THE NEW YORK RULES OF PROFESSIONAL CONDUCT

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EDITED BY

New York County Lawyers' Association Ethics Institute

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RULES AND COMMENTARY, SPRING 2011

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NYCLA'S ETHICS INSTITUTE

VOLUME I

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Preface

There is a plaque in the foyer of the New York County Lawyers' Association at 14 Vesey Street, New York, New York. A quote on the plaque begins: "Those who link arms in the organized bar enjoy to the full that spirit of professional companionship which is one of the joys of our calling."[1]

In July of 2009, a unique cadre of lawyers answered the call to volunteer their time and considerable wisdom to publish this treatise. The Rules of Professional Conduct had become effective on April 1, 2009. The treatise, *The New York Code of Professional Responsibility: Opinions, Commentary and Case Law,* as the name implies, had covered the former Code of Professional Responsibility. Its editor, our esteemed colleague Professor Mary Daly of St. John's Law School, had passed away. Additionally, the publishing responsibilities of Oceana Press had evolved to Oxford University Press. There was an urgent need to communicate to all New York lawyers the details and commentary about the new Rules and how the rules would be applicable to their practices. The new publisher enlisted the Ethics Institute of the New York County Lawyers' Association for assistance. This treatise ensued.

The writers and editors of this treatise are among the most noted professional responsibility lawyers in New York. With others, they served on committees and task forces to assist the Appellate Divisions to implement the New York Rules of Professional Conduct. They teach ethics at our law schools and at continuing legal education seminars. They volunteer their time to hear and referee disciplinary complaints on behalf of the courts. Some are private practitioners who advise other firms and lawyers regarding ethical responsibilities; some are in-house ethics counsel. They serve on bar association "hot lines" to provide immediate assistance to attorneys seeking a consult on their professional responsibilities. Some are or have been counsel to the disciplinary committees and the courts; others defend attorneys charged with disciplinary violations. They serve on committees that study and report on ethical issues; they publish bar association ethics opinions and articles that are relied upon by bench and bar. Proudly, all are members of the Advisory Board of the Ethics Institute of the New York County Lawyers' Association.

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1 Whitney North Seymour, speaking as President-Elect of the American Bar Association at the Annual Dinner of the New York County Lawyers' Association, December 3, 1959.

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We are grateful for the assistance provided by the staff of NYCLA's CLE Institute, especially Jennifer Arsego who coordinated the entire project, keeping everyone on track and all the manuscript organized. It was a daunting task and we could not have completed the book without her extraordinary effort. Special mention should also be given to Judy Shepard for assisting with the design and marketing of the book, and Marilyn Flood, NYCLA Counsel and Executive Director, NYCLA Foundation for

referring the project to the Ethics Institute. The book never would have been completed without the encouragement of Sophia Gianacoplos, NYCLA's Executive Director, who was a true champion of the project from the beginning.

In addition to the writers, editors, and NYCLA staff, others, too numerous to identify, devoted time, energy, and resources to help. We would especially like to thank Mariana Hogan, Dean for Professional Development and Professor of Law at New York Law School and Hillary Mantis, Career Consultant, New York Law School for assisting us in securing research assistance for the project. The researchers, whose names appear on the title page and on the individual chapters, contributed countless hours of research, writing, cite checking, and assistance to the Rules Editors, and we are eternally grateful for their efforts.

We would like to thank the staff at Oxford University Press for giving NYCLA's Ethics Institute the opportunity to become the editors of this treatise. In particular, we recognize Irusia Kocka for her dedication to ensuring that the legacy of Mary Daly lives on and to Peter Berkery for securing for the Ethics Institutes the resources needed to complete the book.

Above all, we want to thank Wally Larson and Judge Lebovits for their collegiality and guidance provided throughout the project and James Kobak for his support and leadership in helping to make this treatise a reality.

Lew Tesser would especially like to acknowledge the herculean efforts of Bari Chase, in the life and spirit of this endeavor. If the writers, editors, and NYCLA staff are the vessels through which this treatise has been produced, then Bari Chase is its heart.

Bari Chase would like to recognize the extraordinary dedication of Lew Tesser, not only to this project, but also to improving the professionalism of New York lawyers. It was an honor to work along side Lew on this book and I treasure his friendship and camaraderie.

THE LAYOUT OF THE BOOK

Volume 1: Analysis of the New Rule

To facilitate research, we have adopted an easy-to-navigate organizational structure for each Rule.

- The Text of the Rule
- NYSBA Commentary
- Cross-references
- Practice Pointers
- Analysis
- Analysis of Ethics Opinions (organized by topic)
- Analysis of Cases (organized by topic)
- Bibliography

Volume 2: Resources and Finding Aids

Volume 2 contains primary source materials, articles, Ethics Opinions, finding aids and other resources designed to assist lawyers in using this treatise and in their practice of law.

- Report of NYCLA's Task Force on Professionalism
- NYSBA Commentary
- Articles
- Forms
- Ethics Opinions
- General Bibliography and Research Aids
- Index
- Tables

CAVEATS

The discussion and analysis of each Rule of Professional Responsibility expresses the personal views of the author. The research and analysis does not in any way reflect the position of NYCLA, nor of the firm, government entity, university, or any other institution that the Rule Editor may be affiliated with.

Some of the references in this book are to older materials that predate the new Rules effective April 1, 2009. While historical sources are always germane, readers must exercise caution in determining whether that material still has applicability to their matter, especially in view of the Rule changes.

While the New York Rules of Professional Conduct were promulgated by the courts, the Comments to the Rules were only issued by the House of Delegates of the New York State Bar Association (similarly, while the predecessor Disciplinary Rules were promulgated by the courts, the Ethical Considerations were issued by the Association). In our view, although the Comments have less weight than the rules themselves, the Comments have and should be accorded greater weight than advisory opinions issued by the ethics committees of the various New York bar associations. One argument for such persuasive authority is the rigor of the process by which the Association's Committee on Standards of Attorney Conduct invited and received comment from the public, bar and bar associations (other bar associations, such as out of New York City and New York County, are represented in the Association's House of Delegates).

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Whitney North Seymour's remarks, memorialized on the plaque in the lobby of NYCLA's Home of Law, continue: "Here the traditions are nourished; here our sense of responsibility to the public and to the maintenance of the good name of the profession gets its greatest support." The men and women who have come together in a spirit of collegiality and service to write this treatise represent the true ideals of professional responsibility. The commitment, professionalism, zeal, and time that they devoted to

this treatise are beyond the limits of what anyone could reasonably expect from volunteers. We are profoundly grateful for their efforts. They embody and sustain the good name of our profession. We offer their work to you, the lawyers of New York and others interested in the ethical obligations of New York lawyers, in the sincere hope that your work will be enhanced and your professional lives enriched.[2]

Lew Tesser, Editor-in-Chief,

Bari Chase, Editorial Director

2 To our readers: we welcome your comments and participation as we prepare new editions of this treatise. Please let us hear from you. You can e-mail your suggestions to cleinstitute@nycla.org.

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Tribute to Mary C. Daly

As President of St. John's University, I am grateful for this opportunity to pay tribute to Mary C. Daly, Esq., who was Dean of our School of Law as well as John Brennan Professor of Law and Ethics at the time of her death in November 2008.

Since coming to St. John's in 2004 from Fordham, where she served as James H. Quinn Professor of Law, Director of the Graduate Program, and co-Director of the Louis Stein Center for Law and Ethics, she was an energetic and effective leader.

Her impact on our School of Law was nothing short of transformative. She established a global focus within the School through creation of several academic programs and initiatives. Among these was the L.l.M. program in U.S. Legal Studies for Foreign Law School Graduates, launched in fall 2008, that provides opportunities for lawyers from other nations to achieve a grounding in the United States legal system. Another is a program that permits St. John's Law School students to spend a summer studying in Rome. She also increased the number of law clinics, which provide students with invaluable opportunities for practical experience as well as service to underserved individuals within the community. And she was an indefatigable fund raiser and goodwill ambassador.

At the same time as she committed herself to enhancing our University's School of Law, she also continued to amass a record of remarkably productive scholarship that contributed to her already enviable national and international reputation. In that regard, the *New York Code of Professional Responsibility: Opinions, Commentary and Caselaw* stands as a significant component of her legacy. For one thing, the work is rooted in the topic that was her passion—ethics. For another, it is the result of the meticulous research that was her standard. And, finally, it is designed for the practitioner, the practicing attorney who was always in the forefront of her thoughts. She had a special gift for combining the academic and practical. And she committed herself to anticipating and meeting the needs of those already in her profession as well as the thousands of students who aspired to that profession.

I know that St. John's is a stronger and better University because she was part of it. And I believe that the broader legal community, as well, has been the beneficiary of

her commitment to excellence and to making this world a better place. We shall miss her presence among us and will be forever grateful for all that she has been and done for us.

Rev. Donald J. Harrington, C.M.

Introduction: The Rules of Professional Conduct

The legal profession in the United States generally, and in New York State, is self-regulating and self-policing. Lawyers control the institutions that regulate their own conduct; such institutions are subject to supervision by the judiciary which also consists of lawyers who became judges. The regulatory process has been gradual, originating in case law and individual modeling behavior by attorneys. In the twentieth century, Bar associations codified, clarified, and promulgated standards, and by the end of the century, the courts re-appropriated responsibility for the rules governing attorney conduct.

1. A BRIEF BACKGROUND OF THE RULES GOVERNING ATTORNEY CONDUCT

[a] John Adams and the Earl of Annesley

John Adams was frequently infuriating. He intelligently but irritatingly cajoled, ranted, and raved. He lacked the diplomatic skills of Thomas Jefferson and the political savvy of Benjamin Franklin.[1] Yet his obstinance and sense of moral imperative, especially as it related to his obligations as an attorney, place him as a father of America's professional standards of attorney conduct.[2]

1 Adams wrote, "Popularity was never my mistress, nor was I ever, or shall I ever be a popular man." Said Franklin, Adams "is always an honest man, often a wise one, but sometimes and in some things, absolutely out of his senses."

2 We gratefully acknowledge the research of Randall Tesser. In "A Good Defense," a National History Day essay, he posited that John Adams influenced the course of American jurisprudence by his actions as here discussed.

Prior to Adams, professional standards had developed to some degree. For example, a client's expectation of confidentiality[3] had grown, interestingly, from a case instigated by a fee dispute, *Annesley v. Anglesea*.[4]

Arthur Annesley, the Earl of Anglesea, lived in Dunmain with his wife and his son James. When his wife left, probably because she was having an affair, Arthur and James moved to Dublin. Arthur found a new love interest and she convinced Arthur to send James to boarding school. The Earl's brother, Richard, recognized that if his nephew went missing, he could inherit Arthur's estate. Richard shipped the thirteen-year-old James to America as an indentured servant and had him declared dead. Arthur eventually died and Richard assumed the estate and titles. After about a decade, James escaped to Jamaica and then returned home to sue Richard for Arthur's estate, which Richard had been enjoying.

Unfortunately for James, he accidentally shot and killed a poacher while hunting soon after returning home. Richard had his lawyer, John Giffard, arrange a prosecution of James for murder. James was acquitted and sued Richard, whose defense was that James was not truly Arthur's legitimate son and heir. James called Giffard as a witness, knowing that Richard's communications with his lawyer would prove Richard's knowledge (or his belief) that James was Arthur's true son. Indeed, a letter of Richard's to Giffard read, "it is not prudent for me to appear publicly in this prosecution, but I would give 10,000 pounds to have him hanged… . If I cannot hang James Annesley, it is better for me to quit this kingdom and go to France, and let Jemmy have his right."

Giffard was happy to blab his client's secrets because Richard owed him legal fees. Richard claimed that the attorney-client privilege protected his confidential communication.[5] Until the *Annesley* case, the privilege belonged to the attorney to protect the attorney's honor, and if the attorney wanted to speak, the client was out of luck. The *Annesley* case dicta recognized the client's interest in the privilege to encourage honest communication by the client. Nevertheless, the court determined that because the communications about the murder prosecution had nothing to do directly with Richard's defense of James' ejectment lawsuit, the privilege did

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3 The history of the attorney-client privilege is recounted in LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003); RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES (2D ED. 1999); CAIRNS, ADVOCACY AND THE MAKING OF THE ADVERSARY CRIMINAL TRIAL 1800–1865.

4 17 How. S. Tr. 1137 (1743).

5 In medieval England, civil judicial disputes resembled swearing contests and professional "oath helpers" waited outside the courts at Westminster to be hired to swear that a party could be believed. In 1562, Queen Elizabeth's Parliament enacted the Statute Against Perjury, which for the first time allowed civil parties to compel witnesses to testify at trial. The statute aimed to cure the justice system by making reliable witnesses available to the jury. At around the same time as the Statute's enactment, parties were barred from testifying in their own matters—their testimony was deemed too unreliable. The opposing party could not be examined, but armed with compulsory service, parties began to call the lawyer of the opposing party as a witness. Attorneys objected—and the doctrine, now called the "attorney-client privilege" first appears in reported cases dating from 1576 to 1583.

not apply.[6] Giffard testified and produced the letter; James theoretically won the case and the estate.[7]

Aside from the attorney-client privilege, many ethical obligations and expectations that we now consider basic were not at all developed at the time when colonial attorneys, including John Adams, were practicing. In 1770, Adams was a thriving attorney,[8] an outspoken patriot,[9] and a well-known politician.[10] At the time, Boston was a cauldron of unrest, its citizens riled by Paul Revere and Adams' cousin, Sam Adams, and there is ample evidence that the Boston "massacre" on March 5, 1770 was intentionally incited by a few colonists. On March 6, Adams was asked to represent the British officers and soldiers who were involved in the shootings.[11]

Although the laws of Massachusetts did allow for counsel,[12] there was scant authority in law or consensus among the bar that an attorney had any professional responsibility to provide a defense for unpopular clients.[13] Adams was informed that no one else would represent "the enemy." [14] Risking his career as an attorney and as a founder of the fledgling nation in progress, Adams accepted the case. He later wrote, "I had no hesitation in answering that council ought to be the very last thing that an accused

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6 17 How. St. Tr. 1139 (1743). The court wrote, "No man can conduct any of his affairs which relate to matters of law without employment and consulting with an attorney … and if he does not fully and candidly disclose every thing that is in his mind …, it will be impossible for the attorney properly to serve him. *Ibid* at 1237. Now, the "crime-fraud" exception would surely include using a lawyer for the murder prosecution of an innocent man.

7 Richard appealed, and James lacked the funds to take the case further. James never took possession of the estate.

8 His bar admission, in 1759, had been sponsored by "the Dean of Massachusetts lawyers" Jeremiah Gridley. His practice was so successful that he moved from Braintree with his family, opened an office in Boston, and hired two clerks.

9 He publically opposed the Stamp Act with the argument that colonists were not represented in the British Parliament. He wrote, "The true source of our suffering has been our timidity… . Let it be known that British liberties are not the grants of princes or Parliaments… . [M]any of our rights are inherent."

10 In 1766, Adams was elected as Selectman in Braintree, Massachusetts.

11 There is support that Adams was approached by The Sons of Liberty, an activist group already clamoring for disengagement from Britain. They assumed that the soldiers would be convicted and wanted the veneer of a fair trial.

12 As the Salem witch trials were drawing to a close, the legislature, probably in reaction to the trials' abuses, rejected the British common law regarding counsel and provided that a defendant could "defend his cause by himself … or with the assistance of such other person as he shall procure."

13 In England, lawyers had been persecuted for accepting unpopular clients. *See* Cohen v. Hurley, 366 U.S. 117, 139 (1961). In colonial New York, two lawyers who acted on behalf of Peter Zenger, a publisher who spoke out against the Crown, were disbarred.

14 Although there is scant contemporaneous corroboration, many historians have said that Adams suffered intense public criticism for his defense. Many years later, in a political, i.e., revisionist autobiography, he wrote that he had brought upon himself "suspicions and prejudices" and that it was "immediately bruited abroad that I had engaged for Preston and the Soldiers, and occasioned a great clamour."

person should want in a free country. That the Bar ought in my opinion to be independent and impartial at all Times and in every Circumstance."[15]

New York's former Code of Professional Responsibility,[16] Ethical Consideration 2-29, proclaimed that when a lawyer is appointed, he should not take into account "the repugnance of the subject matter of the proceedings" or "the identity … of a person involved in the case." NYSBA Commentary to Rule 1.2, Comment [5] of the current New York Rules of Professional Conduct advises that "[l]egal representation should not be denied to any person … whose cause is controversial or the subject of popular disapproval." In many states, attorneys take an oath to "never reject from any consideration personal to myself, the cause of the oppressed." New York's Ethical Consideration and current Commentary and the oaths of many states were derived from the American Bar Association's 1908 Canon on Professional Ethics and Oath of Admission. By the time of the Oath and the Canons, Adams' maverick stand had become generally accepted as an aspirational model for attorney conduct.

[b] The Development of the Code of Professional Responsibility

Standardized ethics rules governing attorney conduct originated from the 32 Canons of Professional Ethics of the American Bar Association (the ABA) in 1908.[17] These Canons solely governed the conduct of ABA member attorneys. In 1969, the ABA adopted a revised set of rules known as the Model Code of Professional Responsibility (the Model Code).[18] The Model Code was intended to provide sample rules to be applicable to all lawyers. It was eventually adopted by all 50 states.[19]

Despite the widespread adoption of the Model Code, the ABA, dissatisfied with both its format and substance, presented the 1983 Model Rules of Professional Conduct

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15 In the trial, Adams argued self defense—the soldiers were threatened by an angry mob. Most of the defendants were acquitted. Two had their hands branded. Adams' summation has been called "a masterpiece of political tight roping and partisan invective, wrapped inextricably in a skillful, effective jury argument." I have found no contemporaneous support for the proposition that Adams suffered any adverse consequences, although he wrote, much later, that he suffered "the instantaneous loss of more than half my business" and that he would be accused of being "an enemy to my country".

16 N.Y. State B. Ass'n., The Lawyer's Code of Prof'l Responsibility 1 (2007) [hereinafter N.Y. Code], *available at* http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Lawyers_Code_of_ Professional_Responsibility/LawyersCodeofProfessionalResponsibility.

17 Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 345–47, 349–51 (2008). The Canons were developed from the lectures of Judge George Sharswood in 1854, *Id.*; *see also* New York County Lawyers' Association, *Report on the Proposed New York Rules of Professional Conduct*, Sept. 13, 2004, *available at* http://www.nycla.org/siteFiles/Publications/Publications54_0.pdf (last visited Jan. 29, 2010).

18 *Id*. at 346–47.

19 New York County Lawyers' Association, *Report on the Proposed New York Rules of Professional Conduct*, Sept. 13, 2004, *available at* http://www.nycla.org/siteFiles/Publications/Publications54_0.pdf (last visited Jan. 29, 2010). Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 346–47 (2008).

(the Model Rules).[20] The new Model Rules format grouped the rules according to lawyers' roles and tasks. The Model Rules utilized a format similar to that of a Restatement of Law in that they consisted of a black letter rule of law followed by commentary.

Although most states chose to adopt the ABA Model Rules, the New York State Bar Association House of Delegates rejected a proposal to do so in 1985.[21] New York's attorneys remained regulated by its version of the Code, amending it in 1990.[22] New York's Code was operative until 2009.[23]

The New York Code of Professional Responsibility consisted of three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules. Only the Disciplinary Rules were formally adopted by the courts but the Ethical Considerations and the Canons have sometimes been cited by New York courts as instructive.[24]

The Canons were essentially chapter headings. The Ethical Considerations were solely aspirational guidelines, representing the objectives toward which every member of the profession should strive.[25] They provided lawyers with guidance but a violation of them would not subject an attorney to discipline. The Disciplinary Rules, unlike the Ethical Considerations, were mandatory, establishing the minimum level of conduct expected of New York attorneys.[26] Lawyers who violated these rules were subject to professional discipline but the Code did not prescribe disciplinary procedures or penalties for violation of a Disciplinary Rule. Instead, the penalty for a violation of a Disciplinary Rule was to be determined by the character of the offense and the attendant circumstances.

Between 1985 and 2003, 47 states and the District of Columbia adopted the ABA Model Rules.[27] New York was one of three states that had not adopted the Model Rules, instead choosing, from time to time, to amend its Code of Professional Conduct.[28]

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20 *Id.* at 348–49.

21 New York County Lawyers' Association, *Report on the Proposed New York Rules of Professional Conduct*, Sept. 13, 2004, *available at* http://www.nycla.org/siteFiles/Publications/Publications54_0.pdf (last visited Jan. 29, 2010).

22 *Id.*

23 *Id.*

24 New York County Lawyers' Association, *Report on the Proposed New York Rules of Professional Conduct,* Sept. 13, 2004, *available at* http://www.nycla.org/siteFiles/Publications/Publications54_0.pdf (last visited Jan. 29, 2010).

25 In its Preliminary Statement, the Code provides, "[t]he Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." Roy Simon, Simon's New York Code of Professional Responsibility Annotated 6 (2006).

26 New York County Lawyers' Association, *Report on the Proposed New York Rules of Professional Conduct*, Sept. 13, 2004, *available* at http://www.nycla.org/siteFiles/Publications/Publications54_0.pdf (last visited Jan. 29, 2010).

27 Yvonne Marciano, *New York Attorney Rules of Professional Conduct Took Effect April 1, 2009*, 29 NY ENVTL LAW 1 (Winter 2009), *available at* http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=27769 (last visited Jan 29, 2010).

28 *Id.*

The widespread adoption of the Model Rules by other states "resulted in a significant degree of national uniformity and a nationwide body of law [frequently] inaccessible to New York practitioners."[29]

In "*Some Historical Perspectives on New York's Rules of Professional Conduct"*, *infra.,* Dave Robertson brings historical color to the development of New York's Rules of Professional Conduct. Formerly, compliance with ethical standards had been voluntary. After reading Robertson's account, we understand how criticisms of these optional standards, "sweet words … full of intellectual pabulum", led to mandatory rules of ethical behavior. Robinson details the development of the four "essential" professional functions: bar admissions, bar discipline, unlawful practice, and the promulgation of rules of normative professional behavior and how these functions became the purview of New York's courts.

2. NEW YORK'S NEW RULES OF PROFESSIONAL CONDUCT

The Presiding Justices of the Appellate Divisions of the New York State Supreme Court adopted New York's Rules of Professional Conduct effective April 1, 2009. The rules aligned New York's ethics standards in form and numbering sequence with the American Bar Association's Model Rules of Professional Conduct. Instantly, restructuring made the ethical standards of other jurisdictions a more readily accessible source of ethical guidance for New York lawyers than was the former New York Code. As noted by NYSBA in its Final Report on the Proposed Rules of Professional Conduct:

> Voluntary compliance with ethics rules is critical to maintaining the integrity of the bar. To that end, it is essential that when lawyers have ethics questions—which are often urgent—they are able to locate quickly and understand readily the applicable rules. The structure of the … Code, however, d[id] not lend itself to quick or ready reference and problem-solving.

[a] Structure of the New Rules of Professional Conduct

The new ethics rules are organized according to the various roles that attorneys may play, for example, "when a lawyer serves as a negotiator, as an advocate or as a counselor."[30] The organizational logic of the Model Rules is described by NYSBA in its Final Report on the Rules of Professional Conduct:

> The former Code places rules governing legal fees under DR 2-106 but rules governing safeguarding of client property under DR 9-102, virtually at opposite

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29 *Id.* (citing New York Courts Press Release*, "*New Attorney Rules of Professional Conduct Announced*"* (Dec. 17, 2008)).

30 New York State Bar Association Committee on Standards of Attorney Conduct, Proposed Rules of Professional Conduct, http://www.nysba.org/Content/ContentFolders30/CommitteeonStandardsofAttorneyConduct2/Introduction.pdf.

ends of the document. The legal fee rule appears under Canon 2, which states aphoristically that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." The rule governing client property, one of the most important provisions of the New York Code, is virtually hidden under Canon 9, which states that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." The Model Rules format, in contrast, places these related rules together in its first section (as Rule 1.5 and Rule 1.15, respectively) under the clear and simplified heading, "Client-Lawyer Relationship."[31]

The new Rules have a more straightforward and sensible structure than did the Code and are divided as follows:

Rule 1.0 Terminology
Section One Rules 1.1 to 1.18 Client-Lawyer Relationship
Section Two Rules 2.1 to 2.4 Attorney as Advisor and Neutral
Section Three Rules 3.1 to 3.9 Attorney as Litigator
Section Four Rules 4.1 to 4.5 Attorney as Professional
Section Five Rules 5.1 to 5.8 Attorney as Supervisor and Practitioner
Section Six Rules 6.1 to 6.5 Pro Bono and Legal Services
Section Seven Rules 7.1 to 7.5 Advertising, Recommendation, Solicitation
Section Eight Rules 8.1 to 8.5 Misconduct, Reporting Misconduct, Bar Admission, Judicial Officers, Discipline

[b] What's New in the New Rules[32]

The new Rules of Professional Conduct include provisions from both New York's former Code and the ABA's Model Rules. While there are notable similarities to the Code, some of the significant differences between the two deserve mention.

First and most significantly, the new Rules include a greatly expanded definitions section in Rule 1.0, "Terminology." Some of the important terms included are: "knowingly," "reasonable" and "confidential information." The definitions now enable lawyers, courts, disciplinary and bar committees to interpret material words in the same way. For example, many provisions in the new Rules require that before lawyers proceed in particular matter, the lawyer must receive a client's "informed consent, confirmed in writing." *See* Rules 1.7(b)(4), 1.9(a)-(b), 1.11(a)(2), 1.12(b), 1.18(d)(1).

The term "confirmed in writing," however, was not defined in the former Code. "Confirmed in writing," is found in Rule 1.0(e) and is defined to mean a writing from a person to a lawyer, or a lawyer to a person confirming that the person has given consent. Additionally, a statement on the record of a proceeding before a tribunal may be deemed to have been "confirmed in writing." "Writing" or "written" in 1.0(x)

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31 *Id.*

32 For a more detailed analysis, *see* article by Sarah Jo Hamilton and Lewis Tesser, *The New NY Rules of Professional Conduct*, 1 Bloomberg Law Reports, vol. 1 (May 2009), *reprinted with permission* in Volume 2 of this treatise.

includes handwritten, printed and photocopied material, photographs, audio or video recordings and e-mail and a "signed writing" includes a writing with an electronic signature. This definition, which was drawn from the ABA Model Rules, also was not in the former Code. In addition, Rule 1.0(j) defines "informed consent" as "an agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision … after the lawyer has adequately explained … the material risks of the proposed course of conduct and reasonably available alternatives."

Another significant difference between the former Code and the new Rules can be found in Rule 3.3 pertaining to the conduct of an attorney before a tribunal. The former Code provided that when an attorney learned that a client had perpetrated a fraud upon a tribunal, the attorney was to request that the client rectify the fraud. If the client refused, the attorney was required to reveal the fraud *unless the information was protected as a confidence or secret.* This language, though well-intentioned was ineffective because there were very few instances where the information would not be protected as a confidence or secret. Conversely, new Rule 3.3 sets forth a clear mandate requiring an attorney to take reasonable remedial measures to correct false evidence including, if necessary, disclosure to the tribunal. New Rule 1.5 pertains to fees and the division of fees. It is more expansive than the pertinent provision in the former Code, including within it the court rule regarding written letters of engagement (22 NYCRR § 1215), and codifying the prohibition against non-refundable retainers that originated in *Matter of Cooperman,* 83 N.Y.2d 465, 611 N.Y.S.2d 465 (1994).

3. A WALK THROUGH THE NEW RULES

Substantively, New York's new Rules represent a fine tuning of the former Code of Professional Responsibility. While the format of the new Rules differs significantly from that of the Code, as discussed above, many of obligations remain exactly the same. Approximately three quarters of the new Rules embody provisions from the former Code of Professional Responsibility.

The Rules, as did the Code, regulate inappropriate attorney conduct. In essence, they define what it means to be a lawyer-fiduciary. Lawyers must act with good faith, candor, and scrupulousness in dealing with clients. Clients place their trust in lawyers and accordingly the ethics rules governing attorney conduct must intelligibly describe the means by which lawyers can fulfill their various ethical obligations under the law.

[a] Terminology: Rule 1.0

To facilitate the means by which lawyers interpret and apply the Rules to their own practice, Section 1.0, "Terminology", provides definitions of terms that are used throughout the Rules. The former Code also contained a Definitions section, but Rule 1.0 now defines many new terms, a change that will hopefully increase the clarity and

consistency of the Rules."[33] In his analysis, Andy Bratton discusses the terms of particular interest that have been added to the Rules.

[b] Client-Lawyer Relationship: Rules 1.1 to 1.18

Rules 1.1 through 1.18 pertain to the lawyer-client relationship and govern a wide array of issues that may arise during the course of a representation of a client. Lawyers, as representatives of their clients, occupy a position of trust and have a duty to act for the benefit of their clients within the scope of the relationship.[34] These Rules detail specific expectations concerning an attorney's relationship to a client.

Rules 1.1 through 1.4 generally describe the initiation and maintenance of the lawyer-client relationship, establishing that lawyers must be both competent, Rule 1.1, and diligent, Rule 1.3, when acting on behalf of clients. Rule 1.2 sets forth a lawyer's obligation to consult with a client regarding the objectives of a representation and the means by which those objectives will be pursued. As is apparent from even a cursory comparison to the former Code, these new Rules emphasize the importance of proper attorney-client communication, a topic we discuss in detail in the article *Avoiding Complaints and Violations,* by Lewis Tesser, in Volume 2, *infra.*

The imperative of sound communication with clients is codified in Rule 1.4, which has no counterpart in the former Code. The Rule provides, among other things, that a lawyer must consult with a client about case strategy and client objectives, keep a client reasonably informed about case status and any material developments, and promptly comply with client requests for information. Attorneys are required to initiate certain discussions with clients. Bratton's helpful practice pointers remind lawyers to promptly return client phone calls and e-mails and to memorialize conversations whether or not the conversations may be billable. He points out that not all information must be conveyed to a client, such as information that might be personally harmful to the client and which the client does not need to know to further the objectives of the representation. Communication pervades every aspect of the client-lawyer relationship and it is only through sound communication that lawyers will be able to carry out their clients' objectives.

Rule 1.5 sets forth the requirements regarding attorney fees and the division of fees. The Rule mandates that lawyers may not charge fees that are excessive or illegal and provides a list of eight factors that are to be considered in determining whether a fee is excessive. The Rule also details the types of fees that may and may not be charged. Interestingly, this Rule about fees again illustrates the importance of good client-lawyer communication, the predominant theme of the new Rules. Author Rich Maltz recommends that lawyers memorialize in writing the fees clients will be charged, even where not so required. He notes that while full disclosure about fees was always

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33 New York State Bar Association Committee on Standards of Attorney Conduct, *Proposed Rules of Professional Conduct*, http://www.nysba.org/Content/ContentFolders30/CommitteeonStandardsofAttorneyConduct2/Introduction.pdf.

34 BLACK'S LAW DICTIONARY 768 (8th ed. 2004).

important, "Rule 1.5 now specifies that there must be specific and full disclosure as to the scope of the attorney's representation and the basis for the lawyer's legal fee for the representation."

Rule 1.6 addresses the duty of confidentiality. Ron Minkoff discusses the circumstances under which confidential client information must be protected and those where it may be knowingly revealed or used by a lawyer. Minkoff reminds us that the obligation to protect confidential client information is "among the most sacrosanct duties of a lawyer …" and offers a profound analysis of the extensive nuances inherent in the rule. He emphasizes that "you can never be too careful about protecting the attorney-client privilege."

Given the undivided loyalty that lawyer-fiduciaries owe their clients,[35] the conflicts of interests precepts, contained in Rules 1.7 through 1.9, deserve special attention. Rule 1.7 is the general conflict of interests rule pertaining to "concurrent" conflicts, i.e., conflicts between current clients. The Rule defines such a conflict as either "representing differing interests" or significantly risking that your professional judgment will be "adversely affected" by your own "financial, business, property, or other personal interests." The Rule also details when a lawyer may represent a client notwithstanding the presence of a concurrent conflict.

Rule 1.8 provides specific conflicts rules pertaining to a lawyer's business transactions with a client, gifts from client, advancing court costs, aggregate settlements, settling certain claims, and sexual relations with a client. Rule 1.9 addresses lawyers' duties to former clients especially as they relate to conflicts and confidential information. Authors Carol Zeigler and Devika Kewalramani examine these conflicts rules in detail while examining the fundamental principles of "client loyalty, trust, confidentiality and professional judgment" that the rules embody. Their practical insights are invaluable and include the reminders to establish the identity of the client by determining whether the client is the institution or the representative; to have a system to check for conflicts and use it; to keep in mind that not all conflicts can be waived and those that can must be in writing.

Rules 1.10 through 1.12 address conflicts of interest as they pertain to law firms, certain governmental lawyers, and third-party neutrals. Rule 1.10 describes the imputation of conflicts to a firm, for example, when one of the lawyers of the firm has a conflict. Rule 1.11 provides rules regarding the special conflicts of interest that former or current government officers and employees may have, for example, when a lawyer moves from government to private employment and vice versa. Rule 1.12 contains special conflict of interest rules that apply where a lawyer previously served as a judge, arbitrator, mediator, or other third-party neutral. Professor Bruce Green analyzes these conflicts rules in detail and offers illustrative examples of permissible and prohibited conflicts that will unquestionably be an invaluable resource for lawyers questioning the propriety of certain representations. Green's directness does not let us forget that the Rules are not a theoretical exercise. "This means you: even if you are not the firm's managing partner, you should insure that your firm has an adequate conflicts-checking system." He explains that we are subject to discipline if we

35 In re Kelly, 23 N.Y.2d 368, 375 (1968).

unwittingly violate the imputed conflicts rule because of the firm's inadequate system.

Rule 1.13 focuses on the duties of a lawyer where the client is an organization. Wally Larson's commentary guides us through potentially difficult situations. He explains that while it is not always a conflict to represent an organization and one or more of its constituents, it may be. We are cautioned to "[m]aster the art of knowing when to give the so-called corporate Miranda warning ('I only represent the organization and not you')."

As with organizational clients, when lawyers represent clients with diminished capacity they are subject to additional specific Rules of Conduct. Larson explains how Rule 1.14 provides options for outside help and recognizes a limited, impliedly authorized disclosure exception where there is a risk of harm to the client.

Rule 1.15 mandates the proper means of maintaining client funds and property. As noted in Larson's commentary on the Rule, property mishandling can be destructive to an attorney's chances of maintaining a license. In his analysis, Larson packs an iron fist into a velvet glove. "Leave it to lawyers to turn a friendly, social word like 'mingling' into a dreaded disciplinary violation. There is good reason; the mixing of our property with the property of our clients is the root of all kinds of unpleasantness. Of course, a 'bad lawyer' will always find ways to be bad, but the lack of care evidenced by commingling can result in a lawyer's inadvertent misuse of client property, such as spending money that was not the lawyer's to spend in the first place."

Rule 1.16 details the circumstances under which an attorney must or may decline or terminate a client representation. Barry Temkin's commentary examines the ethical and practical concerns of lawyers in such circumstances, noting: "In the event that permission for withdrawal from representation must be sought from a tribunal, remember your obligation to preserve client confidential material under Rule 1.6, and be as stinting as possible in disclosing them."

Although the practice of law is a profession, it is also a business. As with any other business, law firms can and do go out of business. Accordingly, lawyers should review Rule 1.17 and Temkin's commentary pertaining to the sale of a law practice. He reminds us, "it is always the clients' decision whether to stay or to find different counsel, so the clients are not being "sold" in the usual sense of the word, e.g. the purchase of chattel."

Lawyers have duties not only to current and former clients, but also to prospective clients. These duties are detailed in Rule 1.18 and the accompanying analysis. A fiduciary relationship can arise even where a lawyer does not represent a client subsequent to an initial consultation. Many lawyers meet with potential clients and will want to take special note of Temkin's analysis of the obligations that such consults may create.

[c] Attorney as Advisor, Evaluator, and Third-party Neutral: Rules 2.1 to 2.4

Rules 2.1 through 2.4 pertain to an attorney's role as advisor, evaluator for use by third parties, and as a third-party neutral. Rule 2.1 specifies that as an advisor, an attorney

must "exercise independent judgment and render candid advice." Rule 2.3 specifies when and how an attorney may provide third parties with a legal assessment of a client matter. Rule 2.4 addresses the duties of lawyers who act as third-party neutrals rather than as client representatives. Barry Temkin provides invaluable commentary on these Rules, acknowledging that attorneys provide guidance that is not always legal in nature. He examines the different roles an attorney may fulfill and provides advice as to how best fulfill these different obligations. One of his practice pointers: "[s]tanding by your ethical and moral principles may not always win you the client, but acting with the highest integrity and remaining a respected member of the profession is far better than risking your career and reputation. It is also likely to mean that your clients receive sound counsel from you that will serve them well in the long term and for which you will be remembered by them."

[d] Attorney as Advocate: Rules 3.1 to 3.9

Lawyers, as advocates, are in a unique position to ensure that the legal system is both effective and respected. Lawyers must adhere to standards of professional responsibility and civility while simultaneously representing their clients' interests. Rules 3.1 through 3.9 detail how lawyers, as officers of the court, must protect the integrity of the adjudicative process while also actively advocating on behalf of clients.

Rule 3.1 sets forth the requirement that attorneys refrain from bringing non-meritorious claims and acting in a "frivolous" manner. Sarah Diane McShea provides helpful commentary as to the distinction between the zealous representation of a client and improper frivolous conduct. McShea also provides an analysis of Rule 3.2 pertaining to the duty to not delay or prolong litigation and Rule 3.3 governing conduct before a tribunal. An attorney who discovers that a client has been untruthful to a tribunal is in a precarious situation. "For a variety of reasons, clients lie—they tell big lies and little lies, lies that are really pleas for sympathy and understanding, lies to bolster otherwise truthful accounts (who can believe that justice will be afforded a blemished client), and lies because sometimes it's just easier… . Often the lawyer learns of the client's proposed lie before it is trotted out in court or in a deposition—it may occur first in the lawyer's office. This is a great opportunity to have a full and frank conversation with the client about the possible consequences of a lie before a tribunal." McShea discusses the various considerations, obligations, and options that an attorney has when a client has been dishonest to a tribunal.

Rule 3.4 details the manner in which lawyers must act to opposing parties and counsel. Rule 3.5 specifies how lawyers should maintain and preserve the impartiality of tribunals and jurors. Rule 3.6 governs the attorney's role in trial publicity while Rule 3.7 specifies the circumstances under which a lawyer may serve as a witness. In her commentary on these Rules, Bari Chase explains, "[w]hen an attorney acts as an advocate, he or she takes the facts involved in a case as they emerge from the discovery process and positions them in the best possible light for the benefit of the client. A witness, on the other hand, normally testifies as to the facts, without regard to their impact to either party in the case."

Rule 3.8 details the special responsibilities of prosecutors and other government lawyers. Ellen Yaroshefsky examines the Rule in detail, paying particular attention to the necessity that prosecutors and government lawyers act both as ministers of justice while simultaneously advocating zealously on behalf of the state. "The expectation is that, as a minister of justice, prosecutors routinely will and should go beyond the minimum requirements." Yaroshefsky provides commentary on Rule 3.9 pertaining to attorneys who appear before either a legislative body or administrative agency while acting in a representative capacity. Yaroshefsky explains that a lawyer who acts as an advocate for a client when appearing before a nonadjudicative body engaged in rule making must identify the fact that she is appearing in a representative capacity.

[e] Attorney as Professional: Rules 4.1 to 4.5

Rules 4.1 through 4.5 provide guidance as to the obligations of attorneys when functioning in a professional capacity with persons other than their clients. Lawyers have an obligation to protect the integrity of the justice system and these rules facilitate the means by which they do so by defining acceptable attorney conduct when lawyers interact with persons other than clients or the courts.

Rule 4.1 mandates that attorneys be truthful when making statements to others in the course of representing a client. As noted by Ellen Yaroshefksy in her commentary, "a lawyer's word is his or her bond." She continues, "A lawyer who knows a client has engaged or intends to engage in a crime or fraud in a matter that is not before a tribunal may not continue to represent the client in that matter if a failure to disclose the crime or fraud constitutes assisting that act."

Marty Minkowitz and Rob Fettman review Rules 4.2 through 4.5. Rule 4.2 requires that attorneys refrain from communicating with persons who are represented by counsel while Rule 4.3 governs communications with persons who are not represented by counsel. As Minkowitz and Fettman note, this Rule restricts lawyers from using their superior skills in order to exert undue influence when dealing with unrepresented parties. Rule 4.4 mandates how attorneys must respect the rights of third parties while representing their clients' interests. The Rule prohibits abusive conduct that has "no substantial purpose other than to embarrass or harm a third person." Rule 4.5 limits an attorney's communication with persons following incidents involving personal injury or wrongful death. The Minkowitz and Fettman commentary on these Rules notes that each of these Rules fosters the proper administration of justice by prohibiting inappropriate attorney conduct that might otherwise cast the legal profession in a negative light.

[f] Attorney as Supervisor and Practitioner: Rules 5.1 to 5.8

Rules 5.1 through 5.8 govern the responsibilities of lawyers and law firms in their roles as supervisors and practitioners.

Rules 5.1 through 5.3 generally address the obligations of lawyers to ensure that others under their supervision abide by the Rules of Professional Conduct and clarify

that even lawyers working under the supervision of others have specific ethical obligations. Rule 5.1 describes the ethical responsibilities of lawyers who function in a managerial role at law firms and law firms. In her commentary, Deborah Scalise is clear, "[l]awyers with managerial or supervisory authority need to be aware of the behavior of the other lawyers in the firm. Managerial/supervisory lawyers cannot choose to look the other way and ignore problematic conduct occurring in the firm, as they may be held responsible for what they 'should have known.'"

Rule 5.2 describes the obligations of subordinate lawyers and Rule 5.3 requires lawyers and firms to appropriately supervise the work of nonlawyers. Scalise notes, "Although the term 'nonlawyer' is not defined in the Rule, to us it means anyone who is not admitted to the practice of law in New York State. Very simply put, if a law firm engages in the practice of foreign outsourcing of legal support services, any foreign lawyers doing work for the New York law firm are nonlawyers for the purposes of this rule. The mandate to adequately supervise the work of nonlawyers includes supervising the work of foreign attorneys." Rule 5.4 focuses on professional independence by restricting the sharing of fees, corporate structure or responsibility with nonlawyers. Scalise provides commentary on these Rules and notes that lawyers and firms should carefully implement supervisory procedures so as to ensure that lawyers and nonlawyers act in a manner required by the Rules.

Rule 5.5 requires New York lawyers to observe the professional rules in any jurisdiction in which they practice and prohibits lawyers from aiding a nonlawyer in the unauthorized practice of law. Rule 5.6 prohibits lawyers from entering into agreements that place restrictions on the right to practice law except under certain enumerated circumstances. Rule 5.7 specifies the differing obligations of lawyers who provide their clients with nonlegal services and Rule 5.8 governs the contractual relationships between lawyers and nonlegal professionals. Authors John Horan and Wally Larson examine these Rules in detail. They note that Rule 5.8 is unique to New York, having no counterpart in the ABA Model Rules. The authors explain that the Rule establishes that lawyers may not pursue "multidisciplinary practice" with nonlawyers. The Rule thus limits the circumstances under which lawyers may enter into contractual relationships with nonlegal professionals for the purpose of offering "legal services as well as other nonlegal professional services." Horan and Larson detail the circumstances under which referral agreements between lawyers and nonlegal professionals are permitted in New York and they offer guidance as to the interpretation of the language of the Rule that is unclear.

[g] Pro Bono and Legal Services: Rules 6.1 to 6.5

Rules 6.1 through 6.5 are intended to encourage lawyers and law firms to provide pro bono legal services to persons of limited financial means or organizations that work on behalf of such persons.

Rule 6.1 "strongly encourages" lawyers to provide pro bono legal services to benefit poor persons and provides an aspirational benchmark. All lawyers should aspire to contribute financially to organizations that provide legal services to poor persons.

Rule 6.3 permits lawyers to serve in leadership roles in not-for-profit legal services organizations "notwithstanding that the organization serves persons having interests that differ from those of a client." Rule 6.4, while intending to promote law reform activities, requires lawyers to disclose to clients that they may be adversely affected by a decision (of a bar association committee, for example) in which the lawyer actively participates. Janessa Bernstein and I analyze this controversial rule, and advocates for a rule more consistent with the rule's purpose. Rule 6.5 specifies rules for lawyers who participate in limited pro bono legal service programs. A purpose of the rule was to encourage such participation. We discuss how the actual rule might tend to achieve a contrary result. "A lawyer participating in short-term limited pro bono programs should be mindful that as soon as the lawyer becomes aware of a conflict of interest, traditional conflicts rules may come into play, overriding the leniency set forth in 6.5(a). This is a problematic situation." Bernstein and I suggest how the rule should be read so that its implementation aligns with its goals.

[h] Advertising, Recommendation, Solicitation: Rules 7.1 to 7.5

Rules 7.1 through 7.5 establish requirements regarding the provision of information about legal services. The legal profession has at times faced harsh criticism for the unseemly efforts of some lawyers to attract clients. In recognition of the need to maintain the integrity of the legal profession, these Rules require that lawyers abide by certain mandates when communicating with potential clients and the public as a whole.

Rule 7.1 defines what an advertisement is and sets substantial limitations on the content of attorney advertisements. As we go to press, this Rule has been materially affected by the Second Circuit decision in *Alexander v. Cahill*, 2010 WL 842711 (2d Cir. (NY) Mar. 12, 2010). Rule 7.2 establishes a general prohibition against lawyers providing compensation to others in exchange for referrals, while enumerating the circumstances under which payments for referrals may properly be made. Bernstein and I discuss the status of the attack on the constitutionality of some of these rules and addresses the types of communications that may be considered "advertisements" subject to Rule 7.1. We also describe the limitations placed on lawyers seeking to compensate certain organizations for client referrals.

Sarah Jo Hamilton provides commentary on Rules 7.3 through 7.5. Rule 7.3 is of particular significance in that it provides limitations on the solicitation of professional employment. Hamilton notes, "[t]he NY Rules governing solicitation contemplate that while lawyers may directly solicit business to a targeted prospective client, such solicitation is fraught with the potential for overreaching. Thus, the basic thrust of the rules regarding solicitation is protection of prospective clients, especially those who, for reason of their circumstances, might not be able to judge whether retention of the lawyer was appropriate." Rule 7.4 describes the means by which lawyers and firms may identify legal practice areas and specialties while Rule 7.5 pertains to the content of professional notices, letterheads and signs. Sarah Jo Hamilton's commentary offers guidance for attorneys and discusses practices like "ambulance-chasing" that have

long subjected the legal profession to criticism. She explains how these rules protect the right of prospective clients to make informed decisions in retaining a lawyer.

[i] Misconduct, Reporting Misconduct, Bar Admission, Judicial Officers, Discipline Rules 8.1 to 8.5

The final section of the Rules, Rules 8.1 through 8.5, aim to maintain the integrity of the legal profession. These Rules describe specific obligations of attorneys and law firms addressed sometimes but not always elsewhere in the Rules. Gordon Eng provides insightful commentary on all of these rules.

Rule 8.1 requires candor in the bar admission process and Rule 8.2 requires the same about statements pertaining to judicial officers and candidates, Rule 8.3 mandates the reporting of professional misconduct. Eng provides important contextual information about this controversial rule. "If lawyers do not adequately police the conduct of their colleagues at the bar, society will certainly reject the current scheme of self-regulation, replacing it with executive agency supervision similar to that now in place for other professions. The disclosure of information mandated by Rule 8.3 must be understood as part of the bargain that the legal profession has struck with society." Rule 8.4 prohibits and defines misconduct. Rule 8.5 subjects New York lawyers to the disciplinary authority of the state and further specifies jurisdictional and choice of law particulars.

ATTORNEY DISCIPLINE IN NEW YORK

While every lawyer in New York is required to observe the Rules of Professional Conduct, a violation of a Rule does not give rise per se to a cause of action and is not necessarily a basis for civil liability. Nevertheless, failing to comply with the provisions of the Rules does constitute a basis for invoking the disciplinary process. While the Rules provide an outline for the ethical practice of law, they do not prescribe the extent of discipline to be imposed on attorneys who commit acts of professional misconduct.

For a more complete discussion of the disciplinary process in New York, the Grievance Committees, investigation of attorney misconduct by a Grievance Committee, sanctions, and discipline, see the article *Attorney Discipline in New York*, by Lewis Tesser, in Volume 2, infra.

AVOIDING COMPLAINTS AND VIOLATIONS

Guided by the Rules of Professional Conduct, the NYSBA Commentary, and expert analysis of the Rules' meaning, it would seem that avoiding disciplinary problems would not be too difficult. Yet, bad things do happen to good lawyers. Each year, some

well-intentioned lawyers cross over the misconduct threshold, and many, many more are the subject of disciplinary complaints even though they have not committed an ethical violation. Thus, it is important to understand the factors triggering disciplinary complaints and the circumstances frequently attending disciplinary violations. Regardless of whether misconduct has in fact been committed, no lawyer ever wants to receive a complaint in an envelope from the disciplinary committee marked "Personal and Confidential."

For a more complete discussion of avoiding disciplinary complaints and avoiding disciplinary violations, complete with helpful practice pointers, see the article *Avoiding Complaints and Violations,* by Lewis Tesser, in Volume 2, infra. It is also important to remember that most lawyers become lawyers for good reasons and I believe that most lawyers are good people. As noted in my article,

> We believe in a society based on the rule of law and fair principles. We employ logic, creativity, savvy and psychology. We help people and institutions. We join bar associations, do pro bono work and zealously argue our clients' interests. How do good people commit disciplinary infractions? Lawyers are good people, but we are people. We have stress, financial problems, health crises, alcohol and substance abuse, family situations, depression, employee and partner conflicts, and procrastination tendencies. These situations affect our judgments. It is often easier to recognize stress when it is happening to someone else than when it is happening to ourselves. If we see a colleague's judgment is being affected, we can remember that we are a community serving a higher calling and that we have resources available to all of us.

Even if you are busy, make time to take care of yourself. And, if you or a colleague is having a serious personal problem, run, do not walk to the New York State Lawyer's Assistance Program. 1 (800) 255-0569. lap@nysba.org.

PROFESSIONALISM

Chief Seattle said, "All things are connected… . We did not weave the web of life, we are merely a strand in it. Whatever we do to the web, we do to ourselves."

Law is a Collegial Profession

This book is a barn-raising. The contributing lawyers, students, and staff come from different law firms; they teach and study at different law school; support different bar associations; prosecute and defend; strictly construe and fight for fairness. They collaborated in this effort voluntarily to serve a common cause—to share their respect for the law and its problem solving potential in a chaotic world.

Lawyers nationwide find ways to share their professional interests. They lobby for reform, write articles, teach and attend continuing legal education courses, meet at events, have coffee together at the firm lunch room and at the courthouse. It is no

accident that the writers of this treatise came together in the house of a bar association. Bar associations nationwide provide opportunities for service, study, and friendship.

For every field of practice, there are bar association interest groups and committees. For example, and under the enlightened leadership of Steven C. Krane, the Committee on Standards of Attorney Conduct of the New York State Bar Association worked for years to assist the court in developing the rules that are the subject of this treatise and to prepare the Analysis accompanying each rule. Similarly, thousands of general practitioners in New York find counsel and camaraderie in the General Practice Section of NYSBA and thousands of others who concentrate in particular fields or otherwise have interests in common belong to other of its sections and committees.

Strong and vibrant local bars as well have associations that enhance the professional and personal lives of the members. In New York State alone, lawyers are actively involved in hundreds of bar associations and interest groups. See Volume II for a list of bar associations in New York State. It includes listings of Local and County Bar Associations, Ethnic and Minority Associations, Specialty Bar Associations, and Women's Bar Associations.

The Association of the Bar of the City of New York was formed in 1870 "when a group of lawyers fought to rid the courts, and City Hall, of corruption." It now has a membership of over 23,000. The City Bar is an organization dedicated to maintaining the high ethical standards of the legal profession while simultaneously promoting reform of the law and providing service to its members and to the general public. For more information about the New York City Bar Association, view the ABCNY Web site at http://www.nycbar.org/ or contact their office at (212) 382-6665.

And of course, there is NYCLA.

By Virtue of Circumstances

The New York County Lawyers' Association deserves special comment.

Founded in 1908, it was the first major bar association in the country to admit members without regard to race, ethnicity, religion, or gender. Indeed, NYCLA's founding principle was to oppose "selective membership" of any kind. Hon. John Choate, who would become NYCLA president in 1912, said that the organizers were determined to create a great democratic bar association where "any attorney who had met the rigid standards set up by law for admission to the bar should, by virtue of the circumstance, be eligible for admission."

Benno Lewison, a NYCLA founder, observed that the association stood for "the cultivation of the science of jurisprudence, the promotion of reforms in the law, the facilitation of the administration of justice, the elevation of the standards of integrity, honor and courtesy in the legal profession, [and] the cherishing of the spirit of brotherhood among the members of the Association." (It sounds to this writer as a vaccine against professional problems.)

A hundred years later, Steven Flanders wrote in NYCLA's Centennial Journal, that "[p]ossibly the term 'civil rights,' as understood in recent decades, was invented at the Association." NYCLA'S President George Z. Medalie, who also had been United

States Attorney for the Southern District of New York and was soon to be elected to the New York Court of Appeals, created the Committee on Civil Rights in 1938, a body that played an important role in shaping anti-discrimination legislation in New York in the 1940s and since.

In the 1940's, NYCLA's President, William Dean Embree, discovered that an African American NYCLA member, Judge James S. Watson's application for admission in the American Bar Association had not been acted on for many years. NYCLA 's active efforts led directly to the repeal of the offending policy.

NYCLA and its members have written books, articles, reports, and amicus briefs; established committees; petitioned legislatures and executives; and volunteered as pro bono lawyers in times of critical need and otherwise. They have spearheaded efforts regarding access to justice, improving the courts, relieving congestion on court dockets, unifying the civil and criminal court system, promoting just compensation and merit selection for judges, increasing fees for Article 18 (b) attorneys to improve the quality of defense afforded to indigent defendants, and improving the quality of treatment of children in the justice system. NYCLA's world class library is a "find." Supreme Court Associate Justice Thurgood Marshall used the library when he arrived in New York, calling it the only place he felt comfortable doing research. The library has kept pace with technology, and offers its users excellent opportunities to do electronic research.

