its name an English language translation of the lawyer's actual surname, by which the lawyer is admitted to the bar and listed on the official roll of attorneys.

7. We conclude that the answer is yes. The English language translation of the inquirer's last name in the firm name is more than a slight deviation from the inquirer's actual surname. The English language translation of the surname has a greater possibility to mislead the public than simply translating a first name to English or dropping a lawyer's first name and using initials to identify the lawyer. In both N.Y. State 1003 and N.Y. State 872, the firm name used the lawyer's legal surname. The public could the readily see that the lawyer had the same name as the firm. Here, because the proposed firm name is different than the lawyer's legal last name under which the inquirer practices, it is far more likely to mislead the public. This is particularly so when, as here, the inquirer proposes to juxtapose the firm name containing the English language translation of the inquirer's last name next to the inquirer's chosen firm name. This placement could deceive the public into believing that the lawyer is not the sole lawyer in the firm – for instance, that two different lawyers named Yohan Schmidt and John Smith practice there – or that it is not the lawyer's firm. Cf. N.Y. State 869 ¶ 13 (2011) (Rule 7.5(b) permitted a solo practitioner named John Smith to use the firm name "The Smith Law Firm" because the name would clearly and accurately identify the one lawyer named Mr. Smith practicing under the firm name). By contrast, the proposed use of a translated surname here would not clearly and accurately identify the one lawyer practicing under the firm name.

CONCLUSION:

8. A lawyer who appears on the official roll of attorneys under the lawyer's given surname may not use a different name in the lawyer's firm name, even if the name is a reasonable English translation of the lawyer's actual surname.

(24-17)

OPINION 1139 (12/11/2017)

TOPIC: Attorneys' Fees; Securing Fees and Expenses by Confessions of Judgment

DIGEST: Prior to conclusion of a pending matter, a lawyer may agree with a client to modify an engagement agreement with the client to provide, as security for legal fees and expenses already due and owing in a fixed amount on which the parties agree, for the execution and filing of a confession of judgment, and the execution and recording of a collateral mortgage with a security interest, if the lawyer complies with rules governing business transactions with a client and thereafter abides by the general rules governing conflicts.

RULES: 1.0(f), 1.0(j), 1.5(a), 1.5(d)(5) & (f), 1.7, 1.8(a), 1.16(c)(5) & (d)

FACTS:

1. The inquiring law firm represents two individuals and a company as defendants in a pending and hotly contested dissolution proceeding; the two individuals are principals of the client company, as to which the Court has appointed a Receiver. The law firm is owed a substantial amount in attorneys' fees and expenses incurred over more than a year in defense of the inquirer's clients. The Receiver holds funds consisting of, among other things, the proceeds from the sale of real property previously owned by one of the inquirer's clients. With the clients' joint consent, the firm has asked the Receiver and the Court to permit the Receiver to release funds to pay the inquirer's outstanding fees and expenses. The adverse party objects to the release of receivership funds for this purpose, and to date the firm remains unpaid.

2. The inquirer does not wish to abandon the clients, but is concerned that, in light of the likely expenses of the receivership, as well as creditors with potential claims with priority over any claim for defense fees and costs, there may be insufficient funds remaining to pay the inquirer's outstanding invoices. The firm recognizes that the clients are in a financially parlous condition, struggling to make ends meet, which is among the reasons why the inquirer does not want to impose the economic burden that the firm's withdrawal from the representation would impose on them. Having discussed the matter with the clients, the inquirer proposes to have each client execute, and to have the inquirer file or record as the case may be, client affidavits confessing judgment and a collateral mortgage with a security interest, in each instance limited to the fixed amount, on which the parties agree, currently due and owing to the law firm for services already performed.

3. The inquirer intends to notify the Receiver of these transactions, and anticipates that the Receiver will notify the Court and the adverse party. The law firm's engagement letter with the clients makes no provision for these security arrangements.

QUESTION:

4. May a law firm agree with its clients to amend its existing engagement letter with the clients during the pendency of a matter to provide for the clients to execute, and for the law firm to file or record, affidavits confessing judgment and collateral mortgages as security for accrued but unpaid attorneys' fees and expenses in a fixed amount on which the parties agree?

OPINION:

5. Our role is to interpret the New York Rules of Professional Conduct (the "Rules"), not to opine on issues of law, including laws addressing creditor rights. Accordingly, for our purposes, we assume without deciding that the proposed security arrangements, as well as the contemplated notice of them, do not violate any statute or rule governing Court-supervised receiverships, including the rights of any third parties or arrangements between the inquiring firm and clients subject to the receivership. We note, too, that nothing in this opinion is intended to apply to fee arrangements in a domestic relations matter, in which special rules control. Rule 1.5(d)(5)(iii) (a lawyer may not enter into an arrangement for any fee in a domestic relations matter that "includes a security interest, confession of judgment or other lien without," among other things, "approval from a tribunal after notice to the adversary"); *see* N.Y. State 1134 (2017) (whether a lawyer in a domestic relations matter may use a credit card to secure legal fees is a question of law under 22 N.Y.C.R.R. Part 1400).

6. In N.Y. State 910 ¶ 19 (2012), this Committee said that "[r]etainer agreements, like all contracts, may be amended with the agreement of the lawyer and the client." We cautioned, however, that "such an amendment raises ethical concerns, because [the] lawyer is often in a position to take unfair advantage of the client." There, as here, the inquirer sought to amend an existing retainer agreement to provide for, among other things, arrangements (including a confession of judgment) to secure payment of the lawyer's fees and expenses. We noted there that, though certain amendments could be considered "normal fee negotiations" subject only to the regulations of Rule 1.5, which govern all fee agreements, "others are considered a 'business transaction with a client'" that are subject to the "higher scrutiny of Rule 1.8." We identified a number of factors that determine whether a particular amendment warranted this heightened level of review. *Id.* ¶¶ 20-24; *see* N.Y. State 1051 ¶ 16 (2015) (applying factors to conclude that Rule 1.8(a) applies to a change in a contingency fee agreement enabling the lawyer to be paid out of the proceeds of a third-party loan made as an advance against the client's later recovery in a structured settlement).

7. The considerations germane to assessing the applicability of Rule 1.8(a) – among them, the timing and circumstances of the proposal, the sophistication of the client, the beneficiary of the amendment (lawyer or client), whether the client has deliberately disregarded an obligation to pay – are fact-intensive, but we need not resolve them, for the requirements of Rule 1.8(a) would apply to the inquirer's proposed security arrangements even if part of the original retainer agreement. Comment [16] on Rule 1.8 says as much: "When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a)." *See* Cmt. [4C] (Rule 1.8(a) applies "when a lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee"); N.Y. State 1104 (2016) (initial engagement letter securing legal fee with a promissory note is subject to Rule 1.8(a)); ABA 11-458 (2011) (amendment to fee arrangements that involve a lawyer acquiring an interest in client property is subject to Model Rule 1.8(a)). Thus, even if some of the factors outlined in N.Y. State 910 might justify an amendment here with reference only to Rule 1.5, the proposed security arrangements require adherence to Rule 1.8(a).

8. Rule 1.8(a) provides:

> A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:
>
> > (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by that client;
> >
> > (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
> >
> > (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

9. Here, the interests of the inquirer and the clients are "differing" within the meaning of Rule 1.0(f), which defines "differing interests" as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to the client, whether it be conflicting, inconsistent, diverse, or other interest." However much the parties may now view the arrangement as a means to maintain their attorney-client relationship, the entry of confessions of judgment and the recording of mortgages with a security interest places the lawyer in direct adversity to the clients. Similarly, while a client may not reasonably expect a lawyer to exercise professional judgment on the client's behalf in the negotiation of a routine retainer agreement, circumstances may exist in which such an expectation arises depending on the sophistication of the client, the complexity of the arrangement, whether the matter is ongoing, and whether the client has independent counsel to assess the transaction. *See* N.Y. State 1104 ¶ 5. That here the law firm is proposing a somewhat elaborate amendment to the parties' agreement amid an ongoing representation of otherwise unrepresented clients in a hotly contested litigation is likely to create a reasonable expectation that the law firm is exercising its professional judgment on the clients' behalf. *See* N.Y. State 1055 n. 1 (2015) (client expectation likely when, for example, client has no other counsel, and the lawyer is acting for the client in the matter); N.Y. State 913 ¶ 7 (2012) (client likely to rely on lawyer when lawyer is receiving equity in client's company as a fee).

10. Rule 1.8(a)(1) requires that the terms of the transaction be fair and reasonable to the clients. The fairness and reasonableness of the proposed arrangement depends primarily on "the circumstances reasonably ascertainable at the time of the transaction." N.Y. State 913 ¶ 12. This turns on facts and circumstances beyond our ability to evaluate based on the inquiry. For now, we note only that, as we said in N.Y. State 474 (1977), the amount of the confession of judgment (and by necessary implication, the amount of the mortgage) must be "commensurate with the value of the services rendered," which means that the fee may not be excessive in violation of Rule 1.5(a), and that the lawyer must "scrupulously observe the provisions" of ethical rules "bearing upon legal fees," including obtaining the clients' agreement to the amount. In addition, here, the inquirer intends to limit the amount of the security interest, whether by a confession of judgment or a collateral mortgage with a security interest, to the amount of fees and expenses currently due and owing for services already performed. We therefore need not address whether Rule 1.8(a) would permit the parties agree to agree on an amount higher than the accrued but unpaid invoices. *Compare* N.Y. State 910 ¶ 12 ("a confession of judgment to secure attorneys fees may be taken only as a form of security and not of payment, and

that it may be taken only to secure payment for services previously rendered") *with* ABA 02-427 (2002) (not *per se* improper for a lawyer to take a security interest for the payment of fees "earned or to be earned").

11. Rule 1.8(a)(1) requires, too, that the law firm completely and lucidly explain the transaction in writing to the clients in language that the clients may reasonably grasp. This requirement is entwined with the requirements of Rule 1.8(a)(3), which says in part that the clients must give their "informed consent, in a writing signed by the client, to the essential terms of the transaction." Rule 1.0(j) defines "informed consent" as an "agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." The "requirements for client consent to conflicts under [Rule] 1.8(a) are at least as stringent as those under Rule 1.7(b)," the rule on general conflicts. N.Y. State 1055 ¶ 8.

12. In Opinion 910, we approved a lawyer obtaining a confession of judgment provided that, among other things, "the client clearly understands the character, effect and purpose of the confession of judgment. This includes the potential effect of a confession of judgment on the client's credit standing and employment opportunities." Publicly-docketed confessions of judgment, and a UCC-recorded mortgage with security interest, are potent creditor tools that may have a substantial harmful impact on the client-debtors, among them an injurious effect on banking accounts, the ability to obtain or maintain credit lines, and to sustain business operations. Without attempting an exhaustive list of information that may be "adequate" in these circumstances, components of the information to be relayed may include: (a) whether the firm intends to seek entry of a judgment based on the client affidavits confessing judgment; (b) whether and to what extent the entry of a judgment starts the accrual of statutory post-judgment interest; (c) whether the clients' affidavits effect a waiver of their right, if any, to arbitration of fee disputes as set forth in Rule 1.5(f) and 22 N.Y.C.R.R. Part 137 *et seq.*, a question of law on which we do not opine; and (d) whether a reasonable alternative exists to address the law firm's unpaid invoices – for instance, holding but not filing the security documents. Our concern is that the clients be fully advised of all the material consequences of the proposed course of conduct and any reasonably viable alternative to enable the client to make an informed choice.

13. We are mindful of the opposing interests at stake. Inhering in the concept of informed consent is freedom of choice, that is, circumstances that are not so coercive as to negate any meaningful election. Here, the clients' difficult financial position may leave them no option but to accede to the law firm's request if the only alternative is the law firm's withdrawal from representing them in the pending matter. Yet a law firm has a right to be paid for services rendered in accordance with the parties' agreement. Rule 1.16(c)(5) permits a law firm to withdraw from a representation when a client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees," albeit here, under Rule 1.16(d), only with permission of the Court if the rules of the Court so mandate. In our view, if a law firm has a right to withdraw from a representation consistent with Rule 1.16(c)(5) – the inquirer so assumes and we proceed on that assumption – then a proposed amendment to a retainer agreement securing the clients' existing obligations to the law firm does not create circumstances in which informed consent is beyond the contemplation of Rule 1.8(a).

14. The balance of Rule 1.8(a) reinforces the import of the provision for informed consent. Rule 1.8(a)(3) prescribes that, in the same writing setting forth the essential terms of the transaction, the lawyer must also describe the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. *See* N.Y. State 958 ¶ 12 (2013) (lawyer's charging of a finder's fee must be fully set forth in writing to the client compliant with Rule 1.8(a)). Here, the lawyer's role is the preparation of the security documents, and the law firm appears poised to act for the client in effecting those transactions. The transactions are for the benefit of the law firm, no matter that the clients may wish the law firm to refrain from withdrawal. This fact enhances the significance of Rule 1.8(a)(2), which obligates the law firm to advise the clients, in writing, of the desirability of seeking, and giving the clients a reasonable chance to obtain, independent counsel to advise them on the proposed security arrangements. Although Rule 1.8(a)(2) does not require the clients actually to retain separate disinterested counsel, case law exists to suggest that the absence of one may facilitate challenges to business transactions with clients. *See, e.g.*¸ *McMahon* v. *Eke-Nweke*, 503 F. Supp. 2d 598, 604 (E.D.N.Y. 2007) (analysis under predecessor of Rule 1.8(a)).

15. The focus of the inquiry, and hence this opinion, is on the inquirer's ethical duties in obtaining the proposed amendment to the parties' existing engagement agreement. Nevertheless, one further consideration merits mention. If the parties agree to the proposed amendment consistent with Rule 1.8(a), the inquirer, in continuing to represent the clients, is still bound by Rule 1.7 governing general conflicts of interest. Rule 1.7(a)(2) provides that a lawyer shall not represent a client, except as permitted by Rule 1.7(b), if "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Thus, the inquirer should consider whether the firm's security interests affect the firm's ongoing representation of the clients in the dissolution proceeding. It is possible, for instance, that in some circumstances either delay or expedition of the proceedings could enhance the value of the inquirer's security interests. *See* N.Y. City 2000-3 (2000) ("An attorney's inquiry into her potential ethical obligations arising out of a transaction in which the attorney accepts securities for fees does not end with [the rule on business transactions with clients]). Unique issues of potential conflicts of interest also may arise as a result of such arrangements."); *see also* Rule 1.8 Cmt. [4D] ("An exchange of securities for legal services will also trigger the requirements of Rule 1.7 if the lawyer's ownership interest in the client would, or reasonably may, affect the lawyer's exercise of professional judgment on behalf of the client").

CONCLUSION:

16. A law firm may seek its clients' agreement to modify its retainer agreement with the clients during the pendency of a current matter to secure payment, by confessions of judgment and collateral mortgages, of fully earned but unpaid legal fees and expenses in an amount on which the parties agree, if the law firm complies with the rules governing business transactions with clients and is mindful of ongoing obligations to avoid general conflicts of interest.

(26-17)

OPINION 1140 (12/11/2017)

TOPIC: Conflicts; representation of testifying expert witness

DIGEST: A law firm may draft a will for a testifying service provider who treats individuals represented by the firm in workers' compensation claims. The law firm is not ethically required to volunteer disclosure of the firm's representation of the witness to others, although the law firm may be required to assure truthful testimony (or remediate false testimony) if the question emerges before a tribunal.

RULES: 1.0(f), 1.6, 1.7, 3.3(a) & (c), 4.1.

FACTS:

1. The inquiring law firm represents injured workers in workers' compensation matters. A health care service provider, who has both a professional and a long-time social relationship with the lawyers in the firm, has asked the firm to draft wills for him and his wife and will pay the firm's normal legal fees for this work. The service provider treats some of the injured workers who are represented by the law firm. There is no referral arrangement, formal or informal, between the service provider and the law firm.

2. Occasionally, the service provider is asked to testify at a hearing before a Workers' Compensation Law Judge about the treatment the service provider intends to render or has rendered to an injured worker whom the law firm represents, typically when, whether before or after the treatment has started, the insurance carrier denies coverage. The testimony usually addresses whether the provider's treatment falls within the Workers' Compensation guidelines and includes the scope of or need for the particular treatment the service provider renders to the injured worker. The law firm, representing the injured worker, calls the service provider as a witness on behalf of the firm's client.

QUESTION:

3. May a law firm draft wills for a testifying expert and his wife and, if so, must the firm disclose its attorney-client relationship with the witness to opposing counsel, the tribunal, or anyone else, in those matters in which the expert is called to testify on behalf of the firm's client?

OPINION:

4. Rule 1.7(a) of the New York Rule of Professional Conduct (the "Rules") provides:

> "[A] lawyer shall not represent a client if a reasonable lawyer would conclude that either:
>
> > (1) the representation will involve the lawyer in representing differing interests; or
> >
> > (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

Rule 1.0(f) defines "differing interests" to mean "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest."

5. Lawyers owe duties of loyalty and independent judgment to their current clients. Conflicts of interest may undermine and impair a lawyer's loyalty or exercise of independent judgment on behalf of a client. Comment [2] to Rule 1.7 provides that resolution of a conflict of interest problem "requires a lawyer, acting reasonably, to (i) identify clearly the client or clients, [and] (ii) determine whether a conflict of interest exists, *i.e.*, whether the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation." Comment [8] to Rule 1.7 says that the "mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference of interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

6. In our view, drafting a will for a person the inquirer employs as an occasional expert is not discordant with the firm's concurrent representation of clients whom the service provider treats and on whose behalf the service provider may testify. The proposed representation (drafting a will) does not implicate differing interests, is not adverse to the firm's representations workers' compensation claims matters, and is not factually or legally related to the claims of the firm's injured clients. No reason emerges to suppose that drafting of estate documents for the provider will adversely affect the firm's professional judgment in representing any other current client (unless the provider's testamentary plans affects one of the injured workers – a situation we imagine would rarely if ever arise). The "mere possibility" of a future conflict between the workers' compensation clients and the service provider and his spouse does not require disclosure and consent from the respective clients.

7. Neither the law firm's interest in receiving its routine fee for drafting wills or any follow-on work, nor its longstanding social relationship with the service provider, poses a "significant risk" of impairing the lawyer's ability to exercise professional judgment on behalf of its clients in workers' compensation matters – for instance, in deciding whether to call the service provider as a witness – so as to engender a "personal interest" within the meaning of Rule 1.7(a). N.Y. State 901 ¶ 12 n. 3 (2011) (concurrent representation of a corporation on business matters and of a corporate officer in acquiring a summer home in which the corporation has no stake does not constitute a personal interest conflict).

8. Nor does anything in the Rules require the law firm to disclose to anyone that the firm has represented the service provider in estate matters. Obviously, if a workers' compensation client or opposing counsel asks the law firm about any relationships between the law firm and the witness, the law firm has an obligation to assure that the response is truthful. *See* Rule 4.1 (a lawyer "shall not knowingly make a false statement of fact" to a third person). This obligation is subject to the confidentiality requirements of Rule 1.6(a), which may require the service provider's informed consent to disclosure, particularly because estate matters are often sensitive. In proceedings before a tribunal, however, Rule 1.6(a)'s duty of confidentiality may yield to other concerns. For example, if a tribunal asks about any relationship between the expert witness and the law firm, the law firm must be honest with the tribunal and must assure that the witness is honest as well, including correcting untrue testimony if necessary. *See* Rule 3.3(a) & (b) (a lawyer "shall not make a false statement of fact" to a tribunal, and must take "reasonable remedial measures" if lawyer comes to know that a witness offered by the lawyer

has testified falsely). In the event of false testimony, Rule 3.3(c) overrides the duty of confidentiality; that Rule says the duties in Rules 3.3(a) & (b) "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." N.Y. State 1123 ¶¶ 8-10 (2017) (noting obligation to disclose confidential information if necessary to correct false information submitted to a tribunal). Subject to these considerations, however, we see nothing in the Rules that compels the voluntary disclosure of an attorney-client relationship between the law firm and its testifying expert.

CONCLUSION:

9. A law firm may draft wills for a testifying service provider who treats clients of the firm without disclosure to or consent of the respective clients. The law firm is not ethically required to disclose the firm's representation of the witness to others, although the law firm may be required to assure truthful testimony (or remediate false testimony) if the question emerges before a tribunal.

(25-17)

OPINION 1141 (12/15/2017)

TOPIC: Conflicts of Interest; imputation of conflicts to co-counsel

DIGEST: Separate law firms that act as co-counsel in discrete matters are not associated in the same firm for purpose of imputing all conflicts of each firm to the other.

RULES: 1.0; 1.6, 1.7, 1.8, 1.9, 1.10, 6.1, 7.2.

FACTS:

1. The inquiring attorney, who is admitted in New York, teaches at an accredited law school in New York. The attorney is involved in the law school's clinical education program, which considers itself a large law firm with different divisions working on particular types of matters. The inquirer supervises one of these divisions, which handles only one type of matter: engaged, *pro bono publico*, in pursuing claims on behalf of indigent clients at hearings before an administrative agency. The inquirer wishes to have the students in the inquirer's clinic division collaborate as co-counsel with a New York not-for-profit legal services organization. The clinic and the legal services organization are financially separate, operate out of different offices, maintain their own files, do not share any overlapping personnel, and represent numerous clients other than those in which they serve as co-counsel. Although the faculty supervisors' positions are constant, the students who participate in the clinic do so for only a semester or two, and thus turnover of student personnel is a characteristic of the program.

2. The inquirer is concerned that, if the legal clinic and legal service organization collaborate as co-counsel, then the N.Y. Rules of Professional Conduct (the "Rules") may treat the law school's entire clinical program and the legal services organization as a single firm for conflicts purposes. Specifically, the inquirer seeks guidance on whether the clinic must clear all its clients with the legal service organization (and *vice versa)*, or must instead check only those clients in matters in which the two serve as co-counsel.

QUESTION:

3. When a law school clinic acts as co-counsel with a legal services organization in particular matters involving the same types of claims, must the clinic clear conflicts for all of its clients with those of the legal services organization, or only those clients involved in the matters in which the two serve as co-counsel?

OPINION:

4. Rule 1.0(h) defines a law firm to include, among other things, any "association authorized to practice law" and "lawyers employed in a qualified legal assistance organization." Rule 1.0(p) defines a "qualified legal assistance organization" to mean one of the organizations listed in Rule 7.2(b)(1)-(4), the first of which is a legal aid office "operated or sponsored by a duly accredited law school." Under the forerunner of the Rules – the New York Code of Professional Responsibility (the "Code") – we said that a law school legal clinic qualifies as a "law firm," N.Y. State 794 ¶ 8 (2006) ("the rules governing law firms are equally applicable to the law school's legal clinic"), and that the clinic must be considered a single law firm for purposes of conflict imputation, despite separate divisions, if the students in the clinic share common offices, files, work areas, and information, N.Y. State 794 ¶ 16.

No changes in the Rules from the Code alter this conclusion. *See* N.Y. State 876 ¶ 6 (2011) (when the provisions of the Code and the Rules are similar or identical to each other on matters relevant to the inquiry, opinions under the Code apply with equal force). Accordingly, the question is whether two separate law firms acting as co-counsel on a series of matters implicates Rule 1.10, governing the imputation of conflicts when lawyers are "associated" in a law firm, specifically conflicts arising under Rules 1.7 (governing concurrent conflicts of interest in general), Rule 1.8, (addressing conflicts in specific circumstances), and Rule 1.9 (outlining duties to former clients).

5. In the circumstances presented, the answer is no.

6. Very briefly stated, Rule 1.7(a) prohibits a lawyer from representing a client if "a reasonable lawyer would conclude either" that the representation "will involve the lawyer in representing differing interests" or if a "significant risk" exists that a "lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." This prohibition is subject to exceptions outlined in Rule 1.7(b), among them where the affected client gives informed consent confirmed in writing, Rule 1.8 is a litany of standards in specific conflict situations, none of which this inquiry raises. Rule 1.9 prohibits a lawyer to be "materially adverse" to a former client in "the same or substantially related matter" without informed consent confirmed in writing. Rule 1.10 says that, while "lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them would be prohibited from doing so" by Rules 1.7, 1.8, or 1.9. Thus, the imputation standard in Rule 1.10 extends the conflicts provisions of the foregoing Rules only when lawyers are "associated" in the same law firm.

7. The Rules do not define the term "associated." In general, however, to be "associated in a firm" means to be a member of, employed by, "of counsel" to, or "affiliated" with the law firm, in each instance reflecting a close and continuing relationship with the firm to warrant imputation of the conflicts of any one lawyer in the firm to the other lawyers there. *See* N.Y. State 876 ¶ 13 (2011) (when "two law firms are both associated with lawyers at a third firm, the conflicts of each firm are imputed to the lawyers in all three firms as if they were a single law firm"); NY State 793 (2006) ("of counsel" relationship gives rise to imputation); N.Y. State 773 (2004) (same); ABA 90-357 (1990) (same); N.Y.C. 2000-4 (2000) (use of the term "affiliated" denotes relationship that is "close and regular, continuing and semi-permanent" requiring imputation of conflicts). Substance, not form, controls; merely maintaining separate practices, free of connective titles, does not invariably elude the concerns animating Rule 1.10's imputation provisions. *Consolidated Theatres v. Warner Bros. Cir. Man. Corp.,* 216 F.2d 920, 927 (2d Cir. 1954) ("we have never believed that labels alone – partner, clerk, co-counsel – should control our decisions in so sensitive an area [as imputation of conflicts]").

8. Thus, for instance, an office sharing arrangement between two separate practitioners could give rise to imputing the conflicts of each practice to the other. *Compare* N.Y. City 80-63 (1980) (solo practitioners sharing an office in which each has ready access to information of the other's practice imputes the conflicts of each to the other) *with* N.Y. State 881 ¶ 12 (2011) (the "occasional use of" telephone lines or conference space "does not, by itself render the inquirer 'associated in'" another lawyer's firm "for purposes of the rule on imputation of conflicts"). *See* Rule 1.10, Cmt. [2] ("two practitioners who share office space and occasionally consult or advise each other would not ordinarily be regarded as constituting a firm," unless they "present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm").

9. Motions to disqualify law firms based on some form of association with counsel of record, though legal issues beyond our jurisdictional charter, afford some insight into the imputation rule. Some of these courts refer to their analysis as a "functional" approach, which is analytically indistinguishable from the ethics opinions of this and other Committees that stress the nature of the relationship not the names that the firms choose to characterize that relationship. Illustrations include: *Cinema 5, Ltd.* v. *Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1975) (disqualifying two law firms representing adverse interests while sharing a common partner such that shared confidences are presumed); *The Fund of Funds, Ltd.* v. *Arthur Andersen & Co.,* 567 F.2d 225 (2d Cir. 1977) (disqualifying successor back-up counsel with which conflicted counsel had ongoing communications about the matter); *Homestead Video, Inc.* v. *Village of Valley Stream*, 409 F.3d 127 (2005) (denying disqualification where there was an "attenuated and remote" "of counsel" relationship between the lawyer and counsel acting for the adversary and holding that "no presumption of confidence sharing" arises between a firm receiving confidential information and "a separate firm serving as co-counsel," absent evidence to the contrary); *Benevida Foods, LLC* v. *Advance Magazine Publishers, Inc.*, 2016 U.S Dist. LEXIS 81186 (June 15, 2016) (disqualifying co-counsel who conferred with a prospective client about a matter but did not comply with Rule 1.18 on protecting confidential information received in such consultation but denying disqualification of co-counsel who conferred with, but received no confidential information from, disqualified counsel about the matter); *Dietrich* v. *Dietrich*, 136 A.D.3d 461 (1st Dept. 2016) (denying disqualification when counsel of record is co-counsel with a potentially disqualified lawyer on an unrelated matter).

10. The predominant theme of these cases and ethics opinions is the protection of client confidential information within the meaning of Rule 1.6. The term "co-counsel" ordinarily means attorneys or firms jointly representing a client or clients with respect to a particular litigation or transaction. The relationship is episodic rather than enduring. Exchange of confidential information between co-counsel is a necessary incident to serving the interests of their mutual client(s). We see nothing in the proposed relationship to justify the merger of the two entities for all conflicts.

11. None of the criteria typically seen in merging firms for conflicts purposes – common personnel or finances, shared office space, ready access to client files, regular and substantial overlap of clients – is present in the co-counsel relationship contemplated here. That the legal clinic plans to bring in the legal services organization as co-counsel in only discrete types of matters does not change this result; in private for-profit practice, it is not at all unusual for a law firm litigating in a foreign forum regularly to choose the same local law firm to act as its local co-counsel in that forum, without fear that all the conflicts of one firm would be imputed to the other firm. *See* ALI, RESTATEMENT OF THE LAW GOVERNING LAWYERS (THIRD), § 123, Cmt. c(iii) (co-counsel who associate for purposes of handling a particular matter are not subject to vicarious disqualification). In light of the Rules' strong encouragement of voluntary *pro bono* legal services, codified in Rule 6.1, it cannot be said that the arrangement proposed here requires stricter standards.

CONCLUSION:

12. Serving as co-counsel in particular matters does not mean that a law firm legal clinic is "associated in" the same firm as a legal services organization for purpose of the imputation provisions of Rule 1.10. Consequently, when the clinic and organization serve as co-counsel in a matter, the Rules require the clinic and organization to clear conflicts individually and separately, only in matters in which the two serve as co-counsel. [29-17]

2018

OPINION 1142 (01/05/2018)

TOPIC: Delivering client file to client, maintenance of client files in electronic form

DIGEST: Where a lawyer keeps client files received in electronic form in that form and a former client requests a copy of the file in paper form, the lawyer must take reasonable measures to deliver the electronic documents in a form in which the client can access them, but the lawyer may charge the client the reasonable fees and expenses incurred in printing out and delivering a paper copy.

RULES: 1.15.

FACTS:

1. The inquirer has a litigation practice in which most documents, such as discovery materials and transcripts, are received or generated in electronic form. The inquirer stores such documents in electronic form. In those instances in which the inquirer receives documents in hard-copy form, such as documents received from clients, he scans the documents and either returns the originals to the client or keeps them separate from the electronic file.

2. Generally, when a former client requests a copy of his or her file, the firm provides a link to a secure, password-protected cloud storage facility containing the client's file. One former client, who retained the firm to represent him in a criminal matter and who is now incarcerated, has requested that the firm send a printed copy of his electronic file to the former client's spouse. The inquirer states that it would be expensive to print out the electronic documents and send the printed copy to the client. The firm has no hard-copy documents for this client.

QUESTION:

3. To what extent must a lawyer provide a former client with the client file in the form in which the client requests it?

4. Where a law firm maintains its client files in electronic form, can the lawyer charge the former client for the costs of printing and mailing a copy of the client file to the client?

OPINION:

5. The principles that largely govern the answers to these questions have been set forth in a number of court and ethics opinions. First, except where original documents have particular evidentiary or similar value, a lawyer is not required to maintain the client file in any particular form. N.Y. State 940 ¶ 12 (2012) (except for "documents such as wills, deeds, contracts, and promissory notes" or other documents whose legal effect or evidentiary value may be impaired by destroying originals, "the Rules permit electronic copies to be kept in lieu of paper originals"); N.Y. County 725 (1998) ("[I]n

some circumstances it may be appropriate for an attorney to record the contents of a client's file electronically or on microfilm instead of retaining the physical file, so long as the evidentiary value of such documents will not be unduly impaired by the method of storage."). *See also* N.Y. State 1020 ¶ 8 (2014) (a lawyer may use cloud-based data storage and sharing tools as long as the lawyer "takes reasonable steps to ensure that confidential information is not breached").

6. Second, it is well-established that, with some exceptions not relevant here, a former client is entitled to his or her client file. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30, 37 (1997) (holding that a former client was presumptively entitled to both "end-product" documents and "work product materials, for the creation of which they paid during the course of the firm's representation"); N.Y. State 766 (2003) (overturning prior opinion in light of *Sage Realty* and concluding that "a former client is entitled to any document related to the representation unless substantial grounds exist to refuse access"). The lawyer's ethical obligation to deliver to the client the client file upon request derives from Rule 1.15(c)(4) of the New York Rules of Professional Conduct (the "Rules"), which requires a lawyer to "promptly . . . deliver to the client . . . as requested by the client . . . the funds, securities or other properties in the possession of the lawyer that the client . . . is entitled to receive." *See* N.Y. State 766.

7. Third, it is likewise well-established that a lawyer can generally charge a former client the reasonable fees and expenses of assembling and delivering to the former client those documents that the client is entitled to receive. *Sage Realty*, 91 N.Y.2d at 38 ("as a general proposition, unless a law firm has already been paid for assemblage and delivery of documents to the client, performing that function is properly chargeable to the client under customary fee schedules of the firm, or pursuant to the terms of any governing retainer agreement"). Where a lawyer gives a client the documents to which the client is entitled, the lawyer is generally entitled to retain a copy, but because the copy is for the lawyer's own protection and not to advance the client's interests, the lawyer must bear the costs of making that copy. N.Y. State 780 (2004) (finding that a lawyer generally has a "right to retain copies of the file in order to collect a fee or to defend against an accusation of wrongful conduct," but that the lawyer must pay for that copy).

8. Thus, it is clear that the inquirer must provide the client with a copy of his file, but we have not previously considered whether the lawyer must print out electronic documents if the client so requests. We conclude that where the client is unable to read electronic documents, the lawyer should make reasonable efforts to transmit the file in a form in which the client can access the documents. This conclusion is based on the premise that the property to which the client is entitled is not merely the physical medium on which the documents reside but the information contained thereon. Where a client is incarcerated, the client may not be permitted to receive a computer disk or drive containing the client file, or may not have the equipment to read the documents so they are usable in any further proceedings.

9. However, the lawyer is not obligated to pay the costs of printing out the documents. Rather, as the Court of Appeals concluded in *Sage Realty*, the costs of "assemblage and delivery of documents to the client" are properly chargeable to the client. 91 N.Y.2d at 38. The costs of preparing electronic documents for delivery to the client are analogous to the costs of assemblage of paper documents that were at issue in that case. *See* N.Y. City 2008-1 ("Although the Court of Appeals' *Sage Realty* decision principally related to paper documents, we do not see any principled reason why a lawyer's fees

may not reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access."). As in *Sage Realty*, however, a different answer on who pays for the printing might obtain where "the law firm has already been paid for" printing a copy of documents, as when a lawyer receives a transcript in hard copy form at a per-page fee that was charged to the client. Here, the inquirer states that there are no such hard copy documents for this client, so they are not the subject of his inquiry. Similarly, because the inquirer was retained by a paying client, we have no occasion to consider whether a different result might obtain where the lawyer was appointed by a court to represent an indigent client.

CONCLUSION:

10. Where a lawyer keeps client files received in electronic form in that form and a former client requests a copy of the file in paper form, the lawyer must take reasonable measures to deliver the electronic documents in a form in which the client can access them. The lawyer may charge the client the reasonable fees and expenses incurred in printing out and delivering a paper copy.

(34-17)

OPINION 1143 (01/18/2018)

TOPIC: IOLA accounts**;** court appointed referee; deposit of third-party funds

DIGEST: An attorney who is appointed as a referee to conduct foreclosure sales pursuant to Part 36 of the Rules of the Chief Judge may deposit funds received from those sales into an IOLA account or special account maintained by the lawyer's firm or by the lawyer.

RULES: 1.15, 5.1.

FACTS:

1. The inquirer is an attorney who is occasionally appointed as a referee to conduct foreclosure sales pursuant to Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36). Most often, when the inquirer conducts these foreclosure sales, a bank representative is present at the sale to receive any sale proceeds, which are typically owed to a third party. At other times, no bank representative is present, so the sale proceeds are left in the possession of the inquirer.

2. The inquirer is a member of a law firm. The inquirer wishes to deposit the excess funds from foreclosure sales into the law firm's Interest on Lawyer Account ("IOLA"), but the inquirer's firm is reluctant to permit a deposit into the firm's IOLA account because only the inquirer, not the firm, was appointed as referee.

QUESTION:

3. When an individual member of a law firm, and not the law firm itself, is appointed pursuant to 22 NYCRR Part 36 as a referee to conduct a foreclosure sale, may the attorney/referee deposit sale proceeds funds owed to a third party into the IOLA account of the individual attorney's law firm?

OPINION:

4. Rule 1.15(b)(1) of the N.Y. Rules of Professional Conduct (the "Rules"), which addresses the handling of client and third-party funds in the possession of an attorney, says in relevant part:

> A lawyer who is in possession of funds belonging to another person *incident to the lawyer's practice of law* shall maintain such funds in a banking institution within New York State. . . Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a *special account* or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited. [Emphasis added.]

5. An IOLA account is one such "special account." *See* Judiciary Law § 497. Our Committee opines only on ethical issues arising under the Rules and not on questions of law. Thus, we offer no

view on whether the Judiciary Law, 22 NYCRR Part 36, or any other statute or rule relating to foreclosure sales, address the question presented. If so, then the requirements of law would govern. But if the law is not to the contrary, we see no reason under the Rules why the proceeds of a foreclosure sale belonging to a third party may not be placed into the IOLA account of the inquirer's law firm. (For convenience, we refer to trust accounts or escrow accounts as "special accounts" except when reference to IOLA accounts – a species of special accounts – is appropriate.)

6. By way of background, the appointment of a referee is usually set out in a judgment of sale entered following foreclosure. That judgment dictates the distribution of proceeds, which typically the referee computes. The referee cannot alter the terms of the judgment of foreclosure and sale. On the day of the sale, the referee announces the sale and reads its terms aloud. Following the sale, the referee is responsible for executing a referee's deed, obtaining the purchase deposit (or price), executing the memorandum of sale and the report of sale, calculating the final amount due, and distributing the funds in accordance with the judgment. Familiarity with these requirements is integral to service as a referee. Thus, although a person need not be a lawyer to act as a referee, courts often name lawyers to serve in that position.

7. Such service, in our view, is "incident to the lawyer's practice of law" within the meaning of Rule 1.15(a) even though non-lawyers are legally eligible to serve as foreclosure referees. The Rules may apply to a lawyer (or law firm) when engaged in activities that a non-lawyer may provide. We find support for this conclusion in our prior opinions applying the Rules to lawyers acting as referees in foreclosure matters. For instance, in N.Y. State 924 ¶¶ 4, 6 (2012), we concluded that an attorney could act as a referee in a mortgage foreclosure proceeding in which a client held a judgment on the mortgaged property, provided that the lawyer complied with the confidentiality provisions of Rules 1.6 and 1.8(b), as well as the conflicts provisions of Rules 1.7 and 1.9. Similarly, in N.Y. State 893 ¶ 5 (2011), we said that a prosecutor could accept appointment to a panel of foreclosure referees provided that the lawyer complied with the conflicts provisions of Rule 1.7. *Cf.* N.Y. State 979 (2013) (lawyers acting as mediators may be subject to the Rules). In light of the prevalence of lawyers appointed to referee foreclosure sales, we have no difficulty concluding that service as such is "incident to" the practice of law, and hence that Rule 1.15 applies.

8. It follows that a lawyer in possession of third-party funds yielded by the sale must assure their safekeeping in a special account segregated from the firm's own business or operating accounts. We know of no reason in the Rules why these funds may not be deposited into an IOLA account maintained by the firm of which the inquirer is a member if the funds qualify for deposit there under applicable laws and regulations. Rule 1.15(a) specifically says that funds so qualifying may be held in special accounts either "in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member." This means that, while the inquirer is not obligated to place the funds into a firm IOLA account, the inquirer is free to do so and the firm is free to accept them.

9. Alternatively, a lawyer in the inquirer's situation may set up a special account (including an IOLA account) in the lawyer's own name. We recognize that some law firms may have their own rules or agreements on such matters – for instance, a partnership provision prohibiting members of the firm from setting up special accounts in the lawyer's own name – but we have not been told of any such provision here. No ethics violation arises if a lawyer sets up a special account only in the lawyer/ref-

eree's name. But the inquirer need not do so if the firm will allow him to deposit the money into the firm's IOLA or other special account.

10. Under all circumstances a lawyer or law firm in possession of funds due a third party must maintain a special account to hold the third-party funds. Whichever course is selected, we note that, under Rule 5.1(a), the firm and its members are responsible to make "reasonable efforts to ensure that all lawyers in the firm conform" to the Rules, including proper maintenance of IOLA accounts and other special accounts.

CONCLUSION:

11. An attorney who is appointed as a referee to conduct foreclosure sales, and who is in possession of funds belonging to a third party received from those sales, may ethically deposit funds into either the attorney's firm's IOLA account or into a special account set up by the attorney/referee individually. In any case, the attorney or the law firm must hold such third-party funds in a special account separate from the firm's business or operating account.

(27-17)

OPINION 1144 (01/29/2018)

TOPIC: Communications with Client; Withdrawal from Representation of Difficult Client

DIGEST: A lawyer may place time and manner limitations on communications with a client provided the lawyer promptly informs and consults with the client on matters within the lawyer's duty of communication. If a breakdown occurs in communications between a lawyer and client such that representation cannot be carried out effectively, the lawyer may seek to withdraw from representing the client subject to any applicable rule of court.

RULES: Rules 1.2(a), 1.4, 1.16, 1.14.

FACTS:

1. A court assigned the inquirer to represent an individual who has been charged with several criminal offenses. Prior to the inquirer's assignment, the client had been represented by a number of other lawyers. The client has unsuccessfully moved to have the inquirer relieved as counsel.

2. The client has ongoing mental health issues for which the client receives treatment. According to the inquirer, the client is physically intimidating, verbally abusive, and often non-responsive. The inquirer wishes to impose some restrictions on the time and manner in which the client may communicate with the lawyer, including limiting communications to scheduled appointments and written communications. If the client does not abide by these limits, or otherwise continues to disrupt communications, then the lawyer wishes to consider withdrawing from the representation.

QUESTIONS:

3. May a lawyer place reasonable restrictions on the time and manner of communications between the lawyer and client? Under what circumstances may a lawyer withdraw from representation of a difficult client?

OPINION:

4. The New York Rules of Professional Conduct (the "Rules"), in Rule 1.4, entitled "Communication," sets out a lawyer's obligations concerning communicating with clients. The Rule says:

> (a) A lawyer shall:
>
> (1) promptly inform the client of:
>
> (i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by the Rules;
>
> (ii) any information required by court rule or other law to be communicated to a client; and
>
> (iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

5. Three core principles can be drawn from this Rule. First, a lawyer must keep the client apprised of material circumstances and developments in the matter. Second, a lawyer must comply with a client's reasonable requests for information. Third, a lawyer must reasonably consult with a client both about the means of accomplishing the client's objectives and about other decisions regarding the representation, some of which are within the client's province to decide. *See* Rule 1.2(a). On the first two of these – on developments in the matter and requests for information from the client – the lawyer must communicate promptly. Although a lawyer's obligations under this Rule are thus robust, neither Rule 1.4 nor other Rules prescribe a specific manner of communication, except when a Rule requires written instruments in specific circumstances, *see, e.g.,* Rule 1.5(b), (c), (d)(5) (governing legal fees); Rule 1.7(b) (governing informed consent to conflicts); Rule 1.8(a) (governing business transactions with clients).

6. Rule 1.4's obligation that a lawyer keep the client "reasonably informed about the status of the matter" can be fairly read to require a lawyer to use methods of communication that are effective, timely, and not unduly burdensome to the client, but the Rule does not prevent a lawyer from selecting the manner of communication. Rule 1.4(a)(4) specifically indicates that a lawyer need comply only with reasonable requests for information, thereby allowing lawyers the flexibility to curtail conversations or meetings that stray beyond the relevant substance of the representation. This provision expresses the Rule's recognition that some clients may thrust upon their lawyers burdensome, immaterial requests for information and that lawyers need not meet such unreasonable demands.

7. Similarly, Rule 1.4 does not prohibit a lawyer from controlling the timing of client communications. Other than the general requirement that developments in the case and responses to reasonable requests for information be "promptly" communicated, the Rule does not curtail a lawyer's discretion to schedule the specific timing of lawyer-client communications. Notably, Comment [4] to Rule 1.4 provides that when a prompt response to a client's reasonable request for information is not feasible, the lawyer (or a member of the lawyer's staff) should "acknowledge receipt of the request and advise the client when a response may be expected." That Comment is consistent with the notion that a lawyer – often balancing competing obligations – needs to have reasonable latitude to schedule the timing of client communications.

8. Consistent with the foregoing, we believe that the Rules do not prohibit a lawyer from responding to a challenging client by limiting the time and manner of communications with the client

as long as the lawyer fulfills the substantive communicative requirements contained in Rule 1.4. *Cf.* N.Y. State 1124 (2017) (noting that no provision in the Rules mandates how lawyers must communicate with each other and that lawyers should work out between themselves the methods of communication that will best facilitate resolution of the matter at hand). Hence, a lawyer may limit communications to scheduled appointments or to some form of written transmission readily accessible to the client.

9. Whether and when a lawyer may seek to withdraw from representing a difficult client is controlled by Rule 1.16, which governs "declining or terminating representation." Rule 1.16(c) provides, in relevant part, that "except as stated in paragraph (d), a lawyer may withdraw from representing when, among other reasons, the "withdrawal can be accomplished without material adverse effects on the interests of the client," Rule 1.16(c)(1), "the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out the representation effectively, Rule 1.16(c)(7), or "the lawyer believes in good faith, in a matter before a tribunal, that the tribunal will find the existence of other good cause for withdrawal" Rule 1.16(c)(12). Rule 1.16(d), in turn, provides that "if permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

10. Because the inquirer has already appeared as counsel for the client in the pending matter, the inquirer may withdraw only with the permission of the tribunal. The reasons for permissive withdrawal in Rule 1.16(c) are disjunctive, so any one of the reasons set forth there may suffice. The most obvious candidate emerging from the facts – and thus the most apparent reason why the inquirer may seek permission for withdrawal from the tribunal – is whether the client's conduct will prevent the inquirer from "carry[ing] out the representation effectively" under Rule 1.16(c)(7). In most representations, and certainly in defending against a criminal prosecution, effective representation requires meaningful communication between a lawyer and client. If the client's verbal abuse and non-responsiveness result in a collapse of meaningful communication, then effective representation is almost certainly not possible. *See* Roy D. Simon & Nicole Hyland, Simon's New York Rules of Professional Conduct Annotated, 959 (2017) (noting, as examples of client conduct that make it unreasonably difficult to carry out representation effectively, "a client's constant calls to talk about the case or request information beyond what is fruitful or reasonable" and "a client's abusive or threatening communications to the lawyer"); *see also Cahill v. Donahoe,* 2014 WL 3339787 (W.D.N.Y. 2014) (granting motion to withdraw where "the attorney-client relationship is no longer productive and . . . the discord that has characterized their relationship over many months appears irreparable."). If an irreparable disintegration in communication has occurred, the inquirer may ask the court for permission to withdraw.

11. That the client here has mental health issues for which the client is receiving ongoing treatments makes it appropriate to mention Rule 1.14, which governs a lawyer's responsibilities to clients with diminished capacity. *See* N.Y. State 949 ¶ 20 (2012). Under Rule 1.14, a lawyer must "as far as reasonably possible" maintain a normal lawyer-client relationship. That a client suffers from mental illness does not diminish the lawyer's responsibility to treat the client attentively and with respect. Rule 1.14, Cmt. [2]. Rule 1.14 permits a lawyer to take protective action when the lawyer reasonably believes that the client is at risk of physical, financial, or other harm unless such action is taken. "Any

condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities on the lawyer." Rule 1.14, Cmt. [1]. "Before considering what measures to undertake, lawyers must carefully evaluate each situation based on all of the facts and circumstances." N.Y. State 986 ¶ 12 (2013). In N.Y. State 986, we added (at ¶ 13):

> Any protective action taken by the lawyer should be limited to what is essential to carry out the representation. Thus, the lawyer may consult with family members, friends, other individuals, agencies or programs that have the ability to take action to protect the client. The Rule does not specify all of the potential protective actions that may be undertaken, but it makes clear that seeking the appointment of a guardian is the last resort, when no other protective action will protect the client's interests.

12. If the inquirer remains on the case, the inquirer will need to maintain a normal lawyer-client relationship "as far as reasonably possible," but, in evaluating the situation, the inquirer may conclude that protective actions are available to facilitate communication with the client so that the lawyer may enhance the prospect of effective representation.

CONCLUSION:

13. A lawyer may place reasonable limitations on the timing and manner of client communications. When there is a breakdown of communications between a lawyer and client such that representation cannot be carried out effectively, the lawyer may seek to withdraw from representing the client.

(36-17)

OPINION 1145 (03/07/2018)

TOPIC: Litigation financing; conflicts of interest

DIGEST: Neither the lawyer nor the lawyer's firm may represent a client in litigation funded by a litigation financing company in which the lawyer is an investor.

RULES: 1.7; 1.8 (a), (e), (f) & (i), 1.10(a), (d)

FACTS:

1. The inquirer is the managing partner of a law firm that represents plaintiffs in commercial litigation. The inquirer sometimes refers clients to a litigation financing company (the "Company") that provides money to the clients in exchange for a percentage of the prospective recovery.

2. The Company is structured as a limited partnership that privately raises money from qualified investors, among whom the inquirer seeks to be a direct and substantial one. The Company invests in a variety of lawsuits, including some brought by the inquirer's clients, and others brought by persons not represented by the inquirer. Investment decisions are made by a registered investment advisor. Neither the inquirer nor the inquirer's firm represents clients in their negotiations with the Company on the terms of the financing arrangements.

QUESTION:

3. May a lawyer or the lawyer's firm represent a client in litigation funded by a litigation finance company in which the lawyer is an investor?

OPINION:

4. The terms "alternative litigation finance" or "third-party litigation finance" refer to

> the funding of litigation activities by entities other than the parties themselves, their counsel, or other entities with a preexisting contractual relationship with one of the parties, such as an indemnitor or a liability insurer. These transactions are generally between a party to the litigation and a funding entity and involving an assignment of an interest in the proceeds from a cause of action. These activities have become increasingly prominent in recent years, leading to significant attention in the legal and popular press, scrutiny by state bar ethics committees, and scholarly commentary.

ABA Commission on Ethics 20/20, Informational Report to the House of Delegates (Dec. 2011) ("ABA Report") at 1 (footnotes omitted); *see also*, *e.g.*, Ethics Committee of the NYSBA Commercial and Federal Litigation Section, "Report on the Ethical Implications of Third-Party Litigation Funding" (2013); N.Y.C. Formal Op. 2011-2; A. Sebok, "*Litigation Investment and Legal Ethics: What Are the Real Issues?*," 55 Canadian Bus. L. Journal 111 (2014).

5. In two previous opinions, we have considered issues arising from alternative litigation finance based on the former New York Code of Professional Responsibility (the "Code"). N.Y. State 769

(2003); N.Y. State 666 (1994). Both opinions analyzed issues of legal ethics but noted that this Committee does not opine on issues of law such as the legality of alternative litigation financing arrangements, and we repeat that caveat here. Here, we focus on the specific ethics issues presented in the inquiry; we do not revisit in any detail the ethical considerations applicable to alternative litigation financing generally.

6. In N.Y. State 666, we opined that a lawyer may ethically refer a client to a litigation financing company, while noting that the lawyer must be careful not to compromise confidentiality by disclosing information to the lending institution without the client's informed consent. In N.Y. State 769, we added that, subject to various limitations, a lawyer may ethically represent a client in negotiations with the litigation financing company and charge an additional fee for doing so. Both opinions also stated limitations relevant to the current inquiry that are set forth in the analysis below.

7. That the inquirer seeks to be a direct and substantial investor in the Company is of consequence. We do not address other situations, such as when a lawyer's investment occurs indirectly through intermediate entities, of which the lawyer may not even be aware.

8. The lawyer's proposed investment in the Company implicates at least four conflict-of-interest rules. We will first discuss two provisions – Rules 1.8(a) and 1.7(a)(2) – which the requisite disclosure and consent could potentially satisfy, and will then discuss two other provisions that we think preclude the proposed conduct in all circumstances.

9. Rule 1.8(a) of the New York Rules of Professional Conduct (the "Rules") sets forth requirements that must be met when a lawyer enters into a business transaction with a client. This specific regulation, rather than the general conflicts provisions of Rule 1.7(a), governs the lawyer's conduct when a lawyer engages in a business transaction with a client. N.Y. State 1055 ¶ 13 (2015). Such a business transaction occurs when a client obtains funding from a source in which the lawyer has a financial interest, which funding will be used in part to pay the lawyer's fees. *See* N.Y. State 769 (citing the Code's predecessor to Rule 1.8(a) as one of bases for concluding that "the lawyer cannot own any interest in the financing institution"). The two other conditions to trigger Rule 1.8(a) are that the lawyer and client "have differing interests" in the transaction and that "the client expects the lawyer to exercise professional judgment therein for the protection of the client." Whether those circumstances are present will depend on the facts of particular cases. Here, we assume their presence, because the Company and the client have differing interests in the terms of the financing arrangements, s*ee* Rule 1.8, Cmt. [4C] (Rule 1.8(a) applies when lawyer obtains financial interest in client's claim except as Rules otherwise allow), and because the lawyer's financial stake in the Company could give rise to the client's reasonable expectation that the lawyer is exercising professional judgment on the client's behalf, *see* N.Y. State 769 ("an unsophisticated client may reasonably assume that by facilitating the transaction, the lawyer is also endorsing the entering into of the proposed transaction and/or the terms thereof"); *cf.* N.Y. State 1055 n. 1 (2015) (client expectation likely when, for example, client has no other counsel, and the lawyer is acting for the client in the underlying matter).

10. When Rule 1.8(a) applies, then the transaction must be "fair and reasonable to the client." This is a fact-intensive inquiry, N.Y. State 913 ¶ 11 (2012), for which we lack data to opine. Assuming the inquirer satisfies this standard, then the inquirer may meet the other requirements of Rule 1.8(a) by complying with the obligations to make full disclosure in a writing, using language the cli-

ent may reasonably understand, including the lawyer's role in the transaction; to advise the client, and to provide the client the opportunity, to seek independent legal counsel; and to obtain informed consent in a writing the client signs. Rule 1.8(a) (1) - (3).

11. If the client is not to be represented by the inquirer in the litigation, but rather by another lawyer in the inquirer's firm, the inquirer's financial interest would still give rise to a conflict by imputation. Rule 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein."). Thus, even if the client is represented by another lawyer in the inquirer's firm, that representation, together with the inquirer's investment in the Company, would trigger the restrictions of Rule 1.8(a). But the imputed restriction could, in appropriate circumstances, be satisfied by informed consent and by meeting the other requirements of Rule 1.8(a)(1) - (3).

12. If the inquirer fully complies with Rule 1.8(a), then the inquirer must still abide by Rule 1.7(a) in connection with the ongoing representation of the client. N.Y. State 1139 ¶ 15 (2017). Rule 1.7(a)(2) provides that a lawyer shall not represent a client if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests," unless the affected client gives informed consent confirmed in writing. The inquirer's personal and financial interest in the Company could create such a risk. For instance, the Company may have an interest in expediting (or prolonging) the litigation to enhance the value of the Company's investment but which may not equate with the client's interests in going to trial (or reaching an early settlement). A continuing duty exists to protect the client from this risk. Nevertheless, in our view, this conflict may be adequately disclosed and waived under Rule 1.7(b) if the other requirements of Rule 1.7(b) are fulfilled. Rule 1.10 imputes this conflict to other lawyers in the inquirer's firm, but, like the underlying conflict, such an imputed conflict could be adequately disclosed and waived to allow the lawyer's firm to represent the client. *See* Rule 1.10(d).

13. There are, however, two other applicable Rules that informed consent cannot remedy. Rule 1.8(e) provides (subject to exceptions discussed below) as follows: "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client." Underlying this Rule are two concerns: first, that such financial assistance "would encourage clients to pursue lawsuits that might not otherwise be brought," and second, that "such assistance gives lawyers too great a financial stake in the litigation." Rule 1.8, Cmt. [10].

14. The other provision (again subject to exceptions discussed below) is Rule 1.8(i): "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client." This rule, too, "is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires." Rule 1.8, Cmt. [16].

15. We believe that the proposed conduct would violate both of these Rules. A violation of Rule 1.8(e) arises because the payments from the Company would constitute "financial assistance to the [inquirer's] client." We recognize that the inquirer would not be the only investor in the Company, and

that the inquirer's client would not be the only litigant funded by the Company, but these facts do not alter the reality that money from the inquirer would be paid as financial assistance to the inquirer's client. Nor does it matter that the money is routed first as an investment in a limited partnership and only thereafter as litigation funding. *See* Rule 8.4(a) (lawyer shall not violate the Rules "through the acts of another"); Phila. Op. 91-9 ("an attorney generally may not loan funds directly to a client, nor may an attorney indirectly do so through a finance company in which such attorney has an interest."); *cf*. Fla. Op. 00-3 (2002) ("an attorney may not indirectly loan funds to clients in connection with pending litigation through a nonprofit corporation funded by attorney contributions.").

16. There are three exceptions to Rule 1.8(e) that allow limited assistance to clients in certain circumstances. Rule 1.8(e) (1) (advances of "court costs and expenses of litigation"), (2) (making such payments for indigent or pro bono clients) and (3) (making such payments in contingency matters). In those cases, the benefits of helping assure access to the courts outweigh the perils of such limited assistance. *See* Rule 1.8, Cmt. [10]. But even then, assistance is limited to "court costs directly related to litigation," such as "filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence." Rule 1.8, Cmt. [9B]. Lawyers are never permitted to give litigation clients the more sweeping kinds of assistance – such as lawyer's fees billed on a non-contingency basis – that, under the inquiry, would apparently be provided by the Company. *See* N.Y. City 2011-2 (for commercial cases such as those at issue here, if the claim appears meritorious, "the financing company will advance amounts to cover attorneys' fees and the other costs of the litigation").

17. This result is consistent with our prior opinions, based on the Code, which indicated that the lawyer "cannot own an interest in the lending institution, as that would indirectly constitute a loan by the lawyer to the client." N.Y. State 666, *cited in* N.Y. State 769. Other jurisdictions agree. *See* N.J. Op. 691 (2001) (ethics rules do not prohibit lawyer from helping a client to obtain financial assistance from another "as long as the lawyer has no financial interest in the individual or entity which secures or provides that funding"); S.C. Op. 92-06 (approving attorney's interest in a loan company given that "the company would not make loans to the attorney's own clients"); Fla. Op. 00-3 (2002) ("The attorney shall not have any ownership interest in the funding company"); Phila. Op. 91-9 ("an attorney generally may not loan funds directly to a client, nor may an attorney indirectly do so through a finance company in which such attorney has an interest."); ABA Report at 16, 19-20 (alternative legal financing may be subject to non-waivable conflict rule prohibiting lawyer from "providing financial assistance to a client").

18. The proposed conduct would also violate Rule 1.8(i). By providing money to the inquirer's client in exchange for a percentage of the prospective recovery, the Company would acquire a proprietary interest in the client's claim. The inquirer, as a part owner of the Company, would also acquire such an interest, which the rule prohibits except in the cases of "a lien authorized by law to secure the lawyer's fee or expenses," Rule 1.8(i)(1), or "a reasonable contingent fee in a civil case," Rule 1.8(i)(2). Neither of those exceptions would apply to the inquirer's financial stake in the Company. Even if a client is to compensate the inquirer by contingent fee, such a fee payment would be different from the percentage of a recovery that would ultimately be paid to the Company, and in part indirectly to the inquirer, in exchange for litigation financing. *See also* ABA Report at 16, 20 (alternative legal financing may be subject to non-waivable conflict rule prohibiting lawyer from "acquiring a proprietary interest in the client's cause of action").

19. As we have said, the imputation provisions of Rule 1.10(a) apply to violations of Rule 1.8. Thus, the preclusion of the proposed conduct by Rule 1.8(e) and Rule 1.8(i) would apply not only to clients whom the inquirer personally represents, but also to those represented by other lawyers associated in the inquirer's firm.

20. These restrictions are not subject to waiver. Rule 1.10(a) applies its imputation standard to any breach of Rule 1.7, 1.8, or 1.9, "except as otherwise provided therein." Rule 1.10(d) says that a "disqualification prescribed by this Rule [1.10(a)] may be waived by the affected client or former client under the conditions stated in Rule 1.7." In the context of prohibited transactions under Rule 1.8(e) or Rule 1.8(i), however, there is no negatively affected client or former client. The concept of waiver makes no sense. What is imputed is not a "disqualification," but rather an outright prohibition of the transaction in question. There are no informed-consent exceptions specific to Rules 1.8(e) and 1.8(i). Accordingly, the prohibitions of financial assistance to a client, and of acquiring a proprietary interest in the subject matter of litigation, are not subject to client waiver, and the same is true of those prohibitions as imputed.

CONCLUSION:

21. Neither the lawyer nor the lawyer's firm may represent the client in a litigation funded by a company in which one of the firm's lawyers is an investor in the litigation financing company providing the funds.

(31-17)

OPINION 1146 (03/20/2018)

Modifies N.Y. State 808

TOPIC: Contingency Fees: Paying Fees in a Criminal Matter from Personal Injury Settlement

DIGEST: A lawyer who represents a client in a personal injury matter and proposes to represent the client in a contemporaneous criminal defense matter and apply any funds recovered in the personal injury matter toward payment of legal fees in the criminal defense matter has a differing interest in any recovery in the personal injury matter and must satisfy the requirements of fairness, full disclosure and written consent set forth in Rule 1.8(a) to enter into the proposed retention.

RULES: 1.0(f), 1.0(j), 1.5(a), 1.8(a), 1.8(i)

FACTS:

1. The inquirer's law firm represents clients in personal injury, criminal defense, and other matters. Occasionally, a client who has a personal injury case becomes involved in a criminal matter and asks the firm represent the client in the criminal matter as well. Clients who are unable to pay in advance for the criminal defense sometimes propose to secure the payment of fees for the criminal representation against the prospective monetary recovery from the personal injury settlement, judgment, or award.

QUESTIONS:

2. The inquirer poses three questions:

> (a) Is it permissible for a client to pay fees for services rendered by the firm in criminal defense matters from a settlement, judgment, or award obtained by the firm on behalf of the client in the personal injury matter?
>
> (b) Is it permissible to enter into a criminal retainer agreement with a current personal injury client which grants a lien against the client's potential personal injury award to cover fees earned on an hourly basis in the contemporaneous criminal representation?
>
> (c) If it is not permissible to enter into a criminal defense retainer agreement which purports to create a lien against the personal injury recovery, is it nevertheless permissible to enter into a retainer agreement for the criminal defense matter, and to create a charging lien against the personal injury settlement, papers, or other materials or funds related to the personal injury case, should the client ultimately fail to pay the fees for the criminal defense case?

OPINION:

3. We think the inquirer's first two questions pose the same issue, namely, whether the N.Y. Rules of Professional Conduct (the "Rules") permit the inquirer to enter into an agreement with a client to have fees for services rendered in the criminal defense matter paid out of, or secured by, the proceeds of any settlement, judgment, or award obtained in a personal injury matter in which the firm

also represents the client. We assume the inquirer will have the client sign an engagement letter in the criminal defense matter that provides for billing the client at a fixed rate, hourly or otherwise, but provides, too, that fees for the criminal defense matter may be paid out of funds obtained in any recovery in the representation of the client in the personal injury matter, thus establishing an additional source for payment of the fees. This is analytically indistinguishable from a scenario in which the lawyer acquires a lien on any recovery obtained in the personal injury matter as security against payment of fees earned on an hourly basis in the contemporaneous criminal representation. In each instance, the proceeds of any recovery in the personal injury matter will be used to cover legal fees in the criminal defense matter only if the client is unable to cover those fees through the client's own personal funds. This arrangement therefore differs from an arrangement in which payment of legal fees in the criminal matter is contingent on the outcome of that matter, which is expressly prohibited by Rule 1.5(d)(1) (a lawyer "shall not enter into an arrangement for, charge or collect" a "contingent fee for representing a defendant in a criminal matter"). Here, payment in the criminal matter is not contingent on its outcome, and thus not the product of the lawyer's defense of the criminal matter.

4. Rule 1.8(i) permits a lawyer "to acquire a lien authorized by law" to secure payment of the lawyer's legal fees or expenses. This differs from the predecessor of the Rules, the N.Y. Code of Professional Responsibility (the "Code"), which in DR 5-103(A) allowed liens only if "granted by law." In N.Y. State 808 (2007), which was decided under the Code, we contrasted DR 5-103(A) with Rule 1.8(i) of the ABA Model Rules of Professional Conduct (the "Model Rules"), which permitted liens "authorized by law." This led us to conclude that, under the Code, a lawyer could not obtain a security interest in a client's claim when the lawyer represents the client in that claim. But the change from "granted" to "authorized" is of consequence. In explaining the Model Rules, ABA 02-247 said that, "[b]y use of the word 'authorized' in place of the word 'granted' under former [Model] Rule 1.8(j), Rule 1.8(i) is intended to permit any legally recognized lien to secure fees to be acquired in property that is the subject of litigation." The Comments to Rule 1.8 echo this same sentiment concerning New York's adoption of Rule 1.8(i): Although Rule 1.8(i) generally prohibits lawyers from acquiring a proprietary interest in the cause of action or subject matter of a litigation the lawyer is handling, the Rule excepts "liens granted by statute, [] originating in common law and [] acquired by contract with the client." Rule 1.8, Cmt. [16]. Here, the inquirer proposes to enter into a contract with the client providing for a lien on recovery in the personal injury matter, which is permissible under the exception in Rule 1.8(i).

5. While a permitted exception to Rule 1.8(i), the inquirer's proposed arrangement for payment of fees in the criminal defense representation must abide by Rule 1.8(a), which governs business transactions with a client. *See* Rule 1.8, Cmt. [16] ("When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a)."). Rule 1.8(a) provides that "[a] lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client" unless the transaction is "fair and reasonable" to the client, the terms are fully disclosed to the client in writing, the client is advised and given an opportunity to seek independent legal counsel, and the client gives informed consent in writing signed by the client.

6. "Differing interests" are defined to "include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Rule 1.0(f). Here, the interests of the inquirer and the client will differ in connection with the inquirer's representation of the client in the personal injury action because the client and lawyer may have differing interests with respect to the amount of recovery sought and the risk analysis each would apply to obtaining it. For example, the lawyer may advise the client to reject a settlement that would otherwise be acceptable to the client because it is insufficient to cover costs in the criminal defense matter, or advise that the client accept a settlement that provides certainty in payment of the criminal defense costs rather than risk pursuing the case to trial when a credible chance exists of a larger recovery for the client at trial. *See* N.Y. State 1139 ¶ 9 (2017). In addition, we have previously observed that when a client has no other counsel in the matter and is an individual, and when the lawyer is responsible for client matters in the subject area – which is true here – it is more likely that the client will expect the lawyer to exercise professional judgment on the client's behalf. *See* N.Y. State 1055 n.1 (2015); see *also* ABA 11-458 (2011) (amendment to fee arrangements that involves a lawyer acquiring an interest in client property is subject to Model Rule 1.8(a)).

7. The lawyer must determine whether the transaction is "fair and reasonable" to the client. Rule 1.8(a)(1). Determining whether a transaction is "fair and reasonable" to the client requires a fact-specific inquiry of the facts ascertainable at the time. *See* N.Y. State 913 ¶¶ 11-12 (2012); *see also* N.Y. State 1139 ¶ 10; ABA 00-418 (2000). In addition, the lawyer must satisfy Rule 1.8(a)'s disclosure and consultation provisions, including assuring that the engagement letter in the criminal defense matter fully discloses the transaction in a manner that can be reasonably understood by the client; that the client provides informed written consent to the terms of the transaction (including the lawyer's role in the matter) after the lawyer has adequately explained the material risks of the proposed fee arrangement and reasonably available alternatives (*see* Rule 1.0(j)); and that the client has been advised to seek, and has been provided a reasonable opportunity to obtain, the advice of independent legal counsel regarding the proposed engagement. If all of the steps outlined above are taken, we see no ethical prohibition to the proposed fee arrangement.

8. The inquirer's third question – whether the law firm may enter into a retainer in the criminal defense matter that creates a charging lien against the personal injury case if the client fails to pay the fees in the criminal defense matter – is moot unless the inquirer is unable to comply with Rule 1.8(a). If compliance with Rule 1.8(a) is not possible, then the question whether a charging lien may be created against the recovery in the personal injury matter is an issue of law that is beyond the scope of this Committee. *See* N.Y. State Judiciary Law §475.

CONCLUSION:

9. A lawyer who represents a client in a personal injury matter and proposes to represent the client in a contemporaneous criminal defense matter and apply any funds recovered in the personal injury matter toward payment of legal fees in the criminal defense matter may do so provided that the lawyer complies with the Rule concerning business transactions with a client.

(38-17)

OPINION 1147 (03/23/2018)

TOPIC: Advertising: Use of "Esq." by a lawyer not admitted in New York.

DIGEST: A lawyer not admitted to practice in New York may use the term "Esq." in connection with a non-legal business conducted in New York, provided that care is taken to avoid confusion about the lawyer's status. A lawyer who performs *pro bono* immigration services for a nonprofit organization may be described to clients and others as a lawyer, as long as all communications disclose the lawyer's jurisdictional and practice limitations.

RULES: 5.5, 7.5(a) 7.5(d), 8.4(b) & (c).

FACTS:

1. The inquirer is admitted to practice law in California but not New York, where the inquirer currently resides. The inquirer works for a municipal agency in New York, but the scope of the inquirer's employment does not involve the practice of law; the municipal agency employs a New York lawyer who acts as the agency's counsel. The inquirer would like to use the term "Esq." on business cards relating to the municipal employment.

2. In addition, the inquirer is a volunteer immigration lawyer for a non-profit organization, representing individuals in proceedings before the federal immigration court, an administrative agency. The inquirer has registered with the court and is identified as counsel on the court's forms when representing clients before the court. The inquirer advises these clients that the inquirer is not admitted to the practice of law in New York but is admitted in California.

QUESTIONS:

3. The inquiry poses two questions:

   a. May a lawyer not admitted in New York use the honorific "Esquire," more commonly abbreviated as "Esq.," on business cards that the lawyer uses as a municipal employee performing non-legal services?

   b. When a lawyer not admitted in New York performs *pro bono* legal services to clients before a federal immigration tribunal, what disclosures of jurisdiction and subject matter limitations must the lawyer provide to clients?

OPINION:

4. In N.Y. State 1089 (2016), we addressed whether a "retired lawyer" within the meaning of Section 118.1(g) of the Rules of the Chief Administrative Judge, 22 NYCRR § 118.1(g), may use the title "Esq." in performing legal services that Section 118.1(g) allows for someone so designated. There (in ¶ 4), we cited with approval N.Y. City 1994-5, which says:

> The title "esquire" does not legally designate an individual as a lawyer because it is not conferred in this country as an academic degree or license. It has, however, been

adopted by lawyers by convention as a form of designation. Thus, one using the title in the United States is identifying himself or herself as a lawyer.

5. In the same opinion, we added (in ¶ 5), "that the term 'Esq.' does not have precisely the same connotation as, for example, 'Attorney-at-Law,'" and that, while lawyers acting in a non-legal capacity such as working for a nonprofit organization in administration or public relations could use the honorific "Esq." without qualification, a lawyer may not lead the recipient of the communication "to conclude that the lawyer was acting in a legal capacity." *Id.* Thus, when someone who is not admitted to practice law in New York uses the term "Esq." on a business card or otherwise, the question is whether the use of that abbreviation is misleading under Rule 8.4(c) of the N.Y. Rules of Professional Conduct (the "Rules"), prohibiting lawyers from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation."

6. We think the analysis in N.Y. State 1089 controls here. There, we noted that the retired lawyer remains a lawyer (although limited to performing unpaid legal work), and that while use of the term "Esq." is accurate, public perception must also be considered. A name on a business card containing solely a New York address and the honorific "Esq." could reasonably lead a member of the public to believe that the cardholder is a lawyer. A name on a business card with the honorific "Esq." but describing the person's position as one performing obviously non-legal services conveys a very different message. The issue, then, is not so much the use of "Esq." – provided the person is a lawyer – but the context in which the title appears. If the business transmits the message that the person is a lawyer but not performing legal services, then we see no reason under the Rules why the inquirer may not say as much. As long as the message is not misleading – as long as the lawyer who chooses to use the title takes care to avoid confusion and assure that the relevant audience is not misled to believe that the lawyer is acting as a lawyer – then we have no quarrel with its use on a business card.

7. The inquirer asks also if it is sufficient to explain to clients whom the inquirer represents as a volunteer immigration lawyer that the inquirer is admitted only in California and not in New York. Although we do not address questions of law, it has been our understanding that federal law permits a member in good standing of the bar of any state not under suspension or otherwise restricted in his or her practice of law may practice before federal immigration tribunals. *See* N.Y. State 863 ¶ 5 (2011).

8. In N.Y. State 863, applying the Rules to determine the disclosure that an attorney not admitted in New York must make, we said that a lawyer must note on letterhead and business cards that the lawyer is admitted to practice only in the state of admission, and that the lawyer's practice in New York is limited solely to immigration matters. We said, too, that prudence in that situation suggests that the lawyer add that the lawyer is "not licensed in New York State," in order to "avoid any possible confusion regarding whether the inquirer is or is not licensed in New York." *See id. ¶* 14.

9. While the jurisdictional and subject matter limitations need not be included in an email signature block, nothing in an email or any communication may state or imply that the lawyer is admitted to practice in New York, because to do so would violate Rule 8.4(c), prohibiting a lawyer from engaging in misrepresentation. *Id. ¶* 15.

CONCLUSION:

10. A lawyer not admitted in New York may use the term "Esq." on business cards as long as the card does not suggest that the lawyer is performing or qualified to perform legal services in this State. A lawyer may engage in a voluntary immigration practice with a nonprofit organization, and may refer to him or herself as a lawyer, provided that letterhead and business cards used in the practice fairly disclose applicable jurisdictional and subject matter limitations.

(37-17)

OPINION 1148 (04/02/2018)

TOPIC: Conflicts of Interest: Former government lawyer in private practice in matters involving former government employer

DIGEST: A lawyer formerly employed by a county department to handle child support enforcement proceedings may, after termination of such employment, represent respondents in such proceedings, provided that the lawyer was not personally and substantially involved in the same matter while a government employee.

RULES: 1.0(j), 1.6, 1.9(a) & (c), 1.11(a) & (c).

FACTS:

1. The inquirer is a New York lawyer formerly employed by a county social services agency (the "Department") within New York State. Among the duties of a county social services department are to assist "the state in the location of absent parents, establishment of paternity and enforcement and collection of support" obligations of legally responsible relatives to contribute for the support of their dependents. N.Y. Social Services Law §111-c(1) (outlining Departmental duties). The Department employs an enforcement unit staffed, in part, by four or five attorneys, who seek to enforce alleged obligations to support dependents. We assume for our purposes that, in doing so, the attorneys represent the Department rather than individuals to whom the support payments may be owed.

2. The inquirer recently retired as one of the Department's enforcement unit attorneys, and has started a solo law firm in the same region. In this practice, the inquirer wishes to represent clients adverse to the Department, including opposing the Department's enforcement actions.

QUESTION:

3. May an attorney, formerly employed by a county department of social services, represent clients opposing the efforts of the attorney's erstwhile government employer, including representing clients challenging support enforcement proceedings brought by that employer?

OPINION:

4. This Committee's charter is limited to interpretation of the New York Rules of Professional Conduct (the "Rules") and does not extend to opining on issues of law, statutes, county ethics codes, or other regulations that may govern the duties of current or former government employees in their relations with their current or former government employers. Accordingly, here, we proceed without deciding that the inquirer's proposed representation conforms to any such limitation on the inquirer's proposed conduct.

5. Nothing in the Rules creates an absolute bar to a former government attorney's representation of a client in opposition to the attorney's former employer. Rule 1.11(a)(2) is the principal Rule governing conflicts that may be faced by a former government attorney. N.Y. State 1029 ¶ 9 (2014). Rule 1.11(a) provides in pertinent part that "a lawyer who has formerly served as a public officer or employee of the government . . . shall not represent a client in connection with a matter in which the

lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation." Hence, Rule 1.11(a)(2) allows a former government attorney to represent private clients on matters in which the attorney did not participate "personally and substantially" while in government service.

6. The history of Rule 1.11(a)(2) makes "clear that the disqualification must be based on the lawyer's "personal participation to a significant extent." N.Y. State 748 (2001). "[T]hat a former government lawyer was counsel for the government in unrelated matters at the same time that the defendant's case was investigated or prosecuted is not enough to demonstrate personal and substantial participation under DR 9-101," the precursor to Rule 1.11(a)(2) in the N.Y. Code of Professional Responsibility (the "Code"), "or to require disqualification under that rule." *Id.* "Neither the Code, nor its goal of promoting public confidence require so limiting the practice of former government lawyers that they may not, following their return to private practice undertake work involving the types of matters in which they have gained particular expertise while in public service." N.Y. State 453 (1976).

7. The aims of Rule 1.11(a), a rule specific to onetime government lawyers, are akin to, but significantly differ from, those of Rule 1.9(a), a rule more generally regulating a lawyer's duty to former clients. The goals of Rule 1.9(a) include preventing a lawyer from "switching sides" and "improperly using confidential information of the former client," Rule 1.9, Cmts. [3] &[4], whereas Rule 1.11(a) is designed not only to protect the former government client but also to "prevent a lawyer from exploiting public office for the advantage of another client," Rule 1.11, Cmt. [3]. An additional and important concern of Rule 1.11(a), however, is to avoid an undue deterrent on lawyers serving in a public position without forever forgoing private practice in the legal area in which the lawyer served the government. Rule 1.11, Cmt. [3]; N.Y. State 1029 ¶ 10. For this reason, the test applicable to Rule 1.9 is qualitatively different from the test applicable to Rule 1.11.

8. To be sure, underlying each Rule is a protection of the former client's confidential information. A government lawyer, like any lawyer, owes an ongoing duty to a former client to preserve the confidential information the lawyer garnered in the representation unless the former client releases the lawyer from that duty. Rule 1.11(a)(1) requires a lawyer who formerly served as a public officer or government employee to comply with Rule 1.9(c), which in turn provides that "a lawyer who has formerly represented a client in a matter" [in this case, a government or governmental agency] "shall not thereafter use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client" or reveal such information, in each case "except as these Rules would permit or require with respect to a current client." Among the exceptions in each Rule is the former client's "informed consent" within the meaning of Rule 1.0(j). Consistent with this proscription, Rule 1.11(a)(2) says that the government agency may consent if a former government attorney seeks to represent another party "in a matter in which the lawyer participated personally and substantially" while a government employee, subject always to the proscription in Rule 1.11(c) against the use of confidential government information against third persons, a ban that consent may not waive (and that is not an issue we address in this opinion).

9. Absent the former client's informed consent, the differing language of the two Rules reflects their different objectives. Rule 1.9(a) bars representation adverse to a former client "in the same or a substantially related matter" to the matter in which the lawyer previously represented a client. Rule

1.11(a) bars representation by a former government employee adverse to the former client only in the same specific matter as the matter in which the lawyer participated "personally and substantially" during the lawyer's government employment. As a result, the application of each Rule may diverge in practical ways. Solely by way of illustration, some courts apply Rule 1.9(a)'s "substantial relationship" test to disqualify lawyers who represented clients in specific types of matters. *See, e.g., Panebianco* v. *First Unum Life Ins. Co.*, 2005 U.S. Dist. LEXIS 7314 (S.D.N.Y. Apr. 27, 2005) (disqualifying law firm that represented former client in disability matters); *Lott* v. *Morgan Stanley Dean Witter & Co.,* 2004 U.S. Dist. Ct. LEXIS 25682 (S.D.N.Y. Dec. 23, 2004) (disqualifying law firm that represented former client in ERISA matters); *Mitchell* v. *Metro. Life Ins. Co.*, 2002 U.S. Dist. LEXIS 4675 (S.D.N.Y. Mar. 21, 2002) (disqualifying law firm that represented former client in discrimination matters). Without endorsing these decisions – disqualification to appear in court is a question of law not ethics and governed by judicial standards outside our purview – a theme running through the opinions, sometimes labeled the "playbook" approach, is not practicable in the context of former government lawyers. Many state and sub-state legal departments represent the government only in specific types of cases. To use this "playbook" approach in interpreting Rule 1.11(a) is to disregard both its purpose of encouraging public service and the different language that Rule 1.11(a) uses to assess whether a government lawyer is able to represent a client against the lawyer's former employer.

10. Otherwise put, Rule 1.11(a) ousts the application of Rule 1.9(a) in the context of government lawyers. Rule 1.9(a)'s "substantial relationship" may extend its reach to encompass matters that Rule 1.11(a)'s requirement of "personal and substantial" involvement in the specific matters was not intended to embrace. We do not negate the possibility that the two may overlap in some instances, but neither do we believe that the two are necessarily congruent. That each Rule uses different language, that Rule 1.11(a) is specific to government lawyers in contrast to Rule 1.9(a)'s general application, and that Rule 1.11(a) serves public purposes beyond those animating Rule 1.9(a), fortify this conclusion. We note, too, that the considerations for determining whether Rule 1.11(a) applies are materially narrower than those customarily applied in analysis of a Rule 1.9(a) conflict. *Compare* Rule 1.11, Cmt. 10 (factors to be used in determining whether two matters are the same include "the extent to which (i) the matters involve the same basic facts, (ii) the matters involve the same or related parties, and (iii) time has elapsed between the matters") *with* Rule 1.9, Cmts. [2] & [3] (setting forth additional factors to be considered in making a decision about whether a conflict exists).

11. Consequently, we conclude that a onetime government lawyer may represent clients adverse to the lawyer's former government employer unless that lawyer had a personal and substantial involvement in the same specific matter in which the lawyer now proposes to challenge the government's position. This conclusion rests on the assumptions (a) that the inquiring lawyer does not possess confidential information about the specific matter obtained during the inquirer's government service, and (b) that the inquiring lawyer does not otherwise possess confidential information about the specific matter which, owing to the lawyer's confidentiality obligations, the lawyer could not competently represent the client in resisting the government's action without violating the lawyer's ongoing duty of confidentiality, *see* N.Y. State 901 ¶ 10 (2011) (a lawyer possessing non-disclosable confidential information relating to existing representation must assess whether the lawyer reasonably believes that the lawyer may competently represent client). But merely knowing how the government agency usually handles such matters, untethered to personal and substantial involvement in or confi-

dential information about the specific matter, is alone insufficient to prevent the former government lawyer from representing a private client against the lawyer's former government employer.

CONCLUSION:

12.A lawyer formerly employed by a county department to handle child support enforcement proceedings may, after termination of such employment, represent respondents in such proceedings, provided that the lawyer was not personally and substantially involved in, and possesses no confidential information acquired about, the same specific matter while a government employee.

(32-17)

OPINION 1149 (04/10/2018)

TOPIC: Conflicts of interest: Agency shop lawyer who represents the government against union members

DIGEST: A lawyer who is an agency shop member of a union may represent a government employer agency in disciplinary matters against union-represented employees, unless, in a particular circumstance, a reasonable lawyer would conclude that a significant risk exists that the lawyer's professional judgment on behalf of the government employer might be adversely affected by the lawyer's agency shop membership. If in a particular matter, a lawyer concludes that a conflict may exist, then the lawyer may undertake the representation if the lawyer reasonably believes that the lawyer can provide competent and diligent representation and the government agency gives its informed consent, confirmed in writing.

RULES: 1.0(q), 1.7(a) & (b).

FACTS:

1. The inquiring lawyer is admitted to practice in New York and an employee of the State. The inquirer at times represents an agency of New York State in disciplinary proceedings initiated against union-represented employees. The inquirer was once a member of the particular union, but subsequently resigned membership, after which the lawyer became an agency shop member. As an agency shop member, the inquirer is required to pay union dues, but is excluded from membership benefits of the union and is unable to participate in union elections.

QUESTIONS:

2. Does a lawyer who is employed by a state government agency and pays union dues as an agency shop member, but is not a union member, have a conflict in representing the government agency in disciplinary cases against members of the union and, if a conflict exists, may the conflict be waived?

OPINION:

3. Rule 1.7(a) of the New York Rules of Professional Conduct (the "Rules") says in relevant part that, "[e]xcept as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude" that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." *See* Rule 1.7, Cmt. [10] (a lawyer's own "financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client."). Rule 1.0(q) defines "reasonable lawyer" to be "a lawyer acting from the perspective of a reasonable prudent and competent lawyer who is personally disinterested in commencing or continuing the representation."

4. In N.Y. State 578 (1986), we concluded that, under the New York State Code of Professional Responsibility (the "Code"), the predecessor of the Rules, a lawyer who was a member of a union and subject to the same collective bargaining agreement as an employee involved in a disciplinary pro-

ceeding had a conflict in undertaking the representation of the employer in that proceeding. We added, however, that, "if the lawyer is simply an agency shop member, or if the collective bargaining agreement involved is not one to which the lawyer is subject, these concerns are not present to the same degree. Therefore, such a lawyer is not specifically prohibited from representing the State in a disciplinary proceeding brought under a collective bargaining agreement, except where the lawyer finds that he or she is unable to exercise independent professional judgment." Otherwise put, when a lawyer is not a union member, the disabling interests that might trigger Rule 1.7(a)(2) do not exist to the same extent that union membership entails Although we later modified N.Y. State 578 on other grounds (on which more below), we remain of the view that an agency shop member is in a different position than a union member for the purpose of conflicts analysis.

5. More recent opinions under the Rules presented questions in analogous situations in which we adopted similar themes. For instance, in N.Y. State 1119 ¶ 6 (2017), we considered whether a onetime associate district attorney could ethically represent defendants in prosecutions brought by the lawyer's former superior. To us, the issue rested on whether a reasonable lawyer would conclude that the inquirer's prior personal relationship with the district attorney created a "significant risk" that the lawyer's prior relationship with district attorney would adversely affect the independent professional judgment of the inquirer in pursuing a defense. Similarly, in N.Y. State 1122 ¶ 8 (2017), when considering whether a foster parent could maintain a practice as an Attorney for Children in Family Court proceedings, we said the conflict posed by an inquirer's status as a foster parent might well be "theoretical and remote," and that, were there "no 'significant risk' of an adverse effect [on the lawyer's professional judgment], objectively determined, an attorney who is a foster parent may undertake and continue representation of" parties in a Family Court proceeding without the need to obtain informed client consent." *See generally* N.Y. State 968 ¶ 17 (2013) (discussing personal considerations giving rise to a "significant risk" that the professional judgment of a government lawyer defending claims of colleagues subject to a government furlough would be adversely affected where the furlough program was also applicable to the inquiring lawyer).

6. Accordingly, each time the lawyer is asked to represent the agency in disciplinary actions against employees represented by the union, the lawyer must determine whether a reasonable lawyer would conclude that the lawyer's former union membership and/or current agency shop member status creates a significant risk that his representation of the State against union members would adversely affect the inquirer's independent professional judgment on behalf of the client (the government agency). On the facts presented to us, we do not believe that a reasonable lawyer would conclude that there is such a significant risk.

7. If in a particular situation, the inquirer reasonably believes that there is a significant risk that the lawyer's professional judgment would be adversely affected, then a curing mechanism appears in Rule 1.7(b), the exception to which Rule 1.7(a) refers. Rule 1.7(b) says that, notwithstanding a conflict under Rule 1.7(a), a lawyer may represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other

proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

8. In N.Y. State 578, we stuck to the position, first set out in pre-Code N.Y. State 40 (1966), that a government could not give informed consent to a conflict. We abandoned that position in N.Y. State 629 (1992) – hence the foregoing reference to modification of N.Y. State 578 – and have since consistently said that a government may provide informed consent. *See* N.Y. State 1130 ¶ 15 (2017); N.Y. State 968 ¶ 22; N.Y. State 770 (2003). Thus, if the inquirer were to conclude that a conflict exists, the conflict is subject to waiver by the State.

CONCLUSION:

9. An agency shop member of a union of State employees union may represent a State agency in disciplinary matters against union-represented employees if the lawyer reasonably believes that no significant risk exists that the lawyer's professional judgment on behalf of the State agency will be adversely affected by the lawyer's personal interests. If in a particular circumstance a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the government employer might be adversely affected by the lawyer's agency-shop membership, then the lawyer may undertake the representation if the lawyer reasonably concludes that the lawyer can provide competent and diligent representation and the agency gives its informed consent, confirmed in writing.

(39-17)

OPINION 1150 (04/30/2018)

TOPIC: Solicitations and Referrals: Spouses in Related Businesses

DIGEST: A lawyer's spouse engaged in a non-legal business related to the lawyer's practice area may for ethics purposes be equated to the lawyer in certain circumstances. Thus, a real estate lawyer whose spouse is a real estate broker may receive referrals from the broker/spouse only if the broker/spouse is not involved in the real estate transaction and the broker/spouse fully complies with the rules governing lawyer solicitations. A real estate lawyer may refer clients to a broker spouse only if the lawyer is not involved in the real estate transaction and may be required, in some instances, to obtain informed consent from the referred client, confirmed in writing.

RULES: 1.7(a)(2); 1.7(b), 1.8(e), 1.8(i), 7.3(a)(1); 7.3(b), 8.4(a).

FACTS:

1. The inquirer is a transactional real estate attorney whose spouse is a real estate broker. The couple wishes to refer matters to each other. In some circumstances, the inquirer would refer clients to the spouse as a broker; in others, the broker/spouse would recommend the inquirer to represent a party in the closing of a real estate transaction. The inquirer understands that the inquirer and broker/spouse may not participate in their respective roles in the same real estate transaction.

QUESTIONS:

2. The inquirer poses three questions:

(a) May a real estate attorney accept referrals from a broker/spouse who has no personal involvement in the real estate transaction?

(b) May a real estate attorney refer business to a broker/spouse if the attorney does not represent any party in the real estate transaction?

(c) May a real estate attorney representing a client in the sale of property refer the selling client to the broker/spouse in connection with the client's rental of an apartment in which the real estate attorney does not represent the selling client?

OPINION

3. The inquirer recognizes that a lawyer may not represent a party to a real estate transaction if the attorney's spouse is involved in the transaction. This is consistent with a view we have long held. *See* N.Y. State 493 (1978); N.Y. State 340 (1974); N.Y. State 244 (1972), *modified on other grounds* in N.Y. State 340. Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the "Rules") provides that a lawyer may not represent a client if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." The reach of a "lawyer's own financial, business, property or other personal interests" extends to the "financial, business, property or other personal interests" of the lawyer's spouse.

4. Such is the teaching of N.Y. State 855 (2011). There, the issue was whether a personal injury lawyer could permissibly refer a client to a litigation financing company in which the lawyer's spouse owned a controlling financial interest. We concluded that a lawyer could not ethically do so. We reasoned that a lawyer is not allowed (with exceptions inapplicable there) to subsidize a client's litigation, Rule 1.8(e), nor permitted to acquire a proprietary interest in a litigation, Rule 1.8(i). *Id.* ¶¶ 4-7. Thus, we said, under the Rules, the lawyer could not personally own an interest in the litigation financing company to which the lawyer referred clients for funding. *Id.* ¶ 5; *see* N.Y. State 1145 ¶¶ 13-20 (2018) (a lawyer may not refer clients to a litigation funding firm in which the lawyer is a direct and substantial investor). The unifying interest that marriage entails persuaded us that, if the lawyer could not directly violate Rules 1.8(e) and 1.8(i), then the lawyer could do not so indirectly with a an entity owned by a spouse. Accordingly, in interpreting Rule 1.7(a)(2), we consider any referral relationship between a lawyer and a lawyer's spouse to implicate the lawyer's own "financial, business, property or other personal interests." *See* N.Y. State 855 ¶¶ 11-12.

5. N.Y. State 855 relied, as we do here, on Rule 8.4(a), which forbids a lawyer a lawyer "to violate or attempt to violate" a Rule "through the acts of another." N.Y. State 855 ¶ 12. Rule 8.4(a) is of particular importance on the subject of the inquirer's first question – the proposed broker/spouse's referral of parties to the inquiring lawyer.

6. Rule 7.3 regulates solicitation and recommendation of professional employment. Rule 7.3(b) defines "solicitation" to mean, in part, "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients," the "primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain." Rule 7.3(a)(1) specifically forbids a solicitation "by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client." In any outreach by the broker/spouse initiated by or on behalf of the lawyer/spouse, the broker/spouse recommending the inquirer as a lawyer in a real estate transaction stands in the shoes of the inquirer as if the inquirer were personally making the outreach. Thus, for instance, the exception for persons who may be contacted in person or in real time – such as former or existing clients – refers to the inquirer's former or existing clients, not those of the broker/spouse. Likewise, Rule 7.3 sets forth other provisions on solicitations – such as recordkeeping and filing – for which the lawyer/spouse must assure compliance. By reason of Rules 1.7(a) and 8.4(a), these regulations apply to the actions of the broker/spouse as if done by the lawyer/spouse.

7. Whether a particular advertisement is a regulated solicitation "initiated by or on behalf of a lawyer" turns on the facts and circumstances of the communication. Rule 7.3(b) "makes an important distinction between communications initiated by the lawyer and those initiated by a potential client." N.Y. State 1049 ¶ 8 (2015); *see* Rule 7.3, Cmt. [2] ("A 'solicitation' means any advertisement" that is "initiated by a lawyer or law firm (as opposed to a communication made in response to any inquiry initiated by a potential client)"). A spectrum exists, on one end, between an unprompted question by a person on whether the broker/spouse knows any real estate lawyers, and, on the other, the broker/spouse's unprompted recommendation of the lawyer/spouse as a lawyer to handle a real estate transaction. *See* N.Y. State 1049 ¶ 17 (a web posting "directed to, or intended to be of interest only to, individuals" referring to a particular incident "would constitute a solicitation under the Rules"); N.Y. State 1014 ¶¶ 8, 10 (2014) (a current client's recommendation of a lawyer to a person in need of legal

services, made without the lawyer's participation or knowledge, is not a solicitation "initiated by or on behalf of the lawyer").

8. The inquirer's second and third questions are really the same: May a lawyer refer a client to the lawyer's broker/spouse to act in a real estate transaction in which the lawyer is not representing the referred client? The Rules set forth no categorical ban on the lawyer making such a referral. Nevertheless, the lawyer owes ongoing duties of care and loyalty to an existing client, including the duty to exercise independent professional judgment on the client's behalf. Not every client request for a referral, no matter how unrelated to the subject of the lawyer's representation of the client, invariably occasions these duties of care and loyalty. Rather, in our view, whether a lawyer's referral of an existing client to a non-lawyer service provider implicates these duties depends on the circumstances. If, for example, a meaningful relationship is present between the subject matter of the lawyer's representation of the client in a particular matter and the nature of the referral the client seeks, then we believe that the client has a reasonable right to expect that, in making the referral, the lawyer will exercise independent professional judgment on the client's behalf. It follows that the duty to exercise independent professional judgment requires an assessment whether any conflict of interest may burden that judgment.

9. In the current inquiry, we believe that the client could reasonably believe that the subject matter of the lawyer's representation of the client and the client's referral request are not so attenuated as to release the lawyer from the duties of care and loyalty to the client. In our view, a reasonable lawyer could well conclude that referring a client to a broker/spouse creates a significant risk that the lawyer's own "financial, business, property or other personal interests" will adversely affect the exercise of professional judgment in making the referral. We believe, however, that this conflict is subject to waiver by the referred client upon informed consent, confirmed in writing, pursuant to Rule 1.7(b). The requirement of consent is not onerous. The lawyer needs to disclose, at a minimum, the marital relationship with the broker/spouse, and the possibility that, if retained, any commission the broker/spouse earns in the matter could benefit the referring lawyer. This disclosure may be oral. The requirement that consent be "confirmed in writing" – which may be written by either the lawyer or the client, by email or other form of written communication – need acknowledge only that, pursuant to the requisite disclosures, the client agrees to waive any conflict.

CONCLUSION:

10. A lawyer who is engaged in a transactional real estate practice and whose spouse is a real estate broker may receive client referrals from the lawyer's spouse provided that the broker/spouse is not involved in the real estate transaction and the lawyer assures that the broker/spouse fully complies with rules governing solicitation by lawyers. A real estate lawyer may refer a client to a broker/spouse provided that the lawyer does not represent the client in the real estate transaction and, if the circumstances suggest a conflict, the lawyer obtains the informed consent of the referred client, confirmed in writing.

(40-17)

OPINION 1151 (05/01/2018)

TOPIC: Restrictive Covenants on Lawyers

DIGEST: A lawyer may not enter into an agreement with an employer restricting the lawyer's right to practice law following termination of employment, even when the employment does not involve the practice of law, but a lawyer may agree to a post-employment restriction expressly made subject to applicable ethical rules.

RULES: 5.6(a)

FACTS:

1. The inquirer, admitted to practice law in New York, is currently employed by an organization that does not render legal services. As an employee, the inquirer does not practice law, does not render legal advice to the organization or any of its constituents, and does not hold herself out as an attorney.

2. The organization's standard procedure is to ask its employees to sign an agreement with various provisions which the organization considers protective of its business interests. The contract, in nine single-spaced pages, deals with many matters, including, among other things, confidential information (meaning data the organization regards as proprietary as defined in the contract); ownership of intellectual property; business conflicts; and interactions with the organization's customers and contractors. Of particular relevance here is a provision – headed "Agreement Not To Solicit" – which says, in part, that an employee signatory "may not, directly or indirectly," communicate with or provide services to any current or prospective customer of the organization "relating in any way" to "any services related to the business" of the organization. The contract provides that this prohibition applies during the signatory's employment and for eighteen months following the end of employment.

3. The inquirer wishes to retain the option, at such time as her current employment ends, to engage in the practice of law. She is concerned that the post-employment 18-month tail on the "Agreement Not To Solicit" is so broad as to permit an interpretation imposing a restrictive covenant on her right to practice. In view of this concern, her employer offered to include a proviso that the clause is enforceable only "to the extent not inconsistent" with applicable ethical rules.

QUESTIONS:

4. May a lawyer enter into an agreement with an employer stipulating that, during the course of employment and for a stated period thereafter, the lawyer may not provide any services relating to the business of the employer when the employer is not engaged in, and the lawyer's employment does not involve, the rendition of legal services?

OPINION:

5. Rule 5.6(a)(1) of the New York Rules of Professional Conduct (the "Rules") says that a "lawyer shall not participate in offering or making" any "partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of the lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement." "The main purposes of

Rule 5.6(a)(1) are to protect the ability of clients to choose their counsel freely and to protect the ability of counsel to choose their clients freely." N.Y. State 858 ¶ 7 (2011); *see* Rule 5.6, Cmt. [1] ("An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."). Agreements prohibited by Rule 5.6(a)(1) limit the pool of available attorneys, a client's choice of legal counsel, and a lawyer's autonomy in accepting new engagements.

6. Rule 5.6(a)(1) applies no matter whether the employment agreement engages the lawyer to practice law. We have not previously had a chance to address this precise issue. Our prior opinions on Rule 5.6(a)(1) – including those issued under its substantially identical predecessor, DR 2-108 of the New York Code of Professional Responsibility (the "Code") – as well as the New York case law applying the ban on restrictive covenants, involve law partnership agreements, or agreements between practicing lawyers and their clients. *See, e.g.,* N.Y. State 858 (confidentiality clauses in agreements with members of an in-house legal department may not extend so beyond a lawyer's duty to maintain confidential information as to restrict a lawyer's post-employment right to practice law); *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95 (1989) (striking down non-compete restrictions in a law partnership agreement). Nevertheless, the unambiguous language of Rule 5.6(a)(1), and the purposes it promotes, supply no basis to distinguish between a contract with a non-client employer (or any other party) restricting a lawyer's right to practice law after the relationship is ended. In each circumstance, the lawyer would be making or participating in the making of an agreement that, by restraining the lawyer's ability to practice law, constricts the freedom of the client to choose a lawyer and the lawyer to accept an engagement.

7. Hence, if the language set forth in the "Agreement Not To Solicit" clause "restricts the right of the lawyer to practice law after termination of" the inquirer's employment, then Rule 5.6(a)(1) forbids the lawyer to agree to that language. Whether contractual language amounts to such a restriction – a separate issue – is a fact-intensive inquiry that customary canons of contract construction control. Although arguments may exist that the employment agreement at issue here is not intended to restrict the inquirer's post-employment right to practice law, the inquirer believes, and we think reasonably so, that the sweeping language of the "Agreement Not To Solicit" clause is sufficiently broad to restrain the lawyer from engaging in the practice of law following termination of her employment. Accordingly, in these circumstances, we conclude that the inquirer may not enter into the employment contract as currently written.

8. Here, though, the inquirer has another option, which is to accept the employer's offer to include language in the agreement to the effect that the "Agreement Not To Solicit" clause is enforceable, and may be invoked, only to the extent that the language is consistent with Rule 5.6(a)(1) or other applicable Rule. This added language, in our view, would remove any doubt about whether the clause impermissibly impinges on the lawyer's right to practice law following the end of employment.

CONCLUSION:

9. A lawyer may not enter into an employment agreement that restricts the lawyer's right to practice law following termination of employment, even when the employment itself does not involve the practice of law, but a lawyer my agree to a post-employment restriction that is expressly made subject to applicable ethical rules.

(3-18)

OPINION 1152 (05/17/2018)

TOPIC: Law Firm Name: Use of Lawyer's First Name as Firm Name

DIGEST: A lawyer may not use only a first name as the sole name of the lawyer's firm.

RULES: 7.1, 7.5(b), 8.4(c).

FACTS:

1. The inquirer is a New York lawyer who practices in both New York and other jurisdictions. The inquirer's surname, we are told, is shared by a number of other firms in New York and other places where the inquirer practices. To distinguish the inquirer's firm from these other firms, the inquirer proposes to use only the inquirer's first name – say, John or Jane – as the sole name of the firm, as in John's Law Offices LLC or The Jane Law Firm LLC. The inquirer asserts that this nomenclature would not only serve to differentiate the firm from others bearing the inquirer's surname but also effect efficiencies – such as how the staff answers telephone calls – with existing or prospective clients. The inquirer assures us that the inquirer's first name is the first name by which the inquirer is admitted to practice in New York.

QUESTION:

2. May lawyer use only the lawyer's first name as the name of the lawyer's firm?

OPINION:

3. The answer is no – that lawyer may not use solely the lawyer's first name as the name of a law firm under the New York Rules of Professional Conduct (the "Rules").

4. Rule 7.5(b) provides, in pertinent part, that a "lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm." "The prohibition against trade names is broad, permitting use of little beyond the names of lawyers presently or previously associated with the firm." N.Y. State 869 (2011) (lawyer may not use practice area in the name of the law firm). This Rule "serves to protect the public from being deceived about the identity, responsibility or status of the individuals using the name." N.Y. State 920 ¶ 3 (2012); *accord,* N.Y. State 732 (2000) (applying prohibition on trade names in DR 2-102(B) of the New York Code of Professional Responsibility (the "Code"), the predecessor of the Rules). "Using a name that is not the legal name of one or more partners or former partners in the law firm constitutes use of a 'trade name' within the meaning of the predecessor to Rule 7.5(b)." N.Y. State 740 (2001) (applying the Code). "This broad prohibition has been applied to disallow firm names adding even limited terms to the names of the lawyers in the firm." N.Y. State 869.

5. We recognize that here, the inquirer proposes to use the inquirer's real first name to identify the inquirer's firm. We have not previously had occasion to address this precise issue, nor can we find any other authority that has done so. Nevertheless, although the term "trade name" is not defined by the Rules, we have written numerous opinions that provide useful guidance in interpreting the mean-

ing of that term. N.Y. State 948 ¶ 3 (2012) (so noting). In N.Y. State 948, for example, we concluded that a "law firm name may not include a variant on the lawyer's name that is created by conjoining the lawyer's initials with an abbreviation of the lawyer's surname." *Id.* ¶ 7. In N.Y. State 920 ¶ 5, we opined that a lawyer may not use a firm name comprised only of the lawyer's initials. In N.Y. State 861 ¶ 4 (2011), we considered the inclusion in a firm name of initials signifying the firm's practice area to constitute an impermissible trade name. In N.Y. State 740, decided under the identical language in the Code, we said that a lawyer may not insert an arbitrary letter in the firm name unconnected to the names of lawyers who practiced there. Most recently, in N.Y. State 1138 ¶ 7 (2017), we regarded the English translation of the inquirer's actual surname "more than a slight deviation from the inquirer's actual surname" and hence impermissible. *See* N.Y. County 677 (1990) (firm name may not include first name of one partner and contraction of surname of another partner, as such a name would violate requirement that lawyers practice only under names of lawyers in the firm).