In short, the history of NYCLA's efforts and successes to improve the law and the life of people could fill a book; in fact, it has. See EDWIN DAVID ROBINSON, BRETHREN AND SISTERS OF THE BAR, A CENTENNIAL HISTORY OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION (Fordham University Press 2008). For more information about the New York County Lawyers' Association, view the website at http://www.nycla.org or contact their office at (212) 267-6646.

The Law is a Higher Calling

On January 11, 2010, NYCLA issued its Task Force Report on Professionalism. See Volume II, Reports, for the complete text of the report. A Task Force had devoted five years studying the attitudes and practices of lawyers, judges, and law schools in New York City in an attempt to measure problems in the profession and to identify

> tangible, realizable steps that an organization such as NYCLA might take to reduce its dimensions and ameliorate the professional lives of some lawyers—and by extension, their adversaries, clients and other participants in the legal system.

Interestingly, one of the most difficult, engaging, and interesting challenges of the Task Force was to define "professionalism". Prohibited conduct, i.e., that which violates the ethical mandates, is easy to label "unprofessional." What conduct, however, though "legal", should be discouraged? One person's obnoxious argument is another's zealous advocacy. The Task Force read writings of numerous scholars, judges, and practitioners, from Edmund Burke to Dean Roscoe Pound to Justice Sandra Day O'Connor. It read reports and articles. It argued, split hairs, and philosophized. Ultimately, all participants reached consensus on a guiding principle; "[a]s attorneys,

we have a higher calling, not merely a job." With that understanding, definitions flowed naturally, as did the work of the Task Force.

The Report of the Task Force helpfully identifies a few themes, problems, and recommended solutions. Of course, there were differences of opinion on the extent of a professionalism problem and how to cure problems that existed. But as the Report notes, "one predominant theme was an expressed need and desire for mentoring. This need appeared to exist not only among those in small or individual practices but also among those in larger firms or institutions, whose formal mentoring programs were sometimes felt to be lacking or potentially compromised by the employer/employee relationship." There was consensus among the Task Force that having a mentoring program in New York would be an "excellent way to increase professionalism among lawyers and increase their professional satisfaction."

The Pilot Mentoring Program

In 2010, a sub-committee of the Task Force and the NYCLA CLE Institute developed a Pilot Mentoring Program which pairs seasoned attorneys with mentees. All participants achieve continuing legal education credits through their active involvement and attendance at educational programs. The program provides formal training through individual access to mentors for questions, consultations, guidance, and the ability to share experiences. Mentors are now meeting with their mentees in person, via phone, and by e-mail on an as-needed basis. Mentees are visiting the mentors' workplaces, are meeting for lunch with their mentors, and are attending seminars, conferences, bar association events, and other networking events together. Additionally, mentees are attending formal programs focusing on skill building and professionalism. Hopefully, the Pilot Mentoring Project can be a viable model for other bar associations and institutions.

The Interests of Our Clients

We do our job well when, consistent with our other obligations, we satisfy the interests of our clients. Ideally, people and organizations, enlightened and informed by the objective standards set forth by centuries of legislative and judicial guidance, with wisdom and maturity, with due regard to fairness and precedent, will consent to resolve their disputes by themselves. Many do. For those that do not, the courts are available to resolve disputes. Our system of dispute resolution is generally based on a winner/loser scheme, but that does not imply that decisions are easy or that one side is clearly right and the other wrong; few parties would knowingly engage in problematic and expensive contests against insurmountable odds. In our Rule of Law, courts balance compelling factors.[36]

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36 Perversely, the fine balancing duties of the courts seem only to have whetted the public's appetite for yet further refinement. Court contests and resolutions are dramatic and much mass media floods our televisions and theaters with these and simulated dramas.

Courts are the temples of secular society. Inviolable. Rich with ritual and respect. We become lawyers studying the beauty and soundness of our precedential model. Access to the justice system is the premise and foundation of our civilized society. Nevertheless our overuse of the courts is a huge problem. It has created a need for a much larger judiciary than currently exists, and judges, as it is, are not paid what they and the public deserve. Our overburdened courts are straining to provide justice while shackled with a heavy caseload and insufficient resources. Many attorneys view litigation as a default mechanism, rather than the failure that it often is of two or more parties and their attorneys to consensually reach a resolution in their own interests.

A lawyer is often called on to advance and to defend the legal rights of clients, and we must do so when we accept such an assignment. Yet when clients come to us, most disputes are susceptible of resolution without requiring the assistance of an authoritative imprimatur. The overwhelming majority of cases settle before trial but many more should settle before legal proceedings are instituted. The mind-set among lawyers to "sue the bastards" to show them that we mean business is in fact mean business and is usually misguided. In GETTING TO YES,[37] ROGER FISHER AND WILLIAM L. URY of the Harvard Negotiation Project demonstrated for the world how good resolutions are enhanced by focusing on the interests of clients rather than their positions, acknowledging relationship and communications issues, exploring options, sometimes openly, and by paying due regard to objective standards (the law).

Nevertheless, at the outset of and during a legal conflict, we too frequently engage in counterproductive settlement stances (accusations, protests, polarized expectations, and bravado postures preventing accord). Clients are too often victim to the premature failure of the settlement dance. Litigation ensues with its cloud of expense, risk, aggravation, wasted time, lost options, and pyrrhic victories. Unfortunately, litigation has become an acceptable dispute resolution method of first resort. A mambo, not a punk mosh, is more likely to get those with opposing views to arrive at the finish together.

The Mediation Movement

Lawyers are discovering that mediation has the potential to enhance the interests of clients. Leona Beane and Simeon Baum have been instrumental in furthering the involvement of NYCLA and NYSBA in exploring and developing this advancing art. In New York City, George O'Malley and Gerald Lepp, in the Southern and Eastern Districts, lead very successful programs that assist litigants reach common ground. The New York State Unified Court System has active and vibrant mediation programs. The Mediation Committee of the Dispute Resolution Section of NYSBA, the Alternative Dispute Resolution Committee of City Bar, and the Arbitration and ADR Committee of NYCLA have many members committed to realizing the potential of mediation.

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37 ROGER FISHER AND WILLIAM L. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Penguin Books 1981, 1991).

There are numerous private organizations, including the AAA, http://aaamediation.com, JAMS, http://www.jamsadr.com, and FINRA (securities industry related mediation), (212) 858-4359, that provide excellent support to those parties who together realize that there are ways to have assistance but still remain in control of the settlement decision. The persons named above, as well as Kenneth L. Andrichik, David Brainin, Frank Carling, Diane Cohen, Hon. Stephen G. Crane, Cathy Cronin-Harris, Gail Davis, Ken Feinberg, George Friedman, Elaine Greenberg, Steve Hoffman, Irwin Kahn, Chief Judge Judith S. Kaye, Nancy Kramer, Michael Lewis, Lela P. Love, Paul McDonough, Debbie Masucci, Abigail Pessen, Hon. Ann Pfau, Margaret Shaw, Hon. Jacqueline Silbermann, Linda Singer, Robert Thaler, and Dan Weitz are only a few of the numerous mediators, practitioners, and judges who are helping to transform the New York skyline.

The Ethics Institute

The Ethics Institute of the New York County Lawyers' Association works in conjunction with the ethics committees of NYCLA; the Professionalism Task Force studies ways in which we serve our calling; the Ethics Committee was the national originator of bar association Ethics Opinions and it continues to issue opinions that inform the bar on ethical responsibilities; the Professional Licensing and Discipline Committee studies the licensing and discipline process and recently instigated a State Bar Resolution on reforming the Escrow rules. The Ethics Institute initiates continuing legal education programs, advises NYCLA on issues of ethics and professionalism, and provides opportunities for members to communicate with the bar and public through books such as this treatise.

In Conclusion

The mandates of the new New York Rules of Professional Responsibility, unlike some other rules of the road, are honored in the observance. The overwhelming majority of the legal community demographic certainly does not intentionally commit disciplinary infractions. This book, this barn-raising, is situated in a beautiful dell landscaped by the professionalism and excellence of the lawyers of New York.

I agree with the Chief. All of us serve to maintain the fabric.

Lewis Tesser 2010

Some Historical Perspectives on New York's Rules of Professional Conduct[1]

New York State's adoption of the Rules of Professional Conduct (effective April 1, 2009) came one hundred years after the American Bar Association promulgated its initial version of the Canons of Ethics in 1908. That code, which came to be known as the "Canons", served as a general model for the profession, on a national basis, until the ABA adopted the Model Code of Professional Responsibility called the "Model Code," in 1969.[2] New York State became an early adopter of the Model Code, which became effective in this state in 1970. Surprising dissatisfaction with the Model Code prompted the ABA to issue a revamped version of ethical precepts in 1983, which the ABA styled the Model Rules of Professional Conduct, (the Model Rules.)

In 1985, the New York State Bar Association (NYSBA) declined the opportunity to become an "early adopter" of the Model Rules. During the decade after New York first turned its back on the Model Rules, the ABA began to have its own misgivings. In 1997, the ABA decided to conduct a larger review and created a commission (the "Ethics 2000 Commission") to review the Rules again. It issued its report, and the ABA's House of Delegates adopted a broad range of amendments in 2002. At that time, New York began another attempt to import the Model Rules to supplant the Empire State's version of the Model Code.

In early 2003, the NYSBA created a committee to review the latest version of the ABA's Model Rules and render them into a form suitable for adoption in New York State. That committee was styled the Committee on Standards of Attorney Conduct and became known by its acronym "COSAC." COSAC itself spent almost two years sifting through the Model Rules and their comments. COSAC and the NYSBA

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1 Contributed by Edwin David Robertson, Cadwalader, Wickersham & Taft LLP.

2 The 1908 Canons were based principally on the Alabama State Bar Association 's Code of Ethics adopted in1887, which was borrowed largely from Judge George Sharswood's lectures, which were published in 1854 under the title of "Professional Ethics," and from the fifty resolutions included in DAVID HOFFMAN, A COURSE OF LEGAL STUDY (2d ed. 1836). On August 14, 1964, the ABA House of Delegates created a Special Committee on Evaluation of Ethical Standards to examine the 1908 Canons of Professional Ethics and to recommend changes. That committee produced the Model Code, which the House of Delegates adopted in 1969. It became effective January 1, 1970.

exhibited political wisdom by adopting a "process for change" that embraced a widening circle of lawyers from across the state and recruited potential supporters for the new rules and their adoption. By that process, COSAC proposed a version of the Model Rules that incorporated a number of features unique to New York's professional standards together with special "New York comments" that explained those points where New York departed from the ABA's Model Rules.

By late 2005, COSAC had issued a two-volume report that included a proposed set of rules and corresponding comments for adoption in New York. The NYSBA House of Delegates accepted that report in early 2006 and adopted a scheduling order that assigned a chunk (or tranche) of rules to each ABA House of Delegates meeting for consideration over the next two years. In turn, local bar associations and other interested parties submitted comments to the House of Delegates, which considered each rule, one by one.[3]

By late 2007, the NYSBA's House of Delegates had considered each of the Model Rules and adopted a version applicable to New York State. By February 2008, the New York State Bar Association issued its "final" report on the Model Rules. That report represented more than five years of painstakingly deliberate action by representatives from every practice section and geographical area in the state. While representing considerable intellectual effort, the report was also a brilliantly conceived exercise in "bar politics" that orchestrated not only adopting of the final report but also its acceptance by a constituency of practitioners and judges that grew over a six-year period. Although a number of leaders and local bar associations share responsibility for successful concluding of the project, the principle credit for that accomplishment goes to Steven C. Krane, NYSBA President in 2001–2002.

The NYSBA submitted its comprehensive report to the presiding justices of the four Appellate Division departments for final adoption and promulgation as "rules" applicable to all lawyers in New York State. After receiving the State Bar's version of the Model Rules, the presiding justices did not issue those rules (or any other version

3 There was one major departure from the NYSBA's methodical process for evaluating each rule. Shortly before COSAC released its initial report, the NYSBA created a task force that formulated a set of rules to replace the Model Code's advertising rules. That task force report proposed a variety of new rules applicable to the Internet and broadcast media. The NYSBA considered those advertising rules, adopted a revised version, and submitted them to the presiding justices for adoption. Ultimately, the presiding justices adopted a version of those rules written in the format and phraseology of the Model Code's Disciplinary Rules. Those new advertising rules became effective in February 2007 and eclipsed the advertising rules in the draft that COSAC initially proposed. In early 2007, the U.S. District Court in Albany enjoined enforcement of those new advertising rules and declared several of them unconstitutional on First Amendment grounds. In January 2009, the United States Court of Appeals heard argument on the state's appeal from the lower court's ruling. As of January 2010, the Second Circuit had not decided the appeal. Meanwhile, one member (Hon. Sonia Sotomayor) of the appellate panel to which that case was assigned has left the court and become an associate justice of the United States Supreme Court.

of them) for "public comment or consideration."[4] Nor did they conduct any public hearings on the substance of the rules or whether any of them should be amended. Rather, the justices made their own amendments, issued their own version, and ordered that they become effective on April 1, 2009.

The introduction to the NYSBA's report to the presiding justices provides a detailed chronology of events between the ABA's promulgation of its initial version of the Model Rules through 2008. That introduction is brief and barely hints at how Model Rules evolved from the Canons over the preceding century. Each one of the Model Rules has a history of its own, and the NYSBA comments offer some helpful background on each Rule. Despite those comments' rich gloss (an undeniable aid in interpreting any particular rule), the presiding justices did not include the comments as part of their promulgation. The justices' decision not to adopt the comments offers a good starting point for examining some of the themes that marked how the code of ethics in New York developed over the last century.

FORMAT

By general consensus, the format of the Model Rules is superior to its predecessors. The 1908 Canons included three sections. The first section was a preamble that stressed the importance of public confidence in the integrity and impartiality of the judicial system and linked that confidence to public confidence in the integrity of lawyers.[5]

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4 After the presiding justices received the NYSBA's report on proposed changes to the advertising rules in 2006, they released a draft of those rules for public comment, and they modified some of the provisions in response to the bar's reaction to those rules.

5 Many of the early works on legal ethics stress the relation between the public's respect for the legal system and the public's esteem for the bar. That theme runs through a number of the "reform" movements that grew in the profession during the first half of the twentieth century. One example is the "public defender" movement that sought not only to supply attorneys for those indigent persons who were accused of a crime but also to require that only a state-employed public defender could represent professional crooks and mobsters. *Bringing Legal Aid To The Little Man*, N.Y. TIMES, Mar. 25, 1934; Mayer C. Goldman, *Defender of Poor*, N.Y. Times, Nov. 25, 1939. The "mouthpiece" label was the theme of Robert H. Jackson's *The Lawyer; Leader or Mouthpiece*, 18 JA JUDICATURE SOCIETY 70 (Oct. 1934), which attacked lawyers' lack of professional independence. Jackson blamed bar leaders for the bar's decline and charged that the leaders' lack of moral integrity had led them to cease "owning themselves." As Jackson put it, bar leaders no longer lead an "independent mental life" but rather were "nourished solely by retainers." Similarly, the courts condemned lawyers' uncritical solicitation of sophisticated, prospective clients as demeaning to the legal system. "[b]usiness men receiving a succession of such communications would be likely to form a very unjust estimate of the profession at large and conclude that the law was not, as consistently maintained, a learned profession, but had deteriorated into a mere business, where the most persistent and adroit self-advertiser would be the most successful, a point of view repugnant to the conception of every honorable practitioner, condemned by the Bar and Bench alike." *In re* Gray, 172 N.Y. S. 650 (1st Dept. 1918). Curiously, this notion is rarely advanced as a compelling state interest to justify regulation of the bar.

The second part of the Canons included 32 numbered sections, each headed by a brief title. The text of most of the Canons employed language flexible enough to be described as "aspirational."[6] Yet some Canons were less loose. For example, Canon 27 was plain that "solicitation of business by circulars or advertisements … is unprofessional." Similarly, the Canons declared that it was "unprofessional to represent conflicting interests, except by express consent of all concerned [after giving] a full disclosure of the facts."

An introductory paragraph to the numbered Canons conceded that no set of rules could possibly "particularize all the duties of the lawyer and the varying phases of litigation or of all the relations of professional life." That paragraph went on to make clear that "the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned." The Canons left those missing duties to the reader's imagination, informed, hopefully, by some sense of professional morality or common sense. Finally, a third section of the Canons recommended adopting of an oath that all lawyers should take upon admission to the bar. Slightly more than a dozen states in 1908 had statutory enactments concerning the duties of lawyers, and in those states oaths administered to new attorneys required observing of those statutory enactments. The ABA's proposed oath curiously did not contain a promise to adhere to the Canons themselves.

The ABA and legal ethicists periodically reviewed the Canons and refined them for the next sixty years. When the Model Code appeared in 1969, the bar perceived it as an improvement over the Canons. The Model Code had three major sections: canons, rules, and ethical considerations. The Canons of the Mode Code were extremely general principles. The Model Code denominated its "rules" as "Disciplinary Rules" and rendered them into a prose style that used such words as "shall" and "shall not" to indicate conduct that is forbidden on pain of discipline. In contrast, the Model Code's "Ethical Considerations" were not "black letter rules" of forbidden behavior. Rather, they were a mixture of explanations and aspirational statements. The structure and style of the Model Code seem designed to create the impression that there was some hierarchy among its three components that placed its "canons" in a lofty place (perhaps somewhere between heaven and the stratosphere) above its "ethical considerations" (located within human sight, but just out-of-reach). At the bottom were the "disciplinary rules," which represent the bare minimum of acceptable professional conduct. They were supposed to be "black letter rules" and clear. Although the first two cynical characterizations might be accurate, the third assessment is clearly wrong. The disciplinary rules are not so plain as to answer all questions about whether some conduct is professionally proper.

The Model Code presented a strange tension in the phraseology of its canons, ethical considerations, and rules. For example, Canon 4 used the aspirational word "should" in stating the simple proposition: "A Lawyer Should Preserve the Confidences and Secrets of a Client." Ethical Consideration 4-1 used the stronger word "require" in stating the point: "the fiduciary relationship existing between lawyer and client and the

6 The Canons repeatedly used the words "should" and "should not." Those words mark the Canons as aspirational.

proper functioning of the legal system require the preservation by the lawyer of confidences and secretes …" Finally, Disciplinary Rule 4-101(b)(1) expressed the idea more firmly: "a lawyer shall not knowingly … [r]eveal a confidence or secret of his client …" The phrasing of the three levels of specificity conflicted directly with Code's own hierarchy.

In New York, the courts adopted the Model Code in a strange fashion. The Appellate Division adopted only the disciplinary rules (with many changes).[7] The Code's canons and ethical considerations were not part of the rules that governed New York lawyers. Second, the Appellate Division changed the numbers of the rules so that they did not correspond to the section numbers in New York's official codification. For example, Disciplinary Rule DR. 3-103 appeared as Section 1200.18 of 22 N.Y.C.R.R. That unfortunate number discrepancy made it difficult for practitioners and students to compare any of New York's ethical rules with the rules in another state or to apply any of the legal scholarship about the Model Code to the rules adopted in New York. Although translation tables were a ubiquitous feature of all New York editions of the Model Code, those tables offered an inadequate crutch for the hurried lawyer who limped from cases and treatises to New York's curious codification of the Model Code.[8]

A Longer View at the Context

New York's adoption of the Model Rules in late 2008 is more than merely the "conclusion" of a "process" that began with the ABA's adopting the original canons in 1908 or the ABA's promulgating the Model Rules in 1983.[9] Either notion places too much weight on the ABA's influence upon New York's approach. Clearly, the Model Rules are not the "final" word on how the ethical standards of lawyers' conduct are expressed in New York. They are only the most recent rendition of the rubrics that govern the bar. Over the years, many factors have shaped how the New York bar

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7 The disciplinary Rules were in Part 1200 of 22 N.Y.C.R.R. Each department of the Appellate Division has a rule that provides that violating the Part 1200 rules constitutes "professional misconduct" within the meaning of Section 90 of the Judiciary Law. *See, e.g.,* 22 N.Y.C.R.R. 691.2 for the Second Department rule.

8 When the NYSBA formally proposed adopting of the Model Rules, it strongly urged adopting their format and numbering system to cure the "translation problem" that had plagued those who sought to study the New York rules in the context of other state's interpretations of the Model Code. These comparisons are essential to any enriched comprehension of all of the Model Rules or the Model Code—no two states ever adopted the same phraseology of the Rules or the Code.

9 The early twentieth century witnessed a number of professions' codification of standards, codes, and rules of ethics. Clyde King, (*Foreword*, *in* THE ETHICS OF THE PROFESSIONS AND OF BUSINESS 4 (Philadelphia: American Academy of Political Science, Clyde King ed.,1922); Robert H. Kohn, *The Significance of the Professional Ideal*, *The Ethics of the Professions and of Business* (Philadelphia: American Academy of Political Science 1922) *Id.*; R. M. MacIver, *The Social Significance of Professional Ethics*, *The Ethics of the Professions and of Business* (Philadelphia: American Academy of Political Science 1922) at 11.

articulates its ethical precepts and how it imposes professional discipline on those who transgress those principles. A number of factors have influenced that evolution. Those same forces will continue to reshape the profession's approach to its rules of conduct.

When the ABA proposed the Canons in 1908, it recognized that neither it nor any other voluntary bar association in American had the power to enforce any ethical rule except by expelling a member from a particular bar association. But expelling a member had no affect on that persons' ability to practice before any court or to render advice to any client.[10] The original ABA Canons became the subject of extensive discussions across the country as local bar association considered their adoption on a purely local basis.[11] The NYSBA adopted an amended version of the Canons in 1909.[12]

Many critics rejected the notion of articulating any ethical principles on the ground that it was not necessary. One critic said "such codes, therefore, are like the creeds of churches, to be observed by those who accept them, to be rejected or disregarded by those who dislike them or are ignorant of them: failure to regard them may be accompanied by some penalty within the body, but a mere violation of these codes, unless it was also a violation of a legal duty, does not subject the member of the association, nor the non-member who is a member of the Bar, to any penalty in his official relations."[13] That notion was put more briefly as "Therefore such a code, while it may be a guide to one who seeks light, is not a curb to one who willfully, or even ignorantly, errs."[14]

Other critics complained that the enumeration of any specific rules detracted from recognizing and implementing "principles" by which behavior should be conducted in an ethical fashion. One New York critic noted that "The modern tendency of legal thought, as illustrated in New York, and doubtless also elsewhere, is to disregard principles for specific instances." Charles A. Boston, another cynic, asked whether "it be conceived that Bar Association codes, without penalties, coached in sweet words

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10 Many voluntary bar associations had grievance committees that investigated complaints against members of the voluntary associations. New York's disciplinary procedures of that era were also somewhat toothless.

11 The NYSBA appointed a committee to study the Canons, and that committee rendered its report at NYSBA's annual meeting in 1909. *New York State Bar Association Proceedings of the Thirty-Second Annual Meeting Held at Buffalo January 19, 28–29, 1909, etc.* 114-68 (Albany: The Argus Company 1909). That committee included General Thomas H. Hubbard, Alton B. Parker (former Chief Judge of the N.Y.S. Court of Appeals), J. Newton Fiero (dean of Albany Law School, former NYSBA president, and official reporter of the N.Y.S. Court of Appeals), and Richard L. Hand (father of Augustus N. Hand). Hubbard, Parker, and NYSBA president Francis Stetson were members of the ABA committee that formulated the Canons.

12 The NYSBA committee proposed several amendments in 1908 that were adopted by the House of Delegates. Discussion of the Canons and their amendments include comments about zealous advocacy and the treatment of contingent fees—topics that continue to excite controversy a century later. *New York State Bar Association Proceedings of the Thirty-Second Annual Meeting Held at Buffalo January 19, 28–29, 1909, etc*. 155–168, 200–209 (Albany: The Argus Company 1909).

13 Charles A. Boston*, "A Code of Legal Ethics,"* The Green Bag (APRIL 1908) p. 224.

14 *Id*. at 224

and full of intellectual pabulum on the duty to the poor and oppressed will ever percolate within the reach of this gentry [of ambulance chasers]."[15] Boston's words lead naturally to examining the environment in which the Model Rules now find themselves in New York.

As a starting point, it is helpful to place the Model Rules in the context of New York's professional disciplinary regime. That regime requires discerning four professional processes or disciplinary "functions": (1) bar admissions, (2) bar discipline, (3) unlawful practice, and (4) promulgating rules of normative professional behavior.[16] Approximately half the states in this country have "mandatory," "incorporated," or "integrated" bars. In those states, elected bar leaders and officials oversee the processes of admissions, expulsions, rule making, and other essential professional concerns. Before the 1920s, all the bar associations in the United States were voluntary associations of lawyers who sought to elevate the legal profession but lacked any means (except moral persuasion and peer shunning) to compel a lawyer to conform to any standard of conduct. Shortly after World War I, the National Conference of Bar Association Delegates began to agitate to create compulsory membership in State Bar Associations. In 1919, the Conference urged states to enact legislation incorporating

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15 *Id*. at 226.

16 Bar Associations use such names as Grievance Committee or Discipline Committee to denote the committees that initiate or implement the expulsion (disbarment), suspension, and censure of lawyers. Such names as Unlawful Practice Committee and Unauthorized Practice Committee refer to bar committees that investigate instances of non-lawyers or unauthorized persons who practice law in violation of state law. In New York, for example, corporations are forbidden from practicing law, even though the individual corporate employee who renders legal advice might be admitted to practice in the state. Also, New York does not allow people to practice law in the state unless they are admitted to practice (licensed) in the state and are currently in good standing (paid a biennial registration fee and attended a certain number of continuing legal education courses every two years), even though that person may be admitted to practice in another state. Bar associations use the terms Ethics Committee and Committee on Professional Ethics to refer to committees that express the profession's ethics principles into rules of general applicability (usually called "canons," "codes," or "rules"). Over the last century, ethics committees have also published reports about how the rules of professional ethics apply to very specific or discrete factual situations. Usually, those published reports of specific applicability are called "ethics opinions." Although these opinions are intended to be instructive to lawyers, they do not have the force of law.

In some bar associations, a single bar association committee may address issues of disbarments, unlawful practice, and promulgating ethics rules. Before the 1920s, the City Bar's Grievance Committee presented an example of a committee that embraced that ambit of activity. Some bar associations designated three different committees to address discipline, unlawful practice, and ethics. After 1913, NYCLA had three such separate committees. As a general matter, ethics committees issued their ethics opinions with minimum oversight by the particular bar association, but their role in formulating codes, rules, and canons was always subject to the highest governing authority of their parent association—or even the association's entire membership itself. Although professional competence has been always a prerequisite for admission to the bar, the disciplinary processes of expulsion and suspension have rarely been used to remove incompetent lawyers from the New York bar. The New York bar has never instituted any program of retesting or recertification as a condition to continued licensure to practice in the state.

the bar, enrolling members in each state, and providing for its self-government.[17] As the Conference put it:

> the Bar cannot be governed by the Bench; the experience of centuries elsewhere shows that the Bar can, when given power, govern itself and make the word "lawyer" a badge of honor.[18]

During the 1920s, New York almost adopted a mandatory bar, but changing bar leadership in 1926 derailed the process.[19] Over the next three decades, the lawyers in half the states became organized into mandatory or unified bars. Bar admission, standard-setting, and discipline are thought to be generally "more efficient and effective" in states with a unified bar.[20]

New York's system of "bar tending" developed without the mechanism of a mandatory bar. Each of the essential professional functions (1) bar admissions, (2) bar discipline, (3) unlawful practice, and (4) promulgating rules of normative professional behavior, moved along independent tracks that lacked any single moving force but ultimately ended up within the court's exclusive power, albeit with an occasional legislative enactment to emphasize that the New York courts are this state's bar

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17 The Conference of Bar Association Delegates began in 1916 as an initiative of Elihu Root and included approximately 200 persons from various local bar associations and the ABA. In its early years, it coordinated activities to thwart the unlawful practice of law, improve ethics standards, and coordinate nationwide activities of local bar associations. It prepared a "model act" for adoption by the states to incorporate their bars. A variety of factors motivated the model legislation. The major motives were the local bars' lack of any well-funded organizational structure and resentment to judicial control. Clarence N. Goodwin of Chicago rendered a report that expressed the proposed bill's theoretical underpinning: the bar itself was a body politic that should be controlled upon principles of representative government by which every member of the bar should have an equal voice in that self-government. Goodwin expressed his annoyance at the bench's control of the bar in terms that compared the judges to Eastern European autocrats: "The old Russian regime was once characterized as despotism tempered by assassination. The condition which exists in the Bar is one of anarchy modified by spasmodic and sporadic activities of various bar associations having no authority over the greater part of the Bar, and effective only through tedious, cumbersome and expensive proceedings in court… . For these reasons your committee is convinced that the matter most important to the future of the Bar is a practical carrying out of the recommendation of your Conference in favor of the [the Bar] as a body politic and giving it power to govern itself, both in the matter of admission and discipline." *Proceedings of the Sixth Annual Conference of Bar Association Delegates … held in Cincinnati, Ohio, on August 30, 1921*.

18 *Proceedings of the Seventh Annual Conference of Bar Association Delegates … held in San Francisco, California, on August 8, 1922*, reported at *Report of the Forty-Fifth Annual Meeting of the American Bar Association held August 9, 10, and 1922*, 595 (Baltimore: Lord Baltimore Press 1922).

19 A brief history of New York's attempt to create a mandatory bar appears in Chapter 3 of ROBERTSON, BRETHREN AND SISTERS OF THE BAR (New York: Fordham U. Press 2008).

20 Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, JOURNAL OF THE PROFESSIONAL LAWYER 359, 367 (2008).

regulators.[21] Keeping those distinctions in mind provides a better appreciation of how New York adopted its approaches to bar admissions and bar discipline, and leads naturally to a brief examination of how the Empire State has regulated the entry and exit doors to the practice of law.

Admissions

Over the years, statutes and court rules institutionalized the requirements for admission to practice on a statewide basis. Before New York's Constitution of 1846, lawyers were admitted to practice by and before specific courts in the state.[22] Until the late 1840s, admission to practice required completing a seven-year program that could include a maximum of four years of "classical studies" after the age of fourteen.[23] The Constitution of 1846 provided for admission to practice "in all the courts of this State," and the Judiciary Act of 1847 reposed that admission authority in the General Term of Supreme Court.[24] Between 1855 and 1860, the legislature passed special laws providing for automatic bar admission by the recipients of law degrees from Hamilton, Albany, Columbia, and N.Y.U.[25] Although these four schools exercised the gatekeeper role, they recruited students without conducting any background checks on the candidates' suitability for admission to the bar.

When the Association of the Bar of New York City Bar ("City Bar") formed in the early 1870s, it began efforts to "reform" these practices, wrest admission authority from the law schools, and seek more stringent statewide standards of admission. The City Bar did acknowledge that the schools were "the armories in which the weapons of the mind are prepared," however, they were "valuable as a means to attain an end, but not as an end." [26] The catalogues for the law schools at Albany, Columbia, and N.Y.U. advertised that "no examination and no particular course of previous study are necessary

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21 MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 3 (LexisNexis, 2004), advances the notion that the bar's self governance is "contrary to democratic ideals" and that ethics rules should be enacted by the legislature.

22 A summary of the requirements for admission to the bar before 1886 appears as Appendix B in GEORGE MARTIN, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1870–1970 385–387 (Boston: Houghton Mifflin, 1970).

23 *Report of the Committee on Admission to the Bar made to the Association of the Bar of the City of New York* 5 (New York: Evening Post Press, 1876). The Constitution of 1777, Article 27, reposed in the courts the authority to admit persons to practice law.

24 Article 6, Section 8.

25 The lower courts declared each of the special laws unconstitutional, but the Court of Appeals upheld these statutes that conferred admission powers directly upon the law schools. In 1875, the courts in Manhattan admitted 36 lawyers, and the City's two local law schools graduated and admitted 250 new attorneys.

26 *Supra* note 23, at 13. The report pointedly observed that John B. Minor (dean of the University of Virginia's law school) insisted upon repealing a similar "special admission" privilege enjoyed by graduates of that institution. Minor's letter to City Bar stressed the importance of

for admission." City Bar sneered at that invitation; "Is it possible that learning or education are to be benefited by such bids as these? Or is the number of their students more highly prized by these institutions than their character?" Surprisingly, those colleges' undergraduate schools all required some previous preparatory schooling before admission. Also, in contrast, the law schools at Penn, Yale, and Harvard required some combination of college degrees, entrance examinations, or certificates of good character.

Between 1880 and 1900, the legislature and the courts adopted many of City Bar's proposals. In 1894, the legislature established the Commission of Bar Examiners to impose uniform rules throughout the state.[27] By 1908, New York required a three-year clerkship for bar admission, part of which could be satisfied by law school attendance. Lawyers admitted in other states were freely admitted to practice in New York without any further examination beyond production of a certificate of admission elsewhere. In 1909, City Bar and the New York County Lawyers' Association (NYCLA) proposed eliminating the uncritical admission of lawyers from other states and extending the clerkship period to five years.[28]

In 1911, NYCLA's and City Bar's admissions committees worked together to lengthen the period of clerkship from three to four years.[29] Lawyers from other states could be "waived into" (admitted to) the New York Bar only if they had practiced for five years elsewhere. Despite those more stringent rules, a number of law professors

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impartial examiners in contrast to exams administered by the same faculties that had taught the students. That notion resonated with the City Bar's reformers.

27 *Uniform Law Examinations*, N.Y. TIMES, May 24, 1894; *State Board of Law Examiners*, N.Y. TIMES, September 4, 1894. Although requirements had been relatively strict in New York City, the lack of statewide uniformity standards invited the bar's cynicism. In 1913, Charles A. Boston described one of the consequences of disparate admissions in the following terms, "… though the examinations for the Bar, in the city, as it then was (now New York County) were sufficiently severe and exhaustive, it was a well known and common practice for ill-equipped or lazy men to stay over night in Poughkeepsie, where the examinations were superficial, swear they were residents of that district, take and pass the nominal examinations there, and appear in New York City the next day as members of the State Bar, while their more conscientious brothers and competitors were sometimes excluded by the more severe examinations to which they submitted in their actual home place. The moral caliber of the men who so evaded the law and their influence upon the ethical tone of the Bar will be readily appreciated." Charles A. Boston, *Practical Activities In Legal Ethics, An Address Before the Law Association of Philadelphia*, *November 14, 1913*, 4, in *Practical Activities in Legal Ethics*, 62 U. PENNSYLVANIA L. REVIEW 103 (1913–4).

28 *Lawyers Attack Short Law Course*, N.Y. TIMES, Aug. 28, 1909.

29 *Admission to Bar Harder After July 1*, N.Y. TIMES, June 11, 1911. The clerkship period was extended to four years, with college graduates receiving "credit" for one year, thereby shortening their clerkship period to three years. That three-year period could be satisfied by a combination of law school attendance and clerkship. In 1912, the bar examiners expanded the test so that its administration took two days. For some years, critics of the test had complained that it placed too much emphasis upon "correct" answers, and the examiners announced that "in marking [the exams] due consideration would be given to the reasoning of the answers." *Bar Examinations Change—Candidates Hereafter Will Have To Face a Two Days' Ordeal*, N.Y. TIMES, Nov. 22, 1912.

pressed to make graduation from college an additional requirement for bar admission, and the media occasionally used those pronouncements to criticize the bar itself. In early 1914, John Dos Passos (chair of NYCLA's Admissions Committee) defended the new rules and observed that it was unrealistic to impose any requirement of college graduation.[30] Today, law school graduation is not a prerequisite to bar admission in New York; however, a candidate for admission must attend law school for at least one year.[31]

The last century has witnessed the expanded role of the law schools as the profession's primary gate keepers. They introduce new lawyers to the culture of the profession, the ethical rules that govern the bar, and the ideals of excellence to which all professionals should aspire. Today, law students must take a course in ethics and professionalism to earn a law degree in this country, and the curricula of those courses are based on the ABA's Model Rules. In addition, the overwhelming majority all of contemporary scholarly works on professional ethics are published by law school ethics professors.

Disciplinary Prosecutions

When New York's voluntary bar associations were established, they had grievance committees that heard complaints against members and proposed expulsion of wayward lawyers from the associations themselves. By 1900 the City Bar empowered its grievance committee to investigate allegations of "specific charges of fraud or gross unprofessional conduct" involving lawyers who were not members of that association.

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30 "Letter to the Editor," N.Y. TIMES, January 4, 1914. Dos Passos's letter emphasized the ability of the Appellate Division's character and fitness committee to weed out those unfit to become lawyers. The letter itself responded to a *Times* editorial citing the arguments of Nicholas Murray Butler (President of Columbia University) for college graduation as a prerequisite to bar admission. Butler's views are exemplified by his address to the Columbia students on opening day, reprinted as *A Menace to Our Integrity as a People in* THE WORLD'S WORK A HISTORY OF OUR TIME, vol. XI, 6817 (New York 1906), when he said, "The greed for gain and the greed for power have blinded men to the time-old distinction between right and wrong. Both among business men and at the bar are to be found advisors, counted shrewd and successful, who have substituted the penal code for the moral law as the standard of conduct. Right and wrong have given way to the subtler distinction between legal, not-illegal, and illegal; or, better, perhaps, between honest, law-honest, and dishonest. This new triumph of mind over morals is bad enough in itself; but when, in addition, its exponents secure material gain and professional prosperity it becomes a menace to our integrity as a people. Against this casuistry of the counting house and of the law office, against this subterfuge and deceit, real character will stand out like a rock." Sixty years after Butler's speech, Jerome Carlin published a more quantitative critique of the New York bar that examined the "social conditions of moral integrity" in the legal profession. JEROME E. CARLIN, LAWYERS' ETHICS, A SURVEY OF THE NEW YORK CITY BAR xxvii (New York: Russell Sage Foundation, 1966). That study portrayed a "material" gap between lawyers' ethical standards and lawyers' actual conduct. It noted that disciplinary sanctions failed to inhibit unethical behavior and showed that lawyers in small firm or independent practices were "most prone" to unethical conduct. *Id*. at xxii.

31 Rules of the New York State Court of Appeals, § 520.4(a) (2).

In addition, the committee had the authority to investigate instances of unlawful practice. The City Bar's Executive Committee exercised ultimate decision-making authority about whether to seek a lawyer's disbarment. During 1899, the City Bar's Grievance Committee received 52 complaints and brought disbarment proceedings against three lawyers. Although the committee relied on volunteers to do most of its work, its expenses were high; more than $5000.[32] When NYCLA was incorporated in 1908, its founding documents also provided for a Committee on Discipline to investigate any lawyer's "misconduct in a professional relation" and report its findings to the board of directors. In turn, the board could authorize further proceedings to seek disbarment.[33]

There were mixed views about whether a voluntary bar association should burden itself with the trouble and expense of disbarring lawyers in contrast merely to expelling them from the association. Some attorneys believed that the expense of disbarment proceedings was "an unnecessary tax upon the Bar." Others believed that the association should hold only its own members to "strict accountability" and thereby create "two classes of lawyers in the community, those of approved integrity, and those of questionable integrity, and in that case membership in the Association will be a badge of integrity and will prove a pecuniary advantage to them." Critics even went so far as point out that it was irrational for "an association of lawyers to tax themselves to make those *outside* of the association so decent that they will become competitors for decent business."[34]

By 1912, the City Bar had expanded its staff to include five full-time attorneys costing $16,000 annually (roughly one-quarter of its entire budget). In comparison, NYCLA spent only about $4,000 on disciplinary proceedings in 1912.[35] By 1968, the annual staff expenses of City Bar's grievance committee were approximately $200,000, most of which came from its own members' dues. In addition, cases were tried by committee members, who volunteered their time as judges to hear grievance cases.[36]

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32 *See, e.g.* YEAR BOOK, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 25, 63, 89 (New York 1900).

33 *Year Book, New York County Lawyers' Association,* 64, 94 (New York, 1910). The Discipline Committee's report for 1910 noted that it preferred charges against 67 lawyers during the first two years of operation (ten times as many proceedings as City Bar commenced in 1899 and 1900). Disbarment proceedings were special proceedings in the Appellate Divisions. Although a bar association petitioned the court to exercise its expulsion power, the association was only a relator rather than a party to proceeding. As a consequence, if the lawyer was not punished, then the association had no right of appeal. *See* Year Book, New York County Lawyers' Association. at 145 (1925); *In Re Dolphin*, 240 N.Y. 89 (1925); *Court Ruling Curbs Bar Association*, N.Y. TIMES, April 1, 1925.

34 Boston, Practical Activities In Legal Ethics, An Address Before the Law Association of Philadelphia, Nov. 14, 1913," 7, "Practical Activities in Legal Ethics," 62 *U. Pennsylvania L. Review* 103 (1913–14).

35 Boston, Practical Activities In Legal Ethics, An Address Before the Law Association of Philadelphia, Nov. 14, 1913," 7, "Practical Activities in Legal Ethics," 62 *U. Pennsylvania L. Review* 103 (1913–14).

36 *See* MARTIN, CAUSES AND CONFLICTS 352–380, on the evolution of the City Bar's grievance committee. In the 1970s, the First Department came under increasing pressure to displace City

The City Bar's grievance committee gained increasingly official status, as the Appellate Division, First Department, looked to it and the Bronx Bar's grievance committee to investigate and prosecute disbarment cases in Manhattan and the Bronx. Following World War II, a joint group prosecuted disbarment proceedings under the name Coordinating Committee on Discipline of the Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Bronx County Bar Association. Currently, the grievance and disbarment process is conducted by the Appellate Division and the voluntary bar associations are spared the expense of funding a permanent staff to initiate disbarment proceedings.[37]

Unlawful Practice

New York prohibits the practice of law by corporations and by persons who are not admitted to the bar; but until the early twentieth century, there was no systematic or comprehensive enforcement of rules against unlawful practice. By the beginning of World War I, unlawful practice schemes preyed upon New York's immigrant community, whose expectations of professional European-style notaries vastly overestimated the ability and integrity of so-called notaries and others who took advantage of the unsophisticated residents of New York's ethnic neighborhoods.[38] The situation was so bad that more than 500 people in Manhattan advertised themselves as lawyers or attorneys even though they were not admitted to practice. That number

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Bar from its central role in Manhattan's disciplinary regime. The nature of that pressure and its consequences are described in MICHAEL J. POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE 144–150 (New York: Russell Sage Foundation, 1988).

37 In the First Department, there is one departmental disciplinary committee. 22 N.Y.C.R.R. Parts 203 and 205. The Second Department has three similar groups called "grievance committees." 22 N.Y.C.R.R. Part 691. The Third Department has a single Committee on Professional Standards which serves as its disciplinary committee. 22 N.Y.C.R.R. Part 806. The Fourth Department has an attorney grievance committee for each judicial district in that department. 22 N.Y.C.R.R. Sec. 1022.19(a). As the New York courts began to exercise tighter control over the discipline process, the ABA was also exposing more pervasive discipline issues in other states. In 1967, the ABA created the Special Committee on Evaluation of Disciplinary Enforcement in response to complaints about defects in many states' disciplinary processes. That committee reported that lawyer discipline was "a scandalous situation that requires the immediate attention of the profession." For example, "lawyers disbarred in one jurisdiction were able to practice in another; lawyers convicted of serious crimes including bribery of government officials—were routinely allowed to continue to practice law." Peter Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct,* 15 GEORGETOWN J. LEGAL ETHICS 313 at note 67 (2001–02).

38 *Charge Immigrant Fraud*, N.Y. TIMES, October 21, 1915. Until the 1960s, "unlawful practice" in New York included a wide range of activities that seem ordinary in the 21st century. For example, books and articles that offered any sort of specific legal advice could run afoul of the prohibition. For example, a book explaining how to avoid probate in New York could subject an author to the risk of a contempt charge. *In re NYCLA (Dacey)*, 21 N.Y. 2d 694 (1969).

amounted to approximately five percent of the entire legitimate (admitted) members of the bar.[39]

In 1913, NYCLA established the first bar association committee to investigate and prosecute violations of the unlawful practice statutes. The press hailed the committee's creation as an "epoch in the history of the practice of law" because its initial efforts followed the lead of the medical profession in rooting out quacks and prescribing druggists.[40] The foremost proponent of that committee's creation was Julius Henry Cohen, who was later instrumental in creating the Port Authority of New York and New Jersey. Cohen's opposition to unlawful law practice was not merely the reflexive reaction of a lawyer who resented laymen who trespassed on his turf. Rather, he eloquently described the fiduciary responsibilities of lawyers and how professional fealty to their clients distinguished them from mere tradesmen whose loyalty was rendered too flexible by commercial pressures.[41] For more than thirty years, Cohen and Edwin Otterbourg, his protégé, advocated for vigorous enforcement of unlawful practice laws and creation of unlawful practice committes to enforce those laws.[42] In New York State, those two lawyers led bar watchdog committees that not only guarded but also expanded the boundaries of the profession's exclusive domain to render legal

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39 *E.g., Lawyers Put Stop to Legal Abuses … Action Taken Against Sixty-one Notaries and Laymen for Posing as Attorneys,* N.Y. TIMES, May 11, 1919.

40 *Lawyers Prepare to Limit Practice*, N.Y. TIMES, May 9, 1913.

41 JULIUS HENRY COHEN, THE LAW: BUSINESS OR PROFESSION? (New York: Banks Pub. Co, 1916).

42 Cohen and Otterbourg shunned formulating any precise definition of "the practice of law." They eschewed any statutory definition because "any attempt to define by statute what constitutes the practice of the law is not only impracticable but will defeat the very purpose of … the Penal Law as [it has] been interpreted by the Courts and that it is in the interests of the community and of the bar that the definition of the practice of the law be obtained by judicial decision rather than by legislative enactment" Over the years, this "know it when I see it" attitude has spawned considerable controversy as issues of multi-disciplinary and multi-jurisdictional practice have complicated analysis of the extent to which lawyers should have a monopoly on the practice of law (however it may be defined). Soha F. Turner, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach To Defining the Practice of Law*, WASHINGTON AND LEE LAW REVIEW (2004). Approximately half the states have some sort of official definition of the "practice of law," and cynics decry them as anti-competitive. Currently, much of the topic's debate concerns (1) the actual need for certified special training in light of readily available information through such modern means of communications as the Internet and (2) the inefficient asymmetry of information possessed by lawyers and by the general public, whom critics argue are deliberately kept uninformed by the bar's restrictive rules. According to critics, the restrictive rules artificially inflate the cost of legal advice. COHEN'S THE LAW: BUSINESS OR PROFESSION? placed a particularly high value on lawyers' ethical responsibilities to clients. Modern bar critics have been reluctant to articulate any economic market value to the legal profession's duties of integrity, loyalty, and confidentiality. That recent reluctance has been accompanied by the bar's similar reluctance to insist that non-lawyer providers of legal information bear the same duties of loyalty that lawyers shoulder in rendering legal advice and thereby subjecting themselves to the sanctions of malpractice and disbarment when they cut corners or exploit clients in ways that might be otherwise acceptable in the laissez-faire world of modern commerce.

advice and represent the public. Cohen and Otterbourg taught the bar and the public that there was a direct relationship between a lawyer's ethical conduct and the condemnation of unlawful practice: as long as lawyers behaved ethically, it was appropriate to prosecute laypersons who practiced law unlawfully. Special statutes and court rules allowed bar associations to initiate unlawful practice proceedings.[43]

Understandably, New York's organized bar groups (i.e., voluntary bar associations) were usually united in opposition to those who engaged in unlawful practice. For example in 1949, the New York State Bar Association (represented by Cohen) and the County Lawyers (represented by Otterbourg) appeared in the Court of Appeals to prosecute *In re Bercu*, the leading case that marks the boundary of permissible activities of tax lawyers and tax accountants.[44]

The bar's solaridity was absent when foreign lawyers began giving advice on foreign divorces. In the 1950s, a Mexican divorce case reached the Court of Appeals and pitted City Bar against both NYCLA and the Brooklyn Bar as they tried to prevent foreign lawyers from setting up divorce shops in New York. In 1957, the Court of Appeals's split opinion in *In re NYCLA* (*Roel*) held that Mexican lawyers could not dispense divorce advice in New York unless they were members of the New York bar.[45]

Unlawful practice cases can assume a variety of poses that go far beyond merely pretending to be a lawyer, drafting legal documents, or offering legal advice. Until modern First Amendment doctrines came into vogue during the last quarter of the

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43 Most bar association prosecutions were premised on Penal Law section 270. Three general routes were available to enforce the statute. One was by criminal prosecution, another was by action for an injunction under article 75-A of the Civil Practice Act, and the third was by summary proceeding under Judiciary Law sections 90(2) and 750(7) (enacted together by L. 1937, ch. 311). Those statutes gave the Supreme Court jurisdiction over all persons assuming to practice law and the power to punish unlawful practice as criminal contempt. They authorized any incorporated bar association to institute a proceeding to stop unauthorized practice. In re NYCLA (Cool), 268 App. Div. 901 (1st Dep't 1944), *aff'd*. 294 N.Y. 853 (1945), held that the contempt proceeding may be employed to punish unlawful practice even though it occurred outside of court.

44 273 A.D. 524 (1st Dept. 1948), *aff'd without op.* 299 N.Y. 728 (1949). Deborah S. Gardner & Christine G. McKay, *Of Practical Benefit: New York State Bar Association, 1876–2001* at 66 (2003).

45 3 N.Y.2d 224 (1957). Judge Froessel's majority opinion contains a lengthy description of the variety of "foreign law" situations that trigger application of Penal Law 270's prohibitions against unlawful practice. Judge Van Voorhis's dissent criticized the ruling as *too protective* of New York attorneys, who would profit from splitting fees with the foreign lawyer. As he expressed it, "All that would be accomplished by that [requiring retention of a New York lawyer as a conduit for the foreign lawyer's advice] would be to obtain remuneration for a New York lawyer for the rendition of no service which he is qualified to perform, which would tend to justify the charge that the motive of such restrictions is 'feather bedding.'" Enforcement cases against foreign lawyers like Roel are now infrequent because New York has adopted statutes and rules that permit foreign lawyers to become licensed in New York where they can opine on foreign law within the constraint of rules that assure that clients are apprised of the legal consequences in New York by somebody competent and licensed to render that advice. That problem was one of the reasons that Roel lost—he could not legally opine whether some particular Mexican divorce decree would have any validity in New York State. Only a New York lawyer could answer that question.

Twentieth Century, New York's bench and bar did not hesitate to stop publications and practices that demeaned the legal system or its prime constituents—lawyers and judges. For example, during the 1930's, radio shows and movies frequently portrayed lawyers and judges in an unfavorabe light. In 1936, the radio program "Good Will Court" presented tales of woe that served as springboards for lawyers and judges to offer spontaneous legal advice to listeners who switched their attentions between pitches for the sponsor's roasted coffee and the contrived scenarios presented by actors who portrayed victims of the Depression.[46] Bar committees asked the courts to condemn the program as a violation of ABA Canon 40 and New York Judiciary Law Section 88.[47] Currently, voluntary bar associations are reluctant to prosecute unlawful practice cases in New York because courts allow the media to offer works of "general interest" regarding "legal subjects."[48] In addition, the U.S. government poses an ever-present threat to prosecute local bar associations that try to exclude trust companies and other commercial enterprises from practicing law, despite the palpable conflicts of interest posed by institutional fiduciaries (trustees and executors) that pretend to exercise professional independence on behalf of individuals who seek legal advice about the intimate considerations necessary to prepare a will or other estate planning instrument.[49]

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46 Programs like the "Good Will Court" potentially ran afoul of not only the prohibitions against unlawful practice but also the prohibitions against attorney advertising. In the 1920s, the ABA canons prevented lawyers from writing magazine or newspaper articles that offered any sort of tailored legal advice. *See* Opinion # 203 of the NYCLA Ethics Committee reprinted at *Year Book, New York County Lawyers' Association* (1922) at 123. In addition ABA Formal Opinion 121 (Dec.14, 1934) and Formal Opinion 179 (dated May 8, 1938) prevented even a local bar association from producing a radio program that offered legal advice and referred to any lawyer by name.

47 A more detailed description of the "Good Will Court" appears in Chapter 4 of Robertson, *Brethren and Sisters of the Bar* (New York: Fordham U. Press, 2008), and *Court Adjourned*, TIME MAGAZINE, Jan. 4, 1937. Chicago Bar Association's Public Relations Committee Chairman Mitchell Dawson said he "thought that the program exploited 'human misery for commercial purposes … encroaches on the practice of law [and] undermines confidence in the courts whose judges lend themselves to the scheme.'"

48 In re NYCLA (Dacey), 21 N.Y.2d 694 (1969). For example, attorney Robert Rowe was acquitted by reason of insanity after killing his wife and three children with a baseball bat. He was suspended from practicing law because of his mental condition. After his release from Creedmoor and completing out-patient psychiatric care, he unsuccessfully applied for reinstatement to practice. He then authored an article entitled *The Right to Refuse Treatment: Therapeutic Orgy or Rotting With Your Rights On?* in the JOURNAL OF URBAN PSYCHIATRY which identified him as "Robert T. Rowe, J.D." The Second Department found his writing violated the suspension order, but the Court of Appeals disagreed and applied *Dacey* to uphold Rowe's First Amendment rights. *In Re Rowe*, 80 N.Y.2d 336 (1992).

49 United States v. New York County Lawyers' Association, 1981 Trade Cases ¶ 64,371 (S.D.N.Y. Oct. 14, 1981) (consent decree).

Ethics Committees in New York State

The voluntary bar associations in New York developed ethics committees during the twentieth century that had roles that were distinct from those associations' grievance committees. The first ethics committee of that nature was among the original committees of the New York County Lawyers' Association when it was incorporated in 1908. Its initial tasks included evaluating the ABA's canons promulgated in that same year. Three years later, NYCLA undertook to answer practitioners' inquiries about ethical conduct through "opinions" that represented a high but practical standard of professional morality.[50] Those opinions were crafted by members of the committee under specially "sanitized and objective" conditions. First, the opinions were answers to real questions posed by real lawyers in contrast to hypothetical questions posed by the committee members to amuse themselves. The identity of the inquiring lawyer was kept confidential so that none of the committee members knew who was asking the question. Some questions were privately answered, and some questions that struck the committee as significant were the subject of public pronouncement. The public pronouncements did not contain any information that might reveal the name of the inquiring lawyer.

The committee began issuing these opinions in 1912, and they achieved instant recognition as a brilliant idea that spread across the county.[51] Charles A. Boston (the committee's chair) spoke and wrote prolifically on ethics topics for the next twenty years and eventually became president of the ABA. Other bar associations across the country adopted the practice of issuing ethics opinions, and they became commonplace within a few decades.

A variety of myths and misconceptions surround the early ethics opinion process despite the committee's taking great pains to dispel any misconceptions.[52] First, the

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50 Within less than five years, these ethics opinions had become part of the curriculum of many law schools ethics classes. *See, e.g.,* GEORGE P. COSTIGAN, JR., CASES AND OTHER AUTHORITIES ON LEGAL ETHICS 592–95 (St. Paul: West Publishing Company, 1917), citing more than fifty of the committee's opinions issued during its first five years of operation. Indeed, West's printed version of the ABA's canons (then styled the "Code of Ethics") contained the first 88 opinions issued by NYCLA's Ethics Committee. CODE OF ETHICS OF THE AMERICAN BAR ASSOCIATION TOGETHER WITH QUESTIONS AND ANSWERS ON LEGAL ETHICS FROM THE NEW YORK COUNTY BAR ASSOCIATION, (St. Paul: West Publishing Co. 1915). Forty years later, the opinions of the City Bar committee and the NYCLA committee were jointly published. WM. NELSON CROMWELL FOUNDATION, OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASSOCIATION (New York: Columbia U. Press 1956).

51 In 1922, the ABA created its Committee on Ethics and Grievances with the power to issue advisory ethics opinions. Joy, "Making Ethics Opinions Meaningful," 15 GEORGETOWN J. LEGAL ETHICS, 313 (2001–2). The City Bar issued its first ethics opinion in late 1923 and created its own ethics committee in 1925. Martin, *Causes and Conflicts*, at 371. *See generally*, *Committees on Legal Ethics*, 24 CALIF. L. R. 28 (1936–1936).

52 A more detailed description of origins of the opinion creation process appears in Chapter 7 of Robertson, *Brethren and Sisters of the Bar* (New York: Fordham U. Press, 2008). A recent

committee made clear that its pronouncements should never become the basis to impose discipline on any lawyer. Rather, its opinions were designed to teach lawyers how to think about the process of making ethical decisions, which the committee thought was more important than any particular answer in a given case. Second, the origin of the ethics opinion practice was a "secret ethics club" inspired by Felix Adler, founder of the Ethical Culture Society. Most of the NYCLA committee members were also members of Adler's secret club.[53] Third, the committee's process for forming an opinion started with the profession's "core values" and "general principles" and then proceeded through a process of ethical reasoning to reach a conclusion. The process did not start with some codified rule or other textual material that was parsed to derive an answer.

The Immediate Future

Although the unlawful practice committees of most voluntary bar associations have become moribund, new Rule 5.5 continues to forbid a lawyer from assisting a layperson's unauthorized practice.[54] Advances in telecommunications technology and the Internet will render lawyers and laypersons alike "virtually present" in places far beyond the borders of any single jurisdiction that admits attorneys to practice. Undoubtedly, the rendition of legal advice will be outsourced to lawyers beyond the boundaries of New York. The Model Rules are relatively silent on how that will be regulated, and it is impossible to predict whether the profession's ethical rules will (1) proactively shape the contours of outsourcing or (2) reactively evolve as responses to particular abuses or conditions that flow from the economic realities of providing legal services in cyber space.

The last century's formulation of ethics rules was fraught with a variety of assumptions about lawyers and clients and the professional relation between them. Among those assumptions has been the notion that all clients are owed the same

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glimpse into the inner workings of ethics committees appears in Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?* 30 HOFSTRA LAW REVIEW 731 (2002). Green identifies "collective decision-making by lawyers with vastly different perspectives" as one of the qualitative values of an opinion from a bar association's ethics committee.

53 Charles A. Boston, *Address on the Proposed Code of Professional Ethics Delivered at a Meeting of the Association, October 6, 1910*, 30 (New York, 1910); Cohen, *The Law: Business or Profession?* 258–59; Boston, *Practical Activities In Legal Ethics, An Address Before the Law Association of Philadelphia*, Nov. 14, 1913, at 8. Cohen, *The Builded Better Than They Knew,* 37 (1946). *See* Samuel L. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Professional Dichotomy,* 47 THE AMERICAN JOURNAL OF LEGAL HISTORY 5, n. 15 (2005). The members of the secret club were Boston, J. H. Cohen, Everett V. Abbott, Albert Sprague Bard, Stewart Chaplin, Joseph E. Corrigan, Abraham L. Gutman, Henry W. Jessup, Laurence Arnold Tanzer, Edmond E. Wise, Everett P. Wheeler, William A. Purrington, George Battle, Edward J. McGuire, Dudley Field Malone, Hampden Dougherty, John Dos Passos, Archibald Watson, and William J. Curtis.

54 The phrasing of Rule 5.5 is virtually the same as that used in former DR 3-101 at 22 N.Y.C.R.R. 1200.16.

duties.[55] The new Rules contain some points of departure from that assumption, and the future will show whether those openings develop into new types of professional relationships or whether the profession will continue with a "one size fits all" set of ethical precepts.[56] Although the Model Rules do not present these special cases as particularly atypical, some recent developments could portend profound changes. For example, the economic downturn in 2000 and 2001 exposed glaring abuses in the governance of many public companies. Those abuses inspired both the ABA and the United States Securities and Exchange Commission to propose rules that would impose a whistle blower/gate keeper role upon lawyers who render services to such clients.[57] Neither the ABA nor the SEC enacted the most stringent version of those proposals, but that experience made it more likely that stronger rules could result from the investigations that follow the most recent economic dislocations in the nation's credit markets.

Developments over the last hundred years offer us a modern irony as the New York Bar moves forward under the ethical aegis of its new Model Rules. More than a century ago, New York's organized bar deplored the gatekeepers of that era: law schools that minted (and admitted) new attorneys who lacked what bar leaders of that era deemed an appropriate grounding in professional ethics. What a change a century makes! Today, all the newly admitted attorneys in New York have been both taught and tested about the Model Rules. These tyros will know more about the organization and phrasings of the bar's Rules of Conduct than their employers, who will have had at most the brief exposure offered by an MCLE course.

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55 Steven C. Krane, *The Fallacy of the Monolithic Client-Lawyer Relationship: Leaving 1908 and Procrustean Regulation Behind*, 2008 J. OF PROF. LAWYER, 43.

56 Rule 1.2 permits consensual limits on the scope of a lawyer's representation of a client under circumstances "where necessary notice is provided to the tribunal and/or opposing counsel." Rule 1.14 addresses problems that may arise during the representation of a client that has "diminished capacity." Rule 1.13 governs relations with clients that are organizations.

57 Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys 17 CFR Part 205, [SEC Release Nos. 33 8150; 34-46868; IC-25829; File No. S7-45-02] RIN 3235-AI72, "Implementation of Standards of Professional Conduct for Attorneys." Note 69 of that release stated that "Thirty-seven states permit an attorney to reveal confidential client information in order to prevent the client from committing criminal fraud." *See* Restatement (Third) of the Law Governing Lawyers (2000) §67, Comment f, and Thomas D. Morgan & Ronald D. Rotunda, Model Code of Professional Responsibility, Model Rules of Professional Conduct, and Other Selected Standards, at 146 (reproducing the table prepared by the Attorneys' Liability Assurance Society (ALAS) cited in the Restatement). The ABA's Model Rule 1.6, which prohibits disclosure of confidential client information even to prevent a criminal fraud, is a minority rule." New York did not follow the ABA's Model Rule; rather, Rule 1.6(b)(2) allows a New York lawyer to disclose confidential information "to prevent the client from committing a crime." The lawyer's power to make that disclosure is discretionary.

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Rule 1.0: Terminology

I. TEXT OF RULE 1.0[1]

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

(b) "Belief" or "believes" denotes that the person involved actually believes the fact in question to be true. A person's belief may be inferred from circumstances.

(c) "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

(d) "Confidential information" is defined in Rule 1.6.

(e) "Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(f) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

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1 Rule Editors Andral Bratton, Appellate Division, First Judicial Department. The commentary expresses the personal views of Mr. Bratton and does not in any way reflect the official position of the Appellate Division. Mr. Bratton gratefully acknowledges the assistance of Daniel Rosenblum and Ryan Gainor in the research and preparation of this chapter.

(g) "Domestic relations matter" denotes representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support or alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.

(h) "Firm" or "law firm" includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

(i) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

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

(k) "Knowingly," "known," "know," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(l) "Matter" includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

(m) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional legal corporation or a member of an association authorized to practice law.

(n) "Person" includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity.

(o) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(p) "Qualified legal assistance organization" means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof.

(q) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.

(r) "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(s) "Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(t) "Screened" or "screening" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.

(u) "Sexual relations" denotes sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse.

(v) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

(w) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording and email. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

II. NYSBA COMMENTARY

Confirmed in Writing

[1] Some Rules require that a person's oral consent be "confirmed in writing." *E.g.*, Rules 1.5(g)(2) (client's consent to division of fees with lawyer in another firm must be confirmed in writing), 1.7(b)(4) (client's informed consent to conflict of interest must be confirmed in writing), and 1.9(a) (former client's informed consent to conflict of interest must be confirmed in writing). The definition of "confirmed in writing" provides three distinct methods of confirming a person's consent: (i) a writing from the person to the lawyer, (ii) a writing from the lawyer to the person, or (iii) consent by the person on the record in any proceeding before a tribunal. The confirming writing need not recite the information that the lawyer communicated to the person in order to obtain the person's consent. For the definition of "informed consent" See Rule 1.0(j). If it is not feasible for the lawyer to obtain or transmit a written confirmation at the

time the client gives oral consent, then the lawyer must obtain or transmit the confirming writing within a reasonable time thereafter. If a lawyer has obtained a client's informed oral consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (h) will depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. For example, a group of lawyers could be regarded as a firm for purposes of determining whether a conflict of interest exists but not for application of the advertising rules.

[3] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates. Whether lawyers in a government agency or department constitute a firm may depend upon the issue involved or be governed by other law.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" and "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform, so long as the necessary scienter is present and the conduct in question could be reasonably expected to induce detrimental reliance.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. *E.g.*, Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent. Other considerations may apply in representing impaired clients. *See* Rule 1.14.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. *E.g.*, Rules 1.7(b) and 1.9(a). For definitions of "writing" and "confirmed in writing" see paragraphs (x) and (e), respectively. Other Rules require that a client's consent be obtained in a writing signed by the client. *E.g.*, Rules 1.8(a) and (g). For the meaning of "signed," see paragraph (x).

Screened or Screening

[8] The definition of "screened" or "screening" applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rule 1.11, 1.12 or 1.18. See those Rules for the particular requirements of establishing effective screening.

[9] The purpose of screening is to ensure that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should promptly be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. In any event, procedures should be adequate to protect confidential information.

[10] In order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening.

III. CROSS-REFERENCES

III.1 Former New York State Code of Professional Responsibility

The new Rule contains many of the definitions found in the former Code. *See* 22 CPLR § 1200.1. *See also* former DR 4-101(A) (Confidence); former DR 5-11(A) (Sexual Relations).

III.2 ABA Model Rules

Rule 1.0, Terminology

IV. PRACTICE POINTERS

1. Attorneys are encouraged to consult the definitions contained in Rule 1.0 when reading and applying the provisions contained in the New York Rules of Professional Conduct.
2. Note, a term is included in Rule 1.0 when it is used in more than one Rule. When terms that require an explanation are only included in one Rule, the term is defined in the body of that Rule.
3. The definition of the term "Belief" in Rule 1.0(b) indicates that a person's belief "may be inferred from circumstances," particularly with regard to the lawyer's own conduct. The intent of this provision is to prevent attorneys from claiming ignorance when the surrounding circumstances indicate otherwise.
4. The definition of "Confirmed in writing" appearing in Rule 1.0(e) emphasizes the increased importance of attorneys obtaining a person's "written consent" before taking specific actions, as discussed in the Rules.
5. "Differing Interests," as defined by Rule 1.0(f), is more expansive than "conflicting interests" because it also included inconsistent, diverse or other interests.

6. The facts and circumstances surrounding the relationship among attorneys, as well as any written agreements, can help determine whether a "Firm" exists within the meaning of Rule 1.0(h).
7. For fraud to exist under the definition in Rule 1.0(i), a person does not have to have suffered damages or relied on the misrepresentation or failure to inform, as long as the necessary knowledge is present and the conduct could reasonably be expected to induce detrimental reliance.
8. The type of consent necessary to satisfy the definition of "Informed consent" in Rule 1.0(j) depends upon the context of the Rule where the term is found. The attorney must still make sure that the client or other person giving consent understands the facts and circumstances so that a truly informed decision can be made.
9. As with the term "Belief," a person's "Knowledge" under Rule 1.0(k) may be inferred from the circumstances. A thin line sometimes exists between an attorney's "belief" and the attorney's "actual knowledge" that a fraud has been committed. Attorneys are discouraged from looking the other way or ignoring the surrounding circumstances that could lead a reasonable person to conclude that fraudulent or improper conduct has occurred.

V. ANALYSIS

V.1 Purpose of Rule 1.0

For the most part, Rule 1.0 is based on the definitional section employed by the old Code and found in 22 NYCPLR § 1200.1. That section contained 10 definitions in 2002 and was expanded to 12 definitions in 2007 by the addition of "Advertisement" and "Computer-accessed information." New Rule 1.0 currently contains 24 definitions, including all of the terms previously defined. This Rule is a substantial expansion of the terms defined under the old Code, which did not define the terms "belief," "confirmed in writing," "informed consent," "knowingly," "matter," "partner," "reasonable," "screened," "sexual relations," or "writing." The adoption of the new definitions has been influenced during the last decade to a large degree by both the ABA "Ethics 2000" Commission and the New York State Bar Association's Committee on Standards of Attorney Conduct (COSAC).

Prior to the 2000 revision of the ABA Model Rules of Professional Conduct, the Terminology section was not a Model Rule, but rather part of an introductory section. The ABA "Ethics 2000" Commission recommended moving the definitions into Rule 1.0 to emphasize the importance of the terms and to facilitate the addition of commentary concerning the individual definitions where warranted.[2] Several of the changes recommended by the Ethics 2000 Commission carry through to the new New York Rules. The former ABA term "consent after consultation" was modified to "informed consent" and "confirmed in writing." The ABA definition of "firm" was expanded to

2 ABA Ethics 2000 Commission Model Rule 1.0 Reporter's Explanation of Changes.

include government legal departments and the legal departments of other associations authorized to practice law.

The Ethics 2000 Commission clarified the meaning of the term "fraud," which is also employed in the New York Rules of Professional Conduct. Prior to the 2002 revision of the ABA Model Rules the definition of "Fraud" was ambiguous. It was not clear whether fraudulent conduct meant conduct involving an intent to deceive or such conduct which violated substantive or procedural law. Today, the ABA Model Rules clearly indicate that "fraud" relates to conduct which violates substantive or procedural law in the relevant jurisdiction. New Rule 1.0(i) adopts the ABA definition in the first sentence and then goes on to include the former definition found in 22 NYCPLR § 1200.1.

The Ethics 2000 Commission also recommended that the term "Screened" include the requirement of an effective isolation policy in the definition itself. Prior to 2002, the term "Tribunal" was not included in the definitional section. The terms "Writing" or "Written" were added to the definitional sections upon the recommendation of the Ethics 2000 Commission, The definition of "Writing" was modeled on the Uniform Electronic Transactions Act to include both tangible and electronic records. The New York definition of "Writing" is identical to the ABA version, except New York uses the word "photocopying" while the ABA Model Rules uses the term "photostating."[3]

Meanwhile, the New York State Bar Association COSAC Proposed Rules of Professional Conduct, as approved by the House of Delegates at its November 3, 2007 meeting, contained 21 defined terms, including all 14 of the definitions in the ABA Model Rules. Seven of the approved definitions were derived strictly from New York sources, including: "domestic partner" (from a New York City ordinance definition[4]); "person;" "professional legal corporation;" "reasonable lawyer;" "sexual relations;" and "state." Twelve of the definitions had no equivalent in 22 NYCPLR § 1200.1 in 2007 including: "belief;" "domestic partner;" "informed consent;" "knows;" "partner;" "reasonable;" "reasonable belief;" "reasonable lawyer;" "reasonably should know;" "screened;" and "writing."[5]

Between the November 2007 COSAC Proposed Rules and the February 2008 COSAC Final Report to the Appellate Division, one more term was added, "Qualified legal assistance organization," and no terms were removed. Twenty-two terms appear in the Final Report delivered to the Courts in February 2008.[6]

The Reporter's Notes to the 2008 COSAC Final Report indicate that terms were included in Rule 1.0 only if they appear in more than one Rule. If a term only appears in one Rule, it is defined in the Rule in which it appears. Terms were added to Rule 1.0 to "increase the clarity, precision, and consistency of the Rules."[7]

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3 ABA Ethics 2000 Commission Model Rule 1.0 Reporter's Explanation of Changes.

4 Proposed Rules of Professional Conduct and COSAC Commentary, NYSBA Committee on Standards of Attorney Conduct, approved by the House of Delegates, Nov. 3, 2007.

5 *Id*.

6 Proposed Rules of Professional Conduct, NYSBA, Albany, N.Y., February 1, 2008.

7 Id.

Rule 1.0 as adopted in December 2008 by the Appellate Division of the Supreme Court, effective April 1, 2009, contains 24 terms. Two terms were eliminated from the 2008 COSAC Final Report: "Substantial" and "Domestic partner." Four terms were added: "Advertisement;" "Computer-accessed communication;" "Confidential information;" "Differing interests;" and "Matter."

V.2 Index of Selected Terms

Editor's Note: The following review of the use of selected terms throughout the body of the New York Rules of Professional Conduct is a useful tool for practitioners. It is also advisable to consult the NYSBA Comments to Rule 1.0, *supra*., for additional guidance.

Rule 1.0 (b), "Belief" or "believes" is used in twelve of the new Rules. "Belief" is found in the Rules in the context of Lawyer-Client Relationship, Counselor, Advocate, and Law Firms and Associations. *See*: Rule 1.6(b)&(b)(3); Rule 1.7(b)(1); Rule 1.14(b); Rule 1.16(c)(2)&(c)(12); Rule 1.17(b)(6); Rule 2.3(a); Rule 3.3(a)(3); Rule 3.4(d)(1)&(d)(4); Rule 3.6(c)(6)&(d); Rule 3.7(a)(4); and Rule 5.7(a)(2)-(a)(4). Practitioners should take note of the fact that a person's belief "may be inferred from the circumstances," particularly with regard to the practitioner's own conduct. Similarly, "actual knowledge" may be inferred from the surrounding circumstances. *See* Rule 1.0(k). A thin line may exist between an attorney's "belief" and his or her "actual knowledge" that a client or someone employed by the attorney is perpetrating a fraud or is otherwise engaged in conduct which a trier of fact will naturally assume that the attorney was fully aware. The intent behind this definition is to discourage attorneys from "sticking their head in the sand" in the face of obvious misconduct.

Rule 1.0 (e) "Confirmed in writing" can be found in six of the Rules, all in the context of the Client-Lawyer Relationship, and emphasizes the increased importance of written confirmations under the new Rules. *See:* Rule 1.5(g)(2); Rule 1.7(b)(4); Rule 1.9(a)&(b); Rule 1.11(a)(2); Rule 1.12(b) and Rule 1.18(d)(1).

Rule 1.0 (f) "Differing interests" is found twice, in Rule 1.7(a)(1), Conflict of Interest: Current Clients and Rule 1.8(a) Current Clients: Specific Conflict of Interest Rules. It is important for practitioners to understand that "differing interests" is more expansive than "conflicting interests," because it also includes inconsistent, diverse, or other interests.

Rule 1.0 (h) "Firm" or "law firm" appears frequently in the Rules in the context of the Client-Lawyer Relationship, Advocate, Transaction with Persons Other Than Clients, Law Firms and Associations, Public Service, Information About Legal Services and Maintaining the Integrity of the Profession. The facts and circumstances surrounding the relationship, as well as any written agreements, can help determine whether a "firm" exists.

Rule 1.0 (i) "Fraud" or "Fraudulent" is found in six of the New York Rules, in the context of Client-Lawyer Relationship, Counselor and Maintaining the Integrity of the Profession. *See* Rule 1.2(d); Rule 1.5(d); Rule 1.6(b)(3); Rule 1.16(c)(2)&(c)(3); Rule 3.3(b); and Rule 8.4(c). For fraud to exist under the Rules, a person does not have

to have suffered damages or relied on the misrepresentation or failure to inform, as long as the necessary knowledge is present and the conduct could reasonably be expected to induce detrimental reliance.[8]

Rule 1.0 (j) "Informed consent" is used in 17 of the New York Rules, mostly in the context of Counselor, Transactions with Persons Other Than Clients, Law Firms and Associations, Public Service, and Information About Legal Services. The type of consent required varies according to the Rule where the term is found, but the attorney should make sure that the client or other person giving consent understands the facts and circumstances so that an informed decision can be made.

Rule 1.0 (k) "Knowingly," "known," or "knows" appears 99 times in the Rules. Practitioners should bear in mind that "[a] person's knowledge may be inferred from circumstances," for the same reasons as a person's "belief" can be deduced from the surrounding circumstances. *See* discussion of Rule 1.0(b), *supra*.

Rule 1.0 (w) "Tribunal" is defined in the Rules as a "court," "arbitrator," "legislative body," "administrative agency," or "other body acting in an administrative capacity." Thus the Rules are applying the term broadly to refer to a body that renders a legal judgment by a neutral official after the presentation of evidence and that judgment directly affects a party's interests in a particular matter.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Rule 1.0(a): Advertisement

N.Y.S. Bar Op. 841 (2010) (an e-mail sent by a lawyer to other lawyers advising them that he is handling personal injury cases involving certain pharmaceutical products and asking the lawyers to refer cases to him, is neither an advertisement under Rule 1.0(a) nor a solicitation under rule 7.3(b). Such a communication is not subject to the filing requirement of Rule 7.3. The e-mail must still comply with Rule 8.4's requirement concerning honesty, fraud and deceit and Rule 7.4 regarding statements that a lawyer or firm is a "specialist" or "specializes." If fee sharing with the referring attorney is also contemplated, the provisions of Rule 1.5(g) have to be complied with as well.).

N.Y.S. Bar Op. 709 (1998) (internet advertising is permissible as long as rules relating to advertising are followed).

N.Y.S. Bar Op. 625 (1992) (message recoded on 900 telephone number constitutes an advertisement, and is permissible).

VI.2 Rule 1.0(c): Computer-accessed Communication

N.Y.S. Bar Op. 810 (2007) (not appropriate for current government employee to use computer-accessed communication, telephone calls or face-to-face discussions to solicit business).

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8 *See* NYSBA Comments to Rule 1.0, [5].

VI.3 Rule 1.0(d): Confidential Information

See Annotations of Ethics Opinions associated with Rule 1.6, *infra.*

VI.4 Rule 1.0(e): Confirmed in Writing

N.Y.S. Bar Op. 829 (2009) (provisions of the new Rules regarding "informed consent" and "confirmed in writing" are broadly similar to the provisions of the old Code. The only real difference is that the Rules now require that a client's consent to a conflict of interest must be "confirmed in writing." In opining on whether a lawyer who obtained a consent to a conflict prior to the effective date of the new Rules must now obtain a new consent to the conflict, the Bar stated that "there is no basis for concluding that consents given prior to the adoption of the new Rules are impaired or invalid as a consequence of the changes in the Rules." In this case the consent was contained in a retainer agreement, which is a writing and would satisfy even the new requirement. The same conclusion would apply to oral consents that were validly given prior to the effective date of the new Rule. Only consents that are given after the effective date of the new Rules, April 1, 2009, must be "confirmed in writing." It was also noted that the new Rules do not require that the client actually sign a formal agreement containing consent. Any type of writing, including an e-mail from the lawyer to the client confirming an oral consent would suffice.).

N.Y.S. Bar Op. 816 (2007) (retainer agreements should be confirmed in writing).

N.Y.C. Bar Op. 2006-1 (2006) (while a conflict waiver need not be written, it is generally best to have it confirmed in writing to avoid future conflicts).

NYCLA Bar Op. 732 (2004) (law firm may require confirmation in writing that a position represented to a government agency is no longer being relied upon before releasing retainer funds to a client).

VI.5 Rule 1.0(f): Differing interests

N.Y.C. Bar Op. 2001-2 (2001) (to determine whether a lawyer is capable of representing two parties with differing interests, the proper inquiry is whether a disinterested lawyer would believe one lawyer could adequately represent both parties).

N.Y.S. Bar Op. 639 (1992) (due to differing interests, a lawyer may not represent two plaintiffs against the same defendant where there will likely be insufficient funds for the complete satisfaction of both plaintiffs).

N.Y.S. Bar Op. 517 (1980) (lawyer may not represent a wife in a divorce action and the co-respondent's husband in another divorce action. Despite both parties wanting the same ultimate result, a lawyer should not place himself in a situation where he would ever be tempted to "soft pedal" the interests of one party to avoid a conflict with the other. When representing clients with differing interests, a lawyer must weigh the possibility that his judgment may be impaired and his loyalty divided.).

VI.6 Rule 1.0(g): Domestic Relations Matter

N.Y.S. Bar Op. 747 (2001) (domestic relations matter is a broad definition. Lawyer may not enter into a contingent fee agreement to collect past due maintenance, child support or alimony.).

N.Y.S. Bar Op. 685 (1997) (client's in domestic relations matters cases must be provided with a client's statement of rights. At a consultation with an attorney, prospective clients in domestic relations matters need not be asked to sign retainer agreements.).

VI.7 Rule 1.0(i): Fraud

New York: N.Y.S. Bar Op. 817 (2007) (a real estate transaction that includes a "grossed up" sales price with a "seller's concession" to obtain a larger mortgage after parties have already agreed to a price is unethical since it is deceitful, unless there is no unlawful conflict and there is full disclosure of the transaction in the transactions documents).

N.Y.C. Bar Op. 1990-2 (1990) (where lawyer knows that client's pervious response to a document request was inaccurate, but the client has prohibited the lawyer from disclosing this information, the lawyer could be helping to perpetuate a fraud if he continued with the representation. Although the information was protected as a confidence or secret, and thus the attorney would not have an affirmative obligation to reveal it, the lawyer would have a duty to withdraw from the case.).

N.Y.C. Bar Op. 1987-2 (1987) (lawyer may not draft pleadings and render other services to lay person proceeding pro se in matrimonial matter without informing the court or opposing counsel).

N.Y.S. Bar Op. 545 (1982) (where a seller of newly constructed home requests that a buyer understate the purchase price of a new home as the "base price" instead of the price reflecting the actual value, lawyer should advise client buyer of serious potential legal consequences in such an illegal transaction. If client insists on going through with the transaction, lawyer is required to withdraw.).

ABA: ABA Formal Op. 92-366 (1992) (withdrawal when a lawyer's services will otherwise be used to perpetrate a fraud).

VI.8 Rule 1.0 (j): Informed Consent

New York: N.Y.S. Bar Op. 829 (2009) (provisions of the new Rules regarding "informed consent" and "confirmed in writing" are broadly similar to the provisions of the old Code. The only real difference is that the Rules now require that a client's consent to a conflict of interest must be "confirmed in writing." In opining on whether a lawyer who obtained a consent to a conflict prior to the effective date of the

new Rules must now obtain a new consent to the conflict, the Bar stated that "there is no basis for concluding that consents given prior to the adoption of the new Rules are impaired or invalid as a consequence of the changes in the Rules." In this case the consent was contained in a retainer agreement, which is a writing and would satisfy even the new requirement. The same conclusion would apply to oral consents that were validly given prior to the effective date of the new Rule. Only consents that are given after the effective date of the new Rules, April 1, 2009, must be "confirmed in writing." It was also noted that the new Rules do not require that the client actually sign a formal agreement containing consent. Any type of writing, including an e-mail from the lawyer to the client confirming an oral consent would suffice.).

N.Y.C. Bar Op. 2008-2 (2008) (centers around corporate legal departments and conflicts of interest between represented corporate affiliates. Questions addressed include; under what circumstances must corporate counsel consider the propriety, under former DR 5-105 and former DR 5-108, of representing or continuing to represent those affiliates; may a conflict between those affiliates be waived; and are there steps that can be taken in advance that will enhance the possibility that inside counsel may continue to represent some or all of the affiliates after a conflict arises?).

N.Y.S. Bar Op. 517 (1980) (when representing multiple parties in one action sometimes it is impossible to get informed consent from all parties due to the requirements of keeping confidences and secrets. This does not waive the requirement of informed consent.).

ABA: ABA Formal Op. 08-450 (2008) (confidentiality when lawyer represents multiple clients in the same or related matters).

ABA Formal Op. 05-436 (2005) (informed consent to future conflicts of interest; withdrawal of formal opinion 93-372).

VI.9 Rule 1.0(k): Know, Knowingly, Knowing

NYCLA Bar Op. 741 (2010) (NYCLA Bar Op. 712, concluding that a lawyer may not use admitted false testimony, while at the same time may not reveal it, is superseded by NYCLA Bar Op. 741. The later opinion was based on the prior Code of Professional Responsibility. The new Rules make it clear that a lawyer has a duty to remedy false statements when he or she comes to know after the fact that the client made them, by disclosure of confidential information, if necessary, while at the same time also seeking to minimize the disclosure of confidential information as much as possible. Actual knowledge is required to trigger the duty to report the fraud, not the mere suspicion. Actual knowledge, however, may be gleamed from the circumstances.).

N.Y.C. Bar Op. 2009-1 (2009) (centers around the question of whether a lawyer who sends a letter or an e-mail directly to a person known to be represented by counsel, can satisfy the prior consent requirement of former DR 7-104(A)(1) by simultaneously

sending a copy of the letter or email to the represented person's lawyer. Further, in the context of an email chain involving lawyers and represented persons, does the prior consent requirement of former DR 7-104(A)(1) require express consent for a "reply to all" communication or may consent be implied?).

VI.10 Rule 1.0(m): Partner

N.Y.S. Bar Op. 814 (2008) (New York office of a multi-state firm may be managed by an associate or counsel admitted in New York and overseen by a partner in another state not admitted in New York).

N.Y.C. Bar Op. 1995-5 (1995) (lawyer has obligation to inform proper disciplinary authorities when he learns partner followed pattern of neglecting client matters and misappropriating funds).

VI.11 Rule 1.0(o): Professional Legal Corporation

N.Y.C. Bar Op. 1995-7 (1995) (provisions that limit a shareholder's vicarious liability are valid for professional legal corporations).

N.Y.S. Bar Op. 465 (1977) (it is improper for a professional legal association to merge with a collection agency. Therefore, it is improper for a lawyer to be director of a corporation established to buy legal judgments at a discount when his law firm will be retained to collect judgments.).

VI.12 Rule 1.0(p): Qualified Legal Assistance Organization

N.Y.S. Bar Op. 791 (2006) (networking organization requires members to bring visitors and referrals. Such an organization would not be considered a qualified legal assistance organization.).

NYCLA Bar Op. 656 (1980) (improper for lawyer to participate in charitable program where members of the public are provided free legal services in the drafting of a will, which contains a bequest to charity running the program).

NYCLA Bar Op. 654 (1980) (charitable organization that offers free legal services regardless of whether they are members or beneficiaries of the organization does not comply with the requirements of a qualified legal assistance organization).

VI.13 Rule 1.0(r): Reasonable Belief

NYCLA Bar Op. 730 (2002) (lawyer shall notify if he receives something from opposing counsel that he reasonably should know is privileged).

N.Y.S. Bar Op. 645 (1993) (where lawyer has several clients with dealings with Town, and lawyer is appointed to Town board with reasonable belief that existing

client secrets will not be subject to town ethical disclosure requirement, lawyer would be obligated to resign to avoid disclosure of a secret).

VI.14 Rule 1.0(t): Screened or Screening

N.Y.C. Bar Op. 2006-02 (2006) (when determining whether a law firm has effectively screened an ineligible attorney, courts look to the timeliness of the implementation of the screen, the size of the firm, whether the excluded lawyer works in close proximity to those lawyers now handling the case, the affidavits from the excluded lawyer saying he has not shared confidences with lawyers working on the case, whether the personally prohibited lawyer works on related matters and whether that lawyer has secrets or confidences in his files).

V1.15 Rule 1.0(w) Tribunal

NYCLA Bar Op. 741 (2010) (taking deposition testimony is no different from calling a witness at trial. False deposition testimony may be considered to be perjury and punishable as a crime. The victim is the adverse party and the justice system as a whole, even if the deposition is not submitted to a court.).

VII. ANNOTATIONS OF CASES

VII.1 Rule 1.0 (a): Advertisement

In re Power, 3 A.D.3d 21, 768 N.Y.S.2d 455 (1st Dept. 2003) (advertising need not be intentionally misleading or deceptive to be unethical under guidelines).

In re Connelly, 18 A.D.2d 466, 240 N.Y.S.2d 126 (1st Dept. 1963) (assistance in flattering magazine article held to have the affect of advertising. Actions that tend to promote the names of attorneys and their special qualifications rises to the level of advertising.).

VII.2 Rule 1.0 (c): Computer-accessed Communication

In re Shubov, 25 A.D.3d 33, 802 N.Y.S.2d 437 (1st Dept. 2005) (disbarment appropriate for attorney who unlawfully accessed information stored on a computer and was convicted of doing so in federal court. Such action amounts to computer trespass and computer tampering.).

VII.3 Rule 1.0 (d): Confidential Information

See Annotations of cases discussed in Rule 1.6 *infra.*

VII.4 Rule 1.0 (e): Confirmed in Writing

In re Perez-Olivio, 33 A.D.3d 141, 820 N.Y.S.2d 14 (1st Dept. 2006) (lawyer did not give criminal defendant's family written confirmation of fee quote, and subsequently failed to return bail money back to family).

In re Cohen, 118 A.D.2d 15, 503 N.Y.S.2d 759 (1st Dept. 1986) (lawyer sanctioned when among other things he promised to reduce a debt payment agreement owed to a client to writing but failed to do so).

VII.5 Rule 1.0 (f): Differing Interests

In re Rogoff, 31 A.D.3d 111, 818 N.Y.S.2d 366 (4th Dept. 2006) (due to differing interests of both sides, lawyer who represented both the buyers and sellers of a motel property was censured for not informing both sides of his dual representation).

In re Bruno, 327 B.R. 104 (Bkrtcy. E.D.N.Y. 2005) (representing both estate and debtor in a bankruptcy action involves differing interests and required informed consent).

VII.6 Rule 1.0 (g): Domestic Relations Matter

In re Shapiro, 5 A.D.3d 52, 774 N.Y.S.2d 244 (4th Dept. 2004) (lawyer censured for failing to use retainer form not in compliance with domestic relations matter and failing to provide clients with billing statements at regular intervals).

VII.7 Rule 1.0 (i): Fraud or Fraudulent

In re Berg, 54 A.D.3d 66, 862 N.Y.S.2d 225 (1st Dept. 2008) (lawyer may not represent both a company and its president in bankruptcy filings, during which time he advised the company president to transfer ownership of real property to his wife for a nominal fee and not report the transfer in the bankruptcy provision. Lawyer also deemed to have acted improperly where he made false statements in a matrimonial action, falsely notarized a signature and represented both the buyer and seller in a real estate transaction.).

In re Latona, 197 A.D.2d 108, 611 N.Y.S.2d 77 (4th Dept. 1994) (lawyer who accepted a $50,000 loan from a client, and upon being unable to repay it, backdated an invoice to provide the client with a tax benefit, was guilty of misconduct).

In re Provda, 195 A.D.2d 17, 606 N.Y.S.2d 608 (1st Dept. 1994) (lawyer who falsified certificates of incorporation to provide individuals with a tax shelter was guilty of misconduct).

VII.8 Rule 1.0 (j): Informed Consent

In re Bond, 282 A.D.2d 93, 723 N.Y.S.2d 811 (4th Dept. 2001) (lawyer did not have informed consent when he failed to inform clients of potential conflict of interest due to multiple representation).

In re Pohlman, 194 A.D.2d 96, 604 N.Y.S.2d 661 (4th Dept. 1993) (lawyer provided dual representation to both sides of a real estate deal and failed to obtain informed consent from both parties to do so).

VII.9 Rule 1.0 (k): Knowingly

In re Lowell, 14 A.D.3d 41, 784 N.Y.S.2d 69 (1st Dept. 2004) (attorney who submitted to a court order but deliberately avoided telling opposing counsel to try to avoid objection was guilty of knowing misconduct).

In re Weidlich, 200 A.D.2d 123, 613 N.Y.S.2d 634 (1st Dept. 1994) (lawyer violates ethical obligations when she knowingly fails to respond to a lawful demand for information about conduct).

VII.10 Rule 1.0 (m): Partner

In re Lefkowitz, 105 A.D.2d 161, 483 N.Y.S.2d 281 (1st Dept. 1984) (lawyer who made illegal payments to a law assistant at the Supreme Court at the behest of a senior partner is liable for disciplinary action and should have reported partner to proper disciplinary authorities).

In re Regan, 94 A.D.2d 272, 464 N.Y.S.2d 169 (1st Dept. 1983) (partner who abandons practice without notice to partner, or advising partner on pending legal matters and neglecting firm matters warrants disbarment).

VII.11 Rule 1.0 (r): Reasonable Belief

In re Silberstein, 274 A.D.2d 151, 709 N.Y.S.2d 185 (1st Dept. 2000) (belief that law assistant could authorize payment of estate fee and waive statutory requirement with the court not reasonable given lawyers 57 years' of practice).

In re Satta, 66 A.D.2d 491, 413 N.Y.S.2d 693 (1st Dept. 1979) (lawyer's explanation of accusations against him were so tenuous and vague so as to defy belief).

VII.12 Rule 1.0 (s): Reasonably Should Know

In re Schildhaus, 23 A.D.2d 152, 259 N.Y.S.2d 631 (1st Dept. 1965) (lawyer who made statements that a building had a certain net income when in fact it was operating at a loss knew or had reason to know the statements were false).

VII.13 Rule 1.0 (t): Screened or screening

In re Lowell, 14 A.D.3d 41, 784 N.Y.S.2d 69 (1st Dept. 2004) (when requiring paralegal to work on case and questioning her about adversaries' litigation strategies, lawyer violated screen between the paralegal and the case at issue).

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Rule 1.1: Competence

I. TEXT OF RULE 1.1[1]

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

II. NYSBA COMMENTARY

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some

1 Rules Editor Andral Bratton, Appellate Division, First Judicial Department. The commentary expresses the personal views of Mr. Bratton and does not in any way reflect the official position of the Appellate Division. Mr. Bratton gratefully acknowledges the assistance of Daniel Rosenblum and Ryan Gainor in the research and preparation of this chapter.

circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kinds of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] [Reserved.]

[4] A lawyer may accept representation where the requisite level of competence can be achieved by adequate preparation before handling the legal matter. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client may limit the scope of the representation if the agreement complies with Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject. *See* 22 N.Y.C.R.R. Part 1500.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility:

DR 6-101, competence and neglect and DR 7-101(A), seeking the client's objectives
Ethical Considerations 6-1, 6-3, 6-4, 1-1, 2-22, 4-2, 7-8
N.Y. Judiciary Law § 90(2) (2006)

III.2 ABA Model Rules

ABA Model Rules of Professional Conduct, Rules 1.1 and 1.3

IV. PRACTICE POINTERS

1. The language in new Rule 1.1(c), requiring that lawyers not *intentionally* fail to seek a client's objectives or *intentionally* prejudice or damage the client during the course of a representation should be compared with new Rule 1.3(b) which states that a lawyer should not neglect a legal matter.
2. Determining what is "competent" legal representation in a matter requires an inquiry into the facts and circumstances involved, including: the complexity of the legal matter entrusted to the lawyer; the lawyer's familiarity with the area of the law; the speed with which the matter has to be concluded; and the financial resources that the client is willing to invest in the representation.
3. A lawyer does not necessarily have to have specialized training or prior experience to handle a matter if her or she can acquire the necessary competence through research, study and preparing for the case. Dedicating oneself to acquiring the requisite skill or knowledge will also satisfy the requirements of Rule 1.1.
4. If a lawyer knows he or she is incapable of handling a case, the lawyer must refer the client to another lawyer in the firm or an attorney in another firm, or seek assistance from another attorney to gain competence. When associating with or referring cases to other counsel, lawyers must be sure to confirm their conduct to the other provisions of the Rules relating to fee sharing and disclosure of clients' secrets or confidences.
5. Lawyers are prohibited from intentionally failing to learn a client's objectives or intentionally prejudicing or damaging the client during the period of representation, except where permitted or required by the Rules.

V. ANALYSIS

V.1 Purpose of Rule 1.1

New Rule 1.1 adopts many of the concepts previously addressed in former DR 6-101 regarding competence and neglect. Subsection (c) directly reflects provisions contained in former DR 7-101(A)(1) and (3). These provisions require proof of the practitioner's specific "intent" to establish a violation of the new Rules. Practitioners are advised to contrast the language of Rule 1.1(c) with the no "intent" language in new Rule 1.3(b), which merely states that a lawyer shall not neglect a legal matter entrusted to him or her.

Normally, if an attorney fails to provide competent legal representation, a client can bring an action against the lawyer for malpractice or breach of a fiduciary duty. Courts have been reluctant under the application of the former Code to create a distinct cause of action for the breach of a disciplinary rule.

V.2 Competent Representation

Subsection (a) is extremely straightforward in stating that a lawyer must provide competent representation to his or her clients. This requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Determining what is adequate under the circumstances "requires a fact intensive inquiry." Among the considerations are: the complexity of the legal matter entrusted to the lawyer; the lawyer's familiarity with the area of the law; the speed with which the matter has to be concluded; and the financial resources that the client is willing to invest in the representation. For example, an insured's defense counsel may adhere to the insurer's instructions to consult a research/brief bank for relevant legal authority before conducting any independent research. The lawyer may not limit his research to the brief bank, however, if doing so would result in inadequate representation of the client.[2]

Yet, a lawyer does not necessarily have to have special training or prior experience to handle a matter. General legal skills, such as the ability to analyze legal precedents, or evaluate the types of issues that may arise, are also important in determining competence.[3] In areas involving novel issues of law, a lawyer may competently represent a client by engaging in necessary research and study. Further, a lawyer may acquire the necessary competence by adequately preparing for a case.[4]

To maintain competence, lawyers should continually keep abreast of the latest changes in the law and case developments. Attending relevant Continuing Legal Education classes is another way to keep current and gain new skills.[5]

V.3 Referral or Association with Other Lawyers

Rule 1.1(b) dictates that an attorney should not handle a matter knowing that he or she is incapable of handling it effectively. For example, a corporate lawyer who is not competent in estate planning should refer a client with such an issue to another lawyer in the firm or an attorney in another firm with the requisite skill set, or ask a lawyer with the appropriate competency for assistance. In the latter instance, however, the lawyer making the request must proceed with caution, as other provisions in Rules come into play regarding the disclosure of a client's secrets or confidences without the client's prior consent.

Furthermore, in associating with another lawyer in an outside firm for the purposes of becoming competent in a matter, a lawyer must also conform his or her conduct to

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2 N.Y.S. Bar Op. 721 (1999).

3 NYSBA Comments to Rule 1.1, [3].

4 Id. at Comment [4].

5 *See* Mandatory Continuing Legal Education Programs for Attorneys in the State of New York, 22 NYCRR Part 1500 (Booklet III at 114); New York State CLE Board Regulations and Guidelines for the Mandatory Continuing Legal Education/Program for Attorneys in the State of New York (Booklet III at 128).

other provisions of the Rules relating to fee sharing. For example, Rule 1.5 prohibits sharing a fee with a lawyer who is not in the same firm without client consent after full disclosure of the fact of the fee arrangement.

V.4 Gaining Competence in the Subject Matter of the Client's Case

Referring the client to a lawyer in a different firm or associating with a lawyer in another firm are not, however, the only two options open to a lawyer whose client proposes to engage the lawyer in a matter which he or she is not presently competent to handle. The lawyer may also dedicate himself or herself to acquiring the requisite knowledge and/or skill.

There are certainly occasions when a long-standing client will bring a matter in an area of the law that is unfamiliar to the lawyer, for which the client is requesting representation. In assessing his or her competence to accept the engagement, it may be perfectly reasonable for the lawyer to conclude that with adequate preparation and study he or she will be able to provide competent services. It does not appear that new Rule 1.1, nor its predecessor, former DR 6-101, intended to prohibit representation in such circumstances.

A lawyer may also have to avail himself or herself of other services to represent the client adequately. For example, if a language barrier exists between the lawyer and the client, the lawyer may have to hire an interpreter to be able to provide competent representation.[6]

V.5 Ascertaining the Objectives of the Client

Subsection (c) approaches a lawyer's duty toward the client from a negative perspective, prohibiting the intentional failure to learn the client's objectives through reasonable means or intentionally prejudicing or damaging the client during the period of representation, except where permitted or required by the Rules, e.g., where the attorney knows that the client intends to perpetuate a fraud upon a tribunal.

V.6 Prejudicing or Damaging the Client During the Representation

Subsection (c) further provides that a lawyer should not "intentionally prejudice or damage the client during the course of the representation, except as permitted or required by these Rules." Therefore, where a lawyer failed to timely respond or timely request an extension of time to respond to a motion to dismiss, resulting in prejudice, failed to file the proper forms, resulting in dismissal of the case, and failed to timely submit papers or request an extension, he was found to have prejudiced his client.[7]

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6 N.Y.C. Bar Op. 1995–6 (1995).

7 In re DeMeil, 2009 WL 4906592 (2d Cir. Dec. 21, 2009) (violation of former DR 6-101(A)).

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Competent Representation

N.Y.C. Bar Op. 2004-01 (2004) (analyzing the ethical obligations of a lawyer representing a class, including the obligations imposed by former DR 6-101).

N.Y.S. Bar Op. 762 (2003) (ethical duty of competence requires a law firm with offices in New York and a foreign country to make certain that the lawyers licensed in a foreign country who work in the New York office are competent to handle the matters assigned to them. If they are not, the law firm must implement procedures enabling them to consult with a lawyer who has competence.).

N.Y.S. Bar Op. 751 (2002) (attorney representing a government agency may not undertake more matters than the attorney can competently handle, but the attorney may accept his or her superior's reasonable resolution of an arguable question of professional duty).

N.Y.S. Bar Op. 746 (2001) (lawyer must still provide zealous and competent representation when client is impaired due to physical or mental incapacitation. Only when a client's capacity is diminished to a severe capacity and there is no other method available for protecting his interest may a lawyer seek appointment of a guardian.).

N.Y.S. Bar Op. 721 (1999) (not per se unethical for an insured's defense counsel to observe the insurer's instructions to consult a research/brief bank for relevant legal authority before doing any research. However, the defense counsel may not limit his or her research to the research/brief bank, if inadequate representation would result.).

N.Y.S. Bar Op. 713 (1999) (lawyer may comply with a client's instruction to forego title searches in connection with the transfer of real property provided that the lawyer can provide competent representation with respect to other aspects of the transaction and the lawyer fully informs the client of the consequences of the client's decision).[8]

N.Y.S. Bar Op. 709 (1998) (duty to provide competent representation established in former Canon 6 obligates a lawyer to take care to assure that the information the lawyer obtains from an Internet site is reliable, if the lawyer is going to rely on the information in advising the client).

N.Y.C. Bar Op. 1995-12 (1995) (if a language barrier exists between a lawyer and a client, former DR 6-101A.2 and former EC 6-3 may require the lawyer to hire an interpreter. Without the assistance of an interpreter, the lawyer may be unable to provide "adequate preparation.").

N.Y.S. Bar Op. 664 (1994) (lawyer may operate a "900 telephone service" that offers legal advice to callers in certain areas of the law provided that the lawyers who respond to the telephone inquiries are competent to handle calls in all areas of the law that are advertised by the service).

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8 While opinion 713 does not specifically cite to former DR 6-101, its application to that provision is quit clear from the text of the opinion.

VI.2 Referral or Association with Other Lawyers

N.Y.S. Bar Op. 789 (2005) (a law firm may consult one of its lawyers on questions of ethical obligations without creating a conflict of interest between the firm and the client. The firm need not advise the client of this consultation, but may need to inform the client of its conclusion reached depending on circumstances.).

N.Y.S. Bar Op. 745 (2001) (attorney who refers a matter to a more skilled or experienced lawyer may receive a referral fee from the receiving lawyer provided that any existing conflict, such as a conflict pursuant to former DR 5-101, can be cured by the client's consent and that the standard for obtaining that consent is satisfied).

N.Y.S. Bar Op. 741 (2001) (attorney may not participate in a business network that requires members to refer clients to and accept referrals from other network members since, inter alia, the lawyer's acceptance of a referred matter might require the lawyer to handle a matter that the lawyer is not competent to handle).

NYCLA Bar Op. 728 (1999) (if the only partner competent to handle a certain category of legal matters withdraws from a law firm, the firm must (1) hire a lawyer with the needed competence; (2) refer the client to a law firm with the needed competence; or (3) withdraw from the representation. Each choice entails additional ethical considerations.).

VI.3 Ascertaining the Objectives of the Client

N.Y.C. Bar Op. 2004-01 (2004) (lawyer representing a class owes the class members the same ethical duties under former DR 7-101 as the lawyer owes an individual client).

NYCLA Bar Op. 730 (2002) (former Code required lawyers to represent their clients zealously and ascertain the client's objectives).

N.Y.S. Bar Op. 721 (1999) (not per se unethical for an insured's defense counsel to observe the insurer's instructions to consult a research/brief bank for relevant legal authority before doing any research. However, the defense counsel may not limit his or her research to the research/brief bank, if inadequate representation would result.).

N.Y.S. Bar Op. 713 (1999) (lawyer may comply with a client's instruction to forego title searches in connection with the transfer of real property provided that the lawyer can provide competent representation with respect to other aspects of the transaction and the lawyer fully informs the client of the consequences of the client's decision).[9]

VII. ANNOTATIONS OF CASES

VII.1 Purpose of Rule 1.1

In re The Law Firm of Wilens and Baker, 9 A.D.3d 213, 777 N.Y.S.2d 116 (1st Dept. 2004) (publicly disciplining a law firm and a lawyer for, inter alia, violating former DR 6-101).

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9 Id.

In re Reibman v. Senie, 302 A.D.2d 290, 756 N.Y.S.2d 164 (1st Dept. 2003) (noting the correspondence between the duty of competence imposed by the former Lawyer's Code and the duty of competence imposed by tort law).

In re Kleeman v. Rheingold, 81 N.Y.2d 270, 598 N.Y.S.2d 149, 614 N.E.2d 712 (1993) (lawyer has a non-delegable duty to provide competent representation. Accordingly, a lawyer will be liable for the negligence of an independent process server whom the lawyer has retained to serve process in connection with the client's cause of action.).

VII.2 Competent Representation

In re John E. Star, 2010 WL 3239090, 2010 BL187945 (E.D.N.Y.2010) (counsel did not earn the $2,000 in fees paid to him by Debtor in a Chapter 13 Bankruptcy case where he violated Rule 1.1 regarding competence, Rule 1.3 regarding diligence and Rule 1.1.3 regarding honesty and candor with a tribunal).

VII.3 Prejudicing or damaging the client during representation

In re DeMeil, 2009 WL 4906592 (2d Cir. Dec. 21, 2009) (violation of former DR 6-101(A)).

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Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

I. TEXT OF RULE 1.2[1]

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

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1 Rules Editor Andral Bratton, Appellate Division, First Judicial Department. The commentary expresses the personal views of Mr. Bratton and does not in any way reflect the official position of the Appellate Division. Mr. Bratton gratefully acknowledges the assistance of Daniel Rosenblum and Ryan Gainor in the research and preparation of this chapter.

(g) A lawyer does not violate this Rule by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

II. NYSBA COMMENTARY

Allocation of Authority Between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. The lawyer shall consult with the client with respect to the means by which the client's objectives are to be pursued. See Rule 1.4(a)(2).

[2] Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. On the other hand, lawyers usually defer to their clients regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Because of the varied nature of the matters about which a lawyer and client might disagree, and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(c)(4). Likewise, the client may resolve the disagreement by discharging the lawyer, in which case the lawyer must withdraw from the representation. *See* Rule 1.16(b)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specificaction on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client, however, may revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to any person who is unable to afford legal services, or whose cause is controversial or the subject of popular disapproval.

By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to issues related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[6A] In obtaining consent from the client, the lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded. In addition, the lawyer must disclose the reasonably foreseeable consequences of the limitation. In making such disclosure, the lawyer should explain that if the lawyer or the client determines during the representation that additional services outside the limited scope specified in the engagement are necessary or advisable to represent the client adequately, then the client may need to retain separate counsel, which could result in delay, additional expense, and complications.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted were not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other laws. *See* Rules 1.1, 1.8, and 5.6.

Illegal and Fraudulent Transactions

[9] Paragraph (d) prohibits a lawyer from counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in

a course of action that is illegal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. When the representation will result in violation of the Rules of Professional Conduct or other law, the lawyer must advise the client of any relevant limitation on the lawyer's conduct and remonstrate with the client. *See* Rules 1.4(a)(5) and 1.16(b)(1). Persuading a client to take necessary preventive or corrective action that will bring the client's conduct within the bounds of the law is a challenging but appropriate endeavor. If the client fails to take necessary corrective action and the lawyer's continued representation would assist client conduct that is illegal or fraudulent, the lawyer is required to withdraw. *See* Rule 1.16(b)(1). In some circumstances, withdrawal alone might be insufficient. In those cases the lawyer may be required to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. *See* Rule 1.6(b)(3); Rule 4.1, Comment [3].

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) prohibits a lawyer from assisting a client's illegal or fraudulent activity against a third person, whether or not the defrauded party is a party to the transaction. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise, but does preclude such a retainer for an enterprise known to be engaged in illegal or fraudulent activity.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law, or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

III. CROSS-REFERENCES

III.1 Former New York State Code of Professional Responsibility

Similar to DR 7-101 and DR 7-102. Also includes provisions formerly found in EC 7-7 and EC 2-36.