6. Common to all these opinions – and to all the opinions we can locate on the meaning of "trade name" – is the presumption that, in requiring the use of only a lawyer's name in the name of a law firm, the Rules intend to refer to the lawyer's (or lawyers') surname(s). In our view, Rule 7.5(b) embeds an understanding that a law firm's name consists of surnames of lawyers who either practice there or once did. We are unaware of any authority or precedent that breaks from this pattern, and it cannot be denied that, at the time the Rules and their predecessors were adopted, the universal practice in this State was to confine the names of law firms to the surnames of its current or former lawyers. We cannot ignore this context in interpreting the meaning of "trade name." Rather, customary usage teaches us that the public in general and the legal profession in particular expect that the name of a law firm reflects the surnames of lawyers currently or formerly associated with the law firm. *Cf.* N.Y. State 148 (1970) (under the pre-Code Canon of Ethics, relying on local custom to determine that a firm may continue use of deceased partners in a firm name); N.Y. State 70 (1968) (to the same effect); N.Y. State 45 (1967) (same); *see also* N.Y. State 622 n.3 (1991) (citing the foregoing to reach the same result under the Code).

7. To disrupt that expectation would, in our view, undermine Rule 7.5(b) and therefore be misleading because of the universal convention on the use of surnames in the names of law firms. *See* Rule 7.1(a); Rule 8.4(c). To us, any firm name that does not include the surname(s) of lawyer(s) who either practice at the firm – or, "if otherwise lawful," as Rule 7.5(b) says, "the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession" – is inherently misleading. This does not preclude the inclusion of the inquirer's first name in the name of the firm, provided the surname appears there as well. *See* N.Y. State 1003 ¶ 9 (2014) (if not misleading, a lawyer may "drop his first name to formulate a firm name that includes his middle initials and legal surname").

8. We note that our conclusion refers only to the name of the inquirer's law firm. Subject to the advertising regulations of Rule 7.1, nothing in the Rules prohibits the inquirer from using the inquirer's first name as a motto, a means of branding, or other advertising. Thus, the inquirer may use only the inquirer's first name in branding the inquirer's law firm on websites and other media to create a distinct identity, provided always that the inquirer complies with Rule 7.1 and any other Rule regulating a lawyer's communications with the public. Rule 7.5, Cmt. [2]; Rule 7.1, Cmt. [8] (permissible to heighten brand awareness); *see In re Von Wiegen*, 63 N.Y.2d 163, 176-77 (1984) (allowing lawyer to accompany firm name with the logo "The Country Lawyer"); N.Y. State 1017 ¶ 8 (2014) (use of

the firm's initials in sponsoring a local sports team did not constitute an impermissible use of a trade name); N.Y. State 937 ¶ 3 (2012) (firm may use firm logo on promotional gifts). We likewise find no obligation in the Rules that a law firm's staff must use the firm's full name in responding to telephone calls. N.Y. State 1017 ¶ 8 (allowing use of the firm's initials in answering telephone calls). There are, in short, various ways for the inquirer to establish a unique identity for the inquirer's law firm and to differentiate the law firm from others that may contain the same surname as the inquirer's. Our point here is that the use of a trade name, that is, one omitting the lawyer's surname, is neither consistent with Rule 7.5(b) nor longstanding expectations about law firm names.

CONCLUSION:

9. A lawyer may not use only the lawyer's first name as the name of the lawyer's firm but may use a first name, together with the lawyer's surname, in the name of the firm. A lawyer may use only the lawyer's first name in promoting the lawyer's practice as a motto or branding element consistent with the rules governing lawyer advertising.

2-18

OPINION 1153 (05/24/2018)

TOPIC: Conflicts of Interest: County attorney's service on the board of a county-sponsored community college

DIGEST: Whether a county attorney may also serve on the board of a county-sponsored community college may raise legal issues that overtake ethical concerns. If such dual service is legally permissible, then a lawyer occupying these roles must assess, in each instance when the interests of the county and community college overlap, whether a reasonable lawyer would conclude that the two positions create a significant risk that the lawyer's duty to one will adversely affect the lawyer's duty to the other. If the lawyer determines that such a condition exists, then the lawyer must decide whether the conflict is subject to waiver and, if so, whether the affected client(s) may give informed consent, either for the lawyer or another lawyer in the county attorney's office. In all events, the lawyer must assure that the affected client(s) is or are aware of the potential risk to evidentiary privileges that the lawyer's dual roles occasion.

RULES: 1.0(f), (h), (j), (q) & (r); 1.6(a) & (b); 1.7(a) & (b); 1.10(a) & (d).

FACTS:

1. A county legislature in New York appointed the inquiring lawyer, who is admitted in New York, as county attorney. In this particular county, the county attorney is a full-time position overseeing a staff of assistant county attorneys. Section 501 of the County Law provides that a county attorney "shall be the legal advisor to the board of supervisors [or legislature] and every officer whose compensation is paid from county funds in all matters involving an official act of a civil nature. The county attorney shall prosecute and defend all civil actions and proceedings brought by or against the county, the board of supervisors [or legislature] and any officer whose compensation is paid from county funds for any official act, except as otherwise provided by this chapter or other law." These duties engage the county attorney in representing the county, its officials, its agencies, and its personnel in litigated matters and administrative proceedings; preparing contracts between the county and others; drafting legislation; and generally acting as legal advisor to the county, its officers, its legislature, and its agencies. The county legislature sets the compensation of the county attorney.

2. The inquiring attorney also serves as a member of the board of trustees of the county-sponsored community college and currently chairs that board. Section 6306.1 of the Education Law says that a community college "shall be administered by a board of trustees" consisting, with exceptions not applicable here, of nine members serving seven-year terms, five of whom the legislature names, which may include one member of that body; and four of whom the governor names from among county residents. (A tenth member must be a student, elected by the student body for a one-year term.) Trustees receive no compensation for their service as such. Community college personnel are paid, at least in part, out of county funds.

3. Section 6306.2 of the Education Law directs the community college board to appoint a college president and to adopt curricula, in each case "subject to approval by the state university trustees." The board must also prepare an annual budget, which must be submitted to the local legislative body for adoption, and must discharge such other duties as may be appropriate under the "general supervision of the state university trustees." Section 6306.4 of the Education Law authorizes the community

college board, among other things, to acquire by deed or lease any real or personal property to carry out the purposes of the college, subject to county legislative appropriation, and apply any proceeds to college purposes subject to the regulations of the state university trustees. Under the same section, title to personal property thus acquired vests in the board of trustees, while title to any real property vests in the sponsoring county. The county and the community college may be parties to other college-related contracts, either between each other or, together or separately, with third parties. The county legislature has the right to audit the community college's expenditures.

4. As the statutory arrangement evinces, the governance of a community college is triangular. Although a county (or, in less-populated areas, a group of counties) sponsors a community college, the county does so in coordination with and only upon approval of the state university system. Section 355 of the Education Law prescribes that the state university trustees shall provide standards and regulations for the organization and operation of community colleges, which the state university trustees have done (*see* 8 N.Y.C.R.R. §600 *et seq.*). Sections 202 and 207 of the New York State Education Law repose ultimate authority over state and community college programs in the New York Board of Regents. By law, then, the county, the community college, and the state university system each plays a role in running the community college.

5. We are told that, in any litigation involving the community college, its board, or its staff, the county attorney's office represents the community college and its constituents, either through the office's own staff attorneys or by selecting outside counsel. The county attorney's office supplies other legal services to the community college as well.

6. The inquirer's appointment as county attorney post-dated the inquirer's appointment to the community college board and election as its chair. The inquirer wishes to know whether ethical issues arise from remaining on the community college's board of trustees while acting as county attorney.

QUESTIONS PRESENTED:

7. Does a conflict of interest arise when an attorney simultaneously serves as a county attorney and as a member of the board of trustees of a county-sponsored community college and, if so, is the conflict subject to waiver by informed consent? What other considerations must a lawyer in these two roles take into account in discharging the lawyer's ethical obligations to each?

OPINION:

Introduction

8. The jurisdiction of this Committee is limited to interpreting the New York Rules of Professional Conduct (the "Rules"). We do not opine on issues of law. The current inquiry potentially raises legal issues under, among others, the County Law, the Education Law, the Public Officers Law, the Rules and Regulations of the New York State University Trustees, the Governance Rules of the Board of Regents, the County Ethics Code, and any ethics regulations of the community college. We note, too, that the so-called "doctrine of incompatibility" – in brief summary, disallowing dual public offices when the holder of one government position has a right to interfere with or subject to audit and review the holder of another government position – is embedded not only in specific statutes, *see, e.g.,* N.Y. County Law §411 (elected county officer may not serve in any other elected county or municipal

office or as county supervisor); N.Y. General City Law § 3 (member of common council may not hold appointed city office), and but also more generally in the common law, *see, e.g., People ex rel. Ryan* v. *Green,* 58 N.Y. 295, 304-05 (1874) (state legislator could not serve as court clerk); *Dupras* v. *County of Clinton*, 213 A.D.2d 952, 953 (3d Dep't 1995) (county legislator could not serve as senior clerk on board of elections); *Held* v. *Hall,* 191 Misc.2d 427, 432 (Supreme Ct., Westchester Co. 2002) (county legislator could not serve as police chief); Informal Op. 1039, 1999 N.Y. AG 45 (1999) (under common law, Town Supervisor could not serve as Town Librarian). Questions concerning the effect of any of these or other legal issues on the proposed conduct is best directed to persons with the statutory authority to render advice on such matters, such as the Attorney General of New York or the New York Joint Commission on Public Ethics. If the inquirer's proposed action does not comply with an applicable law or regulation, then the question to this Committee is moot because applicable laws or regulations take precedence over the Rules. *See* Rule 1.7(b)(2) (disallowing a representation prohibited by law when a concurrent conflict of interest is present). Here, we address solely whether the inquirer's proposed action gives rise to a conflict of interest or other concerns under the Rules.

9. Considerable literature exists on the wisdom of lawyers serving simultaneously as counsel for a corporate entity and as a member of the entity's governing board. *See, e.g.*, Okray, *Lawyers as Corporate Board Members: A Paradigm Shift*, Fed.Lwy. 12 (Mar 2013); Litov, Sepe & Whitehead, *Lawyers and Fools: Lawyer-Directors in Public Corporations*, (Feb. 25, 2013) (available at ssrn.com/abstract=2218855); Frievogel, *An Ethics Primer for Business Lawyers* 8-9 (June 2009) (available at apps.americanbar.org/buslaw/newsletter/0085/materials/ethics.pdf); C. Wolfram, Modern Legal Ethics 738-40 (1986). Although debate on the wisdom of such service is robust, nothing in the Rules, in the ABA Model Rules of Professional Conduct (the "Model Rules"), or, as best we can determine, in any state ethics rules, prohibits the practice. *See* Restatement (Third) of the Law Governing Lawyers §135, Cmts. d and e (Am. Law. Inst. 1998). Nevertheless, common to all analyses is an acknowledgment that conflicts and confidentiality issues inhere in the occupation of two roles that implicate the lawyer/director's duties of care and loyalty to the organization.

10. In N.Y. State 589 (1988), we examined these issues under the predecessor of the Rules, the New York Code of Professional Responsibility (the "Code"). There, consistent with opinions from other jurisdictions we cited, this Committee said that no *per se* bar exists to concurrent service as a lawyer for an organization and service as a member of its board. We then identified three principal concerns, one of which – that a lawyer may not use board membership improperly to solicit matters for the lawyer's firm – is inapposite here in the context of a full-time government lawyer heading an office the purpose of which is to represent the organization. The other two concerns are applicable here, namely, the risk to the lawyer's exercise of independent professional judgment arising out of the lawyer's role as a director, a risk heightened, we said, when the lawyer serves as board chair; and the risk of loss of evidentiary privileges, in particular the attorney-client privilege. *See* ABA 98-410 (1998) (stating similar concerns under the Model Rules).

Conflicts of Interest

11. N.Y. State 589 was decided under DR 5-105 of the Code, which is the forerunner of Rule 1.7(a). The language of DR 5-105 differs somewhat from Rule 1.7(a), but we do not regard the differences as meaningful to our analysis. Rule 1.7(a) says in part that, subject to Rule 1.7(b), "a lawyer shall not represent a client if a reasonable lawyer would conclude either" that the representation "involves the lawyer

in representing differing interests" or that the representation poses a "significant risk" that the "lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Rule 1.0(f) defines "differing interests" to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer a client, whether it be a conflicting, inconsistent, diverse, or other interest." Here, the inquirer's position on the community college board, acting solely in the capacity as trustee, is a personal interest that may differ from or adversely affect the inquirer's legal representation of the county and the county's constituents.

12. A Comment accompanying Rule 1.7 describes the potential conflicts arising from the dual roles of lawyer and director:

> A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the trustees. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations.

Rule 1.7, Cmt. [35].

13. We can envision a variety of circumstances when a reasonable lawyer (on which more below) would conclude that "differing interests" may be involved in the lawyer's dual roles or that a "significant risk" may exist that the county attorney's obligations to the county, its board, and its officials will be adversely affected by the inquirer's personal interests as a member of the community college board. By way of illustration, the community college board must submit any proposed acquisition or leasing of real property to the county board. As a fiduciary of the community college, the inquirer owes a duty to the community college to promote the real estate plan as adopted by the community college board the inquirer chairs, while at the same time owing the county a fiduciary duty to exercise professional judgment in advising the county on that same matter. Whether the terms of any real estate transaction, in which the community college board chair presumably plays an active part in negotiating, accords with the county's interests, with title being vested in the county, is an issue on which the county is entitled to uncompromised independent judgment. The circumstances become more problematic if, as a board member, the inquirer opposed the transaction, yet as board chair must defend a decision to the county board which the inquirer personally disfavors. We have no difficulty determining that, in circumstances like these, a reasonable lawyer would conclude that a significant risk is present that the lawyer's interests as a community college board member imperils the lawyer's independence as attorney for the county.

14. The inquirer must make this determination in each instance in which the interests of the county and the community college intersect. The exercise is necessarily a case-by-case analysis, including, but not limited to, budget matters, audits, contract matters in which the two entities are co-parties or counter-parties, state-directed mandates, or in the event that the inquirer is personally named in any litigation or other proceeding against the community college trustees. This last event may create special tension: When the subject is the potential liability of the college board or one or more of its members, the lawyer must assure that the lawyer can render independent professional

judgment, free of overt or subtle influences that the lawyer's own potential exposure or the lawyer's collegial relationships with other board members may incite.

15. In any circumstance, if the lawyer determines that the conditions of Rule 1.7(a) appear, then the lawyer must decide whether, in the particular instance involved, the conflict is subject to waiver by informed consent under Rule 1.7(b), which says that, notwithstanding "the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

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

Waiver of Conflicts

16. "The requirements of informed consent are set forth in Rule 1.0(j)." N.Y. State 1055 ¶ 12 (2015). We have previously opined that a lawyer may accept "consent by a government entity if he or she is reasonably certain that the entity is legally authorized to waive a conflict of interest and the process by which the consent was granted was sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust." *Id.*; N.Y. State 629 (1992). The inquirer should not participate in the decision whether to consent or advise the county or community college on this issue of consent. *See* N.Y. City 1988-5 (1988) (an attorney who is a member of a cooperative apartment board may not participate in "any decision of the [board] that will reasonably affect the lawyer's own personal" interests as counsel to the board).

17. There remain the other three elements of Rule 1.7(b). As we have said, if the law prohibits the representation under Rule 1.7(b)(2), then no ethics issue need be considered, for the law transcends the Rules. If no law erects a barrier to the representation, then, under Rule 1.7(b)(1), the lawyer must reasonably believe, that is, both subjectively and objectively, that the lawyer is able "to provide competent and diligent representation to each affected client." *See* Rule 1.0(r) (defining reasonable belief); Rule 1.0(q) ("When used in the context of conflict of interest determinations, 'reasonable lawyer' denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation"); N.Y. State 1048 ¶ 20 (2015) (Rule 1.7(b)(1) "has both a subjective and an objective component"). Situations may occur in which, despite the existence of a disqualifying "significant risk" under Rule 1.7(a), a disinterested lawyer could well conclude that the lawyer is able to provide the representation that Rule 1.7(b)(1) requires. In other instances, the facts may preclude such a conclusion, in which event the remedy of informed consent is unavailable.

18. In the latter instance, the question arises whether a lawyer in the county attorney's office other than the county attorney may represent the county or community college in the matter in which a con-

flict prevents involvement of the county attorney. Rule 1.0(h) includes a "government law office" as a "law firm" within the meaning of the Rules. Rule 1.10(a) says that, while lawyers are associated in a law firm, "none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so" by, among other things, Rule 1.7. Thus, if Rule 1.7 disqualifies the county attorney based on a conflict, then the conflict is imputed to all other lawyers in the county attorney's office who are aware of the conflict. Rule 1.10(d), however, says that a "disqualification prescribed by this Rule [1.10(a)] may be waived by the affected client" under the conditions set forth in Rule 1.7. This means that, though the disqualification of the county attorney is imputed to the entire county attorney's office, the applicable entity (whether the county, the community college, or, more likely, both) may consent to representation by another attorney in that office notwithstanding that attorney's knowledge of the conflict. N.Y. State 968 ¶ 25 (2013). Otherwise put, if that other attorney reasonably believes that the attorney may "provide competent and diligent represent to each affected client," then the attorney may proceed with the informed consent of the affected client(s), confirmed in writing.

19. One situation may not allow informed consent no matter the foregoing. Rule 1.7(b)(3) forbids a lawyer to represent a client in "the assertion of a claim by one client against another represented by the lawyer in the same litigation or other proceeding before a tribunal." A county and a community college may find themselves in litigation opposed to each other. We leave for a later resolution, on concrete facts, whether circumstances may exist in which the county attorney or a member of the county attorney's may appear with informed consent in such a dispute or whether the parties would have no recourse but to retain separate independent counsel. *See* N.Y. State 968 ¶ 28 (leaving open the question whether consent is possible in comparable circumstances).

Protection of Confidential Information

20. The other major risk identified in N.Y. State 589 is the preservation of a client's evidentiary privileges, especially the attorney-client privilege. The county attorney acts as counsel to the county and to the community college, but does not represent the community college merely by reason of membership on the college board. Although evidentiary privileges are questions of law beyond our purview, N.Y. State 789 ¶ 4 (2005), Rule 1.6(a) forbids a lawyer to reveal "confidential information" – the definition of which in that Rule includes information "protected by the attorney-client privilege" – unless the client gives informed consent, the disclosure is impliedly authorized, or the disclosure is permitted by Rule 1.6(b), the elements of which need not detain us here. Our concern – one resonant in the literature to which we alluded at the outset – is that the multiple roles may create confusion about, and threaten the ability to assert, the attorney-client privilege.

21. The Comment to Rule 1.7 is again instructive:

> The lawyer should advise the other members of the board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity of trustee might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a trustee or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Rule 1.7, Cmt. [35].

22. We do not trespass the limits of our jurisdiction to recognize that, ordinarily, an attorney's confidential communications with a client in pursuit of legal advice are subject to a claim of attorney-client privilege, whereas communications by one board member with fellow board members on matters of corporate policy are not. When the board member communicating on matters of organizational policy is also the lawyer for that organization, the communication is pregnant with potentially perplexing privilege problems – that is, whether the lawyer is communicating as a lawyer to a client or to fellow policymakers as a board member. The consequence is that, when the attorney is also serving as a board member, a danger exists that the attorney-client privilege may not protect the attorney's communications with the board on legal matters. This may be so even if the lawyer is explicit in distinguishing between the lawyer's provision of legal advice and business advice as a board member, because others (such as courts) may disagree.

23. Juggling the competing responsibilities and overlapping roles of government lawyer and board member thus demands acute alertness to the capacity in which the lawyer is acting in a particular setting and to the audience's understanding of the lawyer's communications. Among other things, the lawyer should advise the other members of the community college board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity as trustee might not be protected by the attorney-client privilege, and a parallel disclosure is required when the lawyer is acting as county attorney before county officials in matters involving the community college. At every meeting and during every discussion, clarity is essential on whether the lawyer is participating as counsel or as a board member. That the inquirer is chair of the board enhances this need. As we said in N.Y. State 589, owing to "the chair's more extensive involvement in decision-making concerning the management of the organization," it is possible "if not, indeed, more likely that the responsibilities of the two roles will conflict more frequently than in the case of a mere director." Hence, when the lawyer is participating as counsel, the lawyer must assure that precautions are taken to protect the client's privilege, including safeguards against public disclosure of privileged communications in board minutes or the presence of third parties whose knowledge of the communication might endanger the privilege.

CONCLUSION:

24. If no law or regulation prohibits the dual roles, an attorney may serve as both county attorney and chair of a county-sponsored community college to which the county attorney's office provides legal services if, in each circumstance when the interests of the county and the community college overlap, a reasonable lawyer would conclude that the dual roles do not involve a significant risk that the lawyer's interests as a board member would adversely affect the discharge of the lawyer's independent professional judgment on behalf of the county. If the lawyer cannot so conclude, then the lawyer may seek a waiver of the conflict from each the county and the community college if the lawyer reasonably believes that the lawyer may provide competent and diligent representation to the county and the lawyer obtains informed consent, confirmed in writing. Absent such a reasonable belief and accompanying informed consent, another lawyer in the county attorney's office may generally act for the affected client upon informed consent confirmed in writing that the other attorney in the office may provide the requisite representation. In all events, the county attorney must take special precautions to assure the protection of evidentiary privileges that the lawyer's dual roles might imperil.

(6-18)

OPINION 1154 (06/05/2018)

TOPIC: Third-Party Payor: Duty to communicate with client of insurance-assigned counsel

DIGEST: An attorney assigned by insurance carrier to represent an insured owes a duty of loyalty to the insured, and may not restrict or limit communications to the insured concerning the representation, notwithstanding attorney's concerns that insured may use such information adversely to financial interests of insurance carrier.

RULES: 1.2(a), 1.4; 1.6; 1.7(a)(2); Rule 1.7(b), Rule 1.8(f).

FACTS:

1. The inquirer is a New York attorney whom an insurance carrier chose to defend an indemnification counterclaim stemming from a fatal car collision.

2. The automobile accident killed the driver husband and passenger wife. The Surrogate's Court appointed one of the couple's children as Executor of the Husband's Estate and the Wife's Estate. The Executor retained both an Estate Counsel and a Litigation Counsel. The Litigation Counsel commenced a wrongful death action on behalf of the Executor, acting for the Estates, as well as the Executor and the couple's other children in their individual capacities and as Beneficiaries of the Estates. Defendants in the wrongful death action are the owner and driver of the other vehicle involved in the collision. The wrongful death action seeks compensatory damages on behalf of the Beneficiaries, comprising lost monetary support, and survival damages on behalf of the Estates, consisting of physical and emotional pain and suffering of the decedents prior to death. The Beneficiaries of both Estates are the same.

3. In answer to the wrongful death complaint, defendants have asserted an affirmative defense of comparative fault that the husband's negligence in operating the vehicle was the sole, or at least a contributing, cause of the accident. Defendants have also asserted a counterclaim solely against the Husband's Estate for indemnification. Neither the affirmative defense nor the counterclaim would reduce the recoveries by the other plaintiffs in the wrongful death action, but a successful affirmative defense could reduce any damages awarded to the Husband's Estate and a successful indemnification claim could result in the Husband's Estate reducing the exposure of defendants to damages awarded plaintiffs. Litigation Counsel represents the Executor of each Estate and the Beneficiaries in opposing the comparative fault affirmative defense. The Wife's Estate and the Beneficiaries have interposed no direct claim against the Husband's Estate.

4. The inquirer is the attorney assigned by the husband's insurance carrier to defend the Husband's Estate against the indemnification counterclaim. The inquirer believes that the insurance coverage may not be adequate to satisfy an award entered on the counterclaim. Although limiting the husband's culpability for the accident is in the interest of all plaintiffs in the wrongful death action, the inquirer believes that tension exists between the interests of the Husband's Estate, on the one hand, and the Wife's Estate and the Beneficiaries, on the other hand, with respect to the wrongful death damages each allegedly sustained. On the inquirer's view, the Executor, acting on behalf of the Husband's Estate in defense of the counterclaim, should seek to minimize the wrongful death damages to reduce the exposure of the Husband's Estate to indemnify defendants, but, acting on behalf of

the Wife's Estate and the Beneficiaries, the Executor should seek to maximize the wrongful death damages allegedly due them.

5. The Executor has directed the inquirer to communicate solely with Estate Counsel about the defense of the indemnification counterclaim. The inquirer is concerned, however, that confidential information received by the Estate Counsel from the inquirer will be shared by the Estate Counsel or by the Executor with Litigation Counsel. That confidential information would ordinarily concern, among other things, the inquirer's strategy for addressing the husband's allegedly culpable conduct and the compensatory wrongful death damages sustained by the Wife's Estate and the survival damages sustained by the Beneficiaries. For this reason, the inquirer wishes to circumscribe the communications to the Estate Counsel, because the inquirer believes that unrestricted communications may adversely affect the insurance company's exposure on the indemnification counterclaim.

QUESTION:

6. May an insurer-assigned counsel for an insured limit communications to the counsel's client based on a belief that the client may use the communications to the financial detriment of the insurance company?

OPINION:

7. The answer is no. Our opinions address solely the ethics issues that an inquirer poses about the inquirer's own prospective conduct; we do not opine on the conduct of others. Thus, we offer no opinion here on whether Litigation Counsel has a conflict of interest in representing all plaintiffs in the wrongful death action. Our focus is confined to the inquirer's duties to the inquirer's client, the Executor of the Husband's Estate, under the New York Rules of Professional Conduct (the "Rules"). The Rules make clear that the inquirer's obligations are to serve the interests of the Executor as the Executor defines them.

8. Rule 1.8(f) prohibits a lawyer from accepting compensation for representing a client from one other than the client unless:

> (1) the client gives informed consent;
>
> (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and
>
> (3) the client's confidential information is protected as required by Rule 1.6.

9. Rule 1.8(f) makes clear that, no matter the source of the lawyer's compensation for

> representing a client, the lawyer's duty is to the client, not to the one paying the lawyer's fees.

10. Comment 11 to Rule 1.8(f) elaborates:

> Lawyers are frequently asked to represent clients under circumstances in which a third person will compensate them, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company). . . . Third-party payers frequently have interests that may differ from those of the client. A lawyer is therefore prohibited from accepting or continuing such a representation unless the lawyer determines that there will be no interference with the lawyer's professional judgment and there is informed consent from the client.

Rule 1.8, Cmt. [11]; *see Feliberty* v. *Damon*, 72 N.Y.2d 112, 120 (1988) ("[T]he paramount interest independent counsel represents is that of the insured, not the insurer."); N.Y. State 1102, ¶ 3 (2016) ("When the insurance company designates counsel for the assured, whether the designated counsel is inside or outside counsel, the lawyer's client is the insured and not the insurance company."); N.Y. State 716 (1999) (the lawyer's primary allegiance is to the client, the insured); N.Y. State 73 (1968) (attorney employed by carrier has superior duty to assured, the client).

11. An insurer-compensated lawyer thus owes the same duties to a client as if the client were paying the lawyer's fees. Rule 1.2(a) provides that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."

12. Rule 1.4 imposes obligations on attorneys, among other things, promptly to inform the client of material developments in the matter, Rule 1.4(a)(1)(iii); reasonably to consult about the means by which the client's objectives are to be achieved, Rule 1.4(a)(2); to keep the client reasonably informed about the matter, Rule 1.4(a)(3); promptly to comply with the client's reasonable requests for information, Rule 1.4(a)(4); and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, Rule 1.4(b).

13. It may be that the inquirer's counterclaim defense litigation strategy, if freely reviewed and discussed with the Executor or Estate Counsel in conformance with inquirer's obligations under Rules 1.2(a) and 1.4, and subsequently disclosed to Litigation Counsel, might harm the interests of the insurance carrier, but consideration of the insurer's interests in discharging the lawyer's obligations under Rules 1.2(a) and 1.4 would constitute interference with the inquirer's attorney-client relationship with the client Executor that Rule 1.8(f) forbids. *See Feliberty*, 72 N.Y.2d at 120 ("[t]he insurer is precluded from interference with counsel's independent professional judgments in the conduct of the litigation on behalf of its client") (citations omitted). Any strategy for opposing and defeating the comparative fault affirmative defense and the indemnification counterclaim is just one element of the larger picture that the Executor must consider, a picture which also presumably takes account of the limited coverage that the insurance carrier provides for the counterclaim. Accordingly, the inquirer's communications with the Executor, or with the Estate Counsel at the direction of the Executor, should be free and unrestricted, guided by the requirements of Rules 1.2(a) and 1.4. The use to which the Executor or Estate Counsel choose to make of those communications, in what they determine to be the overall best interests of the Estates and the Beneficiaries, is for the Executor or Estate Counsel to decide, not the inquirer.

14. The inquirer should take one other consideration into account, an issue we raise owing solely to the inquirer's desire to limit communications to the inquirer's client based on the inquirer's concern about the Husband's Estate's insurer.

15. The inquirer may rely on repeat business from the insurance carrier, whether through a long-standing business relationship between the carrier and the inquirer's law firm, personal relationships with claims agents or other carrier employees, or otherwise. We are mindful, for example, that insurance companies often maintain lists of approved counsel to represent their insureds in particular types of matters. Being so listed is obviously in the financial and business interests of the law firm. We recognize, too, that the interests of the insurer and the insured are not always perfectly aligned. Although each has an interest in minimizing a claimant's recovery, an insured may have other interests in seeking a resolution of a matter that the insurer regards as excessive in light of the insurer's more narrow interests – a situation that this inquiry potentially poses.

16. If a lawyer depends on an insurance carrier for a regular flow of business, and the lawyer believes that the lawyer's insured client is pursuing a course of action that the lawyer considers potentially injurious to the insurance carrier, then the lawyer must determine whether, under Rule 1.7(a), a reasonable lawyer would conclude that a "significant risk" exists "that the lawyer's professional judgment on behalf" of the insured client "will be adversely affected by the lawyer's own financial, business, property or other personal interests." If the lawyer determines that such a "significant risk" is present, then, consistent with Rule 1.7(b), the lawyer must assess whether the lawyer nevertheless reasonably believes that the lawyer "will be able to provide competent and diligent representation" to the insured client and obtain the insured client's informed consent, confirmed in writing, to continuing the representation. In that circumstance, the inquirer should disclose the inquirer's relationship with the insurer and, if able to provide the requisite representation, obtain the Executor's consent to continuing the representation.

CONCLUSION:

17. An insurer-assigned lawyer may not limit or restrict communications to the lawyer's client even if the possibility exists that the client may share the communications with others whose interests may be in conflict with those of the insurer.

(5-18)

OPINION 1155 (08/27/2018)

TOPIC: Dual practice as lawyer and financial planner

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

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

FACTS:

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

QUESTIONS:

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

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

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

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

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

OPINION:

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

The Potential Conflict of Interest

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

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

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

7. We have reached similar conclusions with respect to brokers of financial products. In N.Y. State 536 (1981), we were asked whether the members of a law firm could conduct a financial planning business from the same office in which they practiced law, and whether they could provide both legal and financial planning services to the same clients. We concluded that engaging in such dual

practice would not be unethical, as long as the financial planning corporation did not offer any products (e.g. securities, real estate or insurance) for which it would receive a commission or other form of compensation or act as legal counsel and broker in the same transaction. We reached a similar conclusion in N.Y. State 619 (1991). There, a lawyer engaged in estate planning wanted to recommend to the lawyer's clients the purchase of life insurance products that were an appropriate means to achieve the client's financial or estate planning goals, but the lawyer had a financial interest in the sale of the products recommended. We concluded that this situation presented a nonconsentable conflict of interest:

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

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

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

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

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

> case. The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter.

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

> (a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:
>
> > (1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.
> >
> > (2) A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.
> >
> > (3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.
> >
> > (4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is *de minimis*.

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

12. Rule 5.7(a)(2) governs nonlegal services that are distinct from legal services. Those nonlegal services are still subject to the Rules if the recipient could reasonably believe that they are the subject of a client-lawyer relationship, unless the lawyer has advised the recipient in writing that the protec-

tion of the client-lawyer relationship does not apply to the nonlegal services. Paragraph (a)(3) applies where the lawyer is the owner or agent of any entity that provides nonlegal services to a recipient. Those nonlegal services are still subject to the Rules if the recipient could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship, unless the lawyer has advised the recipient that the protection of the client-lawyer relationship does not apply to the nonlegal services.

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

Are the services distinct?

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

15. When a patron of the nonlegal services business uses only that service and not legal services, there is no integrated whole and the nonlegal services are by definition distinct. When, however, the patron of nonlegal financial planning services is also using or has received related legal services of the lawyer, whether the legal and nonlegal services are distinct will depend on the nature of the legal and nonlegal services. When the legal services involve estate planning and the financial planning services include planning investments that would affect the size and composition of the estate or the educational or retirement plan, even if the nonlegal services are provided from a separate entity and at times are not overlapping, we believe the services would be nondistinct. Therefore, the provisions of the Rules will apply to the nonlegal services.

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

16. In N.Y. State 1135 (2017), we noted that, where the nonlegal services are not distinct from legal services, and thus the Rules would apply to the nonlegal services, the advertising and solicitation rules would apply to the nonlegal services. Thus, the link and the related text here would be

"advertisements" and would have to comply with Rule 7.1 governing advertisements. The same would be true if the information were not in a link but in the lawyer's actual website or newsletter.

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

Referring Financial Planning Clients to a Third-Party Investment Firm

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

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

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

21. Our opinions permit such a payment in very limited circumstances. *See, e.g.,* N.Y. State 981 (2013) (referral fee not prohibited by Rule 1.7 where the service is not related to the lawyer's legal services and the lawyer makes no recommendation to use the service); N.Y. State 667 (1994) (lawyer

may accept referral fee from mortgage broker notwithstanding predecessors to Rules 1.7(a) and 1.8(f) as long as client consents and all proceeds are credited to client if client so requests); N.Y. State 626 (1992) (lawyer for lender may retain fees from a title insurance company as long as client consents and amount of the fee is disclosed to the borrower who will pay the cost of the insurance and the total amount of the lawyer's fee is not excessive); N.Y. State 576 (1986) (lawyer may act as agent for title insurance company and also represent the buyer, seller or mortgagee in a real estate transaction consistent with the predecessors to Rules 1.7(a) and 1.8(f) as long as lawyer credits client with amount received from title insurer or the client expressly consents to the lawyer retaining the fee paid by the insurer); N.Y. State 461 (1977) (lawyer may accept part of a fire adjuster's commission consistent with predecessor to Rule 1.7(a) if client consents and all proceeds thereof are credited to client); and N.Y. State 107 (1969) and N.Y. State 107(a) (1970) (both permitting lawyer to accept a referral fee from a financial company where the lawyer invests the client's funds in certificates of deposit, if client consents after disclosure and lawyer remits the fee to client if client so requests).

22. When these narrow circumstances do not exist, we have opined that receipt of a commission creates a nonconsentable conflict. *See, e.g.*, N.Y. State 682 (1996) (lawyer may not accept a fee from an investment adviser for referring a client under predecessor to Rule 1.7 because disclosure and consent would not cure the lawyer's direct and substantial conflict); N.Y. State 671 (1994) (lawyer engaged in estate planning may not accept referral fee from insurance company for referring client under predecessor to Rule 1.7 because disclosure and consent could not cure the direct and substantial conflict between the client's and the lawyer's interests); N.Y. State 619 (1991) (where estate planning lawyer's remuneration from the third party would vary with the quantity of the product or services recommended, receipt of the referral fee was impermissible under predecessors to Rules 1.7 and 1.8(a) [business transaction with client] because the lawyer's substantial financial interest conflict could not be cured by disclosure and consent).

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

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

25. Rule 1.8(f) provides that:

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

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

Does it Matter that the Referral Relationship Would be Non-Exclusive?

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

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

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

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

CONCLUSION:

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

(10-18)

OPINION 1156 (11/01/2018)

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

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

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

FACTS:

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

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

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

QUESTION:

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

OPINION:

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

Business transactions with clients under Rule 1.8(a)

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

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

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

9. Moreover, "[w]hen a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a)." Rule 1.8, Cmt. [16]; see Rule 1.8, Cmt. [4C] ("The requirements of the Rule ordinarily must be met . . . when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee"); N.Y. State 1104 ¶ 4 (2016); N.Y. State 910 ¶ 16 (2012); ABA Op. 11-458; ABA Op. 02-427; N.Y. City 1988-7 (interpreting predecessor provisions). Hence, the proposed revision is a business transaction between a lawyer and a client governed by Rule 1.8(a).

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

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

12. Because the three conditions are met, the inquirer is subject to the requirements of Rule 1.8(a). The first requirement is that the transaction be fair and reasonable to the client. The inquiry does not

include the text of the proposed agreement. As summarized to us, the proposed agreement does not sound obviously unfair in any way, but the inquirer would have to consider all the terms – such as the details relating to interest and possible foreclosure – to determine that the transaction is fair and reasonable to the client.

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

Security interest in a domestic relations matter under Rule 1.5(d)(5)(iii)

14. In a "domestic relations matter," a lawyer may not take any fee if "the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary." Rule 1.5(d)(5)(iii).

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

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

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

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

CONCLUSION:

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

(13-18)

OPINION 1157 (11/27/2018)

TOPIC: Legal and Non-legal Services Offered by a Single Entity

DIGEST: A lawyer who is a licensed professional engineer may operate both a law practice and an engineering practice in a single entity from the same office. The name of the law firm may not include reference to the lawyer's engineering degree or practice, but the law firm may otherwise promote the lawyer's engineering degree in listing the lawyer's qualifications, as a branding device, or otherwise consistent with the rule governing lawyer advertising. Engineering is a non-legal service distinct from the rendition of legal services, and, as a result, the lawyer may overcome the presumption that the N.Y. Rules of Professional Conduct apply to the rendition of such services by advising the engineering client in writing that the services are not legal services and that the protections of the attorney-client relationship do not attach.

RULES: 5.7(a), 7.1, 7.5(b).

FACTS:

1. The inquirer is a New York attorney and a licensed professional engineer. The inquirer wishes to establish a single-member professional entity – whether as a professional corporation or a professional limited liability company – to offer both legal and engineering services to the public. The inquirer would like to indicate the inquirer's professional status as a licensed professional engineer in the name of this entity, and asserts a current intention to offer only one service (legal or engineering) to each client.

QUESTIONS:

2. The inquiry presents three issues for consideration:

(a) May a lawyer offer legal services and non-legal services through a single professional entity out of the same office?

(b) May a lawyer include reference to the non-legal service in the name of the professional entity?

(c) Does the lawyer owe duties to clients of the lawyer's non-legal services to clarify the lawyer's status as a non-legal service provider?

OPINION:

3. The answer to the first question – whether the lawyer may use a single entity and office to provide both legal and non-legal services – is yes. Rule 5.7 of the New York Rules of Professional Conduct (the "Rules") expressly contemplates that a law firm may offer both legal and non-legal services "to clients or other persons." "For many years, lawyers have provided non-legal services to their clients. By participating in the delivery of these services, lawyers can serve a broad range of economic and other interests of their clients." Rule 5.7, Cmt. [1]; *see* N.Y. State 933 ¶ 4 (2012) (lawyer may

operate real estate brokerage firm out of law office). Thus, the Rules permit a lawyer to conduct both a law office and an engineering practice in a single entity out of the same office.

4. The answer to the second question – whether the lawyer may refer to the non-legal service in the firm's name – is no. The name of a law firm implicates Rule 7.5(b), which regulates the name(s) a lawyer may use to identify the lawyer's firm. Rule 7.5(b) provides, in pertinent part, that a "lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm." "The prohibition against trade names is broad, permitting use of little beyond the names of lawyers presently or previously associated with the firm." N.Y. State 869 (2011) (lawyer may not use practice area in the name of the law firm). In N.Y. State 861 ¶ 4 (2011), we considered the inclusion in a firm name of initials signifying the firm's practice area to constitute an impermissible trade name. *See also* N.Y. State 1152 ¶ 6 (2018) ("[C]ustomary usage teaches us that the public in general and the legal profession in particular expect that the name of a law firm reflects the surnames of lawyers currently or formerly associated with the law firm.")

5. That a lawyer may not use the lawyer's engineering practice in the name of the professional entity that the lawyer uses to render legal services does not mean that the lawyer may not otherwise refer to the lawyer's engineering qualifications in listings of the lawyer's qualifications and areas of practice, as well as in advertising consistent with the standards on lawyer advertising set out in Rule 7.1. Subject always to those standards, nothing in the Rules prohibits a lawyer from using the lawyer's engineering qualifications as a means of branding or other advertising.

6. The answer to the third question – whether a lawyer is obligated to clarify the lawyer's status when rendering non-legal services – is yes if the recipient of those services could reasonably believe that the non-legal services are subject to an attorney-client relationship. Rule 5.7(a) sets forth the lawyer's responsibilities when the lawyer or her law firm provides non-legal services to law clients or other persons:

> (a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:
>
> > (1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.
> >
> > (2) A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.
> >
> > (3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the non-

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

7. Thus, under Rule 5.7(a)(1), non-legal services that are not distinct from legal services are always subject to the Rules, no matter what disclaimer or writing a lawyer may provide to clients of the lawyer's non-legal services. Under Rule 5.7(a)(2), however, when the non-legal services are distinct from legal services, then the non-legal services are subject to the Rules if the recipient could reasonably believe that they are the subject of a client-lawyer relationship. This same point is made in Rule 5.7(a)(3), applicable to this inquiry, when the lawyer is an owner, controlling party, or agent of the entity providing the non-legal service. Rule 5.7(a)(4) creates a presumption of reasonable belief in an attorney-client relationship, but permits the lawyer to overcome that presumption by advising the recipient of the non-legal services, in writing, that the protection of the client-lawyer relationship does not apply to the non-legal services. The initial consideration on the inquirer's third question turns, then, on whether legal services are distinct from engineering services.

8. We believe the two services are distinct. In N.Y. State 1135 ¶ 7 (2017), noting that the Rules do not define distinct, we relied on the ordinary and customary meaning of the word – namely, "not alike, different, not the same, separate, clearly marked off." The "most important factor in determining distinctness is the degree of integration of the services." N.Y. State 1155 ¶ 14 (listing other factors as well). In our view, the engineering profession differs from the legal profession in material ways, and involves the deployment of skills that are distinct from the application of legal principles to a set of facts. A clear demarcation exists between the scientific design and construction of tangible things and the use of legal knowledge and experience to advise a client on adherence to lawful behavior. This contrasts sharply with those services that we have deemed not distinct from legal services. *See, e.g.,* N.Y. State 1135 ¶ 8 (2017) (provision of state and local tax services); N.Y. State 1026 ¶ 10 (2014) (mediation in domestic relations matters); N.Y. State 1015 ¶ 14 (2014) (integrated real estate services).

9. Rule 5.7(a)(4) instructs that, when a legal service provider offers distinct non-legal services to clients which the parties do not intend to create an attorney-client relationship, then the lawyer may overcome the presumption for which that Rule provides by advising the recipient of (here) engineering services, in writing, that the services are not legal services and that the protections attending an attorney-client relationship are inapposite. A lawyer who provides both legal and non-legal services "must take care that the clients are not confused about whether the lawyer is acting as a lawyer and must determine whether the provisions of the Rules apply to the non-legal services." N.Y. State 1155 ¶ 9 (2018). "Whenever a lawyer directly provides non-legal services, the lawyer must avoid confusion on the part of the client as to the nature of the lawyer's role," for the recipient of the non-legal services may reasonably expect "that the protections of client confidences and secrets, prohibitions against

representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of non-legal services when that may not be the case.' Rule 5.7, Cmt. [1]. Thus, while a written disclaimer under Rule 5.7(b)(4) provides something of a safe harbor for a lawyer providing distinct non-legal services such as engineering, any lawyer providing non-legal services, distinct or indistinct, owes a duty to clarify whether an attorney-client relationship exists if a client could reasonably believe in the circumstances that there is such a relationship.

10. We are mindful that the degree of integration of legal and non-legal services may vary with the nature of the legal services; we can envision, for example, that a patent lawyer with an engineering degree may use engineering skills in rendering legal services to a client in a patent matter, and do so in the client's reasonable belief that the protections of the attorney-client privilege apply. In such circumstances, Rule 5.7(a)(1) requires that the full panoply of the Rules apply to the lawyer's conduct. This inquiry does not require us to delve into all the implications of those circumstances. For now, we say only that we regard engineering and legal services as distinct, and that a lawyer offering both services to a client may provide an appropriate written disclaimer to the recipient of distinct non-legal services that the lawyer's rendition of solely engineering services does not give rise to all the attributes that an attorney-client relationship entails.

CONCLUSION:

11. A lawyer may provide both legal and engineering services through a single entity provided that the entity complies with the Rule governing the name of law firms. Engineering services being distinct from legal services, a lawyer offering each service may provide a written notice to the recipient of the engineering services that no attorney-client relationship, with its attendant protections, is thereby established.

Inquiry No. 7-18

OPINION 1158 (12/11/2018)

TOPIC: Conflicts, lawyer seeking new employment

DIGEST: Subject to provisions regarding protection of confidential information and personal conflicts of interest, and other Rules discussed in this Opinion, a lawyer who has worked on regulatory drafting as in-house counsel for a tax authority may seek new employment in a position seeking to change the current tax code and may work in such a position after leaving the agency.

RULES: 1.1(c)(2), 1.6, 1.7, 1.9(c), 1.11

FACTS:

1. Inquirer is an attorney with the Internal Revenue Service. The lawyer worked on a range of matters over his career at the IRS, including recent work on certain regulatory provisions. Inquirer is seeking other employment, including in positions where the goal is to change the current tax code. As part of these efforts to seek employment, the inquirer would like to seek funding and engage in discussions with academics and practitioners to secure their participation in a project to reform the current tax code.

QUESTION:

2. May inquirer communicate with funders to seek funding, and with academics and practitioners to secure their participation in the project, while still employed at the IRS?

3. May inquirer communicate with funders and others in connection with this project after he leaves the IRS?

OPINION:

4. We address in this opinion only the provisions of the New York Rules of Professional Conduct (the "Rules") and assume that the inquirer's proposed activities comply with any other applicable laws and regulations.

Inquirer's Current Job-Seeking Activities

5. There are four provisions of the Rules that may restrict the inquirer's current job-seeking activities, but none is likely to pose a significant limitation.

6. First, the inquirer may not disclose confidential information in violation of Rule 1.6. Confidential information "consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." Rule 1.6(a). We note, however, that confidential information "does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates." *Id.* While the inquirer must be careful not to reveal confidential information of the IRS in conducting a search for employ-

ment or funding, lawyers commonly are able to seek new employment, including establishing new businesses or practices, without disclosing confidential information of their current or prior clients.

7. Second, and most pertinent to the inquirer's current activities, Rule 1.11(d)(2) provides that a lawyer currently serving as a public officer or employee shall not "negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially." The term "matter" is defined in Rule 1.0(l) as "includ[ing] any litigation, judicial, or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or other representation involving a specific party or parties." Work on generally applicable regulations such as the inquirer describes would not ordinarily "involv[e] a specific party or parties," and in any case Rule 1.11(e) provides that, for purposes of Rule 1.11, "the term 'matter' as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions." Thus, while the inquirer generally must be careful to avoid negotiating for private employment with persons involved in matters in which the inquirer is currently participating personally and substantially that involve specific parties or persons, the inquirer need not avoid such negotiations if the matter was limited to the rulemaking function to which he refers.

8. Third, and more generally, Rule 1.7(a)(2) bars a lawyer from representing a client—in this case, the IRS—if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." In this case, if the inquirer's views on the need for reform of the tax code are so strongly felt that a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the IRS in implementing tax legislation would be adversely affected, the inquirer would have a conflict under Rule 1.7. In most cases, if the inquirer reasonably believes, notwithstanding such a significant risk, that he is able to provide competent and diligent representation, the conflict would be subject to consent by an authorized representative of the employer. *See* Rule 1.7(b). The personal-conflict provisions of Rule 1.7 would be applicable to the inquirer even prior to his current search for new employment. Rule 6.4 reinforces the role of Rule 1.7 in connection with law reform activities such as those that the inquirer contemplates. That Rule provides at the outset, "A lawyer may serve as a director, officer or member of an organization involved in the reform of the law or its administration, notwithstanding that the reform may affect the interests of a client of the lawyer." But the Rule notes that "[i]n determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7."

9. Fourth and finally with respect to the inquirer's current job-seeking activities, Rule 1.1(c)(2) states that "[a] lawyer shall not intentionally . . . prejudice or damage the client during the course of the representation except as permitted or required by these Rules." In a prior opinion also dealing with conflicts of government lawyers, we noted that Rule 1.1(c)(2) applies only in ways related to the representation and does not preclude conduct prejudicial to a client unrelated to legal services being rendered. N.Y. State 968 ¶ 9 (2013). We did not then need to decide whether we agreed with that view and we likewise do not need to decide that question here, because we conclude that merely seeking to form a group to advocate for changes to the tax code is not "intentionally . . . prejudic[ing] or damag[ing]" the IRS. The IRS exists to implement the tax code as passed by Congress. In any case, all that inquirer is seeking to do while still at the IRS is explore putting together a group that would

advocate for such changes. We are convinced that such activities in this situation do not rise to the level of "prejudice or damage" within the meaning of Rule 1.1(c)(2).

Inquirer's Potential Future Activities

10. With respect the inquirer's potential future work in advocating for changes to the tax code, Rule 1.11 contains three restrictions relating to former government lawyers.

11. Rule 1.11(a)(1) requires that the inquirer comply with Rule 1.9(c), which in turn bars a lawyer from using confidential information to the disadvantage of a former client or revealing confidential information of the former client, with certain exceptions noted there. Rule 1.9 addresses former-client conflicts generally; Rule 1.11 addresses former-client conflicts of government lawyers. Comment [1] to Rule 1.9 specifies that former government lawyers "must comply with this Rule to the extent required by Rule 1.11." Consistent with our analysis above of Rule 1.6, while the inquirer must be careful to protect the IRS's confidential information in any future activities, we see nothing about advocating for changes in the tax code that necessarily requires use or disclosure of such information.

12. Relatedly, Rule 1.11(c) bars a lawyer from representing a private client adverse to a person about whom the lawyer has information that the lawyer knows is confidential government information. The inquirer does not suggest that adversity exists to any person about whom the inquirer has such information, so we detect no issue here.

13. Finally, Rule 1.11(a)(2) prohibits a former government lawyer, absent consent from the relevant agency, from representing any client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee; for purposes of this provision, "matter" has the same meaning discussed above, and in particular excludes agency rulemaking functions. Thus, this provision would not be implicated by the lawyer's prior work on regulations, even if that work were related to the revisions to the tax code that the inquirer might seek. It seems unlikely that work seeking changes in the code would be the same matter as any matter that the inquirer worked on as an agency lawyer, but of course that is for the inquirer to determine.

CONCLUSION:

14. Subject to the observations made in this opinion regarding protection of confidential information, potential personal conflicts and other Rules, the inquirer is not restricted by the Rules in seeking to put together a project to advocate for changes in the tax code in which the inquirer would be involved after leaving the IRS, or in participating in such a project after the employment ends.

(16-18)

OPINION 1159 (12/14/2018)

TOPIC: Sharing legal fees with the estate of a deceased lawyer

DIGEST: Following the death of a lawyer who was the sole shareholder of a law firm, and the firm's dissolution, a former associate of the firm may share legal fees with the deceased lawyer's estate only as permitted by Rule 5.4(a) or as required by court order.

RULES: 1.5(g), 1.17, 5.4(a) & (d)

FACTS:

1. The inquirer was an associate in a firm wholly owned by the firm's senior lawyer. The firm represented plaintiffs on a contingent-fee basis in personal injury and other actions. The senior lawyer/sole owner died unexpectedly, having made no succession plan or agreement regarding the disposition of the law firm or regarding the payment of legal fees from ongoing cases upon the senior lawyer's death. The estate held the deceased lawyer's interest for a period of time, during which the inquirer continued to represent the law firm's existing clients and undertook the representation of new clients. Thereafter, rather than selling the law firm, the estate's representative dissolved it. The inquirer established a new law firm, and the new law firm continued to represent former clients of deceased lawyer's now-dissolved firm. The estate of the deceased lawyer now seeks to recover a portion of the fees generated in matters originating with the deceased lawyer's firm.

QUESTION:

2. May a law firm pay a portion of the legal fees earned in actions to the estate of a now deceased lawyer who wholly owned a since-dissolved firm in which the actions originated and, if so, in what amount?

OPINION:

3. Preliminarily, we note that, before the dissolution of the deceased lawyer's law firm, the former associate could continue to work in the law firm for a reasonable period. Ordinarily, under the N.Y. Rules of Professional Conduct (the "Rules"), in particular Rule 5.4(d), a lawyer may not practice with a law firm if "a nonlawyer owns any interest therein." But, as an exception, Rule 5.4(d)(1) permits "a fiduciary representative of the estate of a lawyer [to] hold the stock or interest of the [deceased] lawyer for a reasonable period during administration." During that period, the estate representative may take steps to dissolve the firm or to sell the deceased lawyer's practice to another lawyer or law firm pursuant to Rule 1.17(a), and meanwhile, the inquirer could maintain the firm's practice.

4. We do not address questions concerning the sharing of fees with a deceased lawyer's estate before the firm's dissolution, or concerning the sharing of fees with a lawyer who acquires a deceased lawyer's practice pursuant to Rule 1.17. *Cf.* N.Y. State 961 (2013) (addressing issues concerning the sale of a law business under Rule 1.17). Here, the question is whether the former associate may share legal fees with the estate after the firm has been dissolved. The question is governed by Rule 5.4(a), which provides, subject to exception, that: "A lawyer or law firm shall not share legal fees with a non-

lawyer." Absent an applicable exception, legal fees from pending personal injury (or other) matters may not be shared with the estate of the former law firm's deceased owner because the estate is not a lawyer.

5. One potentially applicable exception is Rule 5.4(a)(1), which provides: "an agreement by a lawyer with the lawyer's firm or another lawyer associated in the firm may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons." In this case, the exception is inapplicable, because the deceased lawyer/sole owner never entered into an agreement with the inquirer (or anyone else) "for the payment of money . . . to the lawyer's estate" or to specified others.

6. The other potentially applicable exception is Rule 5.4(a)(2), which provides: "a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased." This exception applies here to a limited extent. If the deceased lawyer/sole owner rendered services in a matter before dying, then the inquirer may pay the estate a portion of legal fees from the matter corresponding to "that portion of the total compensation that fairly represents the services rendered by the deceased." This provision would not allow fees to be shared in matters undertaken after the onetime owner's death. *See* Phil. Op. 92-1 (1992) (opining, under language identical to Rule 5.4(a), that "[i]t would not be appropriate to pay a referral fee to the [deceased] referring lawyer's estate for services rendered to an executor or trustee when those services had not started during the lifetime of the referring lawyer").

7. In N.Y. State 1128 (2017), we addressed a question similar to this one. There, the inquirer's lawyer friend passed away, leaving (as here) no agreement or understanding concerning the sale or dissolution of the decedent's firm, though before dying the friend told an assistant to refer contingent-fee cases to the inquirer. At the time, the inquirer knew that the decedent had worked on at least one of the matters (labeled "Matter A") but was as yet unaware of the work, if any, done on the others. In that instance, we concluded that, "under Rule 5.4(a)(2), the inquirer could, at the conclusion of Matter A, pay the estate a portion that represents the services rendered by the deceased attorney, or at any time pay an amount representing *quantum meruit* for those services." We explained that the proportional contribution fairly representing the value of the decedent's services could not be calculated until the matter concluded, but that the *quantum meruit* amount of fair compensation for those services "could be calculated immediately." *Id.* ¶ 9. With respect to the other matters, however, we said that, "if the deceased lawyer did not provide any legal 'services' on those matters" before death, "then the inquirer may not ethically pay the estate a portion of the fees," because, among other things, such a payment would be an improper division of fees with a nonlawyer in violation of Rule 5.4. *Id.* ¶ 10.

8. Other than as permitted by Rule 5.4(a)(2) to compensate for services rendered by the deceased lawyer before death, no rule authorizes fee-sharing with the deceased lawyer's estate. In N.Y. State 1128 ¶ 10, we declined to opine, as we do here, on whether a deceased lawyer's signing or filing of a retainer agreement, and thus perhaps assuming liability for a matter, amounts to a service rendered by the deceased lawyer. This Committee renders opinions interpreting the Rules but not interpreting other law; therefore, we also do not opine on whether the decedent's estate has a contractual claim, or other legal claim, to legal fees from matters that originated in the now-dissolved firm, whether before or after death. We add only that, notwithstanding Rule 5.4(a), it would be ethically permissible for the

inquirer to satisfy an adverse judgment issued by a court, in the event that the estate brought a civil claim to recover a portion of legal fees in lawsuits pending while decedent was alive. While a lawyer might raise an objection based on Rule 5.4, insofar as it reasonably appears to be applicable, we see nothing in the Rules that would call on a lawyer to defy a court's judgment in this situation once it is issued. *Cf.* N.Y. City Op. 2018-5 (2018) at n. 12 (recognizing that, in litigation against lawyers, courts do not invariably enforce Rule 5.4's proscription on fee sharing with a nonlawyer).

CONCLUSION:

9. Following the death of a lawyer who was the sole owner of a law firm, and the firm's dissolution, a former associate of the firm may share legal fees with the deceased lawyer's estate only as permitted by Rule 5.4(a) or as required by court order.

17-18

2019

OPINION 1160 (01/02/2019)

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

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

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

FACTS:

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

QUESTION:

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

OPINION:

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

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

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

6. We examined Rule 1.5(g) in N.Y. State 864 (2011), in which the inquirer wished to accept a referral from an out-of-state lawyer in a personal injury matter. The injury occurred in New York and the referring lawyer proposed that, in the particular matter at issue, the in-state lawyer would "handle" the matter and pay the referring lawyer a portion of any recovery. We endorsed the proposal subject to compliance with Rule 1.5(g). *Id.* ¶ 16. Although we have declined to delineate the precise contours of "joint responsibility" under this Rule, *see* N.Y. State 745 (2001); *cf.* Rule 1.5, Cmt. [7] ("joint responsibility entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership"), we have made clear that the mere cultivation of client relationships does not qualify as "services performed" by the referring lawyer, N.Y. State 954 ¶ 9 (2013). Thus, the inquirer's contemplated action would violate Rule 7.2(a) unless it could be said that the inquirer is ethically permitted to be affiliated with the out-of-state lawyer in the circumstances presented.

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

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

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

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.
>
> (b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

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

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

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

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

ited to providing legal services that are incidental to a specific case or proceeding pending in that court.

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

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

CONCLUSION:

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

[12-18]

OPINION 1161 (01/04/2019)

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

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

FACTS:

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

QUESTIONS:

2. The inquiry raises two questions:

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

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

OPINION:

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

4. Two exceptions appear in Rule 1.6(a). One is if disclosure is permitted under circumstances set out in Rule 1.6(b), none of which apply to this inquiry. The other is if the disclosure "is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community." We have no factual basis on which to conclude that

these factors apply in the circumstances presented. In the absence of such facts, we assume that the sale contract is confidential information, the sanctity of which the inquirer must preserve absent the client's consent.

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

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

CONCLUSION:

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

(14-18)

OPINION 1162 (01/17/2019)

TOPIC: Referral Fees

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

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

FACTS:

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

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

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

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

QUESTIONS:

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

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

OPINION:

Lawyer-Owned Tax Credit Firm

7. Lawyers have traditionally provided both legal and nonlegal services to their clients. *See* N.Y. State 206 (1971) (conditions under which dual practice is permissible). Since the publication of N.Y. State 206, this committee has issued opinions regarding the implications under the rules of legal ethics of dual practice of legal and nonlegal services. *See, e.g.,* N.Y. State 536 (1981) (financial planning business); N.Y. State 687 (1997) (lawyer-insurance broker); N.Y. State 711 (1998) (same); N.Y. State 784 (2005) (entertainment management).

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

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

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

erty lawyers that the inquirer will inform the targets that the inquirer is a lawyer, we believe that the services RD1 will provide should be considered legal services and therefore subject to the Rules.

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

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

> (a) A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:
>
> > (1) a lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by Rule 5.8, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; and
> >
> > (2) a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(g).

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

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

Non-Lawyer-Owned Tax Credit Firm

15. Lawyers occasionally refer a client to another service provider. Rule 5.8(c) says that its restrictions on multidisciplinary practice do "not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm." This has differing implications depending on whether the lawyer is an employee or an outside consultant to RD2.

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

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

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

18. We have held that a lawyer may accept a referral fee from a nonlegal service provider provided that the referring attorney is not benefitting financially from the underlying transaction and complies with Rule 1.8(f), or, if the referring attorney is involved in the underlying related transaction, the attorney (a) advises the client of the arrangement and (b) credits the client with the referral

fee obtained. *See* N.Y. State 845 (2010); *see also* N.Y. State 667 (1994); N.Y. State 626 (1992); N.Y. State 576 (1986); N.Y. State 461 (1977). Recently in N.Y. State 1086 ¶¶ 15-16 (2016) we again visited the question of referral fees from a third-party service provider. In that case, we stated that the attorney may not accept the referral fee from a third-party investment firm as the money to be invested arose from the engagement in which the lawyer represented the client. In contrast, in N.Y. State 981 ¶¶ 4-5 (2013), we said that a referral fee was not prohibited when the service is not related to the lawyer's legal services and the lawyer makes no recommendation to use the service, which is not the case here.

CONCLUSION:

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

(1-18)

OPINION 1163 (03/11/2019)

TOPIC: Missing client: Lawyer's Duty When Unable To Locate Client

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

RULES: Rules 1.6, 1.16

FACTS:

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

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

QUESTIONS:

3. The inquirer asks two questions:

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

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

OPINION:

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

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

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

7. If, however, the representation has not concluded, or the matter before the court remains open, the lawyer must comply with Rule 1.16, which governs withdrawal from representation of a client. Rule 1.16(c) outlines when a lawyer may withdraw from a representation, including, in Rule 1.16(c)(7), when "the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively," or in Rule 1.16(c)(12), when "the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of good cause for withdrawal." In most representations, "effective representation requires meaningful communication between a lawyer and a client." N.Y. State 1144 ¶ 10 (2018). In our view, "good cause" exists for the lawyer to seek to withdraw from representation if the lawyer cannot locate the client after taking reasonable steps to do so. *See, e.g.,* N.Y. State 787 (2005) (discussing reasonable steps a lawyer should consider when attempting to locate a missing client).

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

9. In applying for withdrawal, a lawyer remains bound by Rule 1.6 governing the nondisclosure of a client's confidential information, which includes information learned during the course of the representation that is subject to the attorney-client privilege, is "likely to be embarrassing or detrimental to the client if disclosed," or "that the client has requested be kept confidential." Privilege issues are questions of law beyond our purview, but we recognize that a communication is a necessary

predicate to its assertion, as is a client's request that information "be kept confidential." There being no communication here, the inquirer must resolve whether disclosure of the client's unavailability is "confidential information" that would likely "be embarrassing or detrimental to the client if disclosed." In N.Y. State 1057 (2015), we discussed disclosure in the context of a motion to withdraw as counsel. There, we noted that a lawyer may always advise a court that "professional considerations require termination of the representation." *Id.* ¶ 12; Rule 1.16, Cmt. [3]. If the court insists on more, then Rule 1.6(b)(6) allows a lawyer to disclose confidential information if ordered to do so by a court.

CONCLUSION:

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

(15-18)

OPINION 1164 (03/21/2019)

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

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

RULES: 1.6, 1.15, 1.16

FACTS:

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

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

QUESTIONS:

3. The inquirer poses two questions:

> (a) Does an attorney have an obligation to delete backup copies of files or data provided by a client after the client has terminated the legal engagement?
>
> (b) May the attorney condition compliance with such a request on obtaining a release and indemnification (including advance of attorneys' fees and expenses), as well as creating an inventory of file names, sizes, and dates to prove what files were or were not in the attorney's possession?

OPINION:

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

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

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

7. No exhaustive catalog of these factors is practicable, but certain common considerations are likely to recur, among them the strength of the client's claim to ownership; the sensitivity of the documents; the centrality of their sensitivity to the object of the representation; the legitimacy of the client's request for destruction; the extent to which the documents slated for destruction comprise the client file (*i.e.*, one document versus the entire file); the difficulty associated with destruction of the documents; the degree to which the lawyer is subject to a meaningful risk of later liability; and the

availability and feasibility of provisions protective of the lawyer's interests. In balancing these and other factors, the weight to be given each depends on the facts and circumstances, with the overriding concern that a lawyer's demand for protections for the lawyer's benefit must be reasonable in light of those facts and circumstances.

8. Applying these considerations to the current inquiry, we believe that it would be reasonable for the lawyer to request a release and a simple hold-harmless agreement from the lawyer's former client in exchange for the lawyer's agreement to destroy the documents at issue. Because the documents originated with the client (no matter their original provenance), the client's claim to ownership is strong. The nature of the dispute – that the documents embody proprietary information – reflects their sensitivity, which appears to be core to the nature of the lawyer's initial engagement, and the settlement agreement supplies a legitimate basis for the client's request. The documents are in an electronic format, so we detect no undue difficulty in achieving the client's aim. If the lawyer destroys the documents as requested, the risk of later liability is correspondingly diminished. Maintaining an inventory of the documents, with which we see no problem, affords the inquirer an additional layer of protection from a subsequent claim. Merely asking for advance payment of legal fees and expenses in the event of suit, or requesting a release and indemnity from the non-client former employer, may not alone violate the Rules, but we are dubious that the lawyer may insist on these conditions before complying with the former client's request that the documents be destroyed and that the lawyer certify to their destruction.

CONCLUSION:

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

(18-18)

OPINION 1165 (05/07/2019)

TOPIC: Unpaid Client Fees

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

RULES: 1.15(b)(4)

FACTS:

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

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

QUESTIONS:

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

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

OPINION:

5. The answer to each question is no.

6. Rule 1.15(b)(4) of the New York Rules of Professional Conduct (the "Rules") states that a lawyer may withdraw funds from a trust account "when due, unless the right of the lawyer to receive it is disputed by the client . . . in which event the disputed portion shall not be withdrawn until the dis-

pute is finally resolved." The client's insistence on the discount is a dispute for purposes of the Rule and so the inquirer may retain but must not remove from the trust account those sums that the client questions until the dispute is resolved, whether by settlement or through some dispute resolution process. Insofar as the client concedes that some of the amounts in the account are properly the lawyer's property, the lawyer may distribute the same to the lawyer's account; to the extent the client disputes any portion of those sums, the lawyer must retain them in escrow.

7. Absent a prior written agreement, the lawyer may not unilaterally charge interest on a delinquent client account. "[I]n order to charge interest on delinquent accounts, a lawyer must advise the client prior to performing services of the fact that interest will be so charged, the definition (time period) of delinquency, and must obtain the client's consent thereto." N.Y. State 399 (1975). "A law firm may seek its clients' agreement to modify its retainer agreement with the clients during the pendency of a current matter to secure payment, by confessions of judgment and collateral mortgages, of fully earned but unpaid legal fees and expenses in an amount on which the parties agree, if the law firm complies with the rules governing business transactions with clients and is mindful of ongoing obligations to avoid general conflicts of interest." N.Y. State 1139 ¶ (2017). *See* N.Y. State 910 (2012) ("A lawyer may request a client to amend a retainer agreement. Whether such an amendment must meet the requirements for fee agreements under Rule 1.5 or for business transactions between the lawyer and client under Rule 1.8(i) depends on the circumstances in which the amendment is requested and the nature of the amendment."); N.Y. State 783 (2005) ("If a client deliberately disregards an agreement to pay legal fees and expenses, and the letter of engagement or retainer agreement is silent as to interest charges on the delinquent accounts, a lawyer may condition continued representation on the client's agreement to prospectively pay interest on any past balance due for services previously rendered or to be rendered in the future"). Accordingly, absent a prior written agreement, the inquirer may not charge interest on the amounts the inquirer believes are due and owing.

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

CONCLUSION:

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

(07-19)

OPINION 1166 (05/07/2019)

TOPIC: Non-legal business owned by lawyer in intellectual property: Choice of Law, Fee-Sharing, and Supervisory Duties

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

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

FACTS:

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

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

3. The services the inquirer proposes to render include, among others, assessing the validity and value of intellectual property, whether registered (*e.g.,* patents) or unregistered (*e.g.,* trade secrets); advising on whether property should be registered or otherwise classified; drafting and reviewing business arrangements between the client and third parties; counseling on how best to exploit and protect the intellectual property; outlining best practices for policies governing issues such as human resources, cyber-security, risk management, contracts with manufacturers and suppliers, insurance, and corporate governance; advising on strategies to raise capital for the client's business and to sell or otherwise transfer the intellectual property; and representing the client in pursuing registrations of intellectual property, issuing opinions, negotiating contracts with third parties in jurisdictions around the globe, and managing other counsel in litigation, arbitration or regulatory proceedings on behalf of the client.

4. The inquirer is in the process of engaging four individuals: (a) a U.S. lawyer with a profile similar to the inquirer's; (b) a U.S. patent agent (who is not and need not be a lawyer); (c) a person certified to practice law in Europe but not admitted to practice in any U.S. jurisdiction; and (d) a tech-

nologist who is neither a lawyer nor a patent agent. These individuals would like to be partners or shareholders in the entities the inquirer owns, or at least employees who not only receive fixed salaries, but also share in the profits and fees generated by the entities.

QUESTIONS:

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

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

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

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

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

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

OPINION:

Disciplinary Authority and Choice of Law

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

7. Rule 8.5(a) is jurisdictional; it tells us the forum authorized to exercise authority over the lawyer. That New York may have the power to discipline a lawyer does not mean that the Rules will apply in evaluating the lawyer's compliance with ethical standards. N.Y. State 1058 ¶ 6 (2015). Rather, the

rules of conduct that a New York disciplinary authority will apply will depend on the choice of law rules set forth in Rule 8.5(b), which provides:

> In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
>
> (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
>
> (2) For any other conduct:
>
> (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
>
> (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

8. In addition, a practitioner, including a lawyer, who handles matters before the USPTO may need to adhere to the Rules of Professional Conduct that the USPTO adopted, effective May 3, 2013, and "that govern a wide range of professional conduct by lawyers and others practicing before the USPTO. *See* 37 C.F.R. §§ 11.101 et seq." N.Y. State 1027 ¶ 18 n. 5 (2014). The USPTO, like New York, followed the format of the ABA Model Rules of Professional Conduct, but with provisions tailored to the USPTO's jurisdiction; among other things, the USPTO defines "tribunal" to include the Office itself, 37 C.F.R. § 11.101. Whether the USPTO Rules preempt and therefore take precedence over the New York Rules is, however, a question of law beyond our jurisdiction to resolve. N.Y. State 1027 ¶ 18 n. 7.

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

10. No matter where the inquirer "principally practices," if a lawyer's "conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct." Rule 8.5(b)(2)(ii). Determinations under Rule 8.5(b) are

necessarily fact specific. Such are the multiplicity of the inquirer's proposed activities, and the locations where the inquirer expects to engage in them, that we are in no position to guide the inquirer beyond saying that the lawyer should assess the potential choices of ethics rules with respect to each discrete activity in which the lawyer is involved. For now, we assume that the applicable Rules are those in New York.

Application of the Rules to the Consulting Firm

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

> (a) With respect to lawyers or law firms providing non-legal services to clients or other persons:
>
> > (1) A lawyer or law firm that provides non-legal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and non-legal services.
> >
> > (2) A lawyer or law firm that provides non-legal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the non-legal services if the person receiving the services could reasonably believe that the non-legal services are the *s*ubject of a client-lawyer relationship.
> >
> > (3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing non-legal services to a person is subject to these Rules with respect to the non-legal services if the person receiving the services could reasonably believe that the non-legal services are the subject of a client-lawyer relationship.
> >
> > (4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving non-legal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the non-legal services, or if the interest of the lawyer or law firm in the entity providing non-legal services is *de minimis*.

(b) Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing non-legal services to a person shall not permit any non-lawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under Rule 1.6(a) and Rule 1.6(c) with respect to the confidential information of a client receiving legal services.

(c) For purposes of this Rule, "non-legal services" shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a non-lawyer.

12. Under Rule 5.7(a)(1), whether non-legal services provided to a person by a lawyer or law firm are subject to the Rules depends upon whether the non-legal services are distinct from legal services being provided to that person. In N.Y. State 1135 ¶¶ 7-8 (2017), we said that, in determining distinctness, one should look to the substance of the service to be provided, the proposed recipient and the degree of integration of the two services. That the two different entities provide the services is not sufficient; if the services are not distinct, and a single person receives both services, the recipient is presumed to believe that the attorney-client relationship applies to both. Non-legal services that are not distinct from legal services are always subject to the Rules, no matter what disclaimer a lawyer may provide about the non-legal services. N.Y. State 1155 ¶ 13.

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

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

14. The inquirer next asks whether the inquirer may share legal fees with a person who is certified to practice law in a civil law country in Europe, but does not have a license to practice law in any of the United States. We are mindful that it is not uncommon for law firms today to operate around the world using various juridical entities and, in some instances, sharing legal fees with persons qualified to practice law in an extraterritorial jurisdiction but not in any of the United States. In the past, we have endorsed this practice – *see, e.g.,* N.Y. State 1072 (2015) (Japanese benrishi); N.Y. State 806 (2007) (Italian law firm); N.Y. State 658 (1993) (Swedish law firm); N.Y. State 646 (1993) (Japanese

bengoshi); N.Y. State 542 (1982) (U.K. solicitors) – with two caveats. First, the arrangement must comply with the substantive law of New York and with the ethical and legal codes of the non-U.S. jurisdiction. Second, the New York lawyer must make an independent evaluation that the educational requirements for the non-U.S. lawyer are equivalent to those for a New York lawyer, and that nothing in the arrangement would compromise the New York lawyer's ability to uphold the ethical requirements of this State, including those requiring the exercise of independent professional judgment and protecting the confidentiality of attorney-client communications. If the inquirer is satisfied that the non-U.S. lawyer here would meet these requirements, then the inquirer may share legal fees with that person.

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

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

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

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

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

Supervision of Non-Lawyers at Inquirer's Firms

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

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

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

CONCLUSION:

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

(21-18)

OPINION 1167 (05/09/2019)

TOPIC: Law Firm Name: Use of Multiple Surnames

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

RULES: Rule 7.5(b)

FACTS:

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

QUESTION:

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

OPINION:

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

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

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

6. Applying these principles to the current inquiry, we conclude that the inquirer's proposed firm name does not violate Rule 7.5(b). For purposes of the Rule, no material difference exists between using a firm name that is comprised of a middle name and a last name and using a firm name that is

comprised of middle initials and a last name. The inquirer's concern that the public might conclude that the firm's name is the last name of an additional partner because it is happens to be a name that is commonly a last name is a concern too amorphous to affect our application of Rule 7.5(b). We live in a country (unlike some other countries) that does not impose blanket limitations on given names, and it is not uncommon for names that are more traditionally last names to be used as given names. In light of this facts, the public cannot reasonably assume that a particular name is a given name or a last name. Accordingly, we do not view the inquirer's proposed use of the firm name "Moretti Jones, PC" as "misleading" about the identity of the lawyer within the meaning of Rule 7.5(b).

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

CONCLUSION:

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

(05-19)

OPINION 1168 (05/13/2019)

TOPIC: Sale of Law Practice; Use of Firm Name after Sale

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

RULES: 1.5(h), 1.17(a), 7.5(b), 7.5(c), 8.4(c)

Overrules N.Y. State 148 (1970) and modifies N.Y. State 850 (2011)

FACTS:

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

QUESTIONS:

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

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

OPINION:

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

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

6. Rule 1.17 now provides in pertinent part:

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

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

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

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

> Many firms, large and small alike, continue to practice under firm names – essentially trade names – that include the names of their founders or other former partners, often long after those lawyers have passed away. They do so to perpetuate the good will associated with their institutional names, as well as to honor lawyers whose efforts and skills laid the foundation for their practice. . . . The justification for sanctioning this practice, in the absence of danger of deception, is that all of the partners contribute to the good will attached to a firm name, and that surviving partners should not be deprived of their right to a benefit to which they contributed their time, skill and labor. N.Y. State 279 (1973).

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

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

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

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

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

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

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

16. Second, in N.Y. State 850 (2011), we were asked whether a law firm could use the name of a former partner in its firm name if the former partner continued to practice law as general counsel to a corporation. Citing N.Y. State 266 (1972), an opinion decided under the Code, we said the former partner "is still engaged in the practice of law as the general counsel to a corporation." Partly depending on EC 2-11, N.Y. State 266 did not require the "retired" partner to stop practicing completely, as long as the lawyer did not practice law except with the former firm. When we issued our opinion in N.Y. State 850, the Rules had eliminated the Ethical Considerations, including EC 2-11. But the Committee still believed that "retired" for purposes of Rule 7.5(b) should mean "not practicing law," despite the fact that Rule 1.17 contained a less restrictive definition. In support of this broader definition, we cited the definition of "retired" in the court rules governing registration of lawyers. *See* 22 NYCRR § 118.1(g) (providing, then as now, that an "attorney is 'retired' from the practice of law when, other than the performance of legal services without compensation, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law"). Upon reconsideration, we believe that Rule 1.17 should recognize that a partner may retire from a law firm without entirely retiring from the practice of law. N.Y. State 622 (to the same effect). The Court Rule on the registration of lawyers has a different purpose from Rules 7.5(b) and 1.17. The Court Rule determines when a lawyer is required to pay registration fees to the Office of Court Administration and when a lawyer must comply with the rules on continuing legal education – not when a law firm name should be considered misleading or a trade name. For these reasons, we believe that N.Y. State 850 is distinguishable and to the extent inconsistent with this opinion is modified.

CONCLUSION:

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

(4-19)

OPINION 1169 (07/08/2019)

TOPIC: Town Supervisor; Law Practice; Conflict of Interest

DIGEST: Subject to any law or regulation governing the office, a public official may engage in the private practice of law, provided that the public official does not represent any private client in a matter involving the official's jurisdiction, does not participate in any matter in which the lawyer participated personally and substantially while in private practice; does not negotiate for private representation on matters with the jurisdiction in which the official would have a role; avoids the use of public office to obtain special treatment for a private client, to influence a tribunal in favor of a client, or to receive consideration from anyone in the guise of legal fees in order to influence official conduct; and does not represent a private client with interests adverse to a person about whom the official acquired confidential government information in a matter in which the information could be used to that person's material disadvantage.

RULES: 1.11(c), (d) and (f)

FACTS:

1. The inquirer is an attorney in private practice in a Town, a municipal corporation, where the inquirer regularly represents business clients located within the boundaries of the municipality. The inquirer wishes to seek public office as Town Supervisor, the powers of which could potentially affect some private clients.

QUESTIONS:

2. May a lawyer continue to represent private clients located within a Town while serving as Town Supervisor?

3. May a lawyer represent private clients before the Town Board, Planning Board, Zoning Board of Appeals, Town Court, or any town departments while serving as Town Supervisor?

4. Are there any other ethical restrictions on a lawyer's private practice of law as a result of serving as Town Supervisor?

OPINION:

5. Rule 1.11(d) of the N.Y. Rules of Professional Conduct (the "Rules") says:

> Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:
>
> > (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

> (2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

6. As Rule 1.11(d) makes clear, any law or regulation governing the conduct of a current governmental official has priority over the Rules. "[E]ven if conduct is not prohibited by Rule 1.11(d), it may still be prohibited or regulated by statutes or ethics codes. Consequently, before a lawyer in public service analyzes Rule 1.11(d), the lawyer should research statutes, ethics codes, and other authorities that apply to government lawyers, since those authorities will trump Rule 1.11." R. Simon & N. Hyland, *Simon's New York Rules of Professional Conduct Annotated* 793 (2017 ed.)

7. For example, the General Municipal Law authorizes municipal corporations to regulate the conduct of officials – for instance, in a Code of Ethics – that would override any inconsistent provisions of the Rules. Provisions regulating the extent of outside employment by a town official may also appear in the Public Officers Law, the Municipal Home Rule Law, and the Town Law. This list is not intended to be exhaustive of potentially applicable rules, as other rules may bear on the Town Supervisor's ability to engage in a private law practice. This Committee's jurisdiction is limited to interpreting the Rules, and thus we do not address here the applicability of other laws that the lawyer must consult by the terms of Rule 1.11(d).

8. Rule 1.11(d) has two prongs. First, it generally prohibits a government officer or employee from participating in a matter in which the lawyer participated personally and substantially while in private practice. This prohibition is subject to the "rule of necessity," which permits the official or employee to participate in a matter of public service even if he or she participated personally and substantially in the matter outside of government service if the official or employee in question is the only one who can possibly be authorized to act on a particular matter. *See* N.Y. State 968 ¶ 29 (2013). Thus, a lawyer serving as Town Supervisor must recuse himself or herself from any participation in, or discussion of, matters in which he was involved as a private attorney, even where, as here, the lawyer is playing a non-legal role in government, unless the elements of necessity apply.

9. The second prong of Rule 1.11(d) prohibits a government officer or employee from negotiating for private employment with any person who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially. This Rule limits a lawyer serving as Town Supervisor from taking on the representation of private clients with regular business with the Township, as the lawyer serving as Town Supervisor would be prohibited from negotiating a retention with any party involved in matters in which the Town Supervisor would have a role.

10. Rule 1.11(f) also governs the conduct of lawyers in public office. The Rule states that a lawyer who holds public office shall not:

> (1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;
>
> (2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

> (3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

11. N.Y. State 1056 (2015) discussed the circumstances under which a County Clerk may engage in the private practice of law. There, we commented that, as a public official seeking to engage in private practice, the County Clerk's conduct was governed by Rules 1.11(d) and (f). We noted:

> Subject to any overriding law or regulation governing the office, a county clerk may engage in the private practice of law provided the clerk does not participate in any way in any matter before the clerk's office in which the clerk is personally and substantially involved in private practice, and avoids use of the public office to obtain special treatment for a private client, to influence a tribunal in favor of a client, or to receive consideration from anyone in the guise of legal fees to influence official conduct.

12. In N.Y. State 510 (1979), we considered whether a deputy Town Supervisor could represent private clients in tax certiorari or other proceedings involving the Town. We concluded that, because the deputy Town Supervisor would assume the duties of the Town Supervisor in the Town Supervisor's absence or inability to act, he could not participate in any litigation involving the Town on behalf of a private client. We commented:

> As an official charged with preserving the funds of the town, the representation of a private client whose interest is to reduce his taxes, or to obtain a judgment against the town, or to prevent a judgment by the town against him, would place the deputy in a position where his duty to his client conflicts with his duty toward the town. Such a conflict should be avoided . . . Even if the conflict were less direct, the deputy should avoid the appearance of impropriety which would inevitably arise from his representation of a party who might receive some benefit to the disadvantage of the town.

13. This analysis applies with greater force to the Town Supervisor, who is primarily charged with preserving the funds of the Town. In such a position, the Town Supervisor cannot represent any private client whose interests may be adverse to those of the Town.

14. We further commented, quoting N.Y. State 431 (1976):

> Rules disqualifying lawyers who are part-time officials from accepting private clients in certain situations are designed to serve two basic purposes. Primarily the disqualification rules serve to prevent private clients from retaining a part-time public official in the hope of gaining some improper advantage by reason of his lawyer's public office. In addition the rules are designed to prevent public suspicion that the client may be gaining some improper advantage by retaining the public official.

15. The prohibitions of Rules 1.11(f)(1) and (3) are clear. They prohibit a lawyer from using his or her position as Town Supervisor to obtain special treatment for a private client, unless the official could make a good faith judgment that the client's interests accord with the public interest. Likewise, the Town Supervisor's use of a private law practice as a vehicle to receive anything of value to influence an official judgment would run afoul of the Rules.

16. Rule 1.11(c) places further restrictions on the conduct of lawyers who are public officers or employees. It provides, in relevant part:

> Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term 'confidential government information' means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.

17. Thus, to the extent that a lawyer serving as Town Supervisor has access to confidential government information about any person as a result of the lawyer's status as a public officer or employee, the lawyer may be disqualified from representing private clients with interests adverse to that person in any matter in which the information could be used to that person's material disadvantage. This provision applies even if the lawyer did no work on a matter and came across the confidential government information by happenstance. This Rule applies only when the lawyer has confidential government information, and does not operate with respect to information that merely could be imputed to the lawyer.

CONCLUSION:

18. In sum, while Rule 1.11 does not prohibit the inquirer from representing private clients located within the Township while he is serving as Town Supervisor, subject to any further restrictions under applicable law, the inquirer cannot represent any private client in a matter involving the Town and should not participate, in his role as a public official, in any matter in which he participated personally and substantially while in private practice. Additionally, the inquirer may not negotiate for private employment with any party involved in matters with the Township in which he would have a role. The inquirer should also avoid the use of his public office to obtain special treatment for a private client, to influence a tribunal in favor of a client, or to receive consideration from anyone in the guise of legal fees in order to influence official conduct. Finally, if the inquirer acquires confidential government information about any person, the inquirer may not represent a private client with interests adverse to that person in a matter in which the information could be used to that person's material disadvantage.

[02-19]

OPINION 1170 (07/09/2019)

TOPIC: Conflict of Interest; village attorney

DIGEST: A Village Attorney who does not represent the Village in court or in criminal matters, may represent private clients in defense of traffic violations, criminal proceedings, or Town Ordinance violation cases brought in the same Town Court that adjudicates such matters arising from summonses issued and arrests that occurred within the Village boundaries, provided that the lawyer adheres to rules governing conflicts and current government employees.

RULES: 1.7(a)(1), 1.7(a)(2), 1.11(c), 1.11(d) and 1.11(f)

FACTS:

1. The inquirer is the Village Attorney, appointed annually, for an incorporated Village that has no Village Justice Court or separate Village Police Department. The inquirer attends bi-monthly meetings of the Village Board, advising on a variety of legal matters, but maintains a separate private legal practice. The inquirer does not represent the Village in Town Justice Court, where Village Ordinance violation cases are adjudicated. The Town Justice Court also adjudicates Vehicle and Traffic Law ("VTL") and criminal cases where summonses were issued or arrests were made by a police department that patrols the entire Town, including the geographic area of the Village located wholly within Town boundaries. VTL violation and other criminal cases are prosecuted by the District Attorney for the county.

2. The Town Justice Court is located in a building owned by the Town. The expenses of operating and maintaining the Town Justice Court, including the salary of the two elected Town Justices, are paid exclusively by the Town. The Village receives some revenue as a result of the disposition of certain criminal charges in which the Town and Village share monetary fines, as well as fines generated by the disposition of Village Ordinance violations that are adjudicated in the Town Justice Court. There is a formula that governs the allocation, between the Town and the Village, of the fines collected in the Town Justice Court arising from violations in the Village. With respect to any given offense, that formula may be fixed by statute, or it may be the product of an agreement between the Town and Village. The percentages allocated in the formula may also differ depending on the particular offense, or category of offense. In addition, the total amount of the fines that are annually distributed to the Village may be substantial or nominal in relation to the overall Village budget.

3. The vast majority of cases pending on the VTL and criminal dockets are resolved by plea negotiation. Not only the amount of the fines, but the particular government entities that receive a portion of the fines, will depend on the particular statutes or ordinances to which the defendant has pled guilty.

4. In private practice, the inquirer appears in Town Justice Court defending only clients who are facing charges that do not involve the Village.

QUESTION:

5. May the inquirer continue to represent persons charged with crimes, VTL violations or other offenses prosecuted by the District Attorney or Town Attorney in the Town Justice Court?

OPINION:

6. The question posed implicates Rules 1.7 and 1.11 of the N.Y. Rules of Professional Conduct (the "Rules").

Rule 1.7

7. Rule 1.7(a)(1) prohibits simultaneous representation of two clients where a reasonable attorney would conclude that "the representation will involve the lawyer in representing differing interests." "Differing interests" are defined by Rule 1.0(f) to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse or other interest." Rule 1.7(a)(2) prohibits a lawyer from representing a client if "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests."

8. Here, we are told that, in matters in which the offense occurred in the Village, a formula exists to allot any fine between the Village and the Town, and that most dispositions are products of plea bargaining. We assume for our purposes that the Village Attorney is familiar with the formula.

9. In representing clients in the Town Justice Court, a Village Attorney in private practice may have the opportunity to guide and cause a client to reach a negotiated disposition that is less favorable to the private client but more favorable to the Village, even though the Village is not a party to the matter, because that disposition will produce a greater dollar return for the Village when the fine is paid and apportioned. Conversely, the lawyer may have an opportunity to negotiate a disposition that is less favorable to the Village in order to enhance a relationship with a private client. This engages the lawyer in representing "differing interests" and could create a risk that the Village Attorney's own financial or business interests could adversely influence the lawyer's concurrent representations of the private client and the Village.

10. If a reasonable attorney would conclude, based on the factors discussed, that there is a "significant risk" that the professional judgment of the Village Attorney when acting on behalf of private clients might be adversely affected by a desire to advance one or the other of the competing interests of the private client or Village, then the representation of the private client in Town Justice Court would be permissible only if the conditions of Rule 1.7(b) are met. Three are relevant here: first, that the Village Attorney reasonably believes that the lawyer will be able to provide competent and diligent representation to both the Village and the private client; second, that the representation is not prohibited by law; and third, that each affected client gives informed consent, confirmed in writing. We note that a number of state and local laws, regulations, codes, and ordinances govern the conduct of municipal officials, any one which, if proscribing the proposed conduct, would override the Rules. Our jurisdiction does not extend to interpreting these legal issues, so we assume for our purposes that no law prohibits the Village Attorney from representing private clients in the Town Court. On that assumption, we see no reason why, if the lawyer reasonably believes that the lawyer may competently and dili-

gently represent the interests of the lawyer's concurrent clients, the lawyer may not seek informed consent from each client, confirmed in writing, to represent private clients in the Town Court.

Rule 1.11

11. Rule 1.11 sets forth restrictions on a lawyer currently serving as a public officer or employee. Rule 1.11(c) prohibits a lawyer from using confidential information about a person, acquired in the course of government employment, from representing a person in a matter in which the information could be used to the material disadvantage of that person. Rule 1.11(d) forbids a lawyer, subject to contrary law, from participating in a matter in which the lawyer participated personally and substantially while in private or nongovernmental practice, or from negotiating for private employment with any person involved as a party or a lawyer for a party in a matter in which the government lawyer is participating personally and substantially. Rule 1.11(f) says that a lawyer shall not: use a public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or a client if the lawyer knows or it is obvious that the legislative proposal is not in the public interest; use a public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or a client; or accept anything of value for the purpose of influencing the lawyer's action as a public official.

12. To anticipate every possible circumstances in which one or more of these proscriptions may come into play is not possible. The Village Law gives the mayor and its governing body powers over a variety of matters, on which presumably the Village Attorney may be called upon to advise. Village Law §§ 101 *et seq.* These powers may include adoption of budgets; setting of taxes and fees; zoning and building permits; village road maintenance, speed limits, and repair; local improvements; managing village properties; and the like. *Id.* It is our understanding that the overwhelming number of villages in New York are located within the boundaries of a single town, and that arrangements between these towns and villages vary widely. For example, some villages have their own police or village justices; the inquirer's village, it seems, does not. Apart from the facts set forth in the inquiry, we are not informed of the range of powers the village has reserved for itself.

13. Mindful of this limitation on our ability to set hard rules, we think a few obvious illustrations may be useful. For instance, a lawyer who acquires confidential information about a building zone matter involving a village resident may not use that information to the detriment of that resident owing to the interests of the lawyer's private client. A Village Attorney may not advise the Village on a matter involving property improvements in which the lawyer personally and substantially represented a private client on that same property, nor may the lawyer seek private employment from a client arising out of, say, a local ordinance in which the Village Attorney counseled the Village. A Village Attorney must forebear from advising a private client about a prospective local law of special interest to that client, nor seek to use the lawyer's influence as Village Attorney to affect an outcome in the Town Court or any other tribunal (including a zoning board) on behalf of a private client. It goes without saying that the Village Attorney may not accept anything of value to influence the lawyer's exercise of that role.

CONCLUSION:

14. A Village Attorney who does not represent the Village in court or in criminal matters is not ethically prohibited from representing private clients in defense of Vehicle and Traffic Law violations,

criminal proceedings, or Town Ordinance violation cases brought in the Town Justice Court, funded exclusively by the Town, that adjudicates Village Ordinance violations, provided that no unconsented financial or business conflicts of interest exist under Rule 1.7(a)(2), and provided that the provisions on current government employees in Rule 1.11 are respected.

(03-19)

OPINION 1171 (08/26/2019)

TOPIC: Deceptive Conduct – Assisting foreign clients to make investments that are subject to foreign currency controls

DIGEST: A lawyer may not engage in deceptive conduct to help clients in foreign countries circumvent currency controls of that country.

RULES: 1.2(d), 8.4(b), 8.4(c)

FACTS:

1. The inquiring lawyer is admitted in New York and in no other extraterritorial or U.S. jurisdiction. The inquirer represents four companies in a multi-step transaction to invest funds now located in China to acquire an interest in an enterprise for a project in the U.S. We are informed that the amount of the funds at issue exceeds the strict limits imposed by China's currency control laws for transfer out of China, would not be permissible under the law of China, and could potentially subject the transferor to criminal liability in China.

2. There are four companies involved in the proposed transaction. Two of them – we will call them Company A and Company B – are each a U.S. corporation commonly owned or controlled by U.S. citizens or holders of Lawful Permanent Resident Cards, popularly known as green cards; Company B is located (or is doing business) in China. The other two companies – for convenience, Company C and Company D – are each a Chinese corporation commonly owned or controlled by citizens of China; Company D is located (or is doing business) in the U.S.

3. The proposed transaction would involve three steps. First, the U.S.-owned and U.S.–based Company A would transfer U.S. dollars to the inquirer's escrow account. Second, after giving notice of the receipt of those U.S. dollars, the inquirer would instruct the Chinese-owned and Chinese–based Company C to wire Chinese funds (*renminbi* or "RMB"), in an amount equivalent to U.S. dollars in the inquirer's escrow account into a Chinese bank account of the U.S.-owned but China-based Company B. Third, following that wire transfer, the U.S. dollars in the inquirer's escrow account would be released to the U.S. bank account of the Chinese-owned but U.S.-based Company D. The inquirer represents to us that Company C has a *bona fide* investment motive for providing funds to Company D. The inquirer denies knowledge, however, on whether Company A has a bona fide investment motive for providing funds to Company B. This much is clear: By this arrangement, the U.S.-owned and U.S.–based Company A would be financing the Chinese-owned and Chinese–based Company C's investment in the Chinese-owned but U.S.-based Company D.

4. The inquirer proposes to charge a fee such as 1% or 2% of the amount held in escrow.

QUESTIONS:

5. May a lawyer help a client in a foreign country invest in a United States company, despite currency controls imposed by the foreign country, using the lawyer's escrow account in a way that avoids direct payment from the investing client to the United States company?

6. If so, may the lawyer charge a fee calculated as a percentage of the amount in escrow?

OPINION:

7. Rule 8.4(c) of the New York Rules of Professional Conduct (the "Rules") provides: "A lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ."

8. The terms "dishonesty," "deceit," and "misrepresentation" are not defined in the Rules, but in Rule 1.0(i) there is a definition of "fraud":

> "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

Application of Rule 8.4(c)

9. We begin by reviewing some facts relevant to whether the proposed conduct would involve dishonesty, fraud, deceit or misrepresentation.

10. The proposed money transfers, taken together, would have a net effect equivalent to (a) a transfer of dollars from Company A to Company B, and (b) a transfer of dollars from Company C to Company D, even though such a transfer, if made directly, would be prohibited by the Chinese laws in question. There are connections among the parties: Companies A and B are commonly owned, as are Companies C and D, and all four are represented by the same attorney. Company C, located in China and subject to Chinese currency controls, has a genuine motive to invest in the United States project of Company D. Such an investment, even though prohibited in direct form by those controls, would in effect be achieved indirectly through the proposed combination of transfers. In addition to the economic analysis that supports that characterization, the inquiry clearly acknowledges that the proposed transfers are motivated by the desire of Company C to invest in Company D's project in the United States. Although there would also effectively be a corresponding transfer from Company A to Company B, nothing in the facts as presented suggests any genuine motive for investment between those two companies. Notably, the amount of the proposed "investment" by Company A in Company B would be exactly equal to the investment by Company C, and therefore not dictated by any investment considerations of Company A.

11. These facts lead to the conclusion that the proposed conduct would have the purpose and effect of allowing Companies A and B, and their purported investments, to be used to circumvent applicable currency controls. The inquirer's proposed use of an attorney escrow account would be an important part of this scheme. The goal of this scheme would be to disguise the true nature of the money transfers and deceive government authorities and counter-parties In our view, the inquiry proposes sham conduct that would involve dishonesty, fraud, deceit or misrepresentation.

Possible application of other Rules

12. Because we conclude that Rule 8.4(c) answers the primary question, we need not resolve whether two other Rules that have to do with "illegal" conduct also apply. One of those Rules provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

Rule 1.2(d); *see* Rule 1.0(i) (definition of "fraudulent").

13. The other is Rule 8.4(b), which provides: "A lawyer or law firm shall not . . . engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

14. These Rules are ambiguous in failing to explain whether the Rules apply only to conduct that is illegal under the laws of the United States or its political subdivisions, or extend their reach to conduct illegal under the law of a foreign country. The Rules do not explicitly distinguish between domestic and foreign law, nor do the relevant Comments. Arguments may be made in favor of either outcome. Nevertheless, we have been unable to locate a single ethics authority – case law, treatises, ethics opinions, and the like – in which a suggestion arises in which a lawyer may be held accountable for conduct in violation of the law solely of a foreign country without any attendant violation of the laws of the United States and its states and territories. A commentator who discusses the point argues that the Model Rules should be changed to clarify the point. Mike Donaldson, "*Lawyers and the Panama Papers: How Ethical Rules Contribute to the Problem and Might Provide a Solution*," 22 Law & Bus. Rev. of the Americas 363, 372 (2016); *id*. at 372 n.49 (citing letter from John Leubsdorf and William Simon to Global Witness, "*Professional Responsibility Assessment of Lawyer Interview Transcripts*" (2015)). Because the current inquiry does not require an answer to this question, we leave its consideration to a future day.

15. Having concluded that the proposed conduct is impermissible, we have no occasion to consider the secondary question: whether ethics provisions including Rule 1.5(a) would permit a fee for those services to be calculated as a percentage of the amount in escrow.

CONCLUSION:

A lawyer may not engage in deceptive conduct to assist a client in a foreign country to carry out a scheme to circumvent currency controls of that country by making sham investments.

(6-19)

OPINION 1172 (10/03/2019)

TOPIC: Referral fees; retired lawyer

DIGEST: A retiring lawyer may ask for a referral fee, from the attorney who agrees to safe keep wills drafted by the lawyer, with respect to new representations of the testators or estates, if the retiring lawyer will assume joint responsibility for the subsequent representations, which may only occur if the lawyer maintains his registration as a lawyer.

RULES: 1.5(g), 1.17, 5.1, 5.4(a), 8.4(a).

FACTS:

1. The inquirer is a practicing attorney who is about to retire. The inquirer has turned over to another attorney (the custodial attorney) several original wills the inquirer had prepared for clients. The inquirer's firm had been holding them for safekeeping, but the firm no longer handles wills and estate matters. The custodial attorney previously practiced with the inquirer's firm, but had moved to another firm by the time of the transfer.

QUESTION:

2. If the wills the inquirer turned over to the custodial attorney evolve into estate work for the custodial attorney, may the custodial attorney pay the inquirer a referral fee, in the amount of a percentage of the fee that the custodial attorney receives?

OPINION:

3. This Committee does not answer questions about the conduct of a lawyer other than the inquirer, and, technically, this inquiry concerns the conduct of the custodial lawyer, not the inquirer. Accordingly, we will consider the question to be whether the inquirer may ask for or accept such a referral fee. *See* Rule 1.5(g) (rule on sharing fees applies to both the payor and the recipient); Rule 8.4(a) (a lawyer shall not induce another to violate the Rules of Professional Conduct (the "Rules")).

4. This opinion assumes that the clients whose wills were turned over to the custodial attorney consented to that action, or that the custodial attorney will read the wills only to the extent necessary to notify the testators and ask for further instructions. *See* N.Y. State 1035 ¶¶ 11-13 (2014) (obligations of a lawyer who received wills when purchasing a law practice); N.Y. State 1002 ¶ 5 (2014) (obligations of lawyer who is executor of estate of deceased lawyer with respect to wills possessed by deceased lawyer).

Referral Fees

5. We have long held that the mere forwarding of a client to another lawyer is not a proper basis for fee splitting. *See, e.g.*, N.Y. State 414 (1975). Referral fees are explicitly restricted under the Rules. Rule 1.5(g) prohibits a lawyer from dividing a fee for legal services with another lawyer who is not associated in the same law firm unless the following conditions are met:

(1) the division is in proportion to the services performed by each lawyer, or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

(2) the client agrees to employment of the other lawyer after a fully disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

6. Here, the inquirer has already drafted the wills and has been paid for those legal services. If the testators or their heirs ask the custodial attorney to provide additional legal services – for example, amending a will or providing services in connection with the administration of the estate – the inquirer, who will be retired, presumably will not be providing any services and therefore would not be entitled to a division of fees in proportion to the services performed for the new representation.

7. We therefore address whether the inquirer could become entitled to share in the legal fees for the new representation by assuming joint responsibility for the representation. Comment [7] to Rule 1.5 provides: "Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership."

8. Whether the inquirer could assume joint responsibility under the facts here would depend on whether the inquirer is not only retiring from his law firm but also giving up the ability to practice law for compensation. There are three ways that an attorney who ceases the active practice of law may structure a relationship with the Office of Court Administration. The first (continued registration) is to continue his or her biennial attorney registration, filing the required form, paying the required fee, and completing the mandatory continuing legal education requirement. This allows the attorney to continue to undertake representations. The second method is by changing his or her registration status to "retired" under Section 118.1(g) of the Rules of the Chief Administrative Judge, 22 NYCRR §118.1(g). Such lawyers are exempt from payment of the biennial registration fee and from compliance with the mandatory CLE requirement, but they may render legal services only without compensation. The third method (voluntary resignation) involves filing an amendment to the attorney's registration form withdrawing his or her registration. Such a filer is no longer considered an attorney. *See, e.g.,* www.nycourts.gov/courts/ad2/attorneymatters_VoluntaryResignation.shtml.

9. We believe the inquirer could assume joint responsibility for a representation only if the lawyer opts for continued registration. Rule 5.4(a) generally prohibits a lawyer from sharing legal fees with a non-lawyer. Moreover, we have held that, in order to agree to joint responsibility for a representation, a lawyer must be able to provide legal services to the client. For example, a lawyer may not agree to joint responsibility with another lawyer if the other lawyer has a non-consentable conflict of interest (N.Y. State 745 (2001)), the other lawyer has been suspended (N.Y. State 334 (1974)), or the other lawyer has been disbarred (N.Y. State 609 (1990)). Similarly, neither "retired" status nor voluntary resignation would enable the inquirer to provide legal services to a client. *See* N.Y. State 1160 ¶¶ 3-4 (2019) (not proper for a New York attorney to share fees with a lawyer who, though resident in New York, is not admitted to practice in New York, if the sharing of fees as a matter of law would constitute the unauthorized practice of law.)

10. Assuming that the inquirer's status is "continued registration" at the time the custodial attorney provides services to the client, we believe the inquirer could meet the requirements of the second clause of Rule 1.5(g)(1).

Sale of a Law Practice

11. Rule 1.17 authorizes a lawyer who retires from the private practice of law to sell his or her law practice, including goodwill, to one or more lawyers or law firms, as long as the lawyer complies with the conditions set forth in that rule. In N.Y. State 961 ¶¶ 3-5 (2013) we said that a retiring lawyer may sell his or her law practice contingent upon receiving a percentage of legal fees collected by the purchaser if the payment either (1) is in proportion to the services performed by the selling lawyer prior to the sale, or (2) fairly represents the value of the "goodwill" of the retiring lawyer. In particular, the payment for "goodwill" that is permitted by Rule 1.17 permits a payment that is made in the future after the fees that reflect "goodwill" are earned. Rule 1.17 does not apply here because the inquirer is not selling all or part of his law practice. The inquirer has already transferred the will files, in return for the custodial attorney's agreement to maintain the files.

CONCLUSION:

12. A lawyer who drafted wills for clients and who, upon retirement, transferred the original wills to another lawyer outside the retiring lawyer's firm for custody, may request and accept a referral fee from the second lawyer if holding the wills results in a new representation for the second lawyer, but only if the retiring lawyer will assume joint responsibility for the subsequent representations within the meaning of Rule 1.5(g), which may only occur if the inquirer maintains his registration as a lawyer.

(19-19)

OPINION 1173 (10/11/2019)

TOPIC: Advertising and Letterhead: Listing of N.Y. admission on out-of-state letterhead

DIGEST: A New York lawyer admitted in one or more other jurisdictions may properly list the lawyer's admission to the New York bar on professional or law firm letterhead, even though the lawyer does not maintain a law office in New York, provided the lawyer makes clear to prospective and existing clients the limits on the lawyer's ability to practice within this State.

RULES: 7.1(a)(1); 7.1(b)(1); 7.5(a)

FACTS:

1. The inquirer is a lawyer admitted to practice in New York and in an adjacent jurisdiction. The inquirer is affiliated solely with a law firm with offices only in that adjacent state, and none in New York.

QUESTION:

2. May a lawyer admitted to practice in two or more jurisdictions (including New York) permissibly list the lawyer's admission in New York, even though the lawyer does not have a law office in New York?

OPINION:

3. Our answer is yes, with a caveat. Lawyers and law firms are permitted to advertise their services provided that their advertisements do not contain statements or claims that are "false, deceptive or misleading." RPC 7.1(a)(1). Rule 7.1(b)(1) of the N.Y. Rules of Professional Conduct (the "Rules") says that a lawyer may properly include in an advertisement information concerning a lawyer's bar admissions. In N.Y. State 637 (1992), which was decided under the predecessor of the Rules, the Code of Professional Responsibility (the "Code"), we said that "a lawyer who is admitted to practice law in another state may indicate this fact on a letterhead or card. DR 2-101(C)(1) [the forerunner of Rule 7.1 (b)(1)] permits the inclusion of 'dates of admission to any bar' in lawyer publicity. Even without this provision, there is nothing inherently false or misleading in truthfully identifying the jurisdictions in which a lawyer is licensed to practice law." No difference exists between the Rules and the Code on this point.

4. Rule 7.5(a) provides that lawyers and law firms may use websites, business cards, professional announcements and office signs, as well as letterhead and similar professional notices, provided that they "do not violate any statute or court rule and are in accordance with Rule 7.1." Rule 7.5(a) is substantially similar to DR 2-102(a) of the Code. The fundamental principle for all forms of attorney advertising and other communications with the public is that they may not be "false, deceptive or misleading." In our view, a letterhead accurately stating that a lawyer is a "Member of the Bars of [X State] and New York is not engaged in false, deceptive or misleading conduct.

5. Our sole caveat is that a lawyer listing admission in New York but lacking an office located in New York must explain to prospective and existing clients the limits that the absence of a New York

office imposes on the lawyer to engage in practice in New York. For example, Judiciary Law § 470 requires that a lawyer practicing in New York must have a physical office located here – that is, a brick-and-mortar workplace – and, in *Schoenefeld* v. *Schneiderman*, 821 F.3d 273 (2nd Cir. 2016), the Court of Appeals held that this requirement does not violate the U.S. Constitution. Hence, while a lawyer may list a New York admission on an out-of-state firm's letterhead (and other advertising), the lawyer who wishes to practice within our borders must fully comply with all legal and regulatory provisions governing practice within this State.

6. Nothing in this opinion is intended to address the ethics of the inquirer's proposed conduct under the rules governing lawyers in the other jurisdiction where the lawyer is admitted.

CONCLUSION:

7. A New York lawyer admitted in one or more other jurisdictions may properly list the lawyer's admission to the New York Bar on professional or law firm letterhead, even though the lawyer does not maintain a law office in New York, provided that the lawyer discloses to prospective and existing clients the limits placed on the lawyer's ability to practice in New York without an office here.

(09-19)

OPINION 1174 (10/15/2019)

TOPIC: Conflicts of interest; lawyer advocating as amicus for one side of litigation while other lawyers in same firm advocate as amicus for other side.

DIGEST: Attorneys at a law firm are not permitted to submit amicus briefs for both sides of a litigation when representing a client as amicus for one or the other side, but, in the absence of a represented client may do solely on a pro se basis.

RULES: 1.2(a); 1.7; 1.8; 1.9; 1.10(a); 1.7(b)(3); 1.7(a)(2),

FACTS:

1. The inquirer is an attorney at a law firm. The law firm circulated a proposal for attorneys to volunteer pro bono legal services supporting a particular position, and preparing an amicus brief advocating that position, for submission to the Supreme Court of the United States.

2. The response of the attorneys at the firm was mixed. Some associates favored one side of the issue before the Court, while others wished to take the opposing view. The law firm proposed creating two mutually exclusive teams to work on their respective positions, with each group submitting its own amicus brief.

QUESTION:

3. May attorneys from a single law firm submit amicus briefs on opposing sides of the same issue before the same court?

OPINION:

4. Even with amicus briefs, an attorney is generally not submitting them on his or her own behalf, but, either individually or as a firm, is doing legal work for a client, be it for compensation or pro bono.

5. Once an attorney enters into an attorney-client relationship, then all the elements of the N.Y. Rules of Professional Conduct (the "Rules") applicable to such representations apply. These include Rule 1.2(a), which says that, subject to certain exceptions not apposite here, "a lawyer shall abide by a client's decisions concerning the objectives of representation." *See* Rule 1.2(a), Cmt. [1] ("[p]aragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation"). If, for instance, a client wants attorneys at the law firm to advocate a particular position as an amicus, in support of either an appellant or an appellee, debate within the firm may be had about how most effectively to do so. By way of example, the division into two mutually exclusive teams to work on opposing sides may be a useful tool to hone a brief, test the strongest arguments for each position, and assess the weaknesses of relying on certain precedents or claims.

6. Equally applicable once a law firm establishes an attorney-client relationship are the Rules governing conflicts set out in Rules 1.7, 1.8, and 1.9, each of which is imputed to all lawyers in the firm under the standards set forth in Rule 1.10(a). N.Y. State 968 ¶ 18 (2013). Opinion 968 addressed a situation in which government attorneys inquired regarding their ability to defend their agency in

proceedings challenging agency actions to which they themselves were subject, including challenges brought by their own fellow government attorneys. There, we concluded that the attorneys were permitted to do so, if consent were obtained, and if certain qualifications were met, including the defending attorneys not themselves being involved in challenging the agency actions.

7. The Opinion then continued: "There is one form of nonconsentable conflict that presents a different problem, and that is the situation presented by Rule 1.7(b)(3), which bars a lawyer from representing clients on both sides of the same litigation or other proceeding before a tribunal. Lawyer A cannot appear on both sides of a litigation, but can Lawyer A appear adverse to Lawyer B from the same law firm in that litigation? We think that such a situation would be governed by different considerations because litigation involves the interests not just of the affected client or clients but also of the public and the judiciary. For example, where a matter is in litigation, the appearance of lawyers from the same firm may deprive the judiciary and the public of the confidence that the adversary system, on which the development of the law depends, will function as it should." *Id.* ¶ 28. In Opinion 968, we did not address "that question with finality here, as the issue is not presented." *Id*. We explained in a footnote: "Rule 1.7(b)(3) by its terms only applies when lawyers are *representing clients* on both sides of the case. Here, the [opposing] lawyer . . . would be proceeding *pro se*, and would not be representing a client (other than him- or herself)." *Id.* fn. 11 (emphasis in original).

8. Here, we believe it necessary to resolve the issue left open in Opinion 968. Two scenarios occur to us as possibilities confronting the inquirer. One is that the inquirer's firm has one or more clients asking the firm to submit amicus briefs on opposing sides of the issue before the Court. We believe that the firm may not do so, for such a circumstance falls within the prohibition of Rule 1.7(b)(3). This is so whether the clients are outside clients or lawyers within the firm. A law firm may form an attorney-client relationship with one or more of its own lawyers. New York State 789 (2005). If the law firm forms such a relationship with one of its own attorneys for purposes of submitting an amicus brief, the same prohibition applies as if the client were an "outside" client.

9. The second scenario is the one to which the footnote in Opinion 968 referred, namely, that lawyers in a firm propose to appear *pro se*. "[L]awyers are as free as anyone else to pursue legal remedies . . . and they are not obligated . . . to retain other counsel in such pursuits. [Each] lawyer clearly may serve as [the lawyer's] own client." New York State 527 (1980). It is not for us to assess whether the firm's governing documents allow for such freelancing, but we see no ethical reason why attorneys may not appear in their own name (rather than in the name of the firm) as *pro se* amici on opposing sides of a question before the Court.

10. We suggest that the law firm consider whether the Supreme Court would expect attorneys appearing *pro se* on opposite sides of an issue to disclose that they are affiliated with the same firm, or at least disclose their law firm affiliation, for the affiliation could affect the Court's evaluation of the competing briefs.

CONCLUSION:

11. Attorneys at the law firm representing clients may not submit amicus briefs on opposing sides of an issue before the Supreme Court of the United States, but attorneys at the firm may in their individual capacities submit amicus briefs for opposite sides of an issue *pro se*.
(13-19)

OPINION 1175 (10/29/2019)

TOPIC: Withdrawal of guilty plea; allocation of authority between lawyer and client.

DIGEST: Once a lawyer has explained the material risks and chances of success of the withdrawal of a previously entered guilty plea to a criminal defendant, the lawyer must follow the decision of the client to withdraw the plea.

RULES: 1.2(a), 1.4, 3.1

FACTS:

1. The inquiring lawyer has been assigned as counsel to a criminal defendant who, while represented by previous counsel, had entered a guilty plea to a criminal charge with an understanding of the sentence to be imposed. On the date set for that sentencing, defendant did not appear and later was re-arrested on two misdemeanor charges. The sentencing was adjourned.

2. On the new date set for sentencing, the defendant discharged his prior attorney and advised the court that he wished to withdraw his prior guilty plea. On that same date, the inquirer was appointed by the court and the case adjourned to allow the inquirer to bring a motion to withdraw defendant's prior guilty plea.

3. The inquirer has obtained a transcript of the plea proceedings and interviewed prior counsel and finds nothing which would support the contention that the plea was not knowingly and voluntarily made. The inquirer is likewise convinced that the evidence would result in a guilty verdict if the matter were taken to trial and that if he withdraws his prior guilty plea he will not be afforded a drug treatment program that was in the previous plea agreement.

QUESTION:

4. Is a lawyer required to follow the client's decision to withdraw a guilty plea when the consequences of such withdrawal will result in a more severe sentencing of the defendant and the motion has little chance of success?

DISCUSSION:

5. Our jurisdiction is limited to interpreting the N.Y. Rules of Professional Conduct (the "Rules"). It is our understanding that New York's Criminal Procedure Law section 220.60 (c) permits the withdrawal of a guilty plea at any time before sentencing upon the discretion of the court. Nothing in this opinion addresses the legal sufficiency of any argument under this section nor of the probability of success of a motion addressed to the court's discretion. Nor do we opine on constitutional issues that may arise under the Sixth Amendment concerning a client's rights in entering pleas. *See, e.g., Missouri* v. *Frye*, 566 U.S. 139 (2012); *Lafler* v. *Cooper*, 566 U.S. 156 (2012).

6. Rule 1.2(a) addresses the allocation of responsibility between a lawyer and client regarding pleas in criminal matters and states: "Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives and as required by Rule 1.4, shall consult with the client as

to the means by which they are to be pursued." Comment [1] to Rule 1.2 reinforces the point: "Paragraph (a) confers upon the client the ultimate authority to determine the purpose to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations."

7. Rule 1.2(a) makes clear that, "in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to," among other things, "the plea to be entered." The lawyer's ethical obligation is to consult with the client on the means of achieving the client's objectives and "to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4(b). Here, this includes the lawyer's assessment of the probability of success on any motion as well as any adverse consequences flowing from its denial. Having explained to the client the advantages and disadvantages of a particular objective the client desires, the lawyer has satisfied the lawyer's obligations under Rules 1.2 and 1.4. We detect no difference in Rule 1.2(a) between a decision to enter a particular plea and a decision later to seek to withdraw it. *See generally* Criminal Procedure Law §§ 220 *et seq.*

8. This Committee has extended the application of Rule 1.2(a) to a client's decision to enter a drug treatment program as part of the resolution of a criminal proceeding. In N.Y. State 1106 ¶ 20 (2016), we said: "Once the client makes his or her choice, whether it be to attend a treatment program or to go through the traditional criminal justice system, the lawyer must abide by that decision."

9. We note that a lawyer is always bound by Rule 3.1(a), which says that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." The Rule continues: "A lawyer for a defendant in a criminal proceeding or for a respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established."

CONCLUSION:

10. Once a lawyer has explained the material risks and chances of success of the withdrawal of a previously entered guilty plea to a criminal defendant, the lawyer must follow the decision of the client to withdraw the plea.

(10-19)

OPINION 1176 (10/29/2019)

TOPIC: Escrow Account

DIGEST: A lawyer may make nominal deposits of the lawyer's own funds into a trust or escrow account to avoid the account being closed for inactivity or failure to maintain minimum balance.

RULES: 1.15(a), (b)(1), (b)(3)

FACTS:

1. The inquirer's trust or escrow account has had a zero balance of funds for a period of time. The inquirer apprehends that the bank may close the account for inactivity or failure to maintain the requisite minimum balance. The inquirer is concerned that, if the inquirer deposits lawyer funds into the account to avoid bank sanction and thereafter receives client funds for deposit into the trust or escrow account, the inquirer could be impermissibly commingling funds.

QUESTION:

2. May a lawyer make a nominal deposit of the lawyer's own funds to avoid having the lawyer's trust or escrow account closed for inactivity or failure to maintain a minimum balance?

OPINION:

3. The N.Y. Rules of Professional Responsibility (the "Rules") regulate lawyer trust or escrow accounts in Rule 1.15. For current purposes, three provisions of Rule 1.15 govern the conclusion of the inquiry. First, a lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution . . . in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. . . . Such funds shall be maintained, . . . in a special account or accounts, separate from any business or personal accounts of the lawyer . . ." Rule 1.15(b)(1). Second, "A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law . . . must not . . . commingle such funds or property with his or her own." Rule 1.15(a). *See* N.Y. State 1127 ¶ 3 (2017); N.Y. City 2014-3 (2014). As Comment [1] to Rule 1.15 provides, "All property that is the property of clients or third persons . . . must be kept separate from the lawyer's business and personal property . . ."

4. Third, and most pertinent to this inquiry, is Rule 1.15(b)(3), which says that funds "reasonably sufficient to maintain the account or to pay account charges may be deposited therein." This is simple common sense – that a lawyer may provide a cushion from the lawyer's own funds to maintain the account and cover account charges. This is no license to pad the account with the lawyer's money: the words "reasonably sufficient" mean than that a lawyer may pay into the account such amounts as may be reasonably adequate to meet whatever bank requirements exist to sustain the account, pay the bank's charges, and meet the minimal thresholds that the bank imposes for the account to endure. Amounts beyond those "reasonably sufficient" to maintain the account may cross the line of commingling. In light of the variety of possible banking requirements to maintain an account, no bright lines of dollars may be set to establish the amount constituting the scope of the what constitutes "reason-

ably sufficient," but we are confident that a lawyer who uses the lawyer's own funds to sustain the account within the bank's guidelines faces no fear of crossing the line into commingling.

CONCLUSION:

5. A lawyer may make nominal deposits in the lawyer's trust or escrow account to maintain the account or to pay account charges.

(26-19)

OPINION 1177 (11/08/2019)

TOPIC: Counseling clients in illegal conduct; medical marijuana law.

DIGEST: The Committee reaffirms its conclusion in N.Y. State 1024 (2014) that a lawyer may ethically assist a client in conduct designed to comply with New York's medical marijuana law.

RULES: 1.2(d).

FACTS:

1. In July 2014, New York, following the lead of 22 other states, adopted the Compassionate Care Act ("CCA"), a law permitting and regulating the cultivation, distribution, prescription, and use of marijuana for medical purposes. The CCA enables specially approved organizations such as hospitals and community health centers to dispense medical marijuana to patients who have been certified by a health care provider and who have registered with the state Department of Health, and provides further for the regulation and registration of organizations to manufacture and deliver marijuana for authorized medical uses.

2. Although federal criminal law forbids the possession, distribution, sale, or use of marijuana, the United States Department of Justice ("DOJ") does not enforce the law against individuals and entities engaged in the cultivation, transportation, delivery, prescription, or use of medical marijuana in accordance with state regulatory law. In 2013, the DOJ issued a memorandum (the "Cole Memo") restricting federal enforcement of the federal marijuana prohibition when individuals and entities act in accordance with state regulation of medical marijuana.

3. On September 29, 2014, this Committee issued Opinion 1024, which concluded that, "in light of current federal enforcement policy, the N.Y. Rules of Professional Conduct (the "Rules") permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana." *Id.* ¶ 26. Opinion 1024 said, too, that "[i]f federal enforcement were to change materially, this Opinion might need to be reconsidered." *Id.* ¶ 25.

4. In December 2014, as part of a spending measure subject to periodic review, Congress enacted the Rohrabacher-Farr amendment (now known as the Rohrabacher-Blumenauer amendment, hereafter the "Rohrabacher Amendment"), which prohibits the DOJ from using any of the funds appropriated by Congress to prevent states with medical marijuana laws "from implementing their own State laws that authorize, the use, distribution, possession, or cultivation of medical marijuana." https://www.congress.gov/amendment/113th-congress/house-amendment/748/text. The Rohrabacher Amendment was the basis of the decision in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir 2016), which prohibited the Department of Justice from prosecuting defendants who complied with their respective states' medical marijuana laws. Since 2014, Congress has continuously renewed the Rohrabacher Amendment (by healthy bipartisan majorities) in subsequent spending measures. Although the Cole Memo was rescinded by former Attorney General Jeff Sessions on January 4, 2018, General Sessions' successor, William Barr, said during his confirmation hearing that he would not target state legal marijuana businesses, and would leave it to Congress to act.

QUESTION:

5. Does the Committee adhere to its conclusion in Opinion 1024 that lawyers may assist clients in complying with New York's medical marijuana law?

OPINION:

6. The Committee concludes that, notwithstanding the Attorney General's rescission of the Cole Memo, the guidance provided in Opinion 1024 remains sound because, in light of the Rohrabacher Amendment, federal law and enforcement practice continue to permit New York to implement its medical marijuana law.

7. After providing extensive factual and legal background, which we need not repeat here, Opinion 1024 focused on the application of Rule 1.2(d), which provides: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client." We observed that, as a general matter, "although a lawyer may not encourage a client to violate the law or assist a client in doing so, a lawyer may advise a client about the reach of the law," and that therefore "a lawyer may give advice about whether undertaking to manufacture, transport, sell, prescribe or use marijuana in accordance with the CCA's regulatory scheme would violate federal narcotics law." N.Y. State 1024 ¶ 21. We observed also that "Rule 1.2(d) forbids a lawyer from assisting a client in conduct only if the lawyer *knows* the conduct is illegal or fraudulent. If the lawyer believes that conduct is unlawful but there is some support for an argument that the conduct is legal, the lawyer may provide legal assistance under the Rules (but is not obligated to do so)." *Id.* ¶ 22 (emphasis in original). We then turned to "[t]he difficult question [that] arises if the lawyer *knows* that the client's proposed conduct, although consistent with state law, would violate valid and enforceable federal law." *Id.* ¶ 23 (emphasis in original).

8. On that question, we said that "[o]rdinarily, . . . while the lawyer could advise the client about the reach of the federal law and how to conform to the federal law, the lawyer could not properly encourage or assist the client in conduct that violates the federal law. That would ordinarily be true even if the federal law, although applicable to the client's proposed conduct, was not rigorously enforced and the lawyer anticipated that the law would not be enforced in the client's situation." *Id.* We reasoned, however, that "the situation is different where the state executive branch determines to implement the state legislation by authorizing and regulating medical marijuana, consistent with current, published federal executive-branch enforcement policy, and the federal government does not take effective measures to prevent the implementation of the state law. In that event, the question under Rule 1.2(d) is whether a lawyer may assist in conduct under the state medical marijuana law that the lawyer knows would violate federal narcotics law that is on the books but deliberately unenforced as a matter of federal executive discretion." *Id.*

9. In concluding that lawyers may assist clients in complying with New York's medical marijuana laws, we explained in part (*id.* ¶ 24):

> We do not believe that by adopting Rule 1.2(d), our state judiciary meant to declare a position on this debate or meant to preclude lawyers from counseling or assisting conduct that is legal under state law. Rule 1.2(d) was based on an ABA model and there is

> no indication that anyone – not the ABA, not the state bar, and not the state court itself – specifically considered whether lawyers may serve in their traditional role in this unusual legal situation. We assume for purposes of this Opinion that state courts will themselves serve in their traditional role: As issues of interpretation arise in litigation under the CCA, state courts will be available to issue interpretive rulings and take other judicial action that has the practical effect of assisting in the implementation of the CCA. Serving this role will not undermine state judicial integrity. Similarly, we do not believe that it derogates from public respect for the law and lawyers, or otherwise undermines the objectives of the professional conduct rules, for lawyers as "officers of the court" to serve in their traditional role as well, if they so choose. Obviously, lawyers may decline to give legal assistance regarding the CCA.

10. The DOJ's rescission of the Cole Memo does not meaningfully change federal law enforcement policy. If anything, the adoption, continued approval, and implementation of the Rohrabacher Amendment reinforces our earlier conclusion. Not only does the DOJ continue to permit states to implement their medical marijuana laws, but federal legislation now prohibits the DOJ from preventing states from doing so.

11. Accordingly, we reaffirm our earlier conclusion that the Rules permit lawyers to give legal assistance regarding the CCA that goes beyond a mere discussion of the legality of the client's proposed conduct. "Implicitly, the state law authorizes lawyers to provide traditional legal services to clients seeking to act in accordance with the state law. . . . Nothing in the history and tradition of the profession, in court opinions, or elsewhere, suggests that Rule 1.2(d) was intended to prevent lawyers in a situation like this from providing assistance that is necessary to implement state law and to effectuate current federal policy." *Id.* ¶ 25

CONCLUSION:

12. In light of current federal policy, the Rules permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law.

OPINION 1178 (12/13/2019)

Modifies NY State 678 (1996)

TOPIC: Lawyer as third-party neutral

DIGEST: A lawyer-mediator engaged in providing third-party neutral services is subject to Rule 2.4 but not the Rules that govern the representation of clients. As such, the lawyer-mediator is generally free to conduct the mediation in the way the lawyer thinks best, and to charge whatever fee may be appropriate, provided always that the lawyer fully discloses to the parties that the lawyer is acting as a disinterested mediator and not as counsel to any party, including the consequences of that difference. In the event of an agreement, the lawyer-mediator may memorialize the parties' understanding in a document and may appear as counsel for one party (but not both) in filing a divorce action if the other party gives informed consent confirmed in writing.

RULES: 1.5, 1.6, 1.7, 1.12, 2.4, 5.7

FACTS:

1. The inquiring lawyer intends to become a mediator and plans to focus on mediating cases involving parties who would otherwise seek a contested divorce. The lawyer-mediator anticipates that the parties may find that meeting individually to discuss the issues that need to be resolved in order to submit their agreement to the court would be beneficial given the antagonistic position between them.

2. The lawyer-mediator intends to charge an upfront, flat rate for the mediation services. The goal of those services is for the parties to resolve all of the issues necessary for the parties to be in a position to submit an uncontested divorce package. In the event that the parties discontinue using the lawyer as a mediator before all of the issues are resolved, the contract will provide that the parties will pay the lawyer-mediator an hourly rate for the services performed, charged against the upfront payment with any unused amount returned to the parties.

QUESTIONS:

3. In connection with setting up a mediation practice, the inquiring lawyer poses several questions:

> (a) May the lawyer-mediator meet with the parties individually to inform them of the various issues that need to be resolved in order to have a divorce granted in New York?
>
> (b) May the lawyer-mediator enter into a contract with the parties to provide mediation services? If so, may the contract provide for the payment of a flat rate by the parties in the event resolution is reached that results in an uncontested divorce packet but otherwise provides for the payment by the parties on an hourly basis if the parties discontinue the lawyer-mediator's services before all issues can be resolved?
>
> (c) What disclosures does the lawyer-mediator have to provide to parties to the mediation concerning her role as mediator?

(d) May the lawyer-mediator prepare documents, including a divorce action representing the parties, if the parties reach agreement?

OPINION:

4. Generally, lawyer-mediators are not engaged in the representation of a client and are not providing legal services to the parties to the mediation. *See* N.Y. State 999 ¶ 2 (2014); N.Y. State 1026 ¶ 6 (2014). Thus, the N.Y. Rules of Professional Conduct (the "Rules") that apply when a lawyer represents a client do not necessarily apply in the context of a lawyer providing mediation services, including Rule 1.5 concerning fees, Rule 1.6 concerning confidentiality, and Rule 1.7 concerning conflicts, although lawyer-mediators should be aware that certain rules will continue to apply even in the absence of an attorney-client relationship. *See* Rule 5.7, Cmt. [4].

5. Instead, Rule 2.4 is directed to lawyers acting as third-party neutrals and provides:

> (a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
>
> (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third party neutral and a lawyer's role as one who represents a client.

6. In terms of the required disclosure under Rule 2.4(b) stated above, we have noted that "[t]he precise content of the required conversation, and the exact information the lawyer-mediator will have to disclose to a party about the lawyer's role, may vary from one mediation to another." *See* N.Y. State 878 (2011). Comment [3] to Rule 2.4 provides some guidance:

> Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform the unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as a third-party neutral and as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of the disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute resolution process selected.

7. "Thus, unless all mediating parties are represented by counsel in the mediated matter, a lawyer-mediator must explain whatever needs to be explained to assure there is no confusion about the lawyer-mediator's role and the difference between a lawyer's role on behalf of a client and a mediator's role as a neutral." *See* N.Y. State 878 (2011).

8. There may also be times when it is not possible for the lawyer-mediator to provide an effective explanation regarding the difference between the role as a lawyer-mediator compared to a lawyer's role when representing a client. As we noted in N.Y. State 736 (2001), matrimonial mediation may be undertaken in many circumstances, but sometimes "the complex and conflicting interests involved in a particular matrimonial dispute, the difficult legal issues involved, the subtle legal ramifications of particular resolutions, and the inequality in bargaining power resulting from differences in personalities or sophistication of the parties make it virtually impossible to achieve a result free from later recriminations or bias or malpractice, unless both parties are represented by separate counsel. In the latter circumstances, informing the parties that the lawyer 'represents' neither and obtaining their consent, even after a full explanation of the risks, may not be meaningful; the distinction between representing both parties and not representing either, in such circumstances, may be illusory."

9. In addition, even though the confidentiality provisions of Rule 1.6 would not apply, a lawyer-mediator may be governed by other confidentiality obligations found in substantive laws (such as statutes or court rules) or private sources (such as ethics codes promulgated by mediation groups). *See* Rule 2.4, Cmt. [2] ("the lawyer may be subject to court rules or other law that applies either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics"); Rule 1.12, Cmt. [3] (lawyers who serve as third-party neutrals "typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals"); N.Y. State 1026 ¶ 7 (2014).

10. Accordingly, as long as the lawyer-mediator follows Rule 2.4 (and any other applicable rules or laws), the lawyer-mediator would be free to conduct the mediation in the way the lawyer-mediator thinks best, including meeting with the parties separately, and contracting for and structuring her fee however the lawyer-mediator would like.

11. We also note that the lawyer-mediator may assist the parties with memorializing in writing the terms to which they agree during the mediation. Such an *aide memoire* or Memorandum of Understanding is a common product of the mediation process.

12. Beyond this, however, that lawyer-mediator may not cross the line between acting as a neutral arbiter and acting as counsel to the parties. N.Y. State 1026 ¶ 10 (the lawyer performs legal services when the lawyer drafts and files divorce papers in court on behalf of the parties). In that event, all of the mediation services would then be covered by the Rules as the non-legal mediation services would not be distinct from the legal services. *See* Rule 5.7. Nevertheless, Rule 1.12(b) expressly permits the lawyer-mediator, at the conclusion of the mediation, in the event of an agreement between the parties, to represent one of the parties in filing a divorce action in court, provided the other party gives informed consent, confirmed in writing. At that point, the erstwhile mediator owes all the duties accompanying the attorney-client relationship under the Rules to the represented party. Rule 1.7(b)(3) forbids a lawyer from representing adverse parties in a proceeding, even with informed consent, and so the lawyer-mediator may not represent both parties in the filing of a divorce action.

13. In so concluding, we expressly supersede N.Y. State 678 (1996) insofar as that opinion says that the provision of mediation services by lawyers constitutes the practice of law. That opinion was issued before adoption of Rule 2.4, which specifically governs a lawyer's provision of neutral services and which had no equivalent in the predecessor N.Y. Code of Professional Responsibility. We have earlier so hinted: Following adoption of the Rules, we noted the possibility that our conclusion under the Rules might change on this issue. In N.Y. State 979 (2013), we said that there were conflicting opinions concerning whether the provision of mediation services was the practice of law and that "[t]he case that such services are not the practice of law was arguably bolstered by New York's adoption of the Rule specifically governing a lawyer's service as a mediator." We now make explicit that Rule 2.4 ousts our conclusion in N.Y. State 678 that the provision of mediation services invariably constitutes the practice of law. Only when a lawyer-mediator engages in services beyond providing neutral services, such as filing papers in court, does the lawyer-mediator cross the line into providing legal services.

CONCLUSION:

14. A lawyer-mediator engaged in providing third-party neutral services is subject to Rule 2.4 but not the Rules that govern the representation of clients. As such, the lawyer-mediator is generally free to conduct the mediation in the way the lawyer-mediator thinks best and to charge whatever fee the lawyer-mediator thinks appropriate and must provide disclosure to the parties concerning the lawyer-mediator's role as a mediator compared to that of a lawyer representing a client. If, however, the lawyer-mediator engages in an activity that constitutes a legal service, that legal service would not be distinct from the non-legal mediation services and the Rules would then apply to both the legal and non-legal services provided by the lawyer-mediator. At the conclusion of the mediation, the lawyer may represent one (but not both) of the parties in filing a divorce action, provided the other party gives informed consent, confirmed in writing.

(08-19)

2020

OPINION 1179 (01/17/2020)

TOPIC: Conducting law practice under a trade name

DIGEST: A New York attorney may not practice in New York under a trade name in New York, even when the attorney's office is a branch of an out-of-state law firm that is permitted to practice under the trade name in its home state.

RULES: Rule 7.5(b)

FACTS:

1. The inquirer is admitted to practice in New York and wishes to open a New York office for a law firm the main office of which is in California. In California, the firm practices under a trade name, as permitted by the ethics rules in California, which, according to the inquirer, has allowed such trade names since 1979. The inquirer acknowledges that the New York Rules of Professional Conduct (the "Rules") make no such allowance, but asserts that applying the Rules to prevent use of the California trade name in New York deprives the inquirer's firm of the good will embedded in the California trade name – a well-established name, we are told – and thereby frustrates the inquirer's ability to exploit the benefits associated with the name in connection with the New York office.

QUESTIONS:

2. May an out-of-state law firm that is permitted to practice law using a trade name in its home state practice law in New York using its trade name?

3. If the inquirer may not practice in New York under the California trade name, may the California firm establish a New York presence with lawyers who are not admitted in New York?

OPINION:

4. This inquiry asks whether New York's prohibition on lawyers engaged in the private practice of law using trade names remains in effect, even though the ethical rules of other states permit trade names and the cross-jurisdictional practice of law is becoming more common. The answer is yes. Rule 7.5(b) states in part:

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

5. No ambiguity clouds this Rule. "'The prohibition against trade names is broad, permitting little beyond the names of lawyers presently or previously associated with a law firm.'" N.Y. State 1168 ¶ 12 (2019) (quoting N.Y. State 869 (2011)). "[U]sing a name that is not the legal name of one or more partners or former partners in the law firm constitutes use of a trade name." N.Y. State 740 (2001). Thus, we have previously concluded that a lawyer may not use only the lawyer's first name as a firm name, N.Y. State 1152 (2018), or the phrase, "The Business Dispute Clinic," N.Y. State 869 (2011), or the area of law in which the lawyer practices, N.Y. State 740 (2001).

6. As explained in N.Y. State 861 (2011), the New York office of a law firm "cannot operate under a name that does not include the name of a current or deceased partner." In N.Y. State 1023 (2014) the committee said that an attorney licensed only in New York could not be of counsel to an out-of-state firm practicing under a trade name in a state that permits the use of trade names. The opinion notes that a lawyer admitted only in New York could also not become an associate or partner of an out-of-state law firm that practices under a trade name. Thus, we have repeatedly, and we believe correctly, concluded that no circumstances exist in which a New York lawyer may ethically practice under a trade name in New York, even though the use of a trade name is permitted in another state in which the firm has offices.

7. This does not mean that the inquirer may not use the California law firm's names in other ways, that is, other than as the name of the law firm in New York. Thus, nothing in the Rules prevents the inquirer from saying, for example, that the inquirer's firm practices in California under firm name XYZ or otherwise truthfully stating in advertising and other branding activities the inquirer's New York firm is elsewhere known as XYZ. Hence the prohibition on trade names in New York does not entirely deprive the inquirer of the benefits of whatever good will may reside in the name of the California firm.

8. The inquirer's second question – whether the California firm populated solely by lawyers not admitted in New York may establish a New York presence– is beyond our jurisdiction to answer. This question raises issues of unlawful practice under New York State's Judiciary Law § 478, about which the committee does not opine, for they present pure questions of law, not ethics.

CONCLUSION:

9. A New York lawyer may not practice law under a trade name in New York, even though the use of a trade name is permitted in another state in which the firm has offices.

(21-19)

OPINION 1180 (01/17/2020)

TOPIC: Professional letterheads and emails

DIGEST: An attorney may communicate with third parties on a client's behalf using a client's email address with a signature line that includes the client's logo and a title indicating that the inquirer is "Corporate Counsel and Chief Compliance Officer" for the client, provided that the client devotes a substantial amount of professional time to the client's representation and provided that such position and title representations are truthful.

RULES: 7.1(a); 7.5(a)(4)

FACTS:

1. The inquirer, a solo practitioner, serves as outside counsel to a client company. The inquirer devotes a substantial amount of professional time to the client's affairs. The client has requested, when communicating on the client's behalf to third parties, that the inquirer use a client email address with a signature line that includes the client's logo and a title indicating that the inquirer is "Corporate Counsel and Chief Compliance Officer" for the client, a statement that, we are told, is factually correct.

QUESTION:

2. May an attorney communicate with third parties on a client's behalf using a client's email address with the client's logo including a signature line indicating the attorney's title and position with the client?

OPINION:

3. Rule 7.5(a) of the New York Rules of Professional Conduct ("Rules") authorizes attorneys to use "the internet, web sites, professional announcement cards, office signs, letterhead or similar professional devices" provided two conditions are satisfied:

> a. Rule 7.5(a) requires that such communications not violate any statute or court rule and must be in accordance with Rule 7.1, which prohibits the use of statements that are false, deceptive or misleading (¶ (a)(1)) or which violate a Rule (¶ (a)(2)); and
>
> b. Such communications must conform to certain specific restrictions that circumscribe the information that may be provided in professional cards (¶ 7.5(a)(1), notices (¶7.5 (a)(2), signs (¶ 7.5(a)(3) and letterhead (¶ 7.5(a)(4).

4. Rule 7.5 (a)(4) also imposes an additional condition with respect to the use of "General Counsel" or "similar professional reference" on client stationery:

> A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of the client.

5. Here, it is ethically permissible for the inquirer, when communicating on behalf of the client, to use the client email's address, as proposed, because the attorney does in fact devote a substantial amount of professional time in the representation of the client, and does in fact serve the client in the signified positions.

6. Our analysis warrants two additional comments. First, we see no functional difference between the application of the safe harbor of Rule 7.5(a)(4) on an attorney's use of client letterhead to an attorney's use of a company email address and template that includes the company logo. Second, although we recognize the possibility that an attorney's communication on such a template with a signature block indicating that the attorney is the client's "Corporate Counsel and Chief Compliance Officer" might lead a third-party recipient to assume that the attorney is a payroll employee of the client, and not outside counsel, that does not, in our opinion, raise any concerns regarding false, deceptive or misleading statements under Rule 7.1. Whether an attorney serves as in-house counsel or outside counsel, the fiduciary obligation of the lawyer to the client and the Rules of Professional Conduct that govern that relationship are the same. Therefore, any misimpression formed would be irrelevant, having no more significance than if a third party, for example, mistook a lawyer's gender based on unfamiliarity with a foreign name.

CONCLUSION:

7. An attorney may communicate with third parties on a client's behalf using a client's email address with a signature line that includes the client's logo and a title indicating that the attorney is "Corporate Counsel and Chief Compliance Officer" for the client, provided that the client devotes a substantial amount of professional time to the client's representation and provided that such position and title representations are truthful.

(23-19)

OPINION 1181 (01/17/2020)

TOPIC: Charging interest on expenses

DIGEST: A New York contingency-fee attorney may impose an interest charge on unpaid disbursements if a written agreement signed by the client fully discloses the terms on which interest may be charged and the terms are reasonable.

FACTS:

1. The inquirer is a New York lawyer whose practice includes matters done on a contingency fee basis. We are told that recent changes in the law concerning contingency fee cases have sowed some confusion about our prior opinions on a lawyer's ability to charge interest on disbursements. This confusion, we are told, stems from the laws allowing a lawyer to fund disbursements rather than seeking immediate reimbursement from the client.

QUESTIONS:

2. The inquirer asks the following:

(a) May a lawyer impose a flat interest charge on lawyer-funded disbursements?

(b) Must the lawyer advise the client of each individual expense and be offered the chance to pay the expense as incurred?

(c) May the lawyer use the statutory interest rate of 9% set forth in CPLR § 5004 as guidance for a reasonable interest rate or may the lawyer charge a higher rate based either on the lawyer's cost of money from the lawyer's bank or other factors?

OPINION:

3. Assorted laws and court rules govern a lawyer's obligations in contingency fee cases. We address questions arising solely under the N.Y. Rules of Professional Conduct (the "Rules"), so nothing in this opinion should be construed as overriding or interpreting the laws and regulations that govern the practices of contingency fees as set forth by the legislature and the courts, including those statutes and rules that mandate the disclosures a lawyer must provide a client. *See, e.g.,* 22 NYCRR 806.27(c)(2) (3d Dept.) (in certain actions, "[I]n the event that the attorney agrees to pay costs and expenses of the action pursuant to Judiciary Law section 488(2)(d), on the gross sum recovered before deducting expenses and disbursements, [then] [t]he retainer agreement or letter of engagement shall describe these alternative methods, explain the financial consequences of each, and clearly indicate the client's selection"); *see also* 22 NYCRR 603.25 (e)(3)(ii) [Schedule B] [1st Dept.]; 691.20 (e)(3)(ii) [Schedule B] [2d Dept.]) Here, our focus is only on the lawyer's ethical responsibilities.

4. Whether a lawyer may charge interest on disbursements in a contingency fee case is not a new issue for us. In N. Y. State 729 (2000), which was issued under a substantially identical rule in the prior Code of Professional Responsibility (the "Code"), we said that a lawyer may do so provided certain conditions are met. These conditions were: (a) that the client is clearly advised in writing that dis-

bursements not paid within an expressly stated time period would be subject to an interest charge; (b) that the client is billed for the disbursement promptly after the disbursement is incurred so that the client may pay the disbursement, if the client so chooses, before the client incurs an interest charge; (c) that the period of time between the bill and the imposition of the interest charge is reasonable; (d) that the disbursement is itself appropriate (*see, e.g.,* ABA 93-379 (1993) (citing appropriate disbursements); (e) that the interest rate is reasonable; and (f) that the client gives informed consent in writing to the arrangement before the arrangement goes into effect. We believe that the conditions set forth in Opinion 729 are equally applicable under the Rules, and we thus continue to endorse them as appropriate conditions when a lawyer seeks to charge interest on disbursements in a contingency fee case, whether the interest rate is flat or fluctuating.

5. Our adherence to Opinion 729 answers the inquirer's first two questions, namely, that a lawyer may charge interest on disbursements but must offer the client a reasonable chance to pay the expense before the interest charge is incurred. This leaves only the inquirer's question about whether the statutory provision for 9% interest on pre- and post-judgments may (or must) serve as a yardstick for the amount of interest a lawyer may charge for unpaid disbursements.

6. In Opinion 729, we declined to opine on the amount of interest a lawyer may charge other than to conclude that the amount must be reasonable. We adhere to that view. Nothing in the Rules dictates a particular amount as reasonable, and this Committee interprets the Rules, it does not make them. That said, we see no obvious relationship between, on the one hand, a legislative policy on the interest that must be paid on judgments (that is, 9%) and, on the other, the ethical reasonableness of an interest charge on unpaid disbursements in a contingency case. It is possible that one may bear on the other, but the connection is not ineluctable. We believe, instead, that the reasonableness of an interest rate varies with the facts and circumstances of a particular lawyer-client relationship. It follows that, in our view, a lawyer is not required to use the statutory interest rate as an interest charge, and that whether a lawyer may do so depends on the facts and circumstances.

7. For example, we have previously opined that a lawyer may pass on to a client the interest rate (but no more) that the lawyer actually incurs if the lawyer borrows from a bank to fund the disbursements. N.Y. State 754 (2002); *see* N.Y.C. 1997-1 (1997). In our Opinions 729 and 754, we said, too, that whether the lawyer uses the lawyer's own funds to finance the disbursements rather than borrowing those funds should not matter; in each instance, there is an economic cost to the lawyer which the lawyer may ethically pass on to the client provided the conditions set forth above are satisfied. The factors comprising the lawyer's cost of money in the absence of bank financing are impossible to identify to any useful effect, except to note that laws exist (such as usury laws) that regulate these matters and hence apply.

CONCLUSION:

8. A New York contingency fee attorney may impose an interest charge on unpaid disbursements as long as (a) the agreement describes the alternative methods of payment of such disbursements, explains the financial consequences of each, and clearly indicates the client's selection, (b) the client is clearly advised, indicating that an interest charge will be imposed on disbursements that are not paid within a stated period of time, and the client consents to that arrangement before it goes into effect, (c) the client is billed for the disbursements promptly after they have been incurred so the cli-

ent may decide whether to pay the disbursements or incur the interest charge, (d) the period of time between the bill and the imposition of the interest charge is reasonable, (e) the disbursement itself is appropriate, and (f) the interest rate is reasonable. The reasonableness of the interest rate depends on the facts and circumstances of the case.

(12-19)

OPINION 1182 (01/23/2020)

TOPIC: Disposition of Wills

DIGEST: A lawyer may not dispose of wills even when the testators' locations and/or circumstances are unknown. A lawyer must safeguard the wills indefinitely unless the law provides an alternative.

RULES: 1.15(c)

FACTS:

1. The inquiring lawyer is in possession of over five hundred wills where the testators' whereabouts are unknown to the inquirer and/or cannot be discovered with due diligence. The inquirer (or the inquirer's firm) prepared some of these wills, but most came to be in the inquirer's possession by reason of the inquirer's succession to the practices of other lawyers (in some instances, lawyers who had themselves acquired practices and, with them, wills). Among these wills are some prepared more than seventy years ago.

2. The inquirer has conducted a due diligence search of office records, the internet, and the Surrogate's Court in the county where the inquirer's office is located in an attempt to find information about the testators, executors, or beneficiaries. To date, these efforts have been to no avail and we accept the inquirer's assertion that the prospect of discovering the information is unpromising. The inquirer would like to dispose of the wills for which identifying information is lacking and unlikely to emerge.

QUESTION:

3. May an attorney dispose of Wills, when after due diligence and significant passage of time the attorney is unable to learn the whereabouts or other circumstances of the testators?

OPINION:

4. Rule 1.15(c)(1) of the New York Rules of Professional Conduct (the "Rules") provides that a lawyer shall "promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest." Rule 1.15(c)(2) - (4) requires the lawyer to preserve such property, keep complete records and render appropriate accounts, and to promptly pay or deliver the property as requested by the client or third person. A will is a piece of property.

5. In N.Y. State 341 (1974), the Committee concluded that a lawyer who receives wills from an attorney who retires from the practice of law "holds them only as a custodian and that the firm was required to notify the lawyer's clients of his retirement." We have indicated that a lawyer who comes into possession of a will by acquiring the practice of a retiring lawyer is required to take reasonable steps to locate and notify third persons, such as the testator, with an interest in the will. N.Y. State 1035 (2014); *see* N.Y. State 1133 ¶ 9 (2017) (a lawyer "must maintain the files unless and until a client retrieves them or gives notice to the affected clients of some other disposition").

6. We have not previously resolved the question presented here – that is, to outline a lawyer's duties in the event that the lawyer is unable to locate the testator or another person with an interest in the will despite a lawyer's reasonable efforts to do so. The Rules do not explicitly answer that question.

7. In 1999, the New York City Bar Association's Ethics Committee did address the issue under the N.Y. Code of Professional Responsibility (the "Code"), and in particular the Code's DR 9-102(c), the language of which was identical to Rule 1.15. In its Opinion 1999-05, the City Bar said that "as to those clients who cannot be located, the lawyer's obligation to retain the Wills in safekeeping continues indefinitely or in accordance with law." In so concluding, the City Bar relied on Massachusetts Bar Association Opinion 76-7, which concluded that "if the lawyer, cannot find the testator and does not wish to deposit the will with the appropriate court, [the lawyer] remains obligated to use reasonable care to keep it secure."

8. We agree with these opinions. When, as here, an attorney is the custodian of wills – whether by reason of the attorney's own practice or by succession to the practice of other lawyers through acquisition or otherwise – and cannot after due diligence locate a testator, the attorney must maintain the wills indefinitely or act as the law may allow. Our jurisdiction stops at the corners of the Rules, so we have no charter to give legal advice, but we have opined that "[i]n general, when a lawyer is uncertain about what to do with property that he or she holds for safekeeping, the lawyer may seek judicial guidance" N.Y. State 775 (2004). Otherwise put, a lawyer may always seek court permission to dispose of property in accordance with law.

9. We note that Section 2507 of the Surrogate's Court Procedure Act provides that the court "of any county upon being paid the fees allowed therefor by law shall receive and deposit in the court any will of a domiciliary of the county which any person shall deliver to it for that purpose and shall give a written receipt therefor to the person depositing it." The Law Practice Management Committee of this Association, in the second edition of its *Planning Ahead Guide*, explains (at App. 2C ¶ 12) that "[o]riginal wills and other original documents must be returned to clients and may not be destroyed or otherwise disposed of. In the case of original wills, if you are unable to locate the clients after a diligent search, you may file such wills with the Surrogate's Court (be aware of filing fees) or deposit them with an appropriate depository (e.g., the appropriate county bar association) and notify the clients in writing, addressed to their last known address"); *see also id.* App. 17 ("If a lawyer or law firm has retained original wills, they must be preserved or returned to the testators for safekeeping. Lawyers who retain original wills should make arrangements for someone else to safeguard them after they retire or cease practicing . . . Consider filing the wills in the local Surrogate's court . . . Some County Bar associations offer will registries which may be useful. Another law office may be willing to retain the wills of a deceased or retired attorney").

CONCLUSION:

10. A lawyer may not dispose of Wills, whose testators' locations and/or circumstances are unknown. The Wills constitute property, and the lawyer must safeguard the Wills indefinitely unless the law affords the lawyer an avenue to file or otherwise dispose of the wills.

(20-19)

OPINION 1183 (03/10/2020)

TOPIC: Designated counsel in financing transactions; payment of fees by a third party; exercise of independent judgment; conflicts of interest

DIGEST: A lawyer may accept appointments as designated counsel for underwriters, lenders or other funding sources involved in private equity or corporate financing transactions on the recommendation of the counter-party to the transaction, with the lawyer being paid out of the proceeds of the transaction, provided that no interference occurs with the lawyer's exercise of independent professional judgment on the clients' behalf, the lawyer preserves the confidentiality of client confidential information, and the lawyer obtains the clients' informed consent, confirmed in writing.

RULES: 1.0(j), 1.1, 1.2, 1.3, 1.4, 1.6, 1.7(a) & (b), 1.8(f), 4.2, 5.4(c)

FACTS:

1. The inquirer is a New York lawyer who represents underwriters, lenders and other financial institutions that participate in large private equity offerings and other corporate financing transactions. The fees for the lawyer and the lawyer's clients are paid out of the proceeds of the transactions. At risk of oversimplification, but for ease of reference, we refer to the lawyer's clients as the "funders" and the counterparties as the "recipients."

2. We are told that, in a growing number of these financing transactions, it is not uncommon for the recipients (or their counsel) to maintain lists of designated counsel to act on behalf of the funders, the use of which counsel is a condition precedent to the recipients' willingness to transact business with the funders. As we understand the circumstances, the recipients' designation of the funders' counsel is made independent of the selection of the funders and is made by the law firm representing the recipients. No provision is made for the funders' consent to counsel other than that implicit in the funders' agreement to participate in the transaction.

3. These financing transactions are not part of a series of offerings, but have different parties for each transaction. The inquirer has been offered the opportunity to have the inquirer's firm included on the list of designated counsel, which the inquirer acknowledges could result in fees comprising a material portion of the income of the firm's financial transactions practice.

4. Recently the inquirer has learned that the recipients have sent a so-called "terms list" to the funder clients with instructions to agree with the proposed terms, or propose counter terms, but to do so without consultation with the funders' designated counsel. According to the inquirer, no opportunity exists for the funders to use their designated counsel to negotiate the term sheet with the recipients. The role of the funders' designated counsel is thus to prepare the financing documents based on the terms negotiated by the funders (without benefit of counsel) and the recipients (with counsel).

5. We are asked to assume that, if the designated counsel fails to abide by the recipients' directives, then the prospect of future designations will disappear, with the attendant loss of income to the lawyer's firm.

QUESTION:

6. May a lawyer accept a designation of counsel to represent a client in a transaction when the counterparty in the transaction makes the designation, places restrictions on the lawyer's ability to exercise independent professional judgment on behalf of the lawyer's client, and the designated counsel is paid out of the proceeds of the transaction?

DISCUSSION:

7. The inquiry implicates several provisions of the N.Y. Rules of Professional Conduct (the "Rules"). These Rules regulate the lawyer's responsibilities in an attorney-client relationship when factors extraneous to that relationship may imperil the lawyer's fiduciary obligations to a client and the duties of loyalty and care that accompany those obligations. Broadly stated, the Rules forbid a lawyer to allow a stranger to the attorney-client relationship to inhibit the lawyer's faithful discharge of those obligations to a client, at least absent circumstances in which the client is able freely to provide informed consent to the intrusion without impairing the lawyer's ability to fulfill the lawyer's duties to the client.

8. One such provision is Rule 5.4(c), contained in the provision "Professional Independence of a Lawyer," which says that, unless the law otherwise provides, "a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client" that Rule 1.6 safeguards. Comment [2] associated with this Rule explains that the Rule "expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another." *See generally* N.Y. State 1081 ¶ 16 (2016); N.Y. State 957 ¶¶ 11-12 (2013).

9. This same Comment [2] directs attention to Rule 1.8(f), of special pertinence here, which says that a "lawyer shall not accept compensation for representing a client from one other than the client unless (1) the client gives informed consent; (2) there is no interference with the lawyer's independent professional judgment and (3) information relating to the representation of the client is protected as required by Rule 1.6." "Simply put, Rule 1.8(f) means that a lawyer owes a client the same duties owed to a client without regard to the source of the fees the lawyer is paid, with the added proviso that a client must give 'informed consent' to the arrangement." N.Y. State 1000 ¶ 5 (2014) (allowing a lawyer to be paid by an adverse party subject to Rule 1.8(f)). As Comment [11] to this Rule explains, and as our Opinion 1000 attests, "[t]hird-party payors frequently have interests that may differ from those of the client." But this fact does not unburden the lawyer of the duty to comply with obligations to a client, including, among others, the duties of competence set out in Rule 1.1, of diligence set out in Rule 1.3, of communication set out in Rule 1.4, of confidentiality set out in Rule 1.6, and of attention to conflicts of interest set out in Rule 1.7.

10. N.Y. State 818 (2007) is instructive in applying these principles to this inquiry. That opinion was issued under the N.Y. Code of Professional Responsibility (the "Code"), the precursor of the Rules, but the relevant provisions of the Code and the Rules are interchangeable for our purposes. There, the inquirer was designated counsel for an underwriter of a series of municipal security offerings by the same issuer. The lawyer was "selected for this work by the issuer," which paid the designated counsel's fees. In Opinion 818, we recognized that "there may be competing interests when

negotiating the underwriting agreement" and that disagreements could arise about what is 'material' for the purposes of disclosure in offering documents." *Id.* ¶ 5. We continued: "The Code explicitly requires that a lawyer whose fees will be paid by a third party obtain the consent of the client, after full disclosure of all relevant facts and circumstances, before accepting such compensation." *Id.* ¶ 8. Included in the disclosures are "any material facts or circumstances – beyond the selection of Designated Underwriters' Counsel by the issuer and what that normally entails – that might bear on the lawyer's ability to exercise independent professional judgment on behalf of the client (the underwriter) or otherwise interfere with the lawyer's ability to adequately represent the client." *Id.*

11. Although some facts in Opinion 818 vary from those here – for instance, here each transaction is unique and involves different financial instruments and participants – these variances do not affect the controlling principles. Among other things, the competing interests and the potential for disagreement over disclosure and material terms persist, and thereby engender the same concerns animating Opinion 818. There, as here, these concerns included that the designating counterparty might impose conditions on the lawyer's exercise of independent professional judgment and also that the prospect of future designations comprising a significant source of income to the lawyer could affect lawyer's exercise of that judgment. *Id.* Accordingly, there, we concluded: "A law firm selected to serve as Designated Underwriters' Counsel by a company must carefully consider its relationship with the company selecting it, and assess whether a disinterested lawyer would conclude that the law firm can competently represent the interests of the underwriters in light of its relationship with the company, and if so, ensure that the underwriters appropriately consent to its representation of them." *Id.* ¶ 14.

12. Apparent from Opinion 818 is that a conflicts analysis under Rule 1.7 may be an integral part of appraising the ethical limitations of accepting the role of counsel designated by an adverse party and paid by other than the counsel's own client. The Comments associated with each Rule refer to the other. Thus, Comment [12] under Rule 1.8(f) says that a conflict under Rule 1.7(a) may exist if "there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third party payer." Likewise, Comment [13] under Rule 1.7(a) says that a lawyer "may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. *See* Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's exercise of professional judgment on behalf of a client will be adversely affected by the lawyer's own interest in accommodating the person paying the lawyer's fee . . . then the lawyer must comply with the requirements of [Rule 1.7] (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation." Our prior opinions frequently refer to each Rule in describing a lawyer's duties when the source of the lawyer's fee is other than the client. *See, e.g.,* N.Y. State 1162 (2019); N.Y. State 1155 (2018); N.Y. State 1086 (2016); N.Y. State 1063 (2015).

13. The lessons for this inquiry from these Rules and the opinions construing them are readily apparent. A lawyer may not ethically accept a representation of a client if the lawyer accepts compensation or "anything of value" (including inclusion of an approved list of designated counsel), nor a recommendation to serve as counsel, if the lawyer thereby allows a stranger to the attorney-client relationship to interfere with, among other things, the lawyer's exercise of independent professional judgment on behalf of the client. To us, this means that a lawyer may not allow counsel for an adverse

party to dictate the limits the lawyer's role in service of a client's interests absent a client's informed consent confirmed in writing.

14. Other Rules compel this conclusion. Rule 1.2(a) provides that a "lawyer shall abide by a client's decisions concerning the objectives of representation," and by necessary implication not abide by the dictates of others. Rule 1.3 says that a lawyer "shall act with reasonable diligence and promptness in representing a client." Rule 1.4 imposes obligations on a lawyer promptly to inform the client of material developments in the matter and, among other things, reasonably to consult with the client about the means by which the client's objectives are to be achieved and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. To fulfill these responsibilities requires the unfettered ability to exercise independent professional judgment on the client's behalf unless the client otherwise agrees.

15. In addition, in these circumstances, if a "significant risk" exists that a disinterested lawyer would conclude that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's "own financial, business, property or other personal interests," then a conflict of interest is present. In light of the inquirer's acknowledgment that a failure to abide by the third party's directives could endanger a material portion of the lawyer's business and property interests, it is likely that a disinterested lawyer would find such a significant risk. Fortifying this conclusion is that Rule 1.8(f), which addresses specific conflicts that Rule 1.7 addresses more generally, identifies situations involving third-party payors as ones in which conflicts are inherently present. So, too, does Rule 5.4(c).

16. This leaves the question – applicable under Rule 1.7(a) and Rule 1.8(f) – whether the conflict is subject to informed consent. We think the answer is yes. Rule 1.0(j) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." The expectation of informed consent to the representation is found within Rule 1.8(f) and, save for the requirement of a writing, is no different from that required under Rule 1.7(a)(2). On our view, "informed consent" cannot be adequate without disclosing to the client the lawyer's business and personal interest in carrying out the representation.

17. This is nothing new. We have followed these principles in other areas, most notably in insurance defense when the existence of third party payment of fees did not alter the primary obligations owed to the client. *See* N.Y State 721 (1999). For instance, in N.Y. State 1154 (2018), we said that, if the "lawyer depends on an insurance carrier for a regular flow of business," then the inquirer needed to resolve whether this relationship created a conflict of interest. If the inquirer concluded that it did, then the inquirer had to determine whether the inquirer reasonably believed that the inquirer could nevertheless provide "competent and diligent" representation to the affected client. If yes, then the inquirer needed to obtain the client's informed consent confirmed in writing, including by disclosing "the inquirer's relationship with the insurer." *Id.* ¶ 16. Applying that statement to the present inquiry would suggest that the inquiring counsel disclose to the funder clients the nature of the inquirer's relationship with recipients and their counsel.

18. Similarly, in N.Y. State 942 (2012), another inquiry involving a third-party payor, the client would not be told material facts concerning the fee arrangement. There, we said: "Informed consent can occur only after the lawyer has adequately explained the risks and provided enough information for the client to make an informed decision." We concluded, "That standard may not be satisfied here, given the apparent limits to the planned disclosure to the client." So, too, here. The analysis of adequate consent is heavily fact-dependent, including clarification that the duty runs solely to the client, the sophistication of the client, the risks flowing from the representation, and the ability to exercise independent judgment on the client's behalf. Nevertheless, we are confident that the funder's willingness to participate in the transaction does not alone constitute "informed consent" within the meaning of the Rules.

19. Nothing in this opinion is intended to criticize or discourage use of designated counsel, a common practice that often provides efficiencies of great benefit to the clients and other parties. Nor is there anything wrong with principals negotiating the material terms of a transaction without benefit of counsel on each side and then enlisting lawyers to prepare the needed documents, subject to the requirements of Rule 4.2 regulating a lawyer's right to communicate with a person known to be represented by counsel. And a client is free to give informed consent, as defined above, to limit the scope of a representation if the limitation is reasonable in the circumstances. Rule 1.2(c) & Rule 1.2, Cmt. [6A]. But a lawyer is not free to undertake a representation of a client when a counter-party dictates the terms of the lawyer's exercise of independent professional judgment.

CONCLUSION:

20. A lawyer may accept appointments as designated counsel for underwriters, lenders or other funding sources involved in a private equity or corporate financing transaction on the recommendation of and paid for by the issuer, borrower or other lead entity from the transaction proceeds if the lawyer concludes the third party will not interfere with the lawyer's independent professional judgment and the lawyer obtains the informed consent confirmed in writing to the representation from the lawyer's client.

(33-19)

OPINION 1184 (03/10/2020)

TOPIC: Freelance or per diem attorney; trade names; maintenance of bank accounts and records conflicts

DIGEST: A New York attorney seeking to market services as a "freelance attorney" to provide contract or per diem services to other attorneys or law firms may use the name and domain name Surname Esquire. Depending on the nature of services provided, the lawyer need not comply with the strict rules on maintaining separate bank accounts but may need to comply with certain recordkeeping requirements. The lawyer is otherwise subject to the ethical rules, including the obligation to check for and avoid conflicts of interest.

RULES: 1.0(a), 1.1, 1.4(a)(3), 1.6, 1.7, 1.8, 1.9, 1.10(e), 1.15(d), 3.3(f)(1), 4.1, 4.2, 7.1, 7.4, 7.5

FACTS:

1. The inquirer is a New York attorney who seeks to perform work on a freelance or per diem basis for other attorneys and/or law firms without forming a law firm. The inquirer proposes to market services on a website with the domain name "[Surname] Esquire.com" directly solely to other lawyers. The proposed website would contain the inquirer's biographical information and would state that the inquirer is available for retention by other attorneys or law firms on a contract basis. The inquirer proposes also to say on a LinkedIn profile that the inquirer works as a "Freelance Attorney" at [Surname] Esquire. For our purposes, a "freelance" attorney is the same as a per diem or contract lawyer.

2. The inquirer asks whether such conduct is permissible under the N.Y. Rules of Professional Conduct (the "Rules"), whether the inquirer is required to maintain a separate bank account for the legal practice, and whether any other ethical restrictions or requirements exist on this type of freelance or per diem legal practice.

QUESTIONS:

3. May the inquirer market legal services to other lawyers or law firms using the name and website of "[Surname] Esquire" and describing the inquirer as a "Freelance Attorney"?

4. Is the inquirer required to maintain a separate bank account(s) for the proposed legal practice?

5. Are there any other ethical restrictions on the inquirer's proposed practice?

OPINION:

Firm Name & Advertising

6. Although the inquirer disclaims an intention to form a "law firm," Rule 1.0(h) defines a "law firm" to include a sole proprietorship. Thus, under the Rules, the proposed [Surname] Esquire is a law firm governed by the same ethical provisions as any other law firm.

7. Rule 7.5(b) provides, in relevant part, that "A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm." We have previously opined that, while the prohibition against using trade names is broad, the use of an attorney's surname in a firm name is permissible, and in fact customary. In N.Y. State 1152 ¶ 6 (2018), we noted:

> In our view, Rule 7.5(b) embeds an understanding that a law firm's name consists of the surnames of lawyers who either practice there or once did. We are unaware of any authority or precedent that breaks from this pattern, and it cannot be denied that, at the time the Rules and their predecessors were adopted, the universal practice in this state was to confine the names of law firms to the surnames of its current or former lawyers.

See also N.Y. State 1167 ¶ 6 (2019) (lawyer who practices under a full surname may use a law firm name that includes only the lawyer's middle name and last name, without including the lawyer's first name); N.Y. State 1003 ¶ 9 (2014) (sole practitioner may use initials with full surname as law firm name); N.Y. State 869 ¶ 11 (2011) (a sole practitioner may practice under the name "The [Surname] Law Firm"). These precedents make clear that the inquirer may practice in a law firm using solely the inquirer's surname as the name of a law firm and as a domain name.

8. Likewise, the use of the term "Esquire" or "Esq." by an attorney admitted to practice in New York does not constitute an improper trade name or a name that is misleading about the identity of the lawyer. In N.Y. State 1147 (2018) and N.Y. State 1089 (2016), we considered the use of the term "Esq." or "Esquire" by lawyers not admitted in New York and by retired lawyers, respectively. We cited with approval N.Y. City 1994-5, which states:

> The title "esquire" does not legally designate an individual as a lawyer because it is not conferred in this country as an academic degree or license. It has, however, been adopted by lawyers by convention as a form of designation. Thus, one using the title in the United States is identifying himself or herself as a lawyer.

9. Accordingly, we concluded that a lawyer not admitted in New York or a retired lawyer could use the title "Esq.," so long as he or she took care to avoid the risk of confusion by indicating the limitations on his or her right to practice. The obvious implication of these opinions is that an attorney licensed and actually practicing in New York may use the term "Esquire" or "Esq." to indicate that he or she is a lawyer. There is, therefore, no ethical bar to the inquirer using the name and website "[Surname] Esquire" to market per diem, freelance, or other legal services.

10. The inquirer indicates an intention to market services only to other attorneys, rather than to the public. We assume for our purposes that this is possible to do on a website or LinkedIn profile, though it may be that, to the extent that these media are available to the general public, a disclaimer may be needed to clarify the inquirer's intention. To the extent that the marketing is aimed solely at other lawyers, then the content of the marketing does not fall under the rubric of attorney advertising and thus is not subject to the provisions of Rule 7.1 that govern the content of attorney advertisements. Rule 1.0(a) (providing that the definition of an "advertisement" specifically "does not include communications to . . . other lawyers"); *see* Rule 7.1, Cmt. [7] ("communications to other lawyers . . . are

excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm").

11. Nevertheless, as Comment [6] to Rule 7.1 says:

> All communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law." *See also* 8.4(c).

12. The inquirer's designation of a practice as "freelance attorney" does not violate the rules prohibiting attorney fraud, dishonesty, misrepresentation or deceit if it accurately describes the inquirer's practice. The same is true of any biographical information accompanying the designation.

13. Rule 7.4 regarding "Identification of Practice and Specialty" applies to a lawyer or law firm's public identification even when the advertising rules do not apply. This rule permits a lawyer or law firm to "publicly identify" areas of law in which he or she practices and permits a lawyer to state that "the practice of the lawyer or law firm is limited to one or more areas of law." Thus, insofar as the inquirer intends to identify the areas of law in which a lawyer's practice is limited – for example, appeals, depositions, wills – the inquirer should, as we understand the inquirer intends, identify the limited nature of the inquirer's practice, that is, as a freelance or contract attorney.

Bank Accounts

14. Whether the inquirer must maintain a separate bank account for the law firm depends on the financial arrangements the inquirer makes with a contracting lawyer or firm and the nature of the work the inquirer would be doing.

15. Rule 1.15(a) says that a lawyer "in possession of funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own." Rule 1.15(b) and Rule 1.15(c) contain specific requirements on the handling of funds or other property belonging to a person other than the lawyer. In the event that, by reason of the contractual nature of the services being provided, the inquirer comes into possession of funds or property in which others have an interest, then all these provisions apply, including specifically the maintenance of a separate bank account within New York State.

16. In our experience, however, contract and per diem lawyers typically work on an hourly or flat fee basis and are paid directly by the hiring lawyer or law firm for services rendered. To us, such payments are the functional equivalent of a distribution made to a partner or a salary paid to an associate, in-house counsel, government lawyer, and the like – that is, the money belongs solely to the lawyer, who presumably deposits the funds into a personal bank account in the lawyer's own name without need to worry about the regulations in Rule 1.15(a), (b), or (c).

17. Yet the Rules seem to say otherwise. Specifically, Rule 1.15(d) provides, in relevant part, that: "(1) A lawyer shall maintain for seven years after the events that they record: (i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank

account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement." Rule 1.15(d)((2) expressly requires a lawyer to make "accurate entries" of all financial transactions "in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded." The financial records required by this Rule shall be maintained at the principal New York office of the lawyer and a failure to do so will be "deemed a violation of those rules" and subject the lawyer to discipline. Rule 1.15(i) and (j). Nothing in the Rule prohibits the inquirer from, for example, depositing payments for services rendered directly into a personal account. But nothing excuses the inquirer from the recordkeeping requirement.

18. Although skeptical that the framers of the Rule intended this result, we have no choice in light of its language but to conclude that, if Rule 1.15 applies to the inquirer's practice, then the inquirer must comply with the recordkeeping requirements of Rule 1.15(d).

Other Ethical Considerations

19. Finally, the inquirer seeks guidance regarding any other ethics issues that the inquire may encounter in operating a freelance or per diem legal practice. As we noted in N.Y. State 1113 (2017):

> We will not attempt to catalog all of the ethical duties of per diem lawyers, but we will suggest several. Under Rule 1.1, they should be competent, and thus should obtain whatever knowledge is necessary to handle an appearance. Under Rule 1.3(a), they must be diligent, and must be on time for the matters they have been retained to handle. Under Rule 1.4(a)(3), they must keep the client (through the client's agent, the hiring lawyer) reasonably informed about the status of the matter. Under Rule 1.6, they must preserve the confidentiality of any client confidential information to which they are privy . . . [U]nder Rule 1.10(e) they must check for conflicts and, if consentable, obtain consent or decline the proffered representation . . .
>
> Per diem lawyers also owe duties to adversaries. For example, under Rule 4.1, they must not make a false statement of fact or law to an adversary or other third person. Under Rule 4.2, they must not communicate on the subject of the representation with a party they know to be represented by counsel unless they have that counsel's prior consent.
>
> In addition, per diem lawyers owe duties to courts. Rule 3.3(f)(1) provides that, in appearing before a tribunal, a lawyer shall not fail to comply with local customs of practice of a particular tribunal, so per diem lawyers must comply with the relevant court rules for the courts and parts in which they appear . . . [C]ourt rules may impose additional obligations, but interpreting those rules is beyond our jurisdiction.

20. The obligations of a contract or per diem attorney to avoid conflicts of interest pursuant to Rules 1.7, 1.8, and 1.9 and to engage in conflicts checking pursuant to Rule 1.10(e) has been addressed previously by this Committee and has been the subject of numerous bar association ethics committee opinions. *See* N.Y. State 1113 (2017); N.Y. State 715 (1999); N.Y. City 1996-8 (1996); N.Y. City. 1989-2 (1989); N.Y. City 1988-3 and 3-A (1988); ABA 88-356 (1988).

21. In N.Y. State 1113 this Committee noted that a per diem lawyer who handled a specific appearance, or argued a specific motion, could not later appear on behalf of the other side in that case or substantially related case. Critically, under 1.10(e), both the hiring law firm and the per diem lawyer must maintain a written record of engagements and a system by which proposed engagements are checked against current or previous engagements. The per diem lawyer has the same obligation as the hiring lawyer to check for and identify conflicts. *See* N.Y. State 1113.

CONCLUSION:

22. A lawyer may market services as a "freelance," contract, or per diem attorney to other attorneys using the name and website with the lawyer's surname and the word Esquire. If such services are being marketed solely to other attorneys, the freelance attorney is not required to comply with restrictions on attorney advertising. A freelance attorney who does not hold funds for other people is not required to maintain a separate trust or escrow account, but must comply with the record keeping requirements of Rule 1.15(d) regarding any other bank account that concerns or affects the lawyer's practice of law. Finally, a freelance attorney must comply with all other ethical obligations.

(24-19)

OPINION 1185 (04/22/2020)

TOPIC: Conflicts of interest in defending multiple clients in prosecutions

DIGEST: It is likely an unwaivable conflict of interest exists for a lawyer or law firm concurrently to represent two individuals in separate criminal prosecutions that arise out of the same common nucleus of circumstances in which each client is a witness in each matter.

RULES: 1.7, 1.10

FACTS:

1. The inquirer concurrently represents two individuals – for our purposes Client One and Client Two – in two separate but related criminal matters.

2. Client One has been charged with a crime in which Client Two is the alleged victim. Client One and Client Two are in a relationship; Client Two denies Client One committed any wrongdoing, opposed Client One's arrest, and wishes to testify in favor of Client One. According to each Client, Client Two was intoxicated during the events at issue, and, following Client One's arrest, Client Two was arrested for driving while intoxicated (DWI).

3. The inquirer's firm proposes to represent each Client in the proceedings resisting the charges. The prosecution objects to the firm's representing Client Two (its alleged victim in the charge against Client One), suggesting that the firm has co-opted the prosecution's main witness against Client One. The inquirer asserts that no conflict exists because the prosecutions are separate, and that Client Two may testify in defense of Client One while invoking the Fifth Amendment on any questions probing intoxication.

QUESTION:

4. Is the inquirer's representation of the two clients in separate but related matters a conflict of interest and, if so, it the conflict subject to waiver?

OPINION:

5. We reject the arguments of each side as described to us. In our view, no party has a possessory interest in a witness, so we consider the prosecutor's position as inconsistent with the N.Y. Rules of Professional Conduct (the "Rules"). We also consider the fact of separate prosecutions as unpersuasive, because the two charges, though to be individually prosecuted, arise out of the same common nucleus of circumstances. Clients One and Two may be facing separate charges, but it is impossible to divorce the allegations of one from the allegations of the other.

6. Whether a conflict exists depends on Rule 1.7(a). Rule 1.7(a) says, in summary, that a conflict of interest exists for a lawyer concurrently to represent two clients if a reasonable lawyer would conclude that it will involve the lawyer in representing differing interests, or that a "significant risk" exists that the lawyer's professional judgment will be adversely affected by the lawyer's own financial, business, property or other personal interests. Rule 1.0(f) defines "differing interests" to "include

every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."

7. We believe that Client One's interests differ from those of Client Two, just as Client Two's interests differ from Client One's. For instance, a reasonable lawyer for Client One would have every incentive to establish that Client Two was indeed intoxicated based on eyewitnesses, the later arrest, behavior before the Client' One's arrest, and other evidence – all of which would be detrimental to Client Two in the DWI case. Similarly, a reasonable lawyer for Client Two might well advise Client Two not to testify in Client One's defense, not just for the aforementioned damage to Client Two's own legal status but also the risk of waiving Fifth Amendment rights. Likewise, a reasonable lawyer for Client One would have every incentive to advise Client One to testify against Client Two in the DWI case to justify the actions giving rise to Client One's arrest. This is not intended as an exhaustive list of the ways the interests of the two clients diverge, but simply as common sense examples of the way they do.

8. Accordingly, in our judgment, advancing the legal interests of Client One would adversely affect the legal interests of Client Two, and vice-versa. "In order to be 'differing,' the interests need not arise in the same matter, and they need not arise in litigation." N.Y. State 990 (2013). "For example, the professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions that each client might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." N.Y. State 867 (2011). We believe, too, that a significant risk exists that the firm's fiduciary duty to one client would be compromised by its concurrent fiduciary duty to the other.

9. Even if separate lawyers in the inquirer's firm would represent Client One and Client Two in their matters, Rule 1.10(a) imputes such lawyers' representations, and thus the conflict, to the entire firm.

10. We are left, then, with the issue whether the conflict of interests may be waived for the law firm (one lawyer or different lawyers in that firm) to continue to represent both clients in their matters. Rule 1.7(a) is subject to Rule 1.7(b), which permits a conflict to be waived if the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and if each client gives "informed consent confirmed in writing." Rule 1.0(j) defines "informed consent" to mean "the agreement by a person to a proposed course of action after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives."

11. Whether a conflict of interest is subject to waiver is very fact-intensive and depends on a variety of factors of which we have limited knowledge here. Among these factors are the relationship between Clients One and Two, the timing of their respective hearings, the sophistication of the clients,

their respective familiarity with the judicial processes they confront, and other matters. These considerations render us reluctant to conclude that a conflict may never be waived on the facts as presented. Nevertheless, we are very skeptical that informed consent is possible here, among other reasons because (1) Client Two's state of intoxication could be raised in both proceedings; (2) the possibility that inquirer's firm might cross-examine Client Two in Client One's proceeding (and vice versa); (3) the possibility that Client Two might have a change of mind about the content of testimony; (4) the judgment involved for both clients on questions such as which proceeding to push forward first, and whether to negotiate a plea; (5) the risk that the inquirer's firm might be tempted to withhold complete explanations of the considerations and risks to either client out of concern for harming the other's proceeding; (6) the ever-present possibility of negotiable plea options, which could adversely affect the legal interests of one client or the other; and (7) the inadvisability of Client One's counsel advising Client Two of Fifth Amendment issues.

12. We stress, finally, that our opinion is confined to an interpretation of the Rules and does not address issues under the Sixth Amendment of the U.S. Constitution on effective assistance of counsel. *See United States* v. *Schwarz*, 283 F.3d 76 (2nd Cir. 2002) (reversing conviction despite common defendants' informed consent to representation by one lawyer).

CONCLUSION:

13. It would be a conflict of interest for the inquirer's law firm concurrently to represent two clients in separate but related criminal matters in which each client would be a witness. Whether the two clients may provide informed consent to the concurrent representation is highly fact intensive subject to the considerations set forth in this opinion.

(2-20)

OPINION 1186 (04/22/2020)

TOPIC: Legal Aid Society; conflicts of interest; screening; definition of law firm

DIGEST: Screening cannot prevent imputation of a conflict under Rule 1.10(a). Certain elements of screening may be used to demonstrate that divisions or projects of a legal services organization constitute different law firms for purposes of the conflict's rules. But the bar is high to show that the firms are separate and not merely branches of a single entity.

RULES: Rule 1.0(h), 1.0(t), 1.7(a), 1.7(b), 1.10(a)

FACTS:

1. A Legal Aid Society (the "Society") in New York has two divisions. One is a civil division that has programs in the areas of family law, housing and consumer law, immigration law and education law, and the second division represents children in the Family Court of the county where the Society is located. The Society has found over the past several years that it has had an increasing number of conflicts arising between its two divisions, and within the programs in each division. For example, the Society has found that many of its clients who are children, and are represented by an attorney for the child, might also have their own housing or family law issue.

2. The Society would like to minimize conflicts through a firewall that would screen each program and division from the others. The Society believes that it has the ability to screen the programs from each other through its case management system. In addition, we are told that the housing program is on a different floor from the other programs.

QUESTION:

3. May a Legal Aid Society avoid conflict imputation between its two divisions and between programs in each division by screening them, or otherwise characterize each division or program as a separate law firm for the purposes of avoiding conflicts and conflict imputation?

OPINION:

Conflicts of Interest

4. We assume, for purposes of this opinion, that the Society is correct in its conclusion that certain representations in which it is asked to engage would involve a conflict of interest under the N.Y. Rules of Professional Conduct (the "Rules").

5. Rule 1.7(a) prohibits a lawyer from representing a client if a reasonable lawyer would conclude that either the representation will involve the lawyer in representing differing interests or there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected, among other things, by the lawyer's own business or personal interests. When lawyers are associated in a firm, Rule 1.10 attributes a conflict under Rule 1.7, 1.8 or 1.9 of one lawyer to all lawyers in the firm. *See* Rule 1.10(a) ("[w]hile lawyers are associated in a firm, none of them shall know-

ingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7.").

6. A number of our prior opinions discuss conflicts in legal services offices. *See, e.g.,* N.Y. State 975 (2013) (when Public Defender's office has three part-time criminal PDs and two part-time Family Court PDs, all of whom maintain their own private offices and who do not share files with each other, their conflicts are imputed to each other even though they work on a part-time basis and work in different divisions of the office); N.Y. State 973 (2013) (imputation of conflicts within a legal aid organization and waiver of imputed conflicts); N.Y. State 862 (2011) (imputing conflict from a public defender office to a part-time assistant public defender in private practice, and discussing waiver of the conflict).

Screening as a Cure for Conflicts

7. Although the inquiry asks about "firewalls," the term used in certain conflicts provisions of the Rules is "screening." See definition 1.0(t) ("Screened" or "screening" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.")

8. Comment [8] to Rule 1.0 makes clear that screening generally applies only when the screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rule 1.11 (former and current government officers and employees), Rule 1.12 (former judges, arbitrators, mediators or other third-party neutrals), or Rule 1.18 (lawyers who meet with prospective clients who do not become actual clients). Implicit in Comment [8] is that the Rules do not approve screening when a current conflict exists between clients under Rule 1.7(a), at least absent informed client consent confirmed in writing under Rule 1.7(b).

9. Our opinions support the conclusion that, with the exceptions noted above, a screen may not be used to eliminate conflicts under the conflict's rules. For example, in N.Y. State 876 (2011), which involved two separate firms that were unconnected to each other, but each of which had lawyers who were associated with a third firm, the inquirer asked whether the firms could avoid the imputation of conflicts by creating a screen (that is, the third firm would maintain its files electronically and make them available only to the attorneys of the third firm, and the third firm's files would be maintained physically at the two other firms in locked cabinets separated from the general files of the two firms, with locks preventing access to anyone other than attorneys of the third firm) and limiting the practice of the third law firm. The Committee responded:

> When two law firms are both associated with lawyers at a third firm, the conflicts of each firm are imputed to the lawyers in all three firms as if they were a single law firm. Screening, no matter how elaborate, cannot avoid that imputation. Therefore, the three law firms must conduct interrelated conflict checks as if they were one firm. The screening measures proposed here would prevent two of the law firms from checking for conflicts and would likewise deprive those two firms of the information necessary to obtain informed consent from clients to waive the imputation of any conflicts that

might exist. Limiting the practice of the firm that will be screened does not change the analysis.

May the Society Structure itself into Different Law Firms?

10. Under Rule 1.0(h), a "firm" or "law firm" includes a qualified legal assistance organization under Rule 7.2(b)(1) – (4), including a legal aid office or public defender office operated by a *bona fide* non-profit community organization or by a governmental agency. But Comment [4] to the definition section makes clear that, in certain circumstances, a legal services organization may be considered to be more than one firm: "Depending upon the structure of the organization, the entire organization or components of it may constitute a firm or firms for purposes of these Rules." This proviso is limited to not-for-profit legal services organizations and has no impact on other legal services entities that fall within the definition of "firm" under the Rules.

11. Our opinions note that the determination of whether one or more entities constitute a firm is a fact-intensive one. *See* N.Y. State 1105 (2016) (where one firm lawyer, A, also received case assignments from local daytime courts when the county public defender's office had a conflict of interest, and another firm lawyer, B, accepted a part time position with the county public defender's office to represent clients in evening appearances, whether conflicts of the public defender office would be imputed to Lawyer A depended on whether the public defender's office constituted a single "law firm," which was a question of fact and depended on whether the public defender's office was organized so that matters heard in daytime and evening sessions were handled by different "firms.")

12. We have issued several opinions that discuss the structure that may be indicative of a separate law firm. These opinions focus, among other things, on the physical space where the divisions or projects (sometimes referred to as units) are located, the arrangement for maintaining separate files, including a case management system, the interaction between the units, and the management system for the separate units. *See also* N.Y. City 2009-3 (2009) (factors considered by courts in determining whether a law firm has effectively screened a conflicted lawyer include the timeliness of implementation, the size of the law firm, the size of the office space, the accessibility of files and the relative informality of office interaction, including the extent to which the disqualified lawyer has contact with lawyers working on the other matter). The operating mechanisms designed to create separate units should ensure that (1) the confidential information of clients of each "firm" is not shared with the other firm or firms, (2) the professional judgment of the lawyers in each firm is not affected by close association with the other firm, and (3) public confidence that the Rules are complied with is maintained.

Office Space and Files

13. Several of our opinions have focused on physical space and access to files. N.Y. State 794 (2006) involved a law school legal clinic which had different projects, such as civil rights and domestic violence, and wanted to start a legal clinic involving consumer protection. The law school planned to hire an outside lawyer as the part-time director of the clinic and wanted to avoid the imputation of conflicts to and from the outside lawyer's law firm. The clinic proposed various measures to segregate the projects, including that (1) the offices of the supervising lawyers would not be part of the clinic's common space, although students assigned to the consumer project would continue to work side-by-

side with students assigned to other projects; and (2) the consumer project and the other projects would each have exclusive access to a separate client information database for storing documents electronically, although client files would be physically located in the common clinic space. In that opinion, decided under the equivalent provisions of the former Code of Professional Responsibility, we said:

> The sharing of merely the same leasehold, a library, an electronic research account, restrooms, a central phone system with individual lines, or a common receptionist is not sufficient, alone or in combination, to merge lawyers in separate practices into one. Acceptance of these organizations presupposes, however, that the confidences and secrets of the clients of each separate practice will not be shared or appear to be subject to sharing with lawyers working on a conflicting matter.

14. Nevertheless, this Committee objected to the proposed layout of the proposed clinic space, because students involved in the consumer project would be working side-by-side in the same space with students working on the clinic's other matters, and because, even though an electronic barrier would be erected to prevent access to client documents on the electronic database, no physical barrier would separate consumer project students from access to the physical files of other clinic matters, or vice versa. We therefore opined that the legal clinic should be treated as a single law firm:

> Two or more lawyers carrying out conflicting assignments in close proximity in the same space with common tables, facilities, and files engender subtle influences that could affect the exercise of independent professional judgment. EC 5-21, EC 5-23. These "numerous influences might weigh against the unswerving fidelity to the client's interest that professional duty compels." ABA Inf. 1474 (1982) (quoting ABA Inf. 1235 (1972)). In addition, there is a "real danger that a client's confidences and secrets will be divulged" through the use of "shared clerical staff, common files, or otherwise." ABA Inf. 1474 (1972)). "If the physical organization of the office suite places client confidences at risk, it is appropriate to treat the association as a firm or to determine that adverse interests may not be represented." *Commonwealth v. Alison*, 434 Mass. 670, 691, 751 N.E.2d 868, 890 (2001).

See also N.Y. State 1085 (2016) ¶ 6 (quoting N.Y. State 794 as opining that "[s]o long as the clinic's students work in a common space and have shared access to physical files, the entire legal clinic, including the project in question, is a law firm").

15. These opinions contrast sharply with the facts in N.Y. State 1141 (2017), in which a law school's clinical education program proposed to have students collaborate as co-counsel with a New York not-for-profit legal services organization. The clinic and the legal services organization were financially separate, operated out of different offices, maintained their own files, did not share any overlapping personnel, and represented numerous clients other than those in which they would serve as co-counsel. There, we said that the two entities would not be considered "associated" for purposes of imputing all conflicts of each firm to the other.

16. In determining the risk that client confidences may be shared, it is important to consider the size of the physical space and the interaction between the lawyers. New York courts, when determining if a moving lawyer should be able to rebut the presumption that he or she acquired confidences of

a former client before moving to a new firm, have adopted special rules that apply where the former firm was small. *See Cardinale v. Golinello*, 43 N.Y.2d 288, 372 N.E.2d 26 (1977). *Cardinale* and its progeny suggest that, when the original firm is small, and characterized by informality, "constant cross pollination" and a "cross current of discussion and ideas" among the firm's attorneys, and when all firm files are open and available to all lawyers in the firm, then the presumption that the moving lawyer gained confidential information at the first firm is not subject to rebuttal. Similar considerations may apply to the creation of separate firms when a legal services organization is small and characterized by a cross current of discussion and ideas. Even in a legal services organization in a large city, if the lawyers in different units share common eating spaces and discuss cases over lunch or at coffee breaks, it may be problematic to characterize them as separate firms.

17. The Rules governing confidentiality also require special precautions where the different units use a single email system. For example, in N.Y. State 1102 (2016), we discussed the design of the office space of the in-house legal department of an insurance company that represented the company's insureds. After discussing the physical separation of space and files, we turned to whether the use of the insurance company's computer system would adequately safeguard client confidential information. Citing N.Y. State 939 (2012), we analogized, to lawyers who shared office space as well as a single computer, when each lawyer had a separate administrative password to the computer that was not known to the others. In addition, we noted another potential obstacle to confidentiality:

> Here, if the insurance company's technical administrators have access to the Department's client files and are not prohibited from sharing them with persons outside the Department, the lawyers in the Department will be violating their duty to preserve the confidentiality of client information.

18. Moreover, if a single office-wide email system were used to communicate with lawyers in different units, the units might seem more like branches of a single entity than like separate "firms" and might undermine the management considerations discussed below.

Law Firm Management

19. Another consideration in determining whether different units of a legal services firm should be considered separate firms is the manner in which the units are managed, which is indicative of the independence of the units. For example, in N.Y. 914 (2012) we considered whether a "conflict panel" of lawyers established to provide legal assistance to clients who could not be served by the local Legal Aid office because of a conflict of interest should be considered part of the same firm as the Legal Aid office. We concluded that, because neither the Legal Aid office nor its lawyers would exercise any supervision or control over the legal services provided by the conflict panel, they were not part of the same firm.

20. In contrast, N.Y. State 975 (2013) involved a small upstate county whose Public Defender's office had three part-time criminal PDs and two part-time Family Court PDs, all of whom maintained their own private offices and who did not share files with each other. Despite these facts, we concluded that the Public Defender was still a single law firm:

> While it is relevant that in actual practice the Assistants work independently, that factor is outweighed by others. The structure of the office and the central role of the Public Defender are prescribed by statutory provisions [citing County Law § 716]. There is a single attorney who is the Public Defender and who is publicly listed with that title. The other attorneys in the office serve as Assistant Public Defenders and are publicly identified as such. The Public Defender appoints those assistants, and fixes their compensation, subject to authorization by the board of supervisors. It is the Public Defender who is statutorily charged with representing the clients of the office. See County Law § 701(2). . . . We accept the inquirer's representation that the defenders typically do not share assignments or files, but they could, consistent with the underlying statutory provisions, sometimes work together collaboratively.

21. N.Y. State 1036 (2014) involved a national legal services project focusing on immigration matters. The project had a national board, which also employed several lawyers at the national level, as well as a number of separately incorporated local sections. The local sections received both national and local financing. They also shared the same logo, and a case management system that enabled each attorney to have access to the information of all of the project's clients in all sections, and did not have a reliable means for confining confidential information to any one office. In addition, the national board designated several lawyers as "Regional Attorneys" to supervise the attorneys in multiple state offices. We concluded that the regional offices and the national office constituted a single law firm. The project's use of a single case management system with shared access to client files was dispositive. Similarly, the fact that regional supervisors oversaw local lawyers indicated that the local lawyers were not acting independently.

22. Some central management activities would certainly not run afoul of this common management prohibition. For example, we believe that central fundraising and HR activities would be permitted. At the other end of the spectrum, supervision of legal matters in all entities clearly would be prohibited. Between those extremes – for example, in the setting of budgets – there are many activities that are fact specific and inappropriate for general advice. In all cases, the access to confidential information of persons with central management authority should be restricted.

Public Appearance

23. Finally, it is important to note that Comment [2] to Rule 1.0 (on the definition of "Firm") says, with respect to lawyers who share offices, "if they present themselves to the public in a way that suggests that they are a firm . . . they should be regarded as a firm for purposes of these Rules." This may present problems where the units "holistically" represent a single client, e.g., if the housing unit commonly refers its clients to another unit for help with other legal problems without emphasizing that the two units are separate firms and do not share information without the client's consent. Similarly, where the units share a single office building, it would be important for the Society to expressly communicate that its units are separate firms so that the public is not confused.

24. In summary, to qualify as a separate "firm" under the Rules, a unit of a legal services organization must ensure the confidentiality of client confidences. Separate physical space helps to achieve that goal. Our opinions have objected where divisional or project lawyers have too much interaction with those in another unit. *See* N.Y. State 794 (2006) (students from different projects would work

side-by-side). Confidentiality also requires that client files of each unit not be accessible to lawyers in the other firm or firms. But separate space and files alone are not enough when the programs are managed by a common manager. *See* N.Y. State 975 (2013) (separate space and files are not sufficient if management of the programs is done centrally); N.Y. State 1036 (single case management system and supervision across different local offices made the offices more like branch offices of a single firm than like separate firms).

25. The Society here has one division occupying a separate floor. Whether that will be enough to support designation as a separate firm will depend on the degree of interaction between lawyers in that division and those in other divisions or projects, how client files are maintained, how the various projects are supervised and managed and how the various projects present themselves to the public. As for the projects that share space, it will be more difficult to establish the necessary separateness for purposes of the definition of "firm" or in the minds of clients or the public. In order to demonstrate that different units are separate firms, the Society must also demonstrate that each firm is managed and operated independently. While having certain shared services, such as a library, an HR department, and a telephone system, are not inconsistent with having separate firms, central management of legal matters and legal policy for all divisions and projects would be problematical.

CONCLUSION:

26. Firewalls and screens cannot prevent imputation of a conflict under Rule 1.10(a). In the context of not-for-profit legal aid organizations, certain elements of screening may be used to demonstrate that divisions or projects of a legal services organization constitute different law firms for purposed of the conflict's rules. But the bar is high to show that the "firms" are separate and not merely branches of a single entity.

(01-20)

OPINION 1187 (05/06/2020)

TOPIC: Police officer representing traffic court defendants

DIGEST: A lawyer who is a Village police officer may not represent defendants in traffic court in the county where the Village police department is located. Whether the officer may do so in other counties depends on the facts and circumstances, and is subject to compliance with both the rules governing conflicts of interest for lawyers in private practice and the rules governing lawyers serving as public officers or employees.

RULES: 1.7(a), 1.7(b), 1.11(c), 1.11(d), and 1.11(f)

FACTS:

1. The inquirer is a police officer with a Village Police Department in New York and is admitted to practice law in New York. The inquirer wants to represent defendants in traffic court, both in the county where the inquirer serves as a police officer and in other counties. According to the inquirer, traffic infractions are ordinarily classified as "violations," not as misdemeanors or felonies, and thus are not "crimes" in New York as the inquirer understands that term. In our understanding, some traffic infractions may be deemed crimes (driving while intoxicated, for example), but accept for our purposes that others may not be.

QUESTION:

2. May a lawyer who is a Village police officer represent defendants in a county traffic court, either in the county where the Village police department is located or in other counties?

OPINION:

3. The N.Y. Rules of Professional Conduct (the "Rules") impose certain duties on a lawyer currently serving as a public officer such as a police officer. In N.Y. State 615 (1991), we considered whether a police officer could represent a criminal defendant consistent with DR 9-101(B) of the Code of Professional Responsibility (the "Code'), the predecessor of the Rules. DR 9-101(B) said that a lawyer "shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee." In Opinion 615, we concluded that "a former police officer could not as lawyer represent a criminal defendant in any matter in which the lawyer had personally participated as a police officer." It went without saying that, if a former lawyer/police officer was barred from representing a criminal defendant in a matter in which the officer had participated personally and substantially, then a current police officer would be barred from such conduct as well.

4. Rule 1.11(d), which is the successor to DR 9-101(B), says:

> (d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:

> (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
>
> (2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

5. Our jurisdiction is limited to questions arising under the Rules and does not extend to questions of law. Thus, we express no view on whether "law may otherwise expressly provide" contrary to the language of Rule 1.11.

6. Under Rule 1.11(d)(1), if the inquirer has represented defendants of any kind in the past or begins representing traffic court defendants going forward, the inquirer would be prohibited from working as a "public officer or employee" – including as a police officer – on any matter in which the inquirer "participated personally and substantially" while in nongovernmental employment.

7. Under Rule 1.11(d)(2), the inquirer may not negotiate to represent (or agree to represent) any traffic court defendant as a private client if that defendant "is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially." For example, if the inquirer is participating personally and substantially in investigating X with respect to drug dealing, then Rule 1.11(d)(2) would prohibit the inquirer from representing X in traffic court. This would be so even if the traffic court matter is wholly unrelated to the drug investigation. A public officer or employee who is a lawyer may not serve as a private lawyer for any person "involved" in a government matter in which the lawyer is participating personally and substantially, whether the person is involved as a witness, a suspect, an independent contractor, a government supervisor, or otherwise.

8. When acting as a private defense lawyer, the inquirer must also comply with Rule 1.11(c), which provides:

> Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. . . .

Rule 1.11(c) defines the term "confidential government information" to mean "information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public." For example, if the inquirer knows of unfavorable employment reviews or non-public job discipline imposed on a police officer who is a witness in a traffic court matter, and if that information "could be used to the material disadvantage" of that person in plea negotiations or impeachment, then the inquirer may not represent a traffic court defendant in that matter.

9. The inquirer must also abide by Rule 1.11(f), which says (in pertinent part) that a lawyer shall not "use the public position to influence, or attempt to influence, a tribunal to act in favor of the law-

yer or of a client; or accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official." By way of easy illustration, the inquirer may not suggest to a traffic court judge that the inquirer could use a public position as a police officer to give special treatment to the traffic court judge if the judge is caught speeding. Likewise, the inquirer may not accept an outsize fee or expensive gift from a traffic court client if it is obvious that the fee or gift is for the purpose of influencing the inquirer's actions as a police officer.

10. We recently applied Rules 1.7 and 1.11 in N.Y. State 1170 (2019), in which a Village attorney asked about the ethical implications of appearing in Town Justice Court defending clients who were facing charges that did not involve the Village. There, we said:

> A Village Attorney who does not represent the Village in court or in criminal matters is not ethically prohibited from representing private clients in defense of Vehicle and Traffic Law violations, criminal proceedings, or Town Ordinance violation cases brought in the Town Justice Court, funded exclusively by the Town, that adjudicates Village Ordinance violations, provided that no unconsented financial or business conflicts of interest exist under Rule 1.7(a)(2), and provided that the provisions on current government employees in Rule 1.11 are respected.

11. We reach an analogous conclusion here. On our view, whether a police officer may represent clients in traffic violation matters depends on the facts and circumstances of the representation, with two caveats. First, a police officer engaged in private legal practice may not represent traffic court defendants in the same county where the police officer works, because such conflicts arising under Rule 1.7(a)(2) would on our view not be subject to consent under Rule 1.7(b)(1). Second, whatever confidential information the inquirer learns in private practice with respect to a traffic court client or prospective client, the inquirer must not use or reveal that information to advance his work as a Village police officer except as permitted by Rules 1.6, 1.9(c), and 1.18(b).

12. In N.Y. State 615, we considered whether conflicts of interest would arise if a lawyer who was a police officer represented criminal defendants in private practice. We concluded that conflicts would arise. We said that "it is impermissible for the firm to practice criminal law in the town and village courts because it would be inappropriate for the police officer personally to represent criminal defendants." We explained our reasoning as follows:

> . . . [A] criminal defendant is entitled to a defense and representation of undivided loyalty within the limits of the law.
>
> No matter how earnest and complete a defense the lawyer provides, there is an obvious danger that a convicted defendant will believe that his defense was inadequate because of the lawyer's bias as a police officer. Conversely, the public might lose faith in the criminal justice system if it believes that the lawyer was employed in the hope that the lawyer's position as a police officer might enable the lawyer to obtain more lenient treatment for the defendant. A police officer is widely viewed as a representative of the people. We believe that the representation of a criminal defendant by a police officer could lessen public confidence in the integrity of the criminal justice system. Furthermore, the dual roles of police officer and defense attorney could find the lawyer chal-

> lenging in the latter capacity the very laws the police officer is sworn to enforce in the former capacity.
>
> Thus ***we*** find that DR 5-101(A) renders impermissible the lawyer's representation of criminal defendants. . . .

13. That the inquirer here may be defending infractions rather than crimes does not alter our conclusion. In N.Y. State 615, we relied on DR 5-101(A). The successor to DR 5-101(A) in our current Rules is Rule 1.7(a)(2), which provides, in pertinent part, as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . .
>
> > (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.
> >
> > (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
> >
> > > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> > >
> > > (2) the representation is not prohibited by law; . . . and
> > >
> > > (4) each affected client gives informed consent, confirmed in writing.

14. Applying Rule 1.7(a)(2) to the facts before us, we believe that a reasonable lawyer would perceive a "significant risk" that, in some cases, the inquirer's **professional judgment on behalf of a traffic court client will be adversely affected by the inquirer's financial and personal interests. The inquirer's financial and personal interests include** staying in the good graces of his superiors on the police force and in Village government, as well as not incurring the wrath of peers in police departments in the Village and in other towns and villages. For example, when representing a traffic court defendant, the inquirer might be inhibited from arguing that a given police technique is defective, or might be inhibited from arguing that a police officer witness is lying, or might be inhibited from arguing that a defendant was ticketed solely so that an officer could make a quota. In any situation presenting such conflicts of interest, the inquirer may not take on the representation of a traffic court defendant unless the conflict is subject to consent and the inquirer obtains the client's informed consent pursuant to Rule 1.7(b).

15. Applying Rule 1.7(b)(1), our analysis of consent depends on whether the traffic court matter is in the same county where the inquirer serves as a police officer or instead in some other county. When a traffic court defendant will appear in a traffic court in the same county where the inquirer serves as a police officer, we believe the conflict is not subject to consent. But in other counties, the outcome will turn on whether the inquirer reasonably believes the inquirer will be able to provide competent and diligent representation to the traffic court defendant as required by subparagraph (b)(1). This is a case-by-case determination, depending on all of the facts and circumstances.

16. For example, one relevant circumstance will be the relationship between the nature of the traffic violation and the inquirer's work as a police officer. By way of modest example, if the inquirer as a police officer is currently a witness against a driver who made an improper left turn at a busy intersection, then the inquirer as a private lawyer may be unable to provide competent and diligent representation to a defendant charged with making an improper left turn at a busy intersection. Each representation of a traffic court defendant will require a separate analysis taking into account all of the facts and circumstances of both the particular representation and the inquirer's responsibilities and experience as a police officer. In the event that the inquirer concludes that a conflict may exist but is subject to consent, then under Rule 1.7(b)(4) the consent must be "informed consent, confirmed in writing."

CONCLUSION:

17. A lawyer who is a Village police officer may not represent defendants in traffic court in the county where the Village police department is located. Whether a police officer may represent traffic court defendants in private practice in other counties depends on the facts and circumstances of the representation, and is subject to compliance with both the rules governing lawyers serving as public officers or employees and the rules governing conflicts of interest for lawyers in private practice.

(18-19)

OPINION 1188 (05/06/2020)

TOPIC: Attorney Trust Accounts; Deposit of Estate Funds in Attorney Trust Accounts

DIGEST: A lawyer who receives estate funds solely as co-executor of an estate may not use an attorney trust account to hold or disburse such funds

RULE: 1.15(b)(1)

FACTS:

1. The inquirer is a New York attorney who, together with a family relative, was designated in a will as a co-executor of an estate. The two co-executors were issued Letters Testamentary, and had been co-signers on an estate bank account. The inquirer uncovered unauthorized transactions in the estate account, and upon queries to the bank the account was frozen. The inquirer is not counsel to the estate, but acting through such counsel the inquirer has applied in the Surrogate's Court for removal of the co-executor, an application that remains pending. In the interim, the estate faces assorted time-sensitive expenses to preserve estate assets, but the co-executor has refused to open a new estate bank account that would require both to co-sign on all withdrawals. As an alternative, the inquirer proposes to use an attorney trust account through a separate sub-account for the estate to deposit funds payable to the estate and to pay emergency expenses on behalf of the estate; the co-executor has consented to this arrangement. The inquirer is concerned whether doing so comports with the N.Y. Rules of Professional Conduct (the "Rules").

QUESTION:

2. May a lawyer use an attorney trust account to receive and disburse funds on behalf of an estate of which the inquirer is the co-executor when such funds come into the inquirer's possession solely as an executor of the estate and not as a lawyer for the estate?

OPINION

3. Rule 1.15(b)(1) provides, in relevant part, that a "lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State. . . . Such funds shall be maintained in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity."

4. Rule 1.15(b)(1) identifies two species of accounts that a lawyer may maintain when the lawyer holds funds belonging to another. One is an account "incident to the practice of law" and the other is an account the lawyer holds in other fiduciary capacities, among them as an executor.