III.2 ABA Model Rules

ABA Model Rule 1.2

IV. PRACTICE POINTERS

1. Lawyers must abide by their clients' wishes regarding the objectives of the representation and clearly communicate with them about how the objectives will be met.
2. If a dispute arises concerning how to achieve those objectives which cannot be amicably resolved, the lawyer may withdraw from the representation or the client can discharge the lawyer.
3. Representation of a client in no way implies that the lawyer necessarily endorses the client's views or activities.
4. The scope of a lawyer's representation may be limited if reasonable and the client gives consent after being advised about the nature of the engagement and the foreseeable consequences of the limitations.
5. Lawyers may not assist or counsel clients engaged in illegal or fraudulent conduct. Attorneys may, however, professionally discuss the perceived legal consequences of a particular course of conduct.
6. A lawyer should counsel a client to "cease and desist" from engaging in illegal or fraudulent conduct. If the client refuses to follow the lawyer's advice regarding such conduct, the lawyer should withdraw from the case and may even have to disaffirm any opinions or advice given to the client regarding the matter.
7. A lawyer may exercise his or her professional judgment to waive or not assert a client's right or position, accept reasonable requests by the opposing side, and act civilly and courteously when dealing with opposing counsel without violating any duties to the client under Rule 1.2.

V. ANALYSIS

V.1 Purpose of Rule 1.2

New Rule 1.2 is similar to former DR 7-101 and former DR 7-102, while also including provisions formerly found in EC 7-7 and EC 2-36. For the most part, the new Rule takes a positive approach to a lawyer's duties and the allocation of authority between the client and the lawyer, spelling out what a lawyer should do with respect to his or her representation of the client. While zealous representation has been seen as a lawyer's duty, the Rule also attempts to limit an attorney's conduct to protect the integrity of the litigation process and promote civility. Nowhere in the Rules is the term "zealous representation" mentioned and Rule 1.2, provides that a lawyer may accede to "reasonable requests of opposing counsel," avoid offensive tactics and treat "with courtesy and consideration all persons involved in the legal process," as long at the client's rights are not prejudiced.

V.2 Allocation of Authority

Rule 1.2(a) affirmatively provides that lawyers must abide by their clients' wishes regarding the objectives of the representation and clearly communicate with them

about how those objectives will be achieved. While the lawyer has the expertise to determine the strategy for and direction for a case, and clients normally defer to their "specialized knowledge and skill,"[2] lawyers need to be particularly mindful of the client's views on the costs which may be incurred and the effect of a legal strategy on third persons.

The NYSBA Comments to Rule 1.2 note that the Rule does not prescribe how disagreements over achieving the client's objectives should be resolved. But, if a mutually agreeable position cannot be reached, the lawyer may withdraw from the representation, or the client can discharge the lawyer. The Rule does specifically state that after consultation with the client in criminal cases, the lawyer must abide by the client's decision "as to a plea to be entered, whether to waive jury trial and whether the client will testify."

V.3 Endorsement of Client's Views or Activities

One of the hallmarks of the United States' legal system is that legal representation should not be dependent upon a person's ability to pay or the popularity of the person's actions or beliefs. Subsection (b) makes it clear, however, that a lawyer's representation of a client does not mean that the attorney necessarily endorses the client's views or activities.

V.4 Scope of Representation

Under subsection (c), the scope of a lawyer's representation may be limited if reasonable and the client gives informed consent. The lawyer must clearly articulate the limitations on his or her engagement and the foreseeable consequences of the limitation. While clients and lawyers may reach their own agreements concerning the parameters of the representation, the scope of representation must be reasonable under the circumstances. For example, a pro bono lawyer could limit the scope of his representation to providing advice and drafting assistance prior to a bankruptcy filing as long as the lawyer made the client aware of the risks that could result from such a relationship, and the client gave consent.[3] Or, in a criminal proceeding, a lawyer could limit representation to the grand jury phase where the client agreed and the limitation did not violate any court rule.[4]

It has recently been decided that an attorney, with the informed consent of his or her client, may play a limited role and prepare pleadings and other submissions for a *pro se* litigant without disclosing the lawyer's involvement to the tribunal or adverse counsel. Disclosure need only be made "where necessary," such as when mandated by a procedural rule, court rule, judge's rule or order or any other situation where failure

2 *See* NYSBA Comments to Rule 1.2, [2].
3 N.Y.C. Bar Op. 2005-01 (2005).
4 N.Y.S. Bar Op. 604 (1989).

to disclose the attorney's assistance in "ghostwriting" would constitute misrepresentation or otherwise violate a law or the attorney's ethical obligation. Even where disclosure is necessary, the attorney does not need to reveal his or her identity. Instead it should be sufficient to indicate on the ghostwritten document that it was "prepared with the assistance of counsel admitted in New York.[5]

On the other hand, a law firm that sought to transform its representation into an arm's length commercial affiliation through language inserted into a retainer agreement was held to violate the firm's duty of undivided loyalty to its client when it then sought to represent an adverse party involved in the transaction.[6]

V.5 Assisting in Illegal or Fraudulent Conduct

While subsection (d) prohibits lawyers from counseling clients to engage in illegal or fraudulent conduct, the Rule still allows lawyers to professionally discuss the perceived legal consequences of a particular course of conduct with the client. *See* N.Y.S. Bar Op. 515 (1979) (lawyer may counsel client about legality of recording conversations between client and third party to whom no notice is given about the recording).The lawyer may be thrust into a particularly sticky situation when a client has already engaged in a prohibited course of conduct, as the lawyer is strictly forbidden from assisting illegal or fraudulent behavior. For example, a lawyer faced with a request from a fugitive client to sell his assets, pay his creditors, and send the proceeds to the client, must have reasonable support for a claim that the purpose of the request is legal before carrying it out.[7] Counseling the client to "cease and desist" from the proscribed activities is the appropriate way to handle the situation. Yet it may prove extremely challenging to get the client to acquiesce. If the client refuses to follow the lawyer's advice, the lawyer may have no choice but to withdraw from the case, and may even have to disaffirm any opinions or advise given to the client regarding the matter.[8]

A more black and white situation existed where a lawyer was found to knowingly assist in the perpetuation of a real estate fraud, as she represented both the buyer and seller in the real estate transaction and falsified loan documents.[9]

V.6 Exercise of Professional Judgment

Rule 1.2(e) provides that a lawyer may exercise his or her professional judgment to waive or not assert a client's right or position. The lawyer may also accept reasonable requests by the opposing side, as long as the client's rights are not prejudiced.

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5 NYCLA Bar Op. 742(2010).

6 Ulico Cas. Co. v. Wilson Elser Moskowitz Edelman & Dicker, 56 A.D.3d 1, 856 N.Y.S.2d 14 (1st Dept. 2008).

7 N.Y.C. Bar Op. 1999-02 (1999).

8 See NYSBA Commentary to Rule 1.2, [10].

9 In re Marshall, 58 A.D.3d 1066, 871 N.Y.S.2d 764 (3d Dept. 2009).

Subsection (g) clarifies that a lawyer who engages in civility during the course of the representation, by timely fulfilling all professional commitments, avoiding offensive tactics and treating others with courtesy and consideration, does not violate the requirements of Rule 1.2 or adversely affect the client's case.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Allocation of Authority

NYCLA Bar Op. 683 (1990) (lawyer may not require contingent fee client to get prior approval from lawyer before accepting settlement offer).

VI.2 Scope of Representation

NYCLA Bar Op. 742(2010) (under the new Rules, it is allowable for an attorney, with the informed consent of the client, to play a limited role and prepare pleadings and other submissions for a pro se litigant, without disclosing the lawyer's participation to the tribunal or opposing counsel. Disclosure of how the pleading or other submission was prepared need only be made "where necessary," such as when mandated by a procedural rule, court rule, judge's rule judge's order or any other situation where failure to disclose the attorney's assistance in "ghostwriting" would be considered a misrepresentation or otherwise violate a law or the attorney's ethical obligation. Unless required otherwise, in cases where disclosure is necessary, generally the lawyer need not reveal his or her identity and may indicate on the document that it was "Prepared with the assistance of counsel admitted in New York.).

N.Y.S. Bar Op. 798 (2006) (part-time legislator and lawyer is disqualified from representing defendants in cases involving the police department and district attorney's office over whom he has budgetary control. Limiting the scope of representation to the plea bargain stage does not eliminate these concerns.).

N.Y.C. Bar Op. 2005-01 (2005) (pro bono lawyer may limit scope of representation to providing advice and drafting assistance prior to a bankruptcy filing as long as ensures that the client is aware of and consents to any risks that may result from such a relationship).

N.Y.C. Bar Op. 2004-02 (2004) (lawyer representing multiple parties can and should consider structuring those relationship to minimize potential conflicts. This structuring can take the form of limiting representation, providing for co-counsel and obtaining waivers of conflict.).

N.Y.S. Bar Op. 719 (1999) (lawyer may not limit scope of representation through a retainer agreement that allows firm to withdraw from representation in a manner deemed impermissible by former DR-2-110).

N.Y.S. Bar Op. 705 (1998) (lawyer may accept case from non-attorney tax reduction company to represent property owner. The client in this instance, however, is the property owner not the tax reduction company.).

NYCLA Bar Op. 683 (1990) (lawyer may not provide in retainer agreement for client payment of sanctions imposed for bringing a frivolous claim).

N.Y.S. Bar Op. 604 (1989) (lawyer may limit representation of client to grand jury phase of criminal proceeding where client agrees to this limitation and such a limitation does not violate any court rule).

VI.3 Assisting in Illegal or Fraudulent Conduct

N.Y.S. Bar Op. 769 (2003) (lawyer representing client on contingent fee basis may represent that client, for an additional fee, in making an agreement with a company that provides advance payments to plaintiffs. Such an arrangement must be legal under the laws of the state, and the lawyer may not have a stake in the company advancing the money.).

N.Y.S. Bar Op. 817 (2007) (a real estate transaction that includes a "grossed up" sales price with a "seller's concession" to obtain a larger mortgage after parties have already agreed to a price is unethical since it is deceitful, unless there is no unlawful conduct and there is full disclosure of the transaction in the transactions documents).

N.Y.C. Bar Op. 2002-1 (2002) (lawyer cannot disclose client's criminal offense as a "continuing crime" when all of the elements of the crime have been satisfied and the client has already approached the lawyer about representing him against charges. A lawyer may not disclose mere suspicion about future criminal conduct, but instead must have a reasonable belief that the client intends to commit a crime. Where client readily admitted to having stolen car, but stated he would have a retainer in cash within a few days and lawyer knew of no legitimate form of income for client, this was not enough to form a reasonable belief that another crime would be committed.).

N.Y.C. Bar Op. 1999-02 (1999) (lawyer faced with request from client who is a fugitive from justice to sell assets, pay creditors, and send proceeds to client must have some reasonable support for an argument that the purpose of that request is legal before carrying it out).

VI.4 Exercising Professional Judgment

NYCLA Bar Op. 736 (2006) (lawyer may not include in retainer agreement unilateral ability to change a fee arrangement with a client from contingency to hourly if the client rejects a settlement offer deemed reasonable by the lawyer).

NYCLA Bar Op. 699 (1994) (retainer agreement may not include requirement that lawyer approve of settlement).

NYCLA Bar Op. 658 (1983) (appointed lawyer may ask for withdrawal from case when client does not show up to court hearing in a parental rights case. Granting of such withdrawal request, however, is to be determined by the court. If such a request is not granted, a lawyer may exercise his professional judgment to waive the right or

position of his client. In doing so, however, a lawyer should be guided by his responsibility to act in a manner consistent with the best interest of his client. Other considerations include the intelligence, experience or age of the client and the nature of the proceeding.).

VII. ANNOTATIONS OF CASES

VII.1 Allocation of Authority

U.S. v. Midyett, 2010 WL 447384, 7 (E.D.N.Y. 2010) (criminal defendant alleged that he was exposed to a longer sentence due to his defense counsel's failure to advise him of the consequences of rejecting the plea offer. The court held that "the ultimate decision whether to plead guilty must be made by the defendant.").

VII.2 Scope of Representation

In re Ulico Cas. Co. v. Wilson, Elser Moskowitz, Edelman & Dicker, 56 A.D.3d 1, N.Y.S.2d 14 (1st Dept. 2008) (law firm seeking to limit its representation role into an arm's length commercial affiliation through contract language in a retainer violates its duty of undivided loyalty when it then represents an adverse party).

In re Mayes v. UVI Holdings Inc., 280 A.D.2d 153, 723 N.Y.S.2d 151 (1st Dept. 2001) (law firm may not delegate responsibility for supervising litigation).

VII.3 Assisting in Illegal or Fraudulent Conduct

Art Capital Group, LLC v. Neuhaus, 70 A.D.3d 605, 606 (1st Dept. 2010) (plaintiffs sued former employees who established competing financial and consulting services for defrauding and engaging in unfair competition with plaintiffs. In a separate action, Plaintiffs also alleged that the attorney whom the former employees retained had assisted former employees in facilitating the fraudulent conduct because Defendant gave "indispensable legal advice and counsel, documented and negotiated loan transactions between their competing entities and plaintiffs' current and prospective clients, and provided legal services to secure office space for [the former employees]." The Court found that Plaintiffs failed to establish the causes of action because "all of the aforementioned acts fall completely within the scope of defendant's duties as an attorney.").

In re Marshall, 58 A.D.3d 1066, 871 N.Y.S.2d 764 (3d Dept. 2009) (lawyer may not knowingly participate in real estate fraud where she represents both the buyer and seller, falsifies loan documents, and falsifies disability insurance documents).

In re Berg, 54 A.D.3d 66, 862 N.Y.S.2d 225 (1st Dept. 2008) (lawyer may not represent both a company and its president in bankruptcy filings and advise the

company president to transfer ownership of real property to his wife for a nominal fee and not report the transfer in the bankruptcy provision. Lawyer also deemed to have acted improperly where he made false statements in a matrimonial action, falsely notarized a signature, and represented both the buyer and seller in a real estate transaction.).

In re Fagan, 58 A.D.3d 260, 869 N.Y.S.2d 417 (1st Dept. 2008) (disbarment is appropriate for lawyer who brings an action on behalf of an entity he knows does not exist, and seeking relief he knows has already been granted).

In re Andrades, 4 N.Y.3d 355, 828 N.E.2d 599, 795 N.Y.S.2d 497 (2005) (lawyer acted properly when faced with a client who demanded the chance to take the witness stand and make perjured statements during an evidentiary hearing. The lawyer first informed the judge that he had an ethical conflict. When he was not removed from the case, he informed the court as the defendant took the stand that he was merely going to ask basic questions to allow his client to begin telling his story and then simply asked clarifying questions. The lawyer then made no closing argument on the matter and did not use the perjured statement in any argument. Court of Appeals ruled the lawyer acted ethically and still provided valid defense to client.).

In re Janoff, 242 A.D.2d 27, 672 N.Y.S.2d 89 (1st Dept. 1998) (lawyer engages in conduct that consists of fraud and deceit when he knowingly submits false and misleading bills of particulars, fails to correct false deposition testimony, and acquiesces in the filing of false medical records).

In re Bigman, 217 A.D.2d 322, 636 N.Y.S.2d 799 (2d Dept. 1995) (lawyers engaged in various types of fraud involving real estate transactions and falsifying loan applications. After reviewing the disciplinary backgrounds of the attorneys, court determined disbarment was appropriate response.).

In re Latona, 197 A.D.2d 108, 611 N.Y.S.2d 77 (4th Dept. 1994) (lawyer who accepted a $50,000 loan from a client, and upon being unable to repay it, backdated an invoice to provide the client with a tax benefit was guilty of misconduct).

In re Provda, 195 A.D.2d 17, 606 N.Y.S.2d 608 (1st Dept. 1994) (lawyer who falsified certificates of incorporation to provide individuals with a tax shelter was guilty of misconduct).

In re Friedman, 196 A.D.2d 280, 609 N.Y.S.2d 578 (1st Dept. 1994) (despite acquittal on criminal charges, lawyer may still be held disciplinarily responsible for his role in a scheme to bribe witnesses. Furthermore, allowing witnesses to make false statements represent a second level on which disciplinary action was warranted.).

In re Strier, 190 A.D.2d 140, 598 N.Y.S.2d 200 (1st Dept. 1993) (lawyer acquitted of bribery and attempted official misconduct may still face disciplinary action for trying to exert influence on the son of the chairman of the liquor authority to curry favor).

In re Polur, 173 A.D.2d 82, 579 N.Y.S.2d 3 (1st Dept. 1992) (lawyer who violated court disqualification order due to conflict of interest and was found in contempt as a result is subject to disciplinary sanctions and suspension).

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Rule 1.3: Diligence

1. TEXT OF RULE 1.3[1]

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

(c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

II. NYSBA COMMENTARY

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. Notwithstanding the foregoing, the lawyer should not use offensive tactics or fail to treat all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled diligently and promptly. Lawyers are encouraged to adopt and follow effective office

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procedures and systems; neglect may occur when such arrangements are not in place or are ineffective.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated, as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. If a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, Rule 1.16(e) may require the lawyer to consult with the client about the possibility of appeal before relinquishing responsibility for the matter. Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. *See* Rule 1.2.

[5] To avoid possible prejudice to client interests, a sole practitioner is well advised to prepare a plan that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

III. CROSS-REFERENCES

III.1 Former New York State Code of Professional Responsibility

DRs 6-101 and 7-101
Ethical Considerations 2-30, 7-4, 7-8 to 7-10, 7-37 to 7-38 & 8.5

III.2 ABA Model Rules

ABA Model Rules of Professional Conduct, Rule 1.1 and 1.3

IV. PRACTICE POINTERS

1. Attorneys must handle the matters of their clients with reasonable diligence and promptness.
2. Since neglect is frequently cited as a major cause of lawyer discipline, lawyers are encouraged to attend programs focusing on developing law firm management skills.
3. Lawyers need to control their case loads so that the clients' cases they agree to handle can be dealt with expeditiously.
4. While procrastination should be avoided, as it is a leading cause of client dissatisfaction, asking for or agreeing to a reasonable request for the postponement of a case is not prohibited by the Rule.
5. A lawyer cannot intentionally fail to carry out a contract of employment. Lawyers may, however withdraw from case as permitted under the Rules.
6. Lawyers should notify clients, preferably in writing, when the client-lawyer relationship has terminated so as to avoid any confusion on the part of the client.
7. Sole practitioners are encouraged to develop a contingency plan in the case of the lawyer's death, disability, or other inability to deal with client matters competently.

V. ANALYSIS

V.1 Purpose of Rule 1.3

The text of Rule 1.3(a) is new and represents a shift from the old language contained in former Canon 7, namely, "A lawyer shall represent a client zealously within the bounds of the law". Nowhere in the new rules are the terms "zealous" or "zealously" used, perhaps to deter practitioners who, in attempting to be zealous advocates, forget the term "within the bounds of law" or, more implicitly, within the bounds of ethical advocacy. The requirement now is "reasonable diligence and promptness".

The text of the new Rule 1.3 (b) is directly descended from the corresponding provision of the ABA Model Code of Professional Responsibility that was designated DR 6-101. That provision has remained virtually unchanged since its original adoption in 1970.

V.2 Neglect

Subsection (b) forbids a lawyer from "neglect[ing] a legal matter entrusted to the lawyer." Unfortunately, neglect is frequently cited by the courts and commentators as a major cause of lawyer discipline. While the new Rules do not specifically define "neglect," former EC 6-4 did so indirectly, stating "the lawyer's obligation to the client requires adequate preparation for an appropriate attention to the legal work, as well as

promptly responding to inquiries from the client." It has been held that failure to respond to requests for progress reports, failure to do work on estate matters over a period of nine months, and failure to keep several appointments with a client all constitute neglecting a legal matter.[2] So too does failing to communicate with clients,[3] engaging in conduct involving dishonesty, fraud, deceit and misrepresentation.[4]

While lawyers may be good at preparing for and handling legal matters, managing the business of their law practice is sometimes a challenge. Thus, when satisfying his or her Continuing Legal Education (CLE) requirements,[5] a lawyer should carefully consider attending courses that focus on law firm management. Neglect of a client's matter is not generally the result of a deliberate decision by a lawyer or law firm. Typically, a matter becomes neglected either because a lawyer lost track of the engagement in the press of other work or personal problems or because the engagement itself was troublesome (e.g., an unsympathetic, disgruntled, or unrealistic client, a client who no longer has the money to pay the lawyer's fees, but who refuses to let the lawyer withdraw, a contentious or harassing opposing counsel, an overbearing judge, etc.). CLE courses on law firm management often offer useful solutions to these sorts of problems.

Lawyers should also work to control their case loads so that the clients' cases they agree to handle can be dealt with expeditiously. Thus when a sole practitioner took on too much work, this fact did not mitigate the lawyer's neglect which included failure to make settlement payouts to clients, settling claims without the client's knowledge and falsifying documents.[6] Sole practitioners are encouraged to develop a contingency plan with another lawyer in the event of the sole practitioner's death or disability, who would notify clients of the attorney's status, and would handle any matters that need immediate attention.[7]

The NYSBA Comments to the Rules[8] also note that procrastination could be the most "resented" shortcoming of a lawyer, even when no harm has come to the client. This does not mean that a lawyer cannot ask for or agree to a reasonable request for a postponement.

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2 In re Kaplan, 48 A.D.3d 1, 850 N.Y.S.2d 19 (1st Dept. 2008).

3 In the matter of Saghir, 2009 WL 1953017 (S.D.N.Y 2009.) (attorney's attempt to justify her unavailability and failure to act on behalf of her client after accepting a fee from the client's family to represent him in a criminal matter did not excuse her conduct. Thus the court found her conduct was a complete neglect of her client's matter in violation of former DR 7-101(A).).

4 In re Robertson, 40 A.D.3d 69, 832 N.Y.S.2d 175 (1st Dept. 2007) (gross neglect found).

5 *See* Mandatory Continuing Legal Education Programs for Attorneys in the State of New York, 22 NYCRR Part 1500 (Booklet III at 114); New York State CLE Board Regulations and Guidelines for the Mandatory Continuing Legal Education/Program for Attorneys in the State of New York (Booklet III at 128).

6 In re Boter, 46 A.D.3d 1, 842 N.Y.S.2d 411 (1st Dept. 2007).

7 See NYSBA Comment to Rule 1.3, [5].

8 Id. at [3].

V.3 Intent

Subsection (c) prohibiting a lawyer from "intentionally" failing to carry out his or her terms of engagement, is taken directly from former DR 7-102 (a) (2). Unlike subsection (b), specific intent is required for a finding that the practitioner has violated this subsection.

Lawyers should notify their clients, preferably in writing, when the lawyer's engagement has terminated. This will eliminate any doubt on the part of the client as to whether the attorney is still looking after his or her affairs.[9]

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Neglect

N.Y.S. Bar Op. 751 (2002) (attorney representing a government agency may not undertake more matters than the attorney can competently handle, but the attorney may accept his or her superior's reasonable resolution of an arguable question of professional duty).

N.Y.C. Bar Op. 1995-6 (1995) (depending upon the circumstances of the representation, the lawyer's failure to deposit the proceeds of a settlement in an interest-bearing account, even if the amount in question is quite small, may constitute neglect).

VII. ANNOTATIONS OF CASES

VII.1 Neglect

In re John E. Star, 2010 WL 3239090, 2010 BL187945 (E.D.N.Y. 2010) (counsel did not earn the $2,000 in fees paid to him by Debtor in a Chapter 13 Bankruptcy case where he violated Rule 1.1 regarding competence, Rule 1.3 regarding diligence and Rule 1.1.3 regarding honesty and candor with a tribunal).

In re Estate of Rowland, 901 N.Y.S.2d 509 (2010) (disbarred former counsel forfeited his right to compensation for legal services rendered in wrongful death action, even though the former client received a $50,000 settlement and her new law firm had agreed to pay one-third of any legal fee it received to former counsel when it was substituted as counsel. Former counsel had neglected the case for well in excess of a decade, and had filed frivolous applications and false papers during period he represented the client.).

In re Green, 72 A.D.3d 142, 143, 893 N.Y.S.2d 773 (4th Dept. 2010) (lawyer violated Rule 1.3(b), neglecting a legal matter entrusted to him; Rule 1.4(a)(4), failing to comply promptly with a client's reasonable requests for information; and

9 *Id*. at [4].

Rule 8.4(h), engaging in any other conduct that adversely reflects on his fitness as a lawyer).

US v. Morales, 2010 WL 2400120 (2010) (two attorneys representing a client indicted and subsequently convicted on four narcotics- related charges failed to appear on his behalf numerous times, failed to obey court orders to file notices of appearance and to file status reports, failed to submit timely motions, delayed the required presentencing interview by misleading the Probation Department as to who was representing the client, all of which resulted in a delay between conviction and sentencing of more than one year. The Court found that both attorneys violated Rule 1.3 in that neither attorney's representation of the client was diligent; that one attorney violated Rule 1.16 by unilaterally terminating his representation of the client; and that the other attorney violated Rule 7.5 in using the other's letterhead after his separation from the firm in a manner that caused confusion to the Court and both violated the Rules by repeatedly ignoring the Court's orders.).

In the Matter of Saghir, 2009 WL 1953017 (S.D.N.Y. 2009) (although lawyer claimed she was required to be on bed rest as much as possible due to a medical condition, was only working part time and was out of the country for an extended period, the uncontested evidence showed that she still made several trips to the federal prison where her client was incarcerated to visit another inmate, wired money to the other inmate, and communicated with the other inmate by mail. The court concluded there was nothing that would have prevented her from communicating with the client or his family—whom had paid her fee—during the period as well.).

In re Siccardi, 53 A.D.3d 76, 859 N.Y.S.2d 728 (2d Dept. 2008) (lawyer neglects a legal matter entrusted to him when he fails to perfect two appeals and fails to file affidavit in matrimonial action for more than one year).

In re Kaplan, 49 A.D.3d 107, 850 N.Y.S.2d 19 (1st Dept. 2008) (failure to respond to requests for progress reports, failure to do work on estate matter over a period of nine months, and failure to keep several appointments with a client all are all examples of neglecting a legal matter).

In re Boter, 46 A.D.3d 1, 842 N.Y.S.2d 411 (1st Dept. 2007) (when solo practitioner takes on too much work it is a self-created problem that does not serve to mitigate egregious wrongdoing including failure to pay out settlements to clients, settling claims without client knowledge, and falsifying documents).

In re Roberson, 40 A.D.3d 69, 832 N.Y.S.2d 175 (1st Dept. 2007) (failing to communicate with clients, charging excessive fees, engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation all amount to gross neglect).

In re Law, 39 A.D.3d 90, 830 N.Y.S.2d 527 (1st Dept. 2007) (suspension of six months is appropriate where lawyer admits to neglecting three clients, has previous neglect complaints, and several more neglect complaints were recently filed).

In re Fauci, 28 A.D.3d 192, 811 N.Y.S.2d 38 (1st Dept. 2006) (a lawyer is guilty of neglect when he is aware that a matter has been stricken from the trial calendar, he represents to the client that it is still pending, and the lawyer never moves to restore the case back to the calendar prior to dismissal of the case. It is not of consequence that the lawyer's father, who died during the intervening time period had initially taken the case, and it was then taken over by his son.).

In re Melman, 30 A.D.3d 122, 812 N.Y.S.2d 517 (1st Dept. 2006) (lawyer is guilty of neglect when he fails to respond to inquiries from a client about a settlement and fails to pay that client his share of the settlement proceeds).

In re Virginia R. Iaquinta-Snigur, 30 A.D.3d 67, 813 N.Y.S.2d 170 (2d Dept. 2006) (when lawyer fails to timely investigate, account for, and affect the return of overpayment of funds wired to her account she is guilty of neglect of a legal matter entrusted to her).

In re O'Shea, 25 A.D.3d 203, 804 N.Y.S.2d 307 (1st Dept. 2005) (failing to file personal bankruptcy petitions and then lying to clients constitutes neglect. So too does failing to file an amended deed and failing to take timely action to obtain the return of a client's contract deposit).

In re Anschell, 11 A.D.3d 56, 781 N.Y.S.2d 310 (1st Dept. 2004) (lawyer cited three times for failing to keep his clients reasonably well informed was disbarred. Even though New York at the time did not have such an action, the court determined that such action amounted to a form of neglect and was thus cognizable under New York rules.).

In re Bressler, 3 A.D.3d 71, 770 N.Y.S.2d 303 (1st Dept. 2004) (making false statements about whether a lawyer has in fact filed an action for a client amounts to neglect).

VII.2 Intent

In re Wesseldine, 2010 WL 889556, 6 (Bkrtcy N.D.N.Y. 2010) (Chapter 13 Trustee objected to Debtors' plan for relief because Debtors' attorney, who charges a flat fee for handling Chapter 13 bankruptcy cases, "carved certain services out of the flat fee [arrangement]." Court held that while attorneys need to exercise their best business judgment and chose the most suitable billing method, the attorney failed to abide by the flat fee parameters set by the Court.).

VIII. BIBLIOGRAPHY

Joel Cohen, *The Duty of Zealousness*, N.Y.L.J., June 20, 2005, at 4.

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Hal R. Lieberman, *Small Firms and Solos Are Often Subject to Disciplinary Complaints and Malpractice Claims*, N.Y.L.J., Oct. 28, 2002, at S4.

Andrew Schepard & Theo Liebmann, *The Law Guardian Caseload Crisis*, N.Y.L.J., July 7, 2005, at 3.

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Rule 1.4: Communication

I. TEXT OF RULE 1.4[1]

(a) A lawyer shall:

(1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

II. NYSBA COMMENTARY

[1] Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation.

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1 Rules Editor Andral Bratton, Appellate Division, First Judicial Department. The commentary expresses the personal views of Mr. Bratton and does not in any way reflect the official position of the Appellate Division. Mr. Bratton gratefully acknowledges the assistance of Daniel Rosenblum and Ryan Gainor in the research and preparation of this chapter.

Communicating with Client

[2] In instances where these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with the client and secure the client's consent prior to taking action, unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, paragraph (a)(1)(iii) requires that a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously made clear that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. *See* Rule 1.2(a).

[3] Paragraph (a)(2) requires that the lawyer reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases, the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Likewise, for routine matters such as scheduling decisions not materially affecting the interests of the client, the lawyer need not consult in advance, but should keep the client reasonably informed thereafter. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer or a member of the lawyer's staff acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to

describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(j).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. *See* Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to those who the lawyer reasonably believes to be appropriate persons within the organization. *See* Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

III. CROSS-REFERENCES

III.1 Former New York State Code of Professional Responsibility

The Rule has no analogous section in the former Code.

III.2 ABA Model Rules

Rule 1.4

IV. PRACTICE POINTERS

1. Lawyers should return client phone calls within 24 hours. A portion of each day or evening should be set aside specifically to return calls.

2. Lawyers should memorialize the fact that a conversation occurred, either in a hard copy or electronic file or case management/time billing system, regardless of whether the phone call is a billable event or not.
3. Lawyers should respond to written communications and e-mails from clients in writing or with a reply e-mail, specifically addressing the clients' questions or concerns.
4. Lawyers must promptly consult with clients where the client's informed consent is required or where the client must make a specific decision about a matter concerning the case.
5. Lawyers must explain matters to clients in sufficient detail so that a client may reasonably participate in the representation. The facts and circumstances, as well as the capacity of the client, dictate the extent of the explanation required.
6. A lawyer may withhold information from a client when it is in the client's best interest or where required by rules or court orders.
7. Lawyers may not withhold information from clients for their own convenience or for the convenience of others.
8. Lawyers should not underestimate the importance of documenting their communications.

V. ANALYSIS

V.1 Purpose of Rule 1.4

This is an entirely new Rule that emphasizes the importance of regular, informed communication between the attorney and the client. Although, in the past, grievance committees have disciplined attorneys for failing to communicate under former DR 6-101 (A)(3) (now Rule 1.3[b]), failure to communicate is now governed by a separate and distinct Rule.

V.2 Communication: Keeping Clients Reasonably Informed

Perhaps the most common complaint filed by clients with virtually every grievance committee consists of allegations that the practitioner has failed to return phone calls or maintain adequate communication with the client. While these matters normally do not result in discipline (except for repetitive, unreasonable, or grossly negligent circumstances), it is obviously stressful for any attorney to respond to a client's disciplinary complaint, even if the matter is ultimately closed. A lawyer was suspended from practice where he informed a client about a settlement in a personal injury case, but then failed to return any of the client's phone calls and did not respond to numerous letters from opposing counsel pertaining to a release necessary to finalize the settlement. Several other clients had also complained about being unable to reach the lawyer as well.[2]

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2 In re McGinnis, 274 A.D.2d 269, 711 N.Y.S.2d 36 (2d Dept. 2000).

Practitioners are strongly encouraged to return client calls within 24 hours. While lawyers usually cannot drop everything each time the phone rings, they can, however, devote a portion of the day or evening specifically to returning calls. Further, lawyers should memorialize the fact that the conversation occurred, either in a hard copy or electronic file or case management/time and billing system (regardless of whether the phone call is actually billable or not). This practice is particularly pertinent to the "difficult" client who is the most likely to file a complaint against the attorney. Moreover, written and e-mail correspondence from a client should be responded to in writing or with a reply e-mail and specifically address the client's questions or concerns.

V.3 Consultations with Clients

When a client is required to give informed consent or make specific decisions regarding a matter, subsection (a) mandates that the lawyer promptly consult with the client to secure consent. The lawyer should also consult with the client about the means to be employed to accomplish the desired results in the matter. While the facts and circumstances dictate whether consultation is required before or after the lawyer acts, where the lawyer must act immediately, as during the course of a trial, he or she must notify the client of the actions taken on the client's behalf as soon as practical.

V.4 Explaining Matters to Clients

Subsection (b) requires the lawyer to explain a matter to a client in sufficient detail so that the client may reasonably participate in the representation. Again, the facts and circumstances of the situation, including the client's sophistication, will dictate the extent of the explanation. For example, a lawyer should keep a client informed about information and developments material to the client's decisions on matters entrusted to the firm and explain those matters to the extent required for the client to make an informed decision.[3] In any event, the lawyer should reasonably fulfill the client's expectations for information consistent with the lawyer's duty to act in the best interests of the client.[4] Normally the type of information provided by the lawyer will include facts and explanations appropriate for a responsible adult. When the client is a child or suffers from diminished capacity, however, this may be impractical.[5] Where the client is an organization or group, the lawyer does not have to inform the entire group or organization about the progress of a case. Communication with the people whom the lawyer reasonably believes are responsible for the matter is appropriate.

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3 N.Y.C. Bar Op. 1999-4 (1999).

4 *See* NYSBA Comments to Rule 1.4, [5].

5 *Id.* at [6]. For clients with diminished capacity, *see* Rule 1.14, *infra*.

V.5 Withholding Information from Clients

Sometimes a lawyer may withhold information from a client when it is in the best interest of the client, for example not revealing a medical diagnosis that could greatly disturb the client,[6] or when rules or court orders dictate non-disclosure. Lawyers may not, however, withhold information for their own convenience or the convenience of others.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Communication: Keeping Clients Reasonably Informed

N.Y.S. Bar Op. 842 (2010) (since technology is moving so rapidly, lawyer must periodically reaffirm the security measures of an on-line "cloud" data backup system storing confidential client information. If the lawyer learns that the security is insufficient or that confidentiality of the information has been breached, the lawyer must notify any interested clients and discontinue use of the service.).

N.Y.S. Bar Op. 789 (2005) (a law firm may consult one of its lawyers on questions of ethical obligations without creating a conflict of interest between the firm and the client. The firm need not advise the client of this consultation, but may need to inform the client of the conclusion reached depending on circumstances.).

N.Y.S. Bar Op. 734 (2000) (legal services providers such as the Legal Aid Society are bound by the same requirement as private attorneys to inform clients of any mistake, error or omission by the lawyer, whether it is possible to remedy or not. If such an error could give rise to a malpractice claim, the legal service provider may be required to withdraw from the case.).

NYCLA Bar Op. 702 (1994) (when appointed as a guardian ad litem to a defendant who is intentionally avoided the service of process in a mortgage foreclosure action, a lawyer still has a duty to make reasonable efforts to get in touch with his client).

VI.2 Consultations with Clients

N.Y.C. Bar Op. 2009-1 (2009) (the requirement to consult with a client is only a requirement with respect to one's own client. Before sending a direct communication to the client of opposing counsel one is required to have permission from opposing counsel.).

N.Y.C. Bar Op. 2004-01 (2004) (when representing members of a class in a class action lawsuit it is not practical to consult with each member of the class the way a lawyer would an individual client. However, a lawyer is still bound to receive informed consent by communicating with appropriate class representatives before asserting

6 *Id.* at [7].

claims and when conflicts arise. A lawyer must also work in the best interest of the class.).

N.Y.S. Bar Op. 751 (2002) (client cannot agree to a scope of representation that would, under the circumstances, lead to his lawyer neglecting his case).

VI.3 Explaining Matters to Clients

N.Y.C. Bar Op. 2004-01 (2004) (when representing members of a class in a class action lawsuit it is not practical to consult with each member of the class the way a lawyer would an individual client. However, a lawyer is still bound to receive informed consent by communicating with appropriate class representatives before asserting claims and when conflicts arise. A lawyer must also work in the best interest of the class.).

N.Y.C. Bar Op. 1999-4 (1999) (lawyers have a continuing duty to keep clients informed about information and developments material to the client's decisions on matter's entrusted to the firm, such as mergers with other firms. Lawyers should explain matters to the extent required for the client to make an informed decision.).

VI.4 Withholding Information from Clients

N.Y.S. Bar Op. 789 (2005) (a law firm may consult one of its lawyers on questions of ethical obligations without creating a conflict of interest between the firm and the client. The firm need not advise the client of this consultation, but may need to inform the client of the conclusion reached depending on circumstances.).

VII. ANNOTATIONS OF CASES

VII.1 Communication: Keeping Clients Reasonably Informed

In re Green, 72 A.D.3d 142, 143, 893 N.Y.S.2d 773, (4th Dept. 2010) (lawyer violated Rule 1.3(b), neglecting a legal matter entrusted to him; Rule 1.4(a)(4), failing to comply promptly with a client's reasonable requests for information; and Rule 8.4(h), engaging in any other conduct that adversely reflects on his fitness as a lawyer).

In re Giamanco, 68 A.D.3d 9, 886 N.Y.S.2d 194 (2d Dept. 2009) (lawyer who accepted a flat fee to change a partnership into an office condominium intermittently updated client about progress, but then failed to communicate for nearly a year and ultimately never finished the work after nearly four years was suspended. Same lawyer failed to record a deed on a real estate transaction and failed to inform the client he had not done so.).

In re Goldsmith, 61 A.D.3d 132, 874 N.Y.S.2d 28 (1st Dept. 2009) (lawyer censured who ignored a sizeable estate of which he was executor).

In re Abrams, 50 A.D.3d 1449, 855 N.Y.S.2d 768 (3d Dept. 2008) (lawyer reciprocally punished for failure to respond and communicate with a client).

In re Rushin, 37 A.D.3d 64, 826 N.Y.S.2d 413 (2d Dept. 2006) (lawyer accepted employment dispute case but abandoned practice after civil appeal was filed. He failed to file the necessary brief or communicate his new location to his client. Lawyer was disbarred for failure to keep client well informed requirement in a reciprocal discipline case.).

In re Pierini, 21 A.D.3d 42, 797 N.Y.S.2d 65 (1st Dept. 2005) (lawyer failed to communicate with client about a medical malpractice case over the course of approximately six years. Lawyer then told client case had been settled but did not respond to several attempts by the client to learn the status of the settlement.).

In re Anschell, 11 A.D.3d 56, 781 N.Y.S.2d 310 (1st Dept. 2004) (lawyer cited three times for failing to keep his clients reasonably well informed was disbarred. Even though at the time New York did not have such an action, the court determined that such action amounted to a form of neglect and was thus cognizable under New York rules.).

In re Goldman, 7 A.D.3d 18, 777 N.Y.S.2d 89 (1st Dept. 2004) (lawyer immediately suspended for mishandling and misappropriating client funds, and neglect and failure to communicate with a client).

In re Green, 308 A.D.2d 72, 761 N.Y.S.2d 173 (1st Dept. 2003) (lawyer failed to respond to demurer and failed to keep her client informed about the status of his case. With respect to another client, lawyer failed to inform client that the answer in the case had been stricken. Applying the same sanction as the lawyer's home state, New York suspended the lawyer for years.).

In re Anschell, 286 A.D.2d 173, 731 N.Y.S.2d 145 (1st Dept. 2001) (lawyer suspended for failure to inform three clients of problems with their immigration cases, collecting fees on those cases and not returning unearned fees).

In re Saffir, 264 A.D.2d 16, 703 N.Y.S.2d 30 (1st Dept. 2000) (lawyer suspended for failing to file lawsuit prior to expiration of statute of limitations, failing to inform the client about the status of her lawsuit, and failing to inform the client about failing to file the lawsuit).

In re McGinnis, 274 A.D.2d 269, 711 N.Y.S.2d 36 (2d Dept. 2000) (lawyer informed client of settlement in personal injury claim but then failed to return any calls from the client and did not respond to numerous letters from opposing counsel pertaining to a release necessary to finalize the settlement. Several other clients complained about being unable to reach lawyer. Lawyer suspended for two years.).

In re Blumrosen, 253 A.D.2d 239, 687 N.Y.S.2d 357 (1st Dept. 1999) (lawyer sanctioned for failing to comply with client's reasonable request for information about his case).

In re Gould, 253 A.D.2d 233, 686 N.Y.S.2d 759 (1st Dept. 1999) (lawyer censured but not suspended when it was ethical for him to withdraw from three cases, but he failed to communicate this withdrawal with proper diligence to his clients).

In re Blaha, 217 A.D.2d 43, 634 N.Y.S.2d 748 (2d Dept. 1995) (lawyer committed misconduct when he failed to respond to the repeated phone calls and letters of clients).

In re Kakoullis, 196 A.D.2d 85, 608 N.Y.S.2d 437 (1st Dept. 1994) (lawyer suspended when he failed to contact client after being advised to do so by Disciplinary Committee, and failed to return repeated phone calls of other clients).

In re Fanning, 83 A.D.2d 377, 444 N.Y.S.2d 466 (1st Dept. 1981) (lawyer suspended after telling client over the course of five years that a matter was being taken care of, when in actuality it had been dismissed after one year. Client learned of this only after investigating for himself.).

VII.2 Explaining Matters to Clients

Carrion v. Smith, 2010 WL 457326, 1 (2d Cir. 2010) (petitioner filed a petition for habeas corpus relief alleging ineffective assistance of counsel since his defense counsel failed to advise him of his sentencing exposure if convicted at trial or provide any other advice regarding the plea deal, other than stating its terms and that it was a "good offer." The Court of Appeals affirmed the district court's decision to reduce petitioner's sentence to what it would have been if he had taken the plea deal.).

VIII. BIBLIOGRAPHY

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Andrew Schepard & Theo Liebmann, *The Law Guardian Caseload Crisis*, N.Y.L.J., July 7, 2005, at 3.

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Rule 1.5: Fees and Divisions of Fees

I. TEXT OF RULE 1.5 [1]

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

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

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the

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scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

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

(1) a contingent fee for representing a defendant in a criminal matter;

(2) a fee prohibited by law or rule of court;

(3) a fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or

(5) any fee in a domestic relations matter if:

(i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or

(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a statement of client's rights and responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

II. NYSBA COMMENTARY

[1] Paragraph (a) requires that lawyers not charge fees that are excessive or illegal under the circumstances. The factors specified in paragraphs (a) (1) through (a) (8) are not exclusive, nor will each factor be relevant in each instance. The time and labor required for a matter may be affected by the actions of the lawyer's own client or by those of the opposing party and counsel. Paragraph (a) also requires that expenses for which the client will be charged must not be excessive or illegal. A lawyer may seek payment for services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging an amount to which the client has agreed in advance or by charging an amount that reflects the cost incurred by the lawyer, provided in either case that the amount charged is not excessive.

[1A] A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information. Thus, under an hourly billing arrangement, it would be fraudulent to knowingly and intentionally charge a client for more than the actual number of hours spent by the lawyer on the client's matter; similarly, where the client has agreed to pay the lawyer's cost of in-house services, such as for photo-copying or telephone calls, it would be fraudulent knowingly and intentionally to charge a client more than the actual costs incurred. Fraudulent billing requires an element of scienter and does not include inaccurate billing due to an innocent mistake.

[1B] A supervising lawyer who submits a fraudulent bill for fees or expenses to a client based on submissions by a subordinate lawyer has not automatically violated

this Rule. Whether the lawyer is responsible for a violation must be determined by reference to Rule 5.1, 5.2 and 5.3.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Court rules regarding engagement letters require that such an understanding be memorialized in writing in certain cases. *See* 22 N.Y.C.R.R. Part 1215. Even where not required, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the excessiveness standard of paragraph (a). In determining whether a particular contingent fee is excessive, or whether it is excessive to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may regulate the type or amount of the fee that may be charged.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* Rule 1.16(e). A lawyer may charge a minimum fee, if that fee is not excessive, and if the wording of the minimum fee clause of the retainer agreement meets the requirements of paragraph (d) (4). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). A fee paid in property instead of money may, however, be subject to the requirements of Rule 1.8(a), because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made if its terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the

midst of a proceeding or transaction. In matters in litigation, the court's approval for the lawyer's withdrawal may be required. *See* Rule 1.16(d). It is proper, however, to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[5A] The New York Court Rules require every lawyer with an office located in New York to post in that office, in a manner visible to clients of the lawyer, a "Statement of Client's Rights." *See* 22 N.Y.C.R.R. § 1210.1. Paragraph (e) requires a lawyer in a domestic relations matter, as defined in Rule 1.0(g), to provide a prospective client with the "Statement of Client's Rights and Responsibilities," as further set forth in 22 N.Y.C.R.R. § 1400.2, at the initial conference and, in any event, prior to the signing of a written retainer agreement.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained or upon obtaining child custody or visitation. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony, or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not affiliated in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. Paragraph (g) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole in a writing given to the client. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the client's agreement must be confirmed in writing. Contingent fee arrangements must comply with paragraph (c). Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. *See* Rule 5.1. A lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. *See* Rule 1.1.

[8] Paragraph (g) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm. Paragraph (h) recognizes that this Rule does not prohibit payment to a previously associated lawyer pursuant to a separation or retirement agreement.

Disputes over Fees

[9] A lawyer should seek to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. The New York courts have established a procedure for resolution of fee disputes through arbitration and the lawyer must comply with the procedure when it is mandatory. Even when it is voluntary, the lawyer should conscientiously consider submitting to it.

III. CROSS-REFERENCES

III.1 New York's Rules of Professional Conduct

Rules 7.1 (j), (l), (m), (n) and (p) – Advertising Rules Regarding Fees

III.2 Former New York Code of Professional Responsibility

Former New York Code DR 2-106
Former New York Code DR 2-107
Former New York Code Ethical Considerations—2-17, 2-18, 2-19, 2-20, 2-21, 2-22, 2-23
New York's Rules of Professional Conduct—7.1 (j), (l), (m), (n), and (p)
Advertising Rules Regarding Fees

III.3 Court Rules

22 N.Y.C.R.R. Part 1215—Letter of Engagement Court Rule
22 N. Y.C.R.R. Part 137—Fee Arbitration Rule
22 N.Y.C.R.R. § 1210.1(e)—Matrimonial Retainer Rule
22 N.Y.C.R.R. § 603.7—Contingency Fee Court Rule (First Department)
22 N.Y.C.R.R. § 603.7—Office of Court Administration Retainer and Closing Statement Filing Rule

III.4 Judiciary Law

Judiciary Law § 474-a—Fees in medical, dental and podiatric malpractice cases
Judiciary Law § 475—Charging Liens
Judiciary Law § 488—a — Rule regarding expenses in Contingency Cases

III.5 ABA Model Rules

ABA Model Rule 1.5

III.6 Comparison of Former Code to Rule

Rule	Former Code	
1.5(a)	2-106(A)-(B)	Rule 1.5(a) also covers "an expense."
1.5(b)	*None*	Rule references the Written Letter of Engagement rule (22 NYCRR Part 1215), but requires disclosure even if the retention does not require a writing under the court rule.
1.5(c)	2-106(D)	Rule is identical to the DR, but Rule 1.5(c) requires an explanation as to who is ultimately responsible for the expenses in accordance with Judiciary Law § 488-a.
1.5(d)	2-106(C)	Rule is identical to DR, but Rule 1.5(d) adds non-refundable retainer language, in accordance with *Matter of Cooperman*, 83 N.Y.2d 465 (1994) and authorizes minimum fees.
1.5(e)	2-106(F)	Rule is identical to DR.
1.5(f)	2-106(E)	Rule is identical in substance to DR.
1.5(g)	2-107(A)	Rule is similar to DR, but Rule 1.5(g) requires disclosure to the client of the specific share each lawyer will receive and the client's agreement must be confirmed in writing.
1.5(h)	2-107(B)	Rule is identical in substance to DR.

IV. PRACTICE POINTERS

1. A judge has inherent authority over legal fees in cases pending before, or completed by, the judge. An attorney always has the burden to demonstrate that a fee was fully disclosed, bargained for fairly and was fair and reasonable.
2. When entering into a representation with a client the fee arrangement must be in conformity with the Rules of Professional Conduct (RPC), the Rules governing the jurisdiction and any applicable statute. In matrimonial matters a Statement of Client's Rights must be tendered to prospective clients before a Letter of Engagement is executed.
3. Letter of Engagements or Retainer Agreements should specifically state the scope of the representation and what is *not* covered by the engagement.
4. Changing the structure of a fee midstream is frowned upon and could trigger the disclosure requirements necessary to engage in a business transaction with a client under the RPC.
5. Contingency fees are prohibited in criminal cases and for many types of domestic relation matters. In personal and property damage cases contingency fees and expenses are limited by Court Rules. The Court Rules also requires the filing of a retainer and closing statement with the Office of Court Administration, which is separate from a retainer with a client. Filing a false retainer statement with OCA could lead to a disciplinary prosecution.
6. Non-refundable fees are absolutely prohibited, but minimum fees are permitted. A minimum fee allows a lawyer to set a specific fee for a particular task within

a representation and receive the fee if that task is completed even if the representation is not completed.

7. A lawyer may refer a client's case to another unaffiliated lawyer or law firm and divide the fee if: the client's agreement is confirmed in writing after full disclosure (including the share each lawyer will receive); and, the lawyer provides some services or assumes joint responsibility for the representation in writing. The joint/total fee may never be excessive (e.g., more than a third of a contingency fee in a personal injury case).
8. A lawyer whose representation has been terminated may assert a Retaining Lien to retain the client's file until outstanding expenses and, in some instances, fees are paid or secured. The outgoing attorney, if he or she was the attorney of record at some point in the proceeding, will have, by operation of law, a statutory Charging Lien on the former client's recovery. The incoming lawyer must comply with a valid Charging Lien or both civil and disciplinary ramifications may result.

V. ANALYSIS

V.1 Purpose of Rule 1.5

Former DR 2-106 and former DR 2-107 are the primary rules that addressed fee issues in the former Code of Professional Responsibility (Code). First and foremost, the Code prohibited illegal or excessive legal fees. Former DR 2-106(A). It also prohibited contingency fees in criminal cases; set special limitations on fees in domestic relation matters (*Ross v. DeLorenzo*, 28 A.D.3d 631 (2d Dept. 2006)); and, required proper disclosure in contingency cases. Former DR 2-106(C) & (D). Former DR 2-107 addressed the division of fees between unaffiliated lawyers, colloquially known as "referral" or "co-counsel" fees.

Rule 1.5 of the RPC adopted most of the provisions of the two former disciplinary rules with some additions. While full disclosure to clients concerning legal fees has always been deemed important, Rule 1.5 has now codified and expanded upon the requirement that there be full disclosure. Rule 1.5 now specifies that there must be specific and full disclosure as to the scope of the attorney's representation and the basis for the lawyer's legal fee for the representation. Rule 1.5(b). Rule 1.5(b) dovetails with the Letter of Engagement Court Rule ("Letter Rule") adopted a few years earlier, which requires a written Letter of Engagement (or signed retainer agreement) if the retention is expected to be $3,000 or more. 22 N.Y.C.R.R. Part 1215. In fact, Rule 1.5(b) now implicitly references the Letter Rule. It is of particular note that Rule 1.5(b) demands sufficient disclosure even if the Letter Rule is not triggered (e.g., fee does not meet the $3,000 threshold amount).

As part of the approach for fuller disclosure, Rule 1.5(b), for the first time, demands specific disclosure as to who will be ultimately responsible for expenses in a contingency case. This became necessary when lawyers were recently permitted, pursuant to an amendment to Judiciary Law § 488-a, to make expenses contingent upon the recovery

in a contingency case. Presumably, the drafters of the Rule wanted to make sure that clients knew who was ultimately responsible for the expenses now that the lawyer has this discretion.

Another significant change adopted in Rule 1.5 is that it is now necessary to disclose in writing the precise division of the fee when unaffiliated lawyers share a fee. Rule 1.5(g). The specificity the new rule requires goes beyond the Code's former requirement that lawyers simply orally disclose that they will share the fee.

Rule 1.5(d)(4) now codifies the prohibition against non-refundable retainers, but this does not change existing law. Although this prohibition was never a part of the former Code, since 1994 when *Matter of Cooperman*, 83 N.Y.2d 465 (1994) was decided, non-refundable retainers have been unenforceable and unethical. As such, this type of retainer has been the basis for professional discipline ever since *Cooperman*. Presumably the non-refundable language was included in Rule 1.5(d)(4) to codify this long-standing prohibition and as reminder to the Bar. The rule also codifies the right of an attorney to charge a minimum fee. A minimum fee allows a lawyer to set a specific fee for a particular task within a representation and receive the fee if that task is completed even if the representation is not completed.[2]

The purpose of Rule 1.5, as with the new Rules as a whole, is not to create a cause of action or to be deemed as having the "force of law." [3] Generally, the RPC creates professional standards that are to be enforced by disciplinary committees. However, unlike the other RPC rules (other than the conflict rules), Rule 1.5 is commonly cited in civil litigation involving fee disputes between lawyers and clients, at least as a guidepost. Thus, Rule 1.5 plays an important role in all aspects of fee issues and disputes. *See, e.g.*, *Lawrence v. Miller*, 48 A.D.3d 1, 21 (1st Dept. 2007).

Fee disputes have historically been addressed in civil litigation. This is true, in part, because courts have traditionally supervised and regulated the charging of legal fees under its inherent authority and statutory powers to regulate the practice of law.[4] However, there can be little dispute that a former client is at a disadvantage when a former attorney commences a fee action because the client must retain counsel to defend. This is particularly true in disputes over a relatively small amount. At the same time, if litigation is commenced, the courts will carefully scrutinize how the fee agreement was entered into and the burden always remains on the lawyer to prove there was full disclosure to the client. *King v. Fox*, 7 N.Y.3d 181 (2006). Any ambiguity in a fee agreement will be held against the lawyer. *File v. Ostashko*, 60 A.D.3d 643 (2d Dept. 2009).

If a civil suit is brought, the lawyer also has the burden to prove the entire fee is objectively fair and reasonable. This makes legal fees particularly vulnerable because

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2 See Rule 1.5, Comment 4. *See generally*, Brickman & Cunningham, *Nonrefundable Retainers Revisited*, 72 NC Law Rev. 1 (1993).

3 RPC, Preamble [12]; *see* Niesig v. Team I, 76 N.Y.2d 363, 369 (1990) ("[w]hile unquestionably important, and respected by the courts, the code does not have the force of law."; *cf:* Gidatex v. Campaniello Imports, 82 F. Supp.2d 119 (S.D.N.Y. 1999) (violation of the ethics rules does not require exclusion of evidence).

4 First National Bank v. Brower, 42 N.Y.2d 471 (1977); *see also,* Theroux v. Theroux, 145 A.D.2d 625 (2d Dept. 1989).

a court will review the fee after the case is completed and decide whether the fee is out of proportion to the value of the legal services. *King v. Fox, supra* at 134-5 citing *Gair v. Peck*, 6 N.Y.2d 97 (1959). Courts will question a fee with 20-20 hindsight even if the fee agreement was fair at its inception. *In re Friedman* 136 A. D. 750, 751-2 (2d Dept. 1910). In *Ween v. Dow*, 35 A.D.3d 58 (1st Dept. 2006) the court held that as a matter of public policy a court must give particular scrutiny to the reasonableness of a legal fee. The Court stated that the fee must be, "fair, reasonable, and fully known and understood by the client."[5]

While it is true that civil litigation has historically been the forum for fee disputes, for many years disciplinary committees have referred fee dispute complaints to fee arbitration if no serious misconduct is implicated by the complaint. Arbitration has now become the forum of choice for most fee disputes and Part 137 of 22 N.Y.C.R.R. now requires a lawyer to offer a client fee arbitration for any fee dispute over $1,000 and less than $50,000.[6] The adoption of Part 137 is an attempt to level the playing field so clients are not forced into costly litigation, in which legal fees may subsume the attorney fee claim. There are limitations to Part 137 Arbitrations and there is a specific exclusion of legal malpractice claims in those proceedings.

Many law firms now incorporate arbitration clauses in retainer agreements to require arbitration of fee disputes, regardless if it is required by Part 13.This is presumably to expedite such claims and to avoid jury trials, considering a possible a jury of lay people may be sympathetic to a lay person's claim of excessive fees. At least one court has held in a non-Part 137 fee arbitration that if a fee case is arbitrated a subsequent legal malpractice litigation may be precluded if the client was not denied a fair and full opportunity to be heard. *See Altamore v. Friedman*, 193 A.D.2d 240 (2d Dept. 1993).

Most dangerous of all, some clients attempt to use the disciplinary system to extort refunds of legal fees or to avoid paying fees owed. Although disciplinary committees most times will refer fee disputes to fee mediation or arbitration, pursuant to 22 N.Y.C.R.R. Part 137, if there is significant overreaching or fraud the committees will investigate. In short, a legal fee dispute must be handled carefully.

V.2 Letters of Engagement or Retainer Agreements

To minimize the chance of a legal fee dispute blossoming into a larger problem a lawyer should always provide a client with a Letter of Engagement or a Retainer Agreement signed by the client (jointly referred to as Engagement Letter) that fully discloses in plain language: the fee structure; the scope of the representation; and, what the retention does not cover. It is advisable to use an Engagement Letter, even if the fee involved does not fall within the Letter Rule (22 N.Y.C.R.R., Part 1215). This will negate any claim by a client that he or she was unaware, and never apprised of, the fee structure.

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5 *Id.; see also*, Mallin v. Nash, 18 Misc. 3d 890, 895 (Civ. Ct. N.Y. 2008).

6 *Cf.*, Rotker v. Rotker, 195 Misc. 2d 768 (Sup. Ct. West. 2003); Stark v. Molod, Spitz, DeSantis & Stark, 29 A.D.3d 481 (2006).

After the Letter Rule was adopted, the courts were forced to address whether a lawyer may recover a legal fee if a Letter of Engagement was required under Part 1215 and not provided to a client. In *Rubenstein v. Ganea*, 41 A.D.3d 54 (2d Dept. 2007) the Court held that a lawyer is not precluded from recovering a legal fee if a Letter of Engagement was not used, but the lawyer is limited to a recovery in quantum meruit. The court distinguished matrimonial matters in which there was a more compelling basis to deny a fee without a Letter of Engagement.[7]

In the former Code there was no mention of written retainers for cases other than contingency and matrimonial cases, but Rule 1.5(b) specifically mentions the necessity to comply with the applicable statute or court rule for written fee agreements. In other words, the failure to provide a Letter of Engagement, in accordance with a court rule, is a violation of the Rules and this change arguably makes the failure to provide an Engagement Letter a disciplinary matter. *See*, Connors, *Transition to the 'New' New York Rules of Professional Conduct, supra*. It must also not be forgotten that the RPC requires proper disclosure of a fee arrangement even if the fee is not subject to the requirements of the Letter of Engagement court rule. Thus, proper disclosure is necessary in all representations either in writing or orally.

V.3 Excessive Fees

Both the former Code and Rule 1.5(a) prohibits a lawyer from charging an excessive legal fee. Rule 1.5(a). There is no specific definition of "excessive" and this term is necessarily fact-driven. Nonetheless, the rule provides factors for a court to consider when deciding whether a fee is excessive. Rule 1.5(a) includes the following factors:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

These factors are routinely cited by courts in deciding fee disputes. *See, e.g., Lawrence v. Miller*, 48 A.D.3d 1 (1st Dept. 2007); *In re Probate, Will of Corya*, 148 Misc. 2d 723 (Surr. Ct. Suff. Cty. 1990).

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7 *Id*. at 61. s*ee also,* Nicoll & Davis v. Aiinetchi, 52 A.D.3d 412 (1st Dept. 2008). *See generally*, Connors, *Transition to the 'New' New York Rules of Professional Conduct*, N.Y.L.J., May 18, 2009, at 3 col. 1.

Excessive fee issues are sometimes complicated by unusual fee arrangements. For instance, during the "dot.com" era many law firms took stock in new companies in lieu of a legal fee.[8] This was perceived by the client and the law firm as a benefit. Young and potentially lucrative start-up companies were provided legal services that they would not otherwise be able to afford to get the company off the ground. The law firms gambled that if the company did not fail the stock of the young company would rise and their fee would be substantially more than if the firm had charged on an hourly basis. Even with full disclosure, there is certainly a conflict of interest and a potential for overreaching if the fee is disproportionate to the services rendered. Nonetheless, the courts have allowed such arrangements with proper disclosure. In *Goldston v. Bandwith Technology Corp*., 52 A.D.3d 360 (1st Dept. 2008) a court upheld such an arrangement but confirmed that the value of the stock at the time of the litigation was roughly equivalent to the value of the legal service performed. If the value of the stock was completely disproportionate to the legal work performed, the decision suggests the result may have come out differently. Yet, it is questionable whether a different result would be appropriate even if the fee was disproportionate to the work because the law firm is gambling that the company will not fail and a legal fee will be paid. This is not unlike a contingency fee in which a lawyer gambles that a case will result in a recovery ("risk premium") to justify a fee higher than would be charged by an hourly or flat fee.

Changing the structure of a fee midstream has always been problematic. *Naiman v. NYU University Hospital*, 351 F. Supp. 2d 257, 264 (S.D.N.Y. 2005); Roy Simon, *Changing a Fee Agreement in Midstream*, N.Y. Prof. Resp. Rep. (May 2004). Rule 1.5(b) now sanctions such changes with proper notice to the client. However, a good example of a troubling midstream modification of a fee agreement occurred in *Lawrence v. Miller*, 48 A.D.3d 1 (1st Dept. 2007) in which the appellate court remanded the matter to determine, in part, the circumstances surrounding the modification and the competency of the 80 year-old client to understand and consent to the change. This case is discussed below.

V.4 Contingency Fees

When a lawyer agrees to a contingency fee a number of precautions must be taken. In the first instance, it must be remembered that a contingency fee, by nature, creates a conflict with the client. Such fees have historically been permitted to foster the representation of clients who would not, otherwise, be able to afford counsel. However, this justification for a fee was not successful before the Second Circuit when the court held that a contingency fee could be excessive or unconscionable even though the

8 *See* N.Y.C. Bar Op. 2000-3 (N.Y.C. Assn. B. Comm. Prof. Jud. Eth.) (the attorney may have to meet the requirements of the attorney-client business transaction rule, former DR 5-104(A), disclose potential conflicts, advise the client to seek the advice of independent counsel and obtain written consent. Some such transactions may involve a non-waivable conflict and any such fee arrangement may not constitute an excessive fee.).

lawyer argued that the client could not afford to retain counsel for a litigation and the lawyer gambled no fee would be recovered. *King v. Fox*, 418 F.3d 121 (2d Cir. 2005).

All contingency fees must be in writing and such a fee is prohibited in most types of domestic relations matters and all criminal cases. Rule 1.5.5(d)(1) & (d)(5)(i). The percentage for a contingency fee for personal injury and property damage cases must comply with the court rules in each department. *See, e.g.*, 22 N.Y.C.R.R. 603.7 (First Department); 691.20 (Second Department). Lawyers must also comply with the sliding scale fee structure for medical, dental and podiatric malpractice cases as dictated by statute. Judiciary Law § 474-a.

In non-personal injury cases the lawyer is not limited by court rule as to a maximum percentage for a fee. *See, e.g., Lawrence v. Miller*, 48 A.D.3d 1 (1st Dept. 2007). In *Lawrence* the law firm was engaged in a long, arduous, protracted estate litigation with a substantial amount of money at stake. Although typically a percentage for a contingency fee over a third will be heavily scrutinized, the court in *Lawrence* would not find a 40% contingency fee prohibited on its face even though the fee may have been in excess of $40 million. What was interesting in the *Lawrence* case was that court implicitly decided that a total fee does not itself dictate excessiveness. The *Lawrence* court decided that it must look at the totality of the circumstances in deciding whether a fee is excessive or unconscionable. One issue the court determined must be clarified was whether the client was mentally competent to enter into a modified fee agreement that resulted in a substantially increased fee.

Notwithstanding *Lawrence*, the courts have historically struggled with the issue of whether a contingency fee is unconscionable or unfair to the client due to the percentage of the contingency fee. *Gair v. Peck*, 6 N.Y.2d 97 (1959). In evaluating whether a fee is unconscionable the courts have looked at procedural unconscionability (including the formation of the fee agreement and a lack of meaningful choice) and the substantive fee. *Gillman v. Chase*, 73 N.Y.2d 1, 10–11 (1988). *Lawrence* aside, many courts have looked at the size of the fee standing alone and determined that the lawyer took advantage of the client or that the lawyer's conduct was the equivalent of legal fraud. *Gair v. Peck, supra.; cf., King v. Fox, supra*, at 135 (2005). Unconscionabilty may be assessed at the conclusion of the case and the fee's enforcement may be deemed unfair at that time. *520 East 72nd Comm. Corp. v. 520 East 72nd Owners Corp*., 691 F. Supp. 728, 738 (S.D.N.Y. 1988). In *King v. Fox, supra*, a retainer was fairly entered into at the beginning of the attorney client relationship and 22 years later the client sued the attorney. The court permitted the case to proceed on a "continuous representation" theory and evaluated the fee 22 years after the retainer was executed and 17 years after the underlying case was settled. This case reflects the heavy burden the courts place on lawyers to justify a fee in a dispute with a client.

As a bottom line, a determination of whether a fee is excessive is fact-driven and one may argue subjective. This could not be clearer than from the vehement dissent in the *Lawrence* case. Judge Catterson in *Lawrence* was outraged by the potential legal fee and believed it was improper and unethical on its face and the matter did not have to be remanded for further fact finding as ordered by the majority. *Lawrence v. Miller*, 48 A.D.3d at 10. Judge Catterson pointed out that the law firm had received $18 million

on an hourly basis over 22 years and a modification of the fee agreement to a contingency fee netted the firm more than $40 million more. This would have been for only four months work and Judge Catterson believed the fee, pursuant to the modification, could not be justified by the small accomplishment achieved after the modification. The Judge adamantly believed the fee was unconscionable on its face and the Judge was so outraged he suggested that the lawyers seeking the fee should be referred to a disciplinary committee.

V.5 Retaining and Charging Liens

A client always has the right to terminate a lawyer's representation. *Cohen v. Grainger, Tesoriero & Bell*, 81 N.Y.2d 655,658 (1993); *Lai Ling v. Modansky*, 73 N.Y.2d 454, 457 (1989). When an attorney is discharged "without cause" and a new attorney is retained, the client's outgoing attorney has three options to protect his or her fee and monies paid for expenses: a Retaining Lien; a Charging Lien; or, a plenary action. *Teichner v. W & J Holsteins*, 64 N.Y.2d 977, 979 (1985); *Rotker v. Rotker, supra,* at 769.

There is no question that a client's legal file is the property of the client. When a client terminates a lawyer's representation the lawyer must turn over the file to the former client. *Sage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn,* 91 N.Y.2d 30 (1997). Nonetheless, since the time of Lord Mansfield the courts have protected lawyers from clients acting in bad faith and refusing to pay their legal fees by allowing a lawyer to assert a Retaining Lien. *Welsh v. Hale* (1 Doug. 238) cited in *Goodrich v. McDonald*, 67 Sickels 157 N.Y. 1889. In its current manifestation, a Retaining Lien allows the lawyer to hold the client's file/property until all outstanding monies owed the lawyer are paid or secured. A court will require a lawyer to provide a client the file, when monies are owed to the outgoing attorney, only if there are exigent circumstances. See, *e.g., Pileggi v. Pileggi*, 127 A. D.2d 751 (2d Dept. 1987).

Once the outgoing lawyer has received payment for, or secured, all outstanding expenses, the lawyer will typically be obligated to turn over the client's file. Although Retaining Liens are available for lawyers who worked on an hourly basis, these liens are more commonly utilized when an outgoing lawyer in a contingency case seeks reimbursement for expenses paid on behalf of a client in the litigation that will be handled by incoming counsel. In other words, the outgoing lawyer does not want to fund the litigation for which there is a new attorney. Most courts will uphold a Retaining Lien until the expenses are paid or secured. (*Universal Acupuncture Pain Services v. State Farm Mutual Automobile*, 232 F. Supp.2d 127 (S.D.N.Y. 2002).

It is common practice in contingency cases to use a Retaining Lien only to secure the expenses and to allow the payment of any fee owed the outgoing attorney to be reviewed at the end of the case. Reviewing a fee at the end of the case is more efficient because it is easier to gain a perspective on the contribution of incoming and outgoing counsel and, indeed, there may not be a fee if there is no successful conclusion.[9]

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9 Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York, 302 A.D.2d 183, 187 (1st Dept. 2002); *Contra*, Universal Acupuncture Pain Services v. Quadrino & Schwartz,

Typically, after all issues with respect to expenses and the client's file have been worked out, the outgoing lawyer will protect the recovery of their legal fee by the enforcement of a Charging Lien. This type of lien automatically attaches to a recovery or settlement by operation of law if the lawyer appeared as attorney of record in the proceeding. *See* Judiciary Law § 475.[10] The mere fact that the lawyer acted as counsel is not sufficient to trigger a Charging Lien because the lawyer must have been an attorney of record, even if for a short time. *Kent v. Baker*, 31 Misc. 2d 840 (Nass. Cty. Supr. Ct. 1961) Charging Liens are decided by the trial court at a hearing that could be held at the time of the discharge or at the conclusion of the case. *Universal Acupuncture Pain Services v. State Farm Mutual Automobile*, 232 F. Supp.2d at 130 (S.D.N.Y. 2002); *Lai Ling v. Modensky, supra*, at 457. With contingency fees, the Charging Lien hearing will typically be held at the conclusion of the case for the reasons explained above. *Id*.

At a Charging Lien hearing the court will decide what part of the fee, if any, the outgoing attorney should receive. A lawyer who was discharged without cause is entitled to recover compensation for a "fair and reasonable value of the services rendered" whether that is more or less than allowed for in a retainer agreement. *Lai Ling v. Modensky, supra*, at 457. In contingency cases when there is a dispute between a client and the out-going lawyer the basis for the lawyer's fee is quantum meruit. However, when the fee dispute is between incoming and outgoing attorneys, the out-going attorney may elect quantum meruit or a percentage of the fee based upon the proportionate share of the work performed on the whole case. *Warren v. Meyers*, 187 Misc. 2d 668 (Sup. Ct. Nass. Cty. 2001). There is case law with respect to dividing fees in Charging Lien cases when it is based upon a percentage of the fee, but these cases provide only rough guidelines. [11]

In lieu of asserting a Charging Lien the outgoing lawyer always has the option of pursuing a plenary action. The right to bring a plenary action accrues immediately upon an attorney's discharge and can be enforced against all of a client's assets, not only the settlement or recovery in the underlying action. *Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York, supra*, at 189. However, a plenary action is substantially more cumbersome than a fee hearing before the trial judge. In a plenary action there is discovery and all of the "obstacles" that may arise in any litigation while

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370 F.3d 259 (2004). (quantum meruit owed when no recovery even if there was only a contingency fee agreement).

10 Judiciary Law § 475:
From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client' favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

11 *See, e.g.,* Rebello v. City of New York, 135 A.D.2d 473 (work up to filing a Note of Issue—20%); Rouen v. Chrysler Credit Corporation, 169 A.D.2d 656 (initial workup—15%); Fischl v. Carbone, 162 Misc. 2d 343 (work up to the trial—20%).

in a fee hearing it is typically managed expeditiously and with only minimal discovery and without other extraneous process.

All of the remedies described above are available if the lawyer was discharged without cause. However, the lawyer will not be entitled to a fee, a Retaining Lien or a Charging Lien, if the lawyer was validly discharged for cause.[12] A lawyer will also have no right to assert either lien if the lawyer voluntarily withdrew without cause or abandoned the case. *People v. Keeffe*, 50 N.Y.2d 149 (1980); *Gary v. Cohen*, 34 Misc.2d 971 (Sup. Ct. N.Y.C. 1962); *Rotker v. Rotker, supra*, at 770.

V.6 Division of Fees

Lawyers regularly refer matters to other lawyers who are not partners or associates of the lawyer's law firm. There are many reasons for referrals to another lawyer. The most common is the pressures of time and the complexity of a matter. For example, a lawyer may simply be too busy to prepare a case properly for trial at a given moment or, after assuming a representation, may realize that a particular matter calls for the skills of a lawyer more experienced in a particular field of law. Cases are sometimes referred shortly after a lawyer is retained and other times a case is referred solely for trial.

Prior to the new Rules, former DR 2-107[13] permitted and governed the division of fees between unassociated lawyers whether it involved an arrangement colloquially known as a "referral" or entailed a "co-counsel" relationship (collectively "referrals").[14] Under former DR 2-107, if two lawyers were not associated with each other and they wished to divide a legal fee in a client's case (which jointly could not be unreasonable) the rule required disclosure to the client explaining that there would be a division of the fee. However, under the former DR no writing was required. In addition, the fee received was required to be in proportion to the services performed *or* each lawyer had to assume joint responsibility for the representation in a writing given the client.

If the basis of the division was that the referring attorney was going to work on the case, it has been uniformly held that the fee sharing agreement would be upheld as long as "some" work was performed by the referring attorney. As long as the attorney did not refuse to contribute, the courts did not look to the precise work performed. *See Cohen v. Bayger*, 269 A.D.2d 739 (4th Dept. 2000). Although the word "some" was

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12 *See, e.g.,* Yannitelli v. D. Yannitelli & Sons Construction Corp., 247 A.D.2d 271 (1st Dept. 1998); Pessoni v. Rabkin, 220 A.D.2d 732 (2d Dept. 1995); Professional Responsibility Report, Minkoff, *What do you Mean I Don't Get Paid? Fee Forfeiture in New York*. (March 2003).

13 Prior to an amendment to former DR 2-107, if a lawyer referred a matter to another lawyer the referring attorney had to do work on the case *and* take joint responsibility for the case in order for the agreement to be in compliance with the Code and, thereby, enforceable as a matter of law. *See, e.g.*, Oberman v. Reilly, 66 A.D.2d 686 (1st Dept. 1978).

14 "Referrals" have customarily referred to one lawyer referring a case to another unassociated lawyer and the referring lawyers performing no legal services. "Co-counsel" referrals usually involve a referral to another attorney to handle all or most of the work, but the referring attorney would do at least "some" work, if not more, and remain somewhat active in the case.

used by many courts it was not specifically defined. *See, e.g., Grasso v. Kubis*, 198 A.D.2d 811, 812 (4th Dept. 1993); *Witt v. Cohen*, 192 A.D.2d 528 (2d Dept. 1993). It is clear that only a minimal amount of work was necessary to establish "some" work. For example, one court found that some work, "… may be rendered even merely by correspondence." *Carter v. Katz, Shandell, Katz & Erasmous*, 120 Misc. 2d 1009, 1018 (Sup. Ct. N.Y.C. 1983).

However, former DR 2-107 also provided an alternative for an attorney performing "some" work to receive a portion of a fee. The originating lawyer simply had to remain jointly responsible to the client. Former DR 2 -107(A). *See*, NYCLA Bar Op. 715 (1996); *Aiello v. Uriel*, 193 Misc. 2d at 659. Professor Roy Simon explained the rule in relation to its amendment in 1990:

> In 1990, New York significantly revised the Code, including DR 2-107(a). The 1990 Code … reverted to the old ABA Canon 34 formulation allowing a division of fees based *either* on service *or* responsibility. The 1990 Code also kept the other fee sharing conditions from the 1970 New York version of DR 2-107(A). Thus, a lawyer may properly receive a share of the fee simply for referring a matter to another lawyer without doing any of the work, provided (1) the referring lawyer assumes "joint responsibility" for the matter, (2) the client consents after notice, and (3) the two lawyers together charge a reasonable total fee.

Roy Simon, Simon's Code of Professional Responsibility Annotated 338 (2006 Ed.).

The amendment to former DR 2-107 grew out of the common practice of attorneys referring cases and receiving a fee, but doing no work. It brought the rule in line with the custom and practice. By allowing an attorney to receive a fee simply by remaining "jointly responsible" it provided an incentive to a lawyer to refer a case when the lawyer was not competent to handle the matter. Moreover, by obligating the attorney to remain jointly responsible when such referrals were made it forced the referring attorney to refer a case to a responsible attorney because the referring attorney remained "on the hook." What precisely constitutes "joint responsibility" has been the subject of many cases and commentaries. *See, e.g.*, Professional Reasonability Report, Roy Simon, *Joint Responsibility under DR 2-107(A)* (December 2002); Roy Simon, Simon's Code of Professional Responsibility Annotated 435(2008 Ed.); *Aiello v. Adar, supra*, at 463. Comment 7 to Rule 1.5 succinctly describes joint responsibility as financial and ethical responsibility as if the lawyers were partners.

The analysis and authorities cited above presumably will be applicable under Rule 1.5(g) because the rule is identical to former DR 2-107, with two additional requirements. First, the client must consent in *writing* to the fee sharing. Rule 1.5 (2). This is in all fee sharing cases. This is distinct from the requirement that the referring lawyer provide a writing to the client in which the lawyer confirms joint responsibility if that the lawyer does not want to do any work on the case.

The other significant change in the new rule is that the specific share of the fee each lawyer receives must be disclosed. Rule 1.5(g)(2). This specificity as to the precise division is found in the ABA Model Rule, but has no counterpart in New York's prior rule. There may be a number of attorney-attorney relationships in which specific disclosure as to the precise division of the fee may not be required, but the scope of the Rule has not yet been defined.

There have been many times when the attorney who has been referred a case refuses to share the fee with the referring attorney. Needless to say, this has generated a fair amount of litigation. However, the courts have generally enforced fee agreements, with some exceptions. *Benjamin v. Koeppel*, 85 N.Y.2d 549 (1995); *see also Cohen v. Bayger*, 269 A.D.2d at 741; *cf., Graham v. Corona Group Home*, 302 A.D.2d 358, 359 (2d Dept. 2003); New York Jury Instructions (2nd Ed. 2007), Vol.2, § 4:30, p. 766. For instance, a court will not honor an agreement if the lawyers do not comply with former DR 2-107, the referring attorney refused to contribute to the representation or a client was confused or mislead. *Benjamin v. Koeppel, supra, at 556; Samuel v. Sinel*, 12 N.Y.3d 20. 205, 209 (2009). In one instance, the Court of Appeals for the Second Circuit sua sponte denied a referring attorney any fee because the attorney did not work on the case and did not provide the client a joint responsibility writing. The Court also sua sponte gave the referring attorney's share of the fee to the client and not the incoming attorney. *See Rodriguez v. Custodio*, __ F.3d __, 2010 WL 547526 (2d Cir. 2010).

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Letters of Engagement

N.Y.S Bar Op. 816 (2007) (lawyer may ethically accept an advance payment retainer, place such funds in the lawyer's own account, and retain any interest earned. The lawyer may require the client to forward an advance payment retainer to pay for final fees that accrue at the end of the relationship.).

VI.2 Division of Fees

N.Y.S. Bar Op. 841 (2010) (an e-mail sent by a lawyer to other lawyers advising them that he is handling personal injury cases involving certain pharmaceutical products and asking the lawyers to refer cases to him, is neither an advertisement under Rule 1.0(a) nor a solicitation under rule 7.3(b). Such a communication is not subject to the filing requirement of Rule 7.3. The e-mail must still comply with Rule 8.4's requirement concerning honesty, fraud and deceit and Rule 7.4 regarding statements that a lawyer or firm is a "specialist" or "specializes." If fee sharing with the referring attorney is also contemplated, the provisions of Rule 1.5(g) have to be complied with as well.).

N.Y.S Bar Op. 819 (2007) (lawyer may agree with a client to accept less than the judicially determined fee in a domestic relations matter, but agree to reimburse the client for amounts the lawyer later receives from opposing party pursuant to a fee award).

N.Y.S Bar Op. 806 (2007) (New York law firms may participate with foreign law firms in handling New York legal matters, and share legal fees for those matters, when the foreign firm has lawyers of professional education, training, and ethical standards

comparable to those of American lawyers and the firm otherwise complies with former DR 2-107(a)).

NYCLA Bar Op. 733 (2004) (attorney may share an office space with other designated professionals, such as an accountant, provided the attorney does not pay or accept referral fees and there is no fee splitting. Any shared office expenses must be meticulously accounted for.).

N.Y.S Bar Op. 745 (2001) (lawyer who is disqualified from a matter on a non-consentable conflict of interest may not receive a referral fee. A lawyer with a consentable conflict of interest who refers the matter to another attorney may receive a referral fee.).

N.Y.S Bar Op. 739 (2001) (lawyer who represents a low or moderate income individual in a matrimonial action for a reduced fee may include in the retainer agreement a provision contemplating an application to the court for counsel fees from the client's spouse at the lawyer's customary rate).

N.Y.S Bar Op. 733 (2000) (non-lawyers may be compensated based on a profit sharing arrangement but may not be paid a percentage of profits or fees attributable to particular client matters referred by the employee).

NYCLA Bar Op. 715 (1996) (lawyer who refers a matter to another lawyer and receives fees based on acceptance of joint responsibility is obligated to accept vicarious liability for any malpractice occurring during representation, but is not required to supervise the receiving lawyer. An agreement whereby the receiving lawyer agrees to hold harmless and indemnify the referring lawyer for any malpractice is permitted provided it does not limit the client's rights against the referring lawyer.).

VII. ANNOTATIONS OF CASES

VII.1 Letters of Engagement

New York: Matter of Hogan, 56 A.D.3d 887 (3d Dept. 2008) (court disbarred the attorney for failing to either provide a letter of engagement or enter into a retainer agreement when representing clients, among many other more egregious disciplinary violations). Matter of O'Bryan, 55 A.D.3d 254 (4th Dept. 2008) (attorney was suspended for six months for failing to execute written retainer agreements in domestic relations matters, among other more serious disciplinary violations).

Barry Mallin & Assocs. v. Nash Metalware Co., 18 Misc. 3d 890, 849 N.Y.S.2d 752 (N.Y. Civil Ct. 2008) (failure to provide a letter of engagement or written retainer agreement does not defeat recovery in quantum meruit, but the burden is on the lawyer y claiming a fee to prove the value of the services rendered "clearly, and in detail." Assuming arguendo the law firm had alleged a quantum meruit claim, the firm was unable to provide billing records with sufficient precision to entitle them to recovery.).

Rubenstein v. Ganea, 41 A.D. 3d 54 (2d Dept. 2007) (failure to provide a letter of engagement or written retainer agreement does not defeat recovery in quantum meruit against non-matrimonial clients).

Siagha v. David Katz & Assocs., 16 Misc. 3d 1130(A), 847 N.Y.S.2d 905 (N.Y. Sup. Ct. 2007) (execution of a retainer agreement was sufficient to establish a contingency fee arrangement when the representation was passed between firms, and no new retainer agreement was prepared by the second firm).

Ween v. Dow, 35 A.D.3d 58 (1st Dept. 2006) (burden of showing a fee contract is "fair, reasonable and fully known and understood by the client," rests on the shoulders of the attorney).

Castellano v. Ross, 19 A.D.3d 1020 (4th Dept. 2005) (failure to obtain a written retainer agreement in a domestic relations matter precluded recovery for attorneys' fees despite the fact that there was a prior representation).

Federal: Naiman v. New York Univ. Hosp. Center, 351 F. Supp. 2d 257 (S.D.N.Y. 2005) (supplemental contingency fee agreement was rejected because it was not promptly documented and implicated New York's general hostility to midstream efforts to increase a contingency fee percentage).

VII.2 Excessive Fees

New York: Goldston v. Bandwith Technology Corp., 52 A.D.3d 360 (1st Dept. 2008) (validity of a retainer that paid the law firm in stock options was upheld, in part, because the value of the services rendered were roughly equivalent to the value of the stock).
Lawrence v Miller, 48 A.D.3d 1 (1st Dept. 2007) (court found that a 40% contingency fee agreement is not excessive on its face, and that a court would have to look to the circumstances surrounding the agreement and the value of the attorney's services in proportion to the fees charged to determine whether it was excessive).

Matter of Fisher, 44 A.D.3d 127 (2d Dept. 2007) (court suspended the attorney for one year for charging an excessive contingent fee, among other more egregious disciplinary violations. Attorney charged approximately $84,000.00 for less than twenty hours of work.).

Matter of Kroll, 33 A.D.3d 270 (2d Dept. 2006) (attorney was publicly censured attorney for charging excessive fees, among other more serious disciplinary violations. Attorney charged over 75 clients approximately $11,500 for preparing patent applications; this service generally retailed for $700.).

King v. Fox, 7 N.Y.3d 181, 851 N.E.2d 1184 (2006) (burden of showing that contracts are fair, reasonable, and fully known and understood rests on the attorney drafting the retainer agreement and an unconscionable retainer can be ratified under limited circumstances).

520 East 72nd Commercial Corp. v. 520 East 72nd Owners Corp., 691 F. Supp. 728 (S.D.N.Y. 1988) (contingency fee may become unconscionable in its enforcement when "the amount becomes large enough to be out of all proportion to the value of the services rendered").

Federal: King v. Fox, 418 F.3d 121 (2d Cir. 2005) (court found an issue of material fact with respect to the unconscionability of a fee agreement because there may not have been a meeting of the of minds at the time the contract was sought; there were

allegations of deceptive practices by the attorney; and, there was a large contingency fee in relation to the modest amount of work.)

Levisohn, Lerner, Berger & Langsam v. Medical Taping Sys., 20 F. Supp. 2d 645 (S.D.N.Y. 1998) (client was entitled to be recompensed for the payments made to a law firm under a retainer agreement the firm subsequently terminated, minus the quantum meruit value of work the firm had already done).

VII.3 Contingency Fees

New York: Lawrence v. Miller, 48 A.D.3d 1 (1st Dept. 2007) (validity of contingency fee arrangements are judged with reference to the "facts and circumstances surrounding the agreement, including the parties' intent and the value, in hindsight, of the attorney's services in proportion to the fees charged").

King v. Fox, 7 N.Y.3d 181 (2006) (burden of showing that contracts are fair, reasonable, and fully known and understood rests on the attorney drafting the retainer agreement).

Gillman v. Chase Manhattan Bank, 73 N.Y.2d 1 (1988) (for a contingency fee not to be declared unconscionable a lawyer must demonstrate there was no procedural or substantive unconscionability).

Federal: King v. Fox, 418 F.3d 121 (2005) (large contingency fee in relation to a modest amount of work may contribute to a finding of unconscionability).

Universal Acupuncture Pain Services v. Quadrino & Schwartz, 370 F.3d 259 (2d Cir. 2004) (although courts may calculate quantum meruit at the time of discharge a court does not abuse its discretion by postponing that determination until the completion of the underlying case).

Universal. Acupuncture Pain Services v. State Farm Mutual Automobile, 232 F. Supp. 2d 127 (S.D.N.Y. 2002) (terminated firm may not be entitled to quantum meruit until the "conclusion of the [underlying] litigation because the amount of recovery is an element in fixing the amount that will be paid").

520 East 72nd Commercial Corp. v. 520 East 72nd Owners Corp., 691 F. Supp. 728 (S.D.N.Y. 1988) (attorneys operating under a valid contingency fee retainer are entitled to quantum meruit for work done if their services are terminated prior to disposition, provided they keep sufficient contemporaneous records of that work).

VII.4 Retaining and Charging Liens

Levin & Glasser, P.C. v. Kenmore Property, LLC 896 N.Y.S.2d 311, 314 (A.D., 1st Dept. 2010) (law firm entitled to withhold its legal fee that was in dispute from the client's escrow account and must promptly pay funds to client after the final arbitration for the fee dispute was concluded).

Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York, 302 A.D.2d 183 (1st Dept. 2002) (defendant is obligated to honor a charging lien and it may be liable to outgoing counsel if it fails to do so).

Yannitelli v. D. Yannitelli & Sons Construction Corp., 247 A.D.2d 271 (1st Dept. 1998) (attorney forfeited entitlement to fees based on numerous violations of the Code of Professional Responsibility in the case over a period of years).

Pessoni v. Rabkin, 220 A.D.2d 732 (2d Dept. 1995) (attorney forfeited entitlement to fees based on his violation of the Disciplinary Rules during his representation).

Rouen v. Chrysler Credit Corporation et al., 169 A.D.2d 656 (1st Dept. 1991) (discharged attorneys were entitled to 15% of a contingency fee award based on their commencing the action, serving a summons and complaint, filing a bill of particulars, representing the client at depositions, and accumulating various records.)

Fischl v. Carbone, 162 Misc. 2d 343 (N.Y.Sup. Ct. 1994) (discharged attorney was entitled to 20% of a contingency fee award when he prepared the case up until trial, but the incoming attorney tried the case and filed two appeals).

Rebello v. City of New York, 135 A.D.2d 473 (1st Dept. 1987) (discharged attorney was entitled to 20 percent of a contingency fee award based on his filing of the notice of claim, representation at a comptroller's hearing, commencing the action, serving a bill of particulars, and reviewing hearing transcripts in connection with the case.)

VII.5 Division of Fees

In re Stahl, 72 A.D.3d 218, 222, 895 N.Y.S.2d 338, 341 (1st Dept. 2010) (attorney's conduct violated his duties to his fellow attorney by failing to promptly notify a third person of the receipt of funds in which the third person has an interest; and by failing to promptly deliver such funds to the third person").

Samuel v. Druckman, 12 N.Y.3d 205 (2009) (attorney was entitled to one third of a contingency fee award despite the fact that his work did not contribute to the enhanced fee because the language of their fee sharing agreement controls).

Okoli v. Maduegbuna, 62 A.D.3d 477 (1st Dept. 2009) (an oral fee sharing agreement between attorneys indicating that attorneys will split fees as they "had done in the past," was valid and enforceable when there was a previous course of conduct).

Weinstein v. Breitbart, 65 A.D.3d 587 (2d Dept. 2009) (in a fee sharing dispute, whether the attorneys assumed joint responsibility for representation in a writing to the client is an issue of material fact).

Lynn v. Purcell, 40 A.D.3d 729 (2d Dept. 2007) (attorneys assumed joint representation for a matter when a letter sent to the client clearly reflected that they would share equally in the workload and the fees).

Weinstein v. Breitbart, 31 A.D.3d 753 (2d Dept. 2006) (when a client consents to a fee sharing agreement and both attorneys do some share of the work, courts will enforce that agreement without inquiring into the precise worth of the actual services performed by the attorneys).

Lynn v. Purcell, 11 Misc. 3d 400 (Nass. Sup. Ct. 2005) (attorneys assuming joint responsibility for a matter must perform some work with respect to the representation or they will only be entitled to the value of their work in quantum meruit).

Graham v. Corona Group Home, 302 A.D.2d 358 (2d Dept. 2003) (an attorney was entitled to his share of fees pursuant to a fee splitting agreement when he performed 10% of the work on the case even though the agreement will entitle him to one third).

Aiello v. Adar, 193 Misc. 2d 649 (Bx. Sup. Ct. 2002) (when attorneys share a fee in a manner inconsistent with the work done they must assume joint responsibility for the representation. "Joint representation is synonymous with joint and several liability.").

Cohen v. Bayger, 269 AD.2d 739 (4th Dept. 2000) (providing a firm with office support and the assistance of an associate was "some" work sufficient to enforce a fee splitting agreement).

Benjamin v. Koeppel, 85 N.Y.2d 549 (1995) (failure to comply with attorney registration requirement does not preclude an attorney from collecting professional fees).

Gold v. Katz, 193 A.D.2d 566 (1st Dept. 1993) (an attorney "Of Counsel" to a law firm with a fixed link to the firm who regularly participates in the firm's work is an associate of the firm and not subject to a prohibition on fee splitting).

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Rule 1.6: Confidentiality of Information

I. TEXT OF RULE 1.6[1]

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

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(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

II. NYSBA COMMENTARY

Scope of the Professional Duty of Confidentiality

[1] This Rule governs the disclosure of information protected by the professional duty of confidentiality. Such information is described in these Rules as "confidential information" as defined in this Rule. Other rules also deal with confidential information. See Rule 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients; Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client; Rule 1.14(c) for information relating to representation of a client with diminished capacity; Rule 1.18(b) for the lawyer's duties with respect to information provided to the lawyer by a prospective client; Rule 3.3 for the lawyer's duty of candor to a tribunal; and Rule 8.3(c) for information gained by a lawyer or judge while participating in an approved lawyer assistance program.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source. See Rule 1.0(j) for the definition of informed consent. The lawyer's duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer, even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Typically, clients come to lawyers to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon

experience, lawyers know that almost all clients follow the advice given, and the law is thereby upheld.

[3] The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order. The confidentiality duty applies not only to matters communicated in confidence by the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to the representation, whatever its source. The confidentiality duty, for example, prohibits a lawyer from volunteering confidential information to a friend or to any other person except in compliance with the provisions of this Rule, including the Rule's reference to other law that may compel disclosure. *See* Comments [12]-[13]; *see also* Scope.

[4] Paragraph (a) prohibits a lawyer from knowingly revealing confidential information as defined by this Rule. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal confidential information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation with persons not connected to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client.

[4A] Paragraph (a) protects all factual information "gained during or relating to the representation of a client," but not information obtained before a representation begins or after it ends. *See* Rule 1.18, dealing with duties to prospective clients. Information relates to the representation if it has any possible relevance to the representation or is received because of the representation. The accumulation of legal knowledge or legal research that a lawyer acquires through practice ordinarily is not client information protected by this Rule. However, in some circumstances, including where the client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer's research. Information that is generally known in the local community or in the trade, field, or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information that is in the public domain is not protected unless the information is difficult or expensive to discover. For example, a public record is confidential information when it may be obtained only through great effort or by means of a Freedom of Information request or other process.

Use of Information Related to Representation

[4B] The duty of confidentiality also prohibits a lawyer from using confidential information to the advantage of the lawyer or a third person or to the disadvantage of

a client or former client unless the client or former client has given informed consent. See Rule 1.0(j) for the definition of "informed consent." This part of paragraph (a) applies when information is used to benefit either the lawyer or a third person, such as another client, a former client or a business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not (absent the client's informed consent) use that information to buy a nearby parcel that is expected to appreciate in value due to the client's purchase, or to recommend that another client buy the nearby land, even if the lawyer does not reveal any confidential information. The duty also prohibits disadvantageous use of confidential information unless the client gives informed consent, except as permitted or required by these Rules. For example, a lawyer assisting a client in purchasing a parcel of land may not make a competing bid on the same land. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client, even to the disadvantage of the former client, after the client-lawyer relationship has terminated. *See* Rule 1.9(c)(1).

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Implied disclosures are permissible when they (i) advance the best interest of the client and (ii) are either reasonable under the circumstances or customary in the professional community. In addition, lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers. Lawyers are also impliedly authorized to reveal information about a client with diminished capacity when necessary to take protective action to safeguard the client's interests. See Rules 1.14(b) and (c).

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions that prevent substantial harm to important interests, deter wrongdoing by clients, prevent violations of the law, and maintain the impartiality and integrity of judicial proceedings. Paragraph (b) permits, but does not require, a lawyer to disclose information relating to the representation to accomplish these specified purposes.

[6A] The lawyer's exercise of discretion conferred by paragraphs (b)(1) through (b)(3) requires consideration of a wide range of factors and should therefore be given great weight. In exercising such discretion under these paragraphs, the lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure under paragraphs (b)(1), (b)(2) or (b)(3), the lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client. When the lawyer reasonably believes that the client will carry out the threatened harm or crime, the lawyer may disclose confidential information when permitted by paragraphs (b)(1), (b)(2) or (b)(3). A lawyer's permissible disclosure under paragraph (b) does not waive the client's attorney-client privilege; neither the lawyer nor the client may be forced to testify about communications protected by the privilege, unless a tribunal or body with authority to compel testimony makes a determination that the crime-fraud exception to the privilege, or some other exception, has been satisfied by a party to the proceeding. For a lawyer's duties when representing an organizational client engaged in wrongdoing, see Rule 1.13(b).

[6B] Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. Wrongful execution of a person is a life-threatening and imminent harm under paragraph (b)(1) once the person has been convicted and sentenced to death. On the other hand, an event that will cause property damage but is unlikely to cause substantial bodily harm is not a present and substantial risk under paragraph (b)(1); similarly, a statistical likelihood that a mass-distributed product is expected to cause some injuries to unspecified persons over a period of years is not a present and substantial risk under this paragraph.

[6C] Paragraph (b)(2) recognizes that society has important interests in preventing a client's crime. Disclosure of the client's intention is permitted to the extent reasonably

necessary to prevent the crime. In exercising discretion under this paragraph, the lawyer should consider such factors as those stated in Comment [6A].

[6D] Some crimes, such as criminal fraud, may be ongoing in the sense that the client's past material false representations are still deceiving new victims. The law treats such crimes as continuing crimes in which new violations are constantly occurring. The lawyer whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts, because refusal to end a continuing crime is equivalent to an intention to commit a new crime. Disclosure is not permitted under paragraph (b)(2), however, when a person who may have committed a crime employs a new lawyer for investigation or defense. Such a lawyer does not have discretion under paragraph (b)(2) to use or disclose the client's past acts that may have continuing criminal consequences. Disclosure is permitted, however, if the client uses the new lawyer's services to commit a further crime, such as obstruction of justice or perjury.

[6E] Paragraph (b)(3) permits a lawyer to withdraw a legal opinion or to disaffirm a prior representation made to third parties when the lawyer reasonably believes that third persons are still relying on the lawyer's work and the work was based on "materially inaccurate information or is being used to further a crime or fraud." *See* Rule 1.16(b)(1), requiring the lawyer to withdraw when the lawyer knows or reasonably should know that the representation will result in a violation of law. Paragraph (b)(3) permits the lawyer to give only the limited notice that is implicit in withdrawing an opinion or representation, which may have the collateral effect of inferentially revealing confidential information. The lawyer's withdrawal of the tainted opinion or representation allows the lawyer to prevent further harm to third persons and to protect the lawyer's own interest when the client has abused the professional relationship, but paragraph (b)(3) does not permit explicit disclosure of the client's past acts unless such disclosure is permitted under paragraph (b)(2).

[7] [Reserved.]

[8] [Reserved.]

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about compliance with these Rules and other law by the lawyer, another lawyer in the lawyer's firm, or the law firm. In many situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with these Rules, court orders and other law.

[10] Where a claim or charge of any kind alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. Such a claim can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third

person, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone. The lawyer may respond directly to the person who has made an accusation that permits disclosure, provided that the lawyer's response complies with Rule 4.2 and Rule 4.3, and other Rules or applicable law. A lawyer may make the disclosures authorized by paragraph (b)(5) through counsel. The right to respond also applies to accusations of wrongful conduct concerning the lawyer's law firm, employees or associates.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Paragraph (b) does not mandate any disclosures. However, other law may require that a lawyer disclose confidential information. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of confidential information appears to be required by other law, the lawyer must consult with the client to the extent required by Rule 1.4 before making the disclosure, unless such consultation would be prohibited by other law. If the lawyer concludes that other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

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

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified in paragraphs (b)(1) through (b)(6). Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose, particularly when accusations of wrongdoing in the representation of a client have been made by a third party rather than by the client. If the disclosure will be made in connection with an adjudicative proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1)

through (b)(6). A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may, however, be required by other Rules or by other law. See Comments [12]-[13]. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). *E.g.*, Rule 8.3(c)(1). Rule 3.3(c), on the other hand, requires disclosure in some circumstances whether or not disclosure is permitted or prohibited by this Rule.

Withdrawal

[15A] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw pursuant to Rule 1.16(b)(1). Withdrawal may also be required or permitted for other reasons under Rule 1.16. After withdrawal, the lawyer is required to refrain from disclosing or using information protected by Rule 1.6, except as this Rule permits such disclosure. Neither this Rule, nor Rule 1.9(c), nor Rule 1.16(e) prevents the lawyer from giving notice of the fact of withdrawal. For withdrawal or disaffirmance of an opinion or representation, see paragraph (b)(3) and Comment [6E]. Where the client is an organization, the lawyer may be in doubt whether the organization will actually carry out the contemplated conduct. Where necessary to guide conduct in connection with this Rule, the lawyer may, and sometimes must, make inquiry within the organization. *See* Rules 1.13(b) and (c).

Duty to Preserve Confidentiality

[16] Paragraph (c) requires a lawyer to exercise reasonable care to prevent disclosure of information related to the representation by employees, associates and others whose services are utilized in connection with the representation. *See also* Rules 1.1, 5.1 and 5.3. However, a lawyer may reveal the information permitted to be disclosed by this Rule through an employee.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to use a means of communication or security measures not required by this Rule, or may give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.

[18] [Reserved.]

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility:

Former DR 4-101

III.2 ABA Model Rules:

ABA Model Rules of Professional Conduct, Rules 1.6, 1.13, 3.9 & 4.1

III.3 Other Relevant Texts:

N.Y. CPLR § 3101 (work product doctrine)
N.Y. CPLR § 4503 (attorney-client privilege)
N.Y. CPLR § 4548 (application of the attorney-client privilege to electronic communications)
Fed. Rules of Evidence, Rules 501 and 502
Sarbanes-Oxley Act, 15 U.S.C.A. § 7245 (2007)
Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. §§ 205.1–.7

IV. PRACTICE POINTERS

1. You can never be too careful about protecting the attorney-client privilege.
2. Make sure every written communication that you intend to reflect a privileged attorney-client communication prominently states: "PRIVILEGED AND CONFIDENTIAL; ATTORNEY-CLIENT COMMUNICATION."
3. Make sure oral communications that you intend to remain privileged take place only between lawyers (or the lawyer's staff) and the client (or the client's agent). Exclude third parties from the room (including the client's wife, children, or other relatives) to protect the privilege, except in the rare circumstances where the client has physical or linguistic difficulty communicating with the lawyer and the third party's services are needed. Doing this may seem rude or cause resentment, but it is necessary to protect the privilege.
4. Make sure written communications to a client are not routed or otherwise disclosed to non-client third parties. This will break the privilege.
5. If you are going to communicate by e-mail with a client, do so using the client's *private* account. Particularly in New York, attorney communications directed to a client's *business* e-mail account have been held non-privileged.
6. Lawyers who represent corporations and other large business entities often are asked to provide business as well as legal advice. Only the latter is privileged. Many lawyers think it is most protective of the privilege to not separate the legal

from the non-legal advice, either in memos or in formal meetings, hoping that a careless judge scrutinizing it later will lump together everything the lawyer says as "legal" advice. This is a mistake. If a judge finds advice is *primarily* non-legal, she will order disclosure of all of it—including the legal part. The better practice is to separate and protect the legal portion of the advice. In an internal memorandum, for example, the corporate lawyer should put a section clearly marked *legal advice*. In a formal meeting (especially a board meeting), the lawyer should ensure the minutes state clearly the portions of the meeting that are devoted to legal advice, and the room should be cleared of all nonessential personnel while the legal advice is rendered.

7. Remember that just about everything you know about a client can be categorized as "confidential information." Do not disclose to third parties client-related information, even information you consider non-privileged, without first obtaining permission from the client. Also, think long and hard before asking for that permission—especially when it involves potential contacts with the media. If you do ask for that permission, remember you have to get "informed consent" from the client before revealing the information, which requires detailed disclosure about the risks of doing so. The "informed consent" should be in writing if at all possible.
8. If a client instructs you not to disclose certain information he or she provides to you, you should follow that instruction. It is a mistake to substitute your own judgment for the client's in this area.
9. Lawyers must be cautious when talking to third parties about their clients even in highly publicized cases. Not only may the publicly available information about the case be incorrect, but the lawyer talking about that information may also inadvertently cross a line and reveal information that can be classified as confidential, or may simply make statements that harm the client's case. Lawyers should think twice before talking about their client's cases in public—not because the Rules require it, but because common sense often demands it.
10. Even when a client sues you or brings a disciplinary complaint against you, you should limit disclosure of confidential information to what is absolutely necessary to defend yourself, and you should avoid disclosure entirely if at all possible. Some judges and Bar prosecutors get offended by lawyers who are too ready to disclose confidential client information.
11. In any proceeding, be careful about raising defenses that you might have to prove by revealing advice of counsel. This can result in a waiver of the privilege.
12. Always, always, always think long and hard before waiving the attorney-client privilege. You will almost always reveal information you wish you had not.
13. If you do waive the attorney-client privilege, make every effort to obtain the other side's agreement to limit the scope of the waiver to the documents you produce. Otherwise, you risk an argument that you have waived it as to the entire subject matter.
14. When considering revealing confidential information to government regulators, try to limit the scope of the waiver by obtaining an agreement from the regulator that the waiver is limited to the proceeding at hand; that the information disclosed

will not be disclosed to other persons or agencies; and that the information is deemed protected under the applicable Freedom of Information statute.

15. Remember that all the exceptions set forth in N.Y. Rule 1.6(b) to the non-disclosure of client information are *not* mandatory. You should, again, think long and hard before invoking those exceptions. Your client (or anyone else) will rarely question you if you do not reveal confidential information; your client will always second-guess you if you do.
16. You can never be too careful about protecting the attorney-client privilege.

V. ANALYSIS[2]

V.1 Purpose of Rule 1.6

Among the most sacrosanct duties of a lawyer is the obligation to protect confidential client information and to make disclosures only when permitted by law or professional standards.[3] Rule 1.6 is consequently one of the most important provisions in the recently enacted New York Rules of Professional Conduct. Entitled "Confidentiality of Information," Rule 1.6 is the primary professional responsibility standard that governs the protection and release of information gained in the course of the professional relationship.

Like the Rules themselves, Rule 1.6 became effective on April 1, 2009. It replaced and substantially amended DR 4-101 of the former New York Code of Professional Responsibility ("DR 4-101"), which had been in effect for almost 40 years. Former DR 4-101 was the subject of innumerable court decisions and Bar ethics opinions, many of which now conflict (just as former DR 4-101 itself did) with Rule 1.6. Although many of the overarching concepts of the new and old rules are the same, the language and structure of the rules differ in several respects. These textual changes are often quite significant.[4]

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2 Portions of the Commentary are reprinted with slight modification from Mary C. Daly, When Your Client Plans to Commit a Crime, N.Y. Prof. Res. Rep. 1 (Jan. 2001); Mary C. Daly, "Noisy Withdrawal" From a Client's Fraud, N.Y. Prof. Res. Rep. 3 (Aug. 2000); and Ronald C. Minkoff, *A Leak in the Dike,* Ethics in Context 125-55 (PLI 2008 ed.). The authors gratefully acknowledge the publishers' permission to use the selected excerpts. Researchers are urged to consult the annotations at the end of the Commentary. The references in the Commentary and the annotations do not completely overlap, as the Commentary may contain citations that the annotations do not, and vice versa.

3 For a comprehensive overview of the ethical standard of confidentiality and the attorney-client privilege, *see* Restatement of the Law Governing Lawyers §§ 59–86 (Supp. 2000 & 2005) [hereinafter Restatement]; ABA/BNA, Lawyer's Manual on Professional Conduct § 55:101 (2006).

4 The textual analysis will be aided by two articles published in the *New York Professional Responsibility Reporter* by Professor Roy Simon of Hofstra University School of Law, the Vice-Chair and Chief Reporter for the COSAC Committee that principally drafted NY Rule 1.6. *See* Roy Simon, *Interesting Provisions in the New Rules—Part I, Rule 1.0 Through*

Rule 1.6 also differs from its supposed template, Model Rule 1.6 ("MR 1.6"), though the two do have many textual and structural similarities. Among other differences, Rule 1.6's definition of "confidential information" is less sweeping than "client information" used in MR 1.6, and the permissible exceptions to confidentiality are different. These differences will be described below, since they highlight the fact that although New York makes it appear as if it adopted the "Model Rules" regime with respect to confidentiality, that is not really the case.