5. An attorney trust account is solely for funds received "incident to the lawyer's practice of law" and therefore should not be used to hold funds that an attorney receives in any other capacity. Yet we acknowledge that lawyers often do receive funds that are not incident to the lawyer's legal practice,

and so the Rules recognize this fact. For instance, Comment [1] to Rule 1.15 says that "[s]eparate trust accounts may be warranted or required when administering estate monies or acting in similar fiduciary capacities."

6. On our view, the inquirer's receipt of estate funds would not be considered incident to the practice of law. The estate has its own lawyer. It appears that the inquirer was designated as co-executor for reasons unrelated to any status as a lawyer, perhaps a familial one.

7. We have previously dealt with relationships that fall within the ambit of "incident to the practice of law." For instance, in N.Y. State 1143 (2018), we concluded that an attorney serving as a court-appointed referee to conduct foreclosure sales could ethically deposit sale proceeds into the firm's IOLA account because the referee's tasks – executing a referee's deed, obtaining the purchase deposit, executing the memorandum of sale and the report of sale, calculating the final amount due, and distributing the funds in accordance with the judgment – constituted activity "incident to the practice of law" even though non-lawyers are legally eligible to serve as foreclosure referees. Similarly, in N.Y. State 907 (2012), we said that an attorney could use an attorney trust account to make an anonymous charitable donation on behalf of a client based on our view that the attorney was doing so incident to a legal practice, though we cautioned that, if the facts were otherwise, "it may be necessary for the attorney" to set up a separate account.

8. Finally, while questions of law are beyond the purview of this Committee, we note that controlling statutes may dictate the permissibility of the conduct in question without regard to the Rules. *See e.g.*, EPTL § 11-1.6(a) and SCPA § 719(7). As Comment [5] to Rule 1.15 notes, "The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services."

CONCLUSION:

9. A lawyer who receives funds belonging to another may not use an attorney trust account to manage the funds if the funds were not received incident to the practice of law but instead solely in another fiduciary capacity as an executor of an estate.

(07-20)

OPINION 1189 (05/22/2020)

TOPIC: Obtaining and using alternate client contact information

DIGEST: A lawyer may ask a client to designate an alternate contact person, and as needed may contact that person so as to reach the client

RULES: 1.4, 1.6

FACTS:

1. The inquirer is concerned about situations in which it becomes hard to reach clients. As an example, the inquirer notes having been "in regular contact with [a client] for a litigation and related settlement negotiations. But since the ongoing COVID 19 pandemic, [the inquirer has] been unable to reach him by email or phone despite multiple attempts."

2. The inquiry notes that if the inquirer had "emergency contact information" for the client, then the inquirer could call a designated emergency contact person and "introduce myself as the client's lawyer and inquire whether everything is okay with the client" or "whether something (e.g., a medical issue, death) is impacting my client's ability to communicate."

3. Such an inquiry could result in useful information, possibly by revealing that the client had passed away or was hospitalized, or even in the absence of medical developments, by revealing an alternate means for getting in touch with a hard-to-reach client.

QUESTIONS:

4. Is it permissible to ask a client to designate a third person contact in case, due to an emergency or for other reasons, the lawyer cannot reach the client directly?

5. If so, when is it permissible to contact the designated person, and in doing so, what may be disclosed?

OPINION:

6. The inquirer's goal of maintaining the ability to reach clients is plainly salutary. The New York Rules of Professional Conduct (the "Rules"), including especially Rule 1.4, make clear that adequate communication with clients is essential to proper representation.

7. For there to be adequate communication, the attorney and client need effective means of reaching each other. Thus at the formation of an attorney-client relationship, it is a good idea for the lawyer to request, and for the client to provide, sufficient contact information for the lawyer to reach the client as needed.

8. The contact information for reaching the client may of course include basic items such as telephone numbers and mail and email addresses for the lawyer to use in the first instance. But no ethical rule prevents the sharing of additional "emergency" or alternate methods such as the names and con-

tact information of one or more persons likely to know the status and whereabouts of the client if and when it becomes hard to reach the client directly. In some situations, such as when the lawyer knows family members or business colleagues of the client, there may be little reason to ask for such information. In other situations there may be more reason for the lawyer to make such a request, and it is for the client to determine what information to provide.

9. Unless the lawyer and client have agreed to restrict the lawyer's resort to the alternate channel of communication, no specific triggering event is required before the lawyer may use that channel. In particular, if a time comes when the lawyer's usual means for reaching the client are unavailing, then the lawyer may try to reach the client by communicating with the designated alternate contact person.

10. The inquiry reflects a concern about the possible disclosure of confidential information to the designated alternate contact person. There is little basis for that concern.

11. If a lawyer has occasion to reach out to a client's alternate contact person, the lawyer would not need to disclose much information if any. Perhaps the lawyer might need to explain that the lawyer has reason to communicate with, but has had trouble reaching, the client. That minimal information should usually suffice, because presumably the person designated by the client would be sympathetic to the lawyer's need to communicate. Indeed, it would be a good practice for the client to have discussed these matters with that person at the time of the designation.

12. Typically, that minimal information would not be confidential, because it is not privileged; it is unlikely to be embarrassing or detrimental to the client if disclosed; and the client, far from having requested that the information be kept confidential, accepted that the lawyer may have reason to disclose it to the alternate contact person designated by the client. *See* Rule 1.6(a) (definition of "confidential information").

13. Admittedly it is possible to imagine scenarios that could implicate confidentiality issues. For example, the designated contact person, as a condition for the requested help, could demand to be told what information the lawyer needs to discuss with the client. Perhaps a more common scenario would be one in which embarrassment or detriment could result from the mere fact that the client was represented by a particular lawyer, such as one with a specialization in criminal law or divorce.

14. In those kinds of cases, the lawyer would have to consider whether the information to be disclosed with the designated contact is confidential under Rule 1.6(a); whether under Rule 1.6(a)(1) the client expressly consented to disclosure as part of the designation; whether there is implied authorization to disclose under Rule 1.6(a)(2); and whether there are any other applicable exceptions under Rule 1.6(b). But apart from such scenarios, which seem unlikely to occur very frequently, the lawyer will not need to engage in this analysis.

15. Our conclusion that a lawyer may communicate with a designated alternate contact person should not be taken to imply that a lawyer is stymied when the client has not made such a designation. We have addressed the inquirer's question, which is specifically about a designation by the client. But even in the absence of such a designation, a lawyer may have reason to try to reach a client who does not answer to the usual methods. If the lawyer knows or can learn of third persons who might have

information about the client's status or whereabouts, the lawyer could contact such third persons and, as discussed above, could inquire about the client without disclosing confidential information.

16. The permissibility of contacting third parties in the absence of a designation does not undercut the possible value of discussing the matter and making a designation when the lawyer is retained. As a matter of best practices rather than ethical obligation, and depending on the circumstances, there could be value for the lawyer and client to agree on communication procedures in a variety of situations, including emergency contacts and the circumstances that would lead the lawyer to use them, and to update such procedures as appropriate, including revocation of the designation if at any time the client should so desire. Such consultation may be especially valuable when the client would be reluctant for others to know about the very fact of the representation.

CONCLUSION:

17. A lawyer, so as to protect the ability to reach and communicate with a client, may ask the client to designate a person for the lawyer to contact in the event the lawyer is unable otherwise to reach the client.

18. In the event the lawyer is unable to reach the client using ordinary means, the lawyer may, in most circumstances, contact the person designated by the client and may disclose that the lawyer has reason to reach the client but has been unable to do so.

(13-20)

OPINION 1190 (05/22/2020)

TOPIC: Professional limited liability company to provide legal services with non-lawyer members

DIGEST: A professional limited liability company with nonlawyer members may not provide legal services.

RULES: Rule 5.4 (d)(3)

FACTS:

1. The committee has received an inquiry from a lawyer admitted to practice in the state of New York who is a sole practitioner doing business though a Professional Limited Liability Company (PLLC) of which the lawyer is the sole member. The PLLC has no employees. The inquirer proposes to add family members who are not lawyers as minority members of the PLLC so that they can receive retirement and health insurance benefits through the PLLC.

QUESTION:

2. Is it ethically permissible for non-attorneys to be members of a PLLC providing legal services?

OPINION:

3. New York Rule of Professional Conduct 5.4, entitled, "Professional Independence of a Lawyer," contains various provisions to ensure that a lawyer's representation of clients is not tainted by the influence of persons not bound to the tenets underlying the profession. A principle of great importance is that stated in the title of this rule, that a lawyer must maintain professional independence. Thus, a lawyer may not share fees with a non-lawyer (5.4(a)), a lawyer may not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law (5.4(b)), A lawyer may not permit someone who recommends, employs or pays the lawyer to control the lawyer's professional judgment or to interfere with the lawyer's duty of confidentiality (5.4 (c)), and, relevant to this inquiry, a lawyer must not practice with or in the form of a for-profit entity wherein a nonlawyer owns any interest, or a nonlawyer holds a position as a member, director or officer, or occupies a position of similar responsibility in a non-corporate association (5.4(d)).

4. Applying Rule 5.4, this committee has opined that: 1) A patent attorney cannot offer non-distinct (mixed legal and non-legal) services in, among other situations, a business where the lawyer owns the business with a nonlawyer, N. Y. State 1166. 2) A New York lawyer may not partner with a D. C. lawyer who has nonlawyer partners in the lawyer's D. C. practice, N.Y. State 1038. 3) A lawyer may not partner with or be employed by a nonlawyer to offer legal services as part of a "disability office," N.Y. State 992. 4) A lawyer who works for a debt-management company owned by a nonlawyer may not offer legal services to the company's clients, N.Y. State 1081. 5) A lawyer cannot practice principally in New York if working for a United Kingdom firm with nonlawyer owners, N.Y. State 911.

5. The Inquirer notes this Rule, but still asks if the exception stated in Rule 5.4 (a)(3) to permit law firms to include nonlawyer employees in a retirement plan based on a profit-sharing arrangement would include the minority members of a PLLC who are not employees, and if the Committee could include other employee benefits in this exception. The committee has no authority to expand Rules beyond their clear meaning. A "member" of a PLLC is defined in the New York State Limited Liability Law as a person with a "membership interest." A membership interest includes all the indicia of ownership: a right to share in profits and losses, a right to dividends, and a right to vote and participate in management. N.Y. Limited Liability Law § 102 (q, r). The meaning of "Employee" in the Rule at issue is as the term is commonly understood, and the Inquirer has stated that the family members he wishes to include are not employees.

6. Finally, while this Committee does not decide questions of law, it is worth noting that the New York Limited Liability Company Law does not permit PLLCs that practice law to have nonlawyer members. §1203. This provision is in accord with the N. Y. Business Corporation Law (BCL) dealing with Professional Corporations (Article 15), and, of course with N.Y. Judiciary Law §495. In N.Y. State 934, a lawyer who had withdrawn as a partner in a firm but remained "of counsel" to the firm wanted his compensation from the firm to be paid into a subchapter S corporation in which his spouse was a shareholder. The opinion found that the payment for the practice of law could not be made to the S corporation, because the BCL did not permit nonlawyers to own any interest in a Professional Corporation formed to practice law. (N.Y. BCL §1503.)

CONCLUSION:

Therefore, because the contemplated conduct is specifically proscribed by Rule 5.4(d), the Inquirer may not practice law in a PLLC that has nonlawyers as members.

(32-19)

OPINION 1191 (05/26/2020)

TOPIC: Duty to Municipal Organization; Conflicts of Interest

DIGEST: Counsel for a municipal corporation owes a duty solely to the municipal corporation. Upon learning information of serious allegations by municipal employees injurious to the municipality, corporation counsel should report the information to higher authorities within the municipal unit, including, if need be, to the highest authority. A prior or current representation of the employees in their official capacities does not relieve the corporate counsel of this duty.

RULES: 1.6, 1.7, 1.9, and 1.13

FACTS:

1. The inquirer is a New York attorney who is chief counsel to a New York municipal corporation. The corporation counsel's office is responsible for representing the municipality and its employees when sued in an official capacity. If a conflict exists between the municipal corporation and one or more employees, the counsel's office retains outside counsel.

2. The corporation counsel's office is responsible as well for reviewing and investigating allegations of wrongdoing by municipal employees. Recently, the corporation counsel has learned of serious and credible allegations against certain employees, including supervisory employees, who may have engaged in the misappropriation of municipal funds of substantial injury to the municipality. The allegations concern the misuse of funds for work that the employees did not discharge.

3. As corporation counsel, the inquirer has represented some of the alleged wrongdoers in their official capacity, either currently or in the past.

QUESTIONS:

4. The inquirer's questions are best reduced to two:

> (a) What are the obligations of a municipal counsel when faced with serious and credible allegations of wrongdoing by municipal employees adversely affecting the municipal corporation?
>
> (b) What are the municipal counsel's duties when the counsel's office has previously represented, or continues to represent, the alleged wrongdoers, in their official capacities?

OPINION:

5. Rule 1.13 of the N.Y. Rules of Professional Conduct (the "Rules") governs this inquiry. "The duties defined in this Rule apply to government organizations." Rule 1.13, Cmt. [9]. Under that Rule, the inquirer's client is the municipal corporation and not any of its constituents**.** Rule 1.13(a) says:

> When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituent, and it

> appears that the organization's interests may differ from those with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of its constituents.

Rule 1.13 (b) continues:

> If a lawyer for the organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

6. The legal rights and duties of a municipal corporate counsel may vary by municipality, so we are in no position to establish a general standard of conduct in all circumstances. If, however, the municipal corporate counsel reaches the conclusions set out in Rule 1.13(b), and lacks authority to act on the his or her own power without violating Rule 1.6 on the protection of confidential information owned by the municipal corporation (such as a reference to a county District Attorney), then Rule 1.13(b)(3) permits the lawyer to refer the matter "to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law." The "applicable law" is beyond our jurisdiction to decide, but for purpose of this inquiry we assume that the highest authority in a municipality is its chief executive (a mayor or town executive) or its governing body (a town committee, a village board, etc.).

7. Accordingly, if the inquire concludes, as the facts suggest, that municipal employees are engaged in conduct that violates the employees' duties to the municipal corporation, may result in liability to that municipal corporation, and may result in substantial injury to the municipal corporation, then Rule 1.13 obligates the corporate counsel to report the conduct to a higher authority such as the municipality's chief executive or governing body. Whether the corporate counsel may disclose the information if the municipal officials do not act on the disclosure depends on whether disclosure is permitted under Rule 1.6(b), including whether disclosure is "required" by law. Not able to opine on legal questions owing to limits on our jurisdiction, we offer no view on whether the corporate counsel may disclose the municipality's confidential information to third persons, with some confidence that disclosure to the higher authorities may excite some action.

8. That the corporation counsel may have previously represented one or more of the affected employees in their official capacity but in unrelated matters does not affect this duty. Rule 1.9 prohibits a lawyer from representing another person in "the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Nothing in the inquiry suggests that any prior representation of the affected employees was in any way related to the allegations of wrongdoing that corporate counsel currently confronts. Absent circumstances in which the corporate counsel acquired personal (as opposed to municipal) confidential information from the employees – and no such indication exists here – then Rule 1.9 poses no barrier to revealing wrongdoing by a person previously represented in an official capacity.

9. If the corporate counsel's office currently represents an individual employee in an official capacity in a pending matter, and that employee is among those who are alleged to have engaged in wrongdoing, then, again assuming that the corporate counsel has not acquired personal (as opposed to municipal) confidential information from the employee, the corporate counsel should withdraw from the representation consistent with the dictates of Rule 1.16, including, if need be, permission of the tribunal before which the office appears on behalf of the individual. Such is the requirement of Rule 1.7, governing current conflicts of interest, which prohibits a lawyer from a representation that "will involve the lawyer in representing differing interests." On the facts here, the interests of the municipality and the official plainly diverge, and hence a conflict exists.

10. Our parentheticals concerning the acquisition of personal confidential information as opposed to confidential information owned by the municipality are intended as an alert of the perils inhering in any corporate representation – that a lawyer for an organization, including a municipal corporation, must be careful to be clear that the lawyer is counsel for the corporation and not for any of its constituents, including employees.

CONCLUSION:

11. Counsel for a municipal corporation who learns of information that municipal employees have breached a legal duty to the municipality that may be imputed to the municipality or otherwise is likely to result in substantial injury to the municipality should report the information to the municipal authorities and may disclose the information outside the municipality if required by law. A prior representation of the affected employees is no obstacle to this disclosure if unrelated to the alleged wrongdoing, and a lawyer may withdraw from a current representation of an affected employee consistent with the rules of the tribunal.

(31-19)

OPINION 1192 (06/09/2020)

TOPIC: Retention and disposition of lawyer's closed files

DIGEST: With certain important exceptions**,** a lawyer has no ethical duty to retain closed client files (or other documents held by the lawyer owned by third parties) for an indefinite period when neither the client nor the third party requests their return. The exceptions are original documents of intrinsic value such as wills, deeds, or negotiable instruments, as well as documents that the lawyer knows or should know that the client or third party may need in the future. Apart from these documents, a lawyer has an ethical duty to retain for seven years certain books and records concerning an attorney-client relationship, and any documents otherwise required by law to maintain.

RULES: 1.9, 1.10, 1.15

FACTS:

1. The inquirer is a New York attorney who acquired a partnership interest in a law firm some years ago. Upon the inquirer's arrival, the firm was, we are told, in a state of disarray in both its financial and administrative affairs. The prospect of the firm's insolvency looms. Of particular concern to the inquirer in the context of a possible dissolution are the files of thousands of clients and former clients of the firm. The inquirer says that most of these files are stale and without connection to any ongoing client of the firm. The costs of disposal of the files, by whatever means, would be substantial.

QUESTION:

2. What are a lawyer's obligations in dealing with closed client files?

OPINION:

General Principles

3. In 1977, we wrote: "The ethics of our profession do not cast upon lawyers the unreasonable burden of maintaining all files and records relating to their clients. Indeed, the Code of Professional Responsibility is remarkably silent on this subject. What is required of lawyers must for the most part be determined in the light of common sense and certain general principles of considerably broader application." N.Y. State 460 (1977).

4. We think that Opinion 460 is still applicable. Although decided under the Code of Professional Responsibility (the "Code"), the Code's successor, the Rules of Professional Responsibility (the "Rules"), effects no change in its reasoning. With the important exceptions noted below, nothing in the Rules requires lawyers to maintain all files and records concerning an attorney-client relationship for any predetermined period of time. Subject to the following caveats, therefore, a lawyer is free to discard such files and records consistent with common sense and the prudential exercise of professional judgment.

5. *Sage Realty v. Proskauer Rose*, 91 N.Y.2d 30 (1997), teaches that what are generally, if too-broadly-named, as "client files" is a matter of property law. Issues of property law are outside our

jurisdiction; we opine only on the Rules. Rule 1.15(a) says, among other things, that a lawyer in possession of "property belonging to another person, where such possession is his or her incident to practice of law, is a fiduciary." Rule 1.15(c)(4) requires a lawyer to "deliver to the client or third person as requested" any "properties in the possession of the lawyer that the client or third person is entitled to receive." For our purposes, we assume that no client or third person has requested the inquirer to return any property, for otherwise the lawyer's duty is plain: the lawyer must deliver to the requesting party whatever the client or third party is entitled to receive. Absent such a request, however, the issues for the fiduciary are a determination of ownership, and whether the lawyer may dispose of the contents of a client file based on that determination.

6. That the lawyer has succeeded to this duty through acquisition of or new membership in a firm is of no consequence. In our Opinion 623 (1991), decided under the Code but equally applicable today, we said:

> The professional obligation to maintain closed files or to arrange for their disposition is not limited to those members of the firm who worked on the file when it was active. In N.Y. State 398 (1975), we held that, absent a special agreement to the contrary, the clients of a law partnership employ the firm as an entity and not a particular member of the firm. Consistent with that holding, the ethics committee of the Nassau County Bar Association determined that both partners of a two-member firm in dissolution were fully responsible to every client of the firm, and the lawyers' separate agreement to the contrary could not diminish each lawyer's responsibility to the clients of the firm. Nassau County 40–88 (1988). The recently amended provisions of DR 9–102(G) are also consistent with this principle of joint and several responsibility in requiring that "the former partners or members [of the firm in dissolution] shall make appropriate arrangements" for the maintenance of the records which the firm was required by law to maintain.
>
> When a law firm dissolves or a lawyer retires from practice, additional questions arise concerning the disposition of closed files. Dissolution or retirement from practice clearly does not relieve the lawyer of a professional obligation to maintain closed files. See e.g., N.Y. State 460, supra; see also, EC 4–4, EC 4–6.

7. Three possible ownership claims exist when reference is made to client files: a current or former client, a third person, or the law firm itself. However cumbersome the exercise – and we do not underestimate the burden, especially on the facts presented – the Rules require the lawyer as fiduciary to undertake the task. It is ethically immaterial that the economic burden of disposing of closed files may be far in excess of any practical benefit to the parties involved. In its Opinion 43–89 (1989), cited with approval in N.Y. State 623, the Nassau County Bar Association, deciding under the Code and referring to a custodial attorney's release of files to the client of a deceased attorney, aptly said:

> It is no answer to the discharge of custodial counsels' obligations under the Code of Professional Responsibility to complain that the benefits of their passive custody of the documents are not commensurate with the present burdens. Such burdens do not follow solely from the attorney-client relationship, and are not dependent on the payment of fees; rather, the burdens of custody as prescribed by the Code are inherent in

> the lawyer's enjoyment of his professional status, and his concomitant obligations to the public generally. Once the burden is assumed, by actively (or passively) taking custody of funds or property belonging to any "client," those burdens must be fully discharged even if the benefits of the custody are minimal or non-existent.

See also N.Y. State 398 (1975); N.Y. State 341 (1974); N.Y. City 87–74 (1988).

8. Other authorities generally agree. For instance, In its Opinion 725 (1998), the New York County Lawyers' Association Committee on Professional Ethics said:

> Although Inquirer no longer represents private clients, he still is subject to ethical restraints on the length of time he should keep former clients' documents and on the manner of their disposal. Restatement (Third) The Law Governing Lawyers, § 58, cmt. b (Proposed Draft, May 1996). These restrictions are not rigid. They vary case-by-case in light of the concerns of lawyers, clients and the justice system. On the one hand, lawyers wish to avoid unreasonable burdens and expenses from storing closed files. On the other hand, clients and the justice system have an interest in preserving important documents in the event they are needed after a client's file has been closed. See N.Y. State 460 (1977). How these interests are balanced in a particular case usually depends on the type of documents in question.

9. We agree as well. Although of little practical use to the inquirer's circumstances, we note that prudence and good practice counsel in favor of lawyers anticipating the issue of document disposal in engagement letters at the start of a representation, which may outline the law firm's intentions concerning the disposition of files at the close of an engagement and thereby eliminate the problems so many firms face when confronted with stale files and rising storage costs. Today's technology may save some warehouse space but scanning thousands of documents does not necessarily relieve the expense. Foreseeing the issue in engagement letters may thus spare resources better devoted elsewhere.

Files Belonging to Clients and Others

10. In its Opinion 2010-1, the New York City Bar Association Committee on Professional and Judicial Ethics addressed the issue of old files, and sought to classify the contents of a client file into categories. The Committee recognized, as we do, that "upon termination of the attorney-client relationship . . . if the client does not seek access or makes no provision for delivery, [the] attorney may have an obligation to retain certain documents, although the lawyer need not permanently retain all files after an engagement is concluded."

11. One category the Committee recognized were "documents with intrinsic value or those that directly affect property rights such as wills, deeds, or negotiable instruments," which the Committee concluded the lawyer was obligated to retain for an indefinite period. This conclusion is consistent with our recent opinion, NY State 1182 (2020), in which the inquirer was in possession of over five hundred wills, the testators being unknown and, after due diligence, undiscoverable. We concluded there (at ¶ 10):

> A lawyer may not dispose of Wills, whose testators' locations and/or circumstances are unknown. The Wills constitute property, and the lawyer must safeguard the Wills indefinitely unless the law affords the lawyer an avenue to file or otherwise dispose of the wills.

12. Another category the City Bar Ethics Committee classified as subject to indeterminate retention consists of documents "that a lawyer knows or should know may still be necessary or useful to the client, perhaps in the assertion of a defense in a matter for which the applicable limitations period has not expired." Its opinion cites our N.Y. State 460, and accords with our reasoning there that common sense and the prudent exercise of professional judgment is required before a lawyer disposes of files. Within this grouping we would include documents that may be property of a third party – for example, materials gathered in discovery or due diligence – which a lawyer should retain unless judicial or client contractual obligations otherwise dictate. We agree that this duty is not invariably open-ended, and that some lapse following the relevant limitations period may provide closure.

13. Apart from the foregoing, neither the Rules nor our precedents require maintenance of client files belonging to current or prior clients or other persons for any specific period unless the law, whether by statute, regulations, or rules or orders of court, say the contrary. The City Bar's Opinion 2010-1 said that some jurisdictions require retention periods of five or six years. One commentator observed that Illinois Bar Association Committee on Professional Ethics Opinion 17-02, having reviewed resources from various states, and the retention periods dictated by them (some of which were as long as 10 years), arrived at the conclusion that a general default retention period of seven years for ordinary closed file materials is reasonable. J. Rogers, *Usually Okay to Destroy Client Files After Seven Years*, 33 Law. Man. Prof. Conduct 170 (2017), This may be so, but unless some law, regulation, rule, or order says as much, our view is that the Rules alone impose no such obligation, and that therefore a lawyer, in the absence of a legal duty or an owner's instructions, may dispose of files belonging to current or prior clients or other persons at any time except for those in the categories mentioned above.

Files Belonging to the Law Firm

14. It is not uncommon for files called "client files" to contain materials that belong to the custodial law firm. Whether certain materials in the file – purely internal memoranda written to assist the firm in providing advice, a lawyer's handwritten notes of a meeting – belong to the client or the lawyer is an often litigated issue pivoting on, among other things, legal doctrines such as the work product privilege. We avoid entering into this fray except to say that a law firm may have a possessory interest in some of these kinds of documents and, if the law firm does so, then the lawyer may dispose of them as the lawyer sees fit unless a legal duty (compulsory process being an instance) exists to require their preservation.

15. But other duties remain. Rule 1.15(d) imposes on a lawyer or law firm the duty to maintain certain specific records for a period of seven years, a duty that, like its parallel in the Code, Rule 1.15(h) extends to former partners or a successor firm in the event of dissolution, merger, or sale. In brief summary, these duties of retention are to keep for seven years: (1) complete records of all banking transactions affecting the lawyer's practice; (2) complete records of all special accounts; (3) copies of all retainer and compensation agreements with clients; (4) copies of all statements to clients or

others of disbursements of funds on behalf of clients or the others; (5) copies of all client bills; (6) copies of all payments to lawyers, investigators or other persons, not in the lawyer's employ, for services rendered; (7) copies of all retainer and closing statements filed with the Office of Court Administration; and (8) all checkbooks, bank statements and related documents. Some lawyers keep some of these documents only in the client file associated with the services rendered on the client's behalf, and Rule 1.15(d) means that a law firm must segregate these documents for saving if the client file is otherwise discarded.

16. The foregoing is not meant as an exhaustive list of the records a law firm should keep for itself. For example, while imposing no time limit on its retention other than to the extent of overlap with Rule 1.15(d), Rule 1.10(e) says that, in most circumstances, a law firm "shall make a written record of its engagements, at or near the time of each engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements." This Rule is intended to facilitate compliance with the conflicts rules, including Rule 1.9, which governs conflicts with former clients. Inhering in the Rule is that a firm must be mindful of avoiding conflicts prohibited by Rule 1.9, that is, that the law firm must keep a record for some undetermined period of the scope of an earlier but now-closed representations. Rule 1.10(f) warns that a "[s]ubstantial failure to keep" records of these "previous" engagements "shall be a violation" of the Rule no matter whether the failure results in another violation of the Rules.

CONCLUSION:

17. In general, an attorney's duty to maintain a client's closed file is a duty that every law firm partner owes to every past firm client, no matter when the individual partner joined the firm, and a duty that continues during and after the firm's dissolution. Nevertheless, except for original documents of intrinsic value or those a lawyer knows or should know the client or a third party may need in the future, nothing in the Rules obligates a lawyer to maintain storage of closed and unsought client files, with the important caveats that a lawyer has certain bookkeeping duties about current and prior representations and that the lawyer must abide by whatever law may apply to the preservation of certain records.

05-20

OPINION 1193 (06/08/2020)

TOPIC: Law firm name

DIGEST: Lawyers admitted solely in New York may not practice under a law firm with a trade name, even if a trade name is permitted under the governing rules where the firm is principally organized. An out-of-state law firm that conducts business in New York under a name compliant with the New York ethical rules may truthfully advertise its affiliation with an out-of-state firm that uses a trade name permitted in the other jurisdiction.

RULES: 5.4, 7.5, 8.5

FACTS:

1. The inquiring lawyer is admitted to practice only in New York, and is a partner in a firm organized under the rules governing the District of Columbia. In addition to the inquirer, one other partner in the firm who practices principally in New York is admitted both in this State and D.C. Other of the firm's partners principally practice elsewhere, including in D.C.

2. The firm currently practices under a name comprised of the surnames of partners admitted and located in D.C. The inquirer tells us that the firm is considering changing its name to "ABC Law PLLC," with "ABC" lacking the surnames of any current or former partner in the firm. The firm wishes to continue to maintain its New York office using its new name.

QUESTIONS:

3. May a New York lawyer practice in New York in a D.C.-based firm bearing a name lacking the surnames of any past or current partner in the firm, even if the lawyer becomes a member of the D.C. bar?

4. After the law firm changes its name to ABC Law PLLC, may the New York office of the firm continue to practice in New York with a firm name comprised of the surnames of current or past partners in the firm, including those who are not admitted in New York?

OPINION:

5. Rule 7.5(b) of the New York Rules of Professional Conduct (the "Rules") addresses law firm names:

> A lawyer in private practice shall not practice under a trade name, or a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "PC" or such symbols permitted by law, the name of a limited liability company or partnership shall contain "LLC," or "LLP" or such symbols permitted by law and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more

deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.

6. Consistent with this Rule, our prior opinions resolve this inquiry. A firm name that is not made up of the legal surnames of one or more former or current partners of the firm constitutes a trade name under the Rules. "We have repeatedly, and we believe correctly, concluded that no circumstances exist in which a New York lawyer may ethically practice under a trade name in New York, even though the use of a trade name is permitted in another state in which the firm has offices." N.Y. State 1179 ¶ 6 (2020). *See* N.Y. State 861 ¶ 4 (2011); N.Y. State 740 (2001). Here, we conclude that the proposed name change is a prohibited trade name in New York.

7. An out-of-state law firm may be an owner of a New York law firm provided that the out-of-state law firm is owned entirely by attorneys and all legal fees are distributed only to attorneys, so as to ensure there is no ownership interest by or fee sharing with non-attorneys in violation of Rule 5.4. N.Y. State 1038 ¶¶ 12-13 (2014) (a New York lawyer "may not join a D.C. firm that includes a non-lawyer partner" or practice in a firm that is a "wholly-owned subsidiary" of a D.C. firm having non-lawyer partners). *See* N.Y. State 911 ¶ 2 (2012).

8. A lawyer admitted in New York and another jurisdiction may be affiliated with a firm with a trade name if the lawyer principally practices in, and the other jurisdiction ethically permits, the use of trade names. This is because the conduct – practicing under a trade name – principally occurs in the other jurisdiction; accordingly, under the choice-of-law provisions of Rule 8.5(b)(2), the ethical rules that apply would be that of the other jurisdiction. Thus, "a lawyer who is admitted in New York and another jurisdiction that permits a law firm to practice under a trade name, and who principally practices in the other jurisdiction, may be of counsel to a firm with a trade name, even though the lawyer could not do so in New York" N.Y. State 1023 ¶ 8 (2014).

9. Finally, in response to the second question, the inquirer may practice in New York using a firm name comprised of the surnames of current or past partners in the firm, including partners who are (or were) admitted only in D.C. In addition, nothing in the Rules prevents the inquirer from truthfully saying in advertising or other branding that the inquirer's firm practices in D.C. or elsewhere outside New York under a trade name permitted in those jurisdictions. N.Y. State 1179 ¶ 7. Hence, the prohibition on trade names in New York does not entirely deprive the inquirer of the benefits of whatever goodwill may reside in the new name of the D.C.-based firm.

CONCLUSION:

10. Lawyers admitted and practicing solely in New York may not practice under a law firm with a trade name, even if a trade name is permitted under the governing rules where the firm is based. An out-of-state law firm may conduct business in New York under a name that complies with the New York ethical rules, including truthful advertising that the New York firm practices elsewhere under a permitted trade name.

(30-19)

OPINION 1194 (06/11/2020)

TOPIC: Confidentiality of Information; Conduct before a Tribunal; Withdrawal

DIGEST: A lawyer who represents an executor has no ethical duty to the estate's beneficiaries. A lawyer may withdraw, or seek permission to withdraw from a tribunal that requires such permission, when the client ignores the lawyer's request to provide the lawyer with documents pertinent to the representation or if the lawyer has a reasonable belief that the client is engaging or has engaged in criminal conduct. A lawyer who knows that a client intends to engage in criminal or fraudulent conduct related to the proceeding "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Even if such disclosure is not required, a lawyer may reveal confidential information to the extent reasonably believed to be necessary to prevent the client from committing a crime or to comply with law. A lawyer representing an executor may donate a retainer fee to the beneficiaries of the estate.

RULES: Rules 1.0(i), 1.6, 1.16, 3.3(b)

FACTS:

1. The inquirer is a New York attorney who represents an executor in the probate of an estate. The executor had managed the decedent's financial affairs and acted as the decedent's health care proxy during the decedent's later years. The decedent had no known living relatives. The decedent's estate, not insubstantial, was bequeathed mostly to charities, but the will made a modest gift to the executor.

2. Months after a probate petition was filed, the inquirer learned that the executor was the beneficiary of a transfer-on-death designation – known to practitioners in the field as a "TOD designation" – of a significant sum. Before the inquirer learned of this fact, the executor had presented the decedent's death certificate to the institution handling the decedent's account and arranged the transfer of the TOD designation sums to the executor's account. The TOD designation was created after the will's execution, and so, but for the superseding TOD designation, the inquirer believes that the assets would likely have been distributed to the decedent's charitable beneficiaries. Thus, we are told, the size of the beneficiaries' inheritance likely depends on the legitimacy of the TOD designation.

3. According to the inquirer, the executor gave the inquirer varying, conflicting explanations about the reason for, and circumstances of, the TOD designation. The inquirer says that the TOD designation could have been accomplished without the involvement of an attorney or any witnesses, thus insulating the transaction from any meaningful scrutiny. The inquirer says that the executor has repeatedly refused the inquirer's requests to provide copies of the TOD designation, and continues to do so, which heightens the inquirer's concern about its legitimacy.

4. The Surrogate's Court has granted letters of appointment to the executor. The Surrogate's Court inventory form does not itemize the TOD securities accounts. The inquirer believes that the executor will "likely" not disclose the TOD distribution to the Surrogate's Court. The inquirer believes the Surrogate's Court and the N.Y. Attorney General's Charities Bureau would find this omission to be misleading and fraudulent conduct by the executor.

5. The inquirer sent a letter to the executor expressing the inquirer's intention to withdraw from the representation and sending a check (from an IOLA account) in the amount of the original retainer fee for deposit in the decedent's estate. The executor has now retained an attorney who will continue the administration of the estate. After the executor received the intent-to-withdraw letter, the executor declined to cash the IOLA check made out to the decedent's estate, stating that the inquirer did the work and should be compensated. The inquirer does not want to be compensated in any fashion and prefers the money go to the decedent's charitable beneficiaries.

QUESTIONS:

6. The inquirer raises several issues:

(a) Is a lawyer retained to represent an executor obligated to protect the interests of an estate's beneficiaries?

(b) May a lawyer withdraw from this representation when a client is not cooperating with the lawyer and the lawyer suspects wrongdoing on the part of the executor?

(c) What disclosures about the suspected wrongdoing may or must the lawyer make?

(d) What can a lawyer do with a retainer fee that the lawyer does not want to keep?

OPINION:

An Estate Lawyer's Duties to Beneficiaries

7. We addressed an estate lawyer's duties to beneficiaries in our Opinion 1034 (2014). There, we said (at ¶ 6) that the "question of who is the client is largely a matter of law," a principle consistent with paragraph 9 of the Preamble to the N.Y. Rules of Professional Conduct ("Rules"), which teaches that "substantive law external to these Rules determine whether a client-lawyer relationship exists." Issues of law are beyond our jurisdiction. Nevertheless, in Opinion 1034, we noted that § 4503(a)(2) of the Civil Practice Law and Rules ("CPLR") provides that, "for purposes of the attorney-client privilege, absent an agreement to the contrary between the attorney and the personal representative, no beneficiary of an estate may be treated as the client, and the existence of the fiduciary relationship does not by itself constitute a waiver of the privilege." We then concluded that, absent other law or agreements to the contrary, "the Rules and the CPLR require that the lawyer consider the executor as the only client." *Id.* ¶ 8.

8. Accordingly, with the same caveat contained in N.Y. State 1034, we do not believe that the inquirer has any ethical duty running directly to the beneficiaries of the estate. We do not opine on the much-litigated issue whether privity between an estate lawyer and an heir is a requisite to standing in a legal malpractice action against the estate lawyer.

An Estate Lawyer's Right To Withdraw from a Representation

9. Rule 1.16 governs whether a lawyer must or may withdraw from the representation of a client. Rule 1.16 provides, in relevant part, that withdrawal is appropriate when "the client insists upon tak-

ing action with which the lawyer has a fundamental disagreement"; or when "the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively." Rule 1.16(c)(4) & (7). On our view, either of these Rules entitle the inquirer to withdraw from representing the estate on the facts presented. *See* N.Y. State 1034 ¶ 16. In addition, Rule 1.16(c)(2) permits a lawyer to withdraw from a representation when "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." Should the inquirer come to the reasonable belief that the client has implicated the lawyer's services in criminal or fraudulent conduct, 1.16(c)(2) would provide an additional ground for withdrawal. Rule 1.16(b)1) makes this permissive withdrawal mandatory if the lawyer concludes that the representation "will result in a violation of these Rules or of law."

10. The above grounds for withdrawal are subject to the caveat, contained in Rule 1.16(d), which governs matters before a tribunal. Rule 1.16(d) states that, if the tribunal's own rules require permission before withdrawal, permission must be obtained notwithstanding good cause for terminating the representation. It is for the inquirer to determine whether the rules of the Surrogate Court require that court's permission for withdrawal.

An Estate Lawyer's Duty To Make Disclosures to a Tribunal

11. The inquirer owes a duty of confidentiality to the client under Rule 1.6(a). Limits exist on this duty, however, two of which are of special import here. Rule 1.6(b)(6) permits a lawyer to disclose client confidential information "when permitted or required under these Rules or to comply with other law or court order." While this committee cannot answer the question of whether "other law" compels disclosure, it can opine on the effect of Rule 3.3, which mandates disclosure of confidential information in certain situations. Specifically, "a lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(b). Rule 1.0(i), in turn, defines "fraud" as denoting conduct that is "fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive," unless it lacks an element of scienter or a knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another."

12. While the inquirer in this case "suspects" that the executor intends to engage in conduct that the inquirer believes is fraudulent in relation to the proceeding (*i.e.,* by failing to disclose information pertaining to the TOD account to the Surrogate Court), this suspicion must rise to the level of "knowledge" to trigger remedial measures and, if necessary, disclosure. If the inquirer knows that the executor intends to commit fraud related to the proceedings, then Rule 3.3(b) requires the inquirer, after a final effort to persuade the executor to disclose the TOD account, to report the information concerning the TOD designation to the tribunal, a duty that continues despite the lawyer's withdrawal from the representation. *See* N.Y. State 1123 ¶ 4 (2017).

13. The question whether the inquirer knows of the executor's intent to commit fraud appears to turn on two factors: (a) whether the executor will, in fact, omit the TOD account from the Surrogate Court's inquiry; and (b) whether the inclusion of the TOD account on the inventory is legally required (s*ee* § 207.20 of the Uniform Rules for the Surrogate's Court (requiring disclosure to the Court of any

asset "owned by the decedent individually")). The first factor depends on the degree of the inquirer's knowledge of the executor's intent; the second is a legal issue beyond the purview of this Committee.

14. At risk of repetition but for the sake of clarity: Even if Rule 3.3(b) does not mandate disclosure after a failed effort to persuade the executor to do so, the inquirer must still consider Rules 1.6(a)(3) and 1.6(b)(2) & (6). *See* N.Y. State 1034. Under those Rules, disclosure would be permitted if the lawyer "reasonably believes" that disclosing the information is "necessary" to "prevent the client from committing a crime" or is required by "law or court order." This disclosure would be permissible only if the failure to disclose the TOD account to the Surrogate's Court would constitute a criminal fraud or other violation of law. As this too turns on a legal determination beyond the purview of this committee, we cannot answer it. As with Rule 3.3(b), if the inquirer decides to make a permissive disclosure under Rule 1.6(b), the inquirer should first "remonstrate with the client about the desirability" of disclosing the TOD account to the Surrogate's Court.

The Estate Lawyer's Retention of the Fee

15. Finally, with respect to the inquirer's unsuccessful attempt to return the retainer fee to the executor, the inquirer is free to keep the fee or, if the inquirer wishes, to donate the fee to one of the estate's beneficiaries or another charity of the inquirer's choosing. Nothing in the Rules prohibits such a gift. We caution only that, subject to the foregoing, the inquirer in making any gift must be mindful of whatever ongoing duties of confidentiality that the inquirer owes the executor.

CONCLUSION:

16. A lawyer representing an executor of an estate is not ethically obligated to protect the interests of the estate's beneficiaries. A lawyer may withdraw, or seek permission to withdraw from a tribunal that requires such permission, when the client ignores the lawyer's request to provide the lawyer with documents pertinent to the representation or when the lawyer reasonably believes that the client has involved the lawyer's services in criminal or fraudulent conduct. A lawyer must disclose the client's fraudulent conduct with regard to the represented matter if he *knows* that the conduct involves fraud and if other remedial measures have failed. The same disclosure is permitted when the lawyer "reasonably believes" that disclosing the information is "necessary" to "prevent the client from committing a crime." A lawyer representing an executor may donate a retainer fee to the beneficiaries of the estate.

(27-19)

OPINION 1195 (06/11/2020)

TOPIC: Attorney's obligation to accept client files from prior law firm.

DIGEST: A lawyer has no duty to represent clients who were clients of a former law firm and have not engaged the lawyer to represent them at a new firm, no matter whether the lawyer did work on behalf of those clients at the former firm.

RULES: 1.6, 1.9, 1.16

FACTS:

1. The inquirer recently left employment with a law firm in which the inquirer had practiced for some years. Several partners left the firm during the inquirer's last two years at the firm. The inquirer took on a number of matters these lawyers had handled, and settled several of them. In one matter, the inquirer reached a compromise of a lien but then later discovered that another lien existed, at which point the inquirer wrote the client to advise of the outstanding lien and the client's responsibility to pay the lien or negotiate a reduction. The inquirer left the law firm shortly thereafter and started a new firm. Several of the clients from the old firm retained this new firm.

2. Following the inquirer's departure, the former firm began sending files for matters that the inquirer had handled before departure. The inquirer returned the files to the old firm with notice that the inquirer did not represent the affected clients. Nevertheless, the old firm re-sent the files to the inquirer and, we are told, advised those clients in writing that the inquirer was now handling their matters.

QUESTIONS:

3. The inquirer asks:

> (a) Is a lawyer who leaves a law firm responsible for representing clients represented by the inquirer at the prior firm but who have not retained the lawyer's new firm?
>
> (b) Is a lawyer who advised a client about lien prior to departure from a prior firm still responsible for advising the onetime client about the lien?
>
> (c) Is it ethical for a law firm an employee of which has left the firm to advise firm clients that the former employee remains responsible for certain matters the departing lawyer had previously handled?

4. Our charter restricts us to responding to inquiries about a lawyer's own prospective conduct, not about the conduct of other lawyers. Consequently, we offer no opinion in reply to the inquirer's third question.

OPINION:

5. On the facts presented, we consider clients of the inquirer's former firm who have not retained the inquirer's new firm to be former clients of the inquirer. A lawyer owes only certain discrete obligations to former clients. The most prominent of these are set out in Rule 1.9 of the N.Y. Rules of Professional Conduct ("Rules"), which, among other things, requires a lawyer not to reveal the confidential information of former clients protected by Rule 1.6, and not to represent a client adverse to the former client in a matter that is 'the same or a substantially related matter" to one in which the lawyer previously represented the former client. Rule 1.16(e) also makes provisions for avoiding prejudice to a client upon termination of the attorney-client relationship. For the most part, however, a lawyer's duty of care to clients dies with the end of the attorney-client relationship.

6. On our view, this means that the inquirer no longer owes clients of the former firm the range of duties attending an ongoing attorney-client relationship under the Rules. This extends to the client of the former firm whom the inquirer advised about liens. It appears that the inquirer counseled the client to deal with the liens. Unless the client has retained the inquirer's new firm, we see nothing in the Rules to obligate the client further to serve the client, except for making available documents or other information in the inquirer's possession that may avoid prejudicing the erstwhile client's ability to act as instructed.

7. The Rules explicitly state that the existence of an attorney-client relationship is a question of law, not ethics. Rules, Preamble ¶ 9. We do not issue opinions on legal questions, but we do not stray far from our charter in saying that an unaffiliated third party may not unilaterally impose such a relationship without the agreement of the lawyer and the client. Thus, unless clients of the former firm have agreed to retain the inquirer's new firm, the inquirer's duties to those onetime clients are limited to those any lawyer owes a former client. *See* ALI, Restatement of Law Governing Lawyers (Third) § 14(1) (Formation of a Client-Lawyer Relationship) (a lawyer-client relationship arises when "a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services).

CONCLUSION:

8. A lawyer owes no duty to represent clients of a former firm absent a client's agreement and instead owes such persons only the duties all lawyers owe to former clients.

(06-20)

OPINION 1196 (06/12/2020)

TOPIC: Litigation Financing, Conflicts of Interest.

DIGEST: In a medical malpractice action commenced on behalf of an infant, a lawyer may refer the parent or legal guardian in whose name the action is brought to a litigation funding company owned by the lawyer's sibling for a non-recourse loan to finance litigation expenses only if the parent or legal guardian gives informed consent, confirmed in writing, to waive personal-interest conflicts in compliance with Rule 1.7(b) and satisfies the conditions of Rule 1.8(f) for accepting a thing of value from a non-client related to the client's representation.

RULES: 1.0(j), 1.6(a), 1.7(a)(2); 1.7(b); 1.8(e); 1.8(f); 1.8(i)

FACTS:

1. The inquirer is a personal injury attorney whose primary focus is pursuing medical malpractice actions that are brought on behalf of infants by a legal guardian, almost always a parent. Upon conclusion of such actions, whether by way of settlement or judgment, the inquirer's contingent fee is subject to court approval, on notice to the guardian, pursuant to Judiciary Law § 474.

2. According to the inquirer, so-called alternative litigation funding – known as "ALF" and referring to litigation financing provided by entities other than the parties, their lawyers, or insurers – is widely available to finance some medical malpractice actions but not the type of actions in which the inquirer concentrates. We are told that this circumstance results from the reluctance of some courts, exercising their authority under Judiciary Law § 474, to approve disbursement of settlement or judgment proceeds to the ALF funder in accordance with the terms of the ALF agreement.

3. The inquirer has found one ALF company willing to finance the actions brought by inquirer's firm, a company that is owned by the inquirer's sibling. The inquirer has no financial interest in the sibling's company, and the sibling has no financial interest in inquirer's law firm. Their family financial interests intersect only with respect to their separate minority interests in a family-owned property in which neither has any management role.

4. ALF may be used to pay litigation expenses, the legal fees of the attorneys who are prosecuting the action, the living expenses of the client, or any combination of these costs. The funding may take the form of a recourse or non-recourse loan, or the purchase of an interest in the litigation. If a loan, the borrower may be the attorneys or the client. Here, the inquirer proposes to refer clients to the sibling's ALF company to secure non-recourse loans to finance only litigation expenses, not the payment of the firm's attorneys' fees, nor the clients' living expenses.

QUESTION:

5. In a medical malpractice action commenced on behalf of an infant, may a lawyer refer the legal guardian, in whose name the action is brought, to a litigation funding company owned by the lawyer's sibling, for a non-recourse loan to finance litigation expenses?

OPINION:

Rules 1.8(e) and 1.8(i)

6. Rule 1.8(e) of the New York Rules of Professional Responsibility ("Rules") prohibits an attorney from providing financial assistance to a client; Rule 1.8(i) prohibits an attorney from acquiring a proprietary interest in a litigation the lawyer is conducting for a client. Rules 1.8(e) and 1.8(i) have exceptions that allow an attorney representing a client on a contingent fee basis to advance on behalf of the client, or to pay on the lawyer's account, only litigation expenses, which are to be recovered only out of the proceeds of the action. *See* Rules 1.8(e)(1) and (3), and 1.8(i)(2).

7. In N.Y. State 855 (2011), we concluded that a lawyer may not permissibly refer a client to a company owned by the lawyer's spouse to secure ALF for client living expenses. We noted our prior opinions that had "frequently concluded that various rules relating to conflicts involving financial interests apply both to the lawyer and to the lawyer's business relationships with the lawyer's spouse"; we said that, because the referring lawyer could not ethically provide the financial assistance under Rules 1.8(e) or 1.8(i), the lawyer could not cause a spouse to provide that same assistance, "essentially using the spouse as a front for advancing improper financial assistance to a client for whom the lawyer is conducting litigation." *Id.* ¶¶ 11, 13.

8. Again relying on Rules 8.1(e) and 8.1(i), we concluded in N.Y. State 1145 (2018) that neither the inquiring lawyer nor the lawyer's law firm could represent a client in a commercial litigation funded by an ALF company in exchange for a percentage of the prospective recovery in which one of the firm's lawyers was an investor. We noted that the exceptions that allow an attorney to advance or pay litigation expenses in contingency cases were inapplicable on the facts presented and stated: "Lawyers are never permitted to give litigation clients the more sweeping kinds of assistance – such as lawyer's fees billed on a non-contingency basis – that, under the inquiry, would apparently be provided by the Company." *Id.* ¶ 16.

9. In contrast to N.Y. State 855 and 1145, the ALF funding proposed here – solely to pay litigation expenses – would constitute permitted financial assistance for the inquiring lawyer to offer under the litigation expense/contingency fee exceptions of Rule 1.8(e), and would not constitute the prohibited acquisition of interest in litigation under Rule 1.8(i). In any event, because the inquirer has represented that the inquirer has no financial interest in the ALF company owned by the inquirer's sibling, even if the financial assistance to be provided exceeded the safe harbors of Rule 1.8(e) and Rule 1.8(i), no issue would arise on whether ALF funding from the sibling's ALF company was a prohibited subterfuge for avoiding the application of these rules. This is because we have never imputed, between siblings, the same "unified financial interest" of spouses. *See* N.Y. State 855, ¶ 11.

10. Otherwise put, when, as here, a lawyer has no financial interest in the ALF company, a referral to an ALF company to secure financing, even for living expenses that would constitute prohibited financial assistance if made by a lawyer, is not unethical, provided that no referral fee is paid and client confidentiality is suitably protected. N.Y. State 666 (1994); *see also* N.Y. State 855, ¶ 8 ("there is at least one legitimate route to avoiding restrictions imposed by Rule 1.8(e) and (i): a lawyer may refer a client to a financial institution in which the lawyer has no interest").

11. Accordingly, we conclude that neither Rule 1.8(e) nor Rule 1.8(i) presents an ethical bar to the inquirer's contemplated conduct. Nevertheless, though Rules 1.8(e) and 1.8(i) present no bar to the proposed referral of clients to an ALF company owned by lawyer's sibling, substantial questions remain about whether such a referral runs afoul of Rule 1.7(a)(2), which prohibits representations when a reasonable lawyer would conclude "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests," or Rule 1.8(f), which imposes conditions upon a lawyer accepting compensation "or anything of value" related to the lawyer's representation of the client. We deem the sibling's willingness to provide a loan to the client to finance litigation expenses to be a "thing of value" indirectly provided to the inquirer because the inquirer's firm would otherwise need to secure financing of its own or forgo the opportunity to represent the client in the matter.

Rule 1.7(a)(2)

12. Under Rule 1.7(a)(2), strong filial bonds may cause the inquirer to favor a sibling's financial interests, consciously or not, over the client's interests with regard to advising the client (or, here, the guardian) on a number of issues that may arise in the course of the representation.

13. For example, although the inquirer is not necessarily a party to the negotiations between clients and the sibling-owned ALF on the specific terms and conditions of the ALF loan, it is unrealistic to assume that the inquirer's clients would not turn to the inquirer for advice about how the loan would likely affect the net recovery, how the loan compares to terms and conditions of litigation expense funding typically offered by other ALF funding sources, and what alternatives exist, if any, to fund litigation expense other than a loan from a company owned by the inquirer's sibling. The clients would reasonably assume that inquirer would exercise independent professional judgment in addressing these issues when, in fact, the inquirer might encourage clients to enter into ALF funding agreements with a sibling's company, and not with an unrelated third-party ALF funder on similar or even more favorable terms, simply to benefit the financial interests of the sibling.

14. Similarly, although the interests of the inquirer's law firm and the sibling's ALF company are logically aligned with regard to the risks of trial and the benefits of a compromise settlement – because the inquirer earns a contingent fee and the loan by the sibling's company gets repaid only if there is a successful outcome – it is quite plausible that inquirer and the sibling are in dissimilar economic circumstances. One of them is, or could in the future be, in greater need of cash and more willing to press the client to accept an early settlement that does not reflect the fair value of the case obtainable at a later stage of the litigation.

15. Finally, as the inquirer notes, the kind of actions at issue here often require the expenditure of large sums to acquire thousands of pages of medical records; the retention of more than one medical expert who are each compensated at substantial hourly rates for their time consulting, preparing expert reports and being deposed; stenographers who charge a premium for medical malpractice depositions; and the *per diem* fees of the medical experts who ultimately testify at trial. It is not hard to imagine a situation in which developments in a case indicate that the prospect of success at trial is less than assured, and the sibling–owned ALF company perceives its investment in jeopardy. At the same time, the best chance for a successful outcome might be the retention of additional experts requiring substantial additional expense. The issue – inherent in any ALF financing – is whether these

considerations would unduly influence the lawyer's management of the case. The prospect of outsized influence is heightened here by the family relationship between the client's counsel and lender – a potential tension exists between the lawyer's duty zealously to pursue a client's interests that may require the expenditure of substantial additional funds for litigation expenses and the sibling's resistance to advancing more funds owing to a diminishing likelihood of securing a recovery.

16. Based on these considerations alone, we believe that a reasonable lawyer would conclude that the inquirer's personal and financial interests pose a significant risk that the lawyer's professional judgment on behalf of a client may be adversely affected by the ALF funding proposed to be provided by a sibling's ALF company, and that a Rule 1.7(a)(2) conflict of interest therefore exists. We believe, however, that this conflict is subject to waiver under Rule 1.7(b) provided the inquirer satisfies the conditions that Rule imposes. Two of those conditions are relevant here – first, that the inquirer "reasonably believes that the lawyer will be able to provide competent and diligent representation" to the client; and second, that the client "gives informed consent, confirmed in writing."

17. In these circumstances, the inquirer alone is in a position to assess whether the lawyer reasonably believes that the lawyer is able to provide the requisite and diligent representation to the client despite the conflict of interest. The standard of reasonable belief in Rule 1.7(b) embeds both subjective and objective elements, meaning that the inquirer must make not only a personal judgment about the inquirer's capacity to satisfy the requirement but also an appraisal of how a disinterested lawyer would regard the situation. N.Y. State 1048 ¶ 20 (2015). On the circumstances presented, we see no objective consideration that would disable the lawyer from proceeding, but only the lawyer may make this decision based on all the facts known to the inquirer.

18. The second condition requires informed consent. Rule 1.0(j) defines "informed consent" to mean "information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." This means, at a minimum, disclosure of the above considerations that led us to conclude that a Rule 1.7(a)(2) conflict of interest exists. The client should certainly be made aware of the family relationship between the inquirer and the inquirer's sibling, that ALF funding has an enormous profit potential, and that the inquirer and the ALF company may differ substantially on the level of risk that each is willing to tolerate. In addition, to assure that the consent is fully informed, the inquirer should discuss with the client the desirability of retaining independent counsel to provide disinterested advice regarding the client's best interest. As the New York City Bar Association Committee on Professional Ethics said in its Opinion 2011-2:

In providing candid advice, a lawyer should advise the client to consider the costs and benefits of non-recourse financings, as well as possible alternatives. With respect to costs, a common criticism of non-recourse financing is that the fees charged to clients may be excessive relative to other financing options, such as bank loans, thereby significantly reducing the client's recovery. A lawyer thus should bear in mind the extent to which non-recourse financing will limit a client's recovery. And before recommending financing companies, a lawyer should conduct a reasonable investigation to determine whether particular providers are able and willing to offer financing on reasonable terms.

19. In the context of the current inquiry, an independent counsel, if any, might wish to discuss with the client (a) why the inquirer has elected not to secure the ALF funding by the inquirer's firm

itself rather than have the client be the borrower, and (b) whether there are other competent lawyers or law firms who would be willing to represent the client and incur litigation expenses without the need for ALF funding to be secured by the client's recovery.

Rule 1.8(f)

20. Rule 1.8(f) allows a lawyer to accept "a "thing of value" from a non-party where three conditions are met: "(1) the client gives informed consent; (2) there is no interference with the lawyer's independent and professional judgment or with the client-lawyer relationship; and (3) the client's confidential information is protected as required by Rule 1.6."

21. The first and second conditions of Rule 1.8(f) for the inquirer's indirect acceptance of litigation financing from a sibling-owned company will be satisfied if the standard for waiving a personal conflict interest under Rule 1.7(a)(2) has been met. To comply with the third condition, however, that is, the protection of client confidentiality, the inquirer may disclose to the ALF funder for underwriting purposes only such information that is "confidential information" under Rule 1.6(a)(1) to the extent that the client has consented to the disclosure after receiving from the inquirer, as Rule 1.0(j) requires, "information adequate . . . to make an informed decision, and after adequately explain[ing]" to the client "the material risks" of disclosure and the "reasonably available alternatives."

CONCLUSION:

22. In a medical malpractice action commenced on behalf of an infant, a lawyer may refer the parent or legal guardian in whose name the action is brought to a litigation funding company owned by the lawyer's sibling for a non-recourse loan to finance litigation expenses only if the parent or legal guardian gives informed consent, confirmed in writing, to waive personal-interest conflicts in compliance with Rule 1.7(b) and satisfies the conditions of Rule 1.8(f) for accepting a thing of value from a non-client related to the client's representation.

(11-20)

OPINION 1197 (06/22/2020)

TOPIC: Pro bono, conflicts; fees paid by third-party payors

DIGEST: A lawyer who provides free, limited scope legal services to a client through a not-for-profit legal services program need not comply with the general rules governing conflicts of interest absent actual knowledge that a conflict exists, whether directly or by imputation. This is true even if the program pays participating attorneys nominal or below-market fees to render the services, though receipt of such a payment means that the lawyer must obtain the client's informed consent, preserve the client's confidential information, and avoid outside interference in even the limited scope representation.

RULES: 1.6, 1.7, 1.8, 1.9, 6.1, 6.5.

FACTS:

1. The inquirer, a New York lawyer affiliated with a law school in New York, administers a program to support and encourage the public interest practices of the law school's alumni. One specific program is conducted under a non-profit entity within the law school and allows the school to hire experienced alumni attorneys at nominal fees to deliver legal counseling and referral services, and occasional limited legal assistance to qualifying New Yorkers. The program is funded by government bodies comprised of elected officials and enables the law school to provide the legal services to constituents of these officials in need of legal help without charge.

2. The elected officials or their staff arrange for constituents to come to the officials' district offices, or other community-based organizations, where the constituents can meet with one of the program attorneys free of charge. These meetings are limited to brief one-on-one counseling sessions with an attorney and are not allowed to evolve into a full representation. The law school's non-profit entity pays the program attorneys a nominal or so-called "low bono" hourly rate to render this assistance.

3. The program administrator seeks to ensure that the payment of nominal fees to the participating attorneys does not subject them to the general conflict-of-interest provisions of the N.Y. Rules of Professional Conduct ("Rules").

QUESTION:

4. Is a lawyer participating in a free legal services program and receiving a nominal fee from the program administrator subject to the full panoply of provisions governing conflicts of interests set out in the Rules?

OPINION:

5. The answer is no. The operative provision is Rule 6.5, which we believe applies to the program as described and relieves attorneys who participate in limited *pro bono* legal services programs from the customary conflict rules when providing short-term limited legal services under the auspices of a program sponsored by certain kinds of entities: a court, government agency, bar association or not-for-profit legal services organization. *See* Rule 6.5(a). These legal services are short-term, limited

in scope, and free of charge, "with no expectations that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance." Rule 6.5(c).

6. Rule 6.5(a)(1) provides, in part, that a participating lawyer is required to comply with the conflict provisions of Rules 1.7, 1.8, and 1.9 "only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest." Rule 6.5(a)(2) says that the lawyer is required to comply with the imputation provisions in Rule 1.10 "only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by Rules 1.7, 1.8 and 1.0." *See* N.Y. State 1012 ¶¶ 7-9 (2014) (discussing the Rule). A lawyer's actual knowledge of a conflict under the more generally applicable conflict rules is not required to trigger their application. Thus, Rule 6.5(a) imposes a less stringent standard on conflicts in the context of limited *pro bono* legal services. Nothing in the Rule dislodges this lessened "actual knowledge" standard for conflicts based on the lawyer's receipt of a nominal fee for participating in the program.

7. Rule 6.5 is in harmony with Rule 6.1, which concerns the profession's provision of voluntary *pro bono* legal services. Rule 6.1(b) defines such services, which fall squarely within the objects of the inquirer's program:

> (1) professional services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation, to persons who are financially unable to compensate counsel; (2) activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; and (3) professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.

8. The Rules encourage every lawyer to provide at least fifty hours of *pro bono* legal services each year to poor persons, and view these legal services through the intent of the lawyer. *See* Rule 6.1(a)(1). The attorney's intent must be to render free legal services. Rule 6.1, Cmt. [4]. For example, if a fee is anticipated but uncollected, the services rendered cannot be considered *pro bono*. *Id.* If, however, an attorney receives statutory attorneys' fees in a case originally accepted as *pro bono*, the services continue to qualify as *pro bono* and the attorney is "encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means." *Id.*

9. Here, the clients – constituents invited to participate in this program – receive legal services free of charge. The attorneys meet these clients for one session in a government official's district office or other community-based location. The program is paid by the offices of city and state officials and administered by the non-profit arm of a New York law school, and appears to provide broad legal services to increase the availability and quality of legal services to poor persons. The program administrator is, of course, in the best position to determine whether these services qualify as a *pro bono* program. Nevertheless, assuming that the program does address the legal needs of the poor, because the program participants receive free limited scope legal representation, no basis exists to treat this program any differently from any other *pro bono*, limited scope legal services program, despite the payment of a nominal fee to participating attorneys.

10. The reason for relaxing the conflicts rules for lawyers representing clients in *pro bono*, limited scope representation is one of practicality because participating attorneys will likely not be able to check systematically for conflicts of interests." Rule 6.5, Cmt. [3]; *see* Rule 6.5 Cmt. [1]; N.Y. State 1012. This rationale applies here given that the attorneys in this program have their only contact with their respective clients at the time of services for a brief counseling session, which is not permitted to evolve into a full representation. The actual knowledge standard for the conflict, therefore, is the most practical and effective way to facilitate *pro bono* programs and their attorney participants, as is the case here, in serving communities in need of free legal services. The lawyer's receipt of a small fee for providing free legal services to the poor is not inconsistent with this rationale.

11. Additionally, when a lawyer accepts a fee from a third party to represent someone else, the lawyer must comply with Rule 1.8(f). Rule 1.8(f) prohibits a lawyer from accepting compensation from a third party on a client's behalf unless:

> (a) the client gives informed consent;
>
> (b) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and
>
> (c) the client's confidential information is protected as required by Rule 1.6.

12. These conditions are consistent with the language of Rule 6.5(d), which says that the lawyer in a program such as this "must secure the client's consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6." If these three conditions are fulfilled, the Rules permit a third party to pay a lawyer to represent a client. *See* N.Y. State 1063 ¶¶ 8-9 (2-15); N.Y. State 1000 ¶ 5 (2014).

CONCLUSION:

13. General conflicts rules do not apply to lawyers providing free, limited scope legal services to qualifying clients even if the lawyers are paid minimal amounts to participate in the program, though receipt of such payments requires the client's informed consent, preservation of client confidences, and avoidance of interference with the lawyer's independent professional judgment.

(15-19)

OPINION 1198 (06/22/2020)

TOPIC: Former government lawyer disclosure of confidential government information

DIGEST: A former government lawyer is permitted to disclose confidential information of a former client if the lawyer reasonably believes it is necessary to comply with a court order. Upon receiving the subpoena or court order, the lawyer must first consult with the former client and, until otherwise instructed by former client, the lawyer should seek to limit the demand or disclosure prior to disclosing any confidential information. If the lawyer discloses the client's confidential information, the lawyer should seek to minimize the disclosure of confidential information consistent with law.

RULES: 1.4, 1.6, 1.9, 1.11, 8.5

FACTS:

1. The inquirer, an attorney licensed in New York, previously served as a government prosecutor. While a prosecutor, the inquirer served as an onsite legal advisor to the team conducting a certain criminal investigation. The investigation included search warrants and the inquirer was present at the crime scene for evidence gathering.

2. The inquirer has reason to believe that the victim and the victim's family will commence a civil lawsuit and name the inquirer's former government client as a defendant. The inquirer anticipates being called as a witness in connection with the civil case arising from the investigation. The inquirer seeks guidance on how to respond if served with a subpoena in the civil case.

QUESTION:

3. What are a former government attorney's obligations regarding compliance with a subpoena that seeks information or testimony from the attorney about a matter in which the attorney was involved while a government prosecutor?

OPINION:

4. As a preliminary matter, we note that the inquirer's former government employer may have its own rules and regulations pertaining to its current or former government employees that may impose obligations on the inquirer apart from and may be superior to those in the N.Y. Rules of Professional Conduct ("Rules"). Our jurisdiction is limited to questions of ethics under the Rules, so nothing in this opinion is intended to express a view on whether other law may require the inquirer to abide by laws specific to the government agency that employed the inquirer notwithstanding anything in the Rules.

5. Rule 1.6 provides that a lawyer shall "not knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless (a) the client gives informed consent, as defined in Rule 1.0(j); (b) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or (c) the disclosure is permitted by paragraph (b)" of Rule 1.6.

6. Although the inquirer is no longer employed as a prosecutor, the duty of confidentiality continues after the representation of the client has ended. Under Rule 1.9(c), a lawyer who has previously represented a client in a matter shall not thereafter: (i) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as the Rules would permit or require with respect to a current client or when the information has become generally known; or (ii) reveal confidential information of the former client protected by Rule 1.6 except as the Rules would permit or require with respect to a current client. Thus, Rule 1.6's duty of confidentiality endures following the termination of the attorney-client relationship.

7. Rule 1.6(a) defines "confidential information" as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." Under the definition, "confidential information" does not include "a lawyer's legal knowledge or legal research" or information that is "generally known in the local community or in the trade, field or profession to which the information relates." *Id*. We note, as well, that not all information falling within the definition of "confidential information" under the Rules may be subject to evidentiary privileges, though a lawyer's ethical obligation of confidentiality is not limited to privileged information.

8. In parallel to Rule 1.6, Rule 1.11, entitled "Special Conflicts of Interest for Former and Current Government Officers and Employees," defines "confidential government information" to mean "information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public." Although this definition is narrower than that of "confidential information" in Rule 1.6, we consider Rule 1.6 as a touchstone for analysis.

9. Rule 1.6(b) sets forth six permissive exceptions under which a lawyer may reveal confidential information related to a client's representation. The exception of most apparent relevance here is found in Rule 1.6(b)(6), which says that a lawyer "may reveal confidential information to the extent that the lawyer reasonably believes necessary" when the lawyer is "permitted or required under these Rules or to comply with other law or court order." Comment [15] to Rule 1.6 explains that "[p]aragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may, however, be required by other Rules or by other law." Rule 1.6, Cmt [15].

10. Comment [12] to Rule 1.6 observes that "[p]aragraph (b) does not mandate any disclosures. However, other law may require that a lawyer disclose confidential information. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules." Rule 1.6, Cmt [12]. Comment [12] instructs further that, when disclosure of confidential information appears to be required by other law, the lawyer must consult with the client to the extent required by Rule 1.4 – the Rule requiring communications with a client – before making the disclosure, unless such consultation would be prohibited by other law. If the lawyer concludes that other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures "as are necessary to comply with the law." Rule 1.6, Cmt [12]. *See* N.Y. State 998 ¶ 12 (2014) (Rule 1.6(b)(6) permits disclosure

to the extent reasonably believed necessary "when permitted or required under these Rules or to comply with other law or court order").

11. Comment [13] to Rule 1.6 provides additional guidance. The inquirer is to consult with the client and seek informed consent. The inquirer should seek to prevent disclosure by raising arguments to challenge the order. Comment [13] elaborates: "Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other laws, or the order is invalid or defective for some other reason. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of an appeal or further challenge, unless such consultation would be prohibited by other law."

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

13. Hence, the inquirer must initially consult the former client. If the inquirer determines that he or she is required to disclose the client's confidential information to comply with a court order or subpoena, any adverse disclosure should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. Rule 1.6, Cmt [14].

14. In N.Y, State 1057 (2015), this Committee held that: "[w]here a court orders that confidential information be disclosed, the lawyer should seek to protect the information by asking for an in camera examination by the court. In many cases, this will limit the adverse effects of disclosure on the client." *Id.* ¶ 18. The Committee in its opinion continued that in the alternative, "the lawyer may ethically decide not to comply immediately with the court's order. Instead, the lawyer may test the validity of the order by appealing. An appeal is not mandatory, but if the lawyer believes the information to be disclosed is protected by the attorney-client privilege, the lawyer should appeal the court order." *Id.* ¶ 19; *see* N.Y. State 681 (1996) (lawyer may disclose "secrets" [such as information embarrassing or detrimental to the client] if ordered by a court to do so, but if information is protected by the privilege, lawyer may have an ethical obligation to appeal court's ruling); N.Y. State 528 (1981) (when lawyer's claim of privilege is rejected by a court ruling or order, lawyer may postpone disclosure until validity of adverse ruling is determined on appeal).

15. We also note that if the inquirer is licensed to practice in New York and another jurisdiction Rule 8.5, governing choice of law, would determine which jurisdiction's rules should be applied to the lawyer's conduct. The laws of the disciplinary jurisdiction to apply would be the jurisdiction where

the lawyer principally practices. "If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct." Rule 8.5(b)(2)(ii). Accordingly, it is possible that another jurisdiction's rules may apply to the lawyer's conduct as dictated by Rule 8.5.

CONCLUSION:

16. A former government lawyer is permitted to disclose confidential information of a former client if the lawyer reasonably believes it is necessary to comply with a court order. Upon receiving the subpoena or court order, the lawyer must first consult with the former client and until otherwise instructed by client, the lawyer should seek to limit the demand or disclosure prior to disclosing any confidential information. If the lawyer discloses the client's confidential information, the lawyer should seek to minimize the disclosure of confidential information to the necessary, consistent with law.

(08-20)

OPINION 1199 (07/15/2020)

TOPIC: Attorney website to assist *pro se* litigants; marketing of legal services

DIGEST: An attorney may, under certain conditions, establish a separate business through a website to assist *pro se* litigants with filings through an automated system where the business will not be providing individualized legal advice or advertising a law firm's legal services. If an attorney reviews the filings generated by the automated system, or provides general representation on the legal matter, the entirety of the services are subject to all ethical rules governing lawyers.

RULES: 5.7, 7.1, 7.2, 7.3.

FACTS:

1. The inquirer, an attorney admitted in New York, plans to create, with a former law firm colleague, an incorporated business to market the services of the former colleague's firm on a website. The inquirer envisions the website offering three different services.

2. The first service – we will call it Tier I – would be a "guided do-it-yourself" in which the website would provide users with generic templates and general legal guidance to assist them in making *pro se* filings in New York. This automated service, for which the user would pay, would entail no interaction between the user and a lawyer specific to the user's needs; the user would select from a preprogrammed menu of options. In the second service – Tier II – users would still be initially guided through the completion and assembly of their *pro se* filings by the automated system, but the final product would be reviewed by an attorney to check for compliance, completeness, and the potential efficacy of the submission, after which the service and filing of the papers would rest with the *pro se* litigant purchasing the service. A third service, Tier III, would provide the users with full representation by the law firm, in consideration of a legal fee to be paid by the user.

3. The inquirer wishes to avoid forming an attorney-client relationship with visitors to the website who pay for the services offered by Tiers I and II, and to form such a relationship only with those who avail themselves of Tier III by retaining the law firm to represent them. In the inquirer's words, the purpose of Tiers I and II is to provide affordable and accessible guidance to *pro se* litigants who would otherwise be left "completely to their own devices."

4. The website would feature the name of the newly-established corporation wholly owned by the inquirer and the erstwhile colleague, as well as the name of the latter's law firm.

QUESTION:

5. The inquirer asks whether a corporation may offer the services proposed for Tiers I and II. We see other issues as well.

OPINION:

General Principles

6. In N.Y. State 636 (1992), we wrote:

> There is . . . no ethical proscription against a lawyer engaging in a separate business not constituting the practice of law, N.Y. State 557 (1984), provided that the lawyer does not use the separate business as a means of soliciting legal practice in violation of any statute or court rule and the lawyer does not recommend to his or her clients the purchase of a product from the separate business, N.Y. State 536 (1981), and provided further that the lawyer does not violate any ethical or legal rules. N.Y. State 584 (1987); N.Y. State 307 (1973).

7. Consequently, we concluded that "a lawyer or law firm could establish a separate entity to prepare and engage in the general publication of standard form wills." *Id.* We opined that there is no *per se* ethical proscription against a law firm establishing a wholly separate business selling will forms operating under the trade name "The Will Store," provided that the phrase was not used in conjunction with the names of the attorney principals, the business did not constitute the practice of law, and the separate business is not used to solicit legal practice. *Id.*

8. Several years after we issued N.Y. State 636, the courts codified its conclusion, with conditions, by adopting the substantial equivalent of what is now Rule 5.7 of the N.Y. Rules of Professional Conduct ("Rules"), which contains requirements for lawyers and law firms providing non-legal services. Rule 5.7(c) defines non-legal services to "mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by" a non-lawyer. Rule 5.7(a) varies the requirements applicable to these non-legal services depending on whether the services are "distinct" or "not distinct" from the legal services the lawyer or law firm provides to the affected persons.

9. The Rules do not define the word "distinct." Our opinions have interpreted the word consistent with its customary usage to mean "not alike, different, not the same, separate, clearly marked off." N.Y. State 1135 ¶ 7 (2017) (citing *Webster's Unabridged Dictionary* 534 (2d ed. 1979)). The "most important factor in determining distinctness is the degree of integration of the services." N.Y. State 1155 ¶ 14 (2018). Applying this and other factors, we have concluded that some non-legal services are not distinct from legal services, *e.g.*, N.Y. State 1026 ¶ 10 (2014) (lawyer/mediator preparing settlement documents in domestic relations matters), while others are distinct, *e.g.*, N.Y. State 1157 ¶ 8 (2018) (lawyer offering engineering services unrelated to law practice).

10. This matters. Rule 5.7(a)(1) says that a lawyer or law firm providing non-legal services to clients or other persons is subject to the entirety of the Rules when the non-legal services are not distinct from legal services. When the services are distinct, the Rules nevertheless caution that a consumer's reasonable belief controls. By reason of Rule 5.7(a)(2) & (3), "if the person receiving the legal services could reasonably believe that" the non-legal services "are the subject of a client-lawyer relationship," then the lawyer owes a duty to clarify by rebutting the presumption that the Rules create. Rule 5.7(a)(4) presumes that the recipient of the non-legal services will believe that the services are subject to a lawyer-client relationship unless the lawyer or law firm has advised that person in writing "that

the services are not legal services and that the protection of a lawyer-client relationship does not exist with respect to" the non-legal services, or if the interest of the lawyer or law firm in the entity providing the non-legal services is *de minimis*. This written notice or disclaimer removes the rendition of non-legal services from the application of the Rules to those distinct non-legal services, provided that those non-legal services do not constitute the unauthorized practice of law and that the lawyer or law firm in fact supplies no legal services. When, as here, the lawyer and onetime colleague wholly own the entity, the issue of *de minimis* involvement is not implicated.

11. The inquirer acknowledges that the Tier III services – the establishment of a full representation on the matter – creates a lawyer-client relationship to which all the Rules apply. We focus, then, on the website's offering of Tier II and Tier I services. On our view, the inquirer must first determine whether the Tier I and Tier II services constitute the practice of law. This will depend in large part on whether the services provide generic forms or whether they purport to be giving individualized recommendations based on facts the user provides. This is a fact-based determination on which we do not opine: "Questions about services comprising the unauthorized practice of law are outside the orbit of this Committee's reach, and so we offer no opinion on that subject." N.Y. State 1135 ¶ 5; *see* Rule 5.7(c) (non-legal services permitted under Rule 5.7 "mean those services that . . . are not prohibited as an unauthorized practice of law"). For our purposes here, we assume without deciding that the provision of generic legal forms does not constitute the unauthorized practice of law.

An Interactive Internet Relationship between Lawyer and Client on a Specific Legal Matter

12. N.Y. State 832 (2009) is enlightening on the proposed Tier II service, in which visitors to the proposed website would be guided by the automated system to complete generic forms for *pro se* filings but then be advised by a lawyer about features of the forms. In N.Y. State 832, we addressed a sole practitioner's inquiry involving the sale of shelf corporations, which we noted was a non-legal service. We explored the scenario in which the lawyer would provide no legal advice to the purchasers of the shelf corporations as follows (at ¶ 5):

> For the assumption that the lawyer provides no legal advice to remain true, the lawyer could not answer the kinds of questions a prospective customer might ask that are likely to call for legal advice (*e.g.*, What are the tax consequences? How long may I leave the corporation on the shelf? Do I have to notify the state if I buy a shelf corporation? Is the corporation validly formed?). For example, if the shelf corporations were sold over the Internet, and the attorney was not identified anywhere on the web site as a lawyer, and any information about the corporations was provided only in writing (*e.g.*, via FAQs or links to articles), and purchasers never communicated with the lawyer directly and had no opportunity to ask for advice, then the lawyer would not be giving legal advice to purchasers. In that case the Rules would not generally apply to those sales.

13. On our view, the proposed Tier II services in which the final papers generated through the Tier I service would then be reviewed and critiqued by an attorney to check for compliance, completeness, and potential efficacy of the submission, crosses the line we drew in N.Y. State 832. Although the existence of a lawyer-client relationship is ultimately a legal - not an ethics question - Rules, Preamble ¶ 9, the rendition of legal advice on a specific matter seems to us to embrace the very

essence of a lawyer-client relationship. Subject to the Rules, including Rules 7.1, 7.2, and 7.3, a lawyer may offer such services to the public on the Internet. But in our judgment, the lawyer, a law firm, or a lawyer-owned purportedly non-legal services entity may not escape the Rules in engaging in these activities, and no disclaimer or other notice may rescue them from this consequence.

14. Otherwise put, we do not consider the contemplated Tier II service to be a non-legal service but the rendition of legal services to specific persons on specific matters. The services are not distinct from legal services; they are legal services. The Rules fully apply.

A Lawyer's Offering of Forms on the Internet

15. The Rules do not necessarily fully apply to a do-it-yourself site contemplated by the inquirer's Tier I service, not an automated service. Nothing in the Rules prevents a lawyer from starting a separate business to operate a website (or engaging in other activities) that provides generic advice on legal issues to the public – that is, advice not tailored to facts and law unique to a specific identifiable consumer. Assuming, again, that no unauthorized practice of law occurs, we think a lawyer or a non-lawyer may create a website or other platform to offer the public such generic forms of basic documents as wills, trusts, template lawsuits, and the like. To that extent, we consider the practice akin to that blessed in N.Y. State 636's acceptance of The Will Store. But that blessing came with a condition that, if the operator is a member of the bar, then the lawyer may "not use the separate business as a means of soliciting legal practice in violation of any statute or court rule and the lawyer does not recommend to his or her clients the purchase of a product from the separate business." As presented to us, the inquirer's proposal does not comply with this condition. *Cf.* N.Y. State 951 ¶¶ 10-12 (2012) (lawyer may establish a web-based letter-writing service if, among other things, no legal services are rendered and the site prominently disclaims the existence of a lawyer-client relationship).

16. As we said in N.Y. State 832, when the attorney's status as a lawyer is visible to the public (*e.g.*, the attorney uses a law office name or letterhead, or advertises the sales on the lawyer's web site, or puts "Esq." or "J.D." after the lawyer's name), a substantial risk is present that the purchaser of the non-legal service "will be misled as to whether an attorney-client relationship exists." *Id.* ¶ 8. In this scenario, when an attorney or law firm's status is disclosed to a purchaser of the non-legal service, we concluded that "[t]he risk is great because the client may be confused about the nature of the attorney's role." *Id.* ¶ 10; *see* Rule 5.7, Cmt. 1 ("The recipient of the non-legal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of non-legal services when that may not be the case. The risk of confusion is especially acute when the lawyer renders both legal and non-legal services with respect to the same matter."); N.Y. State 951 ¶ 6 ("It is likely that a client of the letter writing service, knowing that the writer is a lawyer, may expect legal advice.").

17. The concerns expressed in N.Y. State 832 and Comment [1] to Rule 5.7 are particularly heightened here, when the business is being formed to market a law firm's services and purchasers for Tier II and Tier III legal services on the very product sold as Tier I service. As a result, if the attorney's status as a lawyer is visible to the public on the website offering the Tier I services, as the inquirer anticipates, "then absent a disclaimer or other steps, the recipients of the non-legal services

could reasonably believe there is an attorney-client relationship, and thus the Rules would apply." N.Y. State 832 ¶ 11.

18. If the attorney's status as a lawyer is visible, such as on the business's website or on a lawyer's website marketing the business, one way for a lawyer to avoid wholesale application of the Rules to the sale of non-legal services would be to give the purchaser in writing the Rule 5.7(a)(4) disclaimer stating that no legal services are being rendered and that the protection of an attorney-client relationship does not exist. Even if the lawyer provides the disclaimer specified in Rule 5.7(a)(4), it would not be effective if the lawyer is engaged in activities that constitute the unauthorized practice of law or the lawyer or law firm actually provided legal advice or other legal services to the consumer of the non-legal service. N.Y. State 832 ¶ 11.

19. In short, a lawyer or law firm may operate a separate business that offers a user generic templates to the public, but may not do so as part of, or in connection with, the lawyer's or law firm's offering of legal services. Assuming, again, that such an offering does not amount to the unauthorized practice of law – that is, that a non-lawyer may engage in such activity without running afoul of the law against unauthorized practice – we think a lawyer or law firm may do the same if, but only if, the lawyer or law firm's status as such is not visible to the public, or if, visible, the lawyer or law firm makes the written disclaimer for which Rule 5.7(a)(4) provides to rebut the presumption that a lawyer-client relationship exists.

CONCLUSION:

20. An attorney may, under certain conditions, establish a separate business through a website to assist *pro se* litigants with filings through an automated system where the business will not be providing individualized legal advice or advertising a law firm's legal services. If an attorney reviews the filings generated by the automated system, or provides general representation on the legal matter, the entirety of the services are subject to the ethical rules governing lawyers.

(03-20)

OPINION 1200 (07/21/2020)

TOPIC: Dual practice as a lawyer and wealth management provider; conflicts of interest

DIGEST: A lawyer may not simultaneously provide legal services and wealth management services to a client for separate fees. A lawyer may provide wealth management services to non-law clients, subject to Rule 5.7. A lawyer may not refer a law client to a financial planner for a fee, even if the services are unrelated, as the referral fee may compromise the loyalty and independent judgment owed to the client.

RULES: 1.7(a) & (b); 1.8(f); 5.7

FACTS:

1. The inquirer, a non-practicing attorney admitted in New York, has maintained a twenty-year career as a wealth manager, providing fee-based planning, life insurance sales, and asset management. The inquirer would like to resume practicing law in a firm or solo practice and also to continue to provide investment advisory services and/or design and broker financial products for a commission. The wealth management services would be provided through an entirely separate entity from the legal services entity. The inquirer asks several questions about the permissibility of providing these services to legal and non-legal clients, including, for example, charging separate fees for creating a life insurance trust for a law client and selling the client a new life insurance policy.

QUESTIONS:

2. The inquirer asks three questions:

(a) May a lawyer simultaneously provide wealth management services to law clients for separate fees?

(b) May a lawyer provide wealth management services to non-law clients?

(c) May a lawyer, during a representation, refer a law client to a third-party financial planner and receive a referral fee?

OPINIONS:

Simultaneous Provision of Legal and Non-Legal Services to the Same Client for Separate Fees

3. In the circumstances at issue, the answer to the first question – the rendition of dual services to the same client for separate fees – is no. Traditionally, lawyers have provided both legal and non-legal services to the same client. See N.Y. State 206 (1971) (lawyer-accountant services). The N.Y. Rules of Professional Conduct ("Rules") expressly allow a lawyer to do so. *See* Rule 5.7.

4. This does not end the inquiry. Rule 1.7(a) prohibits a lawyer from representing a client if a reasonable lawyer would conclude that a significant risk exists that the lawyer's professional judgment on the client's behalf will be adversely affected by the lawyer's own financial or business inter-

ests. Providing legal and non-legal services to a client for separate fees presents a conflict of interest. This conflict of interest may be cured only if client consent is permissible under Rule 1.7(b), after full disclosure, confirmed in writing. In some circumstances, such consent may be sufficient to remedy the conflict. *See* N.Y. State 1155 ¶ 5 (2018) (informed consent permissible in some cases); *e.g.,* N.Y. State 784 (2005) (if an entertainment management company in which a lawyer has an interest that provides non-legal services to a client of the lawyer's firm, the law firm may continue to represent the client only if a disinterested lawyer would believe that the representation of the client will not be thereby adversely affected and the client consents to the representation after full disclosure of the implications of the lawyer's interest in the management company).

5. This Committee has previously opined, however, that some dual practice conflicts are so serious as to preclude the possibility of informed consent. In a series of opinions, we have found that, in certain cases, the conflict between the legal and non-legal services is so severe that informed consent cannot cure it. Most of these opinions involve acting as a lawyer and a real estate broker in the same transaction. See N.Y. State 1015 ¶ 7 (2014); N.Y. State 1013 ¶ 5 (2014); N.Y. State 933 ¶ 7 (2012); N.Y. State 919 ¶ 3 (2012); N.Y. State 752 (2002) (after adoption of the predecessor to Rule 5.7, the conflict provisions of the Code of Professional Responsibility still prohibited a lawyer from acting as a lawyer and a real estate broker in the same transaction, even with the consent of the client); N.Y. State 208 (1971).

6. The problem with consent identified in these opinions is that the broker's personal financial interest in losing the brokerage transaction interferes with the lawyer's ability to render independent advice with respect to the transaction. *See also* N.Y. State 738 (2001) (dual role of lawyer for real estate client and abstract title examiner impermissible because of possible need to negotiate exceptions to title); N.Y. State 621 (1991); N.Y. State 595 (1988). For instance, a lawyer may not provide both legal and financial planning advice to clients and receive brokerage commissions with respect to financial products purchased by clients receiving the lawyer's legal advice. *See* N.Y. State 1155 ¶ 6 (2018). By contrast, we concluded that, as long as the financial planning corporation did not offer any products (*e.g*. securities, real estate or insurance) for which it would receive a commission or other form of compensation or act as legal counsel and broker in the same transaction, then the Rules would permit the conduct. *See id.; see also* N.Y. State 619 (1991); N.Y. State 536 (1981).

7. Here, the inquirer seeks to offer legal services for a fee and wealth management services to the same clients from a separate entity for a separate fee – the creation of the life insurance trust coupled with the sale of an insurance policy being only an illustration. This dual practice creates a conflict that, in our opinion, is not amenable to consent for the same reasons set forth in the foregoing opinions, namely, that the legal fees for creating a life insurance trust are likely modest to the commissions for selling a life insurance policy. As a result, based on our prior opinions, we believe the dual practice is not subject to informed consent and hence impermissible.

Provision of Non-Legal Services to Non-Clients

8. The answer to the second question is yes – a lawyer may provide non-legal wealth management services to non-law clients if the lawyer complies with Rule 5.7. Rule 5.7(c) defines a non-legal service to mean "services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law" when provided by a non-lawyer. Although legal issues are beyond our juris-

dictional reach, we assume without deciding that a lawyer may legally engage in wealth management services and that such services do not constitute the unauthorized practice of law. Rules 5.7(a)(1) & (2) concern situations in which the lawyer intends to offer such non-legal services to law clients – persons to whom the lawyer is providing legal services. Here, however, the inquirer is interested in providing the non-legal wealth management services to persons who are not law clients and to do so through an entity separate from the inquirer's law practice. In these circumstances, the applicable standard is found in Rule 5.7(a)(3).

9. Rule 5.7(a)(3) says that when, as here, a lawyer or law firm "is an owner, controlling party or agent of, or is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing" non-legal services to someone, then the lawyer or law firm "is subject to these Rules with respect" to the non-legal services "if the person receiving the services could reasonably believe" that the non-legal services are the subject of a client-lawyer relationship. Rule 5.7(a)(4) creates a presumption that the person receiving the non-legal services will believe the non-legal services "to be subject to a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist" with respect to the non-legal services.

10. Thus, a lawyer may provide non-legal wealth management services to non-law clients if the lawyer or law firm rebuts the presumption that Rule 5.7(a)(4) creates if, in offering the non-legal services, the lawyer disclaims the existence of a lawyer-client relationship. This disclaimer tells the consumer that such accessories to a lawyer-client relationship as the protection of client confidential information, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence do not apply to the provision of non-legal services.

Receipt of Referral Fees from Third Parties

11. The answer to the inquirer's third question – receipt of a referral fee from a wealth management firm unconnected to the inquirer – was addressed in N.Y. State 1086 (2016). There, we said that the question whether a lawyer may accept a referral fee from a third-party service provider implicates Rules 1.7(a)(2) and 1.8(f). *Id.* ¶ 6. Rule 1.7(a)(2), as we note above, prohibits a representation when a reasonable lawyer would conclude that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business, property or other personal interests unless the conflict can be and is waived under Rule 1.7(b).

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

13. Our opinions permit such a payment in very limited circumstances. *See, e.g.*, N.Y. State 981 (2013) (referral fee not prohibited by Rule 1.7 when the service is not related to the lawyer's legal services and the lawyer makes no recommendation to use the service); N.Y. State 667 (1994) (lawyer may accept referral fee from mortgage broker notwithstanding predecessors to Rules 1.7(a) and 1.8(f) as long as client consents and all proceeds are credited to client if client so requests); N.Y. State 626

(1992) (lawyer for lender may retain fees from a title insurance company as long as client consents and amount of the fee is disclosed to the borrower who will pay the cost of the insurance and the total amount of the lawyer's fee is not excessive); N.Y. State 576 (1986) (lawyer may act as agent for title insurance company and also represent the buyer, seller or mortgagee in a real estate transaction consistent with the predecessors to Rules 1.7(a) and 1.8(f) as long as lawyer credits client with amount received from title insurer or the client expressly consents to the lawyer retaining the fee paid by the insurer); N.Y. State 461 (1977) (lawyer may accept part of a fire adjuster's commission consistent with predecessor to Rule 1.7(a) if the client consents and all proceeds are credited to client); and N.Y. State 107 (1969) and N.Y. State 107(a) (1970) (both permitting lawyer to accept a referral fee from a financial company when the lawyer invests the client's funds in certificates of deposit, if client consents after disclosure and lawyer remits the fee to client if client so requests).

14. When these narrow circumstances do not exist, we have opined that receipt of a commission creates a conflict that informed consent cannot cure. *See, e.g.*, N.Y. State 682 (1996) (lawyer may not accept a fee from an investment adviser for referring a client under predecessor to Rule 1.7 because disclosure and consent would not cure the lawyer's direct and substantial conflict); N.Y. State 671 (1994) (lawyer engaged in estate planning may not accept referral fee from insurance company for referring client under predecessor to Rule 1.7 because disclosure and consent could not cure the direct and substantial conflict between the client's and the lawyer's interests); N.Y. State 619 (1991) (when estate planning lawyer's remuneration from the third party would vary with the quantity of the product or services recommended, receipt of the referral fee was impermissible under predecessors to Rules 1.7 and 1.8(a) [business transaction with client] because the lawyer's substantial financial interest conflict could not be cured by disclosure and consent).

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

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

17. Comment [1] of Rule 1.7 highlights the essential aspects of a lawyer's relationship with a client: loyalty and independent judgment. "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from

the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the lawyer's ability to exercise professional judgment on behalf of each client."

18. Here, there is a possibility that recommending a third-party non-legal services provider for a fee may indeed compromise the attorney's loyalty and independent judgment owed to one's client. Therefore, an attorney may not accept a referral fee from a third-party non-legal services provider from law clients who were referred to and received services from a third-party financial planner.

CONCLUSION:

19. A lawyer may not simultaneously provide legal services and wealth management services to a client for separate fees because it is a conflict of interest that consent may not remedy. A lawyer may provide wealth management services to non-law clients subject to Rule 5.7. A lawyer may not refer a law client, even if the services are unrelated, to a financial planner for a referral fee.

(10-20)

OPINION 1201 (08/31/2020)

TOPIC: Retired lawyers; referral fees

DIGEST: A lawyer who received a referral of a contingency-fee wrongful death matter from a lawyer who later retired under the rules of the Office of Court Administration before the conclusion of the case may share the legal fee with the retired lawyer if the latter assumed joint responsibility for the matter.

RULES: 1.5, 1.17(a), 5.4

FACTS:

1. The inquirer is a New York lawyer who represents plaintiffs in personal injury actions on a contingency-fee basis. The inquirer recently settled a prolonged wrongful death action, and, conforming to State law, sought and obtained court approval of the settlement, including the amount of attorneys' fees. We understand that, in keeping with this court approval, the client has been paid the full amount of the settlement proceeds to which the client is entitled.

2. The inquirer came to the representation of the client as a result of a referral from another New York lawyer unaffiliated with the inquirer. According to the inquirer, an unwritten agreement between the two lawyers provided that the referral fee would be a fixed formula splitting any legal fee based on a statutory schedule established for the type of case at issue; the division was to be made without regard to the legal services that each lawyer actually performed. The client, it is said, knew of this oral agreement but not the specifics of the fee division. We are told that the agreement between the lawyers has no effect on the amount of the client's recovery in the wrongful death settlement, because only the gross amount of the approved legal fees would be subject to any division between the two lawyers.

3. The inquirer tells us that the referring lawyer did some work in the early stages of the matter and agreed at the outset to assume joint responsibility for the matter. Nothing in the inquiry suggests that the referring lawyer later disclaimed this joint responsibility. The referring lawyer now seeks payment consistent with the fixed formula in the oral agreement.

4. During the pendency of the wrongful death action, the referring lawyer retired from the practice of law. In doing so, the referring lawyer changed his/her registration status with the Office of Court Administration to "retired," and ceased paying the bi-annual attorney registration fees that the OCA collects. This change of status occurred five years before the settlement of the long-running matter.

5. One of the requirements of "retirement" status for attorney registration is that the "retired" lawyer may not receive compensation for legal services rendered while retired. 22 N.Y.C.R.R. § 118.1(g). An OCA-retired lawyer, however, may render legal services for no compensation, and the retired lawyer remains a member of the bar. The change in registration does not strip the lawyer of a license to practice law but instead places parameters on the lawyer's practice.

QUESTION PRESENTED:

6. May a lawyer pay a referral fee to a lawyer retired under the rules of the Office of Court Administration despite the provision in those OCA rules that a retired lawyer may not receive compensation for services rendered during retirement?

OPINION:

7. The question before us is narrow. Our role is to interpret the N.Y. Rules of Professional Conduct ("Rules"). The enforceability of the unwritten agreement between the inquirer and the referring lawyer is ultimately a question of law, a question outside the ambit of our charter. A body of case law exists on the issue. *See, e.g., Benjamin* v. *Koeppel*, 85 N.Y.2d 549 (1995) (holding that the referring lawyer's registration status does not affect the enforceability of an otherwise valid fee-sharing agreement). The inquirer was free to present the matter of the fee division to the court that reviewed and approved the settlement, including the gross attorneys' fees, but the inquirer did not do so. This leaves a lingering ethical issue, and so, to address the issue, we assume without deciding that a valid and enforceable fee-sharing agreement exists between the inquirer and the referring, now-retired lawyer.

8. The ethical issue is whether the payment of the referral fee is an impermissible fee-sharing arrangement under Rules 1.5(g) and 5.4(a). Rule 1.5(g) addresses referral fees from lawyers not affiliated with the referring lawyer's firm. With exceptions not applicable here, Rule 5.4(a) prohibits sharing a fee with a non-lawyer. The question for us is whether sharing a legal fee with a lawyer holding "retired" status under the OCA rules is a disallowed fee-sharing arrangement under these Rules. We believe that it is not.

9. We have long said that the mere forwarding of a client to another lawyer is not a permissible basis for sharing in the legal fee thereby generated. N.Y. State 954 ¶ 9 (2013); N.Y. State 414 (1975). Rule 1.5(g) prohibits a lawyer from dividing a fee for legal services with another lawyer not associated in the same firm unless, among other things, "the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation." The Rule is disjunctive. Here, the proposed fee division is based not on a proportional share of the legal fee attributable to whatever preliminary work the referring lawyer performed, but rather on a set formula based on the latter's assumption of joint responsibility. The outcome of the ethical issue under Rule 1.5(g) thus turns on the meaning of "joint responsibility," at least in the context of an OCA-retired lawyer.

10. The Rules do not define "joint responsibility." The Comments accompanying the Rule say that "[j]oint responsibility for the representation entails financial and ethical responsibility as if the lawyers were associated in a partnership." Rule 1.5, Cmt. [7]. We have never delineated the precise contours of this "joint responsibility," save that "joint responsibility" involves "more than financial accountability and malpractice liability." N.Y. State 1128 ¶ 12 (2017); N.Y. State 745 (2001). Although others disagree, s*ee, e.g.*, *Aiello v. Adar*, 750 N.Y.S.2d 457 (Sup. Ct. Bronx Cty. 2002) (only financial accountability required); N.Y. County 715 (1996) (to the same effect), we abide by our prior opinions.

11. The text of Rule 1.5(g) offers some direction on the content of "joint responsibility." The Rule distinguishes between, on the one hand, legal services performed by the referring lawyer directly on

the client's matter, for which the Rule provides for compensation on a proportional basis, and, on the other, the assumption of "joint responsibility" to the client for the rendition of legal services by the lawyer(s) handling the matter, for which the Rule dictates no compensation formula. *See* ABA 474 (2016) (interpreting parallel provision in the ABA Model Rules of Professional Conduct). This distinction means that "joint responsibility" entails something other than some active engagement in the day-to-day handling of the matter; it means, instead, as Comment [7] says, having "financial and ethical responsibility for the matter" in the way partners in a firm do. *See* ABA 487 (2019) (ditto). Rule 5.1(a) requires a law firm to "make reasonable efforts to ensure that all lawyers in the firm conform to" the Rules. At a minimum, therefore, we think "joint responsibility" under Rule 1.5(g) coincides with this Rule 5.1(a) duty.

12. This conclusion is in harmony with our discussion of "joint responsibility" in N.Y. State 961 (2013). There, the question was whether a retired lawyer could receive a fee for referring new matters to a lawyer buying the retired lawyer's practice. The Opinion equated "retirement" under Rule 1.17 with "retirement" under the OCA rules. *Id.* ¶ 13 & fn. 9. We corrected this position in N.Y. State 1168 ¶ 7 (2019), in which we explained that, in contrast to the statewide application of the OCA rules, "retirement" under Rule 1.17 was explicitly a geographic matter, that is, that a lawyer selling a law practice could be "retired" under Rule 1.17 if the selling lawyer ceased practicing within the county or adjacent counties where the selling lawyer had previously offered legal services. Thus, a lawyer who sold a Bronx-based law practice could be "retired" under Rule 1.17 even if the selling lawyer opened a new law office in, say, Columbia or Tompkins County, where a registered lawyer continued to practice law for compensation, and could assume joint responsibility for a matter; in that circumstance, the OCA rules are irrelevant. In any event, in Opinion 961, the selling lawyer did not intend to assume "joint responsibility" for any matters, so we did not resolve the issue of what constitutes "joint responsibility" under Rule 1.5(g). N.Y. State 961 ¶ 13.

13. Nevertheless, we think Opinion 961 offers some insight into the meaning of "joint responsibility" under Rule 1.5(g). There, we said that "the selling lawyer would need to supervise, at least to some extent, the work of the buying lawyer." *Id.* ¶ 13. On the (mistaken) premise that the OCA rules applied, we did not "foreclose the possibility that, under some factual circumstances, a retiring lawyer [under OCA rules] could meet" the requirements of Rule 1.5(g) by assuming a supervisory role consistent with Rule 5.1(a). *Id.* The "degree of supervision required is that which is reasonable under the circumstances." Rule 5.1(c).

14. We think this analysis was correct. Every day, law firm partners commonly meet this Rule 5.1(a) standard by vesting responsibility over matters to other lawyers in the firm whom, through experience, they have come to trust as meeting the standard of competence. *See* Rule 1.1. The partners remain responsible for each such matter – they retain "financial and ethical responsibility" for it – including, to the reasonable degree Rule 5.1(c) requires, for compliance with Rule 5.1(a)'s supervisory duties. Among other things, a lawyer who remains available for consultation on the matter, or who keeps generally abreast of developments on the matter to assure adherence to the Rules, may well fulfill the duties of a supervisory counsel. *See generally* N.Y. State 864 ¶¶ 8, 12 (2011). In assuming "joint responsibility" under Rule 1.5(g), a referring lawyer is in the same position as these partners.

15. In the absence of a full understanding of the referring lawyer's role in the matter at issue over time, we decline to opine on whether that role meets the standard of "joint responsibility" in this specific inquiry. For now, we say only that a lawyer "retired" with the OCA, in some circumstances, may bear the "joint responsibility" that Rule 1.5(g) contemplates, notwithstanding the lawyer's change of registration status to "retirement," and may do so by fulfilling the role akin to a supervisory lawyer in a law firm as outlined in Rule 5.1(a), Rule 5.1(c), and Comment [7] to Rule 1.5.

16. This conclusion requires us to revisit language in our Opinion 1172 (2019). There, the inquirer, anticipating retirement, transferred wills to a former law partner. The question was whether the custodial lawyer could pay fees to the now-retired inquirer in the event that any of the wills matured into fee-generating estate matters. *Id.* ¶ 2. We answered the question in the negative, based in part on the view that "the inquirer could assume joint responsibility for a representation only if the lawyer opts for continued registration" with the OCA. *Id.* ¶ 9. Coloring that view were concerns that the fee division might run afoul of Rule 5.4(a)'s prohibition on dividing fees with non-lawyers, and that a retired lawyer could not perform the services that comprise the requisite joint responsibility. *Id.* On further reflection, we think this answer was overbroad, and so modify the Opinion accordingly.