Many features of the ethical and legal rules concerning attorney-client confidentiality will be discussed, with a few important omissions. For example, this Commentary will not contain a detailed discussion of the application of the evidentiary attorney-client privilege in federal and state court, though the evidentiary privilege is addressed briefly because it is an important component of Rule 1.6.[5] Ethical issues that implicate attorney-client confidentiality will also not be discussed or included in the Case Annotations, but are addressed more specifically in other New York Rules, including conflicts of interest involving current and former clients (Rules 1.7–1.9); clients with diminished capacity (Rule 1.14); information provided by prospective clients (Rule 1.18); candor to the tribunal (Rule 3.3); the "no-contact" rule (Rule 4.2); inadvertent production of confidential information (Rule 4.3); and the mandatory reporting rules (Rule 8.3). Readers are urged to refer to the chapters of this treatise addressing these Rules.

In analyzing Rule 1.6, we will follow the basic structure of the Rule, which is straightforward and uncomplicated. Subsection (a) defines "confidential information" and forbids its use or disclosure unless specifically permitted; subsection (b) identifies the six categories of circumstances in which a lawyer may make disclosure; and subsection (c) requires a lawyer to take reasonable care that the lawyer's employees, associates, and others whose services are utilized by the lawyer observe the strictures of Rule 1.6. Only the last subsection is virtually identical to former DR 4-101; the other subsections contain important differences.[6] We will examine each of these subsections in turn.

Rule 1.6, N.Y. Prof. Resp. Rep. 1 (Apr. 2009) [hereinafter *Simon 4/09*] and Roy Simon, *Some Interesting Provisions in the New Rules—Part II, Rule 1.6(b) Through Rule 1.7*, N.Y. Prof. Resp. Rep. 1 (May 2009) [hereinafter *Simon 5/09*].

5 Numerous treatises address the evidentiary privilege in detail. For its application in federal court, *see* 3 Joseph M. McLaughlin, Weinstein on Federal Evidence §§ 501.02–03, 503 at 503-6-31, 503-1-118 (2d ed. Matthew Bender 2007). For its application in New York state court, *see, e.g.,* Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts (Supp. 2001 & 2004) Michael M. Martin, Daniel J. Capra & Faust F. Rossi, New York Evidence Handbook § 5.2 at 308–34 (2d ed. Aspen 2003); Richard T. Farrell, Prince, Richardson on Evidence (11th ed.), §§ 5-201-214 at 228-45 (Brooklyn Law School 1995).

6 *Compare* Rule 1.6(c) *with* former DR 4-101(D). The variations between the two subsections are minor, and largely result from differences in defined terms.

V.2 Subsection (a): The Definition of "Confidential Information"

[a] In General Subsection (a) creates a new concept in New York professional responsibility jurisprudence: "confidential information."[7] This concept can be broken down into four component parts: (1) Information "gained during or relating to the representation of a client" that is either (2) covered by the evidentiary attorney-client privilege or (3) the disclosure of which may be embarrassing or detrimental to the client, both of which are (4) subject to certain exceptions, some contained in the definition (Rule 1.6(a)) and others listed separately (Rule 1.6(b)). As shown below, the definition of confidential information retains, at least conceptually, the essential (and unique) distinction that existed in former DR 4-101 between "confidences" and "secrets"—a distinction professional responsibility lawyers in other jurisdictions find underinclusive and outmoded, but one with which New York lawyers have become quite comfortable. Nevertheless, this distinction is ignored too frequently in memoranda of law and judicial opinions and everyday conversations among lawyers and judges as well as by the media and the public. It is unfortunate that the terms "attorney-client privilege" and "attorney-client confidentiality" are applied interchangeably in a wide range of settings, both in court and out of court, to describe a lawyer's overarching duty of confidentiality. In fact, there is a very important distinction between the relatively narrow evidentiary privilege (applied only in court) and the far broader ethical and common law prohibition (applied most everywhere else).[8] A lawyer ignoring this distinction and treating the two concepts as interchangeable acts at his or her own ethical peril.

[b] "Information Gained During or Relating to the Representation" The first component of "confidential information" is that it includes "information gained during or relating to the professional relationship, whatever its source." We will analyze this important phrase by breaking it into its component parts.

The Rules do not define "information." For purposes of the ethics rules, "information" is generally understood as referring to factual data. For example, a lawyer who learns the details of a business client's revenue stream, production schedules, or manufacturing methods may not disclose or use those details unless specifically permitted by the Rules. On the other hand, information learned by a plaintiff's lawyer about "the business or operations of [a] defendant corporation that is public information or that

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7 As explained below, the client information protected by the New York Code was limited to "confidences" and "secrets"—both defined terms under former DR 4-101(A). "Confidential information" is a new, broader term. "Confidences" included information protected by the evidentiary attorney-client privilege, and "secrets" were defined as information that is likely to be embarrassing or detrimental to the client if disclosed, or that the client has requested be held inviolate. *See* former DR 4-101(A).

8 *See* NYSBA Commentary to Rule 1.6, Comm. 3 ("The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. *The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times*. . . . ") (emphasis added).

can be learned in future representations without relying on confidences or secrets of a current client" is presumptively not protected. N.Y.S. Bar Op. 730 (2000).[9] This distinction will be explored in greater detail below when we address the exceptions to the definition of "confidential information" found in NY Rule 1.6(a).

There are three important concepts bound up in the phrase "gained during or relating to the professional relationship."

First, by focusing on information obtained "during" the relationship, the Rule excludes "information obtained before a representation begins or after it ends."[10] The former (information obtained before a client relationship begins) is addressed by the new "prospective client" rule, Rule 1.18,[11] while the latter is not addressed in the Rules at all (meaning that no prohibition exists on its use). Nevertheless, a lawyer learning information about a former client must proceed with caution. If the information was learned after the client-lawyer relationship ended and the information came from the former client, the lawyer should be certain (and have evidence) that the client understood that the relationship no longer existed before the lawyer discloses the information.

Second, in contrast to former DR 4-101, which was limited to information "gained in" the professional relationship, Rule 1.6 expands the definition to include information "relating to" the representation—the very same phrasing used in MR 1.6. See MR 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client…"). This broader phrasing covers "disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to discovery of such information by a third person" (e.g., telling a story about a well-known case at a cocktail party, or using a hypothetical to describe a situation to a colleague while ostensibly disguising the client's identity), as well as information stemming from a representation that could be used for the profit of the lawyer or a third person (e.g., the favorable impact to surrounding property values of a proposed real estate deal by a client). See NYSBA Commentary to Rule 1.6, Comm. [4].

Third, the concept of "during the professional relationship" is primarily durational, not substantive. Thus, if a client who hires a lawyer to handle a personal injury case tells the lawyer in confidence about the client's intent to make a tender offer to a public company, the lawyer may not go out and buy stock in the company. Putting federal "insider trading" prohibitions aside, the concept of "professional relationship" is broad

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9 Accord NYCLA Bar Op. 717 (1996). See also N.Y.S. Bar Op. 723 (1999). As shown below, the conclusions reached in these ethical opinions are codified in Rule 1.6(a), which presumptively excludes certain categories of information from the definition of "confidential information". *See* Roy Simon, *NYSBA Proposed Rules of Professional Conduct—Part IV*, N.Y. Prof. Resp. Reptr. 1 (Apr. 2008), at 1 (discussing COSAC draft of Rule 1.6). For additional analysis, *see* Restatement, supra note 3, § 60 cmt. b.

10 NYSBA Commentary to Rule 1.6, Comm. [4A].

11 Rule 1.18 takes a more nuanced approach to the confidentiality of communications from prospective clients than existing New York bar committee opinions such as Nassau County Bar Op. 98-9 (1999) (lawyer who learns information that would be helpful to a current client in the course of an initial consultation regarding the lawyer's possible retention by a different client on an unrelated matter may not reveal the information to the current client). See the chapter on NY Rule 1.18 for a more detailed explanation.

enough to cover all nonpublic information learned when representing the client, regardless of whether it is related to the subject matter of the representation. As will soon be shown, this contrasts with the evidentiary attorney-client privilege, which is generally limited to communications made for the purpose of obtaining legal advice.[12]

The additional phrase "whatever its source" emphasizes the breadth of the concept of "confidential information." Thus, again, the restriction of Rule 1.6 is not limited to communications from or to the client—another contrast with the evidentiary privilege.[13] All the information learned about the client during the representation, whether from witnesses, documents, court conferences, or mediators, must remain inviolate, subject to the various exceptions set forth in the Rule.

[c] Information "Protected by the Attorney-Client Privilege" As already noted, it is beyond the scope of this Commentary to discuss the evidentiary attorney-client privilege in any detail. Readers seeking guidance in this area should examine the *Restatement*,[14] treatises on the law of evidence,[15] entries in secondary sources such as *New York Jurisprudence,*[16] *and, of course, applicable case law. Articles in the New York Law Journal* and the *New York State Bar Association Journal* are often helpful.[17] Although the opinions of bar association ethics committees will refer to the evidentiary privilege in passing, they commonly decline to discuss its application on the ground that its interpretation is a matter of law and therefore outside the committee's purview.

Nevertheless, the attorney-client privilege cannot be skipped entirely, because it is specifically included in the definition of "confidential information," just as it was defined as a "confidence" covered by former DR 4-101. The precise definition of the privilege takes different forms in the treatises and case law. One traditional definition, used in *U.S. v. Kovel,* 296 F.2d 918, 921 (2d Cir. 1961) and cited in several later Second Circuit cases,[18] states that the privilege attaches:

> (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself and the legal advisor, (8) except the protections be waived."

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12 *See, e.g.,* U.S. v. Kovel*,* 296 F.2d 918, 921 (2d Cir. 1961) (limiting evidentiary privilege to "communications relating to that purpose" for which client consulted lawyer).

13 *See id.* at 921 (limiting evidentiary privilege to communications "by the client").

14 See generally RESTATEMENT, supra note 3, §§ 68–86.

15 *See surpra* note 5 for a list of treatises.

16 E.g., N.Y. JURISPRUDENCE 2D, Attorneys at Law, §§ 151–55 (Supp. 1997 & 2004).

17 See e.g., Claudia Hinrichsen, Meeting Ethical Obligations When Representing Healthcare Clients, N.Y.L.J. 1 (Jan. 25, 1999) infra note 17.

18 *See, e.g., In re* Grand Jury Subpoena Duces Tecum Dated September 15, 1983*,* 731 F.2d 1032, 1036 (2d Cir. 1984); U.S. v. Bein*,* 728 F.2d 107, 112 (2d Cir. 1984).

In any event, whatever definition is used, the substantive content of the evidentiary attorney-client privilege is generally similar at the federal and state levels.[19]

The rules governing application of the evidentiary attorney-client privilege differ in New York state and federal court. In state court, CPLR § 4503(a) governs; it codifies the New York state formulation of the privilege.[20] CPLR § 4548 specifically extends the privilege to electronic communications.[21] Meanwhile, in federal lawsuits, the privilege is governed by Rule 501 of the Federal Rules of Evidence, which provides in relevant part:

> [T]he privilege of a witness … shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision the privileges of a witness … shall be determined in accordance with State law.

Thus, in all criminal cases and most civil actions or proceedings, a federal court must look to Rule 501 and apply "the principles of the common law" as interpreted by other federal courts "in light of reason and experience." The federal court will apply the state attorney-client privilege only with respect to an element of a claim or defense as to which state law supplies the rule of decision.[22] Civil actions and proceedings involving diversity and supplemental jurisdiction are the two most common instances in which the federal courts will be called upon to apply either section 4503 or 4548 of the CPLR.

Finally, the newly added Federal Rule of Evidence 502 ("Rule 502") includes dramatic new attorney-client privilege protections for litigants in federal proceedings, mainly by limiting the scope of any purported privilege waiver. The rule will not be discussed at length here, since it concerns the evidentiary privilege and its application is limited to federal court. Nevertheless, Rule 502 must be mentioned because it addresses some important issues. The first is what is known as *selective privilege waiver*, which involves a situation where a litigant decides to disclose privileged documents to one prospective party (e.g., a federal prosecutor, in hopes that doing so will help with a plea negotiation) but not to another (e.g., a civil plaintiff, who will use the documents to extract a large settlement). While courts around the country have generally frowned on selective waiver, and have required a document released to one party to be released to others, the case law in the area is confusing, and the federal

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19 E.g., Shamis v. Ambassador Factors Corp., 34 F.Supp.2d 879, 892 (S.D.N.Y. 1999).

20 CPLR § 4503 states, in pertinent part, "[u]nless the client waives the privilege, an attorney or his or her employee or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing… ."

21 James M. Wicks & Eric W. Penzer, Is It Safe? New CPLR Section Says E-Mail Communications Retain Evidentiary Privilege But Ethical Obligation to Keep Client Secrets May Require Safeguards 3, N.Y.L.J. (Aug. 17, 1998).

22 E.g., Riddle Sports Inc. v. Brooks, 158 F.R.D. 555 (S.D.N.Y. 1994).

circuits are split.[23] Rule 502(a) states that an attorney-client privilege waiver resulting from disclosure of a document or other communication in a federal proceeding or to a federal agency extends to other, undisclosed attorney client communications only if: (1) the waiver was intentional, (2) the disclosed and undisclosed communications or information involve the same subject matter, and (3) "they ought in fairness to be considered together." This last is critical, because it limits a finding of waiver to situations where it would literally be unfair (such as giving the disclosing party a litigation advantage) to allow one document to be disclosed and others not to be. Rule 502(c) extends this limitation to disclosures of attorney-client privileged information made in state proceedings that are claimed as waivers in federal proceedings, while Rule 502(d) makes clear that a ruling in one federal proceeding that a particular disclosure is not a waiver applies in any other proceeding about the same disclosure, whether in federal or state court.[24]

Rule 502(b) addresses inadvertent disclosure of attorney-client privileged communications, a subject dealt with in detail in the chapter in this treatise covering Rule 4.4(b).

[d] Other "Confidential Information" (Former "Secrets") The definition of "Confidential Information" in Rule 1.6(a) includes not just information covered by the evidentiary attorney-client privilege, but also "other information gained during, or relating to the representation of a client, whatever its source, that is… likely to be embarrassing or detrimental to the client if disclosed or… that the client has requested be kept confidential." As already noted, the fundamental distinction between this type of "confidential information," which was labeled a "secret" under former DR 4-101(A), and information covered by the attorney-client privilege, is that the latter concerns information called for or disclosed only in a formal proceeding (i.e., when the lawyer or his or her client is called upon to testify in a judicial, legislative, or administrative forum), while the former concerns the disclosure of information in all other contexts, from cocktail parties to articles to business meetings. Thus, the *ethical* rule of attorney-client confidentiality is far broader than the *evidentiary* attorney-client privilege.

In most representations, it should not be too difficult for the lawyer to identify information that "the client has requested be held inviolate." The application of

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23 The leading case on the subject in the Second Circuit is *In re* Steinhardt*,* 9 F.3d 230 (2d Cir. 1993). There, the court required a company to disclose to a civil plaintiff a memorandum it had disclosed to the SEC, but limited the scope of the waiver to the memorandum itself (rather than to other documents of the same subject matter), and made clear that the result might be different if the SEC and the company had a common interest or had entered into a confidentiality agreement. For more on this subject, *see* Minkoff, *supra* note 2.

24 Rule 502(d) will prevent the type of inconsistency between court rulings that occurred in the various *McKesson HBOC* cases between 2002 and 2005, where state and federal courts in different parts of the country ruled differently on both whether the same disclosure constituted an attorney-client privilege waiver and what the scope of the waiver was… *See* Minkoff, *supra* note 2, at 27.

this provision turns on the client's request to the lawyer.[25] Intimate family or personal matters, past criminal behavior or brushes with the law, current or previous financial difficulties, and physical and mental disorders are the most obvious subject matter areas about which a client may request nondisclosure. It is plain common sense that the lawyer should consult with the client before disclosing this type of information—and should heed the client's direction as to whether disclosure should be made.

In some instances, however, a lawyer may not be able to respect the client's request that information be held inviolate. For example, a statute may require all persons who become aware of past or present mistreatment or abuse of a child to report it to the appropriate authorities.[26] Determining the appropriate response to such a statute is a highly complicated undertaking, and a lawyer faced with such a dilemma should consider seeking the advice of an ethics expert or the ethics committee of a bar association.[27]

Information, "the disclosure of which would be embarrassing," is likely to fall into the same set of categories as those described above. Moreover, a lawyer should be sensitive to a client's professional, religious, ethnic, and personal identity. Information that one client might not consider the least embarrassing another client might consider quite embarrassing. A lawyer should not abrogate to himself or herself the determination of what is embarrassing and what is not. Consultation with the client with respect to such matters is, again, crucial.

Information, "the disclosure of which… would likely be detrimental to the client," cuts a broad swath. At a minimum, this category includes information inconsistent with the merits of a party's claim, entitlement to damages, or defenses.[28] It also includes matters that might harm the client's family or business interests. Conclusions about which sorts of information fall within this category require careful attention to the specific facts of the representation and can only be made on a case-by-case basis.

[e] Definitional Exceptions to "Confidential Information" Although largely adopting the "confidences" and "secrets" concepts, if not the wording, of former DR 4-101, Rule 1.6(a) departs from the old Code by "expressly excluding two categories" from the definition of "confidential information:" "(i) a lawyer's legal knowledge or legal research; and (ii) information that is generally known in the local community or in the

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25 See RESTATEMENT, supra note 3, § 60 cmt. c(ii).

26 See, e.g., N.Y.C. Bar Op. 1997-2 (1997) (analyzing the obligations of a lawyer employed by a social services agency to protect the confidences and secrets of a client who is a minor, if the protected information relates to the mistreatment or abuse of the client); Andrew Schepard, Child Abuse and Custody—Part II: A Lawyer's Obligation, N.Y.L.J. (May 13, 1999) (same); Randye Retkin et al, Attorneys and Social Workers Collaborating in HIV Care, 24 FORDHAM URB. L.J. 533 (1997).

27 See generally, Nassau County Op. 93-39 (1993) (lawyer who discovers that a client may have engaged in unlawful activities in connection with a real estate closing in which the lawyer represented the client should consult specially retained counsel for advice).

28 See generally RESTATEMENT, supra note 32, § 60 cmt. c(i).

trade, field or profession to which the information relates."[29] These exceptions, which "reflect both custom and reality,"[30] were intended to help answer two questions lawyers often ask in seeking to comply with the confidentiality rules.[31]

The first concerns whether a lawyer who conducts research or otherwise gains legal knowledge in one representation can share the fruits of that knowledge in a later representation. NYSBA Comment 4A to Rule 1.6 is emphatic: "The accumulation of legal knowledge or legal research that a lawyer acquires through practice is ordinarily not client information protected by this rule." But the use of "ordinarily" in the Comment tips us off that exceptions exist, including an agreement between the client and lawyer in which the client has a proprietary interest in a particular product of the lawyer's research.[32] Nevertheless, given the language and structure of Rule 1.6(a), it is doubtful a simple instruction from a client to a lawyer to maintain the confidentiality of her research on a particular legal problem would, without more, have to be obeyed under the Rule.

The second question addressed by the exception is whether a lawyer must maintain the confidentiality of *publicly available* information that would be embarrassing or detrimental to a client. Typical examples include adverse court decisions, the existence of criminal records, and romantic trysts reported in tabloids. The breadth of the old "secrets" concept often left lawyers feeling hamstrung by a perceived inability to talk about matters relating to their clients at the same time those matters were being discussed openly by their friends and media reporters. The second exception in Rule 1.6(a) attempts to address this by excluding from the definition of "confidential information" information that is "generally known" in the "local community" or in the relevant "trade, field or profession." But what does "generally known" really mean? The Comment states "information that is in the public domain is not protected," and it is clear lawyers can disclose information found in TV news reports, blogs, tabloid newspapers, and easily accessible public records (e.g., court decisions).[33] But the Comment makes clear that "generally known" does not include publicly available information that is "difficult or expensive to discover" (e.g., that would require a Freedom of Information Law request or similar effort).[34] This phrase was added as a reaction to *Jamaica Public Services Co. v. AIU Insurance Co.,*[35] *in which the New York Court of Appeals held that information about an insurance company's internal corporate structure that could be found in, inter alia,* "filings with state and local regulators" was deemed "generally known" within the meaning of the "former client conflict" rule, former DR 5-108(A) (now Rule 1.9). Rule 1.6(a) and its Comment make clear that the

29 Rule 1.6(a): *see Simon 4/09*, *supra* note 4, at 4.

30 *Id*.

31 The exceptions discussed in this section are exclusions from the definition of "confidential information" itself. They must be distinguished analytically from the exceptions listed in Rule 1.6(b), which are types of "confidential information" that may be disclosed under narrow circumstances, at the lawyer's discretion.

32 NYSBA Commentary to Rule 1.6(a), Comm. [4A].

33 *Id*.

34 *Id*.

35 92 N.Y.2d 631, 684 N.Y.S.2d 459 (1998).

phrase "generally known" may not be construed as broadly under the general confidentiality rule as it is under the former client conflict rule.

In any event, lawyers must be cautious when talking about their clients even in highly publicized cases. Not only may the publicly available information be incorrect, but the lawyer may also inadvertently cross a line and reveal information that can be classified as confidential, or may simply make statements harming the client's case. Lawyers should think twice before talking about their client's cases in public—not because the Rules require it, but because common sense often demands it.

[f] The Prohibitions Against Revealing Confidential Information The text of Rule 1.6(a) not only defines "confidential information," but it also embodies the Rules' strong commitment to the nondisclosure of that information. It prohibits a lawyer from knowingly revealing or using confidential information *for any purpose*—either to help or harm the client, or to benefit the lawyer or a third party—except under three circumstances: (1) when authorized by Rule 1.6(b) (the listed exceptions to confidentiality, which will be referred to as the "Listed Exceptions"); (2) with the client's "informed consent"; and (3) when the disclosure is "impliedly authorized."[36] *See* Rule 1.6(a)(1), (2), and (3). The Listed Exceptions will be discussed in detail in the next section, but the other two items—informed consent and implied authorization—will be discussed here.

"Informed consent" is a defined term in the Rules, and requires the lawyer seeking to obtain it to make extremely detailed disclosures to the client, including both "information adequate for the [client] to make an informed decision" and an "adequate[ ] expl[anation of]. . . the material risks of the proposed course of conduct and reasonably available alternatives." Rule 1.0(j). Although Rule 1.6(a)(1) does not require written consent, the interests of both the client and the lawyer suggest that it is strongly advisable. After all, we are talking about the lawyer being able to breach her duty of confidentiality generally, and in some situations to do so either to help herself (or a third party) or to hurt the client. Under the latter circumstance in particular, the lawyer should insure that the client is not pressured into giving consent and that sufficient time lapses between when the request is made and when the client consents. Written consent allows the client to study the request more closely and to seek the advice of another lawyer more easily. It also assists the defense in any subsequent disciplinary proceeding or civil lawsuit, if the client later denies having given consent or claims that the consent was uninformed.[37]

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36 See generally RESTATEMENT, supra note 3, § 60; ABA/BNA, *supra* note 3, http://www.judiciary.state.nj.us/cle/index.htm § 55:2001–-06.

37 The addition of client consent to the "prohibitions" portion of the Rule represents a drafting change from former DR 4-101, where "client consent" was one of the Listed Exceptions. *See* former DR 4-101(c)(1) ("A lawyer may reveal. . . confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them"). This drafting change flowed from the elimination of the distinction between disclosures that harmed the client (which could not be the product of client consent under former DR 4-101(b)(2)) and those that benefitted the lawyer or a third party (which could be under former DR 4-101(b)(3)).

Rule 1.6(a)(2), the provision on "implied authorization," is more complex. It allows a lawyer to reveal or use confidential information when doing so "is impliedly authorized to advance the best interests of the client *and* is either reasonable under the circumstances *or* customary in the professional community" (emphasis added). This is a wholly new provision, and covers a variety of disclosures not addressed in former DR 4-101, such as statements under exigent circumstances in court, mediations, or other forms of settlement negotiations (i.e., situations where disclosure is necessary to help the client but where obtaining client consent may be impractical).[38] The new Rule closes this gap in the old Code, and has some similarity to Model Rule 1.6(a), which permitted disclosure that was "impliedly authorized to carry out the representation." Nevertheless, it is much more complicated than the Model Rule because it requires disclosure to advance the best interest of the client *and* either is (1) reasonable under the circumstances *or* (2) customary in the professional community. As Professor Simon noted, this new language, which was added by the courts without public comment or input from COSAC, is "both ambiguous and odd."[39] He goes on to explain:

> [The new language] is ambiguous because what is 'customary' is not defined and will vary from one legal field to another, and from one geographic area to another. The language is odd because it means that if implied authority is "customary in the professional community," then it need not be "reasonable under the circumstances." Do we have customs in New York that permit unreasonable disclosures of confidential information? … Unfortunately the courts do not suggest what customs they are talking about, and I am not aware of any."[40]

Professor Simon's analytical concern is certainly understandable. But whatever the provision lacks in logic, it makes up for in practicality. Lawyers called before disciplinary authorities because of an alleged improper disclosure of confidential information need not prove that the disclosure is *both* reasonable *and* customary; they can prove one or the other. Establishing that a particular disclosure is customary in a given practice area or geographical location may be easier than showing it is objectively reasonable, which may require expensive expert proof.

There is another, more logical change in this portion of the Rule. Under former DR 4-101(b), the prohibitions on using protected information were not strictly parallel. Subdivision 2 unqualifiedly barred a lawyer from using a confidence or secret *to the disadvantage of a client*. In contrast, subdivision 3 barred a lawyer from using a confidence or secret *for the advantage of the lawyer or of third person* "unless the client consents after full disclosure." The thought at the time was that the strict prohibition in Subdivision 2 was needed because any disclosure that harmed a client

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38 The Comment uses as examples a lawyer admitting a fact that cannot be disputed, "making a disclosure that facilitates a satisfactory conclusion to a matter," disclosing information about a client to other members of the lawyer's firm, or revealing information about a client with diminished capacity. NYSBA Commentary to Rule 1.6, Comm. [5], citing Rule 1.14(b) and (c).

39 *Simon 5/09*, *supra* note 4, at 1.

40 *Id*.

could not be the subject of informed client consent, and thus any effort to obtain that consent should be prohibited.

By contrast, Rule 1.6(a) treats disclosure of confidential information for the disadvantage of the client and for the benefit of the lawyer or a third person exactly the same way. Thus, under both circumstances, informed consent or implied authorization will support disclosure. This not only creates conformity with MR 1.6, but it also recognizes that the strict prohibition on waivers that harm the client is illogical and unrealistic. For example, allowing a lawyer to use confidential information to defend herself against a claim by the client—permitted at common law as an "implied waiver" of the privilege—is a Listed Exception that would harm the client. Even explicit waivers that ultimately may harm the client in some way are routine; for example, in situations where a client gives "informed consent" to a conflict waiver, the lawyer may end up using the client's confidences to the client's disadvantage. This recognition led to the elimination in Rule 1.6(a) of the strict prohibition in former DR 4-101(B).

V.3 Subsection B: The Listed Exceptions

[a] In General Unlike the professional standards in some states,[41] the Rules do not mandate disclosure of a client's confidential information. Under the Code, disclosure is permissive regardless of the harm that may ensue from the nondisclosure. Accordingly, because so much in this area is left to the lawyer's discretion, no disciplinary action generally may be taken against a lawyer for nondisclosure,[42] nor may nondisclosure serve as a basis for civil liability.[43]

Rule 1.6(b) contains the Listed Exceptions, which identify the only circumstances in which disclosure of confidential information is permitted. The Listed Exceptions in Rule 1.6(b) differ from those contained in former DR 4-101(C). In some cases, the differences are linguistic; in others, the Rules add exceptions to fill gaps left in the

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41 For example, Rule 1.6 of the New Jersey Rules of Professional Conduct provides in pertinent part:

(b) A lawyer shall reveal… information [relating to the representation of a client] to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

42 The "Scope" provision of the Rules states that "[n]o disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of [the] discretion [permitted by the Rules]."

43 Again, the "Scope" provision of the Rules is instructive. It states: "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." The Preamble to the former Code included a similar statement. See also RESTATEMENT, supra note 3, § 67(4).

old Code. Nevertheless, the Listed Exceptions in Rule 1.6(b) do not go as far in permitting disclosure as those in MR 1.6(b), particularly in the area of client fraud.[44]

[b] Reasonably Certain Death or Substantial Bodily Harm Rule 1.6(b)(1) adds a new and very important provision to the confidentiality rules. It permits a lawyer to disclose confidential information "to prevent reasonably certain death or substantial bodily harm." This helps repair the gap in the Code first exposed more than thirty years ago by N.Y. State Bar Op. 478 (1976), which struggled to find a rationale that would permit a lawyer to disclose a client's intention to commit suicide, and again later by the infamous law school hypothetical about whether a lawyer may disclose confidential information learned from a client that another person is about to be wrongfully executed for a crime the client had committed. The new exception is consistent with the view expressed in the *Restatement*,[45] and is verbatim the same as MR 1.6(b)(1).

While recognizing "the overriding value of life and physical integrity," Rule 1.6(b)(1) is limited in three important ways. NYSBA Commentary to Rule 1.6, Comm. [6B].

First, Rule 1.6(b)(1) permits disclosure only to prevent "*reasonably certain"* death or substantial bodily harm. (Emphasis added.). Comment 6B defines such harm as "reasonably certain to occur if it will be suffered imminently or if there is a present and substantial risk that persons will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat." Courts and Bar opinions in Model Rule jurisdictions have often cited situations involving imminent threats of serious physical violence as falling under this exception.[46] More difficult is the oft-cited situation of a lawyer aware that a plant owned by his corporate client is dumping toxic waste into the local water supply. Comment 6B addresses this in cautious terms:

> [A] lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and *the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims* (emphasis added.)

This "present and substantial risk" test, also found in the Comments to MR 1.6, prohibits lawyers from revealing that a corporate client was releasing pollutants likely to increase cancer risk for those drinking the town water over the next decade, as long as that increased risk is not considered "present and substantial."[47] This limitation may

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44 This is discussed in greater detail in connection with Rule 1.6(b)(3).

45 *See* RESTATEMENT, *supra* note 3, § 66 (permitting disclosure if necessary to prevent reasonably certain death or serious bodily harm).

46 *See, e.g.*, McClure v. Thompson*,* 323 F.3d 1233 (9th Cir. 2003) (criminal defense lawyer acted properly in disclosing location of two bodies of people allegedly murdered by client, when lawyer understood victims were still alive at the time and disclosure was necessary to prevent their death or substantial bodily harm); R.I. Ethics Op. 98-12 (1998) (lawyer threatened by client with physical harm may reveal threat to authorities).

47 Comment 6B makes this explicit, albeit in a slightly different context: "[A] statistical likelihood that a mass-distributed product is expected to cause some injuries to unspecified persons over a period of years is not a present and substantial risk under this paragraph." This statement is not found in the Comment to MR 1.6(b)(1).

be comforting to lawyers for corporate polluters, but the general public should not find it so.

Second, as the italicized language above indicates, disclosure is permitted only if "reasonably necessary" to prevent the harm. The lawyer may disclose only if the lawyer knows or is reasonably certain that no one else knows about or is likely to disclose the potential risk, or otherwise take steps to prevent the harm from occurring.

Third, disclosure remains subject to the lawyer's exercise of discretion, as it does for the other Listed Exceptions. For the Rule 1.6(b)(1) exception, as well as those under (b)(2) and (b)(3) discussed below, Comment 6A lists several factors that should inform the exercise of the lawyer's discretion:

> (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury; (iv) the extent to which the client may be using the lawyer's services to bring about the harm or crime; (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action; and (vi) any other aggravating or extenuating circumstances."

The Comment goes on to emphasize the lawyer's duty, upon learning of the client's intentions, to remonstrate with the client to prevent the harm from occurring. This, obviously, should occur before any disclosure.

Putting politics aside, the list of discretionary factors and the importance given to the duty to remonstrate shows the care lawyers are expected to exercise in determining whether to disclose confidential information, even in situations as fraught with risk as those involving anticipated acts of violence or other criminal activity.

[c] Preventing a Client from Committing a Crime Rule (b)(3), which allows disclosure to "prevent the client from committing a crime," is generally referred to as the "future crime" exception. It is similar to old DR 4-101(C)(3), which permitted a lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime."[48] Despite the facial simplicity of the subdivision's language, applying it correctly can be especially challenging. All the factors applicable to the lawyer's exercise of discretion under Rule 1.6(b)(1) (described in the preceding section) apply here as well. See NYSBA Commentary to Rule 1.6(b), Comm. [6A]; accord N.Y.S. Bar Op. 562 (1984). So does the need to exercise restraint and good judgment.

The Rules do not define "crime." This has the practical effect of requiring a lawyer entertaining the possibility of disclosure to determine whether the client's intended future conduct is actually a crime under New York state law. In some cases, that determination will not be difficult to make. In others, it may require careful research. For example, the proposed conduct of a client that a lawyer finds highly alarming may rise to the level of civil—but not criminal—wrongdoing. In this circumstance, the lawyer may be able to withdraw from the representation even though disclosure

48 See generally RESTATEMENT, supra note 3, § 67; ABA/BNA, *supra* note 3, § 55:901–22.

is prohibited. See Rule 1.16(c) (standards for withdrawal); cf. N.Y.C. Bar Op. 1994-8 (1994) (a lawyer must withdraw from representing the purchaser of real estate if the purchaser persists in making "under the table" payments).

A lawyer uncertain whether the client's intended future conduct is criminal would be well advised to seek the assistance of a more experienced criminal lawyer. A client whose lawyer has wrongfully disclosed confidential communications about conduct that turns out not to be criminal may easily win a jury's sympathy in a subsequent action for malpractice or breach of a fiduciary duty. Punitive damages are not beyond the pale. Consultation with an experienced criminal lawyer before taking any action puts the lawyer in a positive light and is strong evidence of the lawyer's good faith in making the decision to disclose.

None of this should hide the fact that the exception in Rule 1.6(b)(2) is quite broad—far broader than anything in the Model Rules. It allows the lawyer to reveal such things as a hungry client's intention to steal a $1.00 bag of peanuts from a corner delicatessen, an angry client's intention to punch his neighbor in the eye, or a mischievous client's intention to put graffiti on a New York City subway car. Nevertheless, this exception has been on the books in substantially the same form for years, with no public backlash and little criticism from the organized Bar.

Determining the likelihood that the client will commit the illegal act is also problematic. In the absence of an absolute declaration by the client, the lawyer faces the difficult decision of assessing and predicting the client's future behavior. One Bar Association opinion has explored this issue, concluding that "a lawyer must have a reasonable belief" that a client intends to commit a crime before disclosure can be considered. N.Y.C. Bar Op. 2002-1 (2002). The opinion cautioned against turning "a blind eye to circumstances that would lead a reasonable person to believe that a client intends to commit a crime even though the lawyer does not 'know' that this is the client's intent." Id.

If a lawyer has concluded that a client's intended conduct is criminal and may be revealed without violating the Rules, the lawyer must still act cautiously. This is explicit in both the language of Rule 1.6(b) itself and in Comment 6C, which specifically addresses Rule 1.6(b)(2). The Comment states: "Disclosure of the client's intention is permitted *to the extent reasonably necessary to prevent the crime"* (emphasis added). In the same vein, the Restatement provides that disclosure "should be no more extensive than the lawyer reasonably believes necessary to accomplish the relevant purpose." *Restatement* § 67 cmt. j. This will depend on the circumstances at hand. In some instances, all that might be needed would be a telephone call to the intended victim (e.g., alerting a bank officer that a loan application filed by the client needs to be reexamined). In other instances, more aggressive action and fuller disclosure might be needed (e.g., alerting a judge to a defendant's threat to inflict physical harm on the judge or a district attorney, or to a similar threat directed at a prosecution witness). In an extreme case, the lines between a present, past, and future crime may become blurry, and even calling the police to a crime scene may be appropriate, if the lawyer believes that the victim of the client's criminal conduct may still be alive or the client may commit suicide in response to the gravity of the situation. See generally *People v. Fentress*, 103 Misc. 2d 179, 425 N.Y.S.2d 485 (Co. Ct. Dutchess Co. 1980); N.Y.S.

Bar Op. 486 (1978) (lawyer may reveal a client's expressed intention to commit suicide). A client's admission of past child abuse also raises extremely thorny issues in the light of the psychology literature suggesting that such abuse is rarely an isolated episode and is likely to continue over time. See Andrew Schepard, Child Abuse and Custody—Part II: A Lawyer's Obligation, N.Y.L.J. (May 13, 1999).

Ongoing or "continuing" crimes present an acute interpretative dilemma under Rule 1.6(b)(3). Generally speaking, the Code prohibits the disclosure of a client's past criminal conduct. From a conceptual perspective, the interpretative dilemma springs from the fact that when a lawyer reveals a client's intention to commit a crime in the future, and that crime is also ongoing, the lawyer is inevitably revealing the client's prior unlawful activity.

Opinion 2002-1 of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York was the most coherent attempt by a Bar ethics committee to help lawyers through this ethical minefield.[49] The Opinion was based on the hypothetical predicament of a lawyer whose client was in possession of a stolen car. It reasoned:

> [A]n attorney may not disclose client confidences and secrets relating to a client's completed criminal act even though the effects may be continuing where that criminal act is the very subject on which the client is consulting the attorney and the client's completed conduct has satisfied all elements of the crime, i.e., where the continuing offense is 'factually indistinguishable from a past offense' aside from temporal continuation.

N.Y.C. Bar Op. 2002-1 (2002). Since the client had consulted the lawyer about criminal charges in connection with his theft of the car, the Committee concluded that the crime of possession of stolen property was a "temporal continuation" of the earlier crime and could not be disclosed. The Committee carefully noted, however, that it would reach a "different outcome… for emergencies which involve the prevention of imminent serious bodily injury or death. In these situations… client confidentiality must yield to the lawyer's decision to protect human life." Id.

The Comment to Rule 1.6 addresses the "continuing crime" dilemma, but does not lead to the same conclusion as N.Y.C. Bar Op. 2002-1. After defining "continuing crimes" as those "in which new violations are constantly occurring," Comment 6D goes on to permit disclosure in certain circumstances. These include "the client's refusal to bring an end to a continuing crime," an exception which might swallow

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49 Earlier efforts to resolve the "continuing crime" dilemma met with little success. In Opinion 405, the Committee on Professional Ethics of the New York State Bar Association concluded that former DR 4-101(C)(3) did not allow disclosure of a continuing crime that "is normally incident to" a past crime. N.Y.S. Bar Op. 405 (1975). Applying this interpretation, the Committee later determined that a lawyer who learned of a client's perjury after the client testified but before the client was scheduled to resume testifying the next day could not reveal the perjury. See N.Y.S. Bar Op. 674 (1995). Other bar association opinions, however, described former DR 4-101(C)(3) as applying "when the client… is continuing an ongoing criminal scheme." E.g. N.Y.C. Op. 1994-10 (1994); N.Y.C. Bar Op. 1994-8 (1994); accord NYCLA Bar Op. 712 (1996) ("continuing crime").

whole the ruling in N.Y.C. Bar Op. 2002-1. For example, imagine a client who committed a bank robbery and still holds the proceeds at an undisclosed location. The client's possession of stolen property is a continuing crime, but should the lawyer really have discretion to reveal that crime—or, worse, the underlying bank robbery—if the client refuses to return the proceeds? The answer to this question should be no, as the commission of many past crimes (fraud, theft, immigration violations, etc.) often results in later, continuing crimes. But Comment 6D, however illogically, suggests the answer should be yes.[50]

In sum, from a theoretical perspective, a lawyer who learns that a client is engaging in a continuing crime faces uncertainty when deciding whether to disclose confidential information. As a practical matter, however, it is difficult to imagine either a disciplinary sanction or civil liability being imposed if a lawyer makes an error in judgment and reveals a continuing crime that is "'factually indistinguishable from a past offense' aside from temporal continuation" rather than an authentic future crime. It is equally difficult to imagine a criminal defense lawyer taking the risk of making disclosure unless the situation is so serious that the lawyer felt almost compelled to act.

Finally, Rule 1.6(b)(2) should be examined in relationship to other provisions of the Rules. For example, if a lawyer is licensed in more than one jurisdiction, the lawyer may have to determine which jurisdiction's code of lawyer conduct applies before determining whether the lawyer may rely on the permissive disclosure option in subsection (2). The importance of making the correct decision is self-evident. If the other jurisdiction has adopted MR 1.6, the lawyer may disclose the client's intention *only* if the criminal act is likely to result in imminent death or substantial bodily harm, or would involve a massive fraud. In contrast, if the jurisdiction has adopted a mandatory disclosure rule such as Rule 1.6 of the New Jersey Rules of Professional Conduct, the lawyer has no discretion and must disclose the client's intention to commit a future crime.[51] Rule 8.5 provides guidance to a lawyer who is licensed in more than one jurisdiction and must determine which jurisdiction's rules apply to the lawyer's conduct.[52]

The public policy served by permitting disclosure is the prevention of harm to the specific target of the client's intended future conduct and to the public in general. Other Listed Exceptions serve that same policy. As noted above, subsection (1) allows a lawyer to make disclosure to prevent "reasonably certain death or substantial bodily harm." Subsection (3) permits a noisy withdrawal under limited circumstances involving a client's crime, fraud, or presentment of materially inaccurate information. Subsection (6) permits disclosure "when permitted under Disciplinary Rules or required by law or court order."[53] Subsection (5) authorizes disclosure "to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct."[54]

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50 Another (and more appropriate) circumstance where disclosure is permitted under Comment 6D is where the client uses the lawyer's services to commit a further crime, such as obstruction of justice or perjury.

51 See supra note 41.

52 See discussion of MR 8.4 infra and accompanying text.

53 See supra and accompanying text.

54 See infra and accompanying text.

A lawyer may be able to invoke subsections (1), (3), (5), or (6) if subsection (2) is not available or its application is uncertain. If an individual client's wrongdoing relates to the affairs of an organization that is also a client of the lawyer's, the lawyer may be able to disclose the wrongdoing to the organization's other constituents. See e.g., Rule 1.13; N.Y.C. Bar Op. 1994-10 (1994) (a lawyer for a limited partnership must inform the limited partners of the wrongdoing of the general partner who is also a client, but may not reveal the general partner's conduct to a non-client unless the general partner is planning to commit a crime in the future or is continuing an ongoing criminal scheme).

[d] To Withdraw a False or Inaccurate Opinion or Representation Rule 1.6(b)(3) provides that the lawyer may reveal confidential information to the extent reasonably necessary to "withdraw a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." This is identical to former DR 4-101(C)(5). Disclosure in these circumstances is commonly referred to as a "noisy withdrawal,"[55] though how "noisy" it needs to be requires careful consideration.

To invoke the permissive disclosure option of subsection (3), a lawyer would have to (1) examine any written or oral opinions or representations the lawyer made; (2) determine if a third person was still relying on the opinion or representation; and (3) conclude that the opinion or representation was based on materially inaccurate information from the client or is being used to further the client's crime or fraud.[56] Each one of these inquiries is fact-specific. Moreover, even if a lawyer is satisfied that subsection (3) permits disclosure, the lawyer must still exercise restraint in making the permitted disclosure by looking to the discretionary factors discussed in Comment 6A. Perhaps most importantly, the only option available to the lawyer under subdivision 3 is to withdraw the opinion or representation. The lawyer may not directly disclose the client's wrongdoing unless one of the other Listed Exceptions permits it.[57]

Inquiry (2) is particularly problematic as it may be difficult to gauge reliance by a third party without posing a pointed inquiry. If the third party is no longer relying on the opinion or representation, subsection (3) does not allow disclosure. Nevertheless, the mere making of the inquiry may be enough to alert the third party that something is amiss with the client's conduct. As a practical matter, a lawyer faced with this inquiry should assume that the improper opinion or representation is being relied upon by the third party absent solid proof to the contrary.

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55 See generally RESTATEMENT, supra note 3, § 67; ABA/BNA, *supra* note 3, § 55:901–22.

56 See generally NYCLA Bar Op. 686 (1991).

57 In Professor Simon's words: "Only a bare-bones disclosure is 'reasonably necessary' to withdraw an opinion or representation. . . . Rule 1.6(b)(3) does not expressly authorize a lawyer to disclose the actual facts, or how a lawyer came to know the opinion was "false." *Simon 5/09*, *supra* note 4, at 2.

Inquiry (3) is hampered by use of the present tense in the phrase "or is being used to further a crime or fraud" in subsection (3). This language suggests ongoing activity in contrast to the use of the past tense in an earlier part of the sentence in the phrase "was based on materially inaccurate information."

In some instances, a lawyer may have a solid suspicion, but not solid proof, of the client's wrongful conduct. If the lawyer alerts the third party, but is later shown to have been mistaken, the client is likely to sue the lawyer for malpractice or breach of fiduciary duty. The mere fact of the lawsuit may cause significant reputational damage to the lawyer and her firm. These built-in impediments in subsection (3) may explain why there is so little reported decisional law applying this provision, although there are certainly ethics opinions on point.[58] Still, lawyers must be careful here: a judge will not be happy to find out that a lawyer knew a client's representation to the court was false and did nothing to correct it. The consequences for the lawyer could be extreme.

The application of subsection (3), like that of subsection (2), is further complicated by the growing interstate nature of legal practice and the lack of uniform ethical standards among the states. As already noted, some states have adopted rules of professional conduct that go beyond the Code's permissive grant and mandate disclosure of a client's fraud or criminal activity. This crazy patchwork quilt of ethics rules on confidentiality places a particular burden on a lawyer who is licensed in more that one jurisdiction or who works in a law firm with offices in more than one state. In the 1999 amendments to the Code, former DR 1-105 was added in an effort to assist a multiple-licensed lawyer in resolving interstate choice-of-law dilemmas in the application of different states' rules of professional conduct. In all material respects, Rule 8.5 is identical to the old Code rule.[59]

In short, a lawyer who is licensed in New York and another jurisdiction must exercise special caution in considering how to respond to situations in which the lawyer has unwittingly given an opinion or made a representation based on materially inaccurate information or participated in a client's fraud or criminal activity. A multiple-licensed lawyer's right to make a noisy withdrawal pursuant to subsection (3) may depend upon the threshold application of MR 8.5.

Perhaps the most interesting aspect of subsection (3) is what exceptions the NYSBA and the courts have chosen *not* to add to the new Rules. The Model Rules contain two detailed exceptions—MR 1.6(b)(2)[60] and (b)(3)[61]—that permit lawyers to disclose

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58 *See, e.g.,* N.Y.S. Bar Op. 797 (2006) (identifying the circumstances under which a lawyer must withdraw any misstatements the lawyer made in certifying a client's statements in a probate proceeding); N.Y.S. Bar Op. 781 (2004) (analyzing a matrimonial lawyer's ethical obligations when the lawyer learns that the client has fraudulently submitted a financial statement to the family court that contains material errors).

59 Rule 8.5 is discussed *infra,* in the chapter devoted to that Rule.

60 MR 1.6(b)(2) allows disclosure "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the client's services."

61 MR 1.6(b)(3) allows disclosure "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the

client information when necessary to prevent client fraud or to "prevent, mitigate or rectify" substantial injury to third parties from that fraud. These changes were adopted in 2003 by a narrow majority of the ABA House of Delegates in response to threats by the Securities and Exchange Commission in the wake of the Enron and Tyco scandals to adopt a "noisy withdrawal" requirement for lawyers who find out that their public company clients are committing fraud.[62] Few jurisdictions have adopted MR 1.6(b)(2) in its original form; more have adopted MR 1.6(b)(3).[63] COSAC recommended that New York adopt a close variation of these exceptions, only to have that recommendation rejected by the NYSBA House of Delegates.[64] The provisions of the old Code relevant to client fraud, now adopted in Rules 1.6(b)(2) and (b)(3), were obviously considered adequate to address the problem.

[e] Disclosure to Obtain Professional Responsibility Advice Rule 1.6(b)(4), which permits a lawyer to reveal or use confidential information "to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm, and the law firm," is new. It fills another gap in the old Code, which did not make clear whether a lawyer needing advice on the ethics rules (or on any other legal issue) could reveal to ethics counsel the client confidences or secrets needed to obtain it. This uncertainty sometimes created awkward situations, with lawyers seeking advice using hypotheticals instead of actual facts, and the lawyers giving the advice unable to conduct proper conflict checks because client identities could not be revealed. Though this treatise has always taken the view that disclosure under these circumstances should not have been considered a violation of former DR 4-101 since ethics counsel had established a client-lawyer relationship with the inquiring lawyer and was therefore bound by former DR 4-101 not to reveal the confidences or secrets of the inquiring lawyer), the old Code did not make this clear. Rule 1.6(b)(4) remedies this problem. An almost identical provision was added to the Model Rules in 2002.[65]

[f] Disclosure to Establish or Collect a Fee or in Self-Defense Rule 1.6(b)(5) recognizes two categories of circumstances in which a lawyer may disclose a client's confidences or secrets: first, "to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct,"[66] and second, "to establish or collect the lawyer's fee."[67] The language of this rule is identical to former DR 4-101(C)(4).

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client's commission of a crime or fraud in furtherance of which the clients has used the lawyer's services."

62 See ABA/BNA Lawyers' Manual for Professional Conduct, 19 CURRENT REPORTS 467 (Aug. 13, 2003).

63 *See, e.g.,* ABA Center for Professional Responsibility, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 102–03 (6th ed. 2007).

64 Simon 5/09, supra note 4.

65 In 2002, the ABA House of Delegates specifically amended MR 1.6(b) to permit a lawyer to reveal information relating to the representation "to secure legal advice about the lawyer's compliance with these Rules." Model Rules of Professional Conduct Rule 1.6(b) (2002). See also id. Comm. 7.

66 See generally RESTATEMENT, supra note 3, §§ 64–65; ABA/BNA, *supra* note 3, § 55:701-16.

67 Actions to establish or collect a fee include writing letters urging payment and filing a court

As with all the Listed Exceptions, subdivision 4 limits the disclosures to those that the lawyer "reasonably believes necessary."[68]

Determining the nature and extent of any authorized disclosure calls for a facts-and-circumstances analysis. Again, a lawyer should exercise self-restraint and caution in this situation. The client-lawyer relationship has generally collapsed by the time that a lawyer is asking whether and to what extent the lawyer can reveal confidential information to establish or collect a fee or in self-defense. The lawyer is likely to be angry at and frustrated by the client's behavior. These emotions can cloud the lawyer's judgment, leading to an excessive release of information, which ultimately could lead to Bar discipline or, more likely, the judicial rejection of a fee or charging lien claim. Restraint and caution are also called for because a disruptive and obstreperous client is likely to try to manipulate the disciplinary system for the purpose of either striking back at a lawyer for trying to collect a fee or furthering the client's underlying accusation of wrongdoing. Such a client will be scrutinizing any disclosure the lawyer makes for evidence that the disclosure was unnecessary. Finally, even if a lawyer makes only necessary disclosures to establish or collect a fee or defend against an accusation of wrongdoing, the lawyer should very carefully weigh *any* comments the lawyer makes outside the proceeding. Discussions with other lawyers, interested third parties, and especially the media can be problematic.

In the recent past, ethics committees have paid increased attention to this exception because insurance companies have expanded the use of in-house and outside auditors to monitor law firm expenditures of time and expenses. Ethics committees have generally expressed reservations about certain aspects of the cooperation the insurance companies routinely request of law firms in connection with billing audits. To the extent such cooperation entails the disclosure of confidences or secrets, express client consent to the disclosure may be necessary. See N.Y.S. Bar Op. 716 (1999).[69]

Subsection (4) also permits a lawyer to reveal a confidence or secret "to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct." The language "lawyer or his or her employees or associates" should be read broadly to include just about anyone who is associated with the lawyer and accused of wrongful conduct. Why the language does not refer to "the lawyer's partners" or "members" of the lawyer's firm is inexplicable. In the context of subsection (4), the only sensible interpretation of the term "associates" includes them.

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action. They do not authorize a lawyer to report a client's nonpayment to a credit bureau, since the credit bureau does not perform any function related to establishing or collecting the lawyer's fee. See N.Y.S. Bar Op. 684 (1996).

68 See e.g., Feeley v. Midas Prop., Inc., 199 A. D. 2d 238, 239, 604 N.Y.S.2d 420 (2d Dep't 1993) (disclosure is permitted "only to the extremely limited extent necessary").

69 See also Licensing Corp. v. Nat'l Hockey League Ass'n, 153 Misc. 2d 126, 580 N.Y.S.2d 128 (Sup. Ct. N.Y. Co. 1992) (retainer and fee arrangement agreement may be subject to discovery; however, the actual bills are privileged. The bills detail the work done by the attorneys, showing services, conversations, and conferences between counsel and others). See generally Lazar Emanuel, Lawyer Needs Insured's Consent Before Submitting Bills to Insurer's Auditor, N.Y. Prof. Res. Rep. 8 (June 1999). Similar issues have arisen in the context of government audits of legal services organizations. See generally Nassau County Bar Op. 96-15 (1996).

"Wrongful conduct" is an ambiguous term that sweeps into its bay a wide range of conduct. It certainly encompasses allegations of criminal activities, violations of a disciplinary or court rule, actions constituting malpractice, breach of a fiduciary duty, or fraud. The allegations, however, must relate to the client-lawyer relationship. For example, assume that during the course of a representation a lawyer and a client are romantically involved. The romance subsequently founders, and the client publicly accuses the lawyer of being insensitive and manipulative. If that accusation is not related to the legal services the lawyer provided, the lawyer cannot rely on subsection (5) and disclose the client's confidential information.

A critical but often overlooked aspect of the New York formulation is that it applies to the lawyer's response to *any* "accusation" of wrongdoing. This is significantly broader than the Model Rules, which limits the "self-defense exception" to establishing a "claim or defense" in a "controversy" between the lawyer and client, to a "criminal charge or civil claim," or to "allegations in any proceeding" involving the lawyer—all of which limit the exception to formal claims in formal proceedings. See MR 1.6(b)(5). In New York, lawyers can invoke subsection (5) to respond to such things as allegations made informally by a client to the police or prosecutors, and even to adverse statements by the client in the media.[70]

Furthermore, the "self-defense" exception is not limited to claims brought against the lawyer by clients: it also allows disclosure to defend against claims brought by third parties.[71] Though this appears to go beyond the original rationale behind this exception (which was based on an implied waiver of confidentiality by the client suing or otherwise accusing the lawyer), it allows the lawyer to remain on a level playing field with the client, who may attempt to pin the blame on the lawyer when dealing with prosecutors and plaintiff's lawyers. Muzzling the lawyer in this situation would be unfair, and would turn the shield of the attorney-client privilege into a sword that the client could use to harm the lawyer while protecting herself.

[g] Disclosure Permitted or Required by Rules, Other Law, or Court Order Rule 1.6(b)(6) permits disclosure of confidential information "when permitted under Disciplinary Rules or required by law or court order."[72] Several Rules permit such

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70 Nevertheless, there are limits. S*ee* Louima v. N.Y. City, No. 98 Civ. 5083 (SJ), 2004 WL 2359943 (E.D.N.Y. Oct. 5, 2004) ("mere press reports" about lawyer's conduct do not justify disclosure of client information even if are reports false and accusations unfounded); NYCLA Bar Op. 722 (1997) (client's criticism of lawyer to neighbor was mere gossip and did not trigger exception to confidentiality rule); Eckhaus v. Alfa-Laval, Inc., 764 F. Supp. 34 (S.D.N.Y. 1991) (dismissing a complaint for defamation filed against a corporate entity by the client's former general counsel on the ground that the self-defense exception was not applicable).

71 Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.), *cert denied,* 419 U.S. 998 (1974), (lawyer named as defendant in civil lawsuit permitted to disclose confidential information about codefendant client to plaintiffs in order to extricate himself from lawsuit.); *In re* Friend*,* 411 F. Supp. 776 (S.D.N.Y. 1975) (lawyer could provide client information to grand jury so he can be exonerated in criminal investigation).

72 See generally Restatement, supra note 3, § 62; ABA/BNA, *supra* note 3, 1201–06, 1301–22.

disclosure aside from Rule 1.6, including the client perjury rule (Rule 3.3) and the reporting requirement (Rule 8.3).[73]

This provision has always been a bit vague and confusing. But one thing should not be confusing: this provision does not detract from the *non-mandatory* nature of disclosure permitted under Rule 1.6(b). Lawyers must distinguish between the source requiring disclosure (a statute or court rule) and the Rule provision permitting it (the NY Rule). Although a court rule may require the disclosure, and a lawyer may be subject to court sanctions for noncompliance, the failure to disclose will not result in disciplinary sanctions—at least not under Rule 1.6. This emphasizes the sanctity accorded the attorney-client privilege and the broad discretion given to lawyers in determining how to resolve difficult disclosure issues.

Precisely identifying those laws that require disclosure of confidences and secrets is tricky. While the Rules do not define "law," the term is generally understood as encompassing statutes, agency regulations, court rules, and analogous sovereign commands. Statutes and agency regulations mandating disclosure by a lawyer qua lawyer are exceedingly rare.[74] A lawyer is likely to wrestle with disclosure in two situations: first, where a statute or regulation imposes an affirmative obligation of disclosure on the client (e.g., federal securities law, state and federal environmental laws, etc.)[75] and the client refuses to comply with that obligation; and second, where the client has specifically designated the lawyer as the client's agent for purpose of compliance or regulatory functions and the client instructs the lawyer not to make disclosures that the lawyer

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73 See supra for a list of these rules.

74 Section 307 of the Sarbanes-Oxley Act directed the SEC to issue regulations governing the conduct of lawyers who appear and practice before the Commission. Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7245 (2002).

As originally drafted, the SEC regulations contained a mandatory whistle-blowing provision. That provision was eliminated in the final draft in response to vocal criticism by the organized Bar. For the current text of the regulations, see Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. §§ 205.1–.7 (2005). The SEC indicated years ago that it may revisit the issue of mandatory whistle-blowing [see generally Anthony E. Davis, SEC's New Sarbanes-Oxley Proposals on 'Noisy Withdrawal', N.Y.L.J. 31 (Mar. 3, 2003), at 3]], but that seems like ancient history in light of the ABA's adoption of MR 1.6(b)(2) and (3) in August 2003.

Nevertheless, the Sarbanes-Oxley regulations do authorize permissive disclosure of a client's confidential information under certain circumstances. 17 C.F.R. § 205.3(d)(2) (2004). The Washington State Bar attempted to curtail the scope of the permitted disclosure through an interpretation of the rule governing disclosure of confidential client information in the state's code of professional conduct. The relevant text of that rule closely resembles New York's former DR 4-101. The Washington Bar's position is highly questionable, and a lawyer licensed to practice law in New York should proceed with great caution before relying on it. If the SEC's regulations were challenged, it is most likely a court would hold that Congress possessed the constitutional authority to authorize the SEC to issue the regulations and that the regulations preempt contrary or inconsistent provisions of state codes of lawyer conduct. Roy Simon, Washington State Bar Takes On the SEC, N.Y. Prof. Res. Rep. 1 (Oct. 2003). Accord No. Carolina State Bar Ethics Comm. Formal Op. 2005-09 (2006).

75 See, e.g., *Meyerhofer,* 497 F.2d 1190 (securities law); Michael Gerrard, Duty of Consultants, Lawyers to Report Contamination, N.Y.L.J. 3 (Mar. 26, 1999) (environmental laws).

believes a statute or regulation requires. The latter situation implicates the lawyer's obligations with respect to withdrawal under Rule 1.16 as well as the lawyer's disclosure obligations under Rule 1.6.

In contrast to statutes and regulations, court rules are more likely to directly impose a disclosure obligation on a lawyer. See generally N.Y.C. Bar Op. 1990-2 (1990) (a lawyer's obligations under Rule 26(e)(2) of the Federal Rules of Civil Procedure are "required by law" within the meaning of former DR 4-101).

Subsection (6) also permits disclosure of confidential information when required by a court order. From time to time, a party in a civil litigation, a prosecutor, or a regulatory agency will formally seek information about a current or former client from a lawyer, and a court will reject the lawyer's invocation of the attorney-client privilege. What happens if a court orders a lawyer to testify, but the client instructs the lawyer not to? Practically speaking, the choices are rather limited. In most instances, withdrawal will not solve the problem, even if the court will permit it.[76] Regardless of the client's status as a present or former client, the lawyer remains subject to compulsory process to obtain the sought-after testimony. The only real options are either to obey the court's order or appeal it after obtaining a stay. It is often said that a lawyer has an ethical obligation to appeal an order directing disclosure, and relevant ethics opinions support this view, although the language of the Rules does not explicitly require it.[77]

V.4 Subsection (c): A Lawyer's Duty to Use Reasonable Care to Prevent Employees from Making Unauthorized Disclosure or Use of Confidences or Secrets

Rule 1.6(c) is one of several rules requiring or urging a lawyer or a law firm to take managerial measures to prevent employees, associates, or others whose services are utilized by the lawyer or law firm from taking actions that the Rules prohibit the lawyer or law firm from taking.[78] The application of Rule 1.6(c) will, of course, vary from law firm to law firm depending on factors such as the size of the firm, the type of work it handles, and the sensitivity of the clients' information. Nonetheless, a few generalizations are appropriate. A law firm should have in place a well-designed hiring, retention, and termination policy that will regularly remind nonlawyer personnel of their

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76 Most court rules require judicial assent to a lawyer's withdrawal. Rule 1.16(d) expressly provides: "If permission for withdrawal is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission."

77 But see Nassau County Bar Op. 92-1 (1992) (if a court rejects a lawyer's invocation of the attorney-client privilege and a good faith appeal may be taken, the lawyer should request a stay pending exhaustion of the opportunities for appellate review that are available to the client). Accord ABA Comm. on Legal Ethics & Professional Responsibility, Formal Op. 94-385 (1994).

78 See Rules 5.1 ("Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers"); see also Rule 1.10(f) (requiring a law firm to keep records of prior engagements and to have a policy to check for conflicts); see generally RESTATEMENT, supra note 3, § 60; Barry H. Berke & Ronald W. Adelman, The Lawyer's Duty to Supervise Paralegals, N.Y. PROF. RES. REP. 5 (Nov. 2000); Marvin Frankel & Charlotte Fischman, The Duty to Supervise: A Firm Responsibility, N.Y. PROF. RES. REP. 1 (Aug. 2000).

obligation not to reveal confidential information during or after their employment.[79] Appropriate measures should be taken to limit the possible inadvertent disclosure of protected information in connection with discovery[80] and the destruction of client files.[81]

Care should be taken if a law firm employs lawyers supplied by a temporary lawyer placement agency,[82] or is associated with a credit company that assists clients in the payment of legal fees and collects the fees directly from clients.[83] Even more care must be taken in connection with outsourcing legal services to foreign lawyers.[84]

Finally, in communicating with clients via e-mail or offering legal services on an Internet Web site, a lawyer must exercise reasonable care to protect confidential information.[85]

VI. ANNOTATIONS OF ETHICS OPINIONS

Editors' Note: The authors of the Commentary have prepared an outline of selected ethics opinions involving the attorney-client privilege in New York. Given the size of this topic, this outline does not pretend to be complete. It does, however, provide cases concerning most of the key issues addressed by Rule 1.6, as well as opinions concerning the evidentiary attorney-client privilege. We hope it will serve as a useful starting point for your research).

VI.1 Opinions Covering Subjects under NY Rule 1.6(a)

What is a "Confidence" Covered by the Rule? N.Y.S. Bar Op. 842 (2010) (lawyer can use an on-line "cloud" data backup system to store confidential client information as long as the lawyer takes the necessary steps to ensure that the system is secure and that confidentiality of the information is maintained).

N.Y.C. Bar Op. 2005-03 (2005) (analyzing the circumstances under which a lawyer may voluntarily testify about a former client; distinguishing between "confidences" and "secrets").

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79 See generally N.Y.C. Bar Op. 1995-11 (1995) (transient nature of lay personnel is a cause for concern in protecting client confidences or secrets).

80 See e.g., United States Fidelity & Guaranty Co. v. Braspetro Oil Serv. Co., 2000 WL 744369 (S.D.N.Y. June 8, 2000); SEC v. Cassano, 189 F.R.D. 83 (S.D.N.Y.1999). See generally ABA/BNA, *supra* note 4, § 55:416–21, 423–24.

81 E.g., N.Y.S. Bar Op. 623 (1991) (in destroying a closed file, a lawyer should take measures to reasonably assure that confidential information is protected); accord NYCLA Bar Op. 725 (1998) (same); see also N.Y.S. Bar Op. 641 (1993) (lawyer who must comply with an ordinance requiring the recycling of office paper must take appropriate steps to prevent the disclosure of protected information).

82 See e.g., N.Y.C. Bar Ops. 1988-3 (1988), 1988-3-A (1988) & 1989-2 (1989).

83 N.Y.C. Bar Op. 1995-1 (1995).

84 ABA Formal Op. 08-451 (2008); N.Y.C. Bar Op. 2006-03 (2006).

85 E.g., N.Y.C. Bar Op. 2000-1 (2000); N.Y.S. Bar Op. 709 (1998). See generally ABA/BNA, *supra* note 4, § 55:401–24.

NYCLA Bar Op. 731 (2003) (lawyer may be obligated to reveal information relating to the existence of a client's insurance coverage under some circumstances, but may not mislead the opposing counsel).

Nassau County Bar Op. 94-12 (1994) (lawyer may execute an affidavit attesting to the fact that the signature on certain checks made payable to him is not his signature, even though the affidavit may implicate his client in criminal activities. The lawyer's knowledge of his signature is not a confidence or secret.).

N.Y.S. Bar Op. 479 (1978) (in the absence of client consent, a lawyer may neither reveal the client's commission of undiscovered murders nor advise the authorities of the location of the dead bodies. With the client's consent, the lawyer may discuss the possibility of such disclosure in the course of plea negotiations with the district attorney.).

Was the Communication for the Purpose of Legal Advice? NYCLA Bar Op. 717 (1996) (if a lawyer/employee of an insurance company is not acting as an attorney, former DR 4-101 is not applicable. If it is applicable, the lawyer must not disclose the client's confidences or secrets. However, not all information the lawyer learns is protected.).

Was the Communication in a Confidential Setting? N.Y.S. Bar Op. 820 (2008) (lawyer may use an e-mail service provider that scans user e-mails to generate advertising, as long as the e-mails are not reviewed by or provided to human beings other than the sender and recipient).

NYCLA Bar Op. 738 (2008) (lawyer who receives from an adversary electronic documents that appear to contain inadvertently produced metadata is ethically obligated to avoid searching the metadata in those documents; there is a presumption that data sent in breach of confidentiality was sent inadvertently).

N.Y.S. Bar Op. 782 (2004) (analyzing a lawyer's duty to preserve a client's confidences and secrets while electronically transferring a document whose metadata may be accessed by the document's recipient).

N.Y.C. Bar Op. 1998-2 (1998) (lawyer may send confidential client communications by unencrypted e-mail).

N.Y.C. Bar Op. 1995-12 (1995) (lawyer who uses the services of an interpreter to facilitate communication with a non-English speaking or deaf client must take reasonable care to prevent the interpreter from disclosing or using the confidences or secrets of the client).

N.Y.C. Bar Op. 1994-11 (1994) (lawyer should exercise caution in conversing on a cellular or cordless telephone or other devices readily capable of interception, if the conversation may allude to confidential client information. The lawyer should consider taking steps to ensure the security of such conversations.).

What is a "Secret"? N.Y.C. Bar Op. 2005-03 (2005) (analyzing the circumstances under which a lawyer may voluntarily testify about a former client; distinguishing between "confidences" and "secrets").

N.Y.S. Bar Op. 742 (2001) (lawyer who learns, while representing a client, that a third party has violated the law may not disclose the violation if the information is protected as a confidence or secret).

N.Y.S. Bar Op. 723 (1999) (general information about the law is not a secret. Information about a former client's financial exposure, workplace rules, and settlement policies may be a secret, but depending upon the circumstances of the representation, possession of the information may not be grounds for disqualification).

Nassau County Bar Op. 98-6 (1998) (lawyer may not reveal the fact that another lawyer has embezzled a client's funds if the client refuses to consent to the disclosure).

Nassau County Bar Op. 96-15 (1996) (as a general rule, billing records constitute client secrets. Therefore, a lawyer may not disclose them to a federal agency (or anyone else.) unless directed to do so by a court order); accord Nassau County Bar Op. 97-3 (1997) (IRS summons); Nassau County Bar Op. 98-5 (1998) (potential inquiry by criminal investigators into the identity of the client who paid the lawyer in cash that included a counterfeit $100 bill).

Nassau County Bar Op. 96-7 (1996) (lawyer may neither disclose nor use to his own advantage the knowledge that he gained in a prior representation of a client's criminal conviction, even though the fact of the conviction is contained in a public record). But see Nassau County Bar Op. 95-2 (1995) (lawyer may disclose a former client's criminal conviction if the lawyer learns of the conviction after the client-lawyer relationship has ended).

NYCLA Bar Op. 702 (1994) (lawyer who is appointed as a guardian ad litem in a foreclosure proceeding for a client whom the mortgagee bank could not locate and who subsequently learns the whereabouts of the client may not disclose the client's location without the client's consent).

Nassau County Bar Op. 94-12 (1994) (lawyer may execute an affidavit attesting to the fact that the signature on certain checks made payable to him is not his signature, even though the affidavit may implicate his client in criminal activities. The lawyer's knowledge of his signature is not a confidence or secret.).

N.Y.S. Bar Op. 645 (1993) (since a client's name, the fees charged, and the fact of the representation may constitute a secret, a lawyer whose appointment to a town board would require the disclosure of such information must: (1) obtain client consent to the disclosure, (2) obtain a declaratory judgment that the disclosure law does not apply to the lawyer, or (3) not accept the appointment).

Nassau County Bar Op. 91-35 (1991) (information may be a "secret" even if it is known to individuals other than the lawyer and the client or the client was not the source of the information).

Scope of Privilege in Certain Contexts: Corporations/Partnerships N.Y.C. Bar Op. 2007-2 (2007) (analyzing the circumstances under which a law firm may second a lawyer to a host organization without violating former DR 4-101).

N.Y.C. Bar Op. 2006-2 (2006) (analyzing the application of former DR 4-101 in the context of a "beauty contest").

N.Y.C. Bar Op. 2004-02 (2004) (discussing confidentiality issues raised in the context of a lawyer's simultaneous representation of a corporation and its constituents).

N.Y.C. Bar Op. 1994-10 (1994) (lawyer for a limited partnership must tell the limited partners any information concerning improprieties by the general partnership.

The lawyer may not reveal the information to non-clients unless disclosure is permitted under the future-crime exception to former DR 4-101C3. Withdrawal may be required.).

N.Y.C. Bar Op. 1994-1 (1994) (former in-house lawyer may sue a former employer for discrimination and participate in the preparation of a class action against the former employer, provided that the lawyer does not use or disclose protected information or serve as class counsel or class representative).

Nassau County Bar Op. 93-14 (1993) (if the individual client who directed the lawyer to organize a corporation, prepare minutes, and issue stock was the lawyer's client, the lawyer may not release information to another individual who is the president and secretary of the corporation and its sole shareholder).

Scope of Privilege in Certain Contexts: Estates Nassau County Bar Op. 2003-04 (2004) (analyzing the circumstances under which a lawyer may reveal the confidences and secrets of a deceased client-wife to husband-executor of her estate).

N.Y.S. Bar Op. 746 (2001) (under "drastic circumstances," a lawyer may disclose a client's confidences or secrets to the limited extent necessary in connection with a petition for the appointment of a guardian).

Nassau County Bar Op. 97-10 (1997) (in a probate proceeding, the wrongful conduct of the executor may be protected as a secret, depending upon the client's identity (i.e., the executor or the estate).

N.Y.S. Bar Op. 649 (1993) (lawyer should disclose the wrongful conduct of an executor unless the information is protected as a confidence or secret).

Nassau County Op. 90-17 (1990) (lawyer may not reveal an elderly client's eccentric behavior to her family for the purpose of advising them that she may need a conservator).

Scope of Privilege in Certain Contexts: Within Law Firms (Firm GC and Others) N.Y.C. Bar Op. 1994-1 (1994) (former in-house lawyer may sue a former employer for discrimination and participate in the preparation of a class action against the former employer, provided that the lawyer does not use or disclose protected information or serve as class counsel or class representative).

VI.2 Opinions Related to NY Rule 1.6(a)(1), (2), and (3)

Did Lawyer Misuse the Client's Confidences or Secrets by Improperly Revealing Them? N.Y.C. Bar Op. 2007-2 (2007) (analyzing the circumstances under which a law firm may second a lawyer to a host organization without violating former DR 4-101).

N.Y.C. Bar Op. 2006-3 (2006) (analyzing the circumstances under which a law firm may outsource legal services without violating former DR 4-101).

N.Y.C. Bar Op. 2005-02 (2005) (analyzing a lawyer's duty to preserve confidences and secrets when a client or potential client informs the lawyer of information relevant to a matter that the lawyer is handling for another client).

N.Y.S. Bar Op. 782 (2004) (analyzing a lawyer's duty to preserve a client's confidences and secrets while electronically transferring a document whose metadata may be accessed by the document's recipient).

N.Y.S. Bar Op. 746 (2001) (under "drastic circumstances," a lawyer may disclose a client's confidences or secrets to the limited extent necessary in connection with a petition for the appointment of a guardian).

N.Y.S. Bar Op. 743 (2001) (analyzing the ethical obligation of a lawyer to protect a client's confidences and secrets in a labor arbitration in which the client is either the union or the union member).

N.Y.S. Bar Op. 742 (2001) (lawyer who learns, while representing a client, that a third party has violated the law may not disclose the violation if the information is protected as a confidence or secret).

N.Y.S. Bar Op. 718 (1999) (provided that certain safeguards are observed to protect confidential client information, a legal aid office may be able to share with a bar association committee information extracted from mental health forms).

N.Y.C. Bar Op. 1998-2 (1998) (lawyer may send confidential client communications by unencrypted e-mail).

N.Y.C. Bar Op. 1995-12 (1995) (lawyer who uses the services of an interpreter to facilitate communication with a non-English speaking or deaf client must take reasonable care to prevent the interpreter from disclosing or using the confidences or secrets of the client).

N.Y.C. Bar Op. 1995-11 (1995) (transient nature of lay personnel is a cause for concern in protecting client confidences or secrets).

N.Y.C. Bar Op. 1994-11 (1994) (lawyer should exercise caution in conversing on a cellular or cordless telephone or other devices readily capable of interception, if the conversation may allude to confidential client information. The lawyer should consider taking steps to ensure the security of such conversations.).

NYCLA Bar Op. 702 (1994) (lawyer who is appointed as a guardian ad litem in a foreclosure proceeding for a client whom the mortgagee bank could not locate and who subsequently learns the whereabouts of the client may not disclose the client's location without the client's consent).

N.Y.S. Bar Op. 641 (1993) (lawyer who must comply with an ordinance requiring the recycling of office paper must take appropriate steps to prevent the disclosure of protected information).

Nassau County Bar Op. 92-1 (1992) (if a court rejects a lawyer's invocation of the attorney-client privilege and a good faith appeal may be taken, the lawyer should request a stay pending exhaustion of the opportunities for appellate review that are available to the client).

N.Y.S. Bar Op. 623 (1991) (in destroying a closed file, a lawyer should take measures to reasonably assure that confidential information is protected).

N.Y.S. Bar Op. 479 (1978) (in the absence of client consent, a lawyer may neither reveal the client's commission of undiscovered murders nor advise the authorities of the location of the dead bodies. With the client's consent, the lawyer may discuss the possibility of such disclosure in the course of plea negotiations with the district attorney.).

Did Lawyer Misuse the Client's Confidences or Secrets by Using Them for the Disadvantage of the Client? N.Y.C. Bar Op. 1997-3 (1997) (lawyer may engage in an activity or express a personal viewpoint adverse to a client's interests provided that protected client information or the zealous representation of the client are not compromised).

Nassau County Bar Op. 93-14 (1993) (if the individual client who directed the lawyer to organize a corporation, prepare minutes, and issue stock was the lawyer's client, the lawyer may not release information to another individual who is the president and secretary of the corporation and its sole shareholder).

Did the lawyer misuse the client's confidences or secrets by improperly using them for the lawyer's own advantage or the advantage of another person? N.Y.S. Bar Op. 749 (2001) (lawyer may not use computer software to access confidential information relating to another lawyer's representation of a client).

N.Y.S. Bar Op. 700 (1998) (lawyer who receives an unsolicited communication from a former employee of an adversary's law firm in which the former employee alleges that certain key records had been tampered with may not communicate further with the former employee and should seek guidance from a tribunal or other appropriate authority on how to proceed).

N.Y.C. Bar Op. 1997-3 (1997) (lawyer may engage in an activity or express a personal viewpoint that is adverse to a client's interests provided that protected client information or the zealous representation of the client are not compromised).

N.Y.C. Bar Op. 1994-1 (1994) (former in-house lawyer may sue a former employer for discrimination and participate in the preparation of a class action against the former employer, provided that the lawyer does not use or disclose protected information or serve as class counsel or class representative).

N.Y.S. Bar Op. 645 (1993) (since a client's name, the fees charged, and the fact of the representation may constitute a secret, a lawyer whose appointment to a town board would require the disclosure of such information must: (1) obtain client consent to the disclosure, (2) obtain a declaratory judgment that the disclosure law does not apply to the lawyer, or (3) not accept the appointment).

VI.3 Opinions Related to NY Rule 1.6(b)

Exceptions to the Confidentiality Rule: Preventing a Crime (Rule 1.6(b)(2)) NYCLA Bar Op. 741 (2010) (NYCLA Bar Op. 712, concluding that a lawyer may not use admitted false testimony, while at the same time may not reveal it, is superseded by NYCLA Bar Op. 741. The later opinion was based on the prior Code of Professional Responsibility. The new Rules make it clear that a lawyer has a duty to remedy false statements by disclosure of confidential information, if necessary, while at the same time also seeking to minimize the disclosure of confidential information as much as possible.).

N.Y.C. Bar Op. 2002-1 (2001) (analyzing the circumstances under which a lawyer (1) may disclose a "continuing crime," and/or (2) has a reasonable belief that the lawyer's client intends to commit a crime).

Nassau County Bar Op. 2001-7 (2001) (lawyer may reveal the intention of a former client to commit a crime consisting of the submission of false information to the Surrogate's Court).

Nassau County Bar Op. 98-11 (1998) (lawyer who represented a client in connection with a personal injury action may disclose a letter in the client's file relating to the client's injuries when the client subsequently files a personal injury action against the lawyer. Under limited circumstances, the lawyer may reveal the client's intention to commit a future crime.).

N.Y.C. Bar Op. 1994-10 (1994) (lawyer for a limited partnership must tell the limited partners any information concerning improprieties by the general partners. The lawyer may not reveal the information to non-clients unless disclosure is permitted under the future-crime exception to former DR 4-1a(c)(3). Withdrawal may be required.).

Exceptions to the Confidentiality Rule: Preventing Physical Harm (Rule 1.6(b)(1)) N.Y.C. Bar Op. 1997-2 (1997) (under some circumstances, a lawyer employed by a social services agency may disclose the confidences or secrets of a minor client relating to abuse or mistreatment of the minor without the client's consent. The lawyer should take reasonable care to preserve the client's confidences and secrets during the course of the lawyer's interaction with nonlawyer professionals employed by the agency, such as social workers.).

N.Y.S. Bar Op. 486 (1978) (lawyer may reveal a client's expressed intention to commit suicide).

Exceptions to the Confidentiality Rule: To Defend Against an Accusation ("Self-Defense" Exception)(Rule 1.6(b)(5)(i)) Nassau County Bar Op. 98-11 (1998) (lawyer who represented a client in connection with a personal injury action may disclose a letter in the client's file relating to the client's injuries when the client subsequently files a personal injury action against the lawyer. Under limited circumstances, the lawyer may reveal the client's intention to commit a future crime.).

NYCLA Bar Op. 722 (1997) (lawyer may disclose a client's confidences or secrets to defend against an accusation of wrongful conduct, but not to reply to negative references or gossip about the lawyer).

Exceptions to the Confidentiality Rule: To Establish or Collect a Fee (Rule 1.6(b)(5)(ii)) Nassau County Bar Op. 94-26 (1994) (lawyer may reveal otherwise protected information to collect a fee, even if the disclosure may subject the client to criminal prosecution and/or civil liability).

Exceptions to the Confidentiality Rule: To Comply with Other Law or Court Order (Rule 1.6(b)(6)) N.Y.S. Bar Op. 681 (1996) (lawyer who was assigned by a court to represent a client who misrepresented the client's financial eligibility for assigned counsel may not disclose the misrepresentation in support of the lawyer's motion to withdraw, but may disclose it if ordered by the court to do so).

N.Y.C. Bar Op. 1990-2 (1990) (lawyer's obligations under Rule 26(e)(2) of the Federal Rules of Civil Procedure are "required by law" under subsection (b)(2) of former DR 4-101. Therefore, the lawyer may disclose the existence of documents responsive to a discovery request even though the client directs the lawyer not to do so. Disclosure may also be permitted under former DR 7-102(b). Finally, withdrawal may be appropriate.).

Exceptions to the Confidentiality Rule: To Withdraw an Opinion or Misrepresentation (Rule 1.6(b)(3)) NYCLA Bar Op. 741 (2010) (lawyer who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case must employ reasonable remedial measures, including counseling the client to correct the testimony, If the remedial efforts prove fruitless, then the lawyer must take additional remedial measures, including disclosure to the tribunal, if necessary. If the client's false statement is disclosed, the lawyer must seek to minimize the disclosure of confidential information. Under the new Ethics Rules, the lawyer cannot simply withdraw from representation while maintaining the confidence.).

N.Y.S. Bar Op. 797 (2006) (identifying the circumstances under which a lawyer must withdraw any misstatements that the lawyer made in certifying a client's statements in a probate proceeding).

Nassau County Bar Op. 2005-3 (2005) (analyzing the circumstances under which an attorney must correct the misrepresentation that the attorney unwittingly made to the opposing counsel regarding ownership interests in a motor vehicle involved in a personal injury action).

N.Y.S. Bar Op. 781 (2004) (analyzing a matrimonial lawyer's ethical obligations when the lawyer learns that the client has fraudulently submitted a financial statement to the family court that contains material errors).

NYCLA Bar Op. 731 (2003) (lawyer may be obligated to reveal information relating to the existence of a client's insurance coverage under some circumstances, but may not mislead the opposing counsel).

NYCLA Bar Op. 686 (1991) (lawyer may correct an oral representation made by the lawyer in the course of a negotiation that was based on information supplied by the client that the lawyer later learns is materially inaccurate and is still being relied upon by a third party).

VI.3 Opinions Related to NY Rule 1.6(c)

N.Y.S. Bar Op. 842 (2010) (lawyers have a duty to stay current on technology to make sure any data backup system used to store confidential client information remains sufficiently advanced to continue protecting the information).

VII. ANNOTATIONS OF CASES

Editors' Note: The authors of the Commentary have prepared an outline of selected cases involving the attorney-client privilege in New York. Given the size of this topic, this outline does not pretend to be complete. It does, however, provide cases concerning most of the key issues addressed by Rule 1.6, as well as cases concerning the evidentiary attorney-client privilege. We hope it will serve as a useful starting point for your research.

VII.1 Cases Covering Subjects under NY Rule 1.6(a)

What is a "Confidence" Covered by the Rule?

New York: Purchase Partners II, LLC v. Westreich, 14 Misc. 3d 1227(A), 2007 WL 329027 (Sup. Ct. N.Y. Co. 2007) (applying the definition of "secret" and "confidence" to communications made in the context of a complex commercial relationship).

N.Y. Times Co. v. Lehrer McGovern Bovis, Inc., 300 A.D.2d 169, 752 N.Y.S.2d 642 (1st Dept. 2002) (attorney-client privilege applies to confidential communications by a client for the purpose of obtaining legal advice with an attorney who has been consulted for that purpose).

Fox v. Fox, 290 A.D.2d 749, 736 N.Y.S.2d 483 (3d Dept. 2002) (describing procedures to protect the confidentiality of clients' files while allowing the plaintiff-wife in a divorce proceeding to inspect the files in order to value the defendant-husband's law practice).

People v. Vespucci, 2002 WL 1396080 (Co. Ct. Nassau, May 29, 2002) (holding that the attorney-client privilege survives a client's death and refusing to pierce the veil of confidentiality to allow the deceased client's lawyer to provide exculpatory evidence in behalf of a defendant charged with murder).

Aetna Cas. & Surety Co. v. Certain Underwriters and Lloyd's London, 176 Misc. 2d 605, 676 N.Y.S.2d 727 (Sup. Ct. N.Y. Co. 1998) (for attorney-client privilege to apply, in the course of a professional relationship a confidential communication between an attorney and client must be made for the purpose of seeking or providing legal assistance or advice and the communication itself must have been primarily or predominantly of a legal character).

Madden v. Creative Serv., Inc., 84 N.Y.2d 738, 622 N.Y.S.2d 738 (1995) (client has no cause of action against individuals who enter a law firm under false pretenses and conduct an unauthorized inspection of the client's documents, especially in the absence of demonstrated harm).

Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 N.Y.2d 371, 575 N.Y.S.2d 809 (1991) (attorney-client privilege applies to communications between a lawyer and client for the purpose of facilitating the rendition of legal services or advice in the course of the professional relationship; the communications themselves must be primarily or predominantly legal in character).

Priest v. Hennessy, 51 N.Y.2d 62, 431 N.Y.S.2d 511 (1980) (attorney-client privilege arises only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services. It must be shown that the communication sought to be protected was a confidential communication made to the attorney for the purpose of obtaining legal advice or services. The burden of proving the claim of privilege rests upon the party asserting it. The privilege can give way where strong public policy requires disclosure. *Cited with approval in, e.g.,* Sackman v. The Liggett Group, Inc., 920 F. Supp. 357 (E.D.N.Y. 1996)).

Federal: Broich v. Incorporated Village of Southampton, 2010 WL 2076800, 1 (E.D.N.Y. 2010) (plaintiff's counsel did not have access to privileged documents that he would not otherwise have access to in this case).

United States v. Stewart, 2002 WL 1300059 (S.D.N.Y., June 11, 2002) (appointing a neutral Special Master to screen the items seized from the defendant-lawyer's office for privilege and responsiveness to the underlying search warrant).

In re Dow Corning Corp., 261 F.3d 280 (2d Cir. 2000) (while declining to order a writ of mandamus, the Court strongly suggested that the district court erred in permitting discovery once it concluded that the attorney-client privilege protected the communications in question).

Baker v. Dorfman, 232 F.3d 121 (2d Cir. 2000) (lower court's appointment of a lawyer/receiver with a broad mandate to increase a law firm's profitability in connection with collection of a judgment for malpractice raises significant issues about the protection of client confidences and secrets and must be remanded for further consideration. The district court's opinion and order on remand (addressing the Second Circuit's concerns) is reported at 2001 WL 55437 (S.D.N.Y. Jan. 23, 2001).).

Bobian Invest. Co. N.V. v. Note Funding Corp., 93 Civ. 7427 (DAB), 1995 WL 662402 (S.D.N.Y. Nov. 9, 1995) (attorney-client privilege protects from disclosure confidential communications made between the attorney and the client in the course of professional employment. The proponent of the privilege must establish that the document in question reflects a communication between the attorney or his agents and the client or its agents, that the communication was made or retained in confidence, and that it was made principally to assist in obtaining or providing legal advice or services for the client. *Cited with approval in, e.g.*, Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99, 756 N.Y.S.2d 367 (Sup. Ct. N.Y. Co. 2003).).

U.S. v. Colton, 306 F.2d 633 (1962) (to establish attorney-client privilege, it must be shown that (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of the court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client).

U.S. v. Kovel, 296 F.2d 918 (1961) (evidentiary attorney-client privilege attaches: (1) where legal advice of any kind is sought (2) from a professional legal advisor in his

capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by his legal advisor, (8) except the protection be waived. *Cited with approval in, e.g., In re* Grand Jury Subpoena Duces Tecum dated September 15, 1983, 731 F.2d 1032 (2d Cir. 1984); *U.S. v. Bein,* 728 F.2d 107 (2d Cir. 1984)).

Was There a Communication between Attorney and Client?

New York: Plimpton v. Mass. Mut. Life Ins. Co., 50 A.D.3d 532, 855 N.Y.S.2d 544 (1st Dept. 2008) (letter to plaintiff from nonlawyer expert whom plaintiff hired to help him decide whether to litigate deemed not privileged, as expert was not a lawyer, advice was non-legal in nature, and plaintiff's lawyer, who had not even been hired yet, did not know about the report until it was produced in discovery).

Federal: U.S. v. Bein, 728 F.2d 107 (2d Cir. 1984) (communications between defendant and his retained accountant, even in presence of defendant's attorney, are not privileged, because not given for purpose of aiding lawyer in rendering legal advice).

U.S. v. Colton, 306 F.2d 633 (1962) (providing preexisting documents to an attorney for purposes of legal advice does not render those documents privileged; only if client himself could have refused to produce the documents may the lawyer refuse to produce them).

U.S. v. Kovel, 296 F.2d 918 (1961) (communications between clients and others hired by the attorney whose presence is necessary (or at least highly useful) for the effective consultation between the client and the lawyer are still covered by the privilege, even if the lawyer is not present—this includes communications with secretaries, clerks, accountants, and foreign language interpreters. The key, if an accountant or other independent contractor for the lawyer is involved, is that the ultimate purpose of the communication be to obtain legal advice.).

Are Client Identity, Fees, and Related Matters Privileged?

New York: Deutsche Bank Trust Co. of Americas v. Tri-Links Inv. Trust, 43 A.D.3d 56, 837 N.Y.S.2d 15 (1st Dept. 2007) (unredacted time records and billing invoices from lawyers considered non-privileged).

In re Nassau Co. Grand Jury Subpoena Duces Tecum dated June 24, 2003, 4 N.Y.3d 665, 797 N.Y.S.2d 790 (2005) (absent special circumstances, information about client identity or fee arrangement between attorney and client is not covered by the attorney-client privilege).

Fox v. Fox, 290 A.D.2d 749, 736 N.Y.S.2d 483 (3d Dept. 2002) (describing procedures to protect the confidentiality of clients' files while allowing the plaintiff-wife in a divorce proceeding to inspect the files in order to value the defendant-husband's law practice).

In re Grand Jury Investigation, 175 Misc. 2d 398, 669 N.Y.S.2d 179 (Co. Ct. Onandaga Co. 1998) (lawyer need not disclose whereabouts of client who was under indictment for custodial interference and had fled jurisdiction, because disclosure

of the information would implicate client's Fifth Amendment rights in this criminal case).

D'Alessio v. Gilberg, 205 A.D.2d 8, 617 N.Y.S.2d 484 (2d Dept. 1994) (attorney-client privilege protects the name of a client who consulted with an attorney in connection with a hit-and-run accident in which the client may have been the driver of the car that struck the victim. In these circumstances, the identity of the client is protected).

Priest v. Hennessy, 51 N.Y.2d 62, 431 N.Y.S.2d 511 (1980) (communications concerning the fee arrangements between an attorney and a client, or between a third-party benefactor and the attorney, are not covered by the attorney-client privilege, since they are collateral to the legal advice given).

In re Jacqueline F., 47 N.Y.2d 215, 417 N.Y.S.2d 884 (1979) (in a civil case, lawyer ordered to disclose client's address where the client fled to Puerto Rico after losing a custody proceeding).

People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Co. Ct. Onandaga Co.), *aff'd* 50 A.D.2d 1088, 376 N.Y.S.2d 771 (3d Dept. 1975), *aff'd* 41 N.Y.2d 60, 390 N.Y.S.2d 867 (1976) (attorney may not be compelled to reveal whereabouts of remains of murder victim which he had located based on information obtained from his client).

Federal: Baker v. Dorfman, 232 F.3d 121 (2d Cir. 2000) (lower court's appointment of a lawyer/receiver with a broad mandate to increase a law firm's profitability in connection with collection of a judgment for malpractice raises significant issues about the protection of client confidences and secrets and must be remanded for further consideration. The district court's opinion and order on remand (addressing the Second Circuit's concerns) is reported at 2001 WL 55437 (S.D.N.Y. Jan. 23, 2001).).

Gerald B. Lefcourt, P.C. v. U.S., 125 F.3d 79 (2d Cir. 1997) (in civil tax proceeding, law firm may not withhold identity of client who had paid firm more than $10,000 in legal fees; fact that disclosure could result in client's incrimination is not a "special circumstance" sufficient to justify nondisclosure).

Vingelli v. U.S., 992 F.2d 449 (2d Cir. 1992) (identity of client and client's fee arrangements not subject to disclosure. Though court recognizes two types of "special circumstance" that preclude disclosure—when disclosure of this information would in substance be a disclosure of the attorney-client communication itself, and when communication already revealed but not its source—neither of those circumstances apply here.).

U.S. v. Goldberger & Dubin, P.C., 935 F.2d 501 (2d Cir. 1991) (lawyer required to disclose on IRS form identity of client who had made large cash payments to lawyer. Though a client's identity is generally not privileged, there might be special circumstances where that information would be protected from disclosure.).

In re Grand Jury Subpoena Served Upon John Doe, 781 F.2d 238 (2d Cir. 1986) (disclosure of fee, client identity, and identity of third-party benefactor are not prohibited by the attorney-client privilege because such disclosure does not inhibit the actual communications between client and attorney for the purpose of legal advice).

In re Grand Jury Subpoena Duces Tecum served upon Gerald L. Shargel, 742 F.2d 61 (2d Cir. 1984) (attorney required to reveal client identity, fee arrangements, and property transfers involving certain named persons, with none of this information

being deemed privileged. While court acknowledges there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communication, this is not one of them.).

U.S. v. Colton, 306 F.2d 633 (1962) (identity of client, fact that a given individual has become a client, the years when services were provided, the general nature of the services, and the amount of fees paid by the client to lawyer are not privileged except in special circumstances. One circumstance where client identity is privileged is when the substance of a disclosure has been revealed, but not its source.).

Was the Communication for the Purpose of Legal Advice?

New York: Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99, 756 N.Y.S.2d 367 (Sup. Ct. N.Y. Co. 2003) (the fact that business advice is sought from or even given by counsel does not automatically remove the communications from the attorney-client privilege; the question is whether the advice given is predominantly legal, as opposed to business, in nature).

Aetna Cas. & Surety Co. v. Certain Underwriters and Lloyd's London, 176 Misc. 2d 605, 676 N.Y.S.2d 727 (Sup. Ct. N.Y. Co. 1998) (fact that attorneys were present at meetings or "workshops" of various London-based insurance companies who were involved in environmental reinsurance claim did not make the minutes of those meetings privileged, meeting primarily involved proposed "economic solutions" to issues, not all those present at the meeting were involved in the case, and no advice was sought from attorneys present on legal issues. No privilege attaches when an attorney is present at a meeting as a "mere scrivener" and no legal advice is sought.).

Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 N.Y.2d 371, 575 N.Y.S.2d 809 (1991) (law firm's report to client on outcome of internal investigation, which included assessment of size and strength of opposing side's legal claim, is covered by the attorney-client privilege, notwithstanding fact that it contained some non-legal recommendations regarding preventing future corruption).

Rossi v. Blue Cross and Blue Shield of Greater New York, 73 N.Y.2d 588, 542 N.Y.S.2d 508 (1989) (in-house attorneys for corporation may serve multiple roles, as officers as well as legal counselors, and thus the attorney-client privilege has to be applied carefully and narrowly to ensure legal advice, rather than business advice is covered. In this case, advice was covered by the privilege: in-house lawyer served solely in role of attorney for company, advice was to be used solely for corporate purposes, and advice involved lawyer's strategy in responding to defamation claim. If advice is predominantly or primarily of a legal character, privilege is not lost if non-legal matters or considerations are included as well.).

Federal: Pritchard v. County of Erie, 473 F.3d 413 (2d Cir. 2007) (attorney-client privilege protects communications between a government lawyer having no policy-making authority and a public official, when those communications assess the legality of a policy and propose alternative policies).

United States v. Stewart, 2002 WL 1300059 (S.D.N.Y. June 11, 2002) (appointing a neutral Special Master to screen the items seized from the defendant-lawyer's office

for privilege and responsiveness to the underlying search warrant. Special Master needs to determine if documents seized represented communications for purpose of legal advice.).

Sackman v. The Liggett Group, Inc., 920 F. Supp. 357 (E.D.N.Y. 1996) (communications between tobacco company in-house attorneys and company scientists regarding research projects intended to show tobacco smoking is less harmful were not primarily legal in character and were thus not subject to the attorney-client privilege; lawyers were functioning in a scientific, administrative, or public relations capacity).

Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp., 93 Civ. 5125 (RPP), 1996 WL 29392 (S.D.N.Y. Jan. 25, 1996) (lawyer who negotiated environmental provisions of corporate sale agreement on behalf of management was acting in a business capacity, and thus his communications with senior managers about the status of the negotiations, the tradeoffs the opposing side was willing to make, his business judgments about environmental risks, and his company's options were not privileged).

Fine v. Facet Aerospace Prods. Co., 133 F.R.D. 439 (S.D.N.Y. 1990) (risk management report prepared by company counsel who also serves as company officer, and involved safety of company's products, was not covered by attorney-client privilege; the only "legal" information contained in report was a list of cases in which the company was sued, which did not require legal acumen to compile).

In re Grand Jury Subpoena Duces Tecum dated September 15, 1983, 731 F.2d 1032 (2d Cir. 1984) (advice rendered by law firm regarding: (1) tax advice under Swiss and American law regarding compensation plans for corporate client's employees, (2) tax consequences of business reorganization, and (3) legality of corporate sale is legal advice, not business advice).

In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982) (communication between corporation's general counsel and accounting firm conducting annual audit is not privileged, since it is not for purpose of legal advice but to enable the accountant to complete the audit).

U.S. v. Colton, 306 F.2d 633 (1962) (attorneys frequently give their clients business advice—in this case, investment advice—which, to the extent it can be separated from legal advice, gives rise to no privilege whatsoever).

U.S. v. Kovel, 296 F.2d 918 (1961) (communications between clients and others hired by the attorney whose presence is necessary, or at least highly useful, for the effective consultation between the client and the lawyer are still covered by the privilege, even if the lawyer is not present—this includes communications with secretaries, clerks, accountants, and foreign language interpreters. The key, if an accountant or other independent contractor for the lawyer is involved, is that the ultimate purpose of the communication be to obtain legal advice.).

Was the Communication in a Confidential Setting?

New York: Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99, 756 N.Y.S.2d 367 (Sup. Ct. N.Y. Co. 2003) (draft document prepared by an attorney for a client is generally privileged if it contains information provided by the client in confidence and the contents of the draft were maintained in confidence. But by sharing draft

merger documents with investment bankers for both parties to a merger, a law firm surrendered any claim of privilege.).

Federal: SR Int'l Bus. Ins. Co., v. World Trade Center Prop. LLC, 2002 WL 1334821 (S.D.N.Y. June 19, 2002) (analyzing the circumstances under which the attorney-client privilege can be extended to communications between a corporation's attorney and its outside agent, a common interest privilege can exist, and a waiver of work product can occur with respect to the communications between the attorney and the agent).

United States v. Ackert, 169 F.3d 136 (2d Cir.1999) (attorney-client privilege did not protect communications between an in-house lawyer and an investment banker, even though the communications occurred to facilitate the lawyer's advising the client about the legal and financial implications of a transaction).

In re Grand Jury Subpoena Duces Tecum dated September 15, 1983, 731 F.2d 1032 (2d Cir. 1984) (drafts circulated by attorney to client of documents that, in final form, will be sent to corporate employees or otherwise made public are still privileged, since drafts themselves reflect confidential requests for legal advice and were not intended to be publicly circulated. Nevertheless, fact that firm was hired to help with reorganization was not treated as confidential, so documents reflecting that fact must be produced.).

U.S. v. Colton, 306 F.2d 633 (1962) (information transmitted by client to lawyer preparing tax return not privileged, since it was not intended to remain confidential but to be included in the tax return).

What is a "Secret?" Purchase Partners II, LLC v. Westreich, 14 Misc. 3d 1227(A), 2007 WL 329027 (Sup. Ct. N.Y. Co. 2007) (applying the definition of "secret" and "confidence" to communications made in the context of a complex commercial relationship).

HF Mgmt. Serv. LLP v. Pistone, 34 A.D.3d 82, 818 N.Y.S.2d 40 (1st Dept. 2006) ("secret" information was not received in the course of a due diligence investigation).

Scope of Privilege in Certain Contexts: Corporations/Partnerships

New York: Purchase Partners II, LLC v. Westreich, 14 Misc. 3d 1227(A), 2007 WL 329027 (Sup. Ct. N.Y. Co. 2007) (applying the definition of "secret" and "confidence" to communications made in the context of a complex commercial relationship).

HF Mgmt. Serv. LLP v. Pistone, 34 A.D.3d 82, 818 N.Y.S.2d 40 (1st Dept. 2006) ("secret" information was not received in the course of a due diligence investigation).

N.Y. Times Co. v. Lehrer McGovern Bovis, Inc., 300 A.D.2d 169, 752 N.Y.S.2d 642 (1st Dept. 2002) (memo written by corporate client's employee upon oral instruction of the lawyer, setting forth the relevant facts and analyzing plaintiff's claim, is covered by the attorney-client privilege).

Aetna Cas. & Surety Co. v. Certain Underwriters and Lloyd's London, 176 Misc. 2d 605, 676 N.Y.S.2d 727 (Sup. Ct. N.Y. Co. 1998) (no privilege attaches when an attorney is present at a meeting as a "mere scrivener" and no legal advice is sought).

Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 N.Y.2d 371, 575 N.Y.S.2d 809 (1991) (law firm's report to client on outcome of internal investigation, which included

assessment of size and strength of opposing side's legal claim, is covered by the attorney-client privilege, notwithstanding that it contained some non-legal recommendations regarding preventing future corruption).

Rossi v. Blue Cross and Blue Shield of Greater New York, 73 N.Y.2d 588, 542 N.Y.S.2d 508 (1989) (in-house attorneys for corporation may serve multiple roles, as officers as well as legal counselors, and thus the attorney-client privilege has to be applied carefully and narrowly to ensure legal advice, rather than business advice is covered. In this case, advice was covered by the privilege: in-house lawyer served solely in role of attorney for company, advice was to be used solely for corporate purposes, and advice involved lawyer's strategy in responding to defamation claim.).

Federal: SR Int'l Bus. Ins. Co., v. World Trade Center Prop. LLC, 2002 WL 1334821 (S.D.N.Y. June 19, 2002) (analyzing the circumstances under which the attorney-client privilege can be extended to communications between a corporation's attorney and its outside agent, a common interest privilege can exist, and a waiver of work product can occur with respect to the communications between the attorney and the agent).

In re Dow Corning Corp., 261 F.3d 280 (2d Cir. 2000) (although declining to order a writ of mandamus, the appellate court strongly suggested that the district court erred in permitting discovery once it concluded that the attorney-client privilege protected the communications in question).

United States v. Ackert, 169 F.3d 136 (2d Cir.1999) (attorney-client privilege did not protect communications between an in-house lawyer and an investment banker, even though the communications occurred to facilitate the lawyer's advising the client about the legal and financial implications of a transaction).

Georgia-Pacific Corp. v. GAF Roofing Mfg., 93 Civ. 5125 (RPP), 1996 WL 29392 (S.D.N.Y. Jan. 25, 1996) (lawyer who negotiated environmental provisions of corporate sale agreement on behalf of management was acting in a business capacity, and thus his communications with senior managers about the status of the negotiations, the tradeoffs the opposing side was willing to make, his business judgments about environmental risks, and his company's options were not privileged).

In re Grand Jury Subpoena Duces Tecum dated September 15, 1983, 731 F.2d 1032 (2d Cir. 1984) (advice rendered by law firm regarding: (1) tax advice under Swiss and American law regarding compensation plans for corporate client's employees, (2) tax consequences of business reorganization, and (3) legality of corporate sale is legal advice, not business advice).

In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982) (communication between corporation's general counsel and accounting firm conducting annual audit is not privileged, as it is not for purpose of legal advice but to enable the accountant to complete the audit).

Scope of Privilege in Certain Contexts: Joint Clients or Joint Defense

New York: Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99, 756 N.Y.S.2d 367 (Sup. Ct. N.Y. Co. 2003) (common interest privilege applies to parties facing common problems in pending or threatened civil litigation; it does not protect business communications. Sharing draft merger documents with investment bankers

for both parties to a potential merger involves communication of a "commercial nature," which is not subject to common interest exception).

Aetna Cas. & Surety Co. v. Certain Underwriters and Lloyd's London, 176 Misc. 2d 605, 676 N.Y.S.2d 727 (Sup. Ct. N.Y. Co. 1998) (exception to requirement that attorney-client communication not involve third parties is the joint defense/common interest privilege. This clearly applies in criminal cases involving joint defendants, but less clearly applies in the civil context. To the extent it does apply, it must be limited to communication between counsel and parties with respect to legal advice in pending or reasonably anticipated litigation in which the joint consulting parties have a common legal interest; it cannot be used to protect communications that are business-oriented or personal in nature. As joint meeting here was primarily of a "commercial nature," it was not protected.).

Federal: SR Int'l Bus. Ins. Co., v. World Trade Center Prop. LLC, 2002 WL 1334821 (S.D.N.Y. June 19, 2002) (analyzing the circumstances under which the attorney-client privilege can be extended to communications between a corporation's attorney and its outside agent, a common interest privilege can exist, and a waiver of work product can occur with respect to the communications between the attorney and the agent).

Sackman v. The Liggett Group, Inc., 920 F. Supp. 357 (E.D.N.Y. 1996) (joint defense theory does not apply when lawyers from tobacco companies combined to work on a joint public relations business strategy designed to promote the economic interest of their clients).

Scope of Privilege in Certain Contexts: Within Law Firms (Firm GC and Others) Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am., 850 F. Supp. 255 (S.D.N.Y. 1994) (communications between law firm partner formally appearing on behalf of pro se law firm in ongoing litigation and other firm partners are covered by the attorney-client privilege).

VII.2 Cases Related to NY Rule 1.6(a)(1), (2), and (3)

Did Lawyer Misuse the Client's Confidences or Secrets by Improperly Revealing Them? Charney v. Sullivan & Cromwell LLP, 2007 WL 1240422 (Sup. Ct. N.Y. Co., Apr. 30, 2007) (applying former DR 4-101 to statements about a law firm, its clients, and the staffing of matters that were contained in a discrimination complaint filed by a former associate. See also Charney v. Sullivan & Cromwell LLP, 2007 WL 1240437 (Sup. Ct. N.Y. Co., Apr. 30, 2007).).

Wise v. Consol. Edison Co., 282 A.D.2d 335, 723 N.Y.S.2d 462 (1st Dept. 2001) (ordering the dismissal of an action for wrongful termination filed by a former in-house counsel on the ground that the litigation would necessarily entail the disclosure of client confidences).

People v. Vespucci, 2002 WL 1396080 (Co. Ct. Nassau, May 29, 2002) (holding that the attorney-client privilege survives a client's death and refusing to pierce the veil of confidentiality to allow the deceased client's lawyer to provide exculpatory evidence in behalf of a defendant charged with murder).

Did Lawyer Misuse the Client's Confidences or Secrets by Using Them for the Lawyer's Own Advantage or for the Advantage of Another Person? Charney v. Sullivan & Cromwell LLP, 2007 WL 1240422 (Sup. Ct. N.Y. Co., Apr. 30, 2007) (applying former DR 4-101 to statements about a law firm, its clients, and the staffing of matters that were contained in a discrimination complaint filed by a former associate. See also Charney v. Sullivan & Cromwell LLP, 2007 WL 1240437 (Sup. Ct. N.Y. Co., Apr. 30, 2007).).

Wise v. Consol. Edison Co., 282 A.D.2d 335, 723 N.Y.S.2d 462 (1st Dept. 2001) (ordering the dismissal of an action for wrongful termination filed by a former in-house counsel on the ground that the litigation would necessarily entail the disclosure of client confidences).