17. Our concern in Opinion 1172 with Rule 5.4(a) on dividing fees with non-lawyers was misplaced. A lawyer who elects to retire under the OCA rules is still a member of the bar, *see* Judiciary Law § 90 (the Appellate Divisions, not the OCA, are responsible for lawyer admission), and indeed the retired lawyer may continue to render legal services for no compensation without fear of engaging in the unauthorized practice of law, s*ee Benjamin*, 85 N.Y.2d at 554 ("a person is authorized to practice law if that person has been admitted to practice and has taken the requisite oath"). Thus, Rule 5.4(a), which is pertinent only to sharing fees with non-lawyers, is inapposite, because an OCA-retired lawyer is still a fully-licensed lawyer.

18. Our other concern in Opinion 1172 – that an OCA-retired lawyer could not perform the requisite legal services of "joint responsibility" – was too sweeping. We are unwilling to say that the supervisory role that Opinion 961 envisioned is beyond the capacity of an OCA-retired lawyer to satisfy, especially when the lawyer, as here, has done nothing to disclaim the lawyer's initial assumption of "joint responsibility." As a member of the bar, for example, such a lawyer could remain available for consultation, could oversee case developments to assure compliance with the Rules, and would remain jointly responsible to the client for the handling of the matter, with continued exposure to any financial and ethical repercussions. We do not mean to exhaust the ways in which an OCA-retired lawyer may bear "joint responsibility," for the duties of a supervisory lawyer under Rule 5.1(a) may vary with the facts. We say only that, on our view, an OCA-retired lawyer may in some circumstances meet the requirements of "joint responsibility" of Rule 1.5(g).

CONCLUSION:

19. A lawyer may pay a referral fee to a lawyer who is retired within the meaning of the rules of the Office of Court Administration if the referring lawyer assumed joint responsibility for the referred matter.

(04-20)

OPINION 1202 (10/01/2020)

TOPIC: Legal fees

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

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

FACTS:

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

QUESTION:

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

OPINION:

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

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

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

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

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

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

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or the circumstances;
>
> (6) the nature and length of the professional relationship with the client;

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

(8) whether the fee is fixed or contingent.

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

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

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

CONCLUSION:

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

(22-20)

OPINION 1203 (10/08/2020)

TOPIC: Withdrawal from representation based on attorney health concerns

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

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

FACTS:

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

QUESTION:

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

OPINION:

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

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

5. Independent of the inquirer's fear of contracting COVID-19, withdrawal would also be permitted pursuant to Rule 1.16(c)(1) if the "withdrawal can be accomplished without material adverse

effect on the interests of the client," or pursuant to Rule 1.16(c)(10) if the client "knowingly and freely assents to termination of the employment."

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

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

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

8. If the Immigration Court grant*s* the inquirer's motion to withdraw, then Rule 1.16(e) will require the inquirer to "take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including by giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly repaying any part of a fee paid in advance that has not been earned and complying with applicable laws and rules."

CONCLUSION:

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

(21-20)

OPINION 1204 (10/14/2020)

TOPIC: Law Firm Letterhead

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

RULES: 7.1(a), 7.5(a)

FACTS:

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

QUESTION:

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

OPINION

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

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

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

5. Rule 7.1(a) provides:

> A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:
>
> (1) contains statements or claims that are false, deceptive or misleading; or
>
> (2) violates a Rule.

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

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

> We have long recognized that the name of a law firm is central to its good will. Branding and reputation are precious commodities in any profession. We cannot ignore that, in today's rapidly changing legal market, the constant merger or acquisition of law firms has engendered combinations in which the nexus between or among the combined firms and their predecessors is at times attenuated or opaque. To say that today's legal profession does not trade in goodwill of storied names would require blinders on reality. [Citation omitted.]

8. *See also* N.Y. State 45 (1967) ("all of the partners have by their joint and several efforts over a period of years contributed to the good will attached to the firm name"). Thus, the law firm's calling attention on its letterhead to the fact that it has acquired the former law office of the retired (and now deceased) lawyer who sold his practice properly allows the firm to benefit from the good will it purchased. This is fully in keeping with the letter and spirit of Rule 7.5(a).

CONCLUSION:

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

(19-20)

OPINION 1205 (10/26/2020)

TOPIC: Government Employee Negotiating for Private Employment

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

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

FACTS:

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

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

QUESTION:

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

OPINION:

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

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

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

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

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

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

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

CONCLUSION:

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

(20-20)

OPINION 1206 (11/02/2020)

TOPIC: Litigation Financing

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

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

FACTS:

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

QUESTION:

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

OPINION:

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

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

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

5. Here, because the former partner and current of counsel lawyer would be personally barred from providing litigation financing to his clients, he may not refer his clients to a litigation financing company owned by his wife. Under Rule 1.10(a), a lawyer's conflicts arising under Rule 1.8 are imputed to all other lawyers "associated in" the firm. Because the former partner maintains an ongo-

ing relationship with the law firm (*i.e.,* he remains "associated" with it), Rule 1.10(a) imputes his conflict of interest arising from referring clients to his wife to the other lawyers in the firm. Thus, the law firm may not refer its clients to the litigation loan company.

6. Arguably, the question posed here raises a slightly different issue from the issues posed in N.Y. State 855, because there the inquiring lawyer was an active lawyer in the firm whereas here the inquiring lawyer is a former partner who is listed as "retired" and "of counsel" on the firm's materials, and has no equity interest in the firm. This factual distinction, however, does not result in a different result. Under Rule 7.5(a)(4), "[a] lawyer or law firm may be designated 'Of Counsel' on a letterhead if there is a *continuing relationship with a lawyer or law firm*, other than as a partner or associate." (Emphasis added.) Indeed, as we noted in N.Y. State 793 (2006): "We have interpreted an of counsel relationship to mean that the of counsel lawyer is 'available to the firm for consultation and advice on a regular and continuing basis.'" Moreover, the law firm's website lists a profile of the former partner under the heading "Our Attorneys" and says that he "*maintains a role with the firm* in an 'of counsel' capacity." (Emphasis added).

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

CONCLUSION:

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

(23-20)

OPINION 1207 (11/09/2020)

TOPIC: Firm names; trade names

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

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

FACTS:

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

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

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

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

QUESTIONS:

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

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

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

DISCUSSION:

8. For decades, lawyers have been required to practice under a firm name that contains the name of one or more of the lawyers in the firm or the name or names of one or more deceased or retired members of the firm (or of a predecessor firm) in a continuing line of succession. Prior opinions issued by this Committee under this Rule have stressed the purpose of the requirement is to protect

the public from being deceived or misled as to the identity of lawyers using or practicing under the firm name.

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

> (a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, provided the same do not violate these Rules or any statute or court rule.
>
> (b) (1) A lawyer or law firm in private practice shall not practice under:
>
> (i) a false, deceptive, or misleading trade name;
>
> (ii) a false, deceptive, or misleading domain name; or
>
> (iii) a name that is misleading as to the identity of the lawyer or lawyers practicing under such name.
>
> (2) Specific Guidance Regarding Law Firm Names
>
> (i) Such terms as "legal aid," "legal service office," "legal assistance office," "defender office," and the like may be used only by bona fide legal assistance organizations.
>
> (ii) A law firm name, trade name, or domain name may not include the terms "non-profit" or "not-for-profit" unless the law firm qualifies for those designations under applicable law.
>
> (iii) A lawyer or law firm in private practice may not include the name of a nonlawyer in its firm name.
>
> (iv) The name of a professional corporation shall contain "PC" or such symbols permitted by law.
>
> (v) The name of a limited liability company or limited liability partnership shall contain "LLC," "LLP" or such symbols permitted by law.
>
> (vi) A lawyer or law firm may utilize a telephone number that contains a trade name, domain name, nickname, moniker, or motto that does not otherwise violate these Rules.-
>
> * * *

10. The June 24, 2020 amendment deleted language in former Rule 7.5(b) that prohibited a "firm name containing the names other than those of one or more of the lawyers in the firm" except "the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a

continuing line of succession." Thus, had the Rule remained unchanged, the Committee would have concluded that practicing under a trade name, whether an acronym or a street name, was prohibited.

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

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

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

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

> [3] By way of example, the name of a law firm in private practice is deceptive or misleading if it implies a connection with (i) a government agency, (ii) a deceased or retired lawyer who was not a former member of the firm in a continuing line of succession, (iii) a lawyer not associated with the firm or a predecessor firm, (iv) a nonlawyer, or (v) a public or charitable legal services organization. A lawyer or law firm may not use a name, trade name, domain name, or other designation that includes words such as "Legal Services," "Legal Assistance," or "Legal Aid" unless the lawyer or law firm is a bona fide legal assistance organization.
>
> [4] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
>
> [5] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a "firm" as defined in Rule 1.0(h), because to do so would be false and misleading. In particular, it is misleading for lawyers to hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners. It is also misleading for lawyers to hold themselves out as being counsel, associates, or other affiliates of a law firm if that is not a fact, or to hold themselves out as partners, counsel, or associates if they only share offices. Likewise, law firms may not claim to be affiliated with other law firms if that is not a fact.

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

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

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

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

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

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

CONCLUSION:

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

(16-20 & 17-20)

OPINION 1208 (11/16/2020)

TOPIC: Solicitation and Referral of Real Estate Matters by Real Estate Broker Employed by Lawyer as Paralegal

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

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

FACTS:

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

QUESTIONS:

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

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

OPINION:

Independent professional judgment: **Rules 1.7 and 5.4**

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

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

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

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

8. Here, a disabling personal financial conflict of interest is likely to arise if the paralegal refers enough matters to the inquirer that those referrals, in the aggregate, constitute a significant portion of the fees earned in the inquirer's practice as a whole. *See* N.Y. State 919 (2012) (lawyer's receipt of multiple referrals from a brokerage office where lawyer was employed part time "magnified risks" of a personal interest conflict); *see also* N.Y. City 2014-1 (2014) (expressing concern that the proposed referral arrangement could create the risk of "divided loyalties" if the lawyer was "dependent" on the referring third-party for "case referrals and legal fees."). Thus, we cannot assess the level of risk that the referral arrangement here poses to the lawyer's exercise of independent professional judgment. We do not know whether those referrals are material to the inquirer's total fee income, and we do not know whether the inquirer's personal and professional relationship with the referring paralegal might increase the risk that the lawyer's independent professional judgment on behalf of the referred real estate clients would be compromised. For example, are the referrals from the paralegal a major source of profit for the inquirer? Is the paralegal a trusted and valuable key employee with respect to paralegal services unrelated to their referral relationship?

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

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

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

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

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

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

14. Moreover, Rule 8.4(a) provides that a lawyer must not "knowingly assist or induce another" to "violate or attempt to violate the Rules of Professional Conduct," and a lawyer must not "do so

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

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

CONCLUSION:

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

(24-20)

OPINION 1209 (12/01/2020)

TOPIC: Retention of former appellate judge with respect to easement on which judge previously ruled.

DIGEST: A former appellate judge, who was on a panel which issued a dispositive order about the scope of an easement, is personally disqualified from representing the owner of the servient estate of the same easement with respect to legal questions involving obstructions to the easement, equitable relief, adverse possession, and "overburdening" of the easement. However, the firm to which the former appellate judge is counsel may, pursuant to Rule 1.12(d), undertake the representation upon appropriate screening and notification.

RULES: 1.11(e), 1.12(a), 1.12(d)

FACTS:

1. The inquirer is a New York lawyer who formerly served as a New York State appellate judge. Ten years ago, inquiring counsel was on a panel which issued a dispositive order confirming the validity and scope of an easement. Inquiring counsel, having retired from the bench, is now "of counsel" to a firm. That firm has been approached by the owner of the servient estate of the same easement with respect to questions involving the potential legal effect of obstructions to the easement, the possible availability of equitable relief to the owner of the dominant estate, the applicability of adverse possession, and whether subdivision of the dominant estate would result in an "overburdening" of the easement.

QUESTION:

2. Does inquiring counsel's service as a judge in the appellate case preclude inquiring counsel or inquiring counsel's firm from undertaking this new representation?

OPINION:

Is the former judge personally disqualified?

3. Rule 1.12(a) of the New York Rules of Professional Conduct ("Rules") provides: "A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity."

4. "A conflict under Rule 1.12(a) is a non-waivable conflict" (N.Y. State 1064, ¶ 4 (2015)), and should be read in conjunction with both the New York Code of Judicial Conduct (22 NYCRR Part 100) and Judiciary Law § 17. *See,* Roy D. Simon, Jr., *Simon's New York Rules of Professional Conduct Annotated* (May 2019 Update) §1.12:2.

5. In N.Y. State 1064 (2015), cited by the Appellate Division in *People v. Burks*, 172 A.D.3d 1640, 1642 (3d Dep't), *lv. to app. den'd*, 33 N.Y.3d 1102 (2019), this Committee opined that Rule 1.12(a) prohibited a former family court judge from privately representing a parent in a permanent neglect proceeding because the same parent had appeared before the judge in a previous neglect pro-

ceeding, and the judge had issued an order "upon the merits" to put the subject child in foster care. This Committee further opined that Rule 1.12(a) also prohibited the former judge from representing the parent in a proceeding to modify child support when the inquirer, as a judge, had issued orders upon the merits related to custody and visitation in the same matter, and custody and visitation issues would be revisited as part of the application to amend child support.

6. In analyzing a former judge's obligations under Rule 1.12(a), Opinion 1064 identified three terms used in the Rule which this Committee was required to define: "judicial capacity," "matter," and "merits."

7. For purposes of the instant inquiry, there is no need to revisit the questions of "judicial capacity" or "merits," since the inquirer was plainly acting in a "judicial capacity" and ruling on the "merits" when he served on the appellate panel. The sole issue before us is whether the advice which the owner of the servient estate now seeks from inquiring counsel or from inquiring counsel's firm is with respect to the same "matter" that was before inquiring counsel as a jurist.

8. Relying heavily upon Comment [10] to Rule 1.11, this Committee in Opinion 1064 adopted a "facts, parties, and time" test. Comment [10] to Rule 1.11 provides:

> In determining whether two particular matters are the same, the lawyer should consider the extent to which (i) the matters involve the same basic facts, (ii) the matters involve the same or related parties, and (iii) time has elapsed between the matters.

9. Addressing the first test factor – whether the matters "involve the same basic facts" – in the appellate case which came before inquiring counsel, it is apparent that the trial court and then the appellate court were required to determine the intent of the original parties to the easement with respect to the use to be made of the easement. It would appear that this same intent would be relevant in determining whether a subdivision of the dominant property would "overburden" the easement. As explained in John W. Bruce and James D. Ely, Jr., *The Law of Easements & Licenses & Land*, §8:13 (June 2020 Update) (footnotes omitted): "The scope of an easement may be expanded beyond the terms of the grant or the original usage, but the dominant owner may not unreasonably increase the burden on the servient estate. . . . Since these rights are relative, courts must strive to protect the interests of both parties. . . . What constitutes an undue burden depends on the facts of particular situations, and general conclusions are difficult to draw." As this same analysis could be applied to a consideration of the impact of obstructions, or even the applicability of adverse possession, the earlier litigation, and the present consultation, may be said to involve the same basic facts.

10. Turning to the second test factor – "same or related parties" – the owners of the respective dominant and servient estates are the same as, or in privity with, or successors to, the parties to the earlier litigation. For purposes of the current consultation, those same parties stand in the shoes of their predecessors, asserting the same bundle of legal rights.

11. Turning to the third and final test factor – the time elapsed – a decade has passed since the appellate case on which inquiring counsel sat as a judge. However, the earlier litigation turned upon the construction of the specific written and recorded easement agreement, which remains unchanged. Therefore, the passage of time has little mitigating impact on the relatedness of the matters.

12. Accordingly, it is our opinion that the appellate case and the current consultation involve the same "matter" for purposes of Rule 1.12(a)(1).

Is the former judge's law firm disqualified?

13. We have also been asked whether the firm with which inquiring counsel is associated may take on the representation of the servient estate owner.

14. Under Rule 1.12(d), screening will avoid imputation of a former judge's conflict as long as the prerequisites of that section are followed. Rule 1.12(d) provides:

> (d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> (1) the firm acts promptly and reasonably to:
>
> (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
>
> (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;
>
> (iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and
>
> (iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and
>
> (2) There are no other circumstances in the particular representation that create an appearance of impropriety.

15. If the inquirer's law firm complies with Rule 1.12(d) by promptly and properly screening off the inquirer and by providing the specified notifications, and if no other circumstances in the particular representation create an appearance of impropriety, then Rule 1.12 will not prohibit the firm from accepting the representation despite the inquirer's personal disqualification.

CONCLUSION:

16. A former appellate judge who was part of a panel which issued a dispositive order in a case involving the scope and extent of an easement is personally disqualified under Rule 1.12(a) from representing the owner of the servient estate of the same easement with respect to questions involving that easement. However, pursuant to Rule 1.12(d), the firm to which the former appellate judge is counsel may undertake the representation upon appropriate screening and notification.

(25-20)

OPINION 1210 (12/02/2020)

TOPIC: Conflicts of interest; definition of law firm; public defender; part-time justice

DIGEST: A county attorney's office represents and advises the county public defender's office on grant funding and other financial and administrative matters. However, the county attorney's office has no access to information concerning the public defender's clients, the two offices do not share common office space or file systems, and the lawyers in the county attorney's office do not supervise or control the legal services provided by the public defender's office. Although the county attorney's office and the public defender's office are not, on these facts, considered a single law firm, an attorney in the public defender's office may nonetheless have a personal conflict of interest in representing clients in criminal cases before a part-time town justice who is also a full-time assistant county attorney. The conflict may arise if lawyers in the county public defender's office have an institutional incentive to curry favor with the part-time justice.

RULES: 1.0(h), 1.7(a)(2), 1.7(b), 1.10(a) & (d), 8.4(f)

FACTS:

1. The inquirer is an attorney in a county public defender's office. The public defender's office is represented and advised by the county attorney's office, which represents and advises all county departments, principally with respect to administrative and financial matters such as office leases and applications for grants to fund the public defender's office. The county attorney's office is not involved in the handling of individual public defender cases, does not share office space with the public defender's office, and does not have access to public defender case files or its case management system.

2. A full-time assistant county attorney was recently elected to serve as a part-time town justice but will continue to serve as an assistant county attorney. As a part-time town justice, the full-time assistant county attorney will preside over criminal cases in which assistant public defenders can be expected to appear.

QUESTION:

3. Is an attorney in the public defender's office ethically permitted to represent clients in front of a town justice who also works as an assistant county attorney in the county attorney's office—an office that represents and advises the public defender principally on financial and administrative matters?

OPINION:

4. Three potential conflicts of interest are presented by this inquiry. First, are the county attorney's office and the public defender's office considered to be a single "law firm" for the purpose of Rule 8.4(f) of the New York Rules of Professional Conduct (the "Rules"), which prohibits a lawyer from causing a judge to violate the judge's ethical obligations under the Rules of Judicial Conduct? Second, as an assistant public defender, does the inquirer have a personal conflict of interest under Rule 1.7(a)(2) arising from an incentive to please or at least avoid antagonizing the county attorney's

office? Third, if the inquirer has such a conflict, is that conflict imputed to all attorneys in the public defender's office?

Are the County Attorney's Office and the Public Defender's Office the Same "Law Firm" for Purposes of Rule 8.4(f)?

5. Section 100.6(B)(3) of the Rules of Judicial Conduct prohibits the partners and associates of a part-time judge from practicing law in the court in which the part-time judge presides. Rule 8.4(f) of the Rules of Professional Conduct prohibits a lawyer from causing a judge to violate ethical obligations under the Rules of Judicial Conduct. Accordingly, attorneys in the town justice's law firm—the county attorney's office—may not appear in front of the town justice. *See* N.Y. State 1115 (2017) (attorney in the public defender's office may not represent a client in the same court where another attorney in the public defender's office serves as a part-time judge). Here, if the public defender's office and the county attorney's office are a single law firm under the Rules, then Rule 8.4(f) would apply to the lawyers in the public defender's office and the inquirer would not be permitted to appear before the part-time town justice.

6. Determining whether a group of lawyers is a single firm "is a fact-intensive inquiry." N.Y. State 1186 (2020); N.Y. State 1105 (2016). Rule 1.0(h), in the "Terminology" section of the Rules, provides that a "firm" or "law firm" "includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers engaged in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization."

7. With respect to legal organizations that consist of more than one component or section, Comment [4] to Rule 1.0 recognizes that, depending on organizational structure, the entire organization may constitute one single firm or each component may constitute a separate firm. Comment [2] to Rule 1.0 identifies two factors to be considered: (1) whether the group presents itself to the public in a way that suggests it is a single firm; and (2) whether the lawyers in the group have mutual access to information concerning the clients they serve. Our opinions focus on similar factors and place particular emphasis on access to client information. Thus, in N.Y. State 794 (2006), we concluded that the various divisions of a law school clinic constituted a single firm for purposes of the conflict rules where the clinic shared common office and file space, notwithstanding that each division maintained computer databases that were inaccessible to other divisions,.

8. Our opinions also look to a third factor: the independence of the lawyers. Thus, in N.Y. State 914 (2012), we concluded that the members of a panel of lawyers established to provide legal assistance to clients who had conflicts with the local Legal Aid Society did not comprise a single firm. We focused in Opinion 914 on the independence of the members of the panel, noting that: "Neither the Society nor its lawyers may exercise any supervision or control over the legal services provided by Conflicts Panel Lawyers."

9. Here, consistent with these guiding principles, we conclude that the county attorney's office and the public defender are not a single firm. We base this conclusion on several factors – (a) the county attorney's office has no access to information concerning the public defender's clients, (b) the two offices do not share a common office or file space, and (c) the lawyers in the county attorney's

office do not exercise any supervision or control over the legal services provided by the lawyers in the public defender's office.

Does the Inquirer Have a Personal Conflict of Interest Under Rule 1.7(a)(2)?

10. Rule 1.7(a)(2) provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that. . .
>
> > (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

11. Whether a reasonable lawyer would conclude that such a "significant risk" exists here depends on the "personal interests" that flow from the advisory and representational relationship between the county attorney's office and the public defender's office. (We have no jurisdiction to address whether those same interests might obligate the part-time town justice to recuse himself when lawyers from the public defender's office appear in front of him. *See* Judiciary Law § 14 (forbidding judges from sitting in matters in which they are interested)).

12. Because the county attorney's office advises and represents the public defender's office to secure funding for its operations and with respect to other financial and administrative matters, the inquirer might have an incentive to curry favor with a full-time assistant county attorney. If strong enough, this incentive might create a significant risk that the inquirer's independent professional judgment on behalf of a client will be adversely affected.

13. Various factors might magnify the risk of an adverse effect on the independent professional judgment of the inquirer. Does the part-time town justice supervise, or is he personally and substantially involved in the legal services provided by the county attorney's office to the public defender's office? Have the inquirer and the part-time town justice worked together on public defender grant applications or on other significant fiscal matters such as the public defender budget? Are they likely to continue or renew that collaboration? Were their interactions positive and productive, or were they hostile and acrimonious? Have the part-time justice and the inquirer become social friends or professional antagonists? Does the part-time justice have a reputation for vindictive or retaliatory behavior?

14. The inquirer will need to consider these and other relevant factors to determine whether a reasonable lawyer would conclude that the incentive to please or at least not antagonize the part-time town justice is strong enough to create "a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected." Rule 1.7(a)(2).

15. If the inquirer determines that a reasonable lawyer would conclude that there is a significant risk that the inquirer's judgment might be affected by a desire to please or at least not antagonize the part-time town justice, then under Rule 1.7(b)(1) the inquirer must determine if, notwithstanding that risk, the inquirer reasonably believes he can provide competent and diligent representation despite the conflict. If so, then the conflict is consentable, and the inquirer may proceed if he obtains the client's

informed consent, confirmed in writing pursuant to Rule 1.7(b)(4). *See* N.Y. State 968 ¶¶ 21-27 (2013) (describing process for analyzing whether a government lawyer's conflict is consentable).

Is The Inquirer's Conflict Imputed to All Attorneys in the Public Defender's Office?

16. If the inquirer has a personal interest conflict under Rule 1.7(a)(2), then Rule 1.10(a) will impute that conflict to all other lawyers in the law firm (the public defender's office) with which the inquirer is "associated." Thus, Rule 1.7(b) will require all other assistant public defenders to determine consentability and obtain informed consent from their clients whenever they appear before the part-time justice.

17. But even if the inquirer's conflict is non-consentable, that does not automatically make the imputed conflicts non-consentable, because Rule 1.10(d) permits consent to an imputed conflict. *See* N.Y. State 968 ¶ 25 (2013) ("We do not believe that this condition of nonconsentability extends to all lawyers in the agency").

CONCLUSION:

18. On the facts and circumstances presented by this inquiry, the county attorney's office and the county public defender's office are not a single law firm. Whether Rule 1.7(a)(2) prohibits a lawyer in the public defender's office from representing a client before the part-time town justice depends on whether, in light of the relationship between the two individuals and their respective offices, there is a significant risk that the independent professional judgment of the lawyer in the public defender's office on behalf of a client will be adversely affected. Rule 1.7(b) explains how and when such a personal conflict can be waived, if it exists. If a conflict exists under Rule 1.7(a), then it is imputed to all other lawyers in the public defender's office.

(30-20)

OPINION 1211 (12/09/2020)

TOPIC: Fees vs. disbursements, charges of contract lawyer or co-counsel

DIGEST: If a lawyer is handling a personal injury matter for a client who dies during the case, the attorney-client relationship automatically terminates, but the lawyer may enter into a new attorney-client relationship with the former client's putative personal representative. The new retainer agreement may provide that the lawyer will retain a probate lawyer in a different firm to file a probate matter and to obtain the appointment of the personal representative to carry on the personal injury case in place of the deceased client. The retainer agreement with the personal representative may also provide that the original lawyer will charge the probate lawyer's legal fees and expenses as a disbursement in the personal injury action.

RULES: 1.1, 1.5(b), 1.5(c), 1.5(g)

FACTS:

1. The inquirer is a personal injury lawyer. On occasion, a client dies in the course of a lawsuit. Because the inquirer does not have the relevant expertise in probate matters, the inquirer will typically engage a lawyer in another law firm to open a probate matter and seek appointment of a personal representative for the estate of the deceased client. The inquirer then moves in the personal injury action to substitute that personal representative as plaintiff under CPLR § 1015(a). The inquirer advises that in most cases, but for the personal injury litigation, no probate proceeding would need to be filed and no personal representative would need to be appointed, as the estate has no other assets requiring probate.

QUESTIONS:

2. Can the legal fees and expenses charged by the probate counsel and paid by inquirer be classified as a "disbursement" and recouped prior to disbursing any recovery obtained by way of settlement or judgment in the personal injury action?

3. Must the treatment of the probate lawyer's fees and expenses as disbursements in the personal injury action be addressed in an engagement letter or retainer agreement with the decedent's personal representative?

OPINION:

4. At the outset, we note that the death of the client terminates the attorney-client relationship. *See, e.g., Pace v. Raisman & Assoc., Esqs., LLP*, 945 N.Y.S.2d 118, 121 (App. Div. 2d Dept. 2012); *Davis v. Cohen & Gresser LLP*, 51 Misc. 3d 1203(A) (Sup. Ct. N.Y. Co. 2016). As a consequence, "[t]he lawyer . . . may not take any further steps in connection with the matter unless and until she is authorized to do so by the deceased's duly qualified personal representative." ABA 95-397. As explained by the Restatement of the Law Governing Lawyers, "A client's death terminates a lawyer's actual authority. . . . The rights of a deceased client pass to other persons—executors, for example, who can, if they wish, revive the representation." Restatement (Third) of the Law Governing Lawyers § 31 cmt. e (2000).

5. Accordingly, in order to proceed with the personal injury action, the inquirer will need to enter into a new attorney-client relationship with the decedent's putative personal representative authorizing the substitution of parties and the continuation of the case. We therefore focus on that second retainer agreement, not the initial retainer agreement with the deceased client, in addressing whether the N.Y. Rules of Professional Conduct (the "Rules") permit the fees and expenses of probate counsel, which the inquirer will be paying and which are necessary to secure the proper appointment of the personal representative, to be treated as a disbursement in the personal injury action.

6. Whether the deceased former client would have had the power, in the initial personal injury retainer agreement, to bind a future personal representative to continue to use inquirer as counsel for the estate, to require the estate to pay for separate probate counsel, or to specify the terms for engaging probate counsel, are questions of law, not ethics, and therefore are beyond our jurisdiction.

Charging the Fees and Expenses of Probate Counsel as a Disbursement in the Personal Injury Action

7. The Rules do not specify how a lawyer should charge for legal services provided by a lawyer associated with a different firm when those services are necessary to serving the client. Should those legal fees be paid out of the lawyer's legal fee (here, out of the inquirer's pocket), or may the lawyer charge them to the client as a disbursement (*i.e.,* out of the client's pocket)? This question is a matter of contract between the lawyer and the client, and in particular depends on the scope of the work that the lawyer has undertaken to perform for the client. *See generally* ABA 00-420 ("Whether the cost attributable to a contract lawyer is billed as an expense or included in legal services fees is not addressed by the Model Rules and does not seem to be a matter of ethics.").

8. The inquirer and the decedent's personal representative thus have discretion to structure the scope of inquirer's re-engagement in the personal injury action so that the inquirer is not responsible for prosecuting any probate matter necessary to appoint a personal representative. Subject to two caveats, the inquirer and the personal representative may instead permit the inquirer to pay for and charge back the legal fees and expenses arising from the engagement of separate probate counsel as a disbursement in the personal injury action.

9. First, the ancillary legal fees and expenses of the probate lawyer must be reasonably incurred to achieve the objectives of the personal injury litigation. *See* N.Y. State 769 (2003) (approving a separate charge for representation in obtaining litigation financing where the personal injury contingent fee agreement "did not anticipate or include [a] proposed transaction with [a litigation] financing company"); N.Y. County 739 (2008) ("A common practice in personal injury matters when the client's case requires ancillary legal services related to other specialized fields of law, such as bankruptcy, the calculation of Medicare Set Aside accounts, and disability planning (*e.g.,* special needs trusts), is to charge for said services as a disbursement against the entire proceeds of the settlement"). If the probate proceeding is uncontested, if the only significant estate asset is the personal injury claim, and if the probate application seeks only limited letters to continue the personal injury action, then the legal fees and expenses associated with that proceeding are certainly ancillary to the personal injury action. However, to the extent that the probate proceeding will involve other matters unrelated to the continuation of the personal injury action – for example, a will contest, disputes between heirs, the management or liquidation of estate assets, or the resolution of creditor claims (none of which

appear to be present here) – those matters would not be ancillary to the continuation of the personal injury action and the legal fees and expenses so incurred would not be properly chargeable as a disbursement in the personal injury action.

10. Second, charging the legal fees and expenses of the probate lawyer as a disbursement must not violate the prohibition of Rule 1.5 against charging an "excessive" fee or expense, and must also be in compliance with the rules of the Appellate Division that prohibit fees in personal injury actions in excess of stipulated percentages of the recovery. 22 N.Y.C.R.R. §§ 603.25(e) (1st Dep't), 691.20(e) (2nd Dep't), 806.27(a) (3rd Dep't), 1015.15(a) (4th Dep't).

The Engagement Letter (Retainer Agreement).

11. Rule 1.5(b) requires that the lawyer communicate to the client "the scope of the representation and the basis or rate of the fee or expenses for which the client will be responsible" and that the information be communicated in writing where required by statute or court rule. Further, with respect to contingency fee cases, Rule 1.5(c) requires that a lawyer provide to the client a writing stating:

> the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of a settlement, trial or appeal; *litigation or other expenses to be deducted from the recovery*; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. *The writing must clearly notify the client of any expenses for which the client will be liable* regardless of whether the client is the prevailing party.

(Emphasis added.)

12. Whether a retainer agreement in a personal injury contingency fee matter meets the requirement to "clearly notify the client" that it may be necessary to incur fees and expenses of additional specialized counsel may depend, for example, on the entire text of the retainer agreement, the customary practices in the legal profession with respect to the particular legal services being out-sourced, and the sophistication of the client. In this regard, N.Y. County 739 (2008) is instructive. That opinion involved the retention of specialized counsel to resolve Medicare, Medicaid and private healthcare liens that were asserted against a personal injury settlement. The question was whether the lawyer could charge lien resolution services as a disbursement. The New York County Lawyers ethics committee observed: "Historically, the resolution of liens on recoveries was considered a routine part of case management." Given that historical context, Opinion 739 concluded that the inquiring lawyer was required to provide lien resolution services "at no extra charge" (*i.e.,* "included in the contingency fee") unless the retainer agreement, among other things, "provides that the attorney may engage an outside law firm for lien resolution and that the fee for said service will be charged as a disbursement."

13. We take no position on whether the retention of probate counsel made necessary by the death of a personal injury client is, as a historical matter, "a routine part of case management" (as with lien resolution in N.Y. County 739), such that personal injury lawyers would customarily file the required probate proceeding to secure appointment of a personal representative of the estate without charging any fee beyond the contingent fee. The disposition of that issue is simply not controlling here, where

the inquirer must enter into a separate new retainer agreement with the decedent's personal representative in order to continue the personal injury representation after securing the appointment of a duly qualified personal representative to substitute as party-plaintiff. However, in accordance with N.Y. County 739 and Rule 1.5(b), we conclude that the fees and expenses of probate counsel may only be charged as a disbursement in the personal injury action if that second, new retainer agreement between the inquirer and the putative personal representative – in addition to authorizing inquirer to retain separate probate counsel and to continue the prosecution of the personal injury action in the name of the personal representative – clearly so provides.

CONCLUSION:

14. A lawyer handling a contingent fee personal injury matter may charge as a disbursement in the personal injury action the fees and expenses of a lawyer separately retained, after the death of the personal injury client, to file a probate proceeding on behalf of the putative personal representative of the deceased former client's estate in order to obtain appointment of the personal representative and authorization to continue the personal injury action, where doing so is not part of the legal services that the personal injury lawyer agrees to provide but is a necessary element of that representation. The personal injury lawyer's retainer agreement or engagement letter with the putative personal representative should clearly notify the client that such legal fees and expenses will be charged as a disbursement in the personal injury action.

(18-20)

2021

OPINION 1212 (01/04/2021)

TOPIC: Public Defender's Obligation as to Closed Files and Transfer of Files upon De-Funding of Program

DIGEST: Absent the client's informed consent, a public defender may not deliver open or closed client files to the assigned counsel program. Rather, the public defender's office must facilitate the transfer of open client matters to the client or successor counsel appointed by the assigned counsel program and must maintain the files until this transfer can be accomplished. Closed client files from a defunded program must be maintained in the manner required of dissolving law firms.

RULES: 1.0(h), 1.0(p), 1.15(c)(4), 1.16(e), 7.2(b)(1)

FACTS:

1. The inquirer is an attorney with a not-for-profit public defender's office representing defendants in criminal matters as part of a county's assigned counsel program. The county has defunded the public defender's office and is moving to an alternate program to satisfy its obligation to provide counsel in accordance with New York County Law Article 18-B. Once the public defender's office has effectively withdrawn from representing its current clients, the county has requested that the public defender's office turn over open and closed client files to the assigned counsel program, which is administered by an employee of the county attorney's office. The closed files, which span more than 30 years, have all been converted for storage into electronic format.

QUESTIONS:

2. May a defunded public defender's office turn its open client files over to the county's assigned counsel program?

3. May a defunded public defender's office turn its closed client files over to the county's assigned counsel program?

OPINION:

4. County Law Article 18-B requires counties to provide criminal defense representation to qualified indigent persons. A county may fulfill its obligations under Article 18-B by appointing a public defender, by furnishing counsel through a private legal aid bureau or society designated by the county, or through a bar association plan in which the services of private counsel are rotated and coordinated by an administrator. *See* County Law § 722.

5. The inquiring attorney here is employed by a public defender's office, established under the authority of County Law Article 18-A, which had been funded by the county to provide the mandated

representation. A public defender's office is a qualified legal services organization and, therefore, constitutes a law firm under the New York Rules of Professional Conduct ("Rules"). *See* Rule 1.0(h) and (p); Rule 7.2(b)(1). The assigned counsel program, however, is not a law firm, but rather is defined as an "Entity that sets forth protocols and policies for assigning attorneys to public defense clients and ensure that those attorneys provide quality representation." *See* N.Y.S. Office of Indigent Legal Services Standards for Establishing and Administering Assigned Counsel Programs – Black Letter Standards with Commentary (July 1, 2019) ("ILS Standards"), §1.4.c (published at https://ils.ny.gov/files/ACP/ACP%20Standards%20with%20Commentary%70119.pdf)

Transfer of Open Client Files

6. Lawyers in the public defender's office who are withdrawing from representing a current client (meaning a client with an "open" file) must comply with Rule 1.16(e) which requires them to "take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, [and] delivering to the client all papers and property to which the client is entitled . . ."

7. In addition, the lawyers in the public defender's office have a responsibility under Rule 1.6 and Rule 1.9(c) to maintain the client's confidential information. As noted in Comment [2] to Rule 1.6, "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source." Rule 1.9(c) generally applies the duty of confidentiality to former clients. Accordingly, the public defender's office may deliver files maintained in connection with an ongoing representation to the clients themselves, or to lawyers who have been appointed pursuant to Article 18-B as successor counsel in particular criminal cases. However, the public defender's office may not deliver such client files to the assigned counsel program, which is neither a lawyer nor a law firm and which does not represent any of the public defender's clients, absent the informed consent of the clients concerned. If delivery of the file to the client is not possible, and if the client's informed consent to delivery of a client file to the assigned counsel program cannot be obtained, then the lawyers in the public defender's office must take steps to preserve the client's file until successor counsel is appointed.

8. We are mindful that administrative transfer of open client files to successor counsel may place a significant burden on an unfunded not-for-profit entity such as the public defender's office. But as Comment [8A] to Rule 1.16 aptly notes, ". . . lawyers are ordinarily better suited than clients to foresee and provide for the burdens of representation." Although responsibility for the cost of preserving the client files during the orderly transition of representation is an issue of law beyond the jurisdiction of the committee, the inquirer may wish to explore whether this expense may qualify as an obligation of the county under Articles 18-A or 18-B of the County Law.

Transfer of Closed Files

9. Under the Rules, a lawyer has no ethical obligation to maintain the entire contents of closed client files indefinitely, but a lawyer may have an ethical obligation to maintain certain documents indefinitely, such as when the lawyer knows or has reason to know the client may need the documents in the future. *See* N.Y. State 1192 ¶ 12 (2020). Although a client's right to some or all of what is

broadly termed the "client file" is a question of law beyond our jurisdiction, we note that a lawyer may have the right to withhold some parts of a client file. *See Sage Realty v. Proskauer Rose*, 91 N.Y.2d 30 (1997) (holding that clients are generally entitled to all documents relating to representation, but a law firm is not required to disclose documents that might violate a duty of nondisclosure owed to third party, a duty imposed by law, or firm documents intended only for internal law office use). We also note that Rule 1.15(c)(4), obligates a lawyer to promptly deliver to the client the property of the client (including papers in the client file) that the client is "entitled to receive."

10. In this instance, the lawyers in the public defender's office have not culled through their closed files and undertaken the sometimes complicated case-by-case and page-by-page analysis that may be necessary to identify (i) the portions of each file to which the client is "entitled," including important papers the client may need in the future, and (ii) the portions of the file the lawyer may withhold from the client. The public defender's office has instead taken the reasonable step of converting all the documents in its closed files to an electronic format, a format that is acceptable, if not preferable in this day and age, as long as the evidentiary value of the documents that may be needed for an appeal or other proceeding is not unduly impaired by this method of storage. *See* N.Y. State 940 (2012) (opining that lawyer satisfies document retention requirements with electronic copies and may destroy original documents, with exceptions, including exception where copies may not be introduced into evidence or otherwise used in place of the originals if the need should arise); *see also,* N.Y. State 623 (1991) (requiring lawyers to maintain documents of a former client that establish substantial personal or property rights "according to law and/or the reasonably foreseeable needs of the client" unless the former client takes possession of such documents or authorizes their destruction).

11. Whether the files are maintained as paper copies or stored in electronic format, attorneys in the public defender's office have the same obligation as members of a law firm to maintain the closed files of former clients. In N.Y. State 1192 (2020), we noted:

> The professional obligation to maintain closed files or to arrange for their disposition is not limited to those members of the firm who worked on the file when it was active. In N.Y. State 398 (1975), we held that, absent a special agreement to the contrary, the clients of a law partnership employ the firm as an entity and not a particular member of the firm. Consistent with that holding, the ethics committee of the Nassau County Bar Association determined that both partners of a two-member firm in dissolution were fully responsible to every client of the firm, and the lawyers' separate agreement to the contrary could not diminish each lawyer's responsibility to the clients of the firm. Nassau County 40-88 (1988).

12. By analogy, the inquirer's obligation to maintain closed client files continues beyond the defunding of the not-for profit entity in the same fashion as it would in the event of a law firm dissolution. Prior ethics opinions have addressed the breadth of the lawyer's responsibility in situations analogous to that presented by the inquiring lawyer, such as retirement and dissolution. *See, e.g.,* N.Y. State 1192 (2020); N.Y. State 623 (1991); N.Y. State 460 (1977); N.Y. County 725 (1998).

13. As we stated most recently in N.Y. State 1192, a lawyer has no ethical responsibility to maintain closed client files indefinitely except for "original documents of intrinsic value such as wills, deeds or negotiable instruments as well as documents the lawyer knows or should know that the client

or third party may need in the future." To the extent the documents contained in the closed client files of the public defender's office fall within these exceptions, we find no material difference in the scope of the inquirer's obligations in this case.

CONCLUSION:

14. Absent the client's informed consent, lawyers in the public defender's office may not deliver open or closed client files to the assigned counsel program. Rather, the public defender's office must facilitate the transfer of open client files to the client or successor counsel appointed by the assigned counsel program and must maintain the files until this transfer can be accomplished. Closed client files must be maintained in the manner required of dissolving law firms.

(31-20)

OPINION 1213 (01/11/2021)

TOPIC: Lawyer paying for recommendation.

DIGEST: A lawyer may not participate in an internet lawyer-client matching service that vouches for the lawyer's credentials, competence and effectiveness, and recommends the lawyer as the "best lawyer" for the needs of the potential client.

RULES: 5.4(a), 7.1(a), 7.2(a)

FACTS:

1. The inquirer is a lawyer who wishes to participate in an online service that connects potential clients facing traffic violations with attorneys willing to represent them to fight the violations.

2. The lawyer matching service has created a platform that requires the client to upload the ticket and provide additional information. According to the inquirer, a proprietary algorithm then matches the client with "the best local traffic lawyer for their case," and quotes a legal fee that was determined by the lawyer selected by the algorithm. Once the fee is paid, the client is paired with the lawyer, who must accept the case within one day or forego the representation opportunity. The legal fee, net of a service charge to the matching service, is then transferred by the service to the lawyer.

3. The inquirer states that the algorithm is driven by a variety of factors, including lawyer location, fee schedules, success rates, local competition, and customer service. The online lawyer matching service collects customer feedback and, in its sole discretion, may offer a full or partial refund in the event of an unfavorable outcome.

4. The service represents that it is not a law firm, does not offer legal advice, and all the attorneys it connects with clients are neither its employees nor its agents. The online service is not owned by New York-admitted lawyers.

QUESTION:

5. Does the portion of the legal fee paid by the client but retained by the online lawyer matching service constitute an impermissible referral fee?

OPINION:

6. With exceptions not here relevant, Rule 7.2 (a) of the New York Rules of Professional Conduct (the "Rules") provides:

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

7. Comment [1] to Rule 7.2 states that paragraph (a) "does not prohibit a lawyer from paying for advertising and communications permitted by these Rules" and, insofar as is relevant, that a lawyer

"may pay others for generating client leads such as Internet-based client leads, as long as . . . the lead generator does not recommend the lawyers." Comment [1] to Rule 7.2 elaborates on the prohibition on recommendations by providing that to comply with Rule 7.1 (which prohibits false, deceptive, or misleading lawyer advertising), "a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, . . . or has analyzed a person's legal problems when determining which lawyer should receive the referral."

8. Here, the matching service is a "lead generator," and participating lawyers pay the service a fee for generating leads. As such, the principal issue the committee must determine is whether the service "recommends" lawyers.

9. This committee has observed that the Rules "generally do not allow lawyers to pay for referrals of clients," but the prohibition is not meant to keep "a lawyer from paying for advertising and communications permitted by the Rules . . ." N.Y. State 979 ¶ 4 (2013). The same opinion concluded that a group of lawyer mediators would be paying for joint advertising, rather than paying for prohibited referrals, where a website included a detailed biography of each member of the group, because that format was "reasonably designed to encourage the consumer to select the member with the expertise appropriate to the consumer's needs, rather than to trigger a consumer to call for a referral." N.Y. State 979 ¶12.

10. In 2017, this Committee issued two additional opinions which, through juxtaposition, illustrate the line between a lawyer ethically participating in internet marketing services, on the one hand, and a lawyer unethically paying for a referral, on the other hand. See N.Y. State 1131 (2017) and N.Y. State 1132 (2017).

11. The for-profit service at issue in N.Y. State 1131 charged participating lawyers a fixed monthly fee, and those lawyers submitted their names, contact information, geographic locale and practice areas to the service to include in its database. Potential clients wishing to be contacted by a lawyer sent the service their names and contact information, their geographic locale, and the practice area in which they sought legal advice. The service then searched its database of participating lawyers to identify all lawyers who stated that they engaged in the requested practice area in the requested geographic locale, and selected a lawyer meeting those criteria in the order in which the lawyers had registered with the service – meaning "the first lawyer to register gets the first lead; second lawyer gets the second lead, etc." N.Y. State 1131 ¶ 1.

12. Based principally on the service's use of "neutral" and "mechanical" factors, we concluded that the lawyer matching service described in N.Y. State 1131 did not violate the prohibition against paying for a recommendation, which is the core tenet of Rule 7.2(a). We reasoned:

> . . . [T]o "recommend also includes identifying a particular lawyer or lawyers to a potential client as "a right" or "the right" lawyer for the client situation after an analysis of either the potential client's legal problem or the lawyer's qualifications to address that problem. We believe identifying "a right" or "the right" lawyer implies some qualitative comparative assessment of the lawyers available to perform the services the potential client requires.

> We believe that the Service would not constitute a "recommendation" as long as the Service's advertising does not state or imply that the Service is making a recommendation and makes clear that (i) being included on its list of participating lawyers requires only a payment and the Service does not vet the qualifications of such lawyers, other than, for example, confirming the lawyer's good standing with the licensing authority, if that is the case, (ii) the Service's selection of a participating lawyer from that list is the result of a neutral process that involves no evaluative judgment, and (iii) when a lawyer is chosen by the Service, it does not mean the selected lawyer is the "best" or "right" lawyer for the client's needs or that the lawyer is otherwise preferred over other lawyers. If these three conditions are met, a layer's payment to the Service to participate in its matching service as a lawyer available to contact potential clients is permissible under Rule 7.2(a).

N.Y State 1131 ¶¶ 20-21.

13. We reached a different conclusion, however, in N.Y. State 1132 (2017), where we concluded that the online lawyer matching service operated by Avvo Legal Services ("Avvo") had crossed the line from a permissible marketing service to an impermissible payment for a recommendation in violation of Rule 7.2(a).

14. We noted in N.Y. State 1132 that Avvo gave each participating lawyer a rating that was advertised as helping a potential client "quickly assess a lawyer's background." The rating was scaled from 1 to 10 and calibrated in one-tenth increments, suggesting to the committee a degree of "mathematical precision." N.Y. State 1132 ¶ 27. Avvo advertisements also stated that the model developed to calculate each lawyer's rating "was developed with input from hundreds of attorneys, thousands of customers and many other legal professionals who deeply understand the work attorneys do" and that the rating "enables a potential client to find 'the right lawyer' . . . for their needs," N.Y. State 1132 ¶ 28.

15. Here, the online service that matches lawyers with potential clients to fight tickets has many characteristics similar to the factors that drove our conclusion in N.Y. State 1132 that Avvo's online lawyer matching service violated Rule 7.2(a). Conversely, the matching service has few of the characteristics that led us to approve the online lawyer matching service at issue in N.Y. State 1131. Specifically, the online service here matches the potential client with an attorney based on factors that include attorney success rate, response rate, and customer service rating. The website states that the potential client is not just matched to any lawyer, but to an "experienced traffic attorney" with a "great track record in the court where the ticket will be contested." The service also states that it has collected data and knows which lawyers are successful and which are not in each court served.

16. The online lawyer matching service here in issue plainly strives to give potential clients the impression that it has selected the "best" or "right" lawyer for the potential client's matter, and that the lawyer selected is preferred over other candidates in the service's database. Based on these express and implied representations, the service appears to vouch for a matched lawyer's credentials, competence and effectiveness, making the communication a prohibited recommendation. Accordingly, under Rule 7.2(a), the inquirer's payment for participation in the online service would constitute a prohibited referral fee, not a permitted marketing fee.

17. Beyond the violation of Rule 7.2(a), two additional ethical concerns arise. First, would the inquirer's participation in the online service result in improper fee sharing with a non-lawyer under Rule 5.4(a)? Second, would participation in the online service violate the inquirer's duty under Rule 7.1(a) not to participate in the use or dissemination of advertisements containing statements or claims that are false, deceptive or misleading? *See* Rule 7.2, Comment [1] (lead generator's communications must be "consistent with" Rule 7.1). Because we conclude that the inquirer's participation in the online matching service violates Rule 7.2(a), we do not need to address these additional concerns now.

CONCLUSION:

18. A lawyer may not participate in an online lawyer-client matching service that vouches for the lawyer's credentials, competence and effectiveness and recommends the lawyer as the "best lawyer" for the needs of the potential client. Accordingly, a lawyer participating in such a lawyer matching service would violate Rule 7.2(a).

(26-20)

OPINION 1214 (01/11/2021)

TOPIC: Frivolous arguments to a court; withdrawal.

DIGEST: A lawyer is ethically prohibited from presenting a frivolous argument to a court. If the lawyer cannot find a non-frivolous basis on which to proceed with a client's motion and the client persists on putting before the court arguments the lawyer believes to be frivolous, the lawyer may seek permission from the court to withdraw from the representation. If the court will not permit the lawyer to withdraw, the lawyer must competently represent the client without engaging in frivolous conduct.

RULES: 1.2(c), 1.4(a)(2), 1.16(c)(4) & (d), 3.1(a)

FACTS:

1. The inquirer is a lawyer at a legal services office that represents homeowners in residential foreclosure proceedings without charge. That office was initially contacted by a homeowner seeking to challenge a judgment of foreclosure. Generally, the inquirer's office does not accept post-judgment cases, and the homeowner's case was declined. Thereafter, the homeowner filed a *pro se* application to vacate the judgment of foreclosure alleging defective service of process. The justice presiding in the matter, rather than deciding the motion, requested that the inquirer represent the homeowner and attempt a settlement. The inquirer agreed, and made it clear to the homeowner that the representation was limited to negotiating settlement terms with the foreclosing bank.

2. The settlement negotiations failed, and the court contacted the inquirer to continue the homeowner's representation in connection with the homeowner's previously submitted application to vacate the judgment of foreclosure. The inquirer protested that the agreed scope of the representation had been limited to settlement negotiations, but the court stated, to the contrary, that the inquirer's scope of representation was unlimited and for the entire case.

3. The inquirer has reviewed the motion papers prepared by the homeowner without the benefit of counsel and has concluded that there is no non-frivolous factual or legal basis for vacating the judgment of foreclosure, including the sole ground asserted in those papers.

QUESTIONS:

4. At oral argument of the motion to vacate the foreclosure judgment, may the inquirer rest on the motion papers prepared by the homeowner or, alternatively, simply state the homeowner's position, even though the inquirer believes the homeowner's position to be frivolous?

5. Having never agreed to take on the homeowner's representation beyond attempting to reach a settlement with the foreclosing bank, may the inquirer refuse to participate any further in the matter?

OPINION:

A. Frivolous arguments

6. Rule 3.1(a) of the New York Rules of Professional Conduct (the "Rules") provides: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." Here, the inquirer has concluded that there is no basis in law or fact that would support the sole ground the homeowner has raised for seeking to vacate the judgment of foreclosure, or any other ground.

7. Frivolous conduct within the meaning of Rule 3.1(a) is not materially different from frivolous conduct as defined in 22 NYCRR Part 130. In the context of sanctioning attorneys for frivolous conduct in litigation, 22 NYCRR § 130-1.1(c) provides that conduct is "frivolous" if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false."

8. The inquirer may not argue or advance frivolous arguments to support the homeowner's motion. It is, however, important for the inquirer to distinguish between arguments that meet the high standard for "frivolous conduct" set forth in 22 NYCRR § 130-1.1(c) and Rule 3.1(a), on the one hand, from arguments that are merely unlikely to succeed but are not frivolous, on the other hand. The inquirer may ethically continue representing the homeowner by advancing any non-frivolous arguments the inquirer reasonably believes support a vacatur application. If the inquirer develops such non-frivolous arguments, then the inquirer must discuss the proposed new or modified position with the homeowner before presenting it to the court. *See* Rule 1.4(a)(2) (a lawyer must "reasonably consult with the client about the means by which the client's objectives are to be accomplished").

9. If the homeowner insists that the inquirer pursue the frivolous arguments contained in the motion papers the homeowner prepared while acting *pro se*, the inquirer may seek permission from the court to withdraw on the basis that "the client insists upon taking action with which the lawyer has a fundamental disagreement," *see* Rule 1.16(c)(4), as well as on any other mandatory or permissive grounds the inquirer has for withdrawal under Rule 1.16. The inquirer must be mindful, however, that: "The nature and extent of information about a client that a lawyer may ethically reveal on a motion to withdraw as counsel depend on whether the information is protected as confidential information under Rule 1.6." N.Y. State 1057 ¶5 (2015).

10. If permission to withdraw is denied by the court, the inquirer must continue the homeowner's representation. *See* Rule 1.16 (d) ("When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."). But even in that circumstance, the inquirer may still not engage in "frivolous conduct" at the direction or behest of the homeowner. A client has no right to instruct a lawyer to violate a Rules of Professional Conduct, and a lawyer has no right to follow an instruction that the lawyer violate a Rule. Thus, the inquirer must find a means to competently represent the homeowner without putting forth frivolous arguments. Since the homeowner rather than the inquirer submitted the frivolous motion papers, the lawyer is not

required to renounce or disavow them, but the inquirer may not rely on any frivolous factual or legal arguments in those papers.

B. Scope of representation

11. We turn now to the inquirer's second question – may the inquirer refuse to continue the homeowner's representation because the inquirer made it clear to the homeowner that the representation would be limited to negotiating settlement terms with the foreclosing bank. Such limited scope representation is acceptable under Rule 1.2(c) "if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel." However, whether the inquirer may refuse the judge's request to continue the representation after settlement negotiations failed, whether the judge's request constituted an order and, if an order, whether such order might not be binding on the inquirer under the circumstances, are all questions of law beyond this committee's jurisdiction.

CONCLUSION:

12. A lawyer is ethically prohibited from presenting frivolous arguments on behalf of a client who seeks to vacate a judgment of foreclosure. The lawyer's duty of competence is fulfilled by presenting whatever non-frivolous arguments can be developed to support vacatur. If the lawyer determines that there are no non-frivolous arguments in support of an application to vacate, then the lawyer shall not proceed with the motion. If the client insists on proceeding based on factual claims or legal arguments that are frivolous, the lawyer may seek permission of the court to withdraw from the representation, but the lawyer must not reveal confidential information unless an exception to the duty of confidentiality applies. If the court does not permit withdrawal, the lawyer must continue to represent the client and must provide competent representation to the client without engaging in frivolous conduct. Whether and under what circumstances a lawyer may decline a court order or request to represent a client is a question of law that is beyond this committee's jurisdiction.

(27-20)

OPINION 1215 (01/15/2021)

TOPIC: Limited scope representation in criminal cases

DIGEST: A law firm may not enter into a retainer agreement in a criminal matter limiting the scope of the firm's services to pretrial work unless (i) the limitation is reasonable under the circumstances, (ii) the client gives informed consent, and (iii) the limitation is not prejudicial to the administration of justice.

RULES: 1.1(b), 1.2(a) & (c), 1.16(d), 8.4(c) & (d)

FACTS:

1. The inquirer is a New York lawyer who employs of counsel attorneys and pays them a flat fee to represent clients in criminal matters. The firm's retainer agreement with these criminal defense clients states that the representation will be handled by an attorney who is of counsel to the firm, and that the scope of the agreement is limited to obtaining a pretrial disposition (such as a guilty plea or dismissal). The retainer agreement further informs the client that if there is no pretrial disposition and the case proceeds to trial, the client must enter into a new agreement with the of counsel attorney, or with another attorney of the client's choosing, in order to secure trial representation.

QUESTIONS:

2. May a law firm enter into a retainer agreement with a criminal defense client stating that the representation will be handled by an of counsel attorney, that the agreement is limited in scope to obtaining a pretrial disposition, and that representation of the client at trial requires the client to separately engage the of counsel attorney, or another attorney, for that purpose?

3. May the law firm pay the of counsel attorney a flat fee for representing the defendant under such a limited scope retainer agreement?

OPINION:

4. In general, there is no ethical prohibition on a law firm entering into an agreement with a client that identifies an individual of counsel attorney who will be handling the client's representation, even in a criminal case, provided that the of counsel attorney is competent to perform the agreed upon services. *See* Rule 1.1(b) ("A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it"). Nonetheless, a number of ethical issues must be considered in any such arrangement where, as here, the retainer agreement provides for a limited scope of *pretrial* representation only. Chief among those issues is whether the limited pretrial scope of service is permissible pursuant to Rule 1.2(c) of the Rules of Professional Conduct ("Rules"),

Rule 1.2(c) and limited scope representation.

5. Rule 1.2(c) expressly permits limited scope representation and provides that a lawyer "may limit the scope of the representation if the limitation is reasonable under the circumstances, the client

gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel."

6. We addressed limited scope representation in criminal matters in N.Y. State 856 (2011). The inquirer there was a lawyer working with a union legal services plan that regularly retained lawyers to represent union members in criminal matters "for arraignment purposes only." After arraignment, the legal services plan required the union member to retain the original legal services plan attorney, or another private attorney, to continue the representation or, if the member could not afford to retain private counsel, to seek a court-appointed or legal aid attorney. We concluded that "limiting the representation to arraignment pursuant to the union legal services plan is ethical" if the lawyer complies with Rules 1.2(c) and 8.4(d). We said that a lawyer can comply with those rules by satisfying three conditions (N.Y. State 856 ¶ 9):

> . . . (a) the lawyer must obtain the *client's consent* after giving the client the information necessary to make an informed decision whether to agree to the limitation, (b) the limitation must be *reasonable under the circumstances* (*i.e.,* the scope of the representation must be sufficiently broad to enable the lawyer to render competent service), and (c) the limitation must *not be prejudicial to the administration of justice*. [Emphasis added.]

7. The question here is whether extending the end point of a limited scope criminal representation from arraignment to the entire pretrial phase can satisfy these criteria.

What disclosures are needed to obtain a client's informed consent?

8. A lawyer who intends to limit the scope of a representation in any way must obtain the client's informed consent. What information would a lawyer need to disclose to ensure that a client's consent to representation limited to the pretrial stage was informed? Comment [6A] to Rule 1.2, which appears under the heading "**Agreements Limiting Scope of Representation**," is instructive:

> [6A] In obtaining consent from the client, the lawyer must adequately disclose the limitations on the scope of the engagement and the *matters that will be excluded*. In addition, the lawyer must disclose the *reasonably foreseeable consequences* of the limitation. In making such disclosure, the lawyer should explain that if the lawyer or the client determines during the representation that additional services outside the limited scope specified in the engagement are necessary or advisable to represent the client adequately, then the client may need to retain separate counsel, which could result in delay, additional expense, and complications. [Emphasis added.]

9. Thus, the law firm here would first need to disclose "the matters that will be excluded" by limiting representation to pretrial matters. Plainly that limitation would exclude selecting a jury, delivering an opening statement, and calling witnesses at trial, but would it also exclude issuing trial subpoenas, filing motions *in limine*, or preparing the case for trial? For reasons we discuss later in this opinion, those latter services cannot be prospectively excluded from the representation when they are necessary to provide competent representation. The law firm would also need to disclose the "reasonably foreseeable consequences" of the limitation, including the risk that the trial court might deny the firm's motion to withdraw from the representation were the case to proceed to trial.

10. In N.Y. State 856, we pointed out that "even if a lawyer validly obtains a client's informed advance consent to withdraw after a discrete stage . . . the lawyer must also comply with Rule 1.16(d)," which provides as follows:

> (d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

11. Here, once a lawyer has entered an appearance in a criminal matter in a state or federal court in New York, permission for withdrawal is invariably required by the rules of that tribunal. The very real possibility that the judge presiding over a criminal case might deny the law firm's motion to withdraw, especially if the motion were made on or near the eve of trial, should also be disclosed. *See, e.g.*, *People v. Young*, 38 Misc.3d 381, 953 N.Y.S.2d 840 (N.Y. City Ct. 2012) ("[W]here defendant appears to have met his initial obligation to the firm, but now indicates an inability to pay, and where the matter has gone well past the discovery and motion stages and is ready to be tried, the Court finds that . . . withdrawal is improper."). There is also a possibility that a court might deny the defendant's application to substitute successor counsel, despite compliance with the retainer agreement, if that application is made too close to trial. *See People v. Arroyave*, 49 N.Y.2d 264, 271, 401 N.E.2d 393, 397 (1980) ("absent exigent or compelling circumstances, a court may . . . deny a defendant's request to substitute counsel made on the eve of or during trial if the defendant has been accorded a reasonable opportunity to retain counsel of his own choosing before that time"). If a motion to withdraw or to substitute other counsel is denied, for whatever reason, the client's representation could be impacted, because the trial would then proceed with the defendant represented by the originally retained lawyer, notwithstanding the understanding of the lawyer and the client to the contrary in the retainer agreement.

Is the limitation to pretrial work "reasonable under the circumstances"?

12. Even if the inquirer's firm makes all of the required disclosures, Rule 1.2(c) permits limited scope representation only if the limitation is "reasonable under the circumstances." We therefore need to consider the "circumstances" carefully to see whether this particular limitation is reasonable.

13. In N.Y. State 856 we said that a lawyer may ethically agree with a client to terminate a representation after "a discrete stage of a matter," and that arraignment was such a "discrete stage." We believe the circumstances are quite different here. In many criminal matters, a bright line cannot be drawn between pretrial work and trial work. The witness interviews, forensic tests, and factual investigation needed to negotiate effectively with a prosecutor are an integral part of pretrial representation in most criminal proceedings. Also, decisions about which legal defenses to present at trial must often be made long before trial. For example, a defense lawyer is required to give advance notice of intent to proffer psychiatric evidence at trial (see C.P.L. 250.10), or when requested by the prosecutor, to give advance notice of intent to present an alibi defense at trial (see C.P.L. 250.20). Therefore, we believe that limiting the scope of criminal defense legal services to pretrial work would ordinarily be unreasonable in a criminal case of any substantive or procedural complexity, or where there is more than a slight possibility that the case will actually proceed to trial.

14. As a general matter, we believe it would be a highly speculative exercise to attempt to predict, at the inception of a criminal case, the likelihood of a negotiated disposition prior to trial. Too much turns on facts that are unknown when an arrest is made and charges are first filed. For example, the defense lawyer is unlikely to know: the character and criminal record of prosecution witnesses (whose testimony could be sterling or could be thoroughly impeached); the nature and availability of defense witnesses; and the results of forensic blood, DNA and ballistics tests. Information obtained from the police and other law enforcement authorities post-arraignment through pretrial discovery, even in a relatively straightforward misdemeanor case, may reveal a basis for a successful motion to suppress eyewitness testimony, admissions, or physical evidence. And, of course, there are multiple intangible factors that may reveal themselves during the course of the prosecution that could affect the ability to negotiate a reasonable disposition.

15. For these reasons, we believe it will only be the rare criminal case, based on facts and circumstances which are highly specific to the particular situation, in which a competent criminal lawyer could predict with a reasonable degree of certainty at the inception of representation that a case will terminate without a trial.

16. In any event, in every criminal case, an agreement to limit the representation to the pretrial phase of the case cannot include a limitation on taking the same steps – at the appropriate times – that would be required of a competent lawyer whose representation was not limited to the pretrial phase of the case. In other words, in a criminal representation, an agreement that limits the scope of the representation to pretrial matters, must nonetheless require the attorney to provide or take the necessary steps to ensure that successor counsel is able to provide all the defense services that are necessary to the provision of competent and effective representation until the final disposition of the case whether by motion, plea agreement, or verdict after trial. Only in that way can the lawyer ensure that the client is not prejudiced by the first attorney's failure to lay an adequate foundation of preparation.

Is the limitation prejudicial to the administration of justice?

17. The third and final factor we discussed in N.Y. State 856 is whether the limitation is "prejudicial to the administration of justice in violation" of Rule 8.4(d). In most circumstances, we think a limitation in the scope of services provided to the pretrial phase of a criminal matter will be prejudicial to the administration of justice unless the lawyer is fully prepared to proceed to trial on the date scheduled by the court if a pretrial disposition is not reached and the court denies a motion to withdraw or to substitute new counsel.

18. Our opinion is rooted in practical considerations. If a criminal defendant who has signed a limited scope retainer agreement is concerned that counsel may abandon the case in the event of trial, the defendant may feel coerced into pleading guilty, notwithstanding the existence of a viable defense or even innocence. A plea coerced by fear of abandonment would be plainly prejudicial to the administration of justice. "In a criminal case," Rule 1.2(a) provides, "the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered . . . ." A defendant should make the choice between pleading guilty and going to trial freely, without fear of abandonment by counsel and without fear that successor counsel will lack sufficient time to prepare for trial.

19. Conversely, if the limited scope lawyer is concerned that the court may not allow the lawyer to withdraw before trial despite a retainer agreement limited to the pretrial phase of the case, the lawyer may urge the defendant to accept a plea offer, even if the client would be better served by rejecting it. That, likewise, would be plainly prejudicial to the administration of justice.

20. Additionally, a lawyer who enters into a retainer agreement that is limited to the pretrial phase of criminal cases may not be competent to actually try a criminal case and yet, if a motion to withdraw is denied, that is what the lawyer will have to do. This would present a grave threat of prejudice to the administration of justice.

21. Finally, there is a risk that if a trial court grants a motion to withdraw shortly before trial, successor counsel will not be afforded the necessary time to prepare sufficiently for trial. This too would substantially prejudice the administration of justice.

22. For all these reasons, we think a limited scope retainer agreement would be prejudicial to the administration of justice, and thus impermissible, unless (i) the lawyer who enters into the limited scope pretrial criminal defense retainer is fully competent to represent the client in defense of the charges (including at any trial), and (ii) that lawyer actually prepares the case and will be ready for trial by the time of the scheduled trial date if the court denies a motion to withdraw or to substitute new counsel, and (iii) the client, after full disclosure of the risks inherent in such a limited-scope agreement, has sufficient sophistication and resolve not to be coerced into accepting a plea offer that the client would not have considered if the client had engaged a lawyer who was committed to continue the representation until the conclusion of the case.

Is the inquirer's firm treating of counsel lawyers unethically by paying a flat fee?

23. Rule 8.4(c) prohibits a lawyer or law firm from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation." In the unusual circumstances where a limited pretrial scope engagement is permitted by Rules 1.2(c) and 8.4(d) in criminal cases, we see nothing in the Rules of Professional Conduct preventing the inquirer's firm from paying of counsel lawyers a flat fee to represent defendants as long as neither the inquirer nor anyone else at the inquirer's firm misleads the of counsel lawyers about the reality of their situation – namely, that if the client fails to engage successor trial counsel, and if the court denies the of counsel lawyer's motion to withdraw, then the obligation of defending the client at trial may fall to the of counsel lawyer. Armed with the knowledge of this risk, the of counsel lawyers can decline to accept the limited scope representation, or can insist upon additional payment from the law firm if required to continue the representation through trial.

CONCLUSION:

24. A law firm may not enter into a retainer agreement in a criminal matter limiting the scope of the firm's services to pretrial work unless (i) the limitation is reasonable under the circumstances, (ii) the client gives informed consent, and (iii) the limitation is not prejudicial to the administration of justice. As criminal cases are commonly high stakes matters with unpredictable twists and turns, this standard will be difficult to meet except in rare cases.

(14-20)

OPINION 1216 (01/15/2021)

TOPIC: Government lawyer doing consulting work for private company

DIGEST: A government agency lawyer, doing work on behalf of the government in connection with a software contract between the agency and a private company, may not also work as a consultant to the private company to help it provide such software to other agencies unless there is law expressly allowing such work. Such consulting work could also be prohibited by rules on conflicts of interest or by the rule prohibiting a lawyer from accepting benefits intended to influence the actions of public officials.

RULES: 1.01(a) (h) & (l), 1.7(a)(1)-(2), 1.7(b), 1.11(d)(2) & (f)(3), 5.7(a) & (d)

FACTS:

1. The inquirer is an assistant county attorney who played a significant role in the county's successful acquisition and implementation of software to manage the county's contracts and insurance. The county paid a one-time fee and pays an annual maintenance fee for the software. The inquirer continues to provide technical support to county staff on the use of the software.

2. The outside vendor who supplied, customized and installed the software for the county, and who worked closely with the inquirer on the software contract with the county, has offered to employ inquirer as a consultant. In that role, the inquirer would provide "implementation and support services" to other counties that purchase its software. As described by the inquirer:

> Implementation involves discovery of what the entity's contract/insurance process is, consulting with the software company to redesign the software so it best works with the county process, uploading county vendors, users and standard form contracts into the software, training on the software and then go-live with the software. Support of the software primarily consists of answering questions as to how the software works, questions/issues with the software and coordinating with the software developer regarding the same.

QUESTIONS:

3. If the inquirer were to provide such consulting services, would it give rise to a conflict of interest and, if so, would the conflict be waivable?

4. In the event of a dispute between the county and vendor arising from or related to the sale and implementation of the software, would the inquirer's role as a paid consultant to the vendor disqualify the county attorney's office from representing the county and, if so, would the conflict be waivable?

5. Would the answers be different if the inquirer were paid directly by other counties that are clients of the vendor, rather than by the vendor itself?

OPINION:

Rule 1.11

6. Rule 1.11 governs special conflicts of interest for former and current government officers and employees. In relevant part it provides:

> (d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not: . . .
>
> > (2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

7. A "matter" includes "any . . . contract, . . . negotiation, . . . or any other representation involving a specific party or parties." Rule 1.0(*l*).

8. The contractual relationship between the county and the vendor in which inquirer has participated and will continue to participate, is thus a "matter" subject to Rule 1.11(d)(2). As such, "[e]xcept as law may otherwise expressly provide," the inquirer is ethically prohibited from negotiating for private employment with the vendor. *See* N.Y. State 1187 ¶7 (2020) (lawyer personally and substantially involved in one matter as a public officer may not negotiate to represent a party to that matter, even in another matter "wholly unrelated" to the first matter). This prohibition is not waivable, and it continues until conclusion of the matter in which the inquirer is participating. N.Y. State 1205 ¶¶ 8-9 (2020).

9. Whether there is a local law or policy that falls within the "law" exception of Rule 1.11(d)(2) and which would authorize or provide a procedure for securing county approval of the proposed consulting services arrangement presents an issue of law rather than of ethics, and is therefore a question beyond the committee's jurisdiction.

10. Even if the inquirer's proposed consulting conduct with the software vendor complies with Rule 1.11, the inquirer must also comply with any local laws and policies that govern county employees in general, including any provisions of the municipality's code of ethics relating to outside employment. *See* N.Y. State 1169 ¶¶ 6-7 (2019). For examples of such laws and policies (from counties other than the one where the inquirer works), *see*, *e.g.*, Rensselaer County Personnel Policy § 2.12 (before beginning outside employment, employees must obtain advance written approval from their department head; outside employment must not interfere with work performance or schedule; and employees may not use County property, time, or IT systems in connection with outside employment); Suffolk County Standard Operating Procedure A-15(5) (outside employment may not be undertaken on regularly scheduled work time or on sick time, and "may not involve or appear to involve a conflict of interest or a potential conflict of interest").

11. Such local laws and policies could significantly limit the ability of inquirer to provide the outside consulting services, even beyond a requirement that the work be approved by the county attorney's office. For example, an assistant county attorney prohibited from outside employment during regular business hours could find it hard to provide software implementation and support services for other counties that have similar regular business hours. However, we do not opine as to how such

local laws and policies might limit the proposed conduct, as our advisory role is limited to interpreting the rules of legal ethics.

Rule 1.7(a)(2)

12. Rule 1.7 sets forth the general rules for conflicts with current clients. It provides, in pertinent part:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

13. Here, there would be a conflict of interest if a reasonable lawyer would find a "significant risk" that the inquirer's professional judgment as an assistant county attorney would be "adversely affected" by the inquirer's own "financial, business, property or other personal interests" in establishing and maintaining a paid consultancy arrangement with the vendor. *See* Rule 1.7(a)(2).

14. The inquirer's personal interests could adversely affect the inquirer's professional judgment in representing the county in various ways. For example, if the county were to consider replacing the vendor's software or terminating the vendor's annual contract – actions that would hurt the vendor financially – the inquirer might be inclined (or might even be pressured by the vendor) to advocate for maintaining the relationship with the vendor, unchanged, for fear of being terminated as an outside consultant by the vendor and losing substantial outside income.

15. If a personal interest conflict exists under Rule 1.7(a), the conflict would preclude the inquirer's proposed consulting relationship with the vendor unless the conflict is waivable and is waived by the county in compliance with Rule 1.7(b), which provides, in pertinent part:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; . . . and (4) each affected client gives informed consent, confirmed in writing.

16. Thus, waiver can only occur upon the satisfaction of the elements of Rule 1.7(b), including the lawyer's reasonable belief that the lawyer "will be able to provide competent and diligent representation" and the informed consent of the county, confirmed in writing.

17. We do not have sufficient facts to determine whether, in fact, the inquirer's employment as an outside consultant for the vendor would present a personal interest conflict, or if so, whether that conflict would be waivable, but if such a conflict exists, waivability under Rule 1.7(b)(1) seems doubtful in light of the likely nature of the inquirer's divided loyalties. We question that a lawyer with such strong financial interests in maintaining good relations with the vendor could "reasonably believe[]" that the lawyer could provide competent and diligent representation to the client (the county).

18. If the inquirer determines that no local law or policy precludes the proposed consulting arrangement or that such local law or policy "expressly" permits it, and if no personal interest conflict

exists, that it is waivable, then the inquirer would still have to consider other ethical issues. In particular, Rule 1.11(f)(3) provides that a lawyer who holds public office shall not "accept anything of value from any person when the lawyer knows or it is *obvious* that the offer is for the purpose of influencing the lawyer's action as a public official." (Emphasis added.) In determining whether such a purpose is "obvious," relevant factors could include (i) the significance to the inquirer of the amount of money to be paid to the inquirer as a consultant; (ii) the value to the vendor of the inquirer's consulting; and (iii) whether there will be county matters within the inquirer's discretion that could significantly benefit vendor. If the proposed conduct would violate this Rule, then the conduct would be absolutely barred, because the Rule contains no provisions for waiving this conflict.

Rule 5.7

19. As a consultant, the inquirer might be providing only "nonlegal services" (defined by Rule 5.7(c) as "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer"). However, the inquirer's consulting work for the vendor could cross the line into legal services to the vendor (or the vendor's other county customers). In that case, the provisions of Rule 5.7(a) would govern the extent to which such services would be subject to the Rules. For an explanation of Rule 5.7, *see, e.g.,* N.Y. State 1200 (2020) (applying Rule 5.7 to lawyer who was also a wealth advisor) and N.Y. State 1178 (2019) (applying Rule 5.7 to a lawyer serving as a third-party neutral).

Rule 1.7(a)(1)

20. Moreover, if the inquirer's nonlegal consulting work veers into legal services, the inquirer would have at least one law client other than the county that employs inquirer, the proposed conduct would have to comply with the conflicts provision of Rule 1.7(a)(1) (a lawyer shall not represent a client if a reasonable lawyer would conclude that "the representation will involve the lawyer in representing differing interests," absent effective waiver under Rule 1.7(b)).

Payments Made by the Other County Clients

21. The inquirer asks whether revising the proposed arrangement so that the inquirer would be paid directly by the vendor's other county customers would affect the ethical analysis. In our view, revising the source of payment would not cure problems under Rule 1.11(d)(2), since the other counties would also be parties to a "matter" (the software contract) in which the inquirer would be participating. Likewise, if the inquirer's proposed conduct would violate Rule 1.7(a)(2), the conflict could not necessarily be avoided by obtaining payment directly from the vendor's other county customers because the inquirer would still have a financial interest in the consultancy arrangements. However, if the conduct would violate Rule 1.11(f)(3), then revising the payment arrangements might avoid the violation, because it seems less likely that the vendor's other county customers would pay consulting fees for the purpose of influencing the inquirer's official conduct on behalf of the county that employs inquirer.

Disputes between the County and the Vendor

22. Since we find it doubtful that the Rules of Professional Conduct would permit the inquirer to engage in the proposed conduct, we will only briefly address the conflicts that would arise if a dispute

arises between the county and the vendor. If the inquirer were to represent the county in that dispute against the vendor, it would magnify the risk that the consultancy arrangement could adversely affect the inquirer's professional judgment on behalf of the county as the likelihood of alienating the vendor by aggressive advocacy on behalf of the county (or seeking to please the vendor with conciliatory advocacy) would be higher. This would be so even if the inquirer were paid by the other counties rather than by the vendor. Thus the inquirer's personal conduct of such litigation would likely give rise to a conflict, and perhaps an unwaivable conflict, under Rule 1.7(a)(2) and 1.7(b).

23. A conflict under Rule 1.7 would be imputed to other assistant county attorneys under Rule 1.10(a), which provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein." A county law department is a "firm." *See* Rule 1.0(h) (defining "firm" to include "a government law office"); N.Y. State 968 ¶19 (2013) (citing Rule 1.0(h) for proposition that a "firm" is defined to include a federal government law office). However, if the inquirer has a conflict under Rule 1.7 that is imputed to those other assistant county attorneys via Rule 1.10(a), the conflict could be waivable even if the inquirer's own conflict were not. *See* Rule 1.10(d) ("A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7"; Rule 1.7(b) (setting forth conditions for conflict waiver); N.Y. State 968 ¶26 (2013) ("where the nonconsentable nature of Lawyer A's conflict is personal to Lawyer A, the circumstances may well allow the client to consent to representation by Lawyer B" in the same firm).

CONCLUSION:

24. A lawyer who personally and substantially participates in implementing and maintaining management software sold to the county where the lawyer is employed as an assistant county attorney may negotiate terms with and provide consulting services as an outside software implementation consultant to the vendor who provided and maintains that software, in order to assist the vendor's other county clients who are acquiring and implementing the same or similar management software, provided the inquirer complies with local law and policy regarding outside employment, and provided that the consulting arrangement satisfies the requirements of Rule 1.7(a)(1) regarding conflicts arising from differing interests, Rule 1.7(a)(2) regarding personal interest conflicts, and Rule 1.11(f)(3) regarding influence on public officials. Although a review of all the facts and circumstances will determine whether the requirements of these Rules can be satisfied, based on the limited information made available to the committee, it appears doubtful that any conflict would be waivable under Rule 1.7(b)(1). Our conclusion regarding the likelihood of overcoming a possible personal interest conflict would be magnified if a dispute arose between the county and the vendor. Our analysis would not be affected if the vendor's other county clients engaged and paid the inquirer in place of a direct contract with, and direct payments from, the vendor.

(29-20)

OPINION 1217 (01/15/2021)

TOPIC: Law firm name after a partner leaves

DIGEST: A law firm may continue to use the name of a former partner in the firm name where the partner leaves the firm for non-legal employment or becomes "Of Counsel" to the firm unless particular facts and circumstances would make it false, deceptive or misleading to use the former partner's name.

RULE: 7.5(b)

FACTS:

1. A named partner we shall call Baker, one of the founding partners of a law firm we shall call Able, Baker and Charlie, will be leaving the firm to work as a non-lawyer at a university. In the new position Baker will perform no legal services. However, Baker plans to consult on an ongoing basis with Able and Charlie regarding client matters Baker worked on while at the law firm. Baker will maintain a license to practice law in New York.

QUESTIONS:

2. May a law firm continue to include the name of a former partner in the firm name if the former partner will maintain his law license but has left the firm to take a nonlegal position?

3. Would the result be different if the former partner becomes "Of Counsel" to the firm after leaving to take the nonlegal position?

OPINION:

4. As amended effective June 24, 2020, Rule 7.5(b)(1) of the New York Rules of Professional Conduct (the "Rules") provides:

> (b) (1) A lawyer in private practice shall not practice under:
>
> (i) a false, deceptive or misleading a trade name;
>
> (ii) a false, deceptive, or misleading domain name; or
>
> (iii) a name that is misleading as to the identity of the lawyer or lawyers practicing under such name.

5. Comment [2] to Rule 7.5 elaborates on Rule 7.5(b) by providing:

> *A lawyer or law firm may not use any name that is false, deceptive, or misleading*. It is not false, deceptive, or misleading for a firm to be designated by the names of all or some of its current members or by the names of retired or deceased members where there has been a continuing line of succession in the firm's identity. A lawyer or law firm may practice under a trade name or domain name if it is not false, deceptive, or

> misleading. A lawyer or law firm also may practice under a distinctive website address, social media username, or comparable professional designation, provided that the name is not false, deceptive, or misleading. [Emphasis added.]

6. In N.Y. State 1207 (2020) we addressed the implications of the Joint Order of the Appellate Divisions altering Rule 7.5(b), emphasizing that the revised Rule is intended to continue to protect the public from being deceived or misled as to the identity of lawyers using or practicing under a firm name. We concluded that under the revised Rule:

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

N.Y. State 1207 ¶ 20.

7. Amended Rule 7.5(b) permits trade names — such as a firm located on "Maple Street" that wishes to practice under the trade name "Maple Street Law Group" — provided such trade names comport with what we described as "the longstanding principle that law firm names must not be false, misleading, or deceptive." N.Y. State 1207 ¶11. Comments [3], [4] and [5] to Rule 7.5 provide examples of deceptive or misleading firm names, none of which suggest any concerns here.

8. There has never been a *per se* prohibition on keeping a former partner's name in the firm name and nothing in amended Rule 7.5(b) prevents the firm of Able, Baker and Charlie from continuing to use Baker's name in the firm name simply because Baker will continue working outside the firm as a non-lawyer. This is the result whether or not Baker becomes "Of Counsel" to the firm. The touchstone remains whether keeping Baker in the firm name would somehow be false, deceptive or misleading. On the facts presented to us, we have no basis to conclude that it would.

CONCLUSION:

9. A law firm may continue to use the name of a former partner in the firm name after the partner leaves the firm for nonlegal employment and/or becomes "Of Counsel" to the firm unless particular facts and circumstances would make it false, deceptive or misleading to do so.

(32-20)

OPINION 1218 (02/22/2021)

TOPIC: Sharing Legal Fees with Former Associate

DIGEST: Subject to any applicable law, a law firm may pay legal fees on particular cases to an attorney formerly affiliated with the firm and now serving in a non-judicial public office for work previously performed at the firm to the same extent that the attorney would have been paid if still affiliated with the law firm.

RULES: 1.5(g-h), 1.11(f)

FACTS:

1. The inquirer is a New York lawyer who is a member of a firm that practices in New York. The firm concentrates primarily on contingent fee personal injury matters. The firm has agreements with its lawyers on the amounts that lawyers working on these matters will be paid upon completion of the matter.

2. Recently, a lawyer in the firm was elected to a non-judicial public office in New York and resigned from the firm to assume the public office. Before resigning, this lawyer had worked on particular cases, some of which were resolved before the lawyer resigned from the firm. The resolution of at least one other matter, for which (the inquirer tells us) the lawyer was "responsible," is now "imminent." The resigning lawyer, who remains a member of the bar, has asked to be paid a share of the legal fees from all three cases to the same extent and in the same percentage as if the lawyer were still affiliated with the firm.

3. The inquirer has asked us to assume that, under the firm's arrangements, the firm would be obligated to pay the lawyer as requested, but the inquirer is concerned about whether the payment would run afoul of the N.Y. Rules of Professional Conduct ("Rules"). Solely for our purposes, we construe this assumption to mean that, in the firm's view, the lawyer's resignation did not terminate the existing arrangement between the firm and the lawyer regarding compensation for services previously rendered.

QUESTION:

4. May a law firm pay to a lawyer previously affiliated with the firm a share of legal fees otherwise due and owing to the lawyer after the previously affiliated lawyer has assumed a public office?

OPINION:

5. Our answer is yes. In so concluding, we stress that we offer no view on whether such a payment to the public official is consistent with whatever laws, regulations, ethics codes, or other mandates may govern the public official's receipt of such legal fees. These are questions of law beyond our purview. We are aware that, in New York, some public officials are permitted to earn income from outside sources, provided that the payments are not made to influence "the lawyer's actions as a public official." Rule 1.11(f)(3). *See* N.Y. State 1169 ¶ 10 (2019) ("Rule 1.11(f) also governs the conduct of lawyers in public office"). But these questions of law are not within our jurisdiction to decide.

Accordingly, we limit ourselves to addressing the Rules and we assume without deciding that complying with the firm's arrangement to share the legal fees with a former colleague and current public servant has no legal impediment and no improper purpose.

6. Rule 1.5 governs the division of legal fees between unaffiliated lawyers. To us, the operative provision is Rule 1.5(h), which says that Rule 1.5(g) "does not prohibit payment to a lawyer formerly associated in a law firm pursuant to" a separation agreement. Rule 1.5(h) is intended to clarify that Rule 1.5(g) – which regulates the division of a legal fee with a lawyer not associated in the firm – is inapplicable when the fee is paid to a formerly affiliated lawyer pursuant to a separation agreement. *See* Rule 1.5, Cmt. [8] ("Paragraph (g) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm. Paragraph (h) recognizes that this Rule does not prohibit payment to a previously associated lawyer pursuant to a separation or retirement agreement.").

7. We believe that the arrangement the inquirer describes qualifies as a "separation agreement" within the meaning of Rule 1.5(h). Although the inquiry makes no reference to a formal *written* "separation agreement," nothing in Rule 1.5(h) requires a writing. It appears that the resigning lawyer left in the belief that the firm would honor its prior agreement, whether written or oral, to compensate the lawyer consistent with the firm's standard compensation practice, and it appears that the firm, for purposes of this inquiry, does not say otherwise.

8. On our view, absent circumstances in which a client must consent – and here the Rules do not so require – we see nothing in the Rules that prohibits a law firm from paying a departing lawyer a share of legal fees that the departing lawyer earned in rendering services to a firm's client, in accord with the parties agreement and the firm's standard compensation practice, to the same extent and in the same percentage as if the lawyer were still affiliated with the firm.

CONCLUSION:

9. Unless law prohibits the payment, a law firm may pay a former lawyer in the firm a share of legal fees in matters on which the former lawyer rendered services, in keeping with the parties agreement and the firm's standard compensation practice, in amounts equal to what the former lawyer would have been paid if the former lawyer were still affiliated with the firm, notwithstanding that the former lawyer has since assumed public office.

(02-21)

OPINION 1219 (03/17/2021)

TOPIC: Part-time county attorney, parole violation hearings, conflicts.

DIGEST: A part-time assistant County Attorney whose office does not handle criminal prosecutions can generally represent defendants in State parole violation hearings. A conflict may arise in particular cases, such as where the defendant is adverse to the County Attorney's office in other proceedings or where County employees are involved in the parole violation, and those conflicts may sometimes be unwaivable.

RULES: 1.0(h), 1.7, 1.10(a).

FACTS:

1. The inquirer is a part-time assistant County Attorney. The County Attorney is the legal advisor to the County Executive and other officers and employees acting in their official capacity and pursues and defends civil actions by and against the County. The County Attorney's Office does not prosecute criminal actions. The inquirer himself, among other things, advises the sheriff, County probation office and County Executive on administrative matters, represents the County in civil cases, and handles employment related hearings.

2. There are attorneys who report to the County Attorney who handle juvenile justice and Social Services matters, but the inquirer does not engage in that practice. Those attorneys work in a different building from the inquirer and do not save files to shared drives. The inquirer does not have access to those offices or files.

3. The County Attorney wishes to engage the inquirer as an independent contractor to provide assigned County-paid representation to defendants in State parole violation hearings and appeals from those hearings. The parole violation hearings and appeals are held before State administrative tribunals that are part of the State Department of Corrections and Community Supervision, not County judges or officials, and the County generally has no role in those hearings (beyond paying for assigned counsel). While it is conceivable that a violation of a County ordinance could lead to a parole violation, County laws are generally not at issue in those proceedings. The County probation office that the inquirer sometimes advises deals with probation and not parole for State law offenses that would be at issue in the parole violation hearings in which the inquirer would be acting.

QUESTION:

4. May a part-time assistant County Attorney whose office does not handle criminal prosecutions represent defendants in State parole violation hearings?

OPINION:

5. This Committee has long opined that a part-time town or county attorney who has prosecutorial responsibility may not undertake criminal defense work in any court of the State if the attorney has the statutory responsibility to prosecute crimes or offenses under State law. N.Y. State 657 (1993), *citing* N.Y. State 544 (1982) and earlier opinions. Even in cases in which the part-time municipal

attorney has responsibility to prosecute violations of local ordinances, but not State law, our opinions have found criminal defense work permissible only if:

> (2) the defense does not require him to appear before a judicial or other official of the locality he represents, (3) the local government unit by which he is employed, or a violation or construction of one of its ordinances, is not involved, (4) the offense charged is unlike any of those which he prosecutes, and (5) the investigating officers and law enforcement personnel involved are not those with whom he associates as prosecutor.

Id. *See also* N.Y. State 874 (2011) (*citing* N.Y. State 544 and 657 as still valid under current N.Y. Rules of Professional Conduct (the "Rules")). These prohibitions on prosecutors defending criminal cases are ordinarily imputed to the entire county or municipal law office under Rule 1.10(a). N.Y. State 788 (2005) (full-time prosecutor's conflicts imputed to part-time prosecutor); N.Y. State 874 (part-time Social Services attorney cannot represent in a criminal proceeding a respondent in an unrelated Social Services child abuse and neglect proceeding being prosecuted by others in the Social Services office).

6. Where, as here, the part-time municipal attorney has no prosecutorial responsibilities, we have found a similar set of criteria to be applicable:

> It has been held a number of times that a part-time town attorney may practice criminal law without conflict of interest or appearance of impropriety if (1) he has no statutory or other responsibility for prosecution of criminal proceedings on behalf of the town or duties closely related thereto, (2) he does not represent private clients before a town justice in the town he represents, and (3) a violation or construction of an ordinance of that town is not involved.

N.Y. State 315 (1973), *modified in* N.Y. State 544. *See also* ABA 34 (1931) ("If the City Attorney's duties and those of his assistants are entirely of a civil character . . ., and he is not required to defend the accused in any court in which a city official performs the duties of judge or magistrate, we find no objection to his conducting the defense of criminal cases.") (*quoted in* N.Y. State 544).

7. Parole violation hearings are not typical criminal proceedings like those that were at issue in these prior opinions, but we need not consider whether the guidance relating to criminal defense work developed in those opinions would otherwise prohibit parole violation defense work, because (1) the inquirer's practice as a part-time county attorney is entirely civil, as is all of the work of the County Attorney's office; (2) the inquirer would not appear before any County judges or officials in the contemplated parole work; and (3) a violation or construction of County law is not typically at issue in parole violation hearings or appeals. In these circumstances, there is no *per se* bar on the inquirer conducting State parole violation work.

8. There may be, however, particular cases in which the inquirer would have a conflict. For example, if the conduct of County employees is involved in the parole violation, or the parole violation defendant is a party to a civil case brought by the County Attorney's Office, the inquirer might have a conflict. *See* N.Y. State 1074 ¶ 8 (2015) (Department of Social Services attorney may accept assignments from county's Assigned Counsel Program except where "the Department is to play any meaningful role in the Family Court proceeding"); N.Y. State 800 ¶¶ 5-6 (2006) (part-time prosecutor

may accept assignment to represent indigent persons in Family Court in adjacent county except, *inter alia*, where prosecutor had worked with law enforcement personnel involved).

9. Where the civil case brought by the County Attorney's Office is pursued by a different unit of the office, as is the case with the child neglect and abuse proceedings, the question would arise whether the conflicts of the County Attorney's Office lawyers who prosecute those proceedings would be imputed to the inquirer. The question of imputation in turn depends on whether the unit handling those proceedings is to be considered to be part of the same "law firm" as the unit in which the inquirer works. See Rules 1.10(a) (imputing conflicts under Rules 1.7 to all lawyers "associated in a firm"), 1.0(h) (definition of "firm" and "law firm" includes "a government law office"). This is "'a fact-intensive inquiry'" that focuses, among other things, on "(1) whether the group presents itself to the public in a way that suggests it is a single firm; . . . (2) whether the lawyers in the group have mutual access to information concerning the clients they serve," and (3) the independence of the lawyers from common supervision. N.Y. State 1210 ¶¶ 6-8 (2020).

10. If a conflict were to arise in a particular case, it may sometimes be waived with the consent, confirmed in writing, of both the individual parole hearing defendant and the County. *See* N.Y. State 1074 ¶ 10 (noting that where a conflict is consentable, "the informed consent of the Department of Social Services and of the lawyer's client, confirmed in writing, is essential"). Our opinions have long recognized, however, that obtaining informed consent from a client who cannot afford counsel, and may not have effective choice of counsel, presents particular difficulties. *See* N.Y. State 1105 ¶ 18 (2016) ("when the lawyer seeks consent from a client who is receiving free legal services, the lawyer must consider whether such consent would be freely given"); N.Y. State 490 (1978) (when seeking consent from client of legal aid office, "the staff should be particularly sensitive to any element of submissiveness on the part of their indigent clients; and . . . the staff [must be] satisfied that their clients could refuse to consent without any sense of guilt or embarrassment").

11. In some circumstances, the conflict may by unwaivable. Our prior opinions in this area identify two paradigmatic situations that give rise to unwaivable conflicts. First, while it apparently is unlikely that County employees will appear as witnesses in parole violation hearings, where the relationship with a witness is such that defense counsel could not reasonably conclude he or she could examine the witness as effectively as an unconflicted counsel, no consent can be sought. Rule 1.7(b)(1); *see*, *e.g.*, N.Y. State 859 ¶ 15 (2011) (citing as example of non-consentable conflict where part-time DSS attorney "might have to impeach the same law enforcement personnel on whom Social Services relies in abuse and neglect proceedings"); N.Y. State 1074 ¶ 10 (same).

12. Second, where a parole violation client is a respondent in a quasi-prosecutorial proceeding—such as a child neglect or child abuse proceeding, if those conflicts are imputed to the inquirer as discussed above—we have held that a part-time prosecutor cannot serve as counsel to the respondent even in an unrelated matter because of the "risk of the public perceiving favoritism at the prosecutor's office." *See* N.Y. State 788 (2005) (such risk where part-time prosecutor serves as criminal defense counsel "precludes waiver of the conflict"); N.Y. State 859 ¶¶ 13, 16 ("[t]he role of the Social Services attorney when prosecuting child abuse and neglect proceedings is comparable to the role of the DA's office in criminal prosecutions," so part-time Social Services attorney may not represent respondent in an unrelated criminal matter even with consent).

CONCLUSION:

13. A part-time assistant County Attorney whose office does not handle criminal prosecutions can generally represent defendants in State parole violation hearings. A conflict may arise in particular cases, such as where the defendant is adverse to the County Attorney's Office in other proceedings or where County employees are involved in the parole violation, and those conflicts may sometimes be unwaivable.

(05-21)

OPINION 1220 (03/31/2021)

TOPIC: Falsely advertising a partnership among law firms

DIGEST: Separate and independent law firms may not form a PLLC and advertise themselves as members of "ABC Law Group PLLC" because (i) the name would be a false, deceptive or misleading trade name, (ii) the name would be misleading as to the identity of the lawyers practicing under that name, and (iii) the name would falsely imply that the separate firms were practicing law in association with each other.

RULES: 1.0(h), 7.1(c)(2), 7.5(b) & (c)

FACTS:

1. The inquirer proposes to bring together separate law firms into a professional limited liability corporation ("PLLC"), which we shall call "ABC Law Group PLLC." The member law firms in ABC Law Group PLLC will sign an operating agreement that will set forth various terms and conditions of membership. Under this proposal, ABC Law Group PLLC will maintain a website describing the services provided by the group as a whole and offering a profile of each separate member firm. Each firm's profile will be linked to the member firm's own website. Visitors to the ABC Law Group PLLC website who click on a link to a member firm's website will be advised that they are leaving the ABC Law Group PLLC website.

2. Each individual PLLC member's letterhead (and other written materials, including engagement letters) will include the words "Member Law Firm" under the name and trademark of ABC Law Group LLC. Client engagement letters will be between the client and the member law firm, not ABC Law Group PLLC. All billing will be done by the member law firms. Member firms may collaborate with each other, and each attorney in a member firm must be insured under a member law firm's malpractice policy.

QUESTION:

3. Is ABC Law Group PLLC a permissible name? Will ABC Law Group PLLC be considered a "law firm" for the purpose of conflict-of-interest rules?

OPINION:

4. Under Rule 7.5(b) of the New York Rules of Professional Conduct ("Rules") as amended effective June 24, 2020, lawyers are permitted to practice under a trade name so long as the name is not false, deceptive or misleading. *See* N.Y. State 1207 (2020). Here, we have no reason to conclude that, in isolation, the "ABC" portion of the proposed PLLC name violates Rule 7.5(b). Rather, it is the combination of "Law Group" *and* "PLLC" in the name that violates Rule 7.5(b). This is so because Limited Liability Company Law §1203(b) requires that all members of a PLLC must be individuals who are professionally licensed in New York and who practice their profession within the PLLC.

5. Thus, the combination of "PLLC" together with "ABC Law Group" necessarily implies that it is formed to practice law and that the members of the PLLC are associated for that purpose. As the

inquiry makes clear, however, that is not the case. Rather, the PLLC members are not practicing law within the PLLC, the PLLC does not enter into engagement agreements with clients, and the PLLC does not bill clients or undertake legal work on their behalf. Accordingly, by implying that the members of the PLLC are associated in the practice of law when they are not, the use of ABC Law Group PLLC as a firm name violates Rule 7.5(b)(1), which provides that a lawyer or law firm shall not practice under a "false, deceptive or misleading trade name" and Rule 7.5(b)(3), which provides that a lawyer or law firm shall not practice under, "a name that is misleading as to the identity of the lawyer or lawyers practicing under such name."

6. In addition, Rule 7.5(c) provides:

> Lawyers shall not hold themselves out as having a partnership with one or more lawyers unless they are in fact partners.

7. A law "partnership" is a form of law firm. The term "law firm" is defined in Rule 1.0(h) as follows:

> (h) "Firm" or "law firm" includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

8. Comment [5] to Rule 7.5 builds on Rule 1.0(h) by elaborating on the prohibition against misrepresenting the business relationship among lawyers. Comment [5] states:

> Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a "firm" as defined in Rule 1.0(h) because to do so would be false and misleading. In particular, *it is misleading for lawyers to hold themselves out as having a partnership with one or more lawyers unless they are in fact partners*. It is also misleading for lawyers to hold themselves out as being counsel, associates, or other affiliates of a law firm if that is not a fact, or to hold themselves out as partners, counsel or associates if they only share offices. Likewise, law firms may not claim to be affiliated with other law firms if that is not a fact. [Emphasis added.]

9. Thus, lawyers who share office space but have no professional association with each other may not use a designation such as the "777 Lawyers Group" because that would deceive the public about the business status of the lawyers. *See* N.Y. City 82-44 (1982). (Opinion 82-44 also noted that the designation "777 Lawyers Group" was at that time an "impermissible trade name" under the predecessor to Rule 7.5(b) – but that objection would not apply today.)

10. Nor would our conclusion change if the proposed PLLC and its website were viewed merely as a vehicle for joint advertising. Rule 7.1(c)(2) provides that an advertisement shall not:

> (2) include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case.

11. Because we have determined that establishing an association of separate law firms in a PLLC to be named "ABC Law Group PLLC" would violate Rules 7.1(c)(2), 7.5(b), and 7.5(c), we do not reach the second issue posed by inquirer, as to whether that association would be deemed to constitute a single law firm for conflict of interest purposes. However, law firms forming associations should be aware that some forms of association among separate firms may be deemed to be a single law firm, and therefore all member firms may be required to check for conflicts with all other firms. *See* N.Y. State 876 (2011) ("Conflicts of interest will be imputed to all lawyers in all firms with which a lawyer is associated as a partner, associate or of counsel"); N.Y. City 2000-4 (2000) ("affiliated" attorneys or law firms "must consider themselves as one unit for conflict clearing purposes").

CONCLUSION:

12. Separate and independent law firms may not form a PLLC and advertise themselves as members of "ABC Law Group PLLC" because (i) the name would be a false, deceptive or misleading trade name, (ii) the name would be misleading as to the identity of the lawyers practicing under that name, and (iii) the name would falsely imply that the separate firms were practicing law in association with each other.

(01-21)

OPINION 1221 (03/31/2021)

TOPIC: Lawyer reaching out to former clients

DIGEST: A lawyer who has changed law firms may contact clients she represented for estate planning purposes at her previous firm, may inform or remind these former clients that she has joined a new firm, and may offer to review their estate planning. Such communications are not advertisements and therefore are not subject to the advertising provisions in Rule 7.1 or the solicitation provisions in Rule 7.3, but they are subject to the more general provisions in Rule 8.4(c) forbidding misrepresentation.

RULES: 1.0(a), 7.1, 7.3, 8.4(c)

FACTS:

1. The inquirer formerly worked at a law firm as an attorney practicing in the elder law area. After notifying the firm that she would be leaving to join another firm, the inquirer sent notice of her impending departure to approximately 1,100 of her current and former clients, most of whom were elderly or disabled. That notice, approved by the firm she was leaving, included a "Client File Retention/Transfer Instruction" form, also approved by the firm, that provided the clients with three options: (1) remain at the inquirer's old firm; (2) follow the inquirer to the new firm and have the client file and unused client funds transferred to the new firm; or (3) request that the file and unused client funds be returned to the client.

2. Shortly after the inquirer's departure, a number of clients who she had been representing advised her that they wished to follow the inquirer to her new firm, and they provided the inquirer with the appropriately completed and signed Client File Retention/Transfer Instruction making that election. The inquirer also received word from dozens of other former clients who advised her that they, similarly, had elected to follow the inquirer to her new firm but had sent their completed and signed Client File Retention/Transfer Instruction to her former firm.

3. The inquirer states that despite her repeated requests over a period of several months, her former firm has not provided her with a list of the clients who have notified the former firm of their election to follow the inquirer to her new firm, and her former firm also has not forwarded their files or transferred their funds. The inquirer notes that many of her elderly or disabled former clients do not have the technical capability to locate her or her new law firm through an online search.

QUESTION:

4. May the inquirer reach out and contact directly the clients she represented at her former firm to remind them that she has joined a new firm and to offer them the opportunity to review and update their estate plans?

OPINION:

5. We note at the outset that this inquiry raises issues of contract and partnership law. Our opinion does not address those issues because they are questions of law and are, therefore, beyond the

jurisdiction of this Committee. *See, e.g.*, N.Y. State 1134 ¶ 6 (2017). Furthermore, the Committee only addresses the conduct of an inquirer. Therefore, this opinion does not address the conduct of the lawyers in inquirer's former firm.

6. As a purely ethical matter, the inquirer may reach out and directly contact the clients she represented at her former firm to remind them that she has joined a new firm and to offer them the opportunity to review and update their estate plans. This communication would not violate the rules governing advertising and solicitation because it would be neither an "advertisement" nor a "solicitation" as those terms are defined in the Rules of Professional Conduct (the "Rules").

7. The term "advertisement" is defined in Rule 1.0(a) as follows:

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

8. Although Rule 1.0(a) excludes "existing clients" but not former clients, the Rules have been interpreted to exclude former clients as well in some circumstances. Rule 7.1, Cmt. [7] says: "Communications to former clients that are germane to the earlier representation are not considered to be advertising." *See also* N.Y. State 1129 ¶ 8 (2017); N.Y. State 848 ¶ 11 (2011); *see also* N.Y. County 748 (2015); N.Y. City Bar 2015-7 (2015); *see generally* Rule 7.1, Cmt. [6] ("Not all communications made by lawyers about the lawyer or the law firm's services are advertising.").

9. Nor would the inquirer's communication to her former clients be a "solicitation." Because "[a]ll solicitations . . . are advertisements with certain additional characteristics . . . [b]y definition, a communication that is not an advertisement is not a solicitation." Rule 7.3, Cmt. [1]. Therefore, communications by a lawyer to former clients that are germane to the lawyer's earlier representation of such former clients are not subject to the advertising provisions in Rule 7.1 or the solicitation provisions in Rule 7.3. *See* N.Y. State 1129 ¶ 18. In any event, even if Rule 7.3 applied, it expressly does not prohibit solicitations to a former client. *See* Rule 7.3(a) ("A lawyer shall not engage in solicitation: (1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, *former client* or existing client") (emphasis added).

10. In N.Y. County 679 (1990), the Committee specifically addressed the word "germane," stating:

> [T]he word must be given its ordinary meaning of "closely related" or "relevant". *See* Random House Dictionary (Unabridged ed. 1967). We believe employment or advice may be closely related because it concerns the prior matter or because the subject matter or issues are the same.

11. The inquirer's communications to her former clients, of course, must be truthful. As Rule 8.4(c) states: "A lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *See also* Comment [6] to Rule 7.1 ("All communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that

lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law."); N.Y. State 1184 ¶ 11 (2020).

12. The inquirer's proposed communications, which are germane to her earlier representations of the former clients she seeks to contact, are therefore permissible, and are not governed by the rules governing advertising or solicitation, but are subject to the more general provisions of Rule 8.4(c).

CONCLUSION:

13. A lawyer who has changed law firms may contact clients she represented for estate planning purposes at her previous firm, may inform or remind these former clients that she has joined a new firm, and may offer to review their estate planning. Such communications are not advertisements and therefore are not subject either to the advertising provisions in Rule 7.1 or to the solicitation provisions in Rule 7.3, but the communications are subject to the more general prohibition against "misrepresentation" in Rule 8.4(c).

(03-21)

OPINION 1222 (04/12/2021)

TOPIC: Non-legal services; mediation; unauthorized practice of law

DIGEST: Lawyers may not jointly own a mediation business with nonlawyers if the mediation business employs lawyers to provide legal services to mediation clients. Lawyers may jointly own a mediation business with nonlawyers if the mediation business does not employ any lawyers and provides only nonlegal services. Lawyers who own a mediationbusiness may accept referrals from it, subject to certain restrictions, and may enter into anon-exclusive reciprocal referral agreement with the mediation business. The Rules of Professional Conduct will apply to the mediation business where a mediation client couldreasonably believe that the mediation services are the subject of a client-lawyer relationship and the lawyers who co-own the mediation business do not provide the mediation client with a written disclaimer stating that the mediation services are not legalservices and that the protection of a client-lawyer relationship does not exist with respectto the mediation services.

RULES: 1.7(a)(2) & (b), 1.12(b), 2.4, 5.5(a), 5.7(a)

FACTS:

1. The inquirers are a law firm ("Law Firm") and three partners in that law firm. Law Firm currently offers three types of services: (i) divorce litigation, (ii) collaborative law, and (iii) mediation services.

2. The inquirers believe that Law Firm's mediation services are not attractive because manyclients and potential clients are reluctant to use lawyers as mediators. However, the inquirers havean opportunity to purchase a controlling interest in a divorce mediation business ("Mediation Business"). They plan to own the Mediation Business together with an experienced, respected mediator who is not a lawyer.

3. The Mediation Business and Law Firm will occupy separate locations and will not use theLaw Firm name or the names of any of the inquiring law partners in the Mediation Business practice Following a successful mediation, the Mediation Business might employ lawyers to drafta separation agreement and related documents to effectuate the divorce on the terms agreed by theparties.

QUESTIONS:

4. The inquirers pose five questions:

- May a mediation business co-owned by lawyers and non-lawyers employ lawyers to provide post-mediation legal services to the mediating parties?
- May lawyers and non-lawyers co-own a divorce mediation business?
- May a law firm accept referrals from a mediation business partly owned by partners in the law firm?

- May a law firm and a mediation business enter into a non-exclusive mutual referral agreement?

- How does Rule 5.7 apply to services offered by nonlawyer mediators at a mediation business co-owned by lawyers?

OPINION:

May a mediation business co-owned by lawyers and non-lawyers employ lawyers to provide post-mediation legal services to the mediating parties?

5. Rule 5.4 ("Professional Independence of a Lawyer") of the New York Rules of Professional Conduct (the "Rules") governs this question. Rule 5.4(a), (b) and (d) provide, in pertinent part:

> (a) A lawyer or law firm shall not share legal fees with a nonlawyer . . . .
>
> (b) A lawyer shall not form a partnership with a nonlawyer if any of the activitiesof the partnership consist of the practice of law. . . .
>
> (d) A lawyer shall not practice with or in the form of an entity authorized to practicelaw for profit, if:
>
> > (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of thelawyer for a reasonable time during administration;
> >
> > (2) a nonlawyer is a member, corporate director or officer thereof oroccupies a position of similar responsibility in any form of association otherthan a corporation; or
> >
> > (3) a nonlawyer has the right to direct or control the professional judgmentof a lawyer.

6. Under Rule 5.4, the Mediation Business may *not* employ lawyers to provide legal servicesas proposed. First, Rule 5.4(a) prohibits a lawyer from sharing legal fees with a nonlawyer, so anyrevenues from the legal services could not be shared with the nonlawyers. Second, even if the legalfees could be segregated from the fees for mediation services, or even if the Mediation Business did not charge fees for the legal services, the Mediation Business would still be barred from offering legal services because Rule 5.4(b) prohibits lawyers from jointly owning a business withnonlawyers "if any of the activities of the partnership consist of the practice of law." Third, any lawyer employed by the Mediation Business would be in violation of Rule 5.4(d), which prohibitsa lawyer from practicing with "an entity authorized to practice law for profit."

7. We also direct the inquirers' attention to N.Y. Judiciary Law § 495, which states: "No corporation or voluntary association shall (a) practice or appear as an attorney-at-law for any person in any court in this state . . . (c) . . . or to render legal services or advice, nor (d) furnish attorneysor counsel,

nor (e) render legal services of any kind in actions or proceedings of any nature or in any other way or manner . . . .” We do not have authority to construe Section 495, but the inquirersshould be aware of it.

May lawyers and non-lawyers co-own a divorce mediation business?

8. The answer to this question depends on whether mediation services constitute the practice of law.

9. If providing mediation services constitutes “the practice of law,” then the same provisions that prohibited the arrangement addressed in the first question would come into play. Fees earned by the Mediation Business would constitute legal fees that would be shared with the nonlawyers, in violation of Rule 5.4(a); lawyers would be in a partnership (or other entity) with nonlawyers where some of the activities of the partnership would consist of the practice of law, in violation of Rule 5.4(b); and a nonlawyer would own an interest in “an entity authorized to practice law for profit,” in violation of Rule 5.4(d).

10. However, in N.Y. State 1026 (2014), we said: “Mediation is a ‘nonlegal service’ as defined by Rule 5.7(c) . . . .” See also Rule 2.4 (implying a distinction between legal services, on one hand, and mediation services, on the other hand); N.Y. State 1178 (2019) (“Only when a lawyer-mediator engages in services beyond providing neutral services, such as filing papers in court, does the lawyer-mediator cross the line into providing legal services”). Thus, the answer to the second question is that lawyers and non-lawyers may jointly own a business that provides only mediation services and does not provide any legal services. In this regard, we express no opinion whether mediators who prepare a separation agreement and related divorce documents are engaged in the unauthorized practice of law as that is a question of law that we lack jurisdiction to answer.

May a law firm accept referrals from a mediation business partly owned by the partners in the law firm?

11. The Rules of Professional Conduct contain no per se prohibition against accepting referrals. However, when the Mediation Business refers clients who have successfully mediated their divorce to Law Firm, inquirers may have a conflict of interest under Rule 1.7(a)(2) because of theirownership interest in the Mediation Business. Rule 1.7(a)(2) provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . .
>
> > (2) there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.

12. If a divorce mediation client expresses unhappiness or second thoughts about the process or results of a “successful” mediation (despite having agreed to the settlement terms), or if an individual inquirer sees reason to question the mediation settlement, the inquirer’s ownership interest might create a “significant risk” of adversely affecting the inquirer’s professional judgmenton behalf of the client. Whether such a risk exists will require a case-by-case analysis, and if doesexist it will be imputed to all lawyers “associated in” the firm. *See* Rule 1.10(a). If there is a conflict under Rule

1.7(a)(2), then the inquirers will need to determine whether the conflict is consentable (*i.e.,* waivable) under Rule 1.7(b)(1) and, if so, obtain the client's "informed consent,confirmed in writing" under Rule 1.7(b)(4).

May a law firm and a mediation business enter into a non-exclusive mutual referralagreement?

13. Subject to various conditions, Rule 5.8, allows contractual relationships between lawyers and certain nonlegal professionals (such as accountants, social workers, land surveyors, engineersand architects – see 22 NYCRR §§ 1205.3). Rule 5.8(c), however, includes this exception to its application:

> (c) This Rule shall not apply to relationships consisting solely of ***non-exclusive reciprocal referral agreements or understandings*** between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm. [Emphasisadded.]

14. Comment [4] to Rule 5.8 elaborates on this language by saying, "A lawyer may enter intosuch an arrangement only if it is nonexclusive on both sides, so that both the lawyer and the nonlawyer are free to refer clients to others if that is in the best interest of those clients." Thus, in N.Y. State 755 (2002) (which construed the Code predecessor to Rule 5.8), we said that non- exclusive reciprocal referral relationships between lawyers and nonlawyers were permissible evenif the nonlawyers are not "professionals," as long as the lawyers do not (among other things) pay for the recommendations. *See also* N.Y. State 1155 (2018) (concluding that Rule 5.8 "by its terms"does not apply to non-exclusive referral relationship between estate planning lawyer and investment firm); N.Y. State 976 ¶ 19 (2013) (lawyer or law firm may not maintain an "exclusive"contractual arrangement with a company owned by nonlawyers). Accordingly, inquirers may enterinto a non-exclusive mutual referral agreement with the Mediation Business as long as they do notpay for those referrals.

15. What is the meaning of "non-exclusive"? Basically, inquirers may not agree that they will refer clients only and exclusively to the Mediation Business, because in some instances a client of Law Firm may be better served by a referral to a different mediation business. Nor may inquirersagree to accept every referral from the Mediation Business. Sometimes, inquirers will have to turndown referrals because they have a conflict of interest or are too busy or lack legal competence tohandle to handle a particular referral. And of course inquirers may not refer their clients to the Mediation Business if mediation is not an appropriate approach in the particular client's matter.

16. Thus, a non-exclusive reciprocal referral relationship is essentially an agreement to consider referring a client to the nonlawyer professional (here, the Mediation Business), or to *consider* accepting a referral from the nonlawyer professional. It cannot be a promise to refer everyclient to the Mediation Business or to accept every referral from the Mediation Business.

How does Rule 5.7 apply to services offered by nonlawyer mediators at a mediationbusiness co-owned by lawyers?

17. When nonlegal services are being provided not by a law firm but rather by a nonlegal entity owned by lawyers, the gateway governing provision is Rule 5.7(a)(3), which provides:

> (3) A lawyer or law firm that is an owner . . . of . . . an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services ***if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship***. [Emphasis added.]

18. Applying Rule 5.7(a)(3) here, we know that each of the inquiring lawyers is an "owner" ofthe Mediation Business and that the Mediation Business is "providing nonlegal services." Thus, the question is whether persons receiving the mediation services "could reasonably believe" that such services "are the subject of a client-lawyer relationship."

19. In the present inquiry there are several factors which appear to support the conclusion thata client of the Mediation Business could not reasonably believe that she or he was receiving legalservices. The Mediation Business and Law Firm offices are separate, their names are different, andthere are no lawyers actually providing mediation services. On the other hand, divorce mediationarises in the context of a legal dispute and – unlike many types of disputes – divorce can ultimatelybe resolved only through the court system. Divorce mediators also often need to explain basic legalprinciples of divorce, such as equitable distribution, joint custody, and maintenance. In addition,as many divorce mediators are, in fact, lawyers, divorcing spouses may not appreciate the difference between a mediator who is a lawyer and one who is not a lawyer. There are doubtless additional relevant factors that may arise in a particular case, including the scope and precise language of any oral or written disclaimer provided by the mediators that they are not providing any legal services.

20. If after weighing all relevant factors, a person receiving divorce mediation services could not reasonably believe that the nonlegal services are the subject of a client-lawyer relationship, theinquiry would be at end. If, however, a person receiving divorce mediation services *could* reasonably believe that the nonlegal services are the subject of a client-lawyer relationship, compliance with Rule 5.7(a)(4) by the inquirers would be required. Rule 5.7(a)(4) provides:

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

21. In other words, once it is determined that a client of the Mediation Business *could* reasonably believe that the nonlegal mediation services are legal services, it will be *"presumed"* that the client *actually* believes that the services are legal services unless the lawyer's interest in the Mediation Business is "de minimis" (apparently not the case here), or the inquirers who co- own the Mediation Business provide a written disclaimer stating that "the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services." The requirement that, in order to rebut the presumption arising under subparagraph (a)(3), the lawyer-inquirers must provide this disclaimer pursuant to subparagraph (a)(4), cannot be avoided by any earlier disclaimer given by a non-lawyer mediator where the balance of factors, notwithstanding

the non-lawyer mediator's disclaimer, tips in favor ofconcluding that the client *could* reasonably believe that the mediation services are the subject of aclient-lawyer relationship under subparagraph (a)(3).

22. Lawyer-owners of a nonlegal entity providing nonlegal services, like the MediationBusiness, are not required to provide this written disclaimer, but if they do not, then the Rules of Professional Conduct apply to the nonlegal mediation services, essentially as if the nonlegal mediation services were being provided by lawyers. Here, for example, if the inquirers do not provide the disclaimer specified in subparagraph (a)(4) to rebut the presumption that arises undersubparagraph (a)(3), the Mediation Business will be required to abide by Rules 1.7, 1.8, 1.9, 1.18,and other Rules governing conflicts of interest (including Rule 1.10(e), which will require the Mediation Business to check each new mediation engagement for conflicts with Law Firm's clients), and must abide by Rule 1.6 regarding the duty of confidentiality.

CONCLUSION:

23. Lawyers may not jointly own a mediation business with nonlawyers if the mediation business employs lawyers to provide legal services to mediation clients. Lawyers may jointly owna mediation business with nonlawyers if the mediation business does not employ any lawyers andprovides only nonlegal services. Lawyers who own a mediation business may accept referrals fromit, subject to certain restrictions, and may enter into a non-exclusive reciprocal referral agreementwith the mediation business. The Rules of Professional Conduct will apply to the mediation business where a mediation client could reasonably believe that the mediation services are the subject of a client-lawyer relationship and the lawyers who co-own the mediation business do notprovide the mediation client with a written disclaimer stating that the mediation services are not legal services and that the protection of a client-lawyer relationship does not exist with respect tothe mediation services.

(35-20)

OPINION 1223 (05/12/2021)

TOPIC: Dual practice; Rental of office space

DIGEST: Renting law office space for lawful purposes is a permitted nonlegal business for a lawyer. Where a lawyer who owns a nonlegal services business is providing nonlegal services to persons who are not clients, Rule 5.7(a)(3) provides that the nonlegal services entity will be subject to the Rules by virtue of Rule 5.7 only if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

RULES: 5.7(a)(3) and (4), 7.1(h)

FACTS:

1. The inquirer plans to establish a Professional Limited Liability Company ("PLLC") or a Professional Corporation ("PC") to operate a "Virtual Office Suite" in the first floor of his home. The business would have a reception desk; ten or more independent workstations with stand-alone, non-networked computers for each user; high speed internet access; separate, secure paper filing systems for each user; and one or more shared conference rooms. The inquirer also states that the business would comply with all aspects of Section 470 of the New York Judiciary Law, which provides an exception to the requirement that lawyers who practice New York law must be resident in New York, if the lawyers reside in contiguous states and keep "an office for the transaction of law business" in this State.

QUESTION:

2. May a New York lawyer rent space to other lawyers as a nonlegal business, and provide them with facilities and equipment to operate their separate law practices?

OPINION:

3. We assume for this opinion that the persons who might rent space from the inquirer are lawyers who are not also legal clients of the inquirer.

4. The jurisdiction of this Committee is limited to questions of legal ethics. We do not give opinions on matters of law. Thus, we cannot opine on whether it would be legally permissible to run a nonlegal business in a PLLC. We note, however, that Limited Liability Company Law § 1203(a) authorizes one or more professionals to form a Professional Limited Liability Company "for the purpose of rendering the professional service or services as such professionals are authorized to practice," which would not appear to be the case here. Similarly, we cannot interpret Judiciary Law §470.

5. Although the inquirer refers to his business as rental of "virtual law offices," we are not adopting this terminology. We do not believe there is a generally accepted definition of a "virtual law office." In N.Y. State 1025 (2015), this Committee defined a "virtual law office" as meaning solely an online presence. *Compare* N.Y. City 2019-2 (which defines a virtual law office, for purposes of that opinion, as a facility that offers business services and meeting and work spaces to lawyers on an "as needed" basis and where the lawyers do not have a dedicated office space, but rather share all space

and amenities with other subscribers). The question of what constitutes a physical office for purposes of Judiciary Law §470, as opposed to a mail drop or internet office, is a question of law. In this opinion, we will therefore describe the inquirer's proposal as renting office space and amenities.

Lawyers Operating a Nonlegal Business

6. The rental of office space and amenities – even space to be used by lawyers for the practice of law – is a nonlegal business. The responsibilities of lawyers who provide nonlegal services is governed by Rule 5.7 of the New York Rules of Professional Conduct (the "Rules"). We have issued several recent opinions on lawyers who also engage in a nonlegal business. *See, e.g.,* N.Y. State 1157 (2018) (engineering), N.Y. State 1155 (2018) (financial planning), N.Y. State 1101 (2016) (real estate brokerage), N.Y. State 915 (2012) (nonlegal consulting). The issue under Rule 5.7 is whether the nonlegal services are not distinct from legal services and thus should be subject to the Rules. Where a lawyer who owns a nonlegal services business is providing nonlegal services to persons who are not clients, Rule 5.7(a)(3) provides that the nonlegal services entity will be subject to the Rules as a result of Rule 5.7 only "if the person receiving the services could *reasonably* believe that the nonlegal services are the subject of a client-lawyer relationship." (Emphasis supplied.) Rule 5.7(a)(4) creates a presumption that the recipient has such a belief, unless the lawyer has advised the person receiving the nonlegal services in writing that the services are not legal services and that the protection of the client-lawyer relationship does not exist with respect to the nonlegal services. However, in N.Y. State 1222 (2021), we said that presumption does not go into effect until, after weighing all relevant factors under Rule 5.7(a)(3), a person receiving the nonlegal services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship. In this case we think it unlikely that lawyers renting office space in accordance with the arrangement described by the inquirer could reasonably believe that the rental of office space creates a client-lawyer relationship with the inquirer. Consequently, we do not believe that the Rule 5.7(a)(4) disclaimer is necessary on the facts here.

Office Sharing Arrangements

7. We will not opine here on the conduct of lawyers who might rent space from the inquirer. We have, however, previously opined on the ethical responsibilities of lawyers who share office space, including their responsibility for maintaining confidentiality. *See* N.Y. State 1102 (2016). In addition, Comment [2] to Rule 1.0 (the definition of firm) notes that "a group of lawyers could be regarded as a firm for purposes of determining whether a conflict of interest exists . . . ."

New York-Resident Lawyers and Judiciary Law § 470

8. A New York resident lawyer may have a nonpermanent office without implicating Judiciary Law § 470. For example, a New York lawyer may work out of his or her residence in New York, but not want to meet clients there or use a home address for business. A New York resident lawyer who spends most of his or her time in court may not need an office other than to meet clients from time to time. A New York resident lawyer may have an office in one New York town but want to explore setting up a location in another New York town. In each of these circumstances, an office that the lawyer does not occupy full-time enables the lawyer, at relatively small expense, to meet both client needs and the lawyer's own law practice management goals.

Section 470 and New York-Admitted Lawyers Not Resident Here

9. The principal issue facing New York-admitted lawyers who are not resident in New York but want to practice here is Section 470 of the Judiciary Law. Section 470, which was adopted at a time when the law provided that only a New York resident could practice law in New York, provides that a person admitted to practice in New York whose *office for the transaction of law business* is in New York may practice as an attorney even though he or she lives in an adjoining state. In 1979, the New York Court of Appeals struck down the residency requirement of Section 470 on the grounds that it violated the Constitutional Privileges and Immunities Clause. *In re Gordon*, 48 N.Y.2d 266 (1979). The New York legislature, however, did not amend the statute to fix the problem. New York courts therefore have interpreted Section 470 to apply to all non-resident members of the New York bar. See *Lichtenstein v. Emerson,* 251 A.D.2d 64 (1st Dep't 1998).

10. In 2015, as part of a federal case challenging the Constitutionality of Judiciary Law § 470, the New York Court of Appeals was asked by the Second Circuit Court of Appeals what constituted an office for the transaction of law business in New York for purposes of the statute. The Court of Appeals opined that the statute required nonresident attorneys to maintain a physical office in New York. *See Schoenefeld v. State*, 25 N.Y.3d 22 (2015). Although the Court was urged to read Section 470 as requiring only some type of physical presence for the receipt of service, such as an address or the appointment of an agent within the State, the Court of Appeals explained that the phrase "for the transaction of law business" makes this interpretation of the law much less plausible. Nevertheless, the Second Circuit held that Section 470 did not violate the Privileges and Immunities Clause. *See Schoenefeld v. Schneiderman*, 821 F.3d 273 (2d Cir. 2016).

11. The Second Circuit's conclusion has directed new attention to the purpose of Judiciary Law § 470. *See Report of the NYSBA Working Group on Judiciary Law § 470* (October 8, 2018). (The report notes that the Legislature adopted Section 470 because it believed a New York office was necessary so that the non-resident lawyer could be served with process. But the Working Group concluded that non-resident attorneys are subject to disciplinary proceedings within New York State, because service could be made on the Clerk of the Appellate Division based on the designation required at the time of admission and in biennial registrations. The Association's CPLR Committee also determined that a non-resident attorney who practices in New York and who is a defendant in a New York legal matter may be served outside New York.) In January 2019, the New York State Bar Association adopted a resolution calling for the repeal of Section 470. The President of the Bar Association stated: "In a digital era where attorneys across the street and around the world are just a click away on their computer or smart phone, an antiquated rule from over a century ago requiring a physical office in the state no longer serves any purpose." Although bills have been introduced in both houses of the New York legislature that would repeal Judiciary Law § 470, *see* N.Y. Assembly Bill A5895 (Weprin 2021), N.Y. Senate Bill S700 (Hoylman 2021), no action has been taken on them. Thus, Section 470, as interpreted by the courts, is still the law of New York.[1]

1 Committee Note dated May 19, 2021: On May 12, 2021, the same day that this opinion was released, the New York State Senate adopted S700. The bill has been referred to the Assembly Judiciary and Rules Committees.

Effect of New York Ethical Rules

12. In N.Y. State 1025 (2014), *i.e*. before the Second Circuit's *Schoenefeld* decision, we considered the requirement of Rule 7.1(h) that an attorney's advertisement must include the attorney's "principal law office address." In an earlier opinion, we had interpreted this requirement as precluding a "mail drop" as the attorney's sole address, but instead said it must be a physical office at which the attorney is located. *See* N.Y. State 964 (2013). However, in N.Y. State 1025, we concluded that it was incorrect to interpret the attorney advertising rule as an independent mandate for attorneys who advertise to maintain a physical office address. Accordingly, we held that a lawyer could use a virtual law office address for Rule 7.1(h) purposes, as long as the lawyer complies with all applicable laws and Rules.

13. In 2019, *i.e*., after the Second Circuit's opinion in *Schoenefeld*, the New York City Bar's Ethics Committee issued Formal Opinion 2019-2. In it, the Committee concluded that any law office listed on attorney advertising under Rule 7.1(h) must qualify as a law office under Judiciary Law § 470 because the purpose of the two requirements is the same – to disclose an office where the lawyer is present and available for contact, and where personal service or delivery of legal papers could be effected. The opinion concluded that a lawyer may use the street address of a virtual law office as the lawyer's principal office address for the purposes of Rule 7.1(h) as long as the virtual law office qualifies as an office for the transaction of law business under Section 470. It also concluded that a lawyer could use a virtual law office address on letterhead, business cards and the lawyer's website, as long as such use is not misleading under the circumstances. The Committee noted that it could not express an opinion on compliance with Section 470, which is a question of law. But it also noted that the virtual law office in that opinion, like the proposed virtual law office here, included a physical facility at which a lawyer could meet with clients and receive service of process.

14. In light of the continued validity of Judiciary Law § 470, we confirm our opinion in N.Y. State 1025: A non-resident attorney who is admitted to practice in New York and who practices New York law must have an office in New York that meets the minimum requirements of Section 470, but we express no opinion as to what Section 470 requires.

CONCLUSION:

15. Renting law office space for lawful purposes is a permitted nonlegal business for a New York lawyer. Where a lawyer who owns a nonlegal services business is providing nonlegal services to persons who are not clients, Rule 5.7(a)(3) provides that the nonlegal services entity will be subject to the Rules by virtue of Rule 5.7 only if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship. In N.Y. State 1025, we allowed a lawyer legally practicing in New York to use a virtual law office address for Rule 7.1(h) purposes. But the principal issue facing New York-admitted lawyers who are not resident in New York is compliance with Judiciary Law § 470. That is a legal issue on which we do not opine.

(10-21)

OPINION 1224 (06/03/2021)

TOPIC: Conflicts of interest; diminished capacity.

DIGEST: When a lawyer is jointly representing two clients as joint purchasers in a transaction and one of them no longer wishes to proceed, the lawyer cannot continue to represent both clients without violating Rule 1.7, which prohibits lawyers from jointly representing clients with differing interests. That one of the clients has diminished capacity does not alter this conclusion.

RULES: Rules 1.7; 1.14

FACTS:

1. The inquirer is an attorney who has known his clients, a husband ("H") and wife ("W"), for over a decade. H and W entered a contract to jointly purchase real property ("Transaction 1"). Shortly afterwards, H was involuntarily committed for a period of time to a psychiatric facility. No petition to appoint a guardian for H was subsequently filed. H wants to move forward with Transaction 1, but W now does not.

2. Separately, just prior to his involuntary commitment, H set up an LLC, with both H and W as members, with the intent that the LLC would buy a second property ("Transaction 2"). No contract has been signed, but H wants to move forward with Transaction 2 while W now does not.

3. W holds a power of attorney ("POA") for H which confers upon W the power to act on behalf of H with respect to real estate transactions, and W has instructed inquirer both to terminate the contract in Transaction 1 and to discontinue negotiations toward a contract in Transaction 2. The inquirer asks if he may ethically follow W's instructions.

QUESTION:

4. Where a husband and wife who are joint clients provide conflicting instructions whether or not to proceed with real estate transactions in which they each have a financial interest, where the wife holds a power of attorney for the husband, and where there is reason to believe that the husband may have diminished capacity, may an attorney follow the instructions of the wife and act contrary to the stated wishes of the husband?

OPINION:

5. Our analysis focuses on Rule 1.7 of the New York Rules of Professional Conduct (the "Rules"). Under Rule 1.7(a)(1), a lawyer may not represent a client (or clients) if "a reasonable lawyer would conclude" that "the representation will involve the lawyer in representing differing interests," unless the conflict is consentable and the lawyer obtains each affected client's informed consent pursuant to Rule 1.7(b). "Differing interests" are defined in Rule 1.0(f) "to include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest."

6. Here, it is abundantly clear that clients H and W now have differing interests. Rule 1.7 therefore prohibits the inquirer from representing them both unless they each give their informed consent, confirmed in writing. See Comment [4] to Rule 1.7 ("If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b)").

7. Implicit in the current inquiry, however, is a question about whether either diminished capacity or a power of attorney require a different outcome. With regard to a client's diminished capacity, Rule 1.14(a) provides that "when a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client." See generally N.Y. State 1144 ¶ 11 (2018) (discussing various aspects of Rule 1.14). By mandating that a lawyer maintain a conventional relationship with a client who has diminished capacity as far as reasonably possible, Rule 1.14(a) requires the inquirer, as much as reasonably possible, to carry out the wishes of H, despite his apparent diminished capacity. See Comment [3] to Rule 1.14 ("the lawyer must keep the client's interests foremost" and must generally "look to the client . . . to make decisions on the client's behalf."). Accordingly, regardless of H's alleged diminished capacity, Rule 1.7(a)(1) prevents the Inquirer from going forward with the joint representation of H and W because they have "differing interests" absent the informed consent of both H and W. Here, however, securing the informed written consent of H and W to the joint representation is not possible because the clients are each directing the attorney to pursue mutually exclusive objectives (go forward and not go forward).

8. The inquirer's remaining question – whether he can honor the instructions of W and terminate the Transactions in reliance on W's use of the POA to act on H's behalf – presents questions of law that are outside the scope of this committee's jurisdiction. We do not opine on issues of law. However, the presence of the POA highlights the conflicted position that inquirer occupies. An unconflicted lawyer might well advise H to seek immediate revocation of the POA so that W does not attempt to use the POA in a manner contrary to H's wishes – but if the inquirer were to do so, he would be acting contrary to W's interests. See Comment [8] to Rule 1.7 ("The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.").

CONCLUSION:

9. When a lawyer is jointly representing two clients as purchasers in a transaction and one of them no longer wishes to proceed, the lawyer cannot continue to represent both clients jointly without violating Rule 1.7. That one of the clients has diminished capacity does not alter this conclusion.

(11-21)

OPINION 1225 (07/08/2021)

TOPIC: Counseling clients engaged in recreational marijuana business; accepting partial ownership of recreational marijuana business in lieu of fee; personal use of recreational marijuana.

DIGEST: In light of current federal enforcement policy, the New York Rules of Professional Conduct permit a lawyer to assist a client in conduct designed to comply with New York's Recreational Marijuana Law and its implementing regulations, notwithstanding that federal narcotics law prohibits the activities authorized by that law. A lawyer may also use marijuana for recreational purposes and may, when the law becomes fully effective, cultivate an authorized amount of marijuana plants at home for personal use. Finally, subject to compliance with Rules 1.7 and 1.8(a), an attorney may accept an equity ownership interest in a cannabis business in exchange for legal services.

RULES: 1.1(a); 1.2(d); 1.3; 1.16(b)(2); 1.7; 1.8(a); 8.4(b); 8.4(h).

FACTS:

1. New York legalized cannabis products for medical use in July 2014. On March 31, 2021, Governor Andrew M. Cuomo signed into law Chapter 92 of the Laws of 2021, entitled the "Marihuana Regulation and Taxation Act," creating a regulated recreational cannabis industry in New York (the "Recreational Marijuana Law"). Although marijuana possession and use were legalized for non-medical purposes effective immediately with the adoption of the Recreational Marijuana Law, the authorized commercial sale of cannabis products awaits various administrative rules and regulations and is not anticipated to begin before late 2022.

2. The regulatory framework established by the Recreational Marijuana Law bears many similarities to New York's regulation of alcohol by the New York State Liquor Authority under the Alcoholic Beverage Control Law. A Cannabis Control Board and the Office of Cannabis Management will control the issuance and revocation of licenses for retail dispensaries and on-site consumption establishments and will administer both the adult-use and medical-use programs, promulgating rules, issuing licenses, and investigating and enforcing violations. The cultivation, processing, distribution, and sale of cannabis products will be tightly controlled and, when the law becomes fully effective, individuals will be permitted to grow a limited number of plants in their homes for personal use.

3. Through local legislation that is subject to permissive referendum, the Recreational Marijuana Law gives cities, villages and towns the authority to "opt out" of allowing retail dispensaries and on-site consumption establishments to operate within their jurisdictions. These localities may also regulate the time, place and manner of the operation of these adult-use facilities, provided the Cannabis Control Board does not determine that such restrictions make such operations unreasonably impracticable. Cannabis businesses also remain subject to local zoning regulations.

QUESTIONS:

4. The inquirer is an attorney who wants to provide legal services to a client engaged in the recreational cannabis business in New York. She poses three separate questions:

a. May an attorney ethically provide legal services to assist a client to comply with New York's Recreational Marijuana Law?

b. May an attorney ethically use marijuana recreationally and grow it at home for personal use?

c. May an attorney accept an equity interest in a client's cannabis business in exchange for providing legal services?

OPINION:

Our Prior Opinions Regarding Rule 1.2(d) and New York's Medical Marijuana Law.

5. Rule 1.2(d) of the Rules of the New York Rules of Professional Conduct (the "Rules") provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

6. Notwithstanding Rule 1.2(d), following the enactment of New York's Compassionate Care Act (the "Medical Marijuana Law"), this committee held in N.Y. State 1024 (2014) that an attorney may ethically provide legal services and advice to doctors, patients, public officials, hospital administrators and others engaged in the cultivation, distribution, prescribing, dispensing, regulation, possession or use of marijuana for medical purposes to help them act in compliance with state regulation regarding medical marijuana, despite the federal narcotics laws that prohibit the possession, distribution, sale or use of marijuana and which provide no exception for medical uses.

7. We noted that the federal government had publicly announced that it was limiting its enforcement of federal narcotics laws and would not ordinarily prosecute individual actors and institutions who acted consistently with state laws that legalized and extensively regulated medical marijuana. Rather, the federal government said it would pursue enforcement only to further certain federal priorities, such as preventing the flow of revenue from marijuana sales to criminal enterprises and preventing marijuana activity from being used as a cover for trafficking other drugs. We reasoned that lawyers could provide a range of valuable assistance to clients seeking to comply with the Medical Marijuana Law consistent with this federal enforcement policy and, because a strong state regulatory system justified the federal policy of forbearance from the enforcement of federal narcotics laws, federal enforcement policy actually depended on the availability of lawyers to establish and promote compliance with a strong and effective state regulatory system.

8. Without minimizing the core tenet of Rule 1.2(d) or a lawyer's fundamental duty not to counsel a client to violate the law or to assist a client in so doing, we concluded that "nothing in the history and tradition of the profession, in court opinions, or elsewhere" suggested that Rule 1.2(d) was intended in this "highly unusual if not unique" circumstance to "preclude lawyers from counseling or assisting conduct that is legal under state law" or to provide assistance "that is necessary to implement state law and to effectuate current federal policy" We identified that "highly unusual and unique circumstance" as "where the state executive branch determines to implement the state legislation by

authorizing and regulating medical marijuana, consistent with current, published federal executive-branch enforcement policy, and the federal government does not take effective measures to prevent implementation of the law." (N.Y. State 1024 ¶¶ 6 & 23-25; footnote omitted.)

9. We cautioned, however, that "If federal enforcement were to change materially, this Opinion might need to be reconsidered" (N.Y. State 1024 ¶ 25).

10. The federal enforcement policy we described in N.Y. State 1024 had been articulated in a Department of Justice memorandum issued August 29, 2013, known as the "Cole Memo" (named for then Deputy Attorney General James Cole, who was its author). On January 4, 2018, however, then Attorney General Jeff Sessions rescinded the Cole Memo. Accordingly, this committee, in N. Y. State 1177 (2019), reconsidered the conclusion we had reached in N.Y. State 1024.

11. N.Y. State 1177 adhered to the conclusion of N.Y. State 1024. We noted in Opinion 1177 that General Sessions' successor, William Barr, had testified during his confirmation hearing that he would not target state legal marijuana businesses and would leave it to Congress to act. We further noted that during the interval between our release of N.Y. State 1024 in November 2014, and the rescission of the Cole Memo in January 2018, Congress had in fact acted. Specifically, in December 2014, Congress adopted legislation known as the "Rohrabacher-Blumenauer Amendment" that prohibited the Department of Justice from using any of the funds appropriated by Congress to prevent States from implementing their own State laws that authorized the use, distribution, possession or cultivation of medical marijuana. We reasoned that, in these circumstances, the rescission of the Cole Memo "does not meaningfully change federal law enforcement policy" (N.Y. State 1177 ¶ 9).

12. Accordingly, based on the state of federal law enforcement policy from 2014 through today, and subject to future changes in that policy, we decided in N.Y. State 1024 and affirmed in N.Y. State 1177 that a lawyer may assist a client in conduct designed to comply with the Medical Marijuana Law without violating Rule 1.2(d).

13. We now apply these same principles to answer the inquirer's three questions.

Assisting a Client to Comply with New York's Recreational Marijuana Law.

14. The inquirer's first question is whether an attorney may ethically provide legal services to assist a client to comply with New York's Recreational Marijuana Law. This question does not require us to analyze any change in federal enforcement policy since we issued N.Y. State 1177 (to our knowledge there have been no changes). Rather, the question is whether New York's broader legalization of cannabis for recreational use imports into the analysis any additional factors or competing considerations that would alter the conclusion reached by the committee in N.Y. State 1024 and 1177 regarding medical marijuana. For the reasons that follow, we believe it does not.

15. First, although the Rohrabacher-Blumenauer Amendment is specifically focused on marijuana for medical and not recreational purposes, over the course of three administrations – Presidents Obama, Trump and Biden – the Department of Justice has not, to our knowledge, taken any public position on federal enforcement that distinguishes between medical and recreational marijuana laws in the states. Indeed, unlike the Rohrabacher-Blumenauer Amendment, the Cole Memo (now

rescinded) was not limited to medical marijuana. Inasmuch as 17 states, plus Washington, D.C., and Guam, have now legalized the recreational use of marijuana in some form, beginning with Colorado in 2012, it seems fair to say that for nearly a decade federal forbearance in the enforcement of federal narcotics laws has been equally applied to state laws legalizing recreational marijuana and to state laws legalizing medical marijuana.

16. Second, the comprehensive licensing and regulatory system that governs recreational use of marijuana in New York is clearly the type of robust and comprehensive state enforcement system that is squarely intended by federal enforcement policy to be an object of federal forbearance.

17. Third, the need for lawyer assistance to clients to assure compliance with state regulatory requirements in the medical marijuana industry, which justifies continued federal forbearance, applies with equal if not more force to recreational marijuana. For example, the licensing process under New York's Recreational Marijuana Law will function more expeditiously and with more consistency if lawyers can assist with preparing and submitting license applications and can counsel the regulators reviewing those applications. More generally, in a complex regulatory system where cultivation, distribution, possession, sale and use of a product are tightly regulated, legal advice and guidance has immense value. Without the aid of lawyers, the recreational marijuana regulatory system would, in our view, likely break down or grind to a halt. The participation of attorneys thus secures the benefits of the Recreational Marijuana Law for the public at large, as well promotes the interests of the private and public sector clients more directly involved in the law's implementation.

18. Fourth, as we observed in N.Y. State 1024, the tension created between federal and state narcotics laws remains a "highly unusual if not unique" situation that was never intended to fall within the blunt prohibition of Rule 1.2(d) against a lawyer counseling a client to engage in, or engaging in, conduct that the lawyer knows is illegal. The federal decision not to enforce narcotics laws against individuals and organizations engaged in conduct authorized by state law renders sui generis our determination of the issues presented by this inquiry, as well as in N.Y. State 1024 and N.Y. State 1177.

Ownership, Home Cultivation, and Personal Use by an Attorney.

19. The inquirer has been offered an equity stake in a client's cannabis business in exchange for legal services. She would also like to use cannabis products recreationally and grow lawful quantities of marijuana at home for personal use. She asks if this would be allowed under the Rules.

20. For many of the same reasons that lead us to conclude that an attorney may provide legal services to a cannabis business, we conclude that such ownership, home cultivation, and personal use, without more, would not violate Rule 1.2(d). We must, also, however, consider Rule 8.4(b) and (h), which provide:

> A lawyer or law firm shall not:
>
> > (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
> >
> > * * *

> (h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

21. The first sentence of Comment [2] to Rule 8.4 provides:

> Many kinds of illegal conduct reflect adversely on fitness to practice law. Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law.

22. Nothing the inquirer proposes to do involves acts of violence. Moreover, if the inquirer's ownership interest in a cannabis business, her home cultivation of marijuana plants, and her personal recreational use of marijuana comply with the Recreational Marijuana Law, they will fall within the scope of federal forbearance. For that reason, although those activities are technically illegal under federal law, they will not constitute illegal conduct that involves "dishonesty, fraud, breach of trust, or serious interference with the administration of justice." Accordingly, without more, such conduct would not adversely reflect on the inquirer's "honesty, trustworthiness or fitness as a lawyer" within the meaning of Rule 8.4(b).

23. The excessive use of marijuana, however, like excessive consumption of alcohol, may adversely impact a lawyer's ability to competently and diligently represent a client as required by Rules 1.1(a) and 1.3. It could also have more serious consequences and create a physical or mental condition that materially impairs a lawyer's ability to represent a client, requiring mandatory withdrawal from representation (see Rule 1.16(b)(2)). Nothing we say here connotes approval of such excessive use or establishes a protective shield for a lawyer who is facing disciplinary charges, malpractice claims, or other adverse consequences arising out of marijuana use.

24. The second sentence of Comment [2] to Rule 8.4 provides:

> A pattern of repeated offenses, even ones of minor significance when considered separately can indicate an indifference to legal obligation.

25. It is true that growing and harvesting marijuana, as well as repeatedly using marijuana, could be said to reflect a "pattern of repeated offenses" of the federal narcotics laws, but we reject the notion that it is a pattern that indicates an "indifference to legal obligation" where, again, the conduct falls squarely within the scope of federal forbearance and New York explicit authorization.

26. Federal forbearance policy is also relevant to Comment [4] to Rule 8.4, which provides in pertinent part:

> A lawyer may refuse to comply with an obligation imposed by law if such refusal is based upon a reasonable good-faith belief that no valid obligation exists because, for example, the law is unconstitutional, conflicts with other legal or professional obligations, or is otherwise invalid.

27. In our view, the scope of federal forbearance provides inquirer with a "reasonable good-faith belief that no valid obligation exists" to comply with federal narcotics laws that would otherwise pro-

hibit her ownership of an interest in a cannabis business, her home cultivation of marijuana plants for personal use, and her recreational use of marijuana, where and when such activities are authorized by New York State law.

Additional Rules Relevant to Accepting an Equity Interest in Exchange for Legal Services.

28. Accepting an equity interest in the client's cannabis business as compensation for providing legal services also requires compliance with Rule 1.8(a) regarding a business transaction with a client. In N.Y. State 913, ¶¶ 6 & 10 (2012), we concluded "that Rule 1.8(a) applies to negotiation of a fee in which a lawyer is to receive an equity interest in a client or the client's company." Accordingly, "the terms of the transaction must be fair and reasonable to the client, fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client, with the client being advised of the desirability of seeking independent legal advice and given a reasonable chance to do so, and the client signing a writing that describes the transaction and the lawyer's role in the deal, including whether the lawyer was acting for the client in the matter."

29. Further, the inquirer must consider whether acquiring or possessing an equity interest in the client's cannabis business will give rise to a conflict of interest under Rule 1.7(a)(2). A conflict will arise if there is a significant risk that the lawyer's advice or other legal assistance to the client will be adversely affected by the lawyer's financial self-interest. In that event, the lawyer may nevertheless proceed with the representation if (i) the lawyer reasonably believes she can provide competent and diligent representation despite the conflict and (ii) the lawyer obtains the client's informed consent, confirmed in writing. See Rule 1.7(b); N.Y. State 990 ¶ 26 (2013); N.Y. State 913 ¶¶ 13-14.

30. We caution that were the inquirer to engage in any cannabis related activity that constituted a serious violation of New York State law or of other federal laws, or in activity that would materially implicate federal enforcement priorities not subject to federal forbearance – for example, assisting in the transfer of sales revenues from recreational marijuana sales to criminal enterprises, or using a cannabis business as a cover for trafficking in other narcotics – her conduct would fall outside the safe harbor established by this opinion. In that case, her conduct would constitute violations of Rule 1.2(d) and Rules 8.4(b) and 8.4(h).

31. We further caution that law enforcement authorities may have views of their own on the reach of the criminal statutes they enforce, and whether the conduct we find here to be ethically permissible is within the prohibited scope of those statutes presents questions of law on which this committee does not opine. Our jurisdiction is limited to interpreting the Rules of Professional Conduct.

CONCLUSION:

32. In light of current federal enforcement policy, the New York Rules of Professional Conduct permit a lawyer to assist a client in conduct designed to comply with New York's Recreational Marijuana Law and its implementing regulations, notwithstanding that federal narcotics law prohibits the activities authorized by that law. A lawyer may also use marijuana for recreational purposes and may, when the law becomes fully effective, cultivate an authorized amount of marijuana plants at home for personal use. Finally, subject to compliance with Rules 1.7 and 1.8(a), an attorney may accept an equity ownership interest in a cannabis business in exchange for legal services.
(08-21)

OPINION 1226 (08/10/2021)

TOPIC: Use of Domain Name Different from Name of Law Firm

DIGEST: An attorney may use a domain name that differs from the name of the law firm under which the attorney practices, provided the domain name and law firm name, separately or combined, are not false, deceptive, or misleading.

RULES: 7.5(b) (1)

FACTS:

1. In anticipation of opening his own law practice, the inquirer purchased the domain name "JDFamilyLaw.com," with JD being the attorney's initials. Although originally intending to practice law under the law firm name "AB Family Law," the inquirer has decided he wishes to practice under his complete name such as "Law Offices of John Doe" or "John Doe, Attorney at Law."

QUESTION:

2. May the inquirer use a domain name for his website and email address that is different from the name the inquirer uses for the law firm?

OPINION:

3. The cornerstone of our analysis rests upon whether the use of the proposed law firm name and the different proposed domain name, separately or combined, would be false, deceptive, or misleading to clients or to the public. Effective June 24, 2020, a Joint Order of the Appellate Divisions amended Rule 7.5(b) of the New York Rules of Professional Conduct (the "Rules") to permit lawyers to practice under a trade name – which had previously been forbidden – as long as the trade name is not false, deceptive, or misleading. In N.Y. State 1207 (2020) and N.Y. State 1217 (2021), we emphasized that the purpose of Rule 7.5(b), even in its amended form, was to protect the public from being deceived or misled as to the identity of lawyers using or practicing under a firm name.

4. As amended effective June 24, 2020, Rule 7.5(b)(1) provides:

> (b) A lawyer in private practice shall not practice under:
>
> (i) a false, deceptive or misleading a trade name;
>
> (ii) a false, deceptive, or misleading domain name; or
>
> (iii) a name that is misleading as to the identity of the lawyer or lawyers practicing under such name.

5. Comment [2] to Rule 7.5 elaborates on Rule 7.5(b) by providing:

> A lawyer or law firm may not use any name that is false, deceptive, or misleading. It is not false, deceptive, or misleading for a firm to be designated by the names of all or

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

6. Comment [9] to Rule 7.5 specifically notes that "it is proper to practice under the lawyer's or law firm's own name, initials, trade name, domain name, abbreviations, areas of practice, variations of the foregoing, or a combination of those features among other things." Permissible examples of practice names may be found in Comment [10], which approves such names as "AbleBaker Real Estate Lawyers, A&B Real Estate Lawyers, or Dirt Lawyers . . . ." The Comment further suggests permissible descriptive domain names such as www.realestatelaw.com or www.ablerealestatelaw.com or colloquial domain names such as www.dirtlawyers.com . . ." However: "Neither the trade name nor the domain name may be false, deceptive or misleading." Comment [11].

7. The history of Rule 7.5 also shows that a law firm may practice under a name that differs from its domain name. Before the 2020 amendments, when trade names were still prohibited, Rule 7.5(e) addressed domain names, stating: "A lawyer or law firm may utilize a domain name for an internet website that does not include the name of the lawyer or law firm" provided the website and domain name met certain conditions. One condition, stated in Rule 7.5(e)(2), was that "the lawyer or law firm in no way attempts to engage in the practice of law using the domain name" if the domain name did not include the name of the lawyer or law firm. Comment [2] to former Rule 7.5 gave examples of such domain names, including "www.ablerealestatelaw.com," "www.realestatelaw.com," and "www.dirtlawyers.com." Since those domain names would have been prohibited trade names under former Rule 7.5(b), a lawyer who chose such a domain name was required to use a different name for the law firm name.

8. The June 2020 amendments to Rule 7.5 eliminated Rule 7.5(e) because under amended Rule 7.5(b) lawyers and firms were permitted to practice under trade names, including practicing under a domain name – but nothing in amended Rule 7.5(b) was intended to mandate that lawyers use the same name for both the law firm name and the domain name, or to prohibit lawyers from using different words for the law firm name and the domain name. A lawyer who chooses a descriptive domain name (such as "JDFamilyLaw.com") may thus practice under the lawyer's own name (such as "Law Offices of John Doe") as long as neither the law firm name nor the domain name is false, deceptive, or misleading.

9. Here, under Rule 7.5(b) as amended, neither the proposed law firm name nor the proposed domain name is false, misleading, or deceptive. The question is posed therefore whether a lawyer may use a permissible law firm name that differs from a permissible domain name. Is that per se false, deceptive, or misleading? In our view, it is not. Nothing in the Rules prohibits use of a domain name different from the name of the law firm. While one could conceive of circumstances where the differing names might otherwise violate Rule 7.5(b), we have no basis on the facts presented here to conclude that use of the proposed law firm name combined with the proposed domain name would be false, misleading or deceptive.

CONCLUSION:

10. An attorney may use a law firm trade name compliant with these Rules and a different compliant domain name provided the combined use of the two is not false, misleading or deceptive. (16-21)

OPINION 1227 (08/26/2021)

TOPIC: Advertising, solicitation, targeted email to prospective clients

DIGEST: Email communication from out-of-state law firm to a list of specific individuals in New York, seeking clients for future false advertising and products liability class actions, is both an advertisement and a solicitation under Rules 7.1 and 7.3 of the New York Rules of Professional Conduct.

RULES: 1.0(a), 7.1, 7.3

FACTS:

1. The inquirer is a partner in a California law firm. Although the firm does not have a New York office, one of its partners is admitted to practice in New York. The inquirer proposes to send out an "email blast" to individuals in New York, seeking potential named plaintiffs for future class action cases that the firm would like to commence alleging false advertising and products liability. The inquirer acquired the names and email addresses of these individuals from various lists, but the inquirer has no information about the individuals listed, including whether or not they have been harmed by the advertisements or products that the firm is investigating.

QUESTION:

2. Is the proposed email communication to potential clients a "solicitation" under Rule 7.3 of the New York Rules of Professional Conduct (the "Rules")?

OPINION:

3. This inquiry is governed principally by Rule 7.3, entitled "Solicitation and Recommendation of Professional Employment." There is a threshold issue, however, as to whether this committee has jurisdiction to interpret Rule 7.3 as applied to the proposed conduct of an attorney who is not admitted to practice in New York and who practices in a firm that does not maintain an office in New York. We believe we do have such jurisdiction, because paragraph (i) of Rule 7.3 provides:

> (i) The provisions of this Rule [7.3] shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

4. Accordingly, as New York specifically asserts disciplinary jurisdiction over out-of-state lawyers like the inquirer who solicit retention by residents of New York State, we will proceed to answer the inquiry.

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

> (b) For purposes of this Rule [7.3], "solicitation" includes any advertisement *initiated* by or on behalf of a lawyer or law firm; that is directed to, or *targeted* at, a specific recipient or group of recipients or their family members or legal representatives, the

> *primary purpos*e of which is the retention of the lawyer or law firm, and a *significant motive* for which is pecuniary gain. It does *not* include a proposal or other writing prepared and delivered in response to a specific request. [Emphasis added.]

6. Comment [2] to Rule 7.3 elaborates on this definition by stating: "Any advertisement that meets all four of these criteria is a solicitation, and is governed not only by the Rules that govern all advertisements but also by special Rules governing solicitation."

7. Rule 1.0(a) defines "advertisement" as follows:

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

8. Since the emails will be sent "by or on behalf of" the inquirer's law firm, and since the "primary purpose" of the emails is to locate future clients willing to retain the inquirer's firm and to serve as named plaintiffs in future class action false advertising or product liability cases which the inquirer's firm will commence, the proposed email is an "advertisement" within the meaning of Rule 1.0(a).

9. The proposed email communication clearly satisfies three of the four additional criteria of Rule 7.3(b) for classification as a solicitation. First, the communication will be "initiated" by the lawyer or law firm (rather than responding to a "specific request" from a potential client). Second, the "primary purpose" of the email is to locate clients who will retain the firm for future class action matters involving false advertising and products liability claims. Third, a "significant motive" for the email is the firm's expectation of "pecuniary gain" via future legal fees if it is retained.

10. The only remaining requirement is that the email communication be "directed to, or targeted at, a specific recipient or group of recipients." Comment [3] to Rule 7.3 provides guidance on this question, explaining that an attorney advertisement is "directed to or targeted at" a specific recipient" if it is "addressed so that it will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages)." Such advertisements are deemed to be solicitations subject to more stringent rules, "because otherwise they would not be readily subject to disciplinary oversight and review." Rule 7.3, Comment [3].

11. This policy of subjecting solicitations to more stringent rules is the crux of the Rule. Newspaper, magazine, and billboard advertisements, like radio and television advertisements, are published or broadcast on "public media," which is accessible and reviewable for compliance purposes. For the most part, website and internet advertising share this characteristic of being accessible and reviewable. In contrast, private communications to individuals or groups of individuals, such as letters, emails, and direct-mail packages, are not as easily accessible to the public or the disciplinary authorities and cannot ordinarily be reviewed or monitored for compliance purposes.

12. The protection of the public from non-compliant lawyer advertising and solicitation is an important aspect of the work of attorney grievance committees. Without the ability to review targeted

advertising, these committees could not confirm that such advertisements are not deceptive, false or misleading, and are otherwise in compliance with the Rules.

13. We have reached similar conclusions in prior opinions. In N.Y. State 1009 (2014), we concluded that email sent to a specific recipient is a mode of communication that is considered "targeted" at "specific recipients" within the meaning of Rule 7.3. In N.Y. State 1039 (2014), we concluded that email sent to subscribers to an attorney blog could be solicitations if the attorney obtained the email addresses through an opt-in box on the blog. In N.Y. State 1136 (2014), we found that written communications from a law firm inviting people to a law firm marketing event must comply with Rule 7.3 if the firm is seeking client retention. In contrast, in N.Y. State 1016 (2014), we found that an emailed advertisement sent to all members of internet message boards of which the attorney was a member was not a solicitation.

14. Here, in our view, the inquirer's emails constitute an "advertisement" that is "targeted at" "specific recipients" whose names are on a list of names and email addresses acquired by the firm. It does not matter that the firm has no further information about the recipients, that the recipient group is large, or that members of the group have not been chosen based on particular shared characteristics. The mailing is to a list of specific individuals, and that suffices to define it as a "solicitation" as defined by Rule 7.3(b).

CONCLUSION:

15. The proposed email communication to a list of individuals in New York, seeking clients for future false advertising or products liability class actions, is a solicitation under the Rule 7.3 of the New York Rules of Professional Conduct.

(13-21)

OPINION 1228 (08/30/2021)

TOPIC: Submitting draft complaint with demand letter

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

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

FACTS:

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

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

QUESTION:

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

OPINION:

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

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

6. Nevertheless, the Rules do impose some restrictions on a threat to file a civil suit. Thus, the Rules generally prohibit falsehood and deception. See Rule 4.1 (in course of representing a client, lawyer "shall not knowingly make a false statement of fact or law to a third person"); Rule 8.4(c)

(lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); ABA 06-439 (2006) (it may be "knowingly false or misleading to seek an advantage" by making "a threat that is baseless . . . because the lawyer has unequivocally stated an intention that does not exist," especially if the threat is made to a non-lawyer).

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

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

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

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

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

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

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

CONCLUSION:

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

(12-21)

OPINION 1229 (09/21/2021)

TOPIC: Lawyer's Rights and Duties after Death of a Client

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

RULES: 1.2(a), 1.16(d)

FACTS:

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

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

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

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

5. The inquirer's contingency-fee agreement with the client entitles the inquirer to a third of the client's recovery after deduction of expenses. Had the client survived and accepted the offer, this

agreement would entitle the client to at least half the tendered settlement amount. The inquirer wishes to abandon the matter based on the client's death.

QUESTION:

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

OPINION:

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

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

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

CONCLUSION:

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

(22-21)

OPINION 1230 (10/06/2021)

TOPIC: Firm names; trade names

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

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

FACTS:

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

QUESTION:

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

OPINION:

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

> (b) (1) A lawyer or law firm in private practice shall not practice under:
>
> (i) a false, deceptive, or misleading trade name;
>
> (ii) a false, deceptive, or misleading domain name; or
>
> (iii) a name that is misleading as to the identity of the lawyer or lawyers practicing under such name.

4. The June 24, 2020 amendment to Rule 7.5(b) deleted language in former Rule 7.5(b) that prohibited a "firm name containing the names other than those of one or more of the lawyers in the firm" except "the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession." As this Committee stated in New York State 1207 ¶ 11 (2020), "The clear implication of the additions to and deletions from Rule 7.5(b) is that law firm names no longer need to contain the names of lawyers practicing in the firm. However, the Rule as amended reaffirms and makes explicit the longstanding principle that law firm names must not be false, misleading, or deceptive."

5. Comment [2] to amended Rule 7.5, recognizes the longstanding tradition that "[i]t is not false, deceptive, or misleading for a firm to be designated . . . by the names of retired or deceased members where there has been a continuing line of succession in the firm's identity." Comment [3] to

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

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

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

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

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

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

CONCLUSION:

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

(21-21)

OPINION 1231 (10/06/2021)

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

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

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

FACTS:

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

QUESTION:

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

OPINION:

3. In N.Y. State 1155 (2018), this Committee recognized that, in many circumstances, a lawyer may provide both legal and nonlegal services to the same client, and that Rule 5.7 provides a framework for a lawyer to provide nonlegal services to a client through a separate entity. However, the lawyer must initially determine whether doing so would violate Rule 1.7, which addresses conflicts of interest arising out of a lawyer's personal interests, including the lawyer's business and financial interests. Further, pro-

viding both legal and nonlegal services, if otherwise permissible, may also implicate Rule 1.8(a), which concerns lawyers' business transactions with clients. This opinion addresses each of these Rules.

Rule 1.7

4. Rule 1.7(a) provides that a lawyer has a concurrent conflict of interest if a "reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial [or] business interests." In that event, the lawyer may undertake the representation only if, pursuant to Rule 1.7(b)(1), "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation" and, pursuant to Rule 1.7(b)(4), the client gives "informed consent, confirmed in writing". In some circumstances, however, the conflict of interest created by the lawyer's financial or business interest may be so severe that it cannot be cured by consent.

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

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

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

> Where a lawyer advises a client on trust and estate matters, a central object of the representation is how best to satisfy the financial needs of the client and of those for whom the client wishes or is obliged to provide. A frequent topic in trust and estate planning is whether and to what extent life insurance products should be used to satisfy some of the client's financial objectives and, if so, which ones. Where a lawyer has a financial inter-

> est or affiliation with a particular life insurance agency or company, the lawyer's independent professional judgment would unavoidably be affected in considering the appropriateness of or recommending, life insurance products for a particular client. . . .

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

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

9. Although other states' ethics committees have taken a different view, for the past three decades this committee has adhered to the view that providing certain types of nonlegal services to law firm clients is fundamentally incompatible with the duty and ability to render independent professional judgment in the provision of legal services. For example, in N.Y. State 1200 (2020), we addressed whether a lawyer may "offer legal services for a fee and wealth management services to the same clients from a separate entity for a separate fee – the creation of the life insurance trust coupled with the sale of an insurance policy being only an illustration." We reviewed prior opinions where we concluded that "the conflict between the legal and non-legal services is so severe that informed consent cannot cure it," in particular, where the lawyer would serve as both a lawyer and a real estate broker in the same transaction, with the result that "the broker's personal financial interest in losing the brokerage transaction [might] interfere[] with the lawyer's ability to render independent advice with respect to the transaction." *Id.*, ¶¶ 5-6 (citations omitted). With respect to the lawyer providing wealth management services, we concluded: "This dual practice creates a conflict that, in our opinion, is not amenable to consent for the same reasons set forth in the foregoing opinions, namely, that the legal fees for creating a life insurance trust are likely modest [compared] to the commissions for selling a life insurance policy. As a result, based on our prior opinions, we believe the dual practice is not subject to informed consent and hence impermissible." *Id.*, ¶ 7.

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

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

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

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

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

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

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

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

Rule 5.7

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

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

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

> When a patron of the nonlegal service business uses only that service and not legal services, there is no integrated whole and the nonlegal services are by definition distinct. When, however, the patron of nonlegal financial planning services is also using or has received related legal services of the lawyer, whether the legal and nonlegal services are distinct will depend on the nature of the legal and nonlegal services. *When the legal services involve estate planning and the financial planning services including planning investments that would affect the size and composition of the estate or the educational or retirement plan, even if the nonlegal services are provided from a separate entity and at times are not overlapping, we believe the services would be nondistinct.* Therefore, the provisions of the Rules will apply to the nonlegal services. [Emphasis added.]

Rule 1.8(a)

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

CONCLUSION:

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

(09-21)

OPINION 1232 (11/09/2021)

TOPIC: Attorney advertising

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

RULES: 7.1, 7.2, 7.3

FACTS:

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

QUESTION:

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

OPINION:

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

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

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

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

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

> (b) For purposes of this Rule [7.3], "solicitation" includes any advertisement initiated by or on behalf of a lawyer or law firm; that is directed to, or targeted at, a specific recipient or group of recipients or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant

> motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request.

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

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

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

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

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

CONCLUSION:

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

(26-21)

OPINION 1233 (12/07/2021)

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

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

RULE: 7.5(b)

FACTS:

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

QUESTIONS:

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

OPINION:

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

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

4. Comment [5] to Rule 7.5 provides:

> Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a 'firm' . . . because to do so would be false and misleading. . . . It is also misleading for lawyers to hold themselves out as being counsel, associates, or other affiliates of a law firm if that is not a fact, or to hold themselves out as partners, counsel, or associates if they only share offices. Likewise, law firms may not claim to be affiliated with other law firms if that is not a fact.

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

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

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

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

CONCLUSION:

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

(30-21)

OPINION 1234 (12/07/2021)

TOPIC: Ownership of New York Law Firm by Nonlawyers

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

RULES: 5.4(d) and 8.5(b)

FACTS:

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

QUESTION:

2. The inquirer asks questions about three distinct scenarios:

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

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

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

OPINION:

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

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

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

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

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

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

> (a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.
>
> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
>
> > (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
> >
> > (2) For any other conduct:
> >
> > > (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
> > >
> > > (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

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

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

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

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

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

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

therein" in Rule 5.4(d) to extend to an indirect ownership interest. Thus, the inquirer here may not escape Rule 5.4(d) by practicing in a law firm that is a wholly-owned subsidiary of a non-New York law firm with nonlawyer owners.

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

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

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

May the inquirer be employed directly by the English firm in a senior leadership role based in the UK/EU?

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

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

may be). Section 470 would not be applicable if no lawyer in the firm were practicing law in New York.

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

May the Inquirer Retire from Practice in New York and Continue to Practice with a Valid License in Another Jurisdiction?

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

18. One way of retiring is for the lawyer to stops practicing law in New York, but to retain his or her license through ongoing registration with the Office of Court Administration and compliance with New York's mandatory continuing legal education (CLE) requirements. Such a person is still a New York lawyer and remains subject to the Rules, including Rule 5.4 and Rule 8.5. Consequently, if the inquirer used this method to retire, Rule 8.5(b)(2)(ii) would apply, requiring an analysis of where the lawyer "principally practices" and where his conduct clearly has its "predominant effect".

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

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

> § 1240.22 Resignation for Non-Disciplinary Reasons; Reinstatement (a) Resignation of attorney for non-disciplinary reasons. (1) An attorney may apply to the Court for permission to resign from the bar for non-disciplinary reasons by submitting an affida-

> vit in the form in Appendix E to these Rules. . . . (2) When the Court determines that an attorney is eligible to resign for non disciplinary reasons, it shall enter an order removing the attorney's name from the roll of attorneys and stating the non-disciplinary nature of the resignation.

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

CONCLUSION:

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

(25-21)

2022

OPINION 1235 (01/03/2022)

TOPIC: Firm Name; Trade Names; Assumed Names

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

RULE: 7.5(b)

FACTS:

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

QUESTION:

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

OPINION:

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

4. The same analysis applies to the current inquiry. In our view, there is nothing inherently false, deceptive or misleading in a single law firm using two separate assumed names when holding itself out or marketing itself as a provider of legal services in two distinct practice areas, but there could well be particular facts and circumstances that would cause us to reach a different conclusion in a different case. No such particular facts or circumstances were presented to us here, especially where the

firm will disclose its full name wherever the assumed names are posted or published, so we conclude that using two distinct "d/b/a" names for different practice areas within the same firm would not be false, deceptive, or misleading and thus would not violate Rule 7.5(b).

CONCLUSION:

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

(24-21)

OPINION 1236 (01/13/2022)

Modifies N.Y. State 613 (1990)

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

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

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

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

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

FACTS:

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

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

QUESTIONS:

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

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

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

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

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

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

OPINION:

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

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

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

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

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

Rule 1.12(b)(1) expressly permits a lawyer-mediator at the conclusion of the mediation to represent one of the parties to the mediation with the "informed consent" of all parties to the mediation.

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

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

9. Separate and apart from his mediation practice, the inquirer also proposes to perform a host of legal services for New York divorce clients pursuant to a limited scope retainer. The scope of his representation would be limited to providing legal advice, negotiating divorce settlements, and drafting legal papers pertinent to the divorce. The inquirer would not file court papers or appear in court.

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

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

12. Further, Comment [8] to Rule 1.2 provides that in a limited scope representation, as in all agreements concerning a lawyer's representation, a lawyer must act in accord with the Rules of Professional Conduct and other law. Thus, to the extent the inquirer seeks to continue to provide legal services for a fee for New York clients despite the closure of his New York office, he may only do so if he complies with "other law." We do not opine on questions of law, so we offer no opinion on which particular "other law" applies to a lawyer who has closed his New York office but continues to practice in another jurisdiction where he is licensed, but the inquirer should consider the applicability of 22 NYCRR § 118.1(g) (governing retired lawyers), which may mandate continuing his biennial attor-

ney registration, filing the required forms, paying the required fee, and completing the mandatory continuing legal education requirements. See N.Y. State 1172 ¶ 8 (2019). If the inquirer is closing his New York office but continuing to practice in New York remotely, then he should also consider the implications of New York Judiciary Law § 470 (discussed below).

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

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

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

15. Based on the plain language of Rule 1.2(c), N.Y. County 742 (2010) concluded that disclosure of the fact that a pro se litigant's court submission was prepared by counsel is required only "where necessary," not in every case. Specifically, N.Y. County 742 said that disclosure was "necessary" where mandated by a procedural rule, a court rule, particular judge's rule, a judge's order in a particular case, or whenever the failure to disclose an attorney's assistance in ghostwriting would constitute a "misrepresentation." We relied on N.Y. County 742 in N.Y. State 856 ¶ 10 (2011) ("we think notice of the limited representation is 'necessary' under Rule 1.2(c) only if a court rule requires such notice, and we lack jurisdiction to interpret court rules"), and we still agree with N.Y. County 742 that disclosure of ghostwriting is not required unless any of those circumstances apply. To the extent we held in N.Y. State 613 (1990) that disclosure of the identity of the lawyer to the court and the opposing party is required whenever a lawyer ghostwrites pleadings for a *pro se* party, we overrule that opinion, because it was issued before New York adopted Rule 1.2(c).

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

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

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

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

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

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

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

CONCLUSION:

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

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

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

(15-21)

OPINION 1237 (02/01/2022)

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

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

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

FACTS:

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

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

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

QUESTIONS:

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

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

OPINION:

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

7. Rule 1.7(a)(2) defines a "personal interest" conflict as arising when a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests."

8. Our opinions have consistently concluded that a conflict arises when a lawyer acts as a lawyer and a broker in the same real estate transaction. They have also concluded that such conflicts are per se non-waivable. N.Y. State 1043 (2015) ("we have long and consistently stated that a lawyer may not act as a lawyer and a broker in the same real estate transaction, with or without client consent, and whether or not the lawyer charges for legal services"); N.Y. State 1177 (2017) ("A lawyer who receives a broker's commission in a real estate transaction may not also serve as the lawyer for the buyers [without charging for the service], even if the buyers are long-time clients and friends and have requested both kinds of services."). We have reasoned that, where a lawyer acts as both broker and lawyer in the same transaction, "the broker's personal and financial interest in closing the transaction interferes with the lawyer's ability to render independent legal advice with respect to the transaction consistent with the principles now embodied in Rule of Professional Conduct 1.7(a) . . . ." That is because "a lawyer should not have a personal stake in the advice rendered, and a broker who is paid only if the transaction closes cannot be fully independent in advising the client as a lawyer." N.Y. State 916 (2012); see also N.Y. State 933 ¶7 (2012) ("the personal interest of a lawyer-real estate broker in the brokerage fee that will be generated by a closing of a real estate transaction so conflicts with the lawyer's responsibility to provide independent legal judgment with respect to that transaction as to preclude the dual roles and to make the conflict non-consentable by the client"); N.Y. State 1015 (2014) (quoting N.Y. State 753 and citing later opinions).

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

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

11. The issue in Opinion 1208 was whether an attorney could accept referrals for real estate closings from her paralegal who was also a real estate broker. Because the attorney had no financial interest in the paralegal-broker's commission, we concluded that the referrals "did not trigger the per se

non-waivable conflict that was present in N.Y. State. 916 and N.Y. State 1043." Accordingly, the appropriate inquiry was whether or not, under the particular facts and circumstances, a referral by the paralegal-broker created a "significant risk that the lawyer's interest would be adversely affected by the lawyer's own financial, business, property or other personal interests." If a significant risk did not exist, then no Rule 1.7(a)(2) conflict arose. If a substantial risk did exist, then the attorney could accept the referral only upon satisfying the exceptions set forth in Rule 1.7(b), including informed written client consent.

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

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

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

15. In N.Y. State 845 part C (2010), the attorney was able to offer a reduced fee as a result of referring business to a real estate broker. By contrast, the inquirer here posits a circumstance where the attorney is enabling the real estate broker to enjoy the possibility of enhanced business prospects resulting from a reduced brokerage commission in connection with referrals to the attorney. Our opin-

ions have indicated that the former is acceptable, at least under certain circumstances. See N.Y. State 845 part C. Rule 7.2(a) makes clear that the latter is not.

CONCLUSION:

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

(01-22)

OPINION 1238 (03/14/2022)

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

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

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

FACTS:

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

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

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

QUESTION:

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

OPINION:

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

6. In N.Y. State 800 (2006), however, when faced with a part-time prosecutor who proposed to represent indigent persons in Family Court proceedings in an adjacent county, we declined to extend the per se prohibition. Instead, we identified three types of Family Court proceedings in which the part-time prosecutor would be barred from representation: (a) matters in which the prosecutor was

then working or had previously worked with the law enforcement officials involved, (b) juvenile delinquency proceedings and (c) cases involving Persons in Need of Supervision ("PINS"). Id. ¶ 5.

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

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

N.Y. State 800 ¶ 4 (footnotes omitted).

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

> We cannot say that the Rules invariably forbid a lawyer to accept the representation of an indigent defendant in a traffic violation merely by virtue of the lawyer's role as a part-time lawyer handling Medicaid, paternity, or child support issues for the Department of Social Services. Likewise, we cannot say that the Rules invariably forbid a lawyer to accept a representation in a Family Court proceeding between, say, two private individuals in which the Department of Social Services has no involvement.

N.Y. State 1074 ¶5.

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

10. Our conclusion is consistent with our most recent opinion in this area, N.Y. State 1219 ¶ 7 (2021), where we opined that the inquirer, a part-time assistant county attorney, was not subject to a "per se bar" on representing convicted defendants in state parole violation hearings where "(1) the inquirer's practice as a part-time county attorney is entirely civil, as is all of the work of the County Attorney's office; (2) the inquirer would not appear before any County judges or officials in the contemplated parole work; and (3) a violation or construction of County law is not typically at issue in parole violation hearings or appeals." Rather, we noted "[t]here may be . . . particular cases in which

the inquirer would have a conflict. For example, if the conduct of County employees is involved in the parole violation, or the parole violation defendant is a party to a civil case brought by the County Attorney's Office, the inquirer might have a conflict." Id. ¶ 8 (citing N.Y. State 1074 ¶ 8 (2015) and N.Y. State 800 ¶¶ 5-6 (2006)).

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

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
>
> > (1) * * *; or
> >
> > (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or other personal interests.

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

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

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

14. We have previously opined that government may waive a conflict pursuant to Rule 1.7(b), provided the conflict is waivable under the Rules and "(i) the lawyer was reasonably certain both that the entity was legally authorized to waive the conflict of interest and that all legal prerequisites to the consent had been satisfied and (ii) the lawyer reasonably believed that the process by which the consent was granted was sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust." N.Y. State 1130 ¶15 (2017).

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

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

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

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

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

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

N.Y. State 859 ¶ 13 (2011).

20. Accordingly, following the broadening of the per se rule that prohibits a part-time prosecutor from representing a defendant in a criminal proceeding anywhere in New York State to include Department of Social Service and assistant county attorneys who prosecute these quasi-criminal matters in Family Court, if the attorneys in the Family Law Division here prosecute juvenile delinquency,

PINS or child abuse and neglect proceedings, which appears likely, its lawyers would not be permitted to accept private clients or 18-B counsel assignments to defend such matters in the Family Court. That per se prohibition would apply to the inquirer if the two offices are, in effect, the same law firm for imputation purposes under Rules 1.10(a) which provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 . . . except as otherwise provided therein."

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

CONCLUSION:

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

(32-21)

OPINION 1239 (03/22/2022)

TOPIC: An Attorney's Ethical Obligation When a Court Orders Forensic Analysis of Hard Drive Containing Client Confidential Information

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

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

FACTS:

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

QUESTIONS:

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

OPINION:

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

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

seded, Rule 1.6(b)(6) provides a safe harbor allowing the lawyer to make the disclosure as necessary to comply with the law or court order. *See* Comment [12] to Rule 1.6.

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

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

Comment [13] to Rule 1.6.

6. To be sure, the facts before us are complicated by the client's waiver of the client-lawyer privilege and consent to the disclosure of confidential information as it pertains to that client's communications. That waiver, however, does not impact the lawyer's obligation to take reasonable steps to safeguard the duty of confidentiality owed to the non-party clients whose interests were not represented when the court issued its order or to notify the non-party clients of the existence of the court order.

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

8. In N.Y. City 2017-5, the New York City Bar Association applied Rule 1.4 to explain an attorney's obligation to advise a client when an electronic device containing confidential information is reviewed or seized upon a border crossing. Comparing the unauthorized access (even if sanctioned by law) to an attorney's obligation to divulge the loss of a client's file (N.Y. City 2015-6) and the obliga-

tion to advise a client of a significant error or omission by the attorney in the rendition of legal services (N.Y. State 1992 (2016)), that committee held:

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

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

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

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

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

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

> officer of the court." Initially, if the client is available, the lawyer must consult the client. If instructed by the client or if the client is unavailable, the lawyer must assert all reasonable claims against disclosure and seek to limit the subpoena or other demand on any reasonable ground. ABA Formal Opinion 473 (2016). We agree.

N.Y. State 1198 ¶12.

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

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

CONCLUSION:

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

(31-21)

OPINION 1240 (04/08/2022)

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

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

RULES: 1.6

FACTS:

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

QUESTION:

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

OPINION:

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

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

5. In N.Y. State 820 (2008), we applied this general principle to a lawyer's use of an e-mail service provider that scans e-mails for keywords and sends or displays targeted computer-generated advertisements to the lawyer using the service based on the words in the e-mail communications. We concluded that using such a service is permissible if "[u]nder the particular e-mail provider's published privacy policies, no individuals other than e-mail senders and recipients read the e-mail messages, are otherwise privy to their content or receive targeted advertisements from the service provider." We reasoned: "Merely scanning the content of e-mails by computer to generate computer advertising . . . does not pose a threat to client confidentiality, because the practice does not increase

the risk of others obtaining knowledge of the e-mails or access to the emails' content." In contrast, we stated it would not be permissible to use the service "if the e-mails were reviewed by human beings or if the service provider reserved the right to disclose the e-mails or the substance of the communications to third parties without the sender's permission (or a lawful judicial order)." Accordingly, we opined that a "lawyer must exercise due care in selecting an e-mail service provider to ensure that its policies and stated practices protect client confidentiality" in conformance with these governing principles.

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

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

N.Y. State 1088 ¶ 7.

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

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

9. Insofar as clients' names constitute confidential information, a lawyer must make reasonable efforts to prevent the unauthorized access of others to those names, whether stored as a paper copy in a filing cabinet, on a smartphone, or in any other electronic or paper form. To that end, before an attorney grants access to the attorney's contacts, the attorney must determine whether any contact – even one – is confidential within the meaning of Rule 1.6(a). A contact could be confidential because it reflects the existence of a client-attorney relationship which the client requested not be disclosed or

which, based upon particular facts and circumstances, would be likely to be embarrassing or detrimental to the client if disclosed. N.Y. State 1088 (2016).

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

11. If a lawyer determines that the contacts stored on his smartphone include the confidential information of any current or former client, the lawyer must not consent to give access to his contacts to an app, unless the attorney, after reasonable due diligence, including a review of the app's policies and stated practices to protect user information and user privacy, concludes that such confidential contact information will be handled in such a manner and for such limited purposes that it will not, absent the client's consent, be disclosed to additional third party persons, systems or entities. See N.Y. State 820 (2008).

CONCLUSION:

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

(34-21)

OPINION 1241 (05/31/2022)

TOPIC: New York attorney with out-of-state office; attorney advertising and letterhead

DIGEST: A lawyer who is admitted to practice in both New York and Florida, but whose only physical office is in Florida, may state on the letterhead of his Florida office that he is "admitted to the New York Bar," provided that this statement does not violate the applicable Rules of Professional Conduct.

RULES: 1.0(a), 7.1(a), 7.5(a), 8.4(c) & 8.5(b)

FACTS:

1. The inquirer is an attorney admitted in both New York and Florida. He is closing his New York office and moving to Florida, where he plans to open an office to provide legal services to clients in Florida and New York. All New York legal services will be provided remotely from the inquirer's physical location in Florida. Among other things, the inquirer's legal services will include legal advice on New York and Florida law with respect to litigation pending or contemplated in New York and Florida courts, and the inquirer will negotiate on behalf of clients regarding such litigation, but he will not file an appearance in any New York court. He intends to state on the letterhead of his Florida office that he is "Admitted to the New York Bar."

QUESTION:

2. If a lawyer is admitted in New York and Florida but maintains a physical office only in Florida, may the lawyer state on the letterhead of his Florida office that he is admitted to the Bar of New York State?

OPINION:

A. Which jurisdiction's Rules of Professional Conduct apply to the inquirer's letterhead?

The first step in analyzing a multijurisdictional question is to determine which jurisdiction's Rules of Professional Conduct ("Rules") will govern the inquirer's conduct. In New York, the answer is found in Rule 8.5(b), which provides as follows (emphasis added):

> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
>
> > (1) *For conduct in connection with a proceeding in a court* before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
> >
> > (2) *For any other conduct:*
> >
> > > (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

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

3. Thus, New York Rule 8.5(b) divides a lawyer's conduct into two categories: (1) conduct related to a proceeding in a court where the lawyer has been admitted generally or pro hac vice, and (2) all other conduct.

Rule 8.5(b)(1): Conduct in connection with proceedings before New York courts

4. The inquirer will advise clients in pending litigation in New York and Florida courts. New York Rule 8.5(b)(1) addresses all conduct "in connection with" those proceedings. If the inquirer sends a letter to a court or to opposing counsel regarding pending litigation, his use of the letterhead would be "in connection with" litigation before a New York or Florida court. His use of the letterhead will thus fall under Rule 8.5(b)(1), and the applicable ethics rules will be the rules of the jurisdiction in which the court sits.

Rule 8.5(b)(2): All other conduct

5. If the inquirer uses his letterhead for purposes not in connection with a pending proceeding before a New York court – for example, if he were to advise a New York client about a threatened litigation or non-litigation matter – then his letterhead and its use would fall under the purview of Rule 8.5(b)(2), which governs "all other conduct." Rule 8.5(b)(2) divides lawyers into two categories: (i) lawyers licensed to practice only in New York, and (ii) lawyers licensed in New York and another state. Because the inquirer is presently licensed in both New York and Florida, his conduct would fall under Rule 8.5(b)(2)(ii).

6. Rule 8.5(b)(2)(ii) requires a two-stage inquiry for lawyers licensed in more than one jurisdiction. First, we ask where the lawyer "principally practices"? The inquirer is closing his New York office and moving to Florida, so it appears at first blush that he "principally practices" in Florida. But determining where a lawyer principally practices is not based solely on physical location. Rather, it requires a multi-factor analysis. *See* N.Y. State 1027 ¶ 14 (2014) ("when a lawyer is licensed in more than one jurisdiction, various factors are relevant to determining the one in which the lawyer principally practices"). Two important factors are (i) "the location of the clients the lawyer serves" and (ii) "the activities the lawyer performs in each jurisdiction." *Id.*

7. Here, the inquirer does not indicate where his clients are located or whether he will represent any clients in Florida matters. If he works primarily for New York clients with respect to matters pending in New York courts, it may be that he principally practices in New York. But if he works primarily for Florida clients or on Florida matters, then he may principally practice in Florida. We lack sufficient facts to determine where the inquirer principally practices. *See* N.Y. State 1041 ¶ 14 (2014) ("ultimately, the determination of 'principally practices' is question of fact that is beyond the Committee's jurisdiction to decide").

8. Wherever the inquirer principally practices, however, Rule 8.5(b)(2)(ii) also requires us to consider an exception: does the "particular conduct" at issue "clearly" have its "predominant effect in another jurisdiction in which the lawyer is licensed to practice"? If so, then "the rules of that jurisdiction shall be applied to that conduct."

9. Determining the state where the "predominant effect" of a lawyer's conduct occurs when the lawyer's conduct is not in connection with a proceeding pending before a court is a question of fact requiring a nuanced analysis. In N.Y. State 1041 ¶ 15 (2014), a lawyer was admitted in New York but was "based" in the U.K. and "principally practiced" in the U.K. If most of his clients were in New York, however, we said the "predominant effect" of the lawyer's conduct would occur in New York, and the New York Rules would apply. But exactly where the predominant effect would occur was "a question of fact" that the Committee could not determine.

10. Here, we cannot determine whether the inquirer "principally practices" in New York or Florida. We also cannot determine where the "predominant effect" of his conduct will clearly be felt. Thus, we cannot determine whether the New York or Florida Rules of Professional Conduct apply when his conduct is not in connection with pending litigation.

Rules 7.1(a), 7.5(a), and 8.4(c)

11. If the New York Rules govern, then the inquirer must comply with Rule 7.5(a), which provides: "A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate these Rules or any statute or court rule." (Emphasis added.) At least three of "these Rules" are relevant.

12. One relevant New York Rule is Rule 7.1(a), which provides that a lawyer or law firm "shall not use or disseminate . . . any advertisement that: (1) contains statements or claims that are false, deceptive or misleading . . . ." (Emphasis added.) An "advertisement" is defined in Rule 1.0(a) as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." Here, the letterhead would not constitute an "advertisement" unless the statement about admission to the New York Bar is for the primary purpose of retention, which we cannot determine. In N.Y. State 964 ¶ 13 (2013), we said that where a letterhead "is used in the ordinary course of professional practice or social intercourse without the primary intent to secure retention, it does not constitute advertising."

13. If, however, the inquirer's primary purpose in stating that he is "Admitted to the New York Bar" is to attract clients who find that credential impressive, then his letterhead is an advertisement. Even if prospective clients reach out to him first, his letterhead would still be an advertisement if its primary purpose is to persuade them to retain him. Rule 7.1(a) permits an advertisement to include "dates of admission to any bar." It follows that a lawyer may list the jurisdictions in which he has been admitted to the bar (with or without the dates of admission). Thus, whether the inquirer's letterhead is an "advertisement" or not, Rule 7.1(a) permits him to state that he is admitted to the New York Bar.

14. A second relevant Rule is Rule 7.5, which governs law firm names and letterhead. *See* Rule 7.5, Cmt. [6] (stating that a "lawyer or law firm may use . . . letterheads . . . provided they do not vio-

late any statute or court rule and are in accordance with Rule 7.1"). The inquirer's proposed Florida letterhead appears to comply with Rule 7.5. His truthful statement that he is admitted to the New York Bar does not "violate any statute or court rule" of which we are aware, and the statement is "in accordance with Rule 7.1" as we explained above.

15. A third relevant Rule is Rule 8.4(c), which is broader than Rules 7.1(a) and 7.5(a) because it is not restricted to advertisements or letterhead. Rule 8.4(c) provides that a lawyer or law firm shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Here, as long as the inquirer remains admitted to practice in New York, the statement on his Florida letterhead that he is "Admitted to the New York Bar" does not involve dishonesty, fraud, deceit, or misrepresentation.

16. Of course, as we cautioned in N.Y. State 1235 ¶ 23 (2022), a New York lawyer who resides in Florida but represents New York clients over the internet from his law office in Florida "must comply with the physical office requirement of New York Judiciary Law § 470." Compliance with § 470 is a question of law on which we do not opine.

17. We also caution that we have no jurisdiction to interpret the Florida Rules of Professional Conduct or other relevant Florida law. Thus, the inquirer should obtain guidance on Florida law to determine whether the Florida Rules or other law apply to his conduct.

CONCLUSION:

18. Under the New York Rules of Professional Conduct, a lawyer who is admitted to practice in both New York and Florida may state on the letterhead of his Florida office that he is "Admitted to the New York Bar," even though his only physical office is in Florida.

(15-21B)

OPINION 1242 (07/07/2022)

TOPIC: Conflicts; Town Attorney

DIGEST: A town attorney is prohibited from representing a private client before boards of a neighboring town with respect to zoning and land use matters if the town attorney has conflicting personal interests, unless the conflict is consentable and the town attorney obtains informed consent from both the town board that appointed him and the private client. In any case, Rule 1.11(f)(2) prohibits the town attorney from using his official position to improperly influence a tribunal to act in a private client's favor.

RULES: 1.0(f) & (w); 1.7(a)(1)-(2) & (b); and 1.11(f)(2)

FACTS:

1. The inquirer is a town attorney who, with the consent of the town board that appointed him, has continued to maintain a private practice. In his private practice, the inquirer represents a client who has commercial real estate interests both within the town he serves and in neighboring towns. The inquirer would like to represent the private client on a zoning and land use matter in one of those neighboring towns.

QUESTION:

2. May a town attorney represent a private client on a zoning and land use matter in another town if the private client also has commercial real estate interests within the town the town attorney serves?

OPINION:

3. Absent informed consent from each affected client, Rule 1.7(a) of the New York Rules of Professional Conduct ("Rules") prohibits concurrent representations when a reasonable lawyer would conclude that either:

> (1) the representation will involve the lawyer in representing differing interests; or
>
> (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or other personal interests. [*Emphasis added.]*

Rule 1.7(a)(1): Differing interests among clients

4. "Differing interests" are defined in Rule 1.0(f) to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest."

5. Zoning and land use issues come before the town board, planning board, zoning board and perhaps other boards in the town which the inquirer serves. These boards normally fall within the definition of a "tribunal" in Rule 1.0(w), which provides that the term "Tribunal" denotes "a court, an

arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. . . ."

6. The zoning and land use issues that come before these boards may be of regional or countywide importance. The same or similar zoning and land use issues, implicating the same or similar development and land use policies and concerns, may come before boards of coordinate jurisdiction in neighboring towns – for example, the protection of environmentally sensitive areas, the preservation of open space and agricultural lands, waterfront development, the creation of multi-family or two-family zoning districts, or the expansion of commercial uses in business districts.

7. It would appear, at first blush, that the town attorney would be representing "differing interests" in a situation where the same or similar land use issues were at play in both the inquirer's own town and a neighboring town, and the inquirer took a position on a land use issue on behalf of the private client in the neighboring town that contradicts the position favored by the town board that appointed him. The Comments to Rule 1.7, however, indicate that Rule 1.7 does not ordinarily require client consent to such a conflict, which is often called a "positional" or "issue" conflict. Specifically, Comment [24] to Rule 1.7 provides in pertinent part:

> [24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. . . .

8. Accordingly, even if the inquirer here, in representing his private client before a neighboring town's board, were to take a position inconsistent with a position that the town board employing him would take, there would be no conflict of interest within the meaning of Rule 1.7(a)(1).

Rule 1.7(a)(2): Personal interest conflicts

9. Nevertheless, the inquirer may have a conflict under Rule 1.7(a)(2) if there is a significant risk that his personal and financial interests would adversely affect the inquirer's professional judgment in representing the town board that employs him or the private client in the neighboring town. As the rest of Comment [24] to Rule 1.7 states:

> [24] . . . A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's representation of another client in a different case; for example, when a decision favoring one client will create a precedent likely to weaken seriously the position taken on behalf of the other client. . . . Similar concerns may be present when lawyers advocate on behalf of clients before other entities, such as regulatory authorities whose regulations or rulings may significantly implicate clients' interests. If there is significant risk of an adverse effect on the lawyer's professional judgment, then absent informed consent of the affected clients, the lawyer must decline the representation. [Emphasis added.]

10. A significant risk might exist here. For example, the inquirer might not zealously advocate for a position that would benefit the private client in the neighboring town if that position would be con-

trary to the preferred land use policies of the town board that employs him. The inquirer in that case might "pull his punches" out of concern that the town board that appointed him would be so displeased that the town board would fire him or refuse to renew his appointment, or that the town board would revoke its consent for him to continue to maintain a private practice. Alternatively, in order to avoid displeasing his private client, the inquirer might soften his positions on behalf of his town board employer or recommend that the town board adopt land use policy positions less hostile to, and more consistent with, the best interests of his private client.

11. In N.Y. State 1216 (2021), we addressed a similar dynamic in a different context. The inquirer there, an assistant county attorney, was responsible for the implementation of a particular vendor's insurance management software in the county that employed him. The same vendor then offered to retain the assistant county attorney as a consultant to facilitate the vendor's sale of the software to other counties. In addressing the "financial, business, property or other personal interests" arising under Rule 1.7(a)(2), we expressed concern that the vendor might pressure the assistant county attorney not to fully assert the county's contractual rights or not to assert the county's best bargaining position when the software service agreement with his county employer came due for renewal, because the inquirer might fear that the outside vendor would terminate him and thereby cut off a significant source of income. Id. ¶ 14.

12. We lack sufficient facts to determine here whether there is a "significant risk" under Rule 1.7(a)(2) that the inquirer's personal and financial interests would adversely affect his professional judgment in representing either the town board which employs him or his private client. The inquirer will have to assess the level of risk himself in light of all of the facts and circumstances, including the factors listed in Comment [24] to Rule 1.7 (quoted above).

Rule 1.7(b): Consentability and consent

13. Even if the inquirer determines that a conflict of interest exists under Rule 1.7(a)(2), the concurrent representation may nonetheless be permitted under Rule 1.7(b) which provides:

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

14. We have previously opined that a unit of government may waive a conflict pursuant to Rule 1.7(b), provided the conflict is waivable under the Rules and "(i) the lawyer was reasonably certain both that the entity was legally authorized to waive the conflict of interest and that all legal prerequi-

sites to the consent had been satisfied and (ii) the lawyer reasonably believed that the process by which the consent was granted was sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust." N.Y. State 1130 ¶15 (2017). The inquirer should determine whether any conflict waiver by the town board satisfies these criteria. See also, N.Y. State 1238 ¶ 14 (2022) (quoting same passage from N.Y. State 1130).

Additional caveats

15. Even if there is no conflict under Rule 1.7(a), or if there is a waivable conflict and informed consent to the representation is properly sought, secured, and confirmed in writing under Rule 1.7(b) from both the town in which the inquirer serves and the private client, two additional caveats are in order.

16. First, this committee interprets the Rules and we do not opine on questions of law. Therefore, the inquirer should be mindful that, independent of any ethical concerns, the inquirer's proposed conduct may violate applicable law governing town attorneys, including but not limited to the Public Officers Law, the General Municipal Law, the Town Law, and the town's own ethics code. See N.Y. State 1130 ¶ 7 (2017).

17. Second, the inquirer must also be mindful of Rule 1.11(f)(2) which cautions that a lawyer who holds public office shall not "use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client" (other than the town that employs him). See also Rule 1.11, Cmt. [3] (Rule 1.11(f) is designed to "prevent the lawyer from exploiting public office for the advantage of another client"); and N.Y. State 1065 ¶ 11 (2015) ("even assuming there is no conflict under Rule 1.7(a), the inquirer is prohibited from using any influence he may have as a public official to influence or attempt to influence, any tribunal to act in favor of the [inquirer's] proposed client.").

CONCLUSION:

18. A town attorney is prohibited from representing a private client before boards of a neighboring town with respect to zoning and land use matters if the town attorney has conflicting personal interests, unless the conflict is consentable and the town attorney obtains informed consent from both the town board that appointed him and the private client. In any case, Rule 1.11(f)(2) prohibits the town attorney from using his official position to improperly influence a tribunal to act in a private client's favor.

(04-22)

OPINION 1243 (07/07/2022)

TOPIC: Public Defender; Part-Time Judge; Conflict of Interest

DIGEST: A part-time assistant public defender whose law partner is a part-time town court judge is precluded from representing clients of the public defender's office in the town court where the part-time judge serves because such representation would appear to violate Judiciary Law § 471 and the Rules of Judicial Conduct found in 22 NYCRR Part 100, thereby constituting a violation of Rule 8.4(f). A full-time assistant public defender whose father-in-law is the same part-time judge is similarly precluded from appearing in the town court, but under certain circumstances he may participate outside of court in defending clients of the public defender's office. These prohibitions are not imputed to other attorneys in the public defender's office.

RULES: 1.7, 1.8, 1.9, 1.10(a), 8.4(f)

FACTS:

1. The inquirer is a county public defender who practices exclusively out of the public defender's offices. A part-time assistant public defender on the inquirer's staff is the first cousin of, and law partner with, a part-time town court judge in a town within the same county. The part-time assistant public defender does not maintain an office in the public defender's office and performs his public defender duties from the law offices he shares with his law partner, the part-time town court judge. Another full-time assistant public defender who practices exclusively out of the public defender's office is the son-in-law of the part-time town court judge.

QUESTIONS:

2. May an assistant public defender who is a law partner and first cousin of a part-time town court judge represent public defender clients in the town court in which the judge serves?

3. May a full time assistant public defender who is the son-in-law of a part-time judge but shares no office space with the part-time judge represent clients of the public defender's office in the town court in which the judge serves?

4. If the answer to either question is no, would the disqualification be imputed to all lawyers in the public defender's office?

OPINION:

Disqualification Pursuant to Rule 8.4(f)

5. Rule 8.4(f) of the New York Rules of Professional Conduct ("Rules") provides that a "lawyer or law firm shall not . . . (f) knowingly assist a judge or judicial officer in conduct that is in violation of applicable rules of judicial conduct or other law." (Emphasis added.) This Committee's authority is limited to interpreting the Rules, and we have no jurisdiction to decide questions of law. Nonetheless, we call the inquirer's attention to provisions of the New York Judiciary Law and the Rules of Judicial Conduct ("RJC") that are pertinent to his inquiry. See, e.g., N.Y. State 1115 ¶ 14 (2017) (citing vari-

ous provisions of the Judiciary Law and RJC when analyzing a public defender's duties under Rule 8.4(f)).

6. Regarding "law," the first provision that we consider relevant to the inquirer's situation is Section 471 of the Judiciary Law, which provides:

> A law partner of, or person connected in law business with a judge, shall not practice or act as an attorney or counsellor, in a court, of which the judge is, or is entitled to act as a member . . . .

7. Regarding "rules of judicial conduct," Section 100.6(B)(3) of the RJC provides:

> A part-time judge:
>
> . . . .
>
> (3) shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law, but may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law . . . .

8. Section 100.3(E)(1)(e) of the RJC provides:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> . . . .
>
> (e) The judge knows that the judge or the judge's spouse, or a person known to be within the fourth degree of relationship to either of them, or the spouse of such person, is acting as a lawyer in the proceeding or is likely to be a material witness in the proceeding. Where the judge knows the relationship to be within the second degree, (i) the judge must disqualify him/herself without the possibility of remittal if such person appears in the courtroom during the proceeding or is likely to do so, but (ii) may permit remittal of disqualification provided such person remains permanently absent from the courtroom.

9. Section 100.3(F) of the RJC describes the remittal procedure, in which the court and the parties can waive judicial disqualification in some circumstances where such disqualification would otherwise be required. In pertinent part, Section 100.3(F) provides:

> A judge disqualified by the terms of subdivision (E), except . . . subparagraph (1)(e)(i) of this section. may disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have

> appeared and not defaulted and their lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

10. The judge's son-in-law stands within the second degree of relationship to the part-time judge in this inquiry, and the judge's cousin stands within the fourth degree of relationship to the part-time judge. See RJC § 100.0(C) (setting out how the "degree of relationship" is calculated for various categories of people under the RJC).

11. Based on the apparent bar of Judiciary Law § 471, and because there seems to be no remittal provision in the RJC for disqualification required of a part-time judge pursuant to RJC §100.6(B)(3), the part-time assistant public defender who is a law partner with the part-time judge may not represent clients in town court proceedings. This is the case notwithstanding the part-time assistant public defender's status as a first cousin of the part-time judge which, placing them in the fourth degree of relationship to each other, might otherwise permit remittal pursuant to RJC § 100.3(F).

12. On the other hand, Judiciary Law § 471 does not appear applicable to the full-time assistant public defender who is not a law partner with, or otherwise "connected in law business" with the part-time judge (his father-in-law), with whom he stands in the second degree of relationship. Based on that second degree relationship, it also appears that the remittal provision of RJC § 100.3(F) is applicable. Accordingly, although the full-time assistant public defender may not appear before any judge of the town court, he may participate outside the courtrooms in proceedings pending in the town court if (i) the prosecutor and the defendant agree that the judge presiding should not be disqualified and (ii) the judge presiding believes he can be impartial.

13. Our opinion here is consistent with our opinion in N.Y. State 1115 (2017), where we determined that members of a public defender's office may not represent a client in a city court where another member of the public defender's office serves as a part-time judge. We reasoned that the inquirer's proposed conduct would violate Rule 8.4(f) by causing a judge to violate the command of the RJC not to "permit his or her partners or associates to practice law in the court in which he or she is a judge." RJC §100.6(B)(3). N.Y. State 1115 was part of a long line of opinions issued by this Committee dealing with the ethical constraints placed upon associates and partners of part-time judges, including inquiries involving members of public defenders' offices. See, e.g., N.Y. State 29 (1966) (an associate of a part-time town court judge may not appear before either judge of a town court consisting of two judges); N.Y. State 65 (1967) (applying the prohibition to partners, as well); N.Y. State 497 (1978) (improper for an assistant public defender to share office space with a village justice where any member of the public defender's staff appeared in the justice court); N.Y. State 701 (1998) (lawyer who is co-counsel with a part-time judge in a civil case may not appear before another judge on the part-time judge's court because the public might perceive that the administration of justice is not fairly and impartially served).

Lack of Imputation Pursuant to Rule 1.10(a)

14. Pursuant to Rule 1.10(a), certain conflicts are imputed to all lawyers associated with the attorney whose conduct or situation gave rise to the conflict. Rule 1.10(a) provides:

> While lawyers are *associated in a firm*, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein. [Emphasis added.]

15. Rules 1.7, 1.8 and 1.9 all concern conflicts with current or former clients. Here, neither the disqualification of the part-time assistant public defender nor the disqualification of the full-time public defender arises from a conflict of interest with a current or former client under Rules 1.7, 1.8 or 1.9. Under Rule 1.10(a), disqualifications based on Rule 8.4(f) are not imputed to other attorneys in public defender's office or to the public defender himself.

16. We recognize that certain language in N.Y. State 1115 ¶ 8 might be read to imply that disqualifications under Rule 8.4(f) are imputed to attorneys "associated" in the same firm, but that was not the Committee's intention. Rather, Opinion 1115's discussion of Rule 1.10(a) was intended to emphasize that all the assistant public defenders in the public defender's office in that inquiry were associated with the part-time judge, who was also an assistant public defender in the same office. Therefore, all lawyers associated with the part-time judge in law practice were disqualified. Here, in contrast, the part-time judge is associated only with the part-time assistant public defender who is his first cousin and law partner.

CONCLUSION:

17. A part-time assistant public defender whose law partner is a part-time town court judge is precluded from representing clients of the public defender's office in the town court where the part-time judge serves because such representation would appear to violate Judiciary Law § 471 and the Rules of Judicial Conduct found in 22 NYCRR Part 100, thereby constituting a violation of Rule 8.4(f). A full-time assistant public defender whose father-in-law is the same part-time judge is similarly precluded from appearing in the town court, but under certain circumstances he may participate outside of court in defending clients of the public defender's office. These prohibitions are not imputed to other attorneys in the public defender's office.

(35-21)

OPINION 1244 (10/06/2022)

TOPIC: Referral fees paid to retired lawyers

DIGEST: A retired lawyer may receive a referral fee as long as the retiree maintains joint responsibility for the referred matter.

RULES: 1.5, 5.1, 5.4

FACTS:

1. The inquirer was a sole New York lawyer who practiced contingency-fee personal injury law in New York. While in practice, the inquirer handled cases only in the venue where the inquirer had an office, and referred matters outside that venue to other unaffiliated lawyers (A and B). Last year, in contemplation of retirement, the inquirer reached agreement with another unaffiliated lawyer (C) to take over the inquirer's remaining unresolved matters. This agreement provided for the inquirer to receive a third of the C's net recovery from each of the referred cases, that is, a third of C's legal fee. The inquirer's arrangements with A and B, made before retirement was considered, are not materially different.

2. About a year ago, the inquirer closed the office the inquirer had maintained. Before doing so, the inquirer communicated with each current and former client about the impending retirement. Separately, the inquirer wrote to those clients whose matters had been referred to C, together with an invitation to contact the inquirer about the client's matter with any questions or concerns. According to the inquirer, no client has complained about C's services. Meanwhile, C has entered engagement letters with each of the referred clients, as have A and B.

3. The inquirer is currently registered with the Office of Court Administration (OCA) as an active lawyer. The inquirer wishes to change his status to "retired." The inquirer is concerned, however, that this change of status may adversely affect the fee arrangements on the referred cases or insurance coverage if the inquirer receives compensation for the referred cases.

QUESTIONS:

4. May a retiring lawyer end "joint responsibility" for a matter upon retirement in order to share in a legal fee the claim for which arose before retirement?

5. Does a lawyer's duty to share "joint responsibility" to share a legal fee depend on whether successor counsel enters into a separate engagement letter with the referred client?

6. Does a retired lawyer's receipt of a legal fee for previously referred cases affect the retired lawyer's insurance coverage?

OPINION:

7. Rule 1.5(g) of the N.Y. Rules of Professional Conduct ("Rules") says:

> (g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:
>
> > (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;
> >
> > (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
> >
> > (3) the total fee is not excessive.

8. In N.Y. State 1201 (2020), we considered issues similar to those in this inquiry. There, the inquirer had received a referral in a contingency-fee matter from a lawyer with whom the inquirer had agreed to share in any legal fee but who later retired under the OCA rules. Those rules provide that a "retired" lawyer may not receive compensation for legal services rendered while retired. 22 N.Y.C.R.R. § 118.1(g); see N.Y. State 1201 ¶ 5. The issues we addressed, among others, were whether paying the referral fee was an impermissible fee-sharing arrangement under Rule 5.4(a), which forbids sharing legal fees with non-lawyers, or under the above-quoted Rule 1.5(g), which regulates fee-sharing between unassociated lawyers. N.Y. State 1201 ¶ 8.

9. In that opinion, we concluded that Rule 5.4(a) was "inapposite" because an OCA-retired lawyer is still a lawyer; only the courts may strip of a person of a law license. Id. ¶ 17. An individual's status with the OCA does not alone affect the person's membership in the bar, and expressly allows a retired lawyer to perform legal services for no compensation. Thus, no issue arises about sharing fees with a non-lawyer. As for Rule 1.5(g), we decided that the retired recipient of the referral fee must continue to bear "joint responsibility" for the matter, and modified prior opinions suggesting that an OCA-retired lawyer could not discharge that responsibility. Id. ¶¶ 12, 18. We adhere to these views.

10. Accordingly, the answer to this inquiry's first question – whether the inquirer may end "joint responsibility" for the referred matters upon retirement – is no, at least as long as the inquirer wishes to share in the legal fees that the referred cases may generate. In N.Y. State 1201, drawing on lessons from N.Y. State 961 (2013), we likened the assumption of "joint responsibility" to the duties of a supervisory lawyer under Rule 5.1. "As a member of the bar, for example, such a [retired] lawyer could remain available for consultation, could oversee case developments to assure compliance with the Rules, and would remain jointly responsible to the client for the matter, with continued exposure to any financial and ethical repercussions." N,Y, State 1201 ¶ 18.

11. The answer to the inquirer's second question – whether successor counsel's engagement letters with the referred clients ousts the duty of "joint responsibility" – is likewise no. Rule 1.5(g) proscribes sharing a fee with an unassociated lawyer unless the division is in proportion to the services each provides (not applicable here) or the unassociated lawyer assumes "joint responsibility" for the matter. That successor counsel may also bear responsibility for the matter does not allow for fee-sharing with an unassociated lawyer unless the latter remains jointly responsible. Indeed, Rule 1.5(g) requires that the client consent to the division of fees in a writing that discloses both the referring law-

yer's joint responsibility and anticipated share of the fee. This language would be meaningless if successor counsel's engagement letter eviscerated the referring lawyer's continuing duty to the client.

12. Finally, the inquirer's third inquiry – about the impact of receiving a referral fee on the inquirer's insurance coverage – is outside our jurisdiction. Nothing in the Rules addresses this issue. As we have said, both its own rules and our opinions allow an OCA-retired lawyer to continue to perform legal services. Nevertheless, insurance coverage is a contract issue and thus a question of law, on which we do not opine.

CONCLUSION:

13. If a retired lawyer wishes to receive a referral fee on matters now handled by successor counsel, the retired lawyer must continue to bear "joint responsibility" for the matters of which clients are informed and to which they consent.

(11-22)

OPINION 1245 (11/16/2022)

TOPIC: Legal Fees, Minimum Fees, Nonrefundable Fees

DIGEST: A lawyer may charge a minimum fee to provide a defined legal service provided (a) the service is performed as agreed; (b) the engagement letter provides in plain language how the minimum fee will be calculated and the circumstances under which it will be "incurred"; and (c) the minimum fee is reasonable and not excessive and was therefore fully "earned."

RULES: 1.5; 1.5(a); 1.5(a)(1)-(8); 1.5(d)(4); 1.16(e)

FACTS:

1. The inquirer proposes to include language in an engagement letter that will fix a "minimum fee" for drafting and finalizing a separation and severance agreement between the inquirer's client and the client's employer. That minimum fee equates to a fixed number of hours of the inquirer's time at a stated hourly rate, and the client would agree to pay for any additional time required to complete the matter at that same rate. The engagement letter will also expressly advise the client that the minimum fee shall be due and owing even if the inquirer expends fewer hours than the fixed number of hours covered by the letter.

QUESTION:

2. Does the financial obligation imposed by the inquirer upon the client in the engagement letter constitute a prohibited "nonrefundable fee?"

OPINIONS:

3. Rule 1.5(d)(4) of the New York Rules of Professional Conduct (the "Rules") sets forth a requirement of full transparency as to what the lawyer must do or accomplish in order to earn a minimum fee, as well as the ultimate reasonableness of the amount of the minimum fee, as two touchstones for ethical propriety. In pertinent part, Rule 1.5(d)(4) thus provides:

> A lawyer shall not enter into an arrangement for, charge or collect
>
> * * *
>
> (4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clauses if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated;

4. As with all legal fees, a minimum fee, and an agreement to pay a minimum fee, is subject to Rule 1.5(a) which provides that "A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense." See also Rule 1.5 Cmt. [4] ("A lawyer may charge a minimum fee, if that fee is not excessive, and if the wording of the minimum fee clause of the retainer agreement meets the requirements of paragraph (d)(4).").

5. To determine whether a fee, including a minimum fee, is reasonable or excessive, Rule 1.5(a) sets forth a list of eight nonexclusive factors:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
>
> (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

6. In N.Y. State 1202 (2020), we examined several proposed fee agreements, all involving flat or fixed fees. We concluded that "a lawyer may charge a non-excessive minimum fee . . . [but] may not charge a non-refundable fee." N.Y. State 1202 ¶ 12. Other opinions that have discussed nonrefundable fees include N.Y. State 599 (1989) (non-excessive minimum fee agreements are permissible, but ultimately subject to the attorney's obligation under ethics rules to return unearned fees); N.Y. City 2015-2 (nonrefundable flat monthly fees may be permitted if they are not excessive, are fully earned and do not impede a client from terminating the representation); and N.Y. City 1991-3 at II (a minimum fee can satisfy the requirement of reasonableness).

7. Here, the proposed retainer letter is not a general retainer in which a client agrees to pay an attorney an agreed sum for that lawyer to be available for an agreed period and where that agreed sum is earned upon receipt. See N.Y. State 816 ¶ 3. Rather, there is a specific legal service to be provided by the attorney which is at the heart of the engagement with the client. It is in this specific context that the reasonableness of the minimum fee under the criteria of Rule 1.5(a) must be considered. For example, was the inquirer required by the client to act expeditiously and, as a result, was she precluded for a time from providing legal services to other clients? Does the inquirer possess the requisite ability, experience and skill for negotiating and drafting employment-related documents? How many hours would such an attorney have anticipated expending on this matter in relation to the minimum number of hours that were incorporated into the engagement letter? Were there particular facts and circumstances known to the inquirer that suggested the existence of novelties or complexities that would complicate and extend the resolution of the agreement? Was the hourly rate used to calculate the minimum fee consistent with hourly rates in the legal community for the same or similar legal services? Did the inquirer obtain a good result for her client?

8. Against this background, the committee does not have sufficient facts to determine whether the inquirer's proposed minimum fee satisfies the requirements of Rule 1.5(d)(4) and is not, therefore, a prohibited nonrefundable fee.

9. The committee also does not address what additional considerations may come into play when an attorney is discharged or withdraws, with or without cause, before completing the legal service that was the subject of the minimum fee retainer letter. These events implicate highly fact-sensitive issues of law on which the committee has no jurisdiction to opine. We note, however, that consistent with the principle that a minimum fee must be reasonable and not excessive, Rule 1.16(e) requires a refund, upon withdrawal, of that portion of a fee that has not been earned:

> Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall . . . promptly refund[] any part of a fee paid in advance that has not been *earned*. . . .

CONCLUSION:

10. A lawyer may charge a minimum fee to provide a defined legal service provided (a) the service is performed as agreed; (b) the engagement letter provides in plain language how the minimum fee will be calculated and the circumstances under which it will be "incurred"; and (c) the minimum fee is reasonable and not excessive and was therefore fully "earned."

(23-21)

OPINION 1246 (11/16/2022)

TOPIC: Partnership with Non-U.S. Lawyer; partner who is also a member of a firm with non-lawyer ownership or management; whether business management and strategy may be the practice of law; affiliation of law firms; co-naming of law firms; billing for services of another law firm.

DIGEST: Rule 7.5(d) recognizes a partnership between a lawyer licensed in New York and one admitted in a non-U.S. jurisdiction under certain circumstances. "Administrative duties" in law firm management may involve the practice of law, depending on the circumstances. The sole fact that an English solicitor is a member of a U.K. ABS does not make it unethical for a New York lawyer to partner with that solicitor. "Co-branding" between law firms must avoid misleading the public as to the true relationship between the firms. Where two law firms provide services to the same client, one firm may charge the fees and expenses of the other firm as a disbursement and then pay the other firm what it is owed if the fees and expenses otherwise comply with the Rules.

RULES: 1.5(g), 1.10(a), 5.4(b), 5.4(d), 5.5, 5.5(b), 7.2(a), 7.5(d), 8.5.

FACTS:

1. The inquirer, a New York lawyer, proposes to become a partner in a New York law firm ("Firm XYZ") that is formed as a Delaware limited liability partnership and is expected to be registered in New York as a foreign limited liability partnership. Firm XYZ will have a majority partner ("S" or "Solicitor") who is a solicitor in England and Wales but not admitted in New York. S is based in, and practices law solely from, the United Kingdom ("U.K."). S's role in Firm XYZ would involve matters of strategy, business and general management, but the inquirer represents that S will not practice English or any other law from Firm XYZ.

2. S is also the managing partner of, and has a controlling interest in, a law firm in the U.K. that is in the form of an "Alternative Business Structure" ("ABS") i.e., which has, or is permitted to have, non-lawyer ownership/control. The firm we'll call "Firm ABS" is expected to have seven or eight partners or members, of which six will be solicitors in the U.K. and one or two will be corporations with non-lawyer ownership. At least one corporate member will have an equity stake in Firm ABS and will have certain veto rights, although it will have no active involvement or control rights in respect of the operation and management of Firm ABS. The inquirer is not admitted in England, will not be a member of Firm ABS, and will practice solely in New York for clients of Firm XYZ.

3. The inquirer states that Firm XYZ and Firm ABS would be separate, independent and distinct legal entities. They would have no parent/subsidiary relationship, although S would have an ownership interest in each. They would not share partnership profits, although the inquirer states that compensation of lawyer members or partners across the two firms might consider, among other factors, the aggregate profits of the two law firms. In addition, the inquirer states that Firm XYZ and Firm ABS may share legal fees, proportionally and in compliance with the Rules. For example, when the law firms represent a client together on the same matter, the combined fees may be presented on a single invoice to the client (after disclosure and client consent), with the law firm receiving the combined fees in the first instance and providing a subsequent payment of the other law firm's share of those fees. Finally, the law firms would be "co-branded".

QUESTIONS:

4. May a New York lawyer become a partner of a New York law firm which has a partner who is an English lawyer not admitted in New York?

5. Does it matter that the English lawyer purports not to practice law with the New York firm?

6. Does it matter if the English lawyer is also a partner of a U.K. law firm that is an "Alternative Business Structure," i.e. has, or is permitted to have, non-lawyer ownership?

7. May Firm XYZ be affiliated with Firm ABS via common ownership by S?

8. May Firm XYZ and Firm ABS be otherwise "affiliated"?

9. May Firm XYZ and Firm ABS be co-branded?

10. May the Firms share legal fees from a common client and may the total fee be billed initially by Firm ABS?

OPINION:

11. The jurisdiction of this Committee is primarily to give opinions interpreting the New York Rules of Professional Conduct. This inquiry implicates several New York laws, including Section 121-1500 of the New York Partnership Law, which are not considered here.

Partnership with a Solicitor Admitted in the U.K.

12. The New York Rules of Professional Conduct (the "Rules") prohibit partnerships between lawyers and non-lawyers if any of the activities of the partnership consist of the practice of law. See Rule 5.4(b). We have often noted that this provision, which seems to disallow a partnership with any lawyer not admitted in New York, is not that restrictive. As we explained in N.Y. State 1072 (2015), Rule 5.4(d) is tempered by Rule 7.5(d):

> Rule 7.5(d) . . . recognizes partnerships "between or among lawyers licensed in different jurisdictions." *See* N.Y. State 658 (1993); *see also* N.Y. State 542 (1982). We also previously have noted that the reference in Rule 7.5(d) to "lawyers licensed in foreign jurisdictions" includes lawyers licensed in foreign countries. *See* N.Y. State 542.

13. As we pointed out in N.Y. State 1072, it is not sufficient that the foreign lawyer is licensed as a lawyer in another country. The New York firm must also inquire into two other factors:

> (i) whether the foreign country's educational requirements for admission are generally similar to those for New York attorneys and (ii) whether the standards of professional conduct and discipline governing the foreign attorney are essentially compatible with New York's standards. See N.Y. State 542 (1982); N.Y. State 658 (1993).

14. In N.Y. State 542, we concluded that lawyers admitted only in the United Kingdom met this requirement:

> The general similarity of our educational requirements for admission to practice, as well as the essential compatibility of our standards of professional conduct and discipline, have inevitably led us to consider such persons beyond the traditional proscription against lay partnerships.

15. If the names of the partners of Firm XYZ are listed on the letterhead of the firm, the letterhead must indicate that S is admitted only in England and Wales (or not admitted to practice in New York)

Does it Matter that the U.K. Solicitor Purports Not to Practice Law with Firm XYZ?

16. The inquiry states that S is based in, and practices law solely from, the U.K. S's role in Firm XYZ would involve matters of strategy, business and general management. Inquirer represents that S will not practice English or any other law from Firm XYZ. We addressed similar facts in N.Y. State 1093 (2016). That opinion involved a New York lawyer who practiced principally with a U.K. ABS that had non-lawyer partners. The lawyer also wanted to become a partner of a New York law firm. In that opinion, we said the answer depended on the application of Rule 8.5 – the choice of law rule – which, in turn, depended on the jurisdiction in which the lawyer "principally practiced". As here, we were told that the lawyer would not practice any type of law in New York, but would merely provide management and administrative activities. We noted that what constitutes the practice of law is a question of law that is beyond the jurisdiction of our Committee. See Judiciary Law § 478 (practicing or appearing as attorney-at-law without being admitted and registered), Rule 5.5, Cmt. [2] ("The definition of the "practice of law" is established by law and varies from one jurisdiction to another.") However, we noted that the determination of what constitutes the practice of law depends greatly on the facts:

> While some law firms hire managers who are non-lawyers and whose role is limited to purely administrative matters, many other law firms employ full-time managing partners who are lawyers admitted to practice in New York. Although some of these managing partners do not represent any clients, they may play active roles in determining which clients their firms should represent, including assessing whether representation would involve conflicts of interest and evaluating the merits of cases, and they may actively oversee the conduct of matters being handled by the firm to ensure that the firm complies with law and professional standards. We therefore cannot rule out the possibility that a New York lawyer managing a New York law firm will be exercising legal judgment. This is one plausible reason that the New York firm would make the person handling management and administrative activities a partner rather than an employee.

Does it Matter that the Solicitor is also a Partner in a U.K. ABS?

17. The New York Rules preclude a New York lawyer from practicing law in any capacity with an entity authorized to practice law if a nonlawyer (a) is a partner, (b) owns an interest in the entity, (c) is a member, director or officer or has a position of similar responsibility, or (d) has the right to direct or

control the professional judgment of a lawyer. Rule 5.4(b) & (d). The New York Rules also preclude a New York lawyer from sharing legal fees with a non-lawyer or from forming a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law. Rule 5.4(a) & (b). Those principles normally prohibit a New York lawyer from becoming a partner in a firm with non-lawyer owners or supervisors.

18. In two prior opinions, this Committee considered whether Rule 5.4 prohibited a New York lawyer from being a partner or associate of a U.K. firm formed as an Alternative Business Structure. See N.Y. State 1093 (2016) (a New York lawyer who is also admitted in a foreign jurisdiction and is practicing with non-lawyer partners in that jurisdiction may also practice in a separate New York law firm without violating the New York Rules of Professional Conduct as long as the lawyer (i) principally practices in the foreign jurisdiction or (ii) the predominant effect of the lawyer's practice with the foreign firm is in the foreign jurisdiction and (iii) the New York firm includes representations by the UK firm in its conflict of interest system); N.Y. State 1041 (2014). See also N.Y. State 1038 (New York lawyer with New York-based practice may not partner with nonlawyer or practice in law firm owned by parent firm that has nonlawyer partner.)

19. This inquiry does not involve a New York lawyer practicing principally outside the U.S. The inquirer would not be a partner, associate or other employee of a U.K. ABS. The U.K. ABS would have no ownership in Firm XYZ or any right to control S's independent professional judgment or role in Firm XYZ. Under Rule 8.5, concerning disciplinary authority, the Rules apply to a foreign lawyer only if the lawyer is admitted here or appears in court here. We therefore see no basis for finding a violation of Rule 5.4 by the New York lawyers in Firm XYZ based solely on the fact that S would be a partner of both firms. Nevertheless, as noted in paragraph 24 below, the conflict of interest considerations discussed in N.Y. State 1093 would apply.

May Firm XYZ and Firm ABS be otherwise "affiliated"?

20. The inquiry does not specify how the firms would be "affiliated," other than through the fact that S is a member of and possesses a majority interest in each. Consequently, we do not have sufficient facts to answer the question. We have previously issued opinions on referral relationships, including firms that wanted to be "associated" or "correspondents", see, e.g., N.Y. State 806 (2007), N.Y. State 538 (1981), stressing that the propriety of the proposals was dependent on the facts.

21. We advised in N.Y. State 538 that the inquirer should consider (and we believe the present inquirer should consider) several factors, including Judiciary Law § 479 (making it unlawful for any person to solicit legal business on behalf of a New York attorney) and the predecessor provision to Rule 7.2(a) (which prohibits a lawyer from compensating or giving anything of value to a person or organization to obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, with certain exceptions not applicable here.)

22. In addition, we cautioned that fees should be divided only in accordance with the predecessor to Rule 1.5(g), which currently provides:

> A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

> (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
>
> (3) the total fee is not excessive.

23. In this case, the inquirer represents that legal fees will be shared "proportionally," which we assume means in proportion to the services provided by each firm.

24. Finally, because S will be a member of both Firm XYZ and Firm ABS, the two firms must comply with the conflict provisions of Rule 1.10(a). See N.Y. State 1093, N.Y. State 876 (2011) (Where a lawyer is "associated" with more than one law firm within the meaning of the imputation rule, all of the law firms with whom the lawyer is associated are treated as one law firm for purposes of conflicts of interest.)

May Firm XYZ and Firm ABS be co-branded?

25. The inquiry does not give us any information about what being "co-branded" would entail. We assume that co-branding means that the firms would have similar names.

26. Before June 2020, Rule 7.5 prohibited a lawyer in private practice from practicing under a trade name, or a firm name containing names other than one or more of the lawyers in the firm, with certain exceptions not relevant here. Then, however, the Rules were changed to allow a firm to use any name that is not false, deceptive or misleading, including one that is misleading as to the lawyers practicing under such name:

> (b) (1) A lawyer in private practice shall not practice under:
>
> (i) a false, deceptive or misleading a trade name;
>
> (ii) a false, deceptive, or misleading domain name; or
>
> (iii) a name that is misleading as to the identity of the lawyer or lawyers practicing under such name.

27. As we noted in N.Y. State 1207 (2020), this allows a name that does not include the name of any lawyer in the firm, and a name based on its street address. Comments [3], [4] and [5] to Rule 7.5 give examples of deceptive and misleading firm names. However, as we noted in N.Y. State 1207, whether a particular name is false, deceptive or misleading is a heavily fact-based inquiry and beyond the jurisdiction of our Committee.

28. The concern with co-branding two completely separate firms is the possibility that it will mislead the public as to the nature of the relationship between the firms and may indicate that the firms

are branches of a single firm. Cf. Rule 7.5(d), which allows partnerships between lawyers licensed in different jurisdictions, as long as any enumeration of the members and associates of the firm make clear the jurisdictional limitations of those lawyers not licensed to practice in all listed jurisdictions, and allowing the same firm name to be used in each jurisdiction.

29. In N.Y. State 1093 (2016), which involved a New York law firm and a U.K. ABS with a common partner, we assumed that the New York firm would not be managed in such a way that it operated as a branch of the U.K. ABS. See also N.Y. State 911 (2012) (a foreign law firm with non-lawyer members or managers may not have a branch in New York). We also stated that a profit-sharing arrangement (which we are told is not present here) would implicate the same concerns.

30. The inquirer states that, although the firms would not share profits, the compensation of partners across the two firms may consider, among other factors, the aggregate profits of the two firms. We believe this would be an indicator that the firms are being managed as a single firm.

31. We believe that a co-branding arrangement could also raise concerns that Firm XYZ is a branch of the U.K. ABS, without disclosure of the exact nature of the relationship between the two firms.

Joint Billing

32. The inquiry states that, when the two law firms represent a client together on the same matter, the combined fees may be presented on a single invoice to the client (after disclosure and client consent), with the law firm receiving the combined fees in the first instance and providing a subsequent payment of the other law firm's share of those fees. We assume that both firms are proving legal services, and that one firm is not entitled solely to a referral fee (i.e. dividing a single legal fee).

33. In N.Y. State 1211 (2020), we considered how counsel in one matter may charge the client for the fees and disbursements of another lawyer who performs related legal services for the client. We noted that Rule 1.5(b) requires that the New York lawyer communicate with the client "the scope of the representation and the basis or rate of the fee or expenses for which the client will be responsible." We also advised that there are two caveats when two firms supply services in the same matter. First, the fees of both firms must be reasonably incurred to achieve the objectives of the representations. Second, charging the legal fees and disbursements of the second firm as disbursements of the first firm must not violate the prohibition of Rule 1.5 against charging an "excessive" fee or expense. However, we concluded that how the client would actually be billed was a matter of contract law with the client, citing ABA 00-420 ("Whether the cost attributable to a contract lawyer is billed as an expense or included in legal service fees is not addressed by the Model Rules and does not seem to be a matter of ethics.") Here, although each firm would be calculating its own fees and expenses, the retainer agreement of one of the law firms may provide that such firm will charge the fees and expenses of the other firm as long as the fees of both firms were reasonably incurred to achieve the objectives of the representations, the total fees and expenses of the two firms are not excessive and the work performed by each firm is made clear to the client.

CONCLUSION:

34. Rule 7.5(d) recognizes partnerships between a lawyer licensed in New York and one admitted in a foreign jurisdiction, as long as the foreign country's educational requirements for admission are generally similar to those for New York attorneys and the standards of professional conduct and discipline governing the foreign attorney are essentially compatible with New York's standards.

35. Although the role of English lawyer here would involve matters of strategy, business and general management, and the inquirer states that the English lawyer will not practice law from the New York firm, we cannot rule out that administrative duties will involve the practice of law. For example, if the foreign lawyer plays an active role in determining which clients the New York firm should represent, including assessing whether representation would involve conflicts of interest and evaluating the merits of cases, or actively oversees the conduct of matters being handled by the firm, the foreign lawyer might be deemed to be exercising legal judgment and thus practicing New York law without a license.

36. No New York-admitted lawyer would be a member or employee of the U.K. ABS. The U.K. ABS would have no ownership in Firm XYZ or any right to control S's independent professional judgment or role in Firm XYZ. We therefore see no basis for finding a violation of Rule 5.4 based solely on the fact that S would be a partner of both firms.

37. We cannot opine as to affiliations between law firms without sufficient facts, but our prior opinions address referral relationships, and the problems of describing relationships between firms without being deceptive or misleading.

38. The issue with co-branding two completely separate firms is the possibility that it will mislead the public as to the nature of the relationship between the firms and may indicate that the firms are branches of a single firm.

39. Where two law firms provide services to the client on the same or ancillary matters, it is permissible for the retainer agreements to provide that one of the firms will charge the fees and expenses of the other firm as a disbursements on its own invoice and then pay the other firm what it is owed, as long as the fees of both firms were reasonably incurred to achieve the objectives of the representations and the total fees and expenses of the two firms are not excessive.

(10-22)

OPINION 1247 (11/21/2022)

TOPIC: Conflict of interest in representing county and serving subpoenas on county departments.

DIGEST: A lawyer who represents certain separate County Departments in diverse matters as an independent contractor for the County Attorney may request and serve subpoenas for documents and witnesses upon a County Department for which he does not perform legal services and which is not represented by the County Attorney without obtaining client consent, as each department is considered separate for purposes of analysis under Rule 1.7 (a)(1).

RULES: 1.7 (a)(1)

FACTS:

1. The inquirer works part time as an independent contractor for a County Attorney while maintaining a private practice. In his contract work, the inquirer represents the County's Department of Mental Health, seeking treatment over objection orders, the County's Department of Health, enforcing fines for violations of the County's Sanitary Code, and the County Sewer District, collecting unpaid sewer taxes. His duties do not extend to providing legal advice to County management or personnel. The inquirer determines his own legal strategy for each of his contract matters and his day-to-day work is not supervised by the County Attorney's office.

2. In private practice the inquirer accepts assignments representing indigent individuals in child custody proceedings in Family Court. In those cases, it is occasionally required that the inquirer request that the Family Court issue subpoenas for records and witnesses from the County's Department of Social Services (DSS) and Child Protective Services (CPS), which is an arm of DSS.

3. The County Attorney does not represent DSS or CPS. DSS has its own attorneys, including a director of legal services, all of whom are appointed under Section 66 of the New York State Social Services Law. While that section provides that DSS attorneys may be deputized by the County Attorney, this has not occurred in the county where the inquirer is employed and practices. The duties and responsibilities of the DSS legal unit are independent of the County Attorney's duties and responsibilities, and DSS attorneys, not the County Attorney, would represent DSS employees who may occasionally be subpoenaed by the inquirer should representation become necessary.

QUESTION:

4. Do the inquirer's requests to the Family Court to issue subpoenas to the County Department of Social Services present a conflict-of-interest?

OPINION:

5. Questions regarding conflicts of interest between part-time government lawyers and the interests they represent in their private practice have regularly come before this Committee, particularly when the lawyer is a part-time prosecutor. N.Y. State 1065 (2015) provides a thorough analysis of the conditions the Committee has set on part-time prosecutors' private practice. Issues have also arisen in cases where the part-time government lawyer practices civil law for the municipality. In those cases,

the Committee has carefully reviewed the interests the lawyer represents in the lawyer's government service to ensure that the interests represented in the private practice do not conflict. Thus, in N.Y. State 1074 (2015), the inquirer was employed part-time by a county's Department of Social Services handling a wide variety of matters including paternity and child-support matters, liens, guardianships, and occasionally child abuse and neglect cases. The question was whether the lawyer could participate in his private practice in the County's Assigned Counsel Program by representing indigent individuals in Criminal and Family Court proceedings-but not child abuse and neglect matters. The Committee said that the lawyer could accept assignments in Criminal and Family Court matters, "provided that the Department or others in law enforcement with whom the lawyer works are not materially involved." The Committee went on to say that the lawyer could not accept assigned clients "in matters within the Department's jurisdiction" or in matters where the lawyer would "be required to cross-examine law enforcement officials with whom the lawyer is now engaged as a part time lawyer at the Department of Social Services or has recently done so."

6. Here, the inquirer's work for the County is limited to (a) representing the County's Health Department enforcing fines imposed for violations of the County Sanitary Code; (b) representing the County Sewer District in collecting district-imposed sewer taxes, and (c) representing the County's Department of Mental Health in proceedings under the Mental Hygiene Law for court-ordered mental health treatment. In private practice, the inquirer declines representation in any Family Court matters in which the County is a party.

7. This Committee has opined, "When a governmental body is organized into a number of separate departments or agencies, such department or agency, and not the parent governmental unit, should be treated as the client for purposes of the rule which forbids the concurrent representation of one client against another." N. Y. State 447 (1976.)

8. The inquirer has asked if requesting and serving subpoenas for documents and witnesses from one department of County government – the Department of Social Services – gives rise to a conflict of interest with inquirer's representation of other County departments, the Departments of Health and Mental Health, and the County Sewer District. However, since the inquirer does not represent DSS, this does not present a situation where the inquirer would be requesting documents and witnesses from a Department or from County employees for whom the inquirer provides legal services. Therefore, Rule 1.7(a)(1) is not implicated.

9. Moreover, even if the inquirer did represent DSS, it is not clear that he would be prohibited from seeking information pursuant to subpoena from that Department under Rule 1.7(a)(1). Although we need not reach that issue on the facts presented, we recognize that subpoenaing documents or witnesses from a current client in a matter unrelated to the lawyer's current representation of that client can raise conflict issues. For example, N.Y. City 2017-6 (2017) dealt with the question of whether a conflict can arise should one lawyer be called upon to request discovery on behalf one client from a current client in an unrelated matter and determined that, "Issuing a subpoena to a current client to obtain testimony from that client will ordinarily give rise to a conflict of interest . . . But that said, the Committee can envision exceptional situations where subpoenaing a witness will not be directly averse to the witness." The American Bar Association has similarly opined in Formal Opinion 92-367 (1992), that, "A lawyer who in the course of representing a client examines another client as an adverse witness in a matter unrelated to the lawyer's representation of the other client or conducts

third party discovery of the client in such a matter, will likely face a conflict that is disqualifying in the absence of appropriate client consent."

10. Here, however, the subject matters that are involved in the inquirer's representations are singularly disparate: on the one hand, treatment over objection orders under the Mental Hygiene law, the collection of sewer taxes, and the enforcement of fines for the Department of Health; and on the other hand, child custody matters. The Departments themselves and their employees appear sufficiently distinct that they would be different clients for purposes of the Rule 1.7(a)(1) analysis, and the inquirer, therefore, would not be representing differing interests.

CONCLUSION:

11. A lawyer who represents certain separate County Departments in diverse matters as an independent contractor for the County Attorney may request and serve subpoenas for documents and witnesses upon a County Department for which he does not perform legal services and which is not represented by the County Attorney without obtaining client consent, as each Department is considered separate for purposes of analysis under Rule 1.7 (a)(1).

(07-22)

OPINION 1248 (11/23/2022)

TOPIC: Dispute over credit card payment for legal services

DIGEST: If a client disputes a credit card payment of legal fees by requesting a chargeback, the lawyer may dispute the chargeback by providing information to the credit card provider about the services rendered, including the disclosure of the retainer agreement and client invoices if (a) the information is not confidential; (b) the client gives informed consent to disclose the confidential information, or (c) absent consent, the lawyer reasonably believes that the disclosure of confidential information is necessary to establish or collect the lawyer's lawfully earned fee. Such disclosures should be limited or redacted to reveal only what is objectively reasonable to rebut the chargeback request and prove the lawyer's entitlement to his fee. Participation in the resolution of the chargeback dispute initiated by the client does not relieve the lawyer of his obligations pursuant to the New York State Fee Dispute Resolution Program.

RULES: 1.6

FACTS:

1. The inquirer receives credit card payments from clients for services rendered. When clients who make credit card payments later dispute the lawyer's services by seeking a "chargeback," the credit card provider allows the lawyer an opportunity to dispute the chargeback by providing information about the services rendered.

QUESTION:

2. In a dispute with a client who has requested a "chargeback" for credit card payments to the lawyer, may the lawyer provide information, such as the retainer agreement and invoices, to the credit card provider to establish the lawyer's entitlement to payment for the lawyer's legal services?

OPINION:

3. It has been recognized for nearly a half century that lawyers may accept credit card payments for legal services. In N.Y. State 362 (1974), we concluded: "The use of credit cards to pay for legal fees is an innovation which should not be discouraged where the participating lawyer complies with the appropriate safeguards . . . [because] it fills a need for a segment of the public that conceivably might not otherwise have access to legal services." Among the necessary safeguards are the protection of clients' confidential information.

4. After making a credit card payment, a client may assert that the lawyer did not render the services for which the client paid, or that the lawyer did not render the services competently and may request a "chargeback" from the credit card provider. In that event, the credit card provider may withhold or withdraw payment to the lawyer. However, the credit card provider may decline to charge back the disputed payment if the lawyer provides satisfactory information about the services rendered. The inquirer asks whether providing information such as the retainer agreement and invoices would violate the duty of confidentiality.

5. Rule 1.6(a)(1) establishes the basic duty of confidentiality. It provides, subject to exception:

> A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless . . . the client gives informed consent, as defined in Rule 1.0(j).

6. The list of exceptions to nondisclosure is set forth in Rule 1.6(b). One of these exceptions is that "A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to establish or collect a fee." *See* Rule 1.6(b)(5)(ii).

Would the disclosure of the retainer agreement or client invoices constitute disclosure of confidential information?

7. The first question we must address is whether a retainer agreement or client invoices are "confidential information" within the meaning of Rule 1.6(a). Our professional conduct rules define confidential information somewhat differently, and slightly more narrowly, than the rules of most other states. Rule 1.6(a) provides in pertinent part:

> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.

8. Under this definition, information about the fact and nature of the lawyer's representation, and the fact that services were rendered, may or may not be confidential, depending on the circumstances. Information in invoices about the general nature of services performed is not invariably either privileged, likely to be embarrassing or detrimental to the client if disclosed, or information that the client has requested be kept confidential. On the one hand, even the existence of a lawyer-client relationship is sometimes confidential information under Rule 1.6(a). See N.Y. State 1088 (2016) ("The client is more likely to find that disclosure of the fact of a current or prior representation by a lawyer is embarrassing or detrimental where the representation involves or involved criminal law, bankruptcy, debt collection or family law."). On the other hand, there may be contexts where the information to be provided to the credit card provider is not privileged, its disclosure would not embarrass or prejudice the client, and the client has not requested that it be kept confidential. Whether nonprivileged information about the general nature of the lawyer's services is confidential "will depend on the client and the specific facts and circumstances of the representation." Id.

If the retainer agreement and invoices are confidential information, has the attorney secured the client's informed consent to their disclosure?

9. If a lawyer determines that the retainer agreement and client invoices are confidential information, he may nonetheless disclose them with client consent pursuant to Rule 1.6(a)(1) in accordance with the definition of informed consent set forth in Rule 1.0(j), which provides:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make

> an informed decision, and after the lawyer has adequately explained to the person the material risks or the proposed course of conduct and reasonably available alternatives.

10. Rule 1.0(j) offers guidance on the content of disclosures the lawyer should make to obtain informed consent. Here, we will also offer guidance on the timing of those disclosures. A lawyer has two basic choices—at the time the dispute arises, or before the dispute arises. Thus, a lawyer may ask the client to give informed consent for the lawyer to disclose confidential information to the credit card provider at the time the dispute arises so that the credit card provider can address the dispute based on fuller information. To obtain informed consent at that juncture, the lawyer should explain the limited purpose of the disclosure to the client, along with the lawyer's assessments of any risk of further disclosure associated with providing the confidential information to the credit card provider. If appropriate, the lawyer might also describe any redactions the lawyer proposes to make to the retainer agreement and the invoices where the redacted information is not necessary or relevant to the resolution of the dispute. Alternatively, a lawyer may obtain the client's informed consent to disclose confidential information to a credit card company in the event of a requested charge back in advance of the dispute (e.g., in the retainer agreement), and the lawyer may rely on that advance consent unless and until the client withdraws that consent (which the client is free to do). Cf. N.Y. State 1061 (2015) ("If the client revokes consent, the revocation will prohibit the lawyer to make future reports of the client's payment status to the System but will not require the lawyer to remove any past reports to the System.").

If the retainer agreement and invoices are confidential information, and the attorney has not secured the client's informed consent to their disclosure, is disclosure "reasonably necessary to establish or collect a fee"?

11. If the client has not consented to allow the lawyer to disclose the retainer agreement, the lawyer's invoices, or other confidential information relevant to the dispute, the lawyer must determine whether an exception to the duty of confidentiality applies. As noted, one of those exceptions is Rule 1.6(b)(5)(ii), which will permit disclosure to the credit card company "to the extent that the lawyer reasonably believes necessary . . . to establish or collect a fee."

12. The fee collection exception will apply sometimes, but not always. For example, it will not apply if the lawyer can allay the client's concerns and persuade the client to withdraw the objection or resolve the dispute, thereby obviating the need to persuade the credit card company that the charge is legitimate. To that end, the lawyer may, where practicable, seek to resolve the dispute, based on full or partial payment, explaining to the client that if an agreed resolution is not reached, the lawyer will submit information about the representation to the credit card provider to the extent reasonably necessary to establish and collect the lawyer's fee. See Rule 1.6, cmt. [14] ("Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure."). Whether direct communication with the client for the purpose of compromising the fee or withdrawing the chargeback request is "practicable" will turn on many factors, including the availability of the client and the client's willingness to engage in a discussion, as well as the credit card company's deadline for the lawyer to respond to the chargeback request. The Rule 1.6(b)(5)(ii) exception will apply either if no resolution of the fee dispute is reached with the client or if the client does not withdraw the dispute. But even if the exception applies, the lawyer may submit to the credit card company only such information as the lawyer "reasonably believes necessary" to

dispute the chargeback and release the funds to pay the lawyer's legitimately earned fee in accordance with the fee agreement.

13. If the lawyer invokes the exception in Rule 1.6(b)(5)(ii) to provide documents such as a retainer agreement or invoices, the lawyer must first redact information that the lawyer does not reasonably believe necessary to establish or collect the lawyer's fee. See Rule 1.6, Cmt. [14] ("[A] disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose"); N.Y. State 1118 (2017) ("The inquirer may disclose confidential information reasonably necessary to collect a fee, but must take all reasonable measures, such as redaction . . . , to limit the disclosure of confidential information to information that is objectively reasonable to prove his entitlement to his fee.").

Does the chargeback review procedure relieve the attorney from compliance with the New York State Fee Dispute Resolution Program?

14. The New York State Fee Dispute Resolution Program (the "Program") "provides for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation." See 22 NYCRR Part 137.0. The Program applies to civil matters where the dispute involves an amount that is $1,000 or more but less than $50,000 (see 22 NYCRR § 137.1 (a) & (b)(2)) "whether or not the attorney has already received some or all of the fee in dispute." See 22 NYCRR § 137.2(a). Where, as here, "the attorney and client cannot agree as to the attorney's fee," the Program requires that the attorney forward by certified mail or personal service a "Notice of Client's Right to Arbitrate." See 22 NYCRR § 137.6(a). The Program has rules concerning the contents of that notice, additional arbitration procedures, and the conduct of the hearing. See generally 22 NYCRR §§ 137.6 & 137.7. The Program also provides the opportunity for judicial de novo review of an arbitration award. See 22 NYCRR §§ 137.8,

15. Although the inquirer may here dispute the chargeback request by providing information to the credit card provider in conformance with this opinion, the chargeback dispute process initiated by the client does not relieve the inquirer from his obligations under the Program. Notice of Client's Right to Arbitrate should, therefore, be provided to the client in accordance with the Program requirements contemporaneously with contesting the chargeback.

CONCLUSION:

14. If a client disputes a credit card payment of legal fees by requesting a chargeback, the lawyer may dispute the chargeback by providing information to the credit card provider about the services rendered. The disclosure may include the retainer agreement and invoices to the client if (a) the information is not confidential; or (b) if the information is confidential but (i) the client gives informed consent to disclose the confidential information, or (ii) the client does not give informed consent, but the lawyer reasonably believes that the disclosure of confidential information is necessary to establish or collect the lawyer's fee. Such disclosures should be limited or redacted to reveal only what is objectively reasonable to rebut the chargeback request and prove the lawyer's entitlement to his fee. Participation in the resolution of the chargeback dispute initiated by the client does not relieve the lawyer of his obligations pursuant to the New York State Fee Dispute Resolution Program.

(09-22)

2023

OPINION 1249 (01/05/2023)

TOPIC: Confidentiality; joint clients; return of clients' files when there has been joint representation

DIGEST: In a joint representation, there is a presumption that the lawyer will share confidential information received from each co-client with the other co-client, but that presumption does not extend to confidential information the lawyer received prior to the inception of the joint representation.

RULES: 1.6(a), 1.7, 1.9, 1.15(c)(4), 1.16(e)

FACTS:

1. The inquirer, a New York attorney, has represented the husband ("Husband") with respect to estate planning matters since 2006. In 2019, Husband asked inquirer to also represent his wife ("Wife"), with respect to estate planning matters and the inquirer prepared a new, joint engagement letter which Husband and Wife both signed. The 2019 engagement letter contains language which states that because the inquirer is representing both Husband and Wife, no communication that each has with the inquirer can be kept confidential from the other. Husband and Wife are now getting divorced, and Husband has instructed the inquirer not to render any more professional services on his behalf. He has also asked the inquirer to send him copies of all documents in his file, which would include Wife's communications with the inquirer and documents the inquirer received from Wife. Shortly after receiving Husband's communication, the inquirer received a request from Wife asking the inquirer to send her all documents in the file, which would include Husband's communications with the inquirer and documents received from Husband.

QUESTIONS:

2. Upon termination of a joint representation, may an attorney provide to each co-client copies of communications exchanged with, and documents received from, the other co-client?

3. Upon termination of a joint representation, may an attorney provide to a co-client copies of communications exchanged with the other co-client, and documents received from the other co-client, prior to the onset of the joint representation?

OPINION:

4. Rule 1.15(c)(4) of the New York Rules of Professional Conduct (Rules") provides that "a lawyer shall . . . promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive." Rule 1.16(e), which addresses termination of representation and the client's file, provides that "a lawyer shall take steps, to the extent reasonably practicable, to avoid fore-

seeable prejudice to the rights of the client, including . . . delivering to the client all papers and property to which the client is entitled."

5. We have previously held that determining whether a client is entitled to specific property is a question of law. N.Y. State 1070 (2015), citing N.Y. State 766 (2003). Although the committee's jurisdiction does not extend to questions of law, we have noted that the Court of Appeals held, in *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30, 34 (1997), that "upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding," a lawyer must "presumptively accord [the client] full access to the entire attorney's file on a represented matter with narrow exceptions." Under *Sage Realty*, those narrow exceptions require a "substantial showing . . . of good cause to refuse." Id. at 37. A possible basis for a "good cause" refusal to turn over documents in a client's file that the client would otherwise be entitled to receive is where a document constitutes confidential information of another person who has not consented to its release. See N.Y. State 970 (2013) (if an executor of a decedent's estate is legally entitled to the same access that the decedent had when alive, then the decedent's former attorney should ordinarily provide the executor access to all the decedent's files).

6. Rule 1.6 addresses an attorney's ethical obligation to protected confidential information and provides in pertinent part:

> (a) A lawyer shall not knowingly reveal confidential information as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
>
> (1) the client gives informed consent, as defined in Rule 1.0(j).

7. "Confidential Information" is defined in Rule 1.6 as consisting of:

> information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed or information that the client has requested be kept confidential.

8. "Informed Consent is defined in Rule 1.0(j) as denoting:

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

9. In N.Y. State 1070 (2015), we said, "[I]n a joint representation, there is a presumption that the lawyer will share material information disclosed by one co-client in the matter with the other co-clients." See also, Restatement Third, The Law Governing Lawyers § 60 cmt. l ("Sharing of information among the co-clients with respect to the matter involved in the representation is normal and typically expected."); N.Y. City 2017-7 (even in the absence of a conflict of interest that would require an attorney to obtain informed consent to represent joint clients, "the attorney must be satisfied that the clients understand that, at least to the extent relevant to the representation, information disclosed to the lawyer by one joint client may be shared with the other joint client").

10. In joint representations, a lawyer owes each client an equal duty of loyalty and an equal duty of communication. Comment [31] to Rule 1.7 highlights this principle by stating that "the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. . . . At the outset of the common representation and as part of the process of obtaining each client's informed consent, the lawyer should advise each client that information will be shared . . ." Comment [33] to Rule 1.7 similarly provides: "[E]ach client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client."

11. Accordingly, based on each client's consent to disclosure contained in the joint engagement letter, as well as the presumption that the lawyer will share confidential information with each co-client during a joint representation, Husband and Wife are each entitled to receive copies of the communications the other has exchanged with the inquirer, as well as documents the other has provided to the inquirer during the period of joint representation. See N.Y. State 761 (2003) (the attorney for co-clients must share all material information relating to the representation with the co-clients, unless the co-clients have consented to an alternative agreement).

12. However, we do not see any basis to conclude, on these facts, that Husband has given informed consent for the inquirer to disclose to Wife his communications with inquirer, or the documents he submitted to inquirer, prior to the inception of the joint representation. We are not told of any language in the joint engagement letter supporting that conclusion, and we do not believe that the presumption that co-clients in a joint representation have agreed to share confidential information with each other during the joint representation should be retroactively applied to incorporate separate and discrete confidential information obtained by the inquirer prior to the joint representation from one of the clients who was at that point not yet a co-client.

13. Our conclusion here conforms with our holding in N.Y. State 1070 (2015), where a joint client requested that the inquirer (Lawyer A) deliver the client file to successor counsel (Lawyer B) but not tell Lawyer A's other joint clients. We pointed out that there are exceptions to the presumption requiring disclosure of confidential information to joint clients, including where disclosure would violate an obligation to a third party or where the lawyer has promised confidentiality with respect to disclosure. We concluded that if Lawyer A were to comply with the client's request not to disclose delivery of the client file, he would breach a duty to the other joint clients to keep them informed of material developments, and that breach of the duty of communication would violate the Rules. In the instant matter, if the inquirer provides Wife with Husband's communications and with documents that Husband provided to inquirer prior to the inquirer's joint representation of Husband and Wife, the inquirer will similarly breach the duty of confidentiality owed to Husband.

CONCLUSION:

14. In a joint representation, there is a presumption that the lawyer will share confidential information received from each co-client with the other co-client, but that presumption does not extend to confidential information the lawyer received prior to the inception of the joint representation.

(21-22)

OPINION 1250 (01/06/2023)

TOPIC: Multi-jurisdictional practice; partnership with non-United States lawyers; imputation of conflicts

DIGEST: The New York Rules of Professional Conduct (the "Rules") govern the conduct of an attorney admitted to practice only in New York who partners with a non-United States law firm. Whether the Rules permit a New York lawyer to form a partnership with an Italian law firm depends on whether the New York lawyer, upon independent inquiry, is satisfied that the training and ethical standards applicable to the Italian lawyer are comparable to those of an American lawyer. Conflicts of interest arising under Rules 1.7, 1.8 or 1.9 are imputed vicariously between the New York admitted lawyer and the Italian law firm pursuant to Rule 1.10(a).

RULES: 1.10(a); 5.4(b); 8.5(a); 8.5(b)(2)(ii)

FACTS:

1. The inquirer is a solo practitioner admitted in New York and no other jurisdiction and has a physical office in New York only. While continuing to provide legal services as a solo practitioner, he would like to enter into a separate limited liability partnership for the practice of law with an Italian firm that practices law in Italy. None of the partners in the Italian firm are licensed to practice law in New York or in any other jurisdiction in the United States. The Italian firm will also continue to practice law in Italy in a separate entity (i.e., not in the LLP with the inquirer).

QUESTIONS:

2. Which jurisdiction's disciplinary rules apply to govern inquirer's proposal to enter into a partnership with an Italian law firm?

3. May a New York lawyer enter into a partnership with an Italian law firm?

4. Is the law firm created by the partnership between the New York lawyer and the Italian firm subject to New York's rules on conflicts of interest?

OPINION:

What Disciplinary Rules Apply?

5. The first question the committee must address is what rules apply to determine the ethical propriety of the inquirer's proposed conduct. Because he is admitted to practice in New York, the inquirer is always subject to the disciplinary authority of this State, regardless of where any alleged conduct may take place. See Rule 8.5(a). The inquirer is also not subject to the "predominant effect" principles of Rule 8.5(b)(2)(ii) that might subject the inquirer to the disciplinary authority of another jurisdiction, because the inquirer is not admitted in any other jurisdiction, and New York's version of Rule 8.5(b)(2)—unlike ABA Model Rule 8.5(b)(2)—applies only to lawyers who are admitted in more than one jurisdiction.

May a New York Lawyer Partner with a Lawyer Admitted to Practice in Italy?

6. Rule 5.4 proscribes a number of relationships between a lawyer and a non-lawyer. E.g., "a lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." Rule 5.4(b). Were "non-lawyer" construed to mean anyone not licensed to practice law in New York, the partnership contemplated by the inquirer and, doubtless hundreds if not thousands of other multi-jurisdictional firms, would be in violation of Rule 5.4(b) and other provisions of Rule 5.4, as well. See, e.g., N.Y. State 542 (1982). We have long expressed the view, however, and repeat it here today, that a New York-licensed lawyer may properly partner with a lawyer duly licensed in another jurisdiction provided that the New York lawyer, upon independent inquiry, is satisfied that the "training of and ethical standards applicable to the foreign lawyer are comparable to those of an American lawyer." N.Y. State 646 (1993). As we explained in N.Y. State 1072 (2015), which considered a proposed partnership between a New York firm and a Japanese benrishi, restricting partnerships to lawyers with comparable training and ethical standards will help to assure that a proposed multi-jurisdictional partnership "will not compromise the [New York] lawyer's ability to abide by the ethical standards of this State, including the standards governing attorney-client confidentiality."

Must the New York Attorney and the Italian Firm Clear Potential Conflicts of Interest?

7. Although the inquirer and the Italian firm have structured their relationship to limit their joint practice and will continue to separately practice law in separate entities in each location in addition to practicing in partnership with each other, the "firms must still comply with the conflict provisions of Rule 1.10(a), which will impute conflicts of each firm to the other[s]." Rule 1.10(a) provides:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

8. We described the effect of Rule 1.10(a) in N.Y. State 876 (2011):

> For decades, both this Committee and various New York courts have consistently stated that where a lawyer is "associated" with more than one law firm within the meaning of the imputation rule, all of the law firms with whom that lawyer is associated are treated as one law firm for purposes of conflicts of interest. Accordingly, under Rule 1.10(a), all conflicts in each firm are imputed to all lawyers in all of the firms associated with a common lawyer. [Citations omitted.]

9. Rule 1.10(e) requires a New York law firm to check all proposed engagements against current and previous engagements. As N.Y. State 876 indicates, when two firms share a common partner or other member, they are treated as one for conflicts purposes. Here, the New York lawyer is a common partner in his own firm and the Italian firm with whom he is forming an LLP. Consequently, in order to comply with Rule 1.10(e), the New York firm must include engagements of the Italian firm in his conflict checking system.

CONCLUSION:

10. The New York Rules of Professional Conduct govern the conduct of an attorney admitted to practice in New York only who partners with a non-United States law firm. Whether the Rules permit a New York lawyer to partner with an Italian law firm depends on whether the New York lawyer, upon independent inquiry, is satisfied that the training and ethical standards applicable to the Italian lawyer are comparable to those of an American lawyer. Conflicts of interest arising under Rules 1.7, 1.8 or 1.9 are imputed vicariously between the New York admitted lawyer and the Italian law firm pursuant to Rule 1.10(a).

(16-22)

OPINION 1251 (01/09/2023)

TOPIC: YouTube channel; general legal information; advertising

DIGEST: As a general proposition, creating videos for a YouTube channel to educate the public or legal profession about matters of general or specific interest is a permitted activity and does not necessarily constitute "advertising" as that term is defined in the Rules of Professional Conduct, but in some circumstances it might constitute advertising.

RULES:1.0(a), 7.1

FACTS:

1. The inquirer is an attorney admitted in New York and a non-U.S. jurisdiction who maintains a law office in New York. She would like to create a YouTube channel to offer content about "being a lawyer in the United States, work/life balance, tips for law students and general legal information for the public." The inquirer intends to use her full name on the channel, which she hopes to generate income through sponsorships and affiliate links.

QUESTION:

2. May an attorney create a revenue-producing YouTube channel, linked to the attorney's professional practice name, that provides general legal information to the public and the profession?

OPINION:

3. It is not unethical for a lawyer to write articles, give lectures, or write a blog about topics of general or specific interest, including the law. In fact, such activities are encouraged and protected, reflecting well on the legal profession and its members as examples of lawyers maintaining interest and involvement in their communities and seeking to contribute to the general well-being of the public. An attorney so inclined, however, must be mindful of Rule 7.1 of the New York Rules of Professional Conduct ("Rules") which would impose certain requirements if the content of the medium were deemed to constitute "advertising."

4. Advertising is defined by Rule 1.0(a) as:

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

Comment [7] to Rule 7.1, states in pertinent part:

> Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising. However, a newsletter, client alert, or blog that provides information or news primarily about the lawyer or

> law firm (for example, the lawyer or law firm's cases, personnel, clients or achievements) generally would be considered advertising.

5. In conformance with this standard, in N.Y. State 848 ¶ 19 (2010) we stated that whether a law firm's educational newsletter would constitute attorney advertising depended on "the content of the communication, the intent (purpose) of the communication, and the targeted audience of the communication."

6. Here, without more facts, the committee cannot determine whether the inquirer's YouTube videos would constitute advertising under this three-part standard (content, intent, and audience) and, accordingly, would be governed by Rule 7.1. To the extent that the YouTube videos provide general legal information for the public about "being a lawyer in the U.S." and "work-life balance," the videos would not constitute advertising. To the extent, however, that the YouTube videos include information and news about the lawyer and her law practice for the primary purpose of retention of the inquirer, they would constitute advertising.

7. If the content of the YouTube channel does not otherwise constitute advertising, publishing and linking the inquirer's name and contact information with the channel will not, in and of itself, push the content of the videos across the line into advertising. As provided in Comment [8] to Rule 7.1 in the context of certain law firm marketing and branding:

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

(Emphasis added.)

8. That the inquirer may receive income from her YouTube activities by way of sponsorship or advertising does not alter the analysis. There is nothing per se improper about a lawyer engaging in two separate income-generating businesses, only one of which is the practice of law. If the inquirer were to make referrals on her YouTube channel to other attorneys or professionals, however, which resulted in referral fees or other forms of compensation being paid to the inquirer, she might be subject to other rules, such as Rule 1.5(g) (governing a division of fees between lawyers in different firms). We do not address those other rules here.

9. Another concern would arise if the inquirer's YouTube channel has features similar to social media sites that, under certain conditions, allow third-party viewers to interact with the site by posting comments or questions. If that is the case, the inquirer must proceed carefully in responding to such viewers and must not provide individual legal advice or disclose confidential information, even if the initiating viewer may have done so. See N.Y. State 899 (2011) (a lawyer may not engage in solicitation on interactive social sites on the Internet but may respond with a private written proposal outside the site; and a lawyer may provide only general answers, not individual advice, in response to legal questions on the site).

10. Finally, if the inquirer's YouTube channel will be linked to her website or other forms of firm advertisements, it is worth considering whether it would be prudent to label the videos as "Attorney Advertising", as required by Rule 7.1(f), even if such disclaimers are not technically required. See N.Y. State 1039 ¶ 9 (2014) ("We do not opine on whether the [attorney advertising] label is actually required here, but we recognize that many lawyers take a conservative approach to whether educational material prepared for clients is an advertisement and thus should bear the label 'attorney advertisement' as required by Rule 7.1(f)").

CONCLUSION:

11. As a general proposition, creating videos for a YouTube channel to educate the public or legal profession about matters of general or specific interest is a permitted activity and does not necessarily constitute "advertising" as that term is defined in the Rules of Professional Conduct, but in some circumstances, it might constitute advertising.

(14-22)

OPINION 1252 (01/11/2023)

TOPIC: Referral Fees

DIGEST: A licensed attorney who only provides nonlegal services to real estate clients may receive referral fees from a third-party investment advisor.

RULES: 1.7, 1.8, 5.7

FACTS:

1. The inquirer is a member of the New York State bar but does not engage in the practice of law. Instead, the inquirer works as a real estate broker.

2. A financial advisor has approached the inquirer and offered to pay referral fees to the inquirer for any clients that the inquirer refers to the advisor.

QUESTION:

3. May the inquirer accept referral fees from the investment advisor?

OPINION:

4. At bottom, the inquiring lawyer asks whether the vast number of opinions this Committee has issued concerning the permissibility of referral fees apply to her because the inquirer does not engage in the practice of law but instead works as a real estate broker. In general, those decisions have found the receipt of referral fees from third party service providers to be permissible only where the personal conflict of interest for the lawyer receiving such fees can be overcome through disclosure to the client and obtaining the client's consent. See N.Y. State 1086 (2016) (collecting opinions). We have often found that the conflict is "so great that disclosure to and consent from the client will not cure the conflict." See id. However, our starting point here is whether the New York Rule of Professional Conduct (the "Rules") apply to the inquirer with respect to the receipt of referral fees.

5. A lawyer's provision of nonlegal services to clients is addressed in Rule 5.7. Because the inquirer is not providing any legal services, thereby eliminating the need to differentiate between the provision of legal and nonlegal services, see Rule 5.7(a)(1) & (2), the only potentially applicable provision is Rule 5.7(a)(3) which provides that:

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

6. Although we do not think clients of a real estate broker would typically believe they are subject to a client-lawyer relationship, Rule 5.7(a)(4) provides that the lawyer must simply inform the client in writing that the services are not legal services, and that the protection of a client-lawyer

relationship does not exist with respect to the nonlegal services to eliminate any presumption that the services are legal in nature.

7. In that case, the lawyer is excused from complying with the Rules dependent upon the existence of a representation or a client-lawyer relationship, such as Rules 1.7 and 1.8 concerning conflicts of interest, although the lawyer is still subject to certain Rules that apply regardless of whether the lawyer is representing a client. See Rule 5.7, Cmt. [4] (Rules 1.9 (prohibiting misuse of confidences or secrets of former clients), 8.3 (requiring reporting of certain misconduct) and 8.4 (prohibiting lawyers from engaging in illegal, dishonest, fraudulent or deceptive conduct) apply to lawyers "irrespective of the existence of a representation"). Therefore, the inquiring lawyer may accept referral fees from a third party investment advisor.

CONCLUSION:

8. A lawyer who only provides nonlegal real estate broker services to clients may accept referral fees from a third party investment advisor.

(13-22)

OPINION 1253 (02/23/2023)

TOPIC: Conflicts of interest among family members

DIGEST: A lawyer who represents the Executor of an estate and simultaneously represents a beneficiary of the estate in an unrelated matter does not have a concurrent conflict of interest. "Differing interests" may arise where lawyer simultaneously represents both an estate's Executor/beneficiary and a co-beneficiary as co-defendants in civil litigation for damages and, if so, the lawyer may not continue the representation of both co-defendants unless the lawyer reasonably believes that she will be able to provide competent and diligent representation to each affected client and each affected client gives informed consent, confirmed in writing. If the Executor instructs the lawyer to file a cross-claim against the co-beneficiary in the civil litigation, then the conflict would become non-consentable.

RULES: 1.0(f) and 1.7(a)(1)-(2) & (b)(1), (b)(3) & (b)(4)

FACTS:

1. The inquiring lawyer ("Lawyer") represents an estate in several matters arising from the conduct of the decedent ("Father") and the decedent's two adult children ("Son" and "Daughter").

2. Father entered into a contract to sell a parcel of real estate. When negotiating the contract and preparing for the closing, Father asked Son to speak for him and act as his agent. We are told by Lawyer that Father, the contract vendee ("Buyer"), the real estate broker, and the attorney who represented both Father and Buyer in the transaction all understood that Son was speaking and acting not for himself but rather for Father.

3. The contract of sale never closed. Buyer sued Father for breach of contract and sued Son for tortious interference with the contract ("Real Estate Litigation"). Since Lawyer believes that everyone in the real estate transaction understood that Son was acting as an agent for a disclosed principal, Lawyer believes that Buyer's separate claim against Son is meritless.

4. Father and Son jointly retained Lawyer to defend them in the litigation. As part of that retention, Father and Son signed a "Conflict Waiver." Father, however, did not sign personally. Rather, the retainer agreement and the conflict waiver were executed by Daughter pursuant to a power of attorney as Father's "Attorney-in-Fact."

5. Father and Son each agreed to pay Lawyer's attorney fees in the Real Estate Litigation equally while the suit was pending, with the understanding that they would be fully reimbursed out of the net proceeds of the sale when the property at issue was ultimately sold. (Son did not own any interest in the property.)

6. At the time of his Father's death, Lawyer was also representing Father in the sale of a separate and unrelated parcel of real property (the "Unrelated Sale") — but in that sale Lawyer was dealing with Father exclusively through Daughter in her capacity as the holder of Father's power of attorney. (Son was not involved in any way in the Unrelated Sale.)

7. While the Real Estate Litigation and the Unrelated Sale were pending, Father died, and by operation of law Father ceased to be Lawyer's client. Father's estate plan named Daughter as Executor of Father's estate. Lawyer entered an appearance in Surrogate's Court on Daughter's behalf and prepared a petition seeking letters testamentary for Daughter. The Real Estate Litigation (which is pending in different court) has been stayed until Father's personal representative (Daughter) is formally substituted for Father, but that has not yet occurred. Father's will bequeathed all of his property per stirpes, so Daughter and Son will eventually split the estate equally. Lawyer is not aware of any disagreement between Daughter and Son over the validity of the will or any of its terms.

8. When Lawyer and Daughter were discussing a retainer agreement for Lawyer to represent Father's estate, however, Daughter asked Lawyer if Son should be blamed for the failure of the real estate transaction and forced to pay his own attorney fees for defending himself in the Real Estate Litigation, rather than reimbursing Son for his attorney fees (per the agreement between Father and Son) out of the proceeds from the eventual sale of the property.

9. Lawyer explained to Daughter the "dangers" of attempting to shift blame onto Son, whereupon Daughter told Lawyer that she was only asking questions and did not herself blame Son. Lawyer recognizes that Daughter's hypothetical inquiry regarding Son's conduct raises the potential for conflict between Daughter and Son, but Lawyer nevertheless believes that she can provide competent and diligent representation both (i) to Daughter as Executor and (ii) to Daughter and Son as co-defendants in the Real Estate Litigation.

QUESTIONS:

10. Lawyer poses three related questions:

A. May Lawyer continue to represent Daughter, in her capacity as Executor of Father's estate, in the sale of the separate and unrelated parcel of real property in Father's estate?

B. May Lawyer represent Daughter generally in her capacity as Executor of Father's estate?

C. May Lawyer continue to represent Daughter, again in the capacity as Executor of Father's Estate, as well as Son, as defendants in the Real Estate Litigation?

OPINION:

11. All Lawyer's questions involve conflicts with current clients (as opposed to conflicts with former clients or prospective clients). We begin, therefore, by setting out Rule 1.7 of the New York Rules of Professional Conduct (the "Rules"). Rule 1.7 provides as follows:

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing *differing interests*; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other *personal interests*.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) *the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation* to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) *each affected client gives informed consent*, confirmed in writing. [Emphasis added.]

Question A: Representing Daughter as Executor in the Unrelated Real Estate Sale

12. Rule 1.7 does not prevent Lawyer from representing Daughter in her capacity as Executor of Father's estate for purposes of completing the Unrelated Sale of Father's real property. Son is not a party to the Unrelated Sale, and nothing suggests that Son has "differing interests" from Father's estate with respect to the Unrelated Sale.

13. Thus, we perceive no conflict of interest under Rule 1.7(a)(1) flowing from Lawyer's representation of Daughter as Executor in the Unrelated Sale, and we see no need for Lawyer to obtain informed consent to a conflict (because there is no conflict requiring consent). Lawyer may ethically continue to represent Daughter as Executor in the Unrelated Sale.

Question B: Representing Daughter as Executor Generally

14. In contrast, representing Daughter as Executor generally raises the potential for conflict. Daughter could revisit and reconsider the role Son played in the real estate transaction and decide to blame Son for the failure of the Real Estate Litigation. (Shifting blame from Father's estate to Son would leave more money in Father's estate for Daughter to inherit.) Daughter could also search for grounds to rescind the fee reimbursement arrangement to which Father had agreed. Thus, Daughter and Son could eventually come to loggerheads, which would require Lawyer to represent one current client (Daughter as Executor) against another current client (Son). Under Rule 1.7(a)(1), a lawyer may not represent one current client against another current client without informed consent from both clients, confirmed in writing.

15. Although Daughter apparently arrived at a point where she told Lawyer that she was only asking him a "hypothetical question" about blaming Son and has said she does not actually intend to blame Son or to unwind the fee reimbursement arrangement, the potential for Daughter to back-pedal is plainly there. Indeed, the potential for Daughter to turn against Son would exist even if Daughter had said nothing, because Lawyer should advise Daughter how to maximize Father's estate, and Daughter is entitled to Lawyer's unconflicted advice on whether she could or should act against Son which might include denying Son legal fee reimbursement or even cross-claiming against Son in the Real Estate Litigation.

16. Rule 1.7(a)(1) precludes representation without informed consent if the representation "will" involve a lawyer in representing "differing interests." The term "differing interests" is defined in Rule 1.0(f) to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." A helpful explanation of this language appears in Comment [8] to Rule 1.7, which provides as follows:

> [8] Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. . . . The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

17. If Daughter has a non-frivolous basis to blame Son for the failure of the real estate transaction and a non-frivolous basis for depriving Son of reimbursement for legal fees in the Real Estate Litigation, that would create "differing interests," and thus a concurrent conflict under Rule 1.7(a)(1). As such, Lawyer could not jointly represent both Daughter in her general capacity as Father's executor and Son at the same time unless (i) the conflict arising out of the Real Estate Litigation were consentable and (ii) Lawyer obtained the requisite informed consent from "each affected client" (meaning both Daughter and Son). This means that Lawyer must reasonably believe that she "will be able to provide competent and diligent representation to each affected client," per Rule 1.7(b)(1), and "each affected client gives informed consent, confirmed in writing," per Rule 1.7(b)(4).

18. Here, we think the conflict is consentable (i.e., waivable) under Rule 1.7(b), given Daughter's statement that she does not intend to act against Son and given Lawyer's belief that Daughter has no valid basis to do so. On these facts, as long as Daughter (as Executor) does not change her mind and decide to take action against Son, it will be reasonable for Lawyer to believe that she can provide competent and diligent representation both to Daughter (as Executor and beneficiary) and to Son (as a co-beneficiary).

Question C: Jointly Representing Daughter and Son in the Real Estate Litigation

19. Representing both Son and Daughter as defendants in the Real Estate Litigation is another variation of the potential conflict of interest that Lawyer faces. In the litigation, Daughter and Son have the same differing interests already described with respect to the Daughter's general capacity as executor and the Son's capacity as an estate beneficiary. That is, Daughter, as Executor for Father's estate, has an interest in maximizing the value of Father's estate (perhaps by cross-claiming against Son for damages and denying Son reimbursement for legal fees) and an interest in maximizing her own inheritance (by the same means). Son, in contrast, has an opposite interest in minimizing his own liability for damages and in minimizing his own legal fees.

20. The existence of these "differing interests" is perhaps more obvious in the context of the Real Estate Litigation because Lawyer would be representing two clients in the same lawsuit, and Rule 1.7(a)(3) prohibits a lawyer from representing "one client against another client represented by the lawyer in the same litigation . . . before a tribunal." But the source and nature of the conflict is the same. Accordingly, as is the case with respect to Lawyer's representation of Daughter as Executor generally, Lawyer cannot specifically represent both Son and Daughter in the Real Estate Litigation unless Lawyer reasonably believes that she can provided competent and diligent representation to both Daughter and Son (i.e., the conflict is consentable) and Lawyer obtains informed consent from each client per Rule 1.7(b)(4).

21. We have not been asked to address the validity or scope of the conflict waiver that Father and Son signed when retaining Lawyer to jointly represent them in the Real Estate Litigation. Nonetheless, Lawyer should be aware that the scope, terms, and disclosures relating to the waiver are critical to establish its validity.

CONCLUSION:

22. A lawyer who represents the Executor of an estate and simultaneously represents a beneficiary of the estate in an unrelated matter does not have a concurrent conflict of interest. "Differing interests" may arise where a lawyer simultaneously represents both an estate's Executor/beneficiary and a co-beneficiary as co-defendants in civil litigation for damages and, if so, the lawyer therefore may not continue the representation of both co-defendants unless the lawyer reasonably believes that she will be able to provide competent and diligent representation to each affected client and each affected client gives informed consent, confirmed in writing. If the Executor instructs the lawyer to file a cross-claim against her co-beneficiary in the civil litigation, then the conflict would become non-consentable.

(15-22)

OPINION 1254 (03/03/2023)

TOPIC: Affiliation with a lawyer not admitted in New York

DIGEST: A New York-admitted lawyer may affiliate and share fees with an out-of-state lawyer residing in New York and practicing immigration law in New York only if (1) neither the lawyers nor their firm would be engaged in the unauthorized practice of law (which is a question that this Committee may not answer), and (2) the lawyers' communications with clients and the public are not misleading.

RULES: 5.5(b), 7.1(a), and 7.5(a)

FACTS:

1. The inquirer, a New York-licensed lawyer living outside New York, concentrates on personal injury matters. The inquirer proposes to affiliate in practice with a lawyer (the Immigration Lawyer) who is admitted only outside New York but who resides in New York and practices immigration law (and only immigration law) from an office located in New York. The inquirer proposes to practice under the law firm name and address of the Immigration Lawyer. The Immigration Lawyer employs a staff to support the immigration practice, and that staff would also assist the inquirer in personal injury matters (although the Immigration Lawyer would not).

QUESTION:

2. May a lawyer admitted in New York affiliate in a law practice with a lawyer who is not admitted in New York but who resides in New York and practices immigration law from an office in New York? If so, may the lawyers practice under the law firm name and address of the New York resident lawyer?

OPINION:

3. In N.Y. State 863 (2011), we stated: "Whether a lawyer who is not admitted to practice law in New York State may engage in a practice within New York State exclusively limited to immigration law is purely a question of law that is not answered by the New York Rules of Professional Conduct and is therefore beyond our jurisdiction." That remains the case, because the unauthorized practice of law (UPL), including by out-of-state lawyers, is governed by law (*see* Judic. Law § 484), and this Committee's mandate is limited to interpreting the New York Rules of Professional Conduct and not other law.

4. The proposed arrangement raises two UPL questions arising from the Immigration Lawyer's activities that we cannot answer, but we consider it important to comment on them in a general fashion.

5. The first UPL question is whether the Immigration Lawyer, who resides and practices in New York but is not admitted to practice in New York, is engaged in the unauthorized practice of law, given that his practice is restricted to immigration law. If the Immigration Lawyer is engaged in the unauthorized practice of law, then the inquirer may not affiliate in a law practice with the Immigration Lawyer, because doing so would impermissibly assist in the Immigration Lawyer's ongoing violation

of New York law. *See, e.g.*, N.Y. State 1160 (2019) ("It would not be proper for the inquiring New York attorney to affiliate, and share fees with, a solely out-of-state-licensed attorney, resident in New York" whose work would constitute the unauthorized practice of law); N.Y. 801 (2006) ("Where the legal services performed in New York by an out-of-state attorney would constitute the unauthorized practice of law in New York under DR 3-101(A) [the predecessor to Rule 5.5(a)], it is unethical for a New York attorney to form a partnership with the out-of-state attorney."); *see also* Rule 5.5(b) ("A lawyer shall not aid a nonlawyer in the unauthorized practice of law.").

6. Even assuming the Immigration Lawyer is not currently engaged in the unauthorized practice of law under New York law in his solo practice, one would need to address a second UPL question relating to his proposed affiliation with the inquirer.

7. The second UPL question is whether New York's UPL law would permit the Immigration Lawyer's *law firm* to represent clients not only in federal immigration matters (which is his exclusive area of practice) but also in state law matters, such as personal injury matters (which is the inquirer's area of practice). Even if the Immigration Lawyer does not personally participate in the other legal matters, the UPL laws could conceivably apply, either because the law firm as an entity represents clients in matters for which resident lawyers must have a New York law license or if the Immigration Lawyer would be employing and supervising the nonlawyers in the office assisting inquirer in the prosecution of the personal injury matters.

8. Assuming the inquiring New York lawyer would thereby not be assisting in the unauthorized practice of law (or in any other violation of law), the inquirer may affiliate with the Immigration Lawyer and practice under that lawyer's law firm name, subject to Rule 7.1(a), which forbids a lawyer or law from engaging in false or misleading advertising. For example, communications must be clear that the Immigration Lawyer is not admitted to practice law in New York and may perform only the specified legal work in New York that is excepted from the UPL law. In addition, to comply with Rule 7.5(a), the letterhead of the law firm and the lawyers affiliated with it must not mislead clients or the public about the nature and limits of the firm's practice.

CONCLUSION:

9. A New York-admitted lawyer may affiliate and share fees with an out-of-state lawyer residing in New York and practicing immigration law in New York only if (1) neither the lawyers nor their firm would be engaged in the unauthorized practice of law (which is a question that this Committee may not answer), and (2) the lawyers' communications with clients and the public are not misleading.

(17-22)

OPINION 1255 (05/26/2023)

TOPIC: Romantic Relationship Between Criminal Defense Attorney and County Deputy Sheriff

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

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

Partially modifies N.Y. State 660

FACTS:

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

QUESTIONS:

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

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

OPINION:

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

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

5. Rule 1.7 (a)(2) provides that a lawyer may not represent a client if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own . . . personal interests" unless the conflict is consent-

able under Rule 1.7(b) and the conflicted lawyer obtains the client's informed consent, confirmed in writing.

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

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

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

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

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

A Personal Interest Conflict Arising from a Romantic Relationship May be Consentable

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

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;

> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

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

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

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

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

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

Rule 1.7, Comment [15].

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

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

15. Thus, in N.Y. State 660 (1994), decided under the former New York Code of Professional Responsibility, an associate in a law firm with a significant criminal defense practice was dating an assistant district attorney in the county in which the associate's firm was located. They dated frequently and had a close personal relationship. The Committee concluded that "[u]nder the circumstances, it would not be unreasonable to assume that they each had a personal interest in one another's

reputation, success and welfare" that "ordinarily would operate to disqualify the lawyers from undertaking an adverse representation without the consent of their respective clients."

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

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

N.Y. State 660 (emphasis added).

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

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

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9 . . . .

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

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

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

> The issue as to whether defense counsel's firm would be disqualified raises what appears as something of an anomaly in applying the provisions of DR 5-105(D) [the predecessor to Rule 1.10(a)]. Because disqualification of the associate is based on DR 5-101(A) [the predecessor to Rule 1.7(a)], a literal reading of DR 5-105(D), as amended effective September 1, 1990, would automatically impute the associate's disqualification to the entire firm. See N.Y. State 632 (1992). DR 9-101(D) [now Rule 1.10(h)] expressly prohibits spouses from undertaking adverse representation [without client consent]. The only operative difference between the general rule of DR 5-101(A) and the more specific prohibition of DR 9-101(D) is that the latter does not trigger automatic imputed disqualification under DR 5-105(D), for reasons bearing more on sociology and economics than traditional notions of conflicting interests.
>
> It should be evident that a spousal relationship is significantly closer than that of a dating couple. Among other things, a dating relationship is usually devoid of the community of financial interests present in the spousal relationship. Consequently, and most anomalously, if the Code were to be applied literally, the closer relationship of spouses would not require automatic disqualification of the entire firm, while the more casual relationship of a dating couple would seem to impute firm-wide disqualification. This result would be as illogical as it is manifestly inconsistent. Notwithstanding that the dating relationship invokes the proscriptions of DR 5-101(A), for purposes of applying standards of imputed disqualification, we believe that it should not be subject to greater constraint than the relationship of spouses addressed by DR 9-101(D). Thus, whether other lawyers in the firm will be disqualified depends on the facts and circumstances. See N.Y. State 638, at 8-11 (1992); N.Y. State 632, at 2-3 (1992); see also N.Y. State 654, at 5 (1993) (discussion of appropriate factors to be considered). If the lawyer concludes that another lawyer in the firm may undertake or continue the representation of a defendant prosecuted by the assistant district attorney in question, the associate must be effectively screened from any participation in the matter and must be apportioned no part of the fee therefrom.

21. In the nearly 30 years since N.Y. State 660 was issued, New York has amended its ethics rules many times – yet no amendments have been made to the provisions imputing personal interest conflicts. Indeed, in 2008 when the New York State Bar Association recommended replacing the Code of Professional Responsibility with a version of the Model Rules, the Bar Association recommended amending Rule 1.10 to eliminate imputed disqualification for personal conflicts of interest absent special circumstances. The New York Administrative Board of the Courts declined to adopt this recommendation in favor of the language quoted above. In 2020, the State Bar again recommended an amendment to Rule 1.10 that would eliminate imputation of personal conflicts of interest, but that proposal is still pending before the Administrative Board. In light of the failure to adopt this proposal by the Administrative Board in 2008 and its failure to act on the most recent proposal, we must conclude that Rule 1.10(h) and Comment [11] to Rule l.7 mean what they say, no matter how inconsistent. We therefore partially modify N.Y. State 660, to the extent that it concludes that whether other

lawyers in the firm will be automatically disqualified depends on the facts and circumstances. The imputation of the personal conflict to the inquirer's entire firm is automatic and would not be dependent on facts and circumstances.

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

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

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

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

CONCLUSION:

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

(07-23)

OPINION 1256 (05/26/2023)

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

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

RULES: 1.8(a), 1.8(i), 8.4(a).

FACTS:

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

QUESTIONS:

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

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

OPINION:

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

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

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

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

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

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

CONCLUSION:

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

(06-23)

OPINION 1257 (05/26/2023)

TOPIC: Conflicts of Interest; Former District Attorney in Public Defender's Office

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

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

FACTS:

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

QUESTIONS:

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

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

OPINION:

Rule 1.11 establishes a special conflicts rule regarding former government attorneys.

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

The Standard for Disqualification Under Rule 1.11(a).

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

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

(Emphasis added)

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

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

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

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

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

> The fact that a former government lawyer was counsel for the government in unrelated matters at the same time that the defendant's case was investigated or prosecuted is not enough to demonstrate personal and substantial participation under DR 9-101 or to require disqualification under that rule. See N.Y. State 638 (1992). At the same time, a former prosecutor must still carefully assess the circumstances of his or her service in the prosecutor's office to determine whether he or she may be deemed to have partici-

> pated "personally and substantially" in the investigation or prosecution of a criminal defendant. Relevant facts include, but are not limited to, (1) the extent to which the former prosecutor served in a more than nominal supervisory role; (2) the extent to which the former prosecutor had knowledge of government confidences and secrets relevant to the proposed representation of the same defendants; (3) the extent to which the former prosecutor provided coverage for other ADAs; (4) the extent to which the former prosecutor was kept apprised of cases in the office; and (5) the extent of the former prosecutor's access to the case files and other information regarding cases in the prosecutor's office.

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

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

Subject to enumerated conditions, Rule 1.11(b) allows other lawyers in the public defender's office to accept representations from which the former district attorney is disqualified.

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

> (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
>
> (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;
>
> (iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule;

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

Under Rule 1.11(c), other attorneys in the firm who accept the representation of a client whom the former government attorney is disqualified from representing must be screened from acquiring confidential government information.

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

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

CONCLUSION:

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

(23-22)

OPINION 1258 (06/05/2023)

Withdrawn by N.Y. State 1258A (04/19/2024)

TOPIC: Credit card fees as an "expense"

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

RULES: 1.5(a)-(b)

FACTS:

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

QUESTION:

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

OPINION:

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

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

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

amount to compensate for the additional merchant processing fee incurred on that processing fee up-charge. We stated:

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

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

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

CONCLUSION:

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

(09-23)

OPINION 1258A (04/19/2024)

Withdraws N.Y. State 1258 (06/05/2023)

TOPIC: Credit card fees as an "expense"

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

RULES: 1.5(a)-(b)

FACTS:

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

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OPINION:

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

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

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

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

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

7. Our jurisdiction is limited to questions of legal ethics. Whether including this upcharge violates Section 518.1 of the General Business Law, as amended effective February 11, 2024, is a question of law that is beyond our jurisdiction. For background on an amendment to General Business Law Section 518, see N.Y. State Division of Consumer Protection, Governor Hochul Announces New Law to Clarify Disclosure of Credit and Debit Card Surcharges Goes Into Effect, Sunday February 11, https://www.governor.ny.gov/news/governor-hochul-announces-new-law-clarify-disclosure-credit-card-surcharges-goes-effect-sunday.

CONCLUSION:

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

(09-23)

OPINION 1259 (06/06/2023)

TOPIC: Collaboration between lawyer and paralegal

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

RULES: 5.3, 5.4(a), 5.5(b), 5.8, 7.2(a)

FACTS:

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

QUESTIONS:

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

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

OPINION:

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

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

6. Turning to the principles that shape the answer to this inquiry, the Committee begins with the rule, firstly, that a lawyer must not share legal fees with the paralegal. Rule 5.4 (a). See also N.Y. State

1068 (2015) (no fee-splitting with a nonlawyer). The paralegal may, of course, be appropriately compensated for the value of the paralegal services on an hourly or per document basis.

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

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

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

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

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

CONCLUSION:

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

(03-23)

OPINION 1260 (07/10/2023)

TOPIC: Responsibilities of a lawyer in a non-legal position.

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

RULES: 5.1(b)(2), 5.2(a), 5.3(a), 5.7

FACTS:

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

QUESTION:

2. In performing his duties as a Confidential Assistant to the School Attorney, is the inquirer governed by the New York Rules of Professional Conduct ("Rules")?

OPINION:

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

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

5. To answer that question, we first turn to Rule 5.7, entitled "Responsibilities Regarding Nonlegal Services." Rule 5.7 distinguishes between "legal services" and "nonlegal services" provided by lawyers and defines nonlegal services to mean "those services that lawyers may lawfully provide and

that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." Rule 5.7(c). Where the legal services provided are "not distinct" from the nonlegal services, a lawyer "is subject to these Rules with respect to the provision of both legal and nonlegal services. Rule 5.7(a)(1) (emphasis added).

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

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

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

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

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

outside the firm working on firm matters, is compatible with the professional obligations of the lawyers and firm").

CONCLUSION:

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

(04-23)

OPINION 1261 (07/27/2023)

TOPIC: Conflicts of Interest

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

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

FACTS:

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

QUESTIONS:

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

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

OPINION:

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

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

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

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

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

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

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

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

9. Even though the inquirer has a conflict of interest with the Former Client under Rule 1.9(a) based on substantial relationship and material adversity, Rule 1.9(a) expressly provides that an attorney may represent a current client notwithstanding a conflict of interest with a former client if the former client "gives informed consent, confirmed in writing." Rule 1.0(j) defines "informed consent" as follows:

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

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

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

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

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

14. Fourth, issues concerning withdrawal under Rule 1.16 must be considered. Rule 1.16(c)(1) allows an attorney (subject to the court's approval) to withdraw from representing a client where such withdrawal "can be accomplished without material adverse effect on the interests of the client." Here, the inquirer should consider whether the duty of confidentiality to the Current Client will prohibit the

inquirer from obtaining the informed consent of the Former Client because the inquirer may simply be unable to reconcile the Current Client's interest in leveraging his cooperation in providing testimony adverse to the Former Client in order to secure a more favorable plea disposition with the interest of the Current Client in avoiding the risk of harm occasioned by the Former Client's knowledge of that cooperation. It may well be that both of these important interests of the Current Client can be protected only if the Current Client is represented by an attorney who is not ethically obligated to seek informed consent from the Former Client regarding the Current Client's anticipated grand jury testimony, because only in that event can the secrecy of the Current Client's testimony before the grand jury be protected from disclosure to the Former Client. If the Former Client is not informed of the Current Client's grand jury testimony, the risk of physical or other harm to the Current Client will be substantially reduced or eliminated entirely.

15. Finally, even if (i) the inquirer determines that the Current Client will not be prejudiced by the Former Client learning that the Current Client will be providing grand jury testimony against him, (ii) the inquirer fully explains to the Current Client the benefits to be gained by cooperating with the district attorney and the risks of disclosing the Current Client's cooperation to the Former Client, and (iii) the inquirer obtains the Current Client's consent to disclose confidential information to the Former Client in order to seek the Former Client's consent to the inquirer's continued representation of the Current Client, the inquirer must still be mindful that, absent consent, Rule 4.2 requires the inquirer to communicate through the Former Client's current counsel in the Former Client's criminal case, not directly with the Former Client. Rule 4.2(a) provides:

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

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

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

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

CONCLUSION:

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

(08-23)

OPINION 1262 (12/14/2023)

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

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

RULES: 1.0(a), 7.1(a) & 7.2(a)

FACTS:

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

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

QUESTIONS:

Inquirer poses three questions:

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

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

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

OPINION:

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

Advertisements

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

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

Sponsorships

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

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

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

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

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

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

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

12. We relied on Comment [8] in N.Y. State 937 ¶ 4 (2012), where we concluded that a lawyer who provided a promotional gift with the law firm's logo in a local hospital welcome package was not engaged in advertising. We explained that "when the intent of a communication is . . . to raise general brand awareness, that intent will be considered its primary purpose." Thus, "even if such communications are more fundamentally motivated by the aim of increasing a lawyer's business, they are not advertising within the meaning of the Rules."

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

Recommendations

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

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

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

ent . . . ." Cf. N.Y. State 1132 (2017) (a lawyer may not pay a "marketing fee" to an entity if the fee includes "an improper payment for a recommendation").

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

CONCLUSION:

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

(11-23)

2024

OPINION 1263 (02/05/2024)

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

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

RULES: 1.7(a)(1), (b)

FACTS:

1. County X recently established a centralized arraignment part (CAP). A CAP is an off-hours arraignment part held in local criminal courts (including town courts) on a rotating basis. The purpose of the CAP is to conduct arraignments and other preliminary proceedings incident to those arraignments. See New York Judiciary Law § 212(1)(w). Judges and justices of local criminal courts in the county are periodically assigned to the CAP. Town Z has only one town justice, and that town justice sits on the CAP on a rotating basis.

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

QUESTION:

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

OPINION:

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

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

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

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

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

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

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

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

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

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

CONCLUSION:

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

(14-23)

OPINION 1264 (03/01/2024)

TOPIC: Listing of Degrees by Attorney Working in Nonlegal Capacity

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

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

FACTS:

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

QUESTION:

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

OPINION:

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

4. Rule 7.1(b) states that "an advertisement may include information as to: (1) legal and nonlegal education; degrees and other scholastic distinctions." The inquirer's proposed communications as a development officer are not "advertisements" under the Rules because "the primary purpose of [the communications]" is not "for the retention of the lawyer or law firm." Rule 1.0 (a) ("'Advertisement' means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm."). It must be noted, however, that even beyond the context of advertising, Rule 8.4(c) prohibits lawyers from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation."

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

We repeat, however, that the inquirer must take care to avoid confusion and "must ensure that any relevant audience is not misled to believe that the [inquirer] is acting as a lawyer" when the lawyer engages in a non-legal capacity. *See* N. Y. State 1089 (discussing various ways to dispel any such confusion).

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

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

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

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

CONCLUSION:

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

(21-23)

OPINION 1265 (04/26/2024)

TOPIC: Conflicts of interest, former clients

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

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

FACTS:

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

QUESTION:

2. Does a lawyer formerly employed by the Legal Aid Society have a conflict of interest in appearing in Family Court adverse to a party who was represented by a different Legal Aid Society lawyer during the time that the inquiring lawyer was employed by the Society?

OPINION:

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

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

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

5. Rule 1.6(a) provides that a "lawyer shall not reveal confidential information. . . or use such information to the disadvantage of a client" unless certain requirements are met. "'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."

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

CONCLUSION:

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

(02-24)

OPINION 1266 (06/14/2024)

TOPIC: Disclosing confidential information to government agency that is funding a client's representation.

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

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

FACTS:

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

QUESTION:

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

OPINION:

3. Rule 1.6(a) provides in pertinent part that "[a] lawyer shall not knowingly reveal confidential information . . . unless . . . the client gives informed consent [or] . . . the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community" or an exception in Rule 1.6(b) applies. The rule defines confidential information as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." A lawyer is subject to a similar duty of confidentiality with respect to a prospective client, and the duty of confidentiality continues even after the lawyer's relationship with the client or prospective client ends. *See* Rules 1.18(b) & 1.9(c).

4. Although client identities and other information sought by the funding agency are unlikely to be protected by the attorney-client privilege, any or all of the information may be confidential information subject to Rule 1.6(a), either because the client seeks to keep it confidential or because its disclosure would be embarrassing or detrimental to the client. *Cf.* N.Y State 1088 (2016) (clients' identities may be, but are not necessarily, confidential information). That is for the lawyer to determine in consultation with the client or prospective client. Addressing a similar question in N.Y. State 1059 (2015), we observed that it was uncertain whether information sought by a third-party – in that instance, the Vera Institute of Justice, which was conducting research regarding immigration proceedings – would be "confidential information" of minor clients in immigration proceedings. But we stated that the lawyer for the minor clients could not disclose information relating to any such repre-

sentation without determining in the individual case that the information was not confidential under Rule 1.6(a). We observed:

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

Id. at para. 9 (emphasis added).

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

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

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

See generally N.Y. State 1084 (2016) (lawyer may have implied authority to disclose deceased client's confidential information to exonerate a co-defendant, if doing so is consistent with the deceased client's previous wishes). In retaining a lawyer in an immigration matter, a client does not impliedly authorize the lawyer to disclose confidential information to a funder, because doing so does not

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

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

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

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

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

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

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

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

11. All of what we have said above is consistent with Rule 1.8(f), which provides that a lawyer shall not accept "compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client" (which would include the government) unless three conditions are satisfied, including: "(1) the client gives informed consent" and "(3) the client's confidential information is protected as required by Rule 1.6." In our view, the government funding in this situation is either "compensation for representing a client" or it is something "of value related to the lawyer's representation of the client . . . ." Accordingly, each client's confidential information must be "protected as required by Rule 1.6," which means that the lawyer cannot disclose the information at issue without obtaining the client's informed consent.

CONCLUSION:

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

(17-23)

OPINION 1267 (06/14/2024)

TOPIC: Paying for a recommendation or referral.

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

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

FACTS:

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

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

QUESTIONS:

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

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

OPINION:

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

Advertising and Required Disclosures

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

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

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

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

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

Referrals and Referral Fees

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

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

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

Comment [1] to Rule 7.2, includes the following definition of the term "recommendation":

> A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities.

Moreover, as we observed in N.Y. State 1131 ¶ 20 (2017), to "recommend" also includes identifying a specific lawyer or lawyers to a potential client as "a right" or "the right" lawyer for the client's situation following an analysis of the client's legal problem. See also N.Y. State 799 (2007) ("For example, if a potential client describes a slip-and-fall incident on an intake form and the website determines that the problem calls for a personal injury lawyer and then recommends one or more attorneys in that area, the website is "recommending" those lawyers").

11. Here, it is difficult to escape the conclusion that the language contained on the business's website creates the impression that the business is indeed recommending the participating lawyers. The website represents that the potential client will be linked with a lawyer in the relevant area of law with excellent qualifications. The website promises to offer lawyers with strong reputations in the appropriate area of law. The website also assures potential clients that they carefully vet the attorneys in their network and match people with top-flight attorneys. The most reasonable inference to be drawn from that representation is that the business has engaged in a substantive review of the lawyers' work and determined that they have excellent qualifications in their areas of practice. See N.Y. State 1132 (although Avvo claimed on its website that its rating did not constitute an endorsement of any particular lawyer, Avvo's use of a rating system together with its statement that Avvo worked only with "highly qualified lawyers" created the impression that it was "recommending" the participating lawyers).

12. In the inquiry before us, the website's explicit claim that it uses a review process aimed at finding the lawyers who deliver a high level of service constitutes a substantive recommendation. Cf. N.Y. State 1131 (a business that accepts only participating lawyers who are in good standing in their jurisdiction would not render the business's selection of a lawyer a recommendation if it uses neutral, non-qualitative criteria); N.J. Committee on Attorney Advertising Op. 2004-1 (lawyer may pay flat fee to internet marketing company for an exclusive website listing for a particular location in specific practice area if the listing includes a prominent, clear disclaimer indicating that listings are not

endorsements); Arizona Op. 11-02 (internet advertisement listing one lawyer for each zip code are acceptable where an advertisement does not imply that the website listing is an endorsement).

13. Because lawyers participating in the website are violating Rule 7.2(a) by paying for recommendations, the inquirer's operation of the website violates Rule 8.4(a), which forbids a lawyer to "induce another" to violate the Rules of Professional Conduct. In our view, the website induces unwary lawyers to violate the Rules by paying for recommendations.

CONCLUSION:

14. A website that promises to connect potential clients with attorneys whom the website claims have excellent qualifications and are carefully vetted, constitutes an "advertisement" on behalf of the lawyers available through the website (see Rule 1.0(a) and Rule 7.1), and the lawyers' payment to the business providing this service constitutes an improper payment for a recommendation in violation of Rule 7.2(a). The inquirer's operation of the website, in turn, violates Rule 8.4(a) because it induces this misconduct by the lawyers who offer their services.

(16-23)

OPINION 1268 (07/03/2024)

TOPIC: Confidential information; publication of article about issues arising in a case handled by the lawyer

DIGEST: After the termination of the representation, a lawyer may publish an article that discusses legal issues in the representation, as long as the article does not reveal confidential information without the consent of the client. Confidential information does not include a lawyer's "legal knowledge or legal research" or information that is "generally known" in the local community or in the trade, field or profession to which the information relates. But information is not generally known merely because it is available in court files.

RULES: 1.1(c), 1.6(a), 1.7(a), 1.7(b), 1.8(b), 1.9(c), 7.1(r).

FACTS:

1. The inquirer represents one of two partners ("Client A") in a contentious dissolution of a business. The case has raised several interesting legal issues. The inquirer also writes on legal issues and would like to write an article about the case. Client A is very wary of publicity and believes that publicity about the case could be damaging to his reputation.

QUESTION:

2. May the inquirer publish an article on legal issues arising in a case in which he represented one of the parties, if the article isn't published until after the conclusion of the proceeding and discusses the issues only from a strictly intellectual perspective?

OPINION:

3. Rule 7.1(r) of the New York Rules of Professional Conduct (the "Rules") encourages lawyers to speak publicly and write for publication on legal topics to help lay persons identify legal problems. Similar policy considerations apply to lawyers who speak or write for the legal community on legal issues that may arise. *See also* Rule 7.1, Cmt. [9] ("[L]awyers should encourage and participate in educational . . . programs concerning the legal system, with particular reference to legal problems that frequently arise"); N.Y. State 1251 ¶ 3 (2023) ("It is not unethical for a lawyer to write articles, give lectures, or write a blog about topics of general or specific interest, including the law. In fact, such activities are encouraged and protected, reflecting well on the legal profession and its members as examples of lawyers . . . seeking to contribute to the general well-being of the public").

4. The inquirer's concern is that Client A is wary of publicity and believes that publicity about the case could be damaging to his reputation. That raises the question whether the proposed article would violate any other provisions of the Rules.

The Duty of Loyalty and the Duty Not to Harm the Client

5. One of the hallmarks of the legal profession is the duty of loyalty to the client. *See* Rule 1.7, Cmt. [1] ("Loyalty and independent judgment are essential aspects of a lawyer's relationship with a

client"); Preamble to the Rules, ¶ 2 ("The touchstone of the client-lawyer relationship is the lawyer's obligation to act with loyalty during the period of the representation.").

6. Rule 1.1(c)(2) reflects the lawyer's duty of loyalty to the client by prohibiting the lawyer from acting against the interests of the client. It says: "A lawyer shall not intentionally prejudice or damage the client during the course of the representation except as permitted or required by these Rules." The exception refers to Rules that authorize a lawyer to take actions that might prejudice or damage the client in limited circumstances, such as disclosures permitted under Rule 1.6(b), withdrawal permitted by Rule 1.16, and disclosure to a court under Rules 3.3(a) and (b). None of those Rules apply here.

7. By its terms, Rule 1.1(c) applies *during the course of the representation*. Thus, Rule 1.1(c) does not apply to former clients. *See* Roy Simon, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED ("Simon's") at § 1.1:44 ("the word 'during' makes clear that the duty not to prejudice or damage the client applies only to *current* clients, not to *former* clients.") (emphasis in original).

8. Similarly, Rule 1.8(b) – one of the rules concerning "specific" conflicts of interest with current clients – provides that a lawyer may not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent or the disclosure is permitted or required by the Rules. But this Rule, too, applies only to current clients. Indeed, the title of Rule 1.8 is "*Current* Clients: Specific Conflicts of Interest" (emphasis added).

When Does a Current Client Become a Former Client?

9. Different confidentiality rules apply once a client becomes a former client. The lawyer's confidentiality duties to a former client are set forth in Rule 1.9(c), which prohibits a lawyer from using or revealing the former client's confidential information unless there is an exception in Rule 1.6 (the confidentiality rule). Specifically, Rule 1.9(c) reads, in relevant part, as follows:

> (c) A lawyer who has formerly represented a client in a matter . . . shall not thereafter:
>
> > (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
> >
> > (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

10. The inquirer will therefore have to determine whether Client A remains a current client in the matter of the representation. In N.Y. State 1008 (2014), we addressed this issue, noting that whether a person is a current client or a former client is a mixed issue of fact and law that the Committee cannot resolve. *See* Rules, Scope ¶ 9 ("principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. . . . Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact."). We stated in Opinion 1008, however, that termination of the attorney-client relationship does not depend on whether the

lawyer has sent a termination letter. Rather, a representation often ends when the lawyer has accomplished the purpose of the representation. As we explained in Opn 1008 ¶ 10:

> . . . [A]n attorney-client relationship may also terminate without a termination letter. *See, e.g., Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc.*, 687 F. Supp. 2d 381, 389-91 (S.D.N.Y. 2010) ("'In what is perhaps the most typical situation, an attorney-client relationship . . . is terminated, simply enough, by the accomplishment of the purpose for which it was formed in the first place,'"; *Miller v. Miller*, 203 A.D.2d 338, 339, 610 N.Y.S.2d 88, 89 (2d Dep't 1994) ("When the Family Court matter concluded, so did the attorney-client relationship"); Restatement (Third) of the Law Governing Lawyers § 31(2)(e) (2000) ("a lawyer's actual authority to represent a client ends when . . . the lawyer has completed the contemplated services").

Sometimes, on the other hand, even accomplishing the purpose of the representation does not end the representation of the client. As we said in N.Y. State 1008 ¶ 11:

> . . . Other circumstances, such as a longstanding pattern of representation over the years or the client's reasonable belief that a lawyer needs to perform additional legal work to fulfill the purpose of the representation, could also preserve an attorney-client relationship, even if the Law Firm has no specific pending assignment . . . at a given moment.

The remainder of our opinion here assumes that the attorney-client relationship in the particular matter before us has indeed ended, and that Client A is now a former client.

Would the Article Use Confidential Information in Violation of Rule 1.6?

11. As noted above, a lawyer's duty of confidentiality to a former client is set forth in Rule 1.9(c), which depends on whether information is "protected by Rule 1.6." Rule 1.6(a) prohibits a lawyer from knowingly revealing "confidential information" (as defined in Rule 1.6), or using it to the disadvantage of the client or for the advantage of the lawyer, unless the client gives informed consent. Rule 1.6 defines the term "confidential information" – and thus defines the information "protected by Rule 1.6" – as follows:

> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

In addition, the client and lawyer may agree that other information will be held confidential. *See* Rule 1.6, Cmt. [4A] ("[W]here the client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer's research.").

12. The inquirer states that Client A is worried about information the inquirer gained during or relating to the representation that is "likely to be embarrassing or detrimental to the client if disclosed." Whether any particular information meets this requirement is a question of fact that we cannot resolve. However, if the article would discuss the legal issues arising in the matter from a strictly intellectual perspective without discussing particular facts of the matter that are not generally known, and if the lawyer has not agreed with the client to refrain from publishing material related to the matter, we do not believe the article would run afoul of Rule 1.9(c).

13. The definition of confidential information in the black letter text of Rule 1.6 (quoted earlier) excludes the lawyer's "legal knowledge or legal research." Comment [4A] elaborates by saying: "The accumulation of legal knowledge or legal research that the lawyer acquires through practice ordinarily is not client information protected by this Rule." Consequently, an article restricted to discussing legal issues and either omitting or masking the facts that come from Client A's matter should not run afoul of Rule 1.6 unless the inquirer has agreed with the client to keep "a particular product of the lawyer's research" confidential. But if the article uses facts from the client's matter, the inquirer should ensure that readers cannot use those facts to ascertain the identity of the client. *See* Rule 1.6, Cmt. [4] ("A lawyer's use of a hypothetical to discuss issues relating to the representation . . . is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client."); N.Y. State 1026 ¶ 15 (2014) (in the context of a lawyer writing a novel based on her career as a lawyer-mediator, the Committee stated that "if confidential information is sufficiently altered, disguised, rearranged, and infused with the inquirer's own imagination so that no one can trace particular information to a particular client, then the book will not reveal 'confidential information' within the meaning of Rule 1.6.").

14. Another important exception in the definition of "confidential information" excludes information that is "generally known" in the local community or in the trade, field or profession to which the information relates. We explained the meaning of the phrase "generally known" in N.Y. State 991 ¶¶ 20 (2013): "In our view, information is generally known only if it is known to a sizeable percentage of people in 'the local community or in the trade, field or profession to which the information relates.'". . . As explained by Rule 1.6, Cmt. [4A], "Information is not 'generally known' simply because it is in the public domain or available in a public file."

15. In N.Y. State 1057 (2015), the inquirer's client wanted him to use allegations the client had made in pleadings in other cases about lawyers and judges involved in those cases. The inquirer asked us if he could provide copies of these pleadings to the judge in support of his withdrawal motion, even if using those documents might prejudice the judge against the client. After quoting Comment [4A] to Rule 1.6, we said in Opinion 1057:

> Here, we believe that, unless the allegations in the client's other lawsuits were reported in the public media, or unless the client himself has widely publicized the allegations, the documents in the client's other cases do not fall within the [generally known] exception and therefore constitute confidential information of the client.

See generally ABA 479 (2017) (discussing the "generally known" exception).

16. We continue to believe that pleadings and other documents filed in a court case are not "generally known" within the meaning of Rule 1.6. Consequently, facts set forth in a court decision should be deemed to be confidential unless those facts are "known to a sizeable percentage of people" in the community, trade, field or profession.

Undermining or Negating the Lawyer's Work for the Client

17. As noted above, after termination of the relationship with Client A, Rule 1.9 would prohibit the inquirer from thereafter representing another client whose interests are materially adverse in a "substantially related" matter. A subset of this prohibition involves representations that would involve the inquirer in attacking or undermining work done for Client A. *See* Rule 1.9, Cmt. [1] ("a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of a former client"). We believe the same principle would apply to an article written by the inquirer – a lawyer may not write an article about a former client that attacks or undermines the legal work the lawyer did for that client. However, it is our understanding that the proposed article would not undermine any positions taken by the inquirer in the representation.

CONCLUSION:

18. After the termination of the representation, a lawyer may publish an article that discusses legal issues in the representation, as long as the article does not reveal confidential information without the consent of the client. Confidential information does not include a lawyer's "legal knowledge or legal research" or information that is "generally known" in the local community or in the trade, field or profession to which the information relates. But information is not generally known merely because it is available in court files.

(03-24)

OPINION 1269 (07/16/2024)

TOPIC: Part-Time Judge; Part-Time Public Defender; Conflict of Interest;

DIGEST: A part-time assistant public defender whose law partner is both his cousin and a part-time town court judge may not represent clients of the public defender's office in the town court where his cousin/law partner and his cousin's co-judge serve because that representation would violate Rule 8.4(f). The assistant public defender may, however, represent defendants in a centralized arraignment part when his cousin and his cousin's co-judge are not presiding, even when the case is subsequently assigned to the town court where his cousin is a part-time judge, as long as the assistant public defender no longer represents the client after the arraignment and does not appear on behalf of the client in the town court where his cousin is a judge. Such limited representation at the centralized arraignment part does not violate Rule 8.4(f).

RULES: 1.0(h), 8.4(f)

FACTS:

1. The inquirer is an attorney who is the Public Defender in a County Public Defenders' Office. Two of that county's Assistant Public Defenders ("APDs") work part-time and perform their APD duties out of their own private offices. These duties include client contact, correspondence, drafting motions and pleadings, and maintaining case files.

2. One of the part-time APDs is also a partner in a private law firm. His partner is a part-time judge in the local town court and is also his cousin. One other judge, a non-lawyer, serves in the same town court.

3. The attorneys working in the Public Defender's Office have represented defendants at the centralized arraignment part of the county jail as counsel at first appearance ("CAFA"). The APDs have rotating assignments to appear as CAFA in the centralized arraignment part. Similarly, local town court judges take turns presiding over this centralized arraignment part on a rotating basis. The inquirer, his law partner cousin/judge, and his cousin's co-judge, all take turns appearing in this centralized arraignment part. After arraignment, a case is transferred to the appropriate town court with jurisdiction over the charges. When the APD's cousin or his cousin's co-judge is presiding over the centralized arraignment part, the APD does not appear as CAFA for any defendants. There are cases, however, where the APD appears as CAFA in the centralized arraignment part but the case is then transferred to the town court where his cousin presides. In these situations, the APD will no longer represent the defendant in the case after the arraignment, and another APD will be assigned instead.

QUESTION:

4. May a part-time Assistant Public Defender whose cousin and law partner is a part-time town court judge appear solely as CAFA at a defendant's arraignment in a centralized arraignment part if neither the APD's cousin nor his cousin's co-judge are presiding, if the case will be transferred immediately after arraignment to the town court where the Assistant Public Defender's cousin presides as a part-time judge (after which another attorney will take over as counsel for the defendant)?

OPINION:

5. The question asks about two related situations: (A) May an APD represent a defendant in the town court before his cousin or his cousin's co-judge? and (B) if so, may an APD represent a defendant solely as CAFA in a centralized arraignment part when neither the APD's cousin nor his cousin's co-judge are presiding if the defendant's case will be transferred immediately after arraignment to the cousin's town court, where another attorney will take over the representation?

A part-time Assistant Public Defender may not represent clients in a town court where his law partner/cousin, or the law partner/cousin's co-judge, preside

6. The part-time APD clearly cannot appear in the town court in which his cousin and his cousin's co-judge preside. This follows from N.Y. State 1243 (2022), where we said that a part-time APD whose law partner is both his cousin and a part-time town court judge is precluded from representing clients of the public defender's office in the town court where the part-time judge serves because such representation would appear to violate both Judiciary Law Section 471 and the Rules of Judicial Conduct found in 22 NYCRR Part 100, thereby constituting a violation of Rule 8.4(f) of the New York Rules of Professional Conduct ("Rules").

7. Rule 8.4(f) states that: "a lawyer or law firm shall not . . . (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law." The "applicable rules of judicial conduct" include the Rules of the Chief Administrative Judge set forth in 22 NYCRR Part 100, and "other law" includes sections of the Judiciary Law that may be applicable to the inquiry. Interpreting the New York Judiciary Law is beyond the Committee's jurisdiction, so we express no views on it, but the rules of judicial conduct are within our jurisdiction so we will discuss their relevance to this inquiry.

8. Section 100.6(B)(2) of the rules of judicial conduct provides that a part-time judge "shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located . . ." (This seems consistent with Judiciary Law § 16, which states: "A judge shall not practice or act as an attorney or counsellor in a court of which he is, or is entitled to act as a member, or in an action, claim, matter, motion or proceeding originating in that court.")

9. This prohibition also applies to the part-time judge's partners and associates as well. Rule 1.0(h) of the Rules defines "firm" or "law firm" as including but not limited to, "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization."

10. Section 100.6(B)(3) of the Rules of Judicial Conduct prohibits a law partner from practicing in the town court where his partner and cousin work as a part-time judge. (A part-time judge "shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law . . ."). Correspondingly, § 471 of the New York Judiciary Law states that:

> The law partner or clerk of a judge shall not practice before him, as attorney or counsellor in any cause, or be employed in any cause which originated before him. A law partner of, or person connected in law business with a judge, shall not practice or act as an attorney or counsellor, in a court, of which the judge is, or is entitled to act as a member, or in a cause originating in that court; except where the latter is a member of a court, ex officio, and does not officiate or take part, as a member of that court, in any of the proceedings therein.

11. As noted in N.Y. State 1243 (2022), the remittal provision in § 100.3(F) of the Rules of Judicial Conduct allows the court and the parties in some cases to waive judicial disqualification, but § 100.3(F) does not appear to apply in situations described in RJC 100.6(B)(3).

A part-time Assistant Public Defender may represent a defendant in a centralized arraignment part when neither his law partner cousin nor his cousin's co-judge are assigned, when the case will be sent for adjudication to his cousin's town court as long as the case is reassigned to another Assistant Public Defender after arraignment

12. The part-time APD says he does not appear as a CAFA when his cousin or his cousin's co-judge are presiding in the centralized arraignment part. Occasionally, however, he does represent defendants in the centralized arraignment part as a CAFA when the case will be transferred for jurisdictional reasons to the town court where his cousin presides. When such a transfer to the cousin's town court occurs, another APD is assigned to the case after the arraignment.

13. Section 100.2 of the Rules of Judicial Conduct, entitled "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities," sets forth in § 100.2 (A) and (B) the following requirements for judicial conduct:

> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.

14. If the APD continued to represent the client after a transfer to his cousin's town court, that representation would violate Rule 8.4(f) (which provides that "a lawyer or law firm shall not . . . (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law") because the APD would be causing his cousin to violate §§ 100.6(B)(3) and 100.2 (A) and (B) (quoted above).

15. As we noted in N.Y. State 1115 ¶ 11 (2017), which discusses Rule 8.4(f):

> Under this provision, a lawyer may not knowingly undertake a representation when doing so would cause a judge to violate his or her own ethical obligations under the Rules of Judicial Conduct (such as the obligation in § 100.6(B)(3) not to "permit his or her partners or associates to practice law in the court in which he or she is a judge").

16. In our view, a part-time APD may appear in the centralized arraignment part for the sole purpose of representing a defendant for arraignment, when the defendant's charges will subsequently be transferred to the same town court on which the part-time APD's cousin/law partner sits, provided the APD does not represent a client in front of his cousin or his cousin's co-judge. That would be consistent with the strictures discussed in N.Y. State 1115. The APD's cousin (as judge) or the APD's cousin's co-judge are not under the APD's control and as judges they will presumably take whatever action they deem appropriate when a case that the APD appeared on at the central arraignment part comes before them in their town court, but under Rule 8.4(f) the APD may not knowingly assist them in conduct that violates the applicable rules of judicial conduct or other law.

CONCLUSION:

17. A part-time assistant public defender whose law partner is both his cousin and a part-time town court judge may not represent clients of the public defender's office in the town court where his cousin and law partner, and his cousin's co-judge, serve because that representation would violate Rule 8.4(f). The assistant public defender may, however, represent defendants in a centralized arraignment part when his cousin and his cousin's co-judge are not presiding, even when the case is subsequently assigned to the town court where his cousin is a part-time judge, as long as the assistant public defender no longer represents the client after the arraignment and does not appear on behalf of the client in the town court where his cousin is a judge. Such limited representation at the centralized arraignment part does not violate Rule 8.4(f).

(18-23)

OPINION 1270 (08/06/2024)

TOPIC: Engagement letters; Recording attorney-client communications; Withdrawing from employment; Advance consent to withdrawal.

DIGEST: A lawyer's engagement letter or retainer agreement may prohibit the client from making audio or video recordings of communications between the lawyer and client provided the engagement letter or retainer agreement: (a) does not mislead the client regarding circumstances under which the lawyer may seek to withdraw from the representation; and (b) does not purport to serve as the client's irrevocable advance consent to the lawyer's withdrawal if the client violates the prohibition.

RULES: 1.16

FACTS:

1. The inquirer contemplates including in his retainer agreements and engagement letters a "No Recording Clause" prohibiting each client from recording any communication between the two of them via audio or video absent the other's informed consent.

2. The inquirer seeks further to reserve the right to withdraw from a representation if a client violates the No Recording Clause.

QUESTIONS:

3. May a retainer agreement or engagement letter include a No Recording Clause?

4. If so, may the lawyer withdraw from the representation if the client violates the No Recording Clause (subject to permission of the tribunal in matters pending before a tribunal)?

5. May a retainer agreement or engagement letter provide that the client consents in advance to the lawyer's withdrawal from representation if the client breaches the No Recording Clause?

OPINION:

6. Nothing in the New York Rules of Professional Conduct (the "Rules") expressly prohibits (or expressly authorizes) the inclusion of a No Recording Clause in a retainer agreement or engagement letter. From that silence, we infer that a retainer agreement may include a No Recording Clause, subject to other provisions of the Rules that may apply to attorney-client relationships and agreements, including several provisions of Rule 1.16.

7. Rule 1.16(b) prescribes the circumstances in which withdrawal is mandatory and Rule 1.16(c) explains when withdrawal is permissive. When a lawyer desires to withdraw from a matter pending before a tribunal, however, the lawyer must comply with Rule 1.16(d), which requires a lawyer to seek permission from the tribunal if the rules of the tribunal so require, and requires a lawyer to "continue representation notwithstanding good cause for terminating the representation" if the tribunal so orders. Moreover, whether a matter is pending before a tribunal or not, the withdrawing lawyer must comply with Rule 1.16(e), which requires the lawyer to "take steps, to the extent reasonably practica-

ble, to avoid foreseeable prejudice to the rights of the client," including various steps specified in the rule.

8. Subject to the conditions set out in Rule 1.16, a lawyer's withdrawal based on a client's violation(s) of a No Recording Clause would be ethically permissible. *See, e.g.*, Rule 1.16(c)(1) (withdrawal is permissible when it "can be accomplished without material adverse effect on the interest of the client"); Rule 1.16(c)(7) (withdrawal is permissible when "the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively"); Rule 1.16(c)(10) (withdrawal is permissible when "the client knowingly and freely assents to termination of the employment"); Rule 1.16(c)(12) (withdrawal is permissible when "the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.").

9. A client's violation of a No Recording Clause will not always satisfy the conditions in Rule 1.16. For example, a client's single, inadvertent, or immaterial violation of a No Recording Clause, standing alone, is not likely to render a "representation unreasonably difficult for the lawyer to carry out employment effectively" within the meaning of Rule 1.16(c)(7) or to constitute "other good cause for withdrawal" within the meaning of Rule 1.16(c)(12). But a client's multiple minor violations of a No Recording Clause, or a client's single deliberate or material violation, are more likely to satisfy the conditions permitting withdrawal.

10. In N.Y. State 719 (1999), in opining on the predecessor to Rule 1.16 in the Code of Professional Responsibility, we noted that our analysis of provisions in engagement letters and retainer agreements permitting a lawyer to withdraw is governed by two principles.

11. The first principle is that an engagement letter or retainer agreement may not purport to authorize an attorney to withdraw from a representation under circumstances in which withdrawal would be impermissible under the rule governing withdrawal (then DR 2-110, now Rule 1.16).

12. The second principle is that an engagement letter may not mislead the client with regard to the attorney's obligations, including the attorney's obligation to continue as counsel in the absence of a permissible ground for withdrawing from the representation (or in the face of a tribunal's order that the attorney must continue the representation even if the attorney has a permissible ground for withdrawal).

13. In N.Y. State 719, we applied these principles to our analysis of DR 2-110, which was the predecessor of Rule 1.16. We said:

> [The withdrawal rule] does not authorize a lawyer to enter into, or act in reliance on, a retainer agreement which purports to set forth conditions for terminating the representation that would not otherwise justify withdrawal. . . . It is axiomatic that a lawyer may not enter into an agreement with a client in which the client expressly authorizes or permits the lawyer to violate a Disciplinary Rule. . . .

14. We believe that our analysis of the withdrawal rule in the former Code of Professional Responsibility (DR 2-110) fully applies today under Rule 1.16. Thus, a lawyer may not enter into, or

act in reliance on, a letter of engagement or retainer agreement that sets forth conditions for terminating the representation that would not justify withdrawal under Rule 1.16.

15. Whether the client's breach rises to a level justifying the lawyer's withdrawal will be a case-by-case inquiry. In any case, if the client breaches the No Recording Clause, the lawyer must seek the permission of the tribunal pursuant to Rule 1.16 (d) before withdrawing, and the lawyer must inform the client that the tribunal's permission will be required even if the client breaches the No Recording Clause. In other words, the lawyer may not mislead the client into believing that the lawyer will have unfettered discretion to withdraw based on the No Recording Clause in the letter of engagement if the client breaches that clause. Rather, both the lawyer and the tribunal will need to assess all of the facts and circumstances at the time the lawyer seeks to withdraw.

CONCLUSION:

16. A lawyer's letter of engagement or retainer agreement may prohibit a client from making video recordings and audio recordings of communications between the lawyer and client, provided the letter of engagement or retainer agreement: (a) does not mislead the client regarding circumstances under which the lawyer may seek to withdraw from the representation; and (b) does not serve as irrevocable advance consent by the client to withdrawal by the lawyer if the client violates the prohibition.

(12-23)

OPINION 1271 (08/20/2024)

TOPIC: Sharing of Legal Fees with Non-Lawyer; Impermissible Referral Fees; Non-Refundable Retainer

DIGEST: A lawyer violates Rule 5.4(a), which prohibits a lawyer from sharing legal fees with a non-lawyer, if she pays a percentage of a legal fee to an online service owned by non-lawyers, on which attorneys can bid on potential clients' legal services requests. Payment to the online service for access to the platform would also violate Rule 7.2(a), prohibiting a lawyer from paying for a recommendation, because the online service's website claims to vet and evaluate the skill of the participating lawyers. If the online service has no mechanism to refund the unearned portion of a fee to a lawyer who withdraws or is discharged by the client before completing the work, that would violate Rule 1.5(d)(4)'s prohibition against nonrefundable fees.

RULES: 1.2, 1.5(d)(4), 5.4(a), 5.8, 7.2(a)

FACTS:

1. The inquirer is considering contracting with a company that operates a website through which her firm would bid against other attorneys for clients in need of legal services (hereinafter referred to as the "Online Bidding Service"). She inquires whether the Online Bidding Service's fee structure violates any of the New York Rules of Professional Conduct (the "Rules").

2. The Online Bidding Service does not charge an upfront fee to participating attorneys. Instead, the client pays 50 percent of the eventual legal fee to the Service. The Service then deducts 15 percent of that 50 percent before delivering the remainder to the winning bidder (*i.e.,* the lawyer who submitted the winning bid).

3. Once the attorney has completed the legal work requested by the client, the attorney submits the legal work to the client through the Online Bidding Service's website. The client then has "a certain amount of time" to review and request changes.

4. After changes are made at the client's request (or after the specified period of time elapses without the client requesting changes), the Online Bidding Service will collect the remaining 50 percent of the fee from the client and deliver payment to the attorney.

5. According to the Online Bidding Service's website, in situations where a client is dissatisfied with the services provided by the attorney service, the Online Bidding Service will "attempt to negotiate a settlement," but will take no binding action. If client and attorney are unable to reach a settlement, "they can go to the state bar associations to deal with it."

6. It is unclear whether the Online Bidding Service has a process for returning fees paid in advance if the attorney fails to perform the contracted work and has not earned the full advance fee.

7. The Online Bidding Service screens potential participating attorneys in several ways. The Online Bidding Service reviews the information provided by applicant attorneys and verifies that they are licensed and in good standing. The Online Bidding Service also conducts video or phone inter-

views of attorney applicants to determine "cultural fit and client service skills." In addition, the Online Bidding Service evaluates the "basic contract drafting and review skills" of applicant lawyers. The Online Bidding Service proclaims on its web page that it can connect potential clients with lawyers who are experts in helping their clients sign favorable contracts. In addition, the Online Bidding Service claims that all its participating lawyers are vetted by its team and reviewed by users.

QUESTIONS:

8. Does the portion of the legal fee retained by the Online Bidding Service violate the prohibition against sharing legal fees with non-lawyers?

9. Does the portion of the legal fee retained by the Online Bidding Service violate the rule against paying for referrals?

OPINION:

10. The answer to both questions is "yes." Use of the Online Bidding Service as described by the inquirer to obtain potential clients would violate multiple Rules.

Sharing of Legal Fees with Non-Lawyers

11. Rule 5.4(a) states that a "lawyer or law firm shall not share legal fees with a nonlawyer," subject to certain exceptions that are not applicable here. Comment [1] to Rule 5.4(a) explains that "[t]hese limitations are to protect the lawyer's professional independence of judgment."

12. Here, the Online Bidding Service is owned by non-lawyers and collects as payment for its service 7.5% (= 15% of 50%) of the total legal fee agreed between lawyer and client. Thus, if the inquirer were to pay the Online Bidding Service under its fee structure, she would be sharing a legal fee with non-lawyers in violation of Rule 5.4(a). The fact that the Online Bidding Service collects its fee from the client before delivering the remainder to the lawyer does not avoid the application of this Rule. Thus, a lawyer who participates in the Online Bidding Service and accepts payment through the method utilized by the Online Bidding Service shares a legal fee with a non-lawyer by allowing the Online Bidding Service to retain a portion of the legal fee. *See* N.Y. State 942 (2012) ("Lawyer may not ethically enter into arrangement with a non-lawyer firm to accept referrals of clients whose legal fees, in an amount not disclosed to the client, would be taken from the fee paid by the client to the non-lawyer firm"); N.Y. City 2014-1 (2014) (if a nonlawyer organization charges the client more for legal services than it pays the Lawyer, then the arrangement could constitute impermissible fee splitting) (citing N.Y. State 942).

13. In short, the fee violates Rule 5.4(a).

Impermissible Referral Fees

14. Payment by a lawyer to the Online Bidding Service to generate clients also violates Rule 7.2(a), because it would be an impermissible payment for a referral.

15. Rule 7.2(a) provides: "A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client . . . ." Comment [1] to Rule 7.2 explains the meaning of the word "recommendation" by stating: "A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities."

16. In addition, Rule 7.2(c) provides:

> [A] lawyer may pay others for generating clients leads, such as Internet-based client leads, as long as (i) the lead generator does not recommend the lawyers, (ii) any payment to the lead generator is consistent with Rules 1.5(g) (division of fees) and 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer's independent professional judgment by a person who recommends the lawyer's services), and (iv) the lead generator's communications are consistent with Rules 7.1 (Advertising) and 7.3 (Solicitation and Recommendation of Professional Employment)."

17. In N.Y. State 1131 (2017), this Committee stated that advertising and marketing fees paid to an online service that matches attorneys with clients do not violate Rule 7.2(a) if the service matches attorneys using mechanical, non-discretionary factors. However, in N.Y. State 1132 (2017), we concluded that Avvo's ratings of participating lawyers "on a scale of 1 (Extreme Caution) to 10 (Superb)" and Avvo's description of participating lawyers as "highly qualified" expressly stated or at least implied or created the reasonable impression that Avvo was "recommending" those lawyers. Likewise, in N.Y State 1213 (2021), this Committee disapproved of attorneys paying fees to an online referral service matching clients seeking representation in traffic matters with attorneys that the service claimed had a "great track record in the court where the ticket will be contested." And in N.Y. State 1267 (2024), this Committee opined that an attorney would be paying an impermissible referral fee under Rule 7.2(a) if the attorney signed up with a web referral service that claimed it applied a "thorough vetting process" to its participating attorneys, who it described as "top tier."

18. Here, the Online Bidding Service states that it verifies the information provided by participating attorneys and that the participating attorneys are licensed and in good standing. If the Online Bidding Service did no more than that to screen attorneys, payment to it would not constitute improper payment for a recommendation. But the Online Bidding Service also conducts interviews with potential participants and claims in its marketing materials that it has assessed participating attorneys' "basic contract drafting and review skills." It further claims that its attorneys are "experts in helping their clients sign favorable contracts." The Online Bidding Service's claims that it has assessed the qualifications and competence of participating attorneys, like the claims of the nonlawyer entity discussed in Opinion 1267, are improper recommendations under the Rules.

19. We recognize that in N.Y. State 1132, N.Y. State 1213, and N.Y. State 1267, the referral service matched clients with attorneys, whereas the Online Bidding Service here allows potential clients to bid on attorneys, leaving the ultimate choice of attorney selection to the client. Nevertheless, the operative question is whether the service "recommends" the lawyers by endorsing the lawyers' qualifications and competence. Pursuant to Comment [1] to Rule 7.2 (quoted above), we believe the

Online Bidding Service is recommending the lawyers here because "it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities."

20. Because the Online Bidding Service recommends the lawyers participating in its service and charges the lawyers who participate in the service, the inquirer's payment to the Online Bidding Service to participate in the Service would be an impermissible referral fee under Rule 7.2(a).

Non-Refundable Retainers

21. Finally, the fee arrangement utilized by the Online Bidding Service implicates Rule 1.5(d)(4), which forbids non-refundable retainer fees. According to the inquirer, if a client discharges the attorney before the fifty percent advance fee has been earned, the attorney must return the unearned portion. Based on the information the inquirer has provided to us, there does not appear to be a mechanism for the attorney to return the portion of the client's fee paid to the Online Bidding Service, raising the specter of the attorney being unable to return to the client an unearned fee. The failure to return the unearned portion of the fee would be an additional violation of Rule 1.5. *See* Rule 1.5, Cmt. [4]. *See also Matter of Cooperman*, 83 N.Y.2d 465 (1994) (holding that non-refundable retainer fee agreements violate public policy and the former Code of Professional Responsibility).

CONCLUSION:

22. If the inquirer were to pay the Online Bidding Service under the Service's fee structure to participate in the Online Bidding Service, she would be sharing a legal fee with non-lawyers in violation of Rule 5.4(a). She would also be violating Rule 7.2(a), which prohibits lawyers from paying for a recommendation, because the Online Bidding Service claims to vet and evaluate the skill of the participating lawyers, thus constituting a "recommendation." In addition, if the Online Bidding Service fails to provide a mechanism to return to the client the unearned portion of the fee, that failure would potentially violate Rule 1.5(d)(4), which prohibits nonrefundable legal fees.

(20-23)

OPINION 1272 (08/27/2024)

TOPIC: Conflict of Interest when part-time Department of Social Services Attorney represents clients adverse to Department of Social Services

DIGEST: Regardless of the scope of a part-time attorney's work for a county Department of Social Services ("DSS"), the part-time DSS attorney may not represent private clients in Family Court in matters in which DSS has an interest or otherwise plays a meaningful role even if DSS and the attorney's client wish to consent, because that situation presents a non-consentable conflict of interest. Consent to representation may permit the inquirer to proceed in other matters in which DSS is in some way involved, however, depending on the specific facts and circumstances.

RULES: 1.7(a) & (b)

FACTS:

1. The Inquirer is a part-time attorney for a county Department of Social Services ("DSS"). The Inquirer's role is limited to representing DSS in child support and paternity matters before the Family Court Support Magistrate.[1] The attorney does not handle confirmation hearings or any other matters that come before the Family Court judge. The attorney also does not handle any child protective matters, nor does the attorney have access to DSS files in such matters. The Inquirer asks whether she may represent clients from her private practice in Family Court in matters in which DSS is involved.

QUESTION:

2. May a part-time DSS attorney whose work for DSS is limited to representing DSS in child support and paternity matters before the Family Court Support Magistrate represent private clients in Family Court in matters in which DSS is involved?

OPINION:

3. Rule 1.7(a) of the New York Rules of Professional Conduct (the "Rules") provides as follows:

> (a) Except as provided in paragraph (b) [of Rule 1.7], a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
>
> > (1) the representation will involve the lawyer in representing differing interests; or
> >
> > (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

4. The Inquirer represents DSS part time and represents private clients the rest of the time. DSS is thus her client. If DSS seeks relief in a Family Court proceeding or otherwise takes a position

1 Support Magistrates are appointed and empowered to hear, determine and grant relief in Family Court support and paternity proceedings. Family Court Act § 439.

regarding the outcome of the matter, but the Inquirer represented a private client whose position is adverse to that of DSS in the matter, then the Inquirer would be representing "differing interests" within the meaning of Rule 1.7(a)(1) even if the DSS matter and the private matter are not related. *See* Rule 1.7, Cmt. 6 ("absent consent, a lawyer may not advocate in one matter for a client against another client that the client represents in some other matter, even when the matters are wholly unrelated").

5. To provide some examples, it would be a conflict of interest under Rule 1.7(a)(1) for the inquirer to represent a private client as respondent (i.e., opposing party) in a Family Court Article 5 proceeding brought by DSS as assignee of an individual receiving public assistance or in a child protective proceeding brought by DSS under Family Court Article 10. Even if DSS is represented by another DSS attorney in such matters and the Inquirer has no involvement in the matter, Rule 1.10 "imputes the conflict of the lawyer to the entire legal unit of the Department [of Social Services] by virtue of the lawyer's part-time affiliation with it." N.Y. State 1074 (2015). This means that the inquirer would have a conflict of interest in such situations simply by virtue of the fact that one client (DSS) is adverse to another client (her private client).

6. Nevertheless, there may be matters in which DSS is involved but in which DSS does not have any particular interest in the course or outcome of the matter. For example, DSS may have conducted a previous investigation that is no longer relevant except as background, or a DSS social worker may be called upon to testify regarding facts that are not in dispute. Such a matter might not implicate Rule 1.7(a)(1) because the Inquirer would not be representing "differing interests," but the Inquirer would still need to consider whether she has a conflict of interest under Rule 1.7(a)(2) (quoted above), which would prohibit her from representing a client if a reasonable lawyer would conclude that there is a "significant risk" that her professional judgment on behalf of her client would be "adversely affected" by her own "financial, business, property or other personal interests." Thus, the Inquirer would need to consider, among other issues, whether her interest in maintaining her part-time position with DSS would constrain her in advancing arguments that might cast DSS or its staff in a bad light or be contrary to the positions DSS has taken in other matters.

7. Whether Rule 1.7(a)(1) or (a)(2) applies in any particular matter would depend on the specific facts and circumstances, but by way of general guidance it is the Committee's view that there would be a conflict if a part-time DSS attorney were to represent a private client in any matter in which DSS plays a "meaningful role." We believe that DSS would play a meaningful role both in matters in which the interests of a DSS client conflict with the interests of the opposing party, as well as in certain other matters in which DSS does not have a direct interest but is nevertheless involved in an important way.

8. The Committee previously articulated similar guidance in N.Y. State 1074 (2015). There, a part-time DSS attorney sought to accept assignments to represent indigent individuals both in criminal matters and in Family Court proceedings. Because the attorney did not intend to accept assignments in child abuse and neglect cases, the Committee concluded that the rule set out in N.Y. State 859 (2011) barring a prosecutor from acting as criminal defense counsel did not apply. Opinion 1074 continued that whether the attorney could take on other types of assigned criminal or Family Court cases depended on the particular facts and circumstances of each case. Specifically, Opinion 1074 stated:

> Although it is true that many Family Court proceedings implicate the Social Services Department, there are certain proceedings there that typically do not. For instance, a couple in a dispute over custody, or the occupancy or possession of marital assets, would not ordinarily excite the interest of the Department of Social Services. This is why we believe that the issue is best left to the facts and circumstances of the matter, in which the lawyer may assess whether the lawyer's part-time employment in the Department of Social Services would be an issue. *If the Department is to play any meaningful role in the Family Court proceeding, then the lawyer should decline the assignment; if not, then we see no reason why the lawyer may not appear in the Family Court on matters in which the Department plays no meaningful role.* [Emphasis added.]

9. If the Inquirer's representation of a private client creates a conflict of interest under Rule 1.7(a)(1) or (2), then the next question is whether that conflict is waivable under Rule 1.7(b). Rule 1.7(b) provides as follows:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

10. The Committee addressed the waiver issue in N.Y. State 1074, stating:

> The most important element of the analysis [under Rule 1.7(b)] is the lawyer's reasonable belief "that the lawyer may provide competent and diligent representation to each affected client." We cannot negate the possibility that a part-time lawyer for the Department of Social Services may reach such a reasonable belief in undertaking the defense of a criminal defendant provided that the matter is one in which the lawyer is not then working or has not recently worked with the law enforcement officials involved, and does not involve any issue within the jurisdiction of the Department of Social Services. For example, a DWI or a larceny charge against a stranger to the Department, in which none of the law enforcement officials with whom the lawyer works or has recently worked, cannot readily be said to entail the serious issues that a lawyer in the inquirer's position might otherwise raise. But for the lawyer to be engaged in *matters within the Department's jurisdiction*, which a Family Court appearance would inevitably invoke, or for the lawyer to be required to cross-examine law enforcement officials with whom the lawyer is now engaged as a part-time lawyer at the Department of Social Services or has recently done so, would present exactly the

> problems that our earlier opinions found impermissible. In all events, the informed consent of the Department of Social Services and of the lawyer's client, confirmed in writing, is essential to the undertaking. [Emphasis added.]

11. In referring to "matters within the Department's jurisdiction," the Committee was referring to matters in which DSS is so directly involved, as a party or otherwise, as to preclude the attorney's forming a reasonable belief, within the meaning of Rule 1.7(b)(1), that "the lawyer will be able to provide competent and diligent representation to each affected client." Absent such a reasonable belief, the conflict is non-consentable (*i.e.*, non-waivable) even if the conflicting parties desire to waive the conflict.

12. Whether the Inquirer here might be able to form such a belief in matters in which DSS is involved only indirectly would depend on the particular facts and circumstances of the matter. But even if the Inquirer reasonably believed that she could render competent and diligent representation to each affected client per Rule 1.7(b)(1), "the informed consent of the Department of Social Services and of the lawyer's client, confirmed in writing, [would be] essential to the undertaking." *See* N.Y. State 1074 (2015).

13. Finally, because the Committee addresses only issues arising under the New York Rules of Professional Conduct, we express no view with respect to any statute, ordinance or municipal ethics code that may bear upon the present inquiry.

CONCLUSION:

14. Regardless of the scope of a part-time attorney's work for a county Department of Social Services ("DSS"), the part-time DSS attorney may not represent private clients in Family Court in matters in which DSS has an interest or otherwise plays a meaningful role even if DSS and the attorney's client wish to consent, because that situation presents a non-consentable conflict of interest. Consent to representation may permit the inquirer to proceed in other matters in which DSS is in some way involved, however, depending on the specific facts and circumstances.

(07-24)

OPINION 1273 (08/28/2024)

TOPIC: Referral of real estate matters to lawyer from real estate broker who is also employed by lawyer as an associate

DIGEST: A lawyer may accept real estate clients referred by an associate in the lawyer's firm who is also a licensed real estate broker, provided the lawyer does not share legal fees or real estate commissions with the broker/associate and the lawyer obtains the client's informed consent, confirmed in writing.

RULES: 1.0(j), 1.7(a) and (b)

FACTS:

1. The inquirer has an associate who is also a real estate broker. The broker/associate would like to refer her real estate clients to the inquirer for legal representation in real estate matters and the inquirer would like to accept those referrals. The inquirer would not pay the broker/associate a referral fee for any matter in which the broker/associate was working as a realtor, and the inquirer would not receive any portion of any real estate commissions that the client paid to the broker/associate.

2. The inquirer states that referrals from the broker/associate would represent only a small part of the inquirer's law practice revenue and that clients would be advised of the employer/employee affiliation between the inquirer and the broker/associate.

QUESTIONS:

3. May the inquirer accept real estate clients referred to him by the broker/associate for legal representation in matters in which she is serving as a realtor?

OPINION:

4. In New York, a lawyer may not serve as both a realtor and a lawyer in the same real estate transaction. As the Committee wrote in N.Y. State 1043 (2015), "we have long and consistently stated that a lawyer may not act as a lawyer and a broker in the same real estate transaction, with or without client consent, and whether or not the lawyer charges for legal services." Opinion 1043 explained that "where the lawyer acts as both broker and a lawyer in the same transaction, 'the broker's personal and financial interest in closing the transaction interferes with the lawyer's ability to render independent legal advice with respect to the transaction consistent with the principles now embodied in Rule of Professional Conduct 1.7(a) . . . .'" *See also* N.Y. State 1015 (2014); N.Y. State 916 (2012); and N.Y. State 933 (2012).

5. In N.Y. State 1237 (2022), where a lawyer who owned a real estate company planned to split the brokerage commission earned on a real estate transaction with the real estate agent, we reaffirmed our view that a lawyer may not act as a lawyer and a broker in the same real estate transaction. In Opinion 1237 we wrote: "Our opinions have consistently concluded that a conflict arises when a lawyer acts as a lawyer and a broker in the same real estate transaction. They have also concluded that such conflicts are *per se* non-waivable" because of the inherent tension between a lawyer's duty to

render independent advice to the client, on one hand, and the lawyer's personal interest receiving a broker's fee, which is earned only upon closing of the transaction, on the other hand. That tension renders the conflict unwaivable (*i.e.,* non-consentable). *See* N.Y. State 1237 (2022), ¶ 8. Thus, returning to the present inquiry, neither the inquirer nor the broker/associate could act as both lawyer and broker on any matter referred to the inquirer by the broker/associate.

6. Referrals from real estate brokers to lawyers are not barred in all situations, however. For example, in N.Y. State 1208 (2020), this Committee opined that a lawyer was permitted to receive referrals from her paralegal who was also a licensed real estate broker, where the lawyer made full disclosure of her (the lawyer's) personal interest conflict to the client and obtained the client's informed consent, confirmed in writing, as required by Rule 1.7(b). Opinion 1208 noted that the ethical concerns in prior opinions "primarily derived from the separate and independent financial interest of the lawyer/broker arising from compensation for the non-legal service." Opinion 1208 observed that "[t]his rationale applies as long as the lawyer has a financial interest in the real estate broker's commission whether or not the lawyer is acting as a broker." N.Y. State 1208 ¶ 6 (*citing* N.Y. State 1043). In Opinion 1208, the Committee determined that the lawyer "had no financial interest in the broker's commission," and therefore, the per se non-waivable conflict that was present in N.Y. State 916 and N.Y. State 1043 because of the lawyer's interest in the broker's commission in those situations was not triggered. But Opinion 1208 advised lawyers to be mindful about maintaining professional independence even if they had no interest in the broker's commission, and cautioned the lawyer not to permit the paralegal to "direct or regulate any advice rendered to the referred real estate client." N.Y. State 1208 ¶ 11.

7. Here, the inquirer asks whether an associate who is also a real estate broker may refer real estate matters in which the associate is acting as a realtor but not as a lawyer. The inquirer would obtain informed client consent from the affected clients, would not allow the broker/associate to participate in the legal work on real estate matters the associate referred to the lawyer, and would not share real estate commissions or legal fees with the broker/associate in referred matters. The inquirer believes that referrals from the broker/associate are unlikely to constitute a significant portion of the inquirer's law practice or to generate significant income.

8. The test for determining whether the conflict is consentable turns on the significance of the likely brokerage revenue to the lawyer and whether such revenue will affect the lawyer's independent professional judgment. As we noted in Opinion 1208, "a disabling personal financial conflict of interest is likely to arise if the paralegal refers enough matters to the inquirer that those referrals, in the aggregate, constitute a significant portion of the fees earned in the inquirer's practice as a whole." N.Y. State 1208 ¶8. Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the "Rules") provides that (absent a client's informed consent, confirmed in writing) a lawyer should not represent a client if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." If there is such a personal interest conflict, Rule 1.7(b) provides that the lawyer may nonetheless represent the client in the transaction if the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation," the representation is not prohibited by law, and the client "gives informed consent, confirmed in writing." Rule 1.7(b)(1), (2) and (4).

9. Rule 1.0(j) defines "informed consent" as follows:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives."

See also Rule 1.0, Comment [6] (explaining "informed consent").

10. Comment [18] to Rule 1.7 elaborates on "informed consent" by stating:

> Informed consent requires that each affected client be aware of the zelevant circumstances, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires. *See* Rule 1.0(j). The information that a lawyer is required to communicate to a client depends on the nature of the conflict and the nature of the risks involved, and a lawyer should take into account the sophistication of the client in explaining the potential adverse consequences of the conflict. . . .

11. We conclude that the conflict of interest arising from the broker/associate's referral of a matter to the inquirer is consentable under these circumstances, and thus Rule 1.7 permits the conflict to be waived by the client if the lawyer obtains the client's informed consent, confirmed in writing, per Rule 1.7(b)(4).

CONCLUSION:

12. A lawyer may accept real estate clients referred by an associate in the lawyer's firm who is also a licensed real estate broker, provided the lawyer does not share legal fees or real estate commissions with the broker/associate and the lawyer obtains the client's informed consent, confirmed in writing.

(01-24)

OPINION 1274 (09/12/2024)

TOPIC: Conflicts of interest, former clients, government lawyers

DIGEST: A lawyer employed in the counsel's office of a state agency would not have a conflict in representing the agency in an enforcement action against a client the lawyer had formerly represented in private practice unless the lawyer would normally be expected to have acquired confidential information in the course of the lawyer's prior representation that was material to the enforcement action. If there were a conflict, the conflict would be imputed to the counsel's office, and screening would not suffice to avoid imputation, absent consent of the former client.

RULES: Rules 1.6(a), 1.9(b)-(c), 1.10(a) & (e), 1.11(d)

FACTS:

1. The inquirer is employed in the counsel's office of a state agency that licenses certain categories of health care providers. Prior to beginning employment at the agency in 2022, the inquirer was in private practice in a law firm that represented a client that is licensed by the agency to provide certain health care services. The same client also provides other services that are not licensed by the agency. The law firm's representation of the client was primarily conducted by another lawyer, but the inquirer was brought in for two of the client's matters: a discrimination complaint by an employee in a facility that is not licensed by the state agency; and a coverage dispute with an insurer pertaining to a claim of abuse by an employee in one of the client's facilities that is also not licensed by the state agency.

2. Recently, the inquirer learned that his agency-employer is considering bringing an enforcement action against the inquirer's former client over a range of deficiencies in the client's licensed facilities, including staffing deficiencies, failure to report incidents, renovations conducted without the required inspection by the agency, and improper treatment practices. The inquirer asks whether he may work on the matter or instead must be screened from it.

QUESTIONS:

3. Does a lawyer currently employed by a state agency have a conflict of interest in working on an enforcement action against a client that the lawyer previously represented in private practice?

4. If the lawyer does have a conflict, is the conflict imputed to the other lawyers in the office of the state agency in which the lawyer works?

OPINION:

5. This inquiry is governed by Rule 1.9 of the New York Rules of Professional Conduct (the "Rules"), and in particular by Rule 1.9(b), which provides:

> (b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client: (1) whose interests are materially adverse to that person; and (2) about

> whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

6. The term "firm," which appears in Rule 1.9(b), is defined in Rule 1.0(h) to include "lawyers employed in a . . . government law office, or the legal department of a corporation or other organization"). Notably, Rule 1.9(c), which is also referred to in the quoted excerpt from paragraph (b), in most circumstances bars a lawyer who formerly represented a client, or whose law firm formerly represented a client, from using confidential information of the client protected by Rule 1.6 adverse to the former client or from revealing such information. Thus, we need to turn to Rule 1.6 to understand Rule 1.9.

7. Rule 1.6(a) prohibits a lawyer from knowingly revealing "confidential information" or using it to the disadvantage of the client or for the advantage of the lawyer, unless the client gives informed consent. Rule 1.6 defines the term "confidential information" as follows:

> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

8. Under Rule 1.9(b), the inquirer would have a conflict only if he or his prior firm had represented the client in a matter that was substantially related to the potential enforcement action and the lawyer had acquired confidential information that was material to the new matter. Comment [3] to Rule 1.9 explains that "[m]atters are substantially related for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Thus, whether or not the inquirer actually obtained material confidential information during the prior representation, a conflict arises under Rule 1.9 if he would normally have obtained such information during the prior representation, because in that instance the prior and current matters would be "substantially related."

9. Comment [3] notes, as an example of a substantially related matter, that "a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce." By contrast, Comment [3] says that "a lawyer who has previously represented a client in securing environmental permits to build a shopping center . . . would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent." Further, "[i]n the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation. On the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such representation." (Emphasis added.) Comment [3] also notes that "[i]nformation acquired in a prior representation may have been rendered obsolete by the passage of time."

10. In this case, the inquirer will need to determine whether confidential information that a lawyer would "normally" have acquired in the course of handling a discrimination complaint or an insurance coverage dispute of the kind that he handled – in each case in a facility that was not covered by the agency license at issue – would materially advance the agency's position in the potential enforcement action against the former client. The inquirer would need to make the same determination with respect to any confidential information that he acquired about other matters handled by the firm even if he did not work on them (e.g., if he had been consulted about them, discussed them informally, or overheard other lawyers discussing them). The fact that the matters concerned different facilities than those that would be the subject of the enforcement action would be relevant but not necessarily dispositive. For example, a conflict would exist under Rule 1.9 if the inquirer learned facts touching on the challenged practices that were applicable to both the licensed and other facilities. The passage of time may also be relevant, so it is relevant when the challenged practices arose in relation to the time period addressed in the discrimination and coverage disputes, and whether information from that time period is still current.

11. If the inquirer concludes that he has a conflict arising out the prior representation, he would be barred from representing the agency in the potential enforcement action unless he received the informed consent of the former client.

12. If the inquirer has a conflict, then the conflict would be imputed to the other lawyers in the agency counsel's office under Rule 1.10. Rule 1.10(a) provides:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule . . . 1.9, except as otherwise provided therein.

Rule 1.10(d) provides that the imputed disqualification can be waived by the former client. Screening alone would not suffice to cure the imputed disqualification except as a condition of consent. N.Y. State 1186 ¶ 26 (2020) ("Firewalls and screens cannot prevent imputation of a conflict under Rule 1.10(a)" unless the Rules provide otherwise).

13. Rules 1.9, and the imputation of Rule 1.9 conflicts under Rule 1.10, apply to current government lawyers as they do to lawyers in a private firm. Comment [9B] to Rule 1.11 states:

> Where a government law office's representation is materially adverse to a government lawyer's former private client, . . . the representation would, absent informed consent of the former client, . . . be prohibited by Rule 1.9. Rule 1.10 remains applicable to that former client so as to impute the conflict to all lawyers associated in the same government law office.

14. We note that under the ABA Model Rules of Professional Conduct, upon which the New York Rules are in many respects based, imputation pursuant to Rule 1.10 does not apply to current government lawyers. ABA Model Rule 1.10(e) ("The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11."); ABA Model Rule 1.11, Cmt. [2] ("Because of the special problems raised by imputation within a government agency, paragraph (d) [of Rule 1.11, which addresses conflicts of a current government lawyer] does not impute the con-

flicts of a lawyer currently serving as an officer or employee of the government to other associate government officers or employees, although ordinarily it will be prudent to screen such lawyers.").

15. In 2008, when the New York State Bar Association proposed to the New York Courts that New York adopt what became the current New York Rules, the State Bar proposed that Rule 1.10 would not apply to government law offices. See New York State Bar Association, Proposed New York Rules of Professional Conduct, Rule 1.10(e) ("The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11."), Rule 1.11(d)(1) ("Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee: (1) shall comply with Rules 1.7 and 1.9 but is not subject to Rule 1.10 . . . .") & Rule 1.11(e) (providing for imputed disqualification in government law offices unless screening is put in place) (Feb. 1, 2008).[2] The Courts did not adopt those proposed provisions, and the State Bar revised the Comments to conform to the black letter text as adopted by the Courts. In revising the Comments, the State Bar promulgated Comment [9B], which, as quoted above, states that conflicts under Rule 1.9 are imputed to lawyers in a government law office as they would be in a private law office.[3]

16. We recognize that the imputation of former-client conflicts to government law offices may present serious difficulties for government agencies, and that agencies will often find it impossible to obtain consent from the particular lawyer's former client. A separate conflict rule in Rule 1.11(d)(1) that bars a government lawyer who has participated in a matter personally and substantially while in private practice from participating in the same matter at the government agency, but conflicts arising under subparagraph (d)(1) are not imputed to the government law office, which contains a "rule of necessity" that states that the disqualification is overridden where "under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter." See Rule 1.11, Cmts. [9A] & [9B] (describing non-imputation and the rule of necessity); N.Y. State 1029 ¶¶ 5-10, 19-26 (2014) (outlining differences between Rule 1.9 conflicts and Rule 1.11(d)(1) conflicts). Neither Rule 1.9 nor Rule 1.10 contains a similar rule of necessity. Whether such a rule of necessity overriding Rule 1.9 conflicts and imputation of those conflicts can be derived from sources outside the Rules of Professional Conduct is a question of law on which we do not opine.

CONCLUSION:

17. A lawyer employed in the counsel's office of a state agency would not have a conflict representing the agency in an enforcement action against a client the lawyer had formerly represented in private practice unless the lawyer would normally be expected to have acquired confidential information in the course of the lawyer's prior representation that was material to the enforcement action. If there were a conflict, the conflict would be imputed to the counsel's office, and screening would not suffice to avoid imputation, absent consent of the former client.

(17-24)

2 Available at NYSBA | Professional Standards for Attorneys (archive.org).

3 The courts in New York adopt only the Rules, not the comments to the Rules. The New York State Bar Association separately publishes the comments to provide guidance for attorneys in complying with the Rules. As stated in the Preamble to the Rules, "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." Preamble [13].

OPINION 1275 (10/23/2024)

TOPIC: Disciplinary Authority and Choice of Law; Immigration Practice

DIGEST: A lawyer admitted to practice in New York who principally practices before federal immigration courts in another state must comply with any reporting obligations in that state's Rules of Professional Conduct.

RULES: 8.3(a), 8.5(a) & (b)

FACTS:

1. The Inquirer is admitted to practice in New York State (State A) but principally practices before federal immigration courts in a different state (State B). While working on a client's matter, the Inquirer became aware that another attorney who is admitted in a third state (State C) has potentially violated the Rules of Professional Conduct in a matter that is not in connection with a proceeding in a court.

QUESTION:

2. Does the Inquirer have an obligation to report another attorney's potential violation of the Rules of Professional Conduct?

OPINION:

3. The Inquirer requests guidance regarding his obligations under the New York Rules of Professional Conduct (the "Rules").

4. Rule 8.3(a) states that a "lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." The question is whether the New York Rules of Professional Conduct apply to the Inquirer, given that he is also admitted to practice in State B and principally practices in State B. The answer to this question is governed by Rule 8.5 ("Disciplinary Authority and Choice of Law").

5. In N.Y. State 1058 ¶ 6 (2015), which addressed an inquiry from a lawyer admitted solely in New York but is authorized by federal law to practice immigration law in another state, we said:

> Under Rule 8.5(a), a lawyer admitted in New York is subject to the disciplinary authority of this state no matter where the lawyer's conduct occurs — but that does not necessarily mean that the New York Rules will apply. Rather, the rules of conduct that a New York disciplinary authority will apply will depend on the choice of law rules set forth in Rule 8.5(b). . . .

6. Rule 8.5(b) provides:

> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
>
> > (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
> >
> > (2) For any other conduct:
> >
> > > (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
> > >
> > > (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

7. Any obligation to report the potential violation described by the inquirer does not relate to "conduct in connection with a proceeding in a court" under Rule 8.5(b)(1), so the matter is governed by Rule 8.5(b)(2), which applies to "any other conduct."

8. The inquirer is formally admitted to practice solely in New York, which might seem to indicate that Rule 8.5(b)(2)(i) applies – but N.Y. State 1058 (2015) noted that "if a New York lawyer is permitted to engage in conduct in another jurisdiction without being formally admitted in that jurisdiction, the lawyer should be deemed to be 'licensed to practice' in the other jurisdiction . . . ." We will assume for purposes of this opinion that the Inquirer is permitted to practice in federal immigration courts in State B, and is therefore deemed licensed to practice in State B. When a lawyer is licensed to practice law "in this state and another jurisdiction," Rule 8.5(b)(2)(ii) applies. *See also* N.Y. State 1054 (2015), N.Y. State 1042 (2014), N.Y. State 1041 (2014), and N.Y. State 815 (2007) (all applying this principle).".

9. The inquirer practices "almost exclusively" in State B before federal immigration courts. Therefore, under Rule 8.5(b)(2)(ii), State B is the jurisdiction in which the inquirer "principally practices" and we believe that the State B's Rules of Professional Conduct will govern the inquirer's reporting obligations if a New York disciplinary authority examines the inquirer's conduct. *See* N.Y. State 750 (2001) ("Because the attorney [who represents individuals in immigration matters] is admitted to practice in New York and Illinois, and the jurisdiction in which the attorney principally practices is Illinois, the ethics rules of Illinois are applicable to the inquirer's question").

10. The inquirer's conduct could, however, also be examined by the disciplinary authorities in State A and State B because, as New York Rule 8.5(a) states: "A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct." Whether the ethics rules of federal immigration courts or any other jurisdiction's Rules of Professional Conduct require the Inquirer to report the potential violation is a question beyond our

jurisdiction on which we offer no opinion. *See, e.g.,* N.Y. State 1058 ¶ 8 ("We do not opine on the specific ethical obligations governing immigration lawyers").

CONCLUSION:

11. A lawyer admitted to practice in New York who principally practices before federal immigration courts in another state must comply with any reporting obligations in that state's Rules of Professional Conduct.

(14-24)

OPINION 1276 (10/23/2024)

TOPIC: Fake social media accounts offering legal services

DIGEST: A lawyer who knows that an unknown or unidentified person is creating fake social media accounts in order to scam the public has no duty under the Rules of Professional Conduct to take any action to combat the fake accounts.

RULES: 3.3(a)(3) & (b), 8.3(a), and 8.4(a)-(c)

FACTS:

1. The inquirer ("Inquirer"), an immigration lawyer, maintains a social media account. On this account Inquirer creates and posts videos explaining various aspects of the immigration process. However, certain unknown imposters and scammers have used Inquirer's name, photo, and immigration videos to create fake accounts on the same social media platform. People who see the videos posted on a fake account may be tricked into paying supposed legal fees to the person operating the fake account, thinking they are retaining Inquirer, but the fake accounts provide no legal services (or any other services), so the would-be clients lose their money. Inquirer does not know who these imposters and scammers are but he has reported these fake accounts to the social media platform and has asked the platform to remove them. So far, the platform has not removed or blocked the fake posts or fake accounts.

2. Inquirer has created and posted videos on his own social media page warning prospective clients not to fall for scams like the fake accounts, but he wants to know if he must take additional action.

QUESTION:

3. Does a lawyer have any ethical obligations with regard to fake social media accounts in which scammers use the lawyer's social media videos to attract clients?

OPINION:

4. We first consider whether Inquirer is engaging in any affirmative misconduct. Rule 8.4 ("Misconduct") provides, in pertinent part, that a lawyer or law firm "shall not":

> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . .

5. The Inquirer is not doing any of these things. Instead, he is the victim of misconduct by others (who may not even be lawyers), and those others – over Inquirer's objection – are engaging in

improper conduct. Far from assisting or inducing the scammers to engage in this conduct, Inquirer is trying to impede or stop the scammers and to warn the public about them. He therefore is not violating Rule 8.4(a)-(c).

6. We next consider whether Inquirer is engaging in misconduct by failing to take more robust action to counteract or stop the fake accounts. Only a few provisions in the New York Rules of Professional Conduct (the "Rules") require a lawyer to report misconduct. In our view, these provisions do not apply here.

7. Rule 3.3(a)(3) provides that lawyers who come to know that they have offered false material evidence to a tribunal must "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." This provision does not apply here because Inquirer has not offered the fake videos (the false evidence) to a tribunal.

8. Rule 3.3(b) provides that lawyers who represent a client before a tribunal and who know that a person "intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding" must "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." The Inquirer here knows that some unidentified "person" is engaging or has engaged in criminal or fraudulent conduct, but Rule 3.3(b) does not apply because that criminal or fraudulent conduct is not related to any pending "proceeding."

9. Rule 8.3(a) provides that a lawyer who "knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." This provision does not apply here because the Inquirer does not know whether any person creating fake social media accounts is a lawyer.

10. Thus, the three provisions of the Rules of Professional Conduct we have identified that require a lawyer to report various kinds of misconduct do not apply to the situation here. Likewise, no other provision in the Rules would require Inquirer to take action to combat the fake social media accounts at issue here.

CONCLUSION:

11. A lawyer who knows that some unknown or unidentified person is creating fake social media accounts in order to scam the public has no duty under the Rules of Professional Conduct to take any action to combat the fake accounts.

(21-24)

OPINION 1277 (11/26/2024)

TOPIC: Crowdfunding on behalf of indigent clients

DIGEST: A non-profit criminal defense organization may set up and administer GoFundMe pages for the benefit of indigent current clients, provided that the financial assistance is rendered as gifts, not loans, and the financial assistance does not promise financial assistance prior to retention or as an inducement to continue the lawyer-client relationship.

RULES: 1.6(a), 1.8(e)(4), & 1.9(c)

FACTS:

1. The inquirer works for a non-profit indigent criminal defense organization. The organization's clients include incarcerated individuals who will have no financial resources when released. The inquirer has submitted this inquiry on behalf of the non-profit organization.

QUESTION:

2. May a non-profit legal defense organization set up and administer GoFundMe pages intended to help the organization's indigent clients raise funds from the public to cover their living expenses upon release from incarceration?

OPINION:

How GoFundMe operates

3. GoFundMe is a for-profit crowdfunding platform that seeks donations to enable individuals or groups to raise funds either for registered 501(c)(3) charities or for private causes. Donations sent to a GoFundMe page may be transferred either to the person setting up the page or to a beneficiary. GoFundMe charges no fee to set up a GoFundMe page, but GoFundMe automatically deducts a standard transaction fee (2.9% + $0.30) from each donation.

4. As a threshold matter, this Committee does not opine on issues of law and expresses no opinion on the legality or implications of the proposed GoFundMe activity under the Internal Revenue Code or other applicable law.

Rule 1.8(e): Financial assistance to indigent clients

5. Until 2020, Rule 1.8(e) of the New York Rules of Professional Conduct (the "Rules") (and the Code of Professional Responsibility before that) generally prohibited lawyers from advancing or guaranteeing financial assistance (such as living expenses or medical expenses) to a client in connection with contemplated or pending litigation unless certain exceptions applied. On June 24, 2020, however, the Appellate Divisions approved new Rule 1.8(e)(4), which allows lawyers to provide financial assistance to indigent clients under specific conditions.

6. Rule 1.8(e), which states the general rule, provides that a lawyer "shall not advance or guarantee financial assistance to a client" unless one of four exceptions applies. Regarding the instant inquiry, which is from a non-profit criminal defense organization, we believe that the exception stated in Rule 1.8(e)(4) applies. Rule 1.8(e)(4) states:

> (e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
>
> > (4) a lawyer providing legal services without fee, a not-for-profit legal services or public interest organization, or a law school clinical or pro bono program, may provide financial assistance to indigent clients but may not promise or assure financial assistance prior to retention, or as an inducement to continue the lawyer-client relationship. Funds raised for any legal services or public interest organization for purposes of providing legal services will not be considered useable for providing financial assistance to indigent clients, and financial assistance referenced in this subsection may not include loans or any other form of support that causes the client to be financially beholden to the provider of the assistance.

7. Rule 1.8(e)(4) – often called the "humanitarian exception" – thus expressly applies to a "not-for-profit legal services or public interest organization" that is serving indigent clients and is "providing legal services without fee." Financial assistance to clients under the humanitarian exception must not come from "[f]unds raised for any legal services" and must be in the form of gifts, not "loans." Thus, so long as the funds raised on the GoFundMe page are disbursed as outright gifts to indigent clients, the inquirer may administer the proposed GoFundMe page as described in the inquiry. *See generally, Simon's New York Rules of Professional Conduct Annotated* § 1.8:76 (Thomson Reuters, 24th ed. 2024) (phrase-by-phrase analysis of the "humanitarian exception" to the general rule against financial assistance to litigation clients).

8. Comment [10A] to Rule 1.8, which the New York State Bar Association added to the Comments in 2020 to explain the "humanitarian exception," elaborates on Rule 1.8(e)(4) as follows:

> Subparagraph (e)(4) allows lawyers providing legal services "without fee," not-for-profit legal services and public interest organizations, and law school clinical and pro bono programs, to provide financial assistance (beyond court costs and expenses of litigation) to indigent clients in connection with contemplated or pending litigation. Examples of financial assistance permitted under subparagraph (e)(4) include payments to cover food, rent, clothing, personal incidentals, and medicine. If financial assistance may have adverse consequences for the client, including, *e.g.,* for receipt of government benefits, receipt of social services, or tax liability, the lawyer should consult with the client about these consequences. *See* Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"). Subparagraph (e)(4) does not permit lawyers, organizations, or programs to provide financial assistance beyond court costs and expenses of litigation to clients who are not indigent.

Duty of confidentiality to current and former clients

9. The lawyers in the inquiring criminal defense organization should also be mindful to comply with the Rules governing confidentiality when administering the GoFundMe page. Rule 1.6(a) prohibits a lawyer from knowingly revealing "confidential information" or using it to the disadvantage of the client or for the advantage of the lawyer, unless the client gives informed consent. Rule 1.6 defines the term "confidential information" as follows:

> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

10. Thus, unless a client gives informed consent (or some other exception to the duty of confidentiality applies, which we doubt is the case here), the lawyers in the organization must take care to ensure that no information is included on the GoFundMe that is likely to be "embarrassing" or "detrimental" to the client, or that could waive the attorney-client privilege, or that the client has requested be kept confidential.

11. Moreover, if the inquiring organization's indigent clients become former clients upon release from incarceration (or at some other point), we caution that Rule 1.9(c) imposes a duty of confidentiality on lawyers toward former clients similar to that imposed by Rule 1.6 toward current clients.

Prohibition against promising financial assistance

12. Finally, under the express language of Rule 1.8(e)(4), the inquiring organization "may not promise or assure financial assistance [via the GoFundMe page] prior to retention" by an indigent client and may not promise such financial assistance "as an inducement to continue the lawyer-client relationship" after the organization is retained. These twin prohibitions seem unlikely to come into play here, given that the inquiring organization does not charge any fees for providing legal services, but these prohibitions are written into subparagraph (e)(4) so we mention them here as a precaution.

CONCLUSION:

13. A non-profit criminal defense organization may set up and administer GoFundMe pages for the benefit of indigent current clients, provided that the financial assistance is rendered as gifts, not loans, and the financial assistance does not promise financial assistance prior to retention or as an inducement to continue the lawyer-client relationship.

(08-24)

2025

OPINION 1278 (02/05/2025)

TOPIC: Disclosure of prior relationship with witness.

DIGEST: Under Rule 3.8(b), a prosecutor is required to timely disclose her past romantic relationship with a law enforcement officer in any case where the officer is to be a witness whose testimony could be subject to challenge. Rules 3.3(a)(1) and 3.4(a)(3) may also be implicated if New York's discovery law requires disclosure of the past romantic relationship. Whether a lawyer's past romantic relationship with a witness implicates a personal interest that would create a "significant risk" of adversely affecting the lawyer's judgment within the meaning of Rule 1.7(a)(2) depends on the facts and circumstances of that prior relationship and its likely impact on the objectivity and conduct of the lawyer in question.

RULES: 1.7(a)(2) & (b), 3.3(a)(1), 3.4(a)(3), and 3.8(b).

FACTS:

1. The inquirer is a prosecutor who had a romantic relationship with a member of law enforcement. That relationship ended years ago and the law enforcement officer moved away – but now the law enforcement officer has now returned to the jurisdiction where the prosecutor works, and he may become a witness in one of the prosecutor's cases. They were not in a relationship during any ongoing cases. The inquirer wants to know if she is ethically required to disclose the former relationship.

QUESTION:

2. Must a prosecutor, who was in a now-ended relationship with a witness, disclose the former relationship?

OPINION:

3. Rule 3.8 of the New York Rules of Professional Conduct (the "Rules") sets out "special" ethical responsibilities that apply to prosecutors and other government lawyers in criminal cases. Relevant to the current inquiry, Rule 3.8(b) requires that:

> A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence **or information** known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal. [Emphasis added.]

Information that "tends to negate the guilt of the accused" includes information that could be used to impeach the credibility of a prosecution witness by exposing the bias of a witness whose testimony could be subject to challenge by the defense. *See* California Rules of Professional Conduct, Rule 3.8 Cmt. [3] (disclosure of exculpatory evidence includes, "at a minimum, the duty to disclose impeachment evidence"); *cf.* N.Y. City 2016-3, n. 12 ("Evidence or information that would be useful solely to impeach a witness will not invariably 'tend to negate the guilt of the accused'"); *see also Giglio v. United States,* 405 U.S. 150, 154 (1972) (evidence that tends to negate the guilt of the accused includes impeachment evidence); *People v. Steadman,* 82 N.Y.2d 1, 7 (1993) ("The prosecutor's duty is not lessened because *Brady* material may affect only the credibility of the witness")[1]. Because the law enforcement officer's prior romantic relationship with the prosecutor could make him a biased witness in favor of the prosecution, defense counsel could use that prior relationship to impeach the witness's credibility by exposing the witness's potential bias. As such, the inquirer has a duty to timely disclose that prior relationship whenever the witness's testimony could be subject to challenge.

4. Moreover, although answering questions of law is beyond the jurisdiction of this committee, it is important to note that New York's criminal discovery statute expressly requires prosecutors to timely disclose "all evidence and information . . . that tends to: . . . impeach the credibility of a testifying prosecution witness," C.P.L. 245.20(k)(iv), and to then certify to the court that the prosecutors have complied with their discovery obligations. C.P.L. 245.50(1). Since a prosecution witness's former romantic relationship with the prosecutor could be used to impeach the credibility of that witness by exposing his potential bias, a prosecutor's failure to disclose the existence of that relationship could run afoul of the prosecutor's statutory discovery obligations. If non-disclosure does indeed violate the law, then that non-disclosure could, in turn, run afoul of the prosecutor's ethical obligations under Rule 3.3(a)(1) to avoid making false statements to a tribunal and the prosecutor's obligations under Rule 3.4(a)(3) to disclose "that which the lawyer is required by law to reveal."

5. In addition to the disclosure obligations discussed above, the inquirer must also consider whether her handling of a case where a former romantic partner would be a witness would create a personal interest conflict. Rule 1.7(a)(2) generally prohibits a lawyer from representing a client "if a reasonable lawyer would conclude that…there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other *personal interests*." (Emphasis added.) Notwithstanding the existence of such an interest, Rule 1.7(b)(1) nonetheless permits the lawyer to represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

1 Notably, both the Association of the Bar of the City of New York and the American Bar Association Standing Committee on Ethics and Professional Responsibility have concluded that Rule 3.8 is not simply an ethical codification of *Brady* and its progeny. *See* N.Y. City 2016-3; ABA 09-454 (2009) (both noting that *Brady's* materiality requirement and *Brady's* timing requirements appear to differ from the plain language of Rule 3.8).

(4) each affected client gives informed consent, confirmed in writing.

6. Whether a lawyer's prior romantic relationship with a witness implicates a personal interest that would create a "significant risk" of affecting the lawyer's judgment depends on facts and circumstances of that prior relationship and its likely effect on the conduct and objectivity of the lawyer. *See* N.Y. State 1255 (2023) (concluding that where defense attorney was in *current* romantic relationship with a county deputy sheriff who was a "supporting officer" in one of the attorney's cases, the attorney must determine if a reasonable lawyer would conclude that there is a significant risk that the attorney's independent professional judgment on behalf of the client will be adversely affected.) For example, if the prosecutor holds significant hostility towards the witness (*e.g.*, if the relationship did not end well) such that the prosecutor's in-court interactions with the witness would be substantively affected or her desire to settle the case to avoid interaction with the witness would be increased, then it could be reasonably concluded that there is a significant risk that the lawyer's personal interest will adversely impact her representation. It is for the inquirer, who is aware of the totality of the circumstances, to determine whether a reasonable lawyer would conclude that there is a significant risk that the attorney's judgment would be affected by the prior relationship.

7. If the inquirer concludes that there is such a risk that her judgment would be adversely affected by the prior relationship, she then must determine whether she reasonably believes that she can still provide competent and diligent representation, *see* Rule 1.7(b)(1), and whether she can otherwise comply with the requirements of Rule 1.7(b), including obtaining the informed consent of the client, confirmed in writing, per Rule 1.7(b)(4). *See* N.Y. State 1255.

CONCLUSION:

8. Under Rule 3.8(b), a prosecutor is required to timely disclose her past romantic relationship with a law enforcement officer in any case where the officer is to be a witness whose testimony could be subject to challenge. Rules 3.3(a)(1) and 3.4(a)(3) may also be implicated if New York's discovery law requires disclosure of the past romantic relationship. Whether a lawyer's past romantic relationship with a witness implicates a personal interest that would create a "significant risk" of adversely affecting the lawyer's judgment within the meaning of Rule 1.7(a)(2) depends on the facts and circumstances of that prior relationship and its likely impact on the objectivity and conduct of the lawyer in question.

(15-24)

OPINION 1279 (02/18/2025)

TOPIC: Prohibited referral fees

DIGEST: A promise by a lawyer to pay a nonlawyer referrer to perform "administrative" work in connection with each matter referred to the lawyer constitutes a thing of "value" as compensation for or as a reward for a referral and thus violates Rule 7.2(a).

RULES: 7.2(a)

FACTS:

1. The inquirer represents medical providers in arbitration proceedings against insurance carriers. The medical providers in these arbitrations are disputing claim denials by the insurance carriers. When a matter settles or the inquirer's client prevails, the inquirer is paid by the insurance carrier.

2. The inquirer's friends and family have offered to refer medical providers to him if the inquirer pays them a fee for the referrals. In response to such offers, the inquirer proposes to pay the referring individuals a flat fee for "administrative, non-attorney related work" by the referring individuals whether or not the inquirer is eventually paid by the insurance carrier. The work by the referring individuals would include their completion and online filing of an arbitration request form for each matter that they refer to the inquirer. (We understand that completing and filing arbitration requests may lawfully be done by a person other than the inquirer and may be done by a non-lawyer.)

QUESTION:

3. May the inquirer pay a flat fee for "administrative, non-attorney related work" (such as completing and filing arbitration forms) to non-attorney individuals who refer a medical provider to the inquirer that the inquirer eventually secures as a client?

OPINION:

4. Rule 7.2(a) of the Rules of Professional Conduct (the "Rules") states that "[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client." Comment [1] to Rule 7.2 amplifies this basic prohibition: "Lawyers are not permitted to pay others for channeling professional work." The only exceptions to Rule 7.2(a) appear in Rules 1.5(g) and 5.8, which are inapplicable here. In short, Rule 7.2(a) forbids payment to anyone who refers a potential client to a lawyer if the payment is a *quid pro quo* for referring the client. *See* N.Y. State 1014, ¶6 (2014) (The vice that these rules address is the payment to what have been described as "touts," runners" and "ambulance chasers.").

5. The Inquirer's proposal to compensate referrers by paying them a flat fee payment for completing and filing a form requesting arbitration (and/or other administrative filings) on behalf of the referred client would run afoul of Rule 7.2(a) because such paid work would be a thing of "value" within the meaning of the Rule. In our view, paying a referrer with an opportunity for paid work is as much a thing of value as a direct payment for the referral.

6. To elaborate, the paid work that the inquirer would like to promise to referrers is a "reward" to referrers for delivering clients to the attorney. It is thus "compensation" and a thing "of value" and is equivalent to a payment for a referral, which is prohibited by Rule 7.2(a). *See* N.Y. State 1237 ¶13 (2022) ("In exchange for the real estate broker's referrals, the inquirer proposes to provide the real estate broker with the ability to charge the clients who hire the inquirer a lower commission without a corresponding reduction in the amount the broker will earn as a commission. Because this ability to charge a lower commission constitutes 'something of value' that is given in exchange for a referral, the arrangement would violate Rule 7.2(a)."). We think the arrangement proposed by the inquirer here is analogous to the arrangement we said was prohibited by Rule 7.2(a) in N.Y. State 1237, so we reach the same conclusion.

CONCLUSION:

7. A promise by a lawyer to pay a nonlawyer referrer to perform "administrative" work in connection with each matter referred to the lawyer constitutes a thing of "value" as compensation for or as a reward for a referral, and thus violates Rule 7.2(a).

(10-24)

OPINION 1280 (03/31/2025)

TOPIC: Conflicts of interest, class actions

DIGEST: Under the New York Rules of Professional Conduct a lawyer may in some circumstances proceed *pro se* while also representing individual co-plaintiffs or co-defendants in the same matter. But whether a lawyer could proceed *pro se* as a class representative and also represent the class is a question that is governed by class action law and not by the Rules of Professional Conduct, and thus is a question that is beyond this Committee's jurisdiction.

RULES: Rule 1.7

FACTS:

1. The inquirer is considering commencing a class action lawsuit against New York State in which the class would consist of every registered attorney in the State. He asks whether he could act as both the named plaintiff and counsel for the class, noting that every New York attorney would participate in any recovery obtained if the action were successful.

QUESTION:

2. May a lawyer simultaneously be both a named plaintiff and counsel for the class in a class action?

OPINION:

3. For the most part, this question is governed not by the New York Rules of Professional Conduct (the "Rules"), but by class action law, and thus is beyond our jurisdiction.

4. In non-class actions, there is no *per se* bar under the Rules to a lawyer proceeding *pro se* and representing a co-party with aligned interests. For example, subject to any applicable court rules, one spouse might appear *pro se* and represent the other spouse in an action in which the two act as co-plaintiffs or co-defendants with respect to a claim by or against both. Or one neighbor might proceed *pro se* and represent other neighbors in a lawsuit concerning a common threat to the neighborhood.[2]

5. Under Rule 1.7(a), a lawyer both representing a client and proceeding *pro se* in the same action will often have a personal conflict of interest, in that there would be "a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." For example, a particular litigation strategy might advance one client's interests more than another client's interests, or a settlement might be in the interests of some clients but not others. Under Rule 1.7(b), however, a conflict arising under Rule 1.7(a) can be waived in most cases if the lawyer "reasonably believes that the lawyer will be able to

2 The right of an individual to proceed *pro se* is protected by statute. *See,* 28 U.S.C. §1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."); N.Y. CPLR § 321 ("A party . . . may prosecute or defend a civil action in person or by attorney, except that a corporation or voluntary association shall appear by attorney . . . ."). The terms under which a lawyer may represent a client in a matter in which the lawyer has a personal interest are addressed by the Rules.

provide competent and diligent representation to each affected client . . . [and] each affected client gives informed consent, confirmed in writing."

6. But courts and commentators widely recognize that lawyers' duties to class members are not governed entirely by the Rules.[3] On many issues, the ethics rules provide limited guidance and courts resolve questions by reference to class action law.[4] Whether a lawyer would be permitted to act as a named plaintiff and also represent the class is thus largely, if not entirely, governed by class action law, not by the Rules.

7. We note that some courts have held that, under Federal Rule of Civil Procedure 23, a lawyer is prohibited from representing a class in which the lawyer is a class representative.[5] Our jurisdiction is limited to interpreting the Rules, however, and we cannot opine on matters arising under class action law.

CONCLUSION:

8. Under the Rules a lawyer may in some circumstances proceed *pro se* in a matter where the lawyer also represents co-plaintiffs or co-defendants. But whether a lawyer could proceed *pro se* as a class representative and also represent the class is a question that is governed by class action law and not the Rules, and thus is a question that is beyond this Committee's jurisdiction.

(32-24)

3 *See, e.g.,* Bruce A. Green & Andrew Kent, *May Class Counsel Also Represent Lead Plaintiffs?*, 72 FLA. L. REV. 1083, 1093-1101 (2020) (collecting cases); Nancy J. Moore, *Ethical Duties of Class Counsel Also Representing Class Representatives*, 72 FLA. L. REV. FORUM 160, 166 (2020-2022) (noting that "the rules of professional conduct do not currently provide adequate protection for the class" and discussing the courts' duties to monitor the adequacy of representation as part of the class action lawsuit); Eli Wald, *Class Actions' Ethical "KISS": The Class Action Lawyer's Client Is the Class*, 74 HASTINGS L.J. 1433, 1458 (2023) (noting that "[t]he Model Rules fail to offer a consistent, clear answer to the fundamental question of whom class counsel represents" . . . and that "[f]or some purposes, courts follow the Model Rules; for many others, they do not").

4 *See, e.g.,* N.Y. City 2004-1 ("The standards used by courts in deciding whether to approve class representation . . . draw to a considerable extent on standards of professional responsibility, but ultimately they are found in caselaw construing Rule 23 . . . ."). Some commentators have suggested that classes in class actions should be seen as a kind of entity or organizational client, and that courts substitute for the governance structures that would direct class counsel under ordinary application of the Rules. Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477, 1487 ("a class differs from other types of entity clients under Rule 1.13. For one thing, it is the court, rather than a decision-making body within the class itself, that is empowered to make decisions normally reserved for clients."); Wald, *supra*, at 1452-55 (suggesting that courts should be considered "constituents" of the class for purposes of overseeing class counsel). In any case, whether a court will or should consent to a particular class counsel's conflict is governed by considerations outside the Rules.

5 *E.g.*, *Perry v. Monaco*, 24 Civ. 8736 (LJL), 2025 WL 460804, at *2 (S.D.N.Y. Feb. 10, 2025) ("in this Circuit, a *pro se* plaintiff who is an attorney may not bring an action in which he will serve as both class representative and class counsel") (citing case law and a treatise on federal court practice).

OPINION 1281 (04/09/2025)

TOPIC: Payments from lawyer's trust account; Pay.gov

DIGEST: With the client's prior written approval, a lawyer may make an otherwise proper payment of funds from the lawyer's trust account in the form of an online payment through Pay.gov

RULES: 1.15(c), (d) & (e)

FACTS:

1. The inquirer's clients are criminal defendants whom a court has ordered to make criminal debt payments (e.g., to pay fines or to make restitution) to the Clerk of a U.S. District Court. The district court does not accept cash for such payments but instead requires that payment be made either by check or through Pay.gov, an online payment program of the U.S. Department of the Treasury (described below). If payment is made through Pay.gov, the court requires that criminal debt payments be made by debit card or "Bank account (ACH)"—i.e., direct debit.

2. To assist clients who are required to make criminal debt payments but do not have bank accounts, the inquirer deposits cash received from such clients into the lawyer's trust account and issues a check payable to the Clerk on the client's behalf. The lawyer asks whether it would be permissible to make such payments from the trust account through Pay.gov, rather than by check. (The inquiry does not specify whether the attorney seeks to make such payments by debit card or by direct debit).

3. Pay.gov is the Government-wide Web transaction portal operated by the Fiscal Service of the United States Department of the Treasury, which is accessed at: http://www.fiscal.treasury.gov and described at www.pay.gov. Pay.gov facilitates the collection of money owed to agencies of the U.S. government. Pay.gov supports various forms of payment, including credit card, debit card and direct debit, but each agency determines the forms of payment it accepts for each type of charge or obligation. As noted above, the present inquiry involves criminal debt payments, which the court requires to be paid by debit card or direct debit if Pay.gov is used.

4. The Pay.gov system operates as follows. First, the website of an agency (in this case, a court) directs a user (such as the inquirer's clients) to a collection page hosted by Pay.gov. To make a criminal debt payment, the user inputs information about the payor, including a case number, a defendant number, a payment amount, and a transaction ID. For payment by direct debit, the user inputs the bank routing and account numbers; for payment by debit card, the user inputs the debit card number. The Pay.gov system allows third parties to make payments on behalf of other persons, as long as they know the case number and check the third-party payor box on the payment form.

5. Once Pay.gov receives payment information, Pay.gov processes ACH (Automated Clearing House) debits. The resulting collected funds are forwarded to the Collections Information Repository (CIR) of the U.S. Treasury's Bureau of the Fiscal Service, a data archive and reporting tool that allows agencies to view and download information for agency-settled transactions. CIR also interfaces with several revenue collection systems to facilitate the movement of funds from commercial banks to the U.S. Treasury. The ACH Network is a nationwide electronic fund transfer (EFT) system

that provides for the inter-bank clearing of electronic credit and debit transactions and for the exchange of payment-related information among participating financial institutions. See 82 FR 42597 (Sept. 11, 2017) (explaining an amendment to 31 CFR Part 210, the Department of the Treasury, Bureau of Fiscal Service's rule governing the use of the Automated Clearing House Network by Federal agencies).

QUESTION:

6. May a lawyer make an otherwise-proper payment of funds from the lawyer's trust account in the form of an online payment through Pay.gov?

OPINION:

7. Rule 1.15 of the N.Y. Rules of Professional Conduct (the "Rules") sets forth the requirements a lawyer must follow in holding funds belonging to a client and in maintaining the special account, commonly referred to as a trust account, in which such funds must be held. Rule 1.15(e), entitled "Authorized Signatories," provides as follows:

> (e) All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by ***bank transfer***. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account. (Emphasis added.)

8. This provision was added to the former Code of Professional Responsibility in 1990 by the Appellate Divisions. Unlike many other Code provisions, it was not originally proposed by the N.Y. State Bar Association. An article written by one of our Committee members notes that one of the changes to this section "would allow lawyers to withdraw funds from the trust account by international (as well as domestic) bank wire transfer with the consent of the party entitled to the funds." *See* Marjorie E. Gross, *The Long Process of Change: The 1990 Amendments to the New York Code of Professional Responsibility*, XVIII Fordham Urban L. J. 283 (1991).

9. Unlike the phrase "electronic funds transfer," which is defined in a statute,[6] the phrase "bank transfer" is not a statutorily-defined term. Nevertheless, the Committee believes that the phrase "bank transfer" is sufficiently broad to include not only wire transfers, but also transfers via the ACH network initiated through Pay.gov. The Washington State Bar Association reached the same conclusion in a similar context in its Advisory Opinion 2210 (2012), which stated:

> . . . [W]hen a debit card is used to pay a filing fee, funds are transferred from the bank account associated with the debit card (here, the lawyer's trust account) to the bank account for the recipient of the filing fee (such as the court). Use of a debit card to pay a filing fee directly is therefore a bank transfer under RPC 1.15A(h)(5).

61 The federal Electronic Funds Transfer Act (EFTA) defines "electronic fund transfer" to include online payments like those here at issue. *See* 15 U.S.C § 1693a(7). The EFTA applies only to transfers from bank accounts "established primarily for personal, family, or household purposes." 15 U.S.C. § 1693a(2). We do not interpret statutes, which are beyond our jurisdiction, but we reference the statutory definition here to highlight the lack of a statutory definition of the term "bank transfer."

10. The purpose of Rule 1.15(e) is to prohibit cash withdrawals or other payments that would not be secure or readily traceable. A "bank transfer" allows a lawyer to make an otherwise-proper payment of funds from the lawyer's trust account in the form of an online payment through Pay.gov, which is consistent with that purpose. The Committee is sensitive to the desire of lawyers, clients and courts to use payment mechanisms that are quicker, cheaper and more convenient than older methods (such as paper checks).

11. The Committee notes that Rule 2(c) of the ABA Model Rules on Client Trust Account Records provides that trust account withdrawals "shall be made only by check payable to a named payee and not to cash, or by authorized *electronic transfer*." (Emphasis added.) As explained in Comment [4] to Rule 1.15(h), an "electronic transfer" includes a transfer in which "an electronic payment is initiated through a secure web environment."

12. We also conclude that making a payment from a trust fund account via Pay.gov would be permissible under 1.15(c)(4). Rule 1.15(c)(4) provides "that a lawyer shall promptly pay or deliver to the client or third person the funds . . . in the possession of the lawyer that the client of third person is entitled to receive."

13. In making a payment from a trust account via Pay.gov, a lawyer must follow the same requirements in Rule 1.15(d) and (e) that apply to other permissible withdrawals. Rule 1.15(d) provides that only a lawyer who is signatory to the trust account can initiate such a payment, payment confirmations must be retained, and payments must be recorded in the trust account ledger. In addition, because the payment is a "bank transfer," Rule 1.15(e) requires the client's advance written "approval" (which we interpret to have the same meaning as the client's advance written "consent"). However, lawyers should avoid authorizing scheduled or recurring automatic withdrawals from a trust account. Automatic withdrawals could result in an automatic ACH debit not covered by a cleared cash deposit from the client who owes the money, which would in turn lead to conversion of escrow funds belonging to other clients.

CONCLUSION:

13. With the client's prior written approval, a lawyer may make an otherwise proper payment of funds from the lawyer's trust account in the form of an online payment through Pay.gov.

(30-24)

OPINION 1282 (07/07/2025)

TOPIC: Disclosing Confidential Information to Non-Legal Staff

DIGEST: A New York lawyer working in another state for a non-profit organization that operates both an immigration legal clinic and a shelter for non-citizens may not share information gained during or relating to the legal clinic's representation with the shelter's nonlawyer staff unless (1) the information is not privileged and the disclosure would not be embarrassing or detrimental to the client; (2) the client gives informed consent to the disclosure; or (3) the disclosure advances the best interests of the client and is reasonable or customary under the circumstances.

RULES: 1.0(j), 1.6(a), 8.5(a) & (b).

FACTS:

1. The inquirer — a lawyer licensed exclusively in New York State — works outside New York in an immigration legal clinic operated by a non-profit organization. The non-profit organization also operates a shelter and provides various support services to non-citizens. When a new person arrives at the shelter, the legal clinic conducts a legal intake. According to the inquirer, the legal clinic operates under a "general directive" not to share information from the legal clinic with nonlawyers on the shelter's staff – but following this directive is difficult because the shelter staff "needs information from the legal clinic to assist residents." For example, after the legal intake, the immigration clinic typically sends the shelter staff an email outlining the forms of legal relief available to the new shelter resident and the expected timetable for providing the legal services needed to secure those forms of relief.

QUESTION:

2. May a New York lawyer working for an immigration legal clinic outside New York disclose client information to nonlawyer staff at a shelter that houses the legal clinic's clients?

OPINION:

3. Since the inquirer is a lawyer who is licensed exclusively in New York state but practices in another state, we must first determine—as a threshold matter—which jurisdiction's professional responsibility rules apply to the inquirer's conduct. Under Rule 8.5(a) of the New York Rules of Professional Conduct (the "Rules"), "a lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyers' conduct occurs." Under Rule 8.5(b)(2)(i), "if the lawyer is licensed to practice only in this state" (which is the case here), then the New York Rules apply to the lawyer's conduct.

4. It is beyond our committee's purview to consider whether the disciplinary authority of the state in which the inquirer is practicing would instead apply that other state's rules to the inquirer's conduct. It is also beyond our committee's jurisdiction to determine whether the inquirer's practice of law in that state is authorized or unauthorized, because that is a question of law.

5. New York Rule 1.6 defines "Confidential information" as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client

privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." Rule 1.6(a) bars a lawyer from knowingly revealing confidential information, or from using such information for the advantage of a lawyer or a third person, unless "the client gives informed consent, as defined in Rule 1.0(j)" or "disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community," or the disclosure is permitted by Rule 1.6(b), which lists various exceptions to the duty of confidentiality.

6. Here, the information ascertained by the inquirer during the legal intake pertaining to the forms of relief available to the shelter resident (the immigration clinic's client) will nearly always meet the definition of "confidential information." The information will normally be "protected by the attorney-client privilege" and may involve information that is "likely to be embarrassing or detrimental to the client if disclosed." The confidential information is likely to be disclosed because the nature of relief available in immigration court is often tied to sensitive personal information, such as whether an individual has been subjected to human trafficking, has been raped, or holds certain political beliefs. Thus, disclosing to the shelter's nonlawyer staff the forms of relief available to the shelter resident may, under the circumstances, require or anticipate the disclosure of information likely to be embarrassing or detrimental to the client. Disclosing the timetable for likely relief is less likely to be embarrassing or detrimental to the client, but in some cases such disclosure might provide clues to I.C.E. about actions to be taken on behalf of the client, so such disclosure could be detrimental to the client.

7. Thus, whether the information gained during intake is "confidential information" involves a case-by-case analysis of that information. *See* N.Y. State 1059 (2015) (whether disclosure of information about the client's understanding of immigration proceedings "would be embarrassing or detrimental to the clients depends on the context and precise nature of the information involved.").

8. Before disclosing confidential information to the shelter's nonlawyer staff, therefore, the inquirer must find an exception to the duty of confidentiality. One exception is to seek the client's informed consent to disclose the information. See Rule 1.0(j). For consent to be informed, the inquirer must make full disclosure of "information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." *Id.* That discussion should include the impact of the disclosure on the attorney-client privilege (such as whether disclosure will waive the privilege). Additionally, the client's consent must be voluntary. N.Y. State 1059; N.Y. State 490 (1978). Notably, lawyers providing services to indigent clients "should be particularly sensitive" to their clients' vulnerable position; and requests for consent to disclosure "should be made only under circumstances where the staff is satisfied that their clients could refuse to consent without any sense of guilt or embarrassment." N.Y. State 490.

9. Finally, if a minor is involved, the inquirer will need to ascertain whether the individual is "capable of understanding the risks of disclosure and of making a reasoned judgment." N.Y. State 1059 (discussing the sensitive inquiry required to determine whether a minor is capable of providing informed consent).

10. Alternatively, confidential information may be disclosed pursuant to Rule 1.6(a)(2) if disclosure would "advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community." The inquirer asserts that the disclosure of the relief sought on behalf of shelter residents and the timing of the relief would advance the best interests of the clients by helping the shelter staff assist the residents. If such disclosures are designed to advance the best interests of these clients and if it is reasonable or customary under the circumstances to make such disclosures, then the disclosures could be justified as "impliedly authorized" under Rule 1.6(a)(2).

11. Rule 1.6(b) sets forth a number of other exceptions to the duty of confidentiality, but none of them apply to the inquirer's question so we will not elaborate on them.

CONCLUSION:

12. A New York lawyer working in another state for a non-profit organization that operates both an immigration legal clinic and a shelter for non-citizens may not share information gained during or relating to the legal clinic's representation with the shelter's nonlawyer staff unless (1) the information is not privileged and the disclosure would not be embarrassing or detrimental to the client; (2) the client gives informed consent to the disclosure; or (3) the disclosure advances the best interests of the client and is reasonable or customary under the circumstances. circumstances.

(34-24)

OPINION 1283 (08/18/2025)

TOPIC: Attorney's Referrals to Title Abstract Company Owned by Referring Attorney

DIGEST: An attorney who owns an interest in a title abstract agency that brokers title insurance may not simultaneously (i) represent a client in a real estate transaction and (ii) act as agent for a title insurance underwriter in the same transaction, unless the attorney performs purely ministerial functions for the title agency and does not negotiate on behalf of the underwriter. Under Rule 1.10(a) (as amended effective January 1, 2025), whether the attorney's conflict (which is based on a financial interest in the title abstract agency) will be imputed to the whole firm depends on whether there is a "significant risk that the representation will be materially limited or that the independent professional judgment of the participating lawyers in the firm will be adversely affected."

RULES: 1.7(a)(2), 1.8(a), 1.10(a)

FACTS:

1. The inquirer is a lawyer in a small New York law firm that concentrates in real estate closings. The inquirer and another partner of the firm are considering obtaining an ownership stake in a title agency.

2. The title agency would act as agent for the title insurance underwriter.

3. Neither the inquirer nor his partner would "be involved in the day-to-day running of the title agency nor in any underwriting decisions or recommendations." The title agency and law firm would office in different locations and would not share any employees. The law firm would "occasionally" refer clients to the title agency but would not be the title agency's sole source of business.

4. When a client of the inquirer's law firm engages the title agency, the inquirer would be screened from the matter and would not participate in negotiations between the law firm and the title agency regarding omitting exceptions to title.

5. The inquirer would require a written waiver of the conflict from law firm clients who use the inquirer-owned title agency. The law firm would disclose in its engagement letter that the owners of the law firm also own an interest in the title agency, and the law firm would explain the potential conflict of interest between the law firm and the client.

6. The inquirer acknowledges that this Committee has over the years issued multiple opinions concluding it would be a non-consentable conflict of interest for an attorney who owns a interest in a title agency simultaneously to represent a client in a real estate transaction and act as agent for title insurance agency in the same transaction. Notwithstanding this Committee's prior opinions, the inquirer asserts that "for many decades it is common practice in many areas of New York State ([and] neighboring states like New Jersey and Connecticut), for attorneys to represent clients in transactions when they also act as the title agent for an agency in which they have an ownership interest."

7. The inquirer also notes that in 2014 the New York State Legislature enacted Insurance Law § 2113(e), which states: "For the purposes of this chapter, an attorney or his or her law firm may repre-

sent a client in a matter and may also act as a title insurance agent in such matter subject to applicable law."

QUESTIONS:

8. Under the circumstances proposed, does Insurance Law § 2113(e) alter this Committee's analysis of the ethical propriety of an attorney representing a client under the circumstances proposed?

9. Does revised Rule 1.10(a), which states that conflicts are not automatically imputed to all members of a firm where a lawyer's conflict is financial or otherwise personal in nature, apply to this inquiry?

OPINION:

This Committee's Prior Opinions on Related Issues

10. This Committee has issued multiple opinions concluding that a lawyer may not represent a client in a real estate transaction and also act as title agent for the insurance underwriter if the attorney owns an interest in the title agency. Such a combination of roles creates a non-consentable conflict of interest.

11. In N.Y. State 595 (1988), for example, applying the former Code of Professional Responsibility (the "Code"), this Committee opined that a lawyer performing anything more than ministerial title work for a title abstract company owned by that lawyer, such as acting as agent for the underwriter, would create a non-consentable conflict of interest if the lawyer were to also represent a party to the transaction. "[T]he dual roles are improper," we said, "because they require a law firm, which as a principal in an abstract company prepares a title report showing exceptions to title and recommending whether a title insurance policy will be issued, to negotiate these issues, as counsel for a party in the underlying transaction, with itself." *Id.* at p.6.

12. In 1991, the Real Property Law Section of the New York State Bar Association asked us to reconsider N.Y. State 595. But in N.Y. State 621 ? 5 (1991), we adhered to the result reached in Opinion 595. We again emphasized that an attorney who acts as agent for an underwriter and represents a client in the underlying real estate transaction is beholden to two masters with potentially irreconcilable interests. We noted two problems: "the danger of the attorney using his or her fiduciary leverage over the real estate client to dictate the choice of title insurer" and "the ultimate risk that the client may not get the right title insurance."

13. In N.Y. State 738 (2001), we revisited the issue in the context of an attorney who represented clients in real estate matters and wanted to refer those clients to a title abstract company owned by the attorney's spouse. We explained that the conflict was not consentable under the former Code because "a 'disinterested lawyer' would believe that the conflict inherent in those dual roles would adversely affect the representation of the real estate client." *See also* N.Y. State 731 (2000) ("[T]he lawyer for a party in a real estate transaction may not permit employees to solicit the lawyer's clients to engage the services of a title company in which the lawyer has an ownership interest. Nor may the lawyer compensate employees for making such referrals.").

14. In N.Y. State 891 (2011), we opined that the reasoning of those prior opinions remains valid under the current New York Rules of Professional Conduct (the "Rules"). Specifically, we concluded that an attorney "may refer a client to a title company in which the attorney has a financial interest provided that the attorney may not represent the client in the transaction in which that title company will provide title services to the client *unless the services are purely ministerial* or if, among other things, the attorney passes the commission on to the client and where exceptions to title are not negotiable." (Emphasis added.)

15. On the other hand, this Committee has also consistently opined that "a lawyer could, with consent after disclosure, refer real estate clients to a title abstract company in which the lawyer or his or her spouse had an ownership interest for *purely ministerial abstract work*, but not where the abstract company provided the additional service of preparing a title report or serving as an agent for the title underwriter." N.Y. State 974 (2013) n.1 (internal quotation marks omitted) (emphasis added).

Insurance Law § 2113(e)

16. The inquirer queries whether Insurance Law § 2113(e), passed in 2014, might lead this Committee to reconsider its earlier opinions, the most recent of which we issued in 2013, before § 2113(e) took effect. Insurance Law § 2113(e) states: "For the purposes of this chapter, an attorney or his or her law firm may represent a client in a matter and may also act as a title insurance agent in such matter subject to applicable law."

17. This Committee does not opine on questions of law and thus does not here opine on the legality of an attorney with an ownership interest in a title agency acting as agent for the underwriter while representing a real estate client in the same transaction. Further, because we here opine, consistent with our previous opinions, that under certain circumstances inquirer may both represent clients in a real estate transaction and act as title agent for a title company in which the attorney has an ownership interest in the same transaction, we need not address whether and to what extent the Legislature intended to address this Committee's ethics opinions with Insurance Law § 2113(e). We note only that we are not aware of any legislative history that speaks to this point.

Impact of Allegedly Common Practices in Other Jurisdictions

18. The inquirer asserts that in parts of New York and other jurisdictions, such as Connecticut and New Jersey, "it is common practice . . . for attorneys to represent clients in transaction where they also act as the title agent for an agency in which they have an ownership interest." We do not know whether the inquirer's assertion is accurate, but in any event the fact that a practice is common would not bear on our analysis under the Rules of Professional Conduct.

19. Further, this Committee is not aware of any New Jersey or Connecticut ethics opinion that validates the inquirer's proposed arrangement. To the contrary, in *In Re Opinion 682 of the Advisory Comm. on Professional Ethics*, 147 N.J. 360 (1997), the Supreme Court of New Jersey held that, under Rule 1.7 of the New Jersey Rules of Professional Conduct, it would create a non-consentable conflict of interest for an attorney who owns a beneficial interest in a title abstract company both to act as title insurance agent and to represent a real estate client in the same transaction. The reasoning

of the Supreme Court of New Jersey on the inherent conflict of interest is similar to this Committee's reasoning on this point. *See id.* at 368-369.

20. Thus, we adhere to our prior opinions, which state that an attorney who owns an interest in a title company while representing a real estate client in a transaction and simultaneously acting as agent for the underwriter creates a non-consentable conflict of interest, unless the title agent performs only ministerial tasks.

Imputation of Conflicts Under Amended Rule 1.10(a)(2)

21. Under the former version of Rule 1.10, the personal financial interest conflict of the attorneys who own an interest in a title agency would have been imputed to all lawyers in the firm. Until January 1, 2025, Rule 1.10(a) stated that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein." Thus, a lawyer's financial and other personal conflicts of interest arising under Rule 1.7(a)(2) were automatically imputed to the lawyer's entire firm unless the client consented to allow lawyers other than the personally conflicted lawyer to work on the matter.

22. However, the Appellate Divisions issued a Joint Order, effective January 1, 2025, amending Rule 1.10(a) so that it now states, in pertinent part:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein, unless:
>
> > (1) the prohibition is based on a lawyer's own financial, business, property or other personal interests within the meaning of Rule 1.7(a)(2), and
> >
> > (2) under the circumstances, a reasonable lawyer would conclude that there is no significant risk that the representation will be materially limited or that the independent professional judgment of the participating lawyers in the firm will be adversely affected.

23. Here, the inquirer's conflict arises under Rule 1.7(a)(2) from the financial interest created by the inquirer's ownership interest in a title insurance agency. Pursuant to revised Rule 1.10(a)(2), however, the conflict will not be imputed to all attorneys in inquirer's firm if "a reasonable lawyer would conclude that there is no significant risk that the representation will be materially limited or that the independent professional judgment of the participating lawyers in the firm will be adversely affected."

24. This Committee has consistently opined that an attorney who represents a real estate client may also act as title agent for the underwriter, even if the attorney owns an interest in the title agency, *provided that* the work does not involve negotiation on behalf of the underwriter. *See* N.Y. State 595; N.Y. State 621; N.Y. State 891.

25. We note that, assuming inquirer will perform purely ministerial services as agent to the underwriter, when the inquirer refers a client to the title abstract company in which it owns an interest, the

disclosure must include notice of the availability of other abstract companies, the nature of inquirer's ownership in the title company, and the fee structure involved with the title company. *See* N.Y. State 595 and N.Y. State 755.

CONCLUSION:

26. An attorney who owns an interest in a title abstract agency that brokers title insurance may not simultaneously (i) represent a client in a real estate transaction and (ii) act as agent for a title insurance underwriter in the same transaction, *unless* the attorney performs purely ministerial functions for the title agency and does not negotiate on behalf of the underwriter. Under Rule 1.10(a) (as amended effective January 1, 2025), whether the attorney's conflict (which is based on a financial interest in the title abstract agency) will be imputed to the whole firm depends on whether there is a "significant risk that the representation will be materially limited or that the independent professional judgment of the participating lawyers in the firm will be adversely affected."

(31-24)

OPINION 1284 (09/16/2025)

TOPIC: Multi-Jurisdictional Practice; Referral Fees; Division of Fees

DIGEST: Lawyers admitted in New York and a foreign jurisdiction who associate with a lawyer admitted only in the foreign jurisdiction may divide a fee with that lawyer because Rule 1.5(g) explicitly permits lawyers associated in the same law firm to share fees. But the New York-licensed attorneys in the firm must exercise supervision pursuant to Rule 5.1 over the non-New York partner to the extent such partner's conduct implicates the New York Rules of Professional Conduct.

RULES: 1.0(a), 1.0(h),1.5(g), 5.1, 5.1(c), 5.3, 5.4(b, 5.5(a), 7.1(a) & (c), 7.2(a), 7.5(d), 8.5(a)

FACTS:

1. The inquiring attorney ("Attorney 1") and his colleague ("Attorney 2") are licensed in New York State and in a foreign country. Both lawyers reside in New York and handle cases in both jurisdictions. They plan to create two entities: (i) a New York PLLC ("NY PLLC"), of which they will be the members, to provide legal services in New York and (ii) a Foreign Country Limited Liability Company ("FC LLP"), in which they will be partners, to provide legal services in the foreign country but not in New York.

2. The two New York attorneys intend to include a third attorney ("Attorney 3"), who is licensed in the foreign country but not New York, as a partner in FC LLP. Attorney 3 will be a partner *only* in FC LLP, and will *not* be a member or employee of NY PLLC. Rather, with respect to NY PLLC, Attorney 3 will not manage clients or cases, will not use resources of NY PLLC, and will be identified on the FC LLP website as an "attorney admitted to practice only in foreign country. Not affiliated with the New York office of NY PLLC." New York PLLC intends to give a 30% referral fee to Attorney 3 for any New York cases Attorney 3 refers to NY PLLC.

QUESTIONS:

3. May New York attorneys pay a referral fee to an attorney who is admitted in a foreign country but not in New York?

4. Are members of a New York PLLC required to exercise supervise responsibility over an attorney who is not a member or employee of the New York PLLC?

OPINION:

5. As a preliminary matter, Attorneys 1 and 2, both of whom are admitted in New York (as well as in a foreign jurisdiction), are "subject to the disciplinary authority of this state regardless of where their conduct occurs." Rule 8.5(a). Moreover, because Attorneys 1 and 2 are admitted in New York and in another jurisdiction, they may be "subject the disciplinary authority of both this state and another jurisdiction where [the lawyers] are admitted for the same conduct." *Id*. In this opinion we opine only on the New York Rules of Professional Conduct (the "Rules") and do not purport to opine on the rules or law of any other jurisdiction.

6. In N.Y. State 1072 (2015), we observed that while Rule 5.4(b) "seemingly disallow[s] a partnership with any lawyer not admitted to practice in New York, [it] is tempered by Rule 7.5(d), which recognizes partnerships 'between or among lawyers licensed in different jurisdictions.'" See N.Y. State 658 (1993); see also N.Y. State 542 (1982). Clearly, today there are many national and international law firms with New York offices, so many New York lawyers are partners with non-New York lawyers who are admitted in other jurisdictions. Indeed, Rule 7.5(d) assumes the legitimacy and validity of partnerships between lawyers licensed in New York and lawyers licensed in non-US jurisdictions. See N.Y. State 1072 ¶ 15 (2015) (Rule 7.5(d)'s reference to "'lawyers licensed in other jurisdictions' includes lawyers licensed in jurisdictions outside the United States").

7. In previous opinions this Committee has addressed the concern that a person who qualifies as an "attorney" in another country may differ in the educational background, ethical standards and other qualifications which would be required of an attorney in this jurisdiction. In N.Y. State 1072 ¶ 16 we opined that "the mere fact that a foreign 'lawyer' is licensed in another country is not by itself sufficient to reach the conclusion that a New York lawyer may permissibly form a partnership with the foreign lawyer." Rather, we stated that "an inquiry needs to be made into (i) whether the foreign country's educational requirements for admission are generally similar to those for New York attorneys and (ii) whether the standards of professional conduct and discipline governing the foreign attorney are essentially compatible with New York's standards. *See* N.Y. State 542 (1982); N.Y. State 658 (1993)."

8. Accordingly, we advised in Opinion 1072 that "[b]efore a New York lawyer may ethically form a partnership with the foreign lawyer, the New York lawyer must conclude that the partnership would not be likely to compromise the New York lawyer's ability to uphold the standards of professional conduct in this State." Thus, before agreeing to admit Attorney 3 to FC LLP as a partner, the Inquirer will need to investigate the requirements to become and remain a lawyer in the foreign country in which Attorney 3 is admitted to make sure that a New York lawyer may ethically partner with a lawyer from that country.

Would payment of a referral fee by Attorneys 1 and 2 to Attorney 3 violate the New York Rules of Professional Conduct?

9. If the Inquirer determines that a New York lawyer may ethically partner with a lawyer from the jurisdiction where Attorney 3 is a lawyer, then paying a referral fee to Attorney 3 would not violate the Rules. Attorneys 1 and 2 will be associated in the same firm - FC PLLC - with Attorney 3, and Rule 1.5(g) explicitly permits a lawyer to divide a fee with another lawyer associated in the same law firm without meeting the conditions set out in Rule 1.5(g) for dividing a fee with a lawyer *not* associated in the same firm. Moreover, Rule 7.2 ("Payment for Referrals"), which prohibits a lawyer from giving anything "of value" to a person as a reward for recommending the lawyer paying the referral fee does not regulate lawyers in the same firm. Lawyers associated in the same firm may ethically compensate or give credit to each other for referring business to that firm. For example, law firms may (and typically do) give "origination credit" to a partner for bringing business to the firm even if another partner in the firm does the work. Rule 7.2 does not apply to intra-firm compensation arrangements.

Are members of the NY PLLC required to exercise supervising responsibility over Attorney 3 even though Attorney 3 will not be a member or employee of NY PLLC?

10. Even though Attorney 3 will not be a member or employee of NY PLLC, the members of NY PLLC will be required to make reasonable efforts to ensure that any partner in the firm who is subject to the New York Rules – including Attorney 3 and FC LLP – complies with the New York Rules of Professional Conduct. In N.Y. State 762 (2003), which construed provisions in the old Code of Professional Responsibility equivalent to today's Rule 5.1, this Committee concluded that:

> New York lawyers with management or supervisory authority in law firms with New York offices, as well as the firms themselves, are required to make reasonable efforts to ensure that lawyers subject to the New York Code who are affiliated with the firm in such offices comply with the New York Code. A New York firm has broad supervisory responsibility under DR 1-104(C) [now covered under Rules 5.1 and 5.3] with respect to non-lawyers and lawyers licensed in foreign countries in the New York office and must ensure that compliance by foreign lawyers with the ethical rules of a foreign jurisdiction does not compromise the firm's adherence to the New York Code.

11. In interpreting Rule 5.1, we stand by our analysis and conclusions in Opinion 762. We also made clear in Opinion 762 that "New York lawyers may enter into partnerships with lawyers who are bound by ethics rules other than the New York Code." A New York law firm must therefore make reasonable efforts to ensure that any lawyer associated in FC LLP who is subject to the New York Rules complies with the Rules. We see no reason to modify that conclusion.

CONCLUSION:

12. Lawyers admitted in New York and a foreign jurisdiction who associate with a lawyer admitted only in the foreign jurisdiction may divide a fee with that lawyer because Rule 1.5(g) explicitly permits lawyers associated in the same law firm to share fees. But the New York-licensed attorneys in the firm must exercise supervision pursuant to Rule 5.1 over the non-New York partner to the extent such partner's conduct implicates the New York Rules of Professional Conduct.

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Disclosing Confidential Information to Non-Legal Staff

Opinion 1283 (08/18/2025) 2036
Attorney's Referrals to Title Abstract Company Owned by Referring Attorney

Opinion 1284 (09/16/2025) 2041
Multi-Jurisdictional Practice; Referral Fees; Division of Fees