VII.3 Cases Related to NY Rule 1.6(b)

Exceptions to the Confidentiality Rule: Preventing Physical Harm (Rule 1.6(b)(1)) Sackman v. The Liggett Group, Inc., 920 F. Supp. 357 (E.D.N.Y. 1996) (communications between tobacco company in-house lawyers and company scientists regarding research projects intended to show tobacco smoking less harmful may be revealed because of the compelling public policy interest in promoting public health).

Exceptions to the Confidentiality Rule: To Defend Against an Accusation ("Self-Defense" Exception)(Rule 1.6(b)(5)(i))

New York: Nesenoff v. Dinerstein & Lesser, P.C., 12 A.D.3d 427, 786 N.Y.S.2d 185 (2d Dept. 2004) (analyzing the self-defense exception in the context of a motion to disqualify the law firm for the defendant lawyer and law firm).

Federal: Acme Am. Repairs, Inc. v. Katzenberg, 2007 WL 952064 (E.D.N.Y. 2007) (analyzing the self-defense exception to former DR 4-101).

Louima v. City of New York, 2004 WL 2359943 (E.D.N.Y. Oct. 5, 2004) (analyzing how a lawyer's violation of former DR 4-101 by responding to improper accusations in the media can affect the lawyer's right to recover his or her fee).

Exceptions to the Confidentiality Rule: To Withdraw an Opinion or Misrepresentation (Rule 1.6(b)(3)) Fried v. Village of Patchogue, 11 Misc. 3d 1068(A), 2006 WL 738909 (Sup. Ct. N.Y. Co.) (Mar. 13, 2006) (analyzing the interplay between a lawyer's possible disclosure of confidential information pursuant to Former DR 4-101(c)(5), a lawyer's signature on litigation papers pursuant to 22 NYCRR 130-1.1, and a lawyer's obligation to withdraw pursuant to former DR 2-110).

Exceptions to the Confidentiality Rule: Crime-Fraud Exception Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F. Supp. 2d 548 (S.D.N.Y. 2008) (discovery under the crime-fraud exception was limited to e-mails covered by the attorney-client privilege, and the right to privacy as to the remaining e-mails was not forfeited even if they too were in furtherance of the crime or fraud).

United States v. Stewart, 2002 WL 1300059 (S.D.N.Y. June 11, 2002) (appointing a neutral Special Master to screen the items seized from the defendant-lawyer's office for privilege and responsiveness to the underlying search warrant).

In re Richard Roe, Inc., 68 F.3d 38 (2d Cir. 1995) (rejecting a "relevant evidence" test for crime-fraud exception that examined only whether the material sought might provide evidence of a crime or fraud, in favor of an "in furtherance of the crime or fraud" test requiring a determination that "the client communication or attorney work product in question was itself in furtherance of the crime or fraud" and that there be "probable cause to believe that the particular communication with counsel… was intended in some way to facilitate or conceal the criminal activity").

In re John Doe, Inc., 13 F.3d 633 (2d Cir. 1994) (further defining the "probable cause standard" as requiring "that a prudent person have a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud and that the communications were in furtherance thereof").

U.S. v. Zolin, 491 U.S. 554 (1989) (while the attorney-client privilege applies when the client discusses past criminal violations or fraudulent conduct with the attorney, communications related to the client's future wrongdoing are subject to the crime-fraud exception. If the client seeks the lawyer's advice to further a crime or fraud, the "seal of secrecy" of lawyer-client communications is broken.).

In re Grand Jury Subpoena Duces Tecum dated September 15, 1983, 731 F.2d 1032 (2d Cir. 1984) (communications that would otherwise be protected by the attorney-client privilege lose their protection if they do not relate to client communication in furtherance of contemplated or ongoing criminal or fraudulent conduct, even if the attorney is unaware of the improper purpose behind the client's request for advice. The crime or fraud need not have occurred for the exception to apply; it only had to be the objective of the client's communication. It is also not necessary the fraudulent nature of the objective be established conclusively; a reasonable basis for believing the objective was fraudulent, and that the communication was in furtherance thereof, is enough.).

In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982) (probable cause to find that communications between firm's in-house lawyers and firm's outside accountant and underwriter's counsel were designed to cover up a bribe payment, and thus were not subject to attorney-client privilege protections).

Exceptions to the Confidentiality Rule: Obtaining Ethics Advice (Rule 1.6(b)(4))—Fiduciary Exception to the Attorney-Client Privilege Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99, 756 N.Y.S.2d 367 (Sup. Ct. N.Y. Co. 2003) (fiduciary exception applies when there is a fiduciary relationship between the party seeking disclosure and the party who sought legal advice for the party seeking disclosure. Accordingly, shareholders may obtain access to communications between corporate management and its lawyers regarding merger, especially since: (1) colorable claim was made of self-dealing; (2) the information sought is highly relevant and may be the only evidence available on the subject; (3) the communication related to prospective actions of management, not past actions; and (4) the request was specific.).

Hoopes v. Carota, 142 A.D.2d 906, 531 N.Y.S.2d 407 (3d Dept. 1988), *aff'd,* 74 N.Y.2d 716 (1989) (applying the fiduciary exception to the attorney-client privilege to allow disclosure to trust beneficiaries of communications between trustees and their counsel regarding allegedly improper employment contracts and pay raises, based on a showing that plaintiffs were directly affected by trustees' decision, the information sought was highly relevant to the case (and may be the only evidence available on key issues), the communication related to prospective actions of the trustees, the plaintiffs' claims of self-dealing were at least colorable, and the information sought was specific).

Waiver/Forfeiture: In General Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99, 756 N.Y.S.2d 367 (Sup. Ct. N.Y. Co. 2003) (client can waive the attorney-client privilege by placing the subject matter of counsel's advice in issue and by making selective disclosure of such advice).

United States v. John Doe, 219 F.3d 175 (2d Cir. 2000) (analyzing the circumstances under which the grand jury testimony of a corporation's founder, chairman, and controlling shareholder given in his individual capacity might constitute a waiver of the corporation's attorney-client and work product privileges).

Waiver/Forfeiture: "Advice of Counsel" Defense

New York: Deutsche Bank Trust Co. of Americas v. Tri-Links Inv. Trust, 43 A.D.3d 56, 837 N.Y.S.2d 15 (1st Dept. 2007) (defendant in prior lawsuit did not waive attorney-client privilege, or put advice of counsel "at issue," by commencing third-party action for indemnification of legal fees. Though indemnification claim sought to determine reasonableness of legal fees, this did not put "in issue" the advice provided by counsel, especially where defendant seeking indemnification stated it would rely on non-privileged documents to support its claim. "At issue" waiver occurs only when party asserts a claim or defense that it intends to prove by use of privileged materials.).

Federal: In re Grand Jury Proceedings, John Doe Co. v. U.S., 350 F.2d 299, 302 (2d Cir. 2003) (corporate subject of grand jury investigation did not waive (or "forfeit") the privilege by writing letter to prosecutor stating, inter alia, that it followed the advice of its counsel. Forfeiture of privilege occurs only when a party advances a claim to a court, jury, or other fact finder while relying on its privilege to withhold from an adversary the material facts needed to defend against the claim. Because disclosure here took place in a grand jury context, this element of unfairness was missing.).

In re Grand Jury Proceedings, 219 F.3d 175, 182–83 (2d Cir. 2000) (placing legal advice at issue in the criminal investigation results in waiver of attorney-client privilege).

U.S. v. Bilzerian, 926 F.2d 1285, 1293 (2d Cir. 1993) ("advice of counsel" defense waives privilege).

Orco Bank, N.V. v. Proteinas de Pacifico, *S.A.,* 179 A.D.2d 390, 577 N.Y.S.2d 841 (1st Dept. 1992) (waiver of attorney-client privilege found when party put legal advice "at issue" and selectively disclosed only portions of the legal advice received).

Waiver/Forfeiture: Waivers in Malpractice Litigation—Plaintiff's Communications with Defendant Law Firm Veras Inv. Partners, LLC v. Akin Gump Strauss Hauer & Feld LLP, 52 A.D.3d 370, 860 N.Y.S.2d 78 (1st Dept. 2008) (privilege is waived when a party affirmatively places the subject matter of its own privileged communication at issue in litigation so that invasion of the privilege is required to determine the validity of the party's claim or defense, and application of the privilege would deprive the party of vital information. Nevertheless, fact that privileged communication will provide relevant information is not enough to support waiver; there must be a showing that a party has asserted a claim or defense that he or she expects to prove using the privileged material.).

Waiver/Forfeiture: Waivers in Malpractice Litigation—Plaintiff's Communications with Successor Counsel Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 62 A.D.3d 581, 880 N.Y.S.2d 617 (1st Dept. 2009) (evaluation by successor counsel of bungled advice on trust transaction is not subject to discovery. Though that information is "relevant" to a malpractice claim based on trust transaction, successor counsel's advice was not placed in issue in that malpractice case because there was nothing successor attorneys could have done or said that affected plaintiff's reliance on the erroneous advice given in the trust transaction years earlier.).

Veras Inv. Partners, LLC v. Akin Gump Strauss Hauer & Feld LLP, 52 A.D.3d 370, 860 N.Y.S.2d 78 (1st Dept. 2008) (disclosure of communications by nonparty successor counsel that would show that counsel's evaluation of the problems caused by defendant counsel's actions not permitted based on relevance alone, and also rejected on work-product grounds).

Goetz v. Volpe, 11 Misc. 3d 632, 812 N.Y.S.2d 294 (Sup. Ct. Nassau Co. 2006) (where legal malpractice plaintiff retained another attorney at the same time defendant was working on settlement agreement, his action in suing defendant is deemed to waive attorney-client privilege with respect to the other attorney, since advice that attorney gave may be relevant to show lack of reliance on defendant's advice).

Jakobleff v. Cerrato Sweeney & Cohn, 97 A.D.2d 834, 835 (2d Dept. 1983) (although defendant law firm sued plaintiff's successor counsel, claiming, inter alia, that successor counsel had failed to remediate defendant's alleged misconduct, this did not allow defendant law firm to obtain privileged communications between plaintiff and successor counsel. If this discovery were allowed, privilege would be rendered a nullity.).

Waiver/Forfeiture: Waivers in Criminal and Regulatory Investigations
In re Cardinal Health, Inc., 2007 U.S. Dist. LEXIS 36000 (S.D.N.Y. Jan. 26, 2007) (no waiver of attorney-client privilege where company's audit committee disclosed results of internal investigation to SEC and U.S. Attorney's Office, since latter are deemed to have "common interest" with company).

In re Natural Gas Commodity Litig., 2005 U.S. Dist. LEXIS 11950 (S.D.N.Y. June 21, 2005) (where corporate parties turned over results of internal investigation to FERC and CFTC, accompanied by confidentiality and nondisclosure agreements, no waiver was found vis-à-vis third parties (following *Steinhardt*)).

In re Grand Jury Proceedings, John Doe Co. v. U.S., 350 F.2d 299, 302 (2d Cir. 2003) (corporate subject of grand jury investigation did not waive (or "forfeit") the privilege by writing letter to prosecutor stating, inter alia, that it followed the advice of its counsel. Forfeiture of privilege occurs only when a party advances a claim to a court, jury, or other fact finder while relying on its privilege to withhold from an adversary material facts needed to defend against the claim. Because disclosure here took place in a grand jury context, this element of unfairness is missing.).

In re Grand Jury Proceedings, 219 F.3d 175 (2d Cir. 2000) (analyzing the circumstances under which the grand jury testimony of a corporation's founder, chairman, and controlling shareholder given in his individual capacity might constitute a waiver of the corporation's attorney-client and work-product privileges).

SEC v. Cassano, 189 F.R.D. 83 (S.D.N.Y. 1999) (SEC's carelessness in producing a privileged document was so egregious as to constitute a waiver of the attorney-client privilege).

In re Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993) (disclosing privileged document to government agency generally waives the privilege (and the work-product protection) as to third parties, except where the disclosing party and government agency can be said to share a "common interest" in the investigation, or where agency entered into a confidentiality agreement with the disclosing party).

Teachers Ins. and Annuity Ass'n. v. Shamrock Broadcasting Co., 521 F. Supp. 638 (S.D.N.Y. 1981) (disclosure of privileged information to government agency does not constitute waiver so long as affirmative steps are taken to preserve the privilege at the time the waiver occurs. For example, if the disclosing party (e.g., a corporation) specifically asserts the privilege at the time the disclosure is made, then the privilege remains intact. *See, e.g.,* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289 (6th Cir. 2002) (discussing checkered subsequent history of *Teachers*).).

Waiver/Forfeiture: Scope of Waiver

New York: Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99, 756 N.Y.S.2d 367 (Sup. Ct. N.Y. Co. 2003) (draft document prepared by an attorney for a client is generally privileged if it contains information provided by the client in confidence and the contents of the draft were maintained in confidence. But by sharing draft merger documents with investment bankers for both parties to merger, law firm waived any claim of privilege. Waiver extends to all documents of the same subject matter.).

Federal: In re Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993) (where corporate party discloses privileged document to government agency as part of an effort to cooperate, waiver is limited to the document itself).

In re Von Bulow, 828 F.2d 94 (2d Cir. 1987) (where waiver occurs in testimony or in other litigation context, such as "advice of counsel," disclosure of all privileged communications on the same subject matter is required, but where waiver occurs extrajudicially (i.e., in book or newspaper article), the waiver is limited only to the disclosure itself).

In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982) (disclosure of privileged communications (or, in one case, failure to disclose privileged communication in order to hide possible criminal activity) to Underwriter's Counsel preparing registration statement deemed a waiver. Corporation cannot disclose information for one purpose (to prepare registration statement for valuable securities offering) without disclosing it for all purposes).

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Rule 1.7: Conflict of Interest: Current Clients

I. TEXT OF RULE 1.7[1]

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

II. NYSBA COMMENTARY

General Principles

[1] Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the

1 Rules Editors Devika Kewalramani, Esq. and Carol L. Ziegler, Esq. The editors would like to thank Pinella Tajcher for her research and cite- checking assistance.

bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the lawyer's ability to exercise professional judgment on behalf of each client. For specific Rules regarding certain concurrent conflicts of interest, *see* Rule 1.8. For former client conflicts of interest, *see* Rule 1.9. For conflicts of interest involving prospective clients, *see* Rule 1.18. For definitions of "differing interests," "informed consent" and "confirmed in writing," *see* Rules 1.0(f), (j) and (e), respectively.

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer, acting reasonably, to: (i) identify clearly the client or clients, (ii) determine whether a conflict of interest exists, *i.e.*, whether the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation, (iii) decide whether the representation may be undertaken despite the existence of a conflict, *i.e.*, whether the conflict is consentable under paragraph (b); and if so (iv) consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include all of the clients who may have differing interests under paragraph (a)(1) and any clients whose representation might be adversely affected under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). *See* Rule 1.10(e), which requires every law firm to create, implement, and maintain a conflict-checking system.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). *See* Rule 1.16(b)(1). Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. *See* Rule 1.9; *see also* Comments [5], [29A].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is acquired by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. *See* Rules 1.16(d) and (e). The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. *See* Rule 1.9(c).

Identifying Conflicts of Interest

[6] The duty to avoid the representation of differing interest [sic][2]prohibits, among other things, undertaking representation directly adverse to a current client without that client's informed consent. For example, absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken may reasonably fear that the lawyer will pursue that client's case less effectively out of deference to the other client, that is, that the lawyer's exercise of professional judgment on behalf of that client will be adversely affected by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client appearing as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Differing interests can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

[8] Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. For example, the professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions that each client might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

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2 There appears to be a typo in the NYSBA Commentary. An "s" should be added to the reference "differing interests" standard.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be adversely affected by responsibilities to former clients under Rule 1.9, or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal-Interest Conflicts

[10] The lawyer's own financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. *See* Rule 5.7 on responsibilities regarding nonlegal services and Rule 1.8 pertaining to a number of personal-interest conflicts, including business transactions with clients.

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

[12] A lawyer is prohibited from engaging in sexual relations with a client in domestic relations matters. In all other matters a lawyer's sexual relations with a client are circumscribed by the provisions of Rule 1.8(j).

Interest of Person Paying for Lawyer's Services

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. *See* Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's exercise of professional judgment on behalf of a client will be adversely affected by the lawyer's own interest in accommodating the person paying

the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. As paragraph (b) indicates, however, some conflicts are nonconsentable. If a lawyer does not reasonably believe that the conditions set forth in paragraph (b) can be met, the lawyer should neither ask for the client's consent nor provide representation on the basis of the client's consent. A client's consent to a nonconsentable conflict is ineffective. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), notwithstanding client consent, a representation is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. *See* Rule 1.1 regarding competence and Rule 1.3 regarding diligence.

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, federal criminal statutes prohibit certain representations by a former government lawyer despite the informed consent of the former governmental client. In addition, there are some instances where conflicts are nonconsentable under decisional law.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to mediation (because mediation is not a proceeding before a "tribunal" as defined in Rule 1.0(w)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires. *See* Rule 1.0(j). The information that a lawyer is required to communicate to a client

depends on the nature of the conflict and the nature of the risks involved, and a lawyer should take into account the sophistication of the client in explaining the potential adverse consequences of the conflict. There are circumstances in which it is appropriate for a lawyer to advise a client to seek the advice of a disinterested lawyer in reaching a decision as to whether to consent to the conflict. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved. *See* Comments [30] and [31] concerning the effect of common representation on confidentiality.

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one client refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation is that each party obtains separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests. Where the fact, validity or propriety of client consent is called into question, the lawyer has the burden of establishing that the client's consent was properly obtained in accordance with the Rule.

Client Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of (i) a document from the client, (ii) a document that the lawyer promptly transmits to the client confirming an oral informed consent, or (iii) a statement by the client made on the record of any proceeding before a tribunal, whether before, during or after a trial or hearing. *See* Rule 1.0(e) for the definition of "confirmed in writing." *See also* Rule 1.0(x) ("writing" includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. The Rule does not require that the information communicated to the client by the lawyer necessary to make the consent "informed" be in writing or in any particular form in all cases. *See* Rules 1.0(e) and (j). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing. *See* Comment [18].

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients, and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the conditions set forth in paragraph (b). The effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. At a minimum, the client should be advised generally of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts. The more comprehensive the explanation and disclosure of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the understanding necessary to make the consent "informed" and the waiver effective. *See* Rule 1.0(j). The lawyer should also disclose the measures that will be taken to protect the client should a conflict arise, including procedures such as screening that would be put in place. *See* Rule 1.0(t) for the definition of "screening." The adequacy of the disclosure necessary to obtain valid advance consent to conflicts may also depend on the sophistication and experience of the client. For example, if the client is unsophisticated about legal matters generally or about the particular type of matter at hand, the lawyer should provide more detailed information about both the nature of the anticipated conflict and the adverse consequences to the client that may ensue should the potential conflict become an actual one. In other instances, such as where the client is a child or an incapacitated or impaired person, it may be impossible to inform the client sufficiently, and the lawyer should not seek an advance waiver. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, an advance waiver is more likely to be effective, particularly if, for example, the client is independently represented or advised by in-house or other counsel in giving consent. Thus, in some circumstances, even general and open-ended waivers by experienced users of legal services may be effective.

[22A] Even if a client has validly consented to waive future conflicts, however, the lawyer must reassess the propriety of the adverse concurrent representation under paragraph (b) when an actual conflict arises. If the actual conflict is materially different from the conflict that has been waived, the lawyer may not rely on the advance

consent previously obtained. Even if the actual conflict is not materially different from the conflict the client has previously waived, the client's advance consent cannot be effective if the particular circumstances that have created an actual conflict during the course of the representation would make the conflict nonconsentable under paragraph (b). *See* Comments [14]-[17] and [28] addressing nonconsentable conflicts.

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or codefendants, is governed by paragraph (a)(1). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal as well as civil cases. Some examples are those in which a lawyer is asked to represent codefendants in a criminal case, co-plaintiffs or codefendants in a personal injury case, an insured and insurer, or beneficiaries of the estate of a decedent. In a criminal case, the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, multiple representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's representation of another client in a different case; for example, when a decision favoring one client will create a precedent likely to weaken seriously the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of this risk include: (i) where the cases are pending, (ii) whether the issue is substantive or procedural, (iii) the temporal relationship between the matters, (iv) the significance of the issue to the immediate and long-term interests of the clients involved, and (v) the clients' reasonable expectations in retaining the lawyer. Similar concerns may be present when lawyers advocate on behalf of clients before other entities, such as regulatory authorities whose regulations or rulings may significantly implicate clients' interests. If there is significant risk of an adverse effect on the lawyer's professional judgment, then absent informed consent of the affected clients, the lawyer must decline the representation.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered

to be clients of the lawyer for purposes of applying paragraph (a)(1). Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraph (a)(1) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, *see* Comment [7]. Relevant factors in determining whether there is a significant risk that the lawyer's professional judgment will be adversely affected include: (i) the importance of the matter to each client, (ii) the duration and intimacy of the lawyer's relationship with the client or clients involved, (iii) the functions being performed by the lawyer, (iv) the likelihood that significant disagreements will arise, (v) the likelihood that negotiations will be contentious, (vi) the likelihood that the matter will result in litigation, and (vii) the likelihood that the client will suffer prejudice from the conflict. The issue is often one of proximity (how close the situation is to open conflict) and degree (how serious the conflict will be if it does erupt). *See* Comments [8], [29] and [29A].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present at the outset or may arise during the representation. In order to avoid the development of a disqualifying conflict, the lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared (and regardless of whether it is shared, may not be privileged in a subsequent dispute between the parties) and that the lawyer will have to withdraw from one or both representations if one client decides that some matter material to the representation should be kept secret from the other. *See* Comment [31].

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to one another, but common representation is permissible where the clients are generally aligned in interest, even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. Examples include helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, and arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given

these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In civil matters, two or more clients may wish to be represented by a single lawyer in seeking to establish or adjust a relationship between them on an amicable and mutually advantageous basis. For example, clients may wish to be represented by a single lawyer in helping to organize a business, working out a financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution of an estate or resolving a dispute between clients. The alternative to common representation can be that each party may have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation that might otherwise be avoided, or that some parties will have no lawyer at all. Given these and other relevant factors, clients may prefer common representation to separate representation or no representation. A lawyer should consult with each client concerning the implications of the common representation, including the advantages and the risks involved, and the effect on the attorney-client privilege, and obtain each client's informed consent, confirmed in writing, to the common representation.

[29A] Factors may be present that militate against a common representation. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, absent the informed consent of all clients, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. *See* Rule 1.9(a). In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between or among commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, it is unlikely that the clients' interests can be adequately served by common representation. For example, a lawyer who has represented one of the clients for a long period or in multiple matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. It must therefore be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. At the outset of the common representation and as part of the process of obtaining each client's informed consent, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential even as among the commonly represented clients. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the two clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitation on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. *See* Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should always seek informed consent of the client organization before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer will avoid representation adverse to the client's affiliates, (ii) the lawyer's obligations to either the organizational client or the new client are likely to adversely affect the lawyer's exercise of professional judgment on behalf of the other client, or (iii) the circumstances are such that the affiliate should also be considered a client of the lawyer. Whether the affiliate should be considered a client will depend on

the nature of the lawyer's relationship with the affiliate or on the nature of the relationship between the client and its affiliate. For example, the lawyer's work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, and the client's overall mode of doing business, may be so extensive that the entities would be viewed as "alter egos." Under such circumstances, the lawyer may conclude that the affiliate is the lawyer's client despite the lack of any formal agreement to represent the affiliate.

[34A] Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate. Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer's client.

[34B] Finally, before accepting a representation adverse to an affiliate of a corporate client, a lawyer should consider whether the extent of the possible adverse economic impact of the representation on the entire corporate family might be of such a magnitude that it would materially limit the lawyer's ability to represent the client opposing the affiliate. In those circumstances, Rule 1.7 will ordinarily require the lawyer to decline representation adverse to a member of the same corporate family, absent the informed consent of the client opposing the affiliate of the lawyer's corporate client.

Lawyer as Corporate Director

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 1.7 is the successor to former DRs 5-101 and 5-105(A), (B) and (C). Specifically:

- Rule 1.7(a) is substantively similar to former DRs 5-101 and 5-105, but combines personal conflicts and client-to-client conflicts in a single section, and also combines restrictions on accepting representation and continuing representation in a single section.
- Rule 1.7(a)(1) is substantively similar to former DR 5-105(A) and (B), but Rule 1.7 deletes the phrase "if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client," leaving only the reference to "representing differing interests" in the Rule. Rule 1.0(f) (Terminology) defines "Differing Interests" to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client."
- Rule 1.7(a)(2) is substantively similar to former DR 5-101, but it replaces the phrase "if the exercise of professional judgment on behalf of the client will be or reasonably may be affected" with the new phrase "if a reasonable lawyer would conclude that…there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected."
- Rule 1.7(b) is similar in substance to the consent provisions in former DRs 5-101 and 5-105(C), but adds additional criteria for consentability and specifies two forms of nonconsentable conflicts of interest.

III.2 ABA Model Rules of Professional Conduct (2009)

- NY Rule 1.7(a) differs substantively from ABA Rule 1.7(a). While both rules begin with identical language, "Except as provided in paragraph (b), a lawyer shall not represent a client if", NY Rule 1.7(a) continues with different language, "a reasonable lawyer would conclude" in contrast to ABA Rule 1.7(a) that states, "the representation involves a concurrent conflict of interest." NY Rule 1.7(a) applies the "reasonable lawyer" standard as defined in Rule 1.0(q) (Terminology) for current client conflicts analysis, whereas ABA Rule 1.7 does not (even though the "reasonable lawyer" standard appears elsewhere in the ABA Rules).
- NY Rule 1.7(a)(1) differs from ABA Rule 1.7(a)(1). NY Rule 1.7(a)(1) carries forward from former DR 5-105(A) and (B) the "differing interests" standard (defined in Rule 1.0(f) (Terminology)): "the representation will involve the lawyer in representing differing interests." ABA Rule 1.7(a) divides current client conflicts into two categories: "direct adversity" conflicts in ABA Rule 1.7(a)(1) and "material limitation" conflicts in ABA Rule 1.7 (a)(2). Because the "differing interests" standard of the NY Rule is broadly defined, it would appear that when

compared to ABA Rule 1.7(a), NY Rule 1.7(a) identifies a conflict where the ABA Rule would not.

- NY Rule 1.7(a)(2) and ABA Rule 1.7(a)(2) both apply the "significant risk standard to personal interest conflicts. The NY Rule asks whether there is a "significant risk" "that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." In contrast, the ABA Rule is not limited to a lawyer's personal interest conflicts but instead asks whether there is a "significant risk" "that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." The "material limitation" language used in the ABA Rule thus focuses on the impact of the conflict on the representation. The NY Rule, however, focuses on the impact of the conflict on the "lawyer's professional judgment on behalf of the client."
- NY Rule 1.7(b), which sets forth the circumstances under which a lawyer can represent a client notwithstanding the existence of a conflict, is identical to ABA Rule 1.7(b), although the "differing interests" standard in the NY Rule may mean that Rule 1.7(b) is triggered more readily than ABA Rule 1.7(b).
- The definition of the term "confirmed in writing" (defined in NY Rule 1.0(e) and used in NY Rule 1.7(b)) is identical to ABA Rule 1.0(b) that is used in ABA Rule 1.7(b) in terms of the flexibility in obtaining the writing, but the Rules are broader than the ABA Rules on what qualifies as a writing for purposes of consent. In NY Rule 1.0(e), "'confirmed in writing' denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter." However, in ABA Rule 1.0(b), "confirmed in writing," when used in reference to the informed consent of a person, "denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent". If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter."
- The definition of "writing" in NY Rule 1.0(x) (Terminology) is identical to ABA Rule 1.0(n), except that the NY Rule substitutes the word "photocopying" in place of the word "photostating" used in the ABA Rule.
- The definition of "informed consent" in NY Rule 1.0(j) (Terminology) that is used in Rule 1.7(b) is substantially similar to the same term defined in ABA Rule 1.0(e) that is used in ABA Rule 1.7(b). In NY Rule 1.0(j) "informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." However, the two definitions differ structurally (i.e., in order and placement of the words).

IV. PRACTICE POINTERS

1. Identify the client or clients. This is not always obvious. A lawyer may acquire a client inadvertently by failing to disabuse a person seeking legal services of that person's reasonable belief that the lawyer will provide such services or because the lawyer seeks and obtains confidential information from that person. Another example of the complexity in identifying the client is where the lawyer represents an entity that is a member of a large corporate structure having numerous subsidiaries and affiliates, or if the client is part of an association with many constituents. A careful lawyer should clearly identify in the engagement letter who the client is and is not to avoid any future doubt as to whom the lawyer represents.
2. Determine if the client is a "current" client, a "former" client (see Rule 1.9), or a "prospective" client (see Rule 1.18). Correctly identifying whether the client is a "current", "former," or "prospective" client can be dispositive in determining whether there is a disqualifying conflict of interest. The Rules do not define who is a "current" or "former" client, and a lawyer should consult the case law. This question is also discussed in connection with Rule 1.9 of this text. A "prospective" client is defined in Rule 1.18.
3. Determine whether a current client conflict of interest exists (i.e., whether the lawyer's judgment may be impaired or his/her loyalty may be divided if the lawyer accepts or continues the representation). This is the "differing interests" standard that is the trigger mechanism for a current client conflicts analysis.
4. Remember that differing interests can arise not only in litigation (including directly adverse representations in unrelated matters) but also in transactional matters.
5. Do not forget to check for imputed conflicts. The clients of any lawyer with whom you are "associated" may also be the source of a client-to-client conflict. An effective, updated conflicts system (as required by Rule 1.10) as well as a conflicts memo (e.g., in the form of an internal e-mail) sent to the lawyers with whom you practice are essential in identifying conflicts.
6. Decide whether the representation may be undertaken despite the existence of a conflict (i.e., whether the conflict is consentable under the four conditions in Rule 1.7(b)), and if consentable, obtain "informed consent" "confirmed in writing" from the affected clients.
7. Oral consents are no longer acceptable. See discussion under Section V.[5]. [d], *infra* for methods to obtain valid consents.
8. Although clients may often consent to a representation notwithstanding a conflict, remember that not all conflicts are consentable. If a lawyer does not reasonably believe that the conditions in Rule 1.7(b) can be met, the lawyer should neither request the client's consent nor provide representation on the basis of the client's consent.
9. Personal conflicts of interest can arise if there is a "significant risk" that the lawyer's financial, business, property, or other personal interests will adversely affect the lawyer's professional judgment on behalf of a client.

10. At the inception of this relationship, depending upon the nature of the representation and the type of client (e.g., institutional lender or insurance company), consider obtaining an advance conflicts waiver. See discussion in the Analysis under Section V [6], infra.

V. ANALYSIS

V.1 Current Client Conflicts: Two Rules in One

No provision in the Rules of Professional Conduct has a greater impact on the everyday activities of lawyers engaged in private practice than Rule 1.7. It governs a variety of situations where lawyers may represent two or more clients in related or unrelated matters, applying across the board to representations in a wide range of practice areas. The fundamental principles Rule 1.7 embodies are client loyalty, trust, confidentiality, and professional judgment.

Rule 1.7(a) combines into a single rule the language defining conflicts of interest among two or more current clients (formerly governed by DR 5-105) and conflicts of interest between a client and the lawyer's own personal interests (formerly governed by DR 5-101).

The Rule is unique. The version of Rule 1.7(a) that was ultimately adopted by the courts differs substantively not only from the version of Rule 1.7(a) proposed by the New York State Bar Association but also from ABA Rule 1.7(a) and former DRs 5-101 and 5-105.

V.2 Regulation of Client-to-Client Conflicts

[a] The Conflicts Scenarios The risk of client-to-client conflicts can arise in a variety of ways: for example, an existing client may seek to refer a new matter to the lawyer that is adverse to another client in an unrelated matter, two or more persons may seek to retain the lawyer to carry out a common objective (such as the formation of a business) or seek representation by the same lawyer as co-parties in litigation. In any scenario, the duty of loyalty to the client compels the lawyer to determine if there is a conflict of interest between the proposed new representation and an existing representation.[3]

[b] Checking for Conflicts There is an affirmative duty to check for conflicts of interest.[4] The duties imposed by Rule 1.7 underscore the critical importance of

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3 Conflicts of interest may also arise under Rules 1.8, 1.9, and 1.18, and a law firm must implement a system for discovering these conflicts as well as those arising under Rule 1.7. *See* N.Y.C. Bar Op. 2003-04 (2003).

4 *See* NY Rule 1.10(e).

conflicts checking before and during the entire course of a representation. A lawyer's duty to avoid conflicts of interests is not confined to the date of the initial engagement; rather, conflicts checking is an ongoing obligation of lawyers. Issues relating to client identity can be complicated, especially in the context of an engagement by a corporate[5] or government entity[6] or a trade association.[7] The key to effective conflicts checking is the ability to precisely identify the client who will be represented.

[c] Effect of Rule 1.7(a) It is important to examine the facts and circumstances of a particular conflicts situation to evaluate how the conflicts rules in Rule 1.7(a)(1) may impact a lawyer's ability to represent a client. The Rule clearly bans certain kinds of adversity, such as a single law firm's representation of both sides in the same litigation. These types of conflicts are nonconsentable (i.e., client consent is irrelevant and cannot cure the conflict). However, the Rule may permit a lawyer to represent a client despite a conflict where, for example, one client in a litigation is adverse to another client in an unrelated matter, and the lawyer obtains the affected clients' informed consent, confirmed in writing. Finally, the circumstances in which informed consent can be inferred may be relaxed in transactional matters where, for example, a firm may represent a client whose interests in a corporate deal are adverse to another client represented by the firm in a separate matter, and it may even jointly represent multiple clients with differing interests in a single matter.[8]

[d] When Rule 1.7(a) Applies. Rule 1.7(a) appears to weaken the previous rigorous standards regarding client-to-client conflicts of interest. Former DR 5-105 prohibited a lawyer from accepting or continuing a representation if the lawyer's independent professional judgment "will be *or is likely to be* adversely affected" by the representation or if the representation "would be *likely* to involve the lawyer in representing differing interests." However, Rule 1.7(a)(1) now prohibits the representation absent informed consent if the representation "*will* involve the lawyer in representing differing interests." The "likely" standard has disappeared from both Rule 1.7(a) and the definition of "differing interests" in Rule 1.0(f). Read literally, Rule 1.7(a)(1) would not prohibit a lawyer from representing a client without client consent even

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5 See e.g., Stratagem Dev. Corp. v. Heron Int'l N.V., 756 F. Supp. 789 (S.D.N.Y.1991); Chem. Bank v. Affiliated FM Ins. Co., 1994 WL 141951 (S.D.N.Y. Apr. 20,1994); Hartford Accident & Indem. Co. v. RJR Nabisco, Inc., 721 F. Supp. 534 (S.D.N.Y.1989). See also Charles W. Wolfram, Corporate-Family Conflicts, 2 J. INST. STUDY LEG. ETHICS 295 (1999); ABA Comm. on Ethics and Professional Responsibility Op. 95-390 (1995); NYCLA Bar Op. 684 (1991).

6 See e.g., Brown & Williamson Tobacco Corp. v. Pataki, 152 F. Supp.2d 276 (S.D.N.Y. 2001); British Airways, PLC v. Port Auth., 862 F. Supp. 889 (E.D.N.Y. 1994); Aerojet Prop., Inc. v. State, 138 A.D.2d 39, 530 N.Y.S.2d 624 (3d Dep't 1988).

7 See e.g., Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 749–50 (2d Cir. 1981); N.Y.C. Bar Op. 1991-1 (1991) (analyzing the circumstances under which a lawyer who represents a trade association may also represent interests adverse to the individual members of the trade association).

8 N.Y.C. Bar Op. 2001-2 (2001).

if the representation is *likely* to adversely affect the lawyer's independent professional judgment on behalf of another client or if the representation is *likely* to involve the lawyer in representing differing interests. In other words, Rule 1.7(a) seems to regulate only conflicts that "will" arise among clients. But this literal meaning may well be the result of unintentional drafting rather than a substantive choice. For this reason, relying on the plain meaning of the rule may not be prudent. A lawyer facing a likely conflict would be well-advised to seek appropriate client consent notwithstanding the apparently weaker standard in Rule 1.7(a).

V.3 Personal Interest Conflicts

Rule 1.7(a)(2) focuses on whether there is a "significant risk" that the lawyer's "financial, business, property or other personal interests" will adversely affect the lawyer's professional judgment on behalf of a client. Interestingly, the phrase "independent professional judgment" no longer appears in the general rule on conflicts of interest (i.e., Rule 1.7(a)), although the phrase does occasionally appear in other places in the new Rules.

V.4 Shades of Gray

Unlike ABA Rule 1.7(a)(2), NY Rule 1.7(a)(2) does not cover "significant risks" arising from client-to-client conflicts involving a current client adverse to a former client or third party. Instead, the Rule narrowly applies the "significant risks" standard to where a lawyer's professional judgment for a client will be adversely affected by the lawyer's own personal interests. This apparent gap in the scope of the new Rules might be troublesome in analyzing a former client conflicts problem where the requirements of Rule 1.9 (i.e., the rule on former client conflicts) may also apply. Suppose that you formerly represented Company in a loan from Bank. Later, Bank (which is unaware that Company is your former client) asks you to analyze its rights and remedies against Company under the loan agreement. You know that your proposed advice to Bank is substantially related to the loan transaction you previously handled for Company and that you will be precluded from using or disclosing any of Company's confidential information without its informed consent. When you request Company's consent to represent Bank, Company consents, but prohibits your use or disclosure of any of its confidential information in your advice to Bank. This scenario is not contemplated by the types of conflicts Rule 1.7(a) governs. It is not (at least literally) covered by Rule 1.7(a)(1) since you will only be representing new client Bank, and, therefore, you will not be simultaneously representing clients with "differing interests."

Since representation under Rule 1.7(a)(2) doesn't implicate your "financial, business, property or other personal interests," it is not a literal basis for protecting former client Company's confidences. But this does not mean that you could agree to represent

Bank against Company without first obtaining Bank's informed consent after explaining that you will be barred from using or revealing any confidential information obtained from Company. However, Rule 1.7(a)(2) does not appear to make that point clear.

V.5 Effective Client Consent

[a] In General Rule 1.7(b) governs when a conflict can be cured by client consent and states the requirements for obtaining that consent. This Rule represents perhaps the most important change in the Rules governing the day-to-day practice of law. The "reasonably believes" standard in Rule 1.7(b) is more familiar than the inimitable "disinterested lawyer" standard that was in effect in New York (and only in New York) for the past decade.

[b] Nonconsentable Conflicts Nonconsentable conflicts of interest are defined in the first three subparagraphs of 1.7(b). These are situations where the client's consent is ineffective (i.e., it will not cure the conflict): (1) if the lawyer does not reasonably believe he/she can competently and diligently represent each affected client; or (2) if the representation is prohibited by law (an uncommon situation); or (3) if the lawyer (or law firm) will be handling both sides of a claim before a tribunal (also unusual). These provisions are not new; they would all have presented a nonconsentable conflict of interest under former DRs 5-101 and 5-105.

[c] Consentable Conflicts A major change that will clearly impact lawyers in their everyday practice is in the fourth subparagraph of Rule 1.7(b). It requires that every affected client's informed consent to a conflict of interest be "confirmed in writing." This phrase is defined in Rule 1.0(e) which provides that "Confirmed in writing" denotes (1) a writing from the person to the lawyer confirming that the person has given consent, (2) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (3) a statement by the person made on the record of any proceeding before a tribunal. It if is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must "obtain or transmit it within a reasonable time thereafter." What constitutes a "writing" is defined in Rule 1.0(x), which provides that "writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, audio or video recording, and e-mail. A "signed" writing includes "an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing."

[d] Three Ways to Satisfy the Rule Rule 1.7(b)(4), read in conjunction with the new definitions in Rule 1.0 of "confirmed in writing" and "writing," provides three equally valid alternatives for satisfying the new Rule. First, the lawyer can ask the client to

send a signed or unsigned letter, memo, or e-mail to the lawyer expressing the client's consent. This path could be risky: the client may send it too late (i.e., work has already begun), or the client might fail to adequately describe the conflict or omit key language that clearly indicates consent. Second, the lawyer can send a signed or unsigned letter, memo, or e-mail to the client memorializing the client's consent. Third, the lawyer can ask the client to confirm consent by making a statement on the record in a proceeding before an adjudicatory body. The last method will be relatively uncommon and likely confined to cases where a conflict unexpectedly arises in the middle of a trial or hearing.

The second alternative (i.e., the lawyer writes to the client) may be the easiest and least risky. The client need not sign the confirmation of consent (though there may be instances when a lawyer decides that confirmation provides some additional protection against a future disagreement with the client on this issue). When the lawyer takes the initiative, the lawyer controls the timing and the content of the writing without depending on any action by the client once the client has given oral consent. The lawyer need not reiterate all the disclosures that the lawyer made to obtain the client's consent. It is sufficient if the writing briefly describes the nature of the conflict so that the client knows what the lawyer is confirming. In any event, the Rule is satisfied so long as any of these above methods are used to confirm consent in writing at the time the client gives oral consent, or, if that is not feasible, "within a reasonable time thereafter."

V.6 Advance Conflicts Waiver

[a] Effectiveness Increasingly, law firms use advance (or prospective) conflicts waiver provisions at the time of engagement either to avoid seeking client consent on a matter-by-matter basis or to avoid having to decline a subsequent representation that is adverse to a current client. While such waivers are not per se unethical,[9] clients are free to challenge them at a later date on the basis that unforeseeable, changed circumstances make them void.[10] Generally speaking, advance waivers are most likely to be effective to the extent that the client reasonably understands the material risks that the waiver entails and the measures that will be taken to protect the client (such as screening) should the conflict arise. The more the client is told about the types of future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts, the more likely that the consent to a future conflict will be "informed."

[b] Factors to Consider NYSBA Comment [22] provides that the adequacy of the disclosure necessary to obtain informed consent may also depend on the level of sophistication and experience of the client. If a sophisticated, experienced user of the

9 E.g., NYCLA Bar Op. 724 (1997).

10 See e.g., Univ. of Rochester v. G.D. Searle & Co., Inc., 2000 WL 1922271 (W.D.N.Y. Dec.11, 2000).

type of legal services (aka a repeat player) is involved, particularly one who is advised by in-house or other counsel, even open-ended or general waivers may be effective. Comment [22] reflects the factors courts throughout the country have used in determining the effectiveness of advance waivers, but a prudent New York lawyer will keep an eye on developing New York case law.

V.7 Other Strategies for Avoiding Conflicts

[a] Restricting the Scope of the Engagement Lawyers may limit the scope of an engagement to avoid a conflict with a current or former client, provided that (1) the client whose engagement is limited consents to the limitation after full disclosure of the reasonably foreseeable consequences of the limitation, and (2) the limitation on the representation does not render the lawyer's counsel inadequate or diminish the zeal of the representation.[11] To the extent that a lawyer can carve out a piece of a representation in a manner that is both discrete and restricted in scope, such a limitation may well solve the conflict at hand. For example, in the litigation context, a lawyer defending a client in a lawsuit who later discovers that there are potential cross-claims between that client and another client in an unrelated matter may, with the informed consent of the client whose engagement is being limited, restrict the engagement to the defense of the case, and exclude representation of the first client against the second client. Similarly, in the corporate context, where a lawyer represents a seller in an auction and another client emerges as a potential buyer, absent consent, the lawyer is precluded from negotiating with the second client, unless the lawyer limits the representation to exclude from the scope of the representation any aspect adverse to the second client and continues to advise the first client in other aspects of the auction that are not adverse to the second client. In doing so, lawyers must remain mindful of their duty of undivided loyalty to all clients and their duty to protect and preserve client confidences.

[b] Hot Potatoes Lawyers and law firms should not drop a client "like a hot potato" to take on a more lucrative matter from another client against the "dropped" client simply by taking advantage of the less restrictive conflicts standards that apply to former clients. The courts have uniformly disapproved of this tactic.[12] However, where lawyers and law firms do not create the conflict or are not aware of it prior to taking on a disputed representation, courts have, in limited circumstances, permitted firms to

11 N.Y.C. Bar Op. 2001-3 (2001).

12 E.g., Universal City Studios v. Reimerdes, 98 F. Supp.2d 449, 453 (S.D.N.Y. 2000); Stratagem Dev. Corp. v. Heron Int'l N.V., 756 F. Supp. 789, 794 (S.D.N.Y.1991). If a conflict is created by the merger of corporate clients, however, a law firm may be permitted to withdraw from one of the representations. E.g., Univ. of Rochester, 2000 WL 1922271 at ∗8–9 (W.D.N.Y. Dec.11, 2000), at ∗8-9. *See also* Unified Sewerage Agency of Washington County, Oregon v. Jelco Inc., 646 F.2d 1339 (9th Cir. 1981).

drop one client and continue representing the other. Courts describe these as conflicts "thrust upon" the law firm.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Regulation of Client-to-Client Conflicts

N.Y.C. Bar Op. 2008-2 (2008) (opinion examines conflicts of interest that can be created when a corporation's inside counsel also represents a member of the corporate family (an affiliate). The opinion also describes steps that can be taken to potentially resolve the conflict.).

N.Y.C. Bar Op. 2007-3 (2007) (conflict of interest may exist where an attorney represents a corporation and a company that is a corporate family member (an affiliate) of the current corporate client in a matter).

N.Y.S. Bar Op. 789 (2005) (analyzing the circumstances under which a lawyer's representation of the lawyer's law firm in connection with a matter of professional responsibility may constitute a conflict with the law firm's representation of a client).

N.Y.C. Bar Op. 2005-05 (2005) (analyzing "thrust upon" conflicts).

N.Y.C. Bar Op. 2005-02 (2005) (analyzing the circumstances in which a lawyer may represent Client A even though the lawyer possesses confidential information relating to Client B that might be relevant to Client A's representation when their interests are not otherwise in conflict).

N.Y.C. Bar Op. 2005-01 (2005) (analyzing the circumstances in which a lawyer may represent a client pro bono in a Chapter 7 bankruptcy while simultaneously representing one or more of the client's creditors in unrelated matters).

Nassau County Bar Ass'n Op. 2005-1 (2005) (attorney may perform transactional work for a client that he may have to give adverse testimony against if called upon in a pending litigation matter).

N.Y.S. Bar Op. 738 (2001) (improper for a lawyer to refer a real estate client to a title abstract company in which the lawyer's spouse has an ownership interest for other than purely ministerial work). *Accord* N.Y.S. Bar Op. 731 (2000).

N.Y.C. Bar Op. 2001-3 (2001) (lawyer may limit the scope of an engagement to eliminate a conflict with another client).

N.Y.C. Bar Op. 2001-2 (2001) (under limited circumstances, a law firm may represent a client whose interests in a corporate transaction are adverse to a current client represented by the firm in a separate matter and may even represent multiple clients with differing interests in a single matter).

N.Y. C.L.A. Op. 710 (1995) (lawyer may represent a bankruptcy trustee as special counsel in an action against a secured creditor while also representing other creditors of the bankruptcy estate, if the representation will not violate former DR 5-105 or the Bankruptcy Code).

N.Y.C.L.A. Op. 684 (1991) (under certain circumstances a lawyer may accept employment in a matter adverse to a subsidiary of a corporate client).

VI.2 Client Consent to Conflicts

N.Y.S. Bar Op. 829 (2009) (a consent to a conflict of interest that was validly given prior to the effective date of the Rules does not need to be re-obtained solely on account of the adoption on the new Rules).

VI.3 Advance Conflict Waivers

N.Y.C. Bar Op. 2006-01 (2006) (analyzing the circumstances under which a lawyer may request a client to waive future conflicts).

NYCLA Bar Op. 724 (1998) (lawyer's request for an advance waiver of conflicts from a prospective or existing client is not per se unethical).

VII. ANNOTATIONS OF CASES

VII.1 Regulation of Client-to-Client Conflicts

Glacken v. Incorporated Village of Freeport, 2010 WL 3843527 (E.D.N.Y. 2010) (motion to disqualify granted where attorney had advised town as to its obligations to plaintiff, former mayor of the town).

All Star Carts and Vehicles, Inc. v. BFI Canada Income Fund, 2010 WL 2243351, 1 (E.D.N.Y. 2010) (2d circuit standard of proof for disqualification discussed).

DeAngelis v. American Airlines, Inc. 2010 WL 1270005, 1 (E.D.N.Y. 2010) (apparent conflict of interest where law firm represented two different corporate defendants in a personal injury case).

Phelan v. Torres, 2010 WL 1292283, 2 (E.D.N.Y. 2010) (defendants' motion for disqualification was denied because the defendants did not identify "any action taken by counsel that would jeopardize the infant plaintiff's claims or that demonstrates that counsel is placing the interests of the parents over that of the infant").

Principal Life Ins. Co. v. McMillan, 2010 WL 2075873 (E.D.N.Y. 2010) (in an interpleader action, motion by defendant for an order disqualifying the co-defendant from serving as guardian of an infant was denied, where no evidence suggested the infant's interest would be compromised when the infant retained an independent counsel and the additional cost of appointing another guardian was unnecessary).

In re National Legal Professional Associates, 2010 WL 624045, 22 (N.D.N.Y. 2010) (organization representing two criminal codefendants who were charged with conspiracy in the same criminal complaint could be significant and damaging due to conflict of interest).

Mercado v City of New York, 2010 WL 3910594, 2010 BL 229475 (S.D.N.Y. 2010) (plaintiffs seek damages under the fourth and fourteenth amendments of the Constitution as well as under the laws and constitution of New York State claiming that employees of the New York City Department of Correction and Prison Health Services, while acting under color of law, were deliberately indifferent to the serious

medical needs of decedent, which resulted in decedent's suicide. Plaintiffs contend that the joint representation of several of the defendants by HPMB and NYC Corporation Counsel violates Rule 1.7 because of conflicts of interest between the City of New York and the individual defendants and conflicts among the individual defendants. The court found a conflict on interest in the Corporation Counsel representing all of the individual defendants because of personal defenses available to individual defendants which work to the detriment of others. These defenses would require that the individual defendants either waive the right to asset the defenses, that Corporation Counsel be disqualified from representing one of the defendants or that Corporation Counsel relinquish all control and oversight of the representation of the defendants other than one.).

Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc., 687 F. Supp. 2d 381, 388 (S.D.N.Y. 2010) (motion for disqualification will be granted only if the facts present a real risk that the trial will be tainted).

Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc. WL 481206 (S.D.N.Y. 2010) (adverse interests of attorney).

Lieberman v. City of Rochester, 681 F. Supp. 2d 418 (W.D.N.Y. 2010) (in the absence of showing actual conflict, the court denied disqualification motion without prejudice in the event that "the possibility that a potential conflict of interest may arise" by having outside counsel represent city and police officers in three different proceedings arising from a single incident).

Pacheco Ross Architects, P.C. v. Mitchell Assoc. Architects, 2009 WL 1514482 (N.D.N.Y. 2009) (absent a substantial relationship between the lawyer's prior and current representation, the court denied a motion to disqualify attorney).

Merck Eprova AG v. ProThera, Inc. 670 F. Supp.2d 201, 208 (S.D.N.Y. 2009) (under the "per se" standard the attorney must be disqualified unless "there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation").

Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 865 N.Y.S.2d 14 (App. Div. 1st Dept. 2008) (modifying Supreme Court's order for fee forfeiture due to law firm's breach of its fiduciary duty by engaging in conflicted transactional representations, denying plaintiff's motion for partial summary judgment and granting defendant's cross motion for summary judgment to the extent of dismissing the causes of action for malpractice and breach of fiduciary duty, and vacating so much of the order as directs the disgorgement of attorneys' fees).

HRH Const. LLC v. Palazzo, 15 Misc.3d 1130(A), 2007 WL 1299232 (Sup. Ct. NY. Co. 2007) (disqualifying the defendant's law firm on the ground that it represented the plaintiff in ongoing litigation).

Parklex Assoc. v. Parklex Assoc., 15 Misc.3d 1125(A), 2007 WL 1203617 (Sup. Ct. NY. Co. 2007) (lawyer's violation of former DR 5-101 may suggest a breach of a fiduciary duty to a client).

In re Balco Equities, Ltd., 2006 WL 1892598 (Bankr. S.D.N.Y. 2006) (court denied a law firm's request for fees and directed the disgorgement of the bankrupt's retainer on the ground, inter alia, that the law firm maintained a flawed database that led to the firm's failure to disclose a simultaneous conflict).

Hempstead Video, Inc. v. Incorporated Village of Valley Stream, 409 F.3d 127 (2d Cir. 2005) (analyzing when a lawyer who is "of counsel" to a law firm is "associated

with" the firm for purposes of imputed disqualification, and deciding that even if the lawyer is "associated with" the law firm, de facto separation or screening may protect the firm against imputed disqualification).

Eastman Kodak Co. v. Sony Corp., 2004 WL 2984297 (W.D.N.Y. 2004) (disqualifying a law firm because of a conflict that was created by a client's merger).

Flaherty v. Filardi, 2004 WL 1488213 (W.D.N.Y. 2004) (mere fact that the two codefendants had previously entered into an indemnity agreement was not sufficient to require the disqualification of their joint counsel).

Chang's Imports, Inc. v. Srader, 216 F. Supp.2d 325 (S.D.N.Y. 2002) (lawyer clearly acting as a neutral mediator in a dispute is not providing legal representation to two clients with adverse interests in violation of former DR 5-105's prohibition).

Discotrade Ltd. v. Wyeth-Ayerst Int'l, Inc., 200 F. Supp.2d 355 (S.D.N.Y. 2002) (disqualifying a law firm because of the firm's simultaneous representation of an affiliated company).

JPMorgan Chase Bank v. Liberty Mut. Ins. Co., 189 F. Supp.2d 20 (S.D.N.Y. 2002) (disqualifying a law firm on the basis of a simultaneous conflict, after concluding that a holding company and its primary subsidiary should be treated as a single entity for conflicts purposes).

Bianchi v. Mille, 266 A.D.2d 419, 698 N.Y.S.2d 545 (2d Dept. 1999) (mem.) (lawyer's dual role as corporate counsel for the defendant corporation and for the plaintiffs (the corporation's minority shareholders) required the lawyer's disqualification).

Swift v. Choe, 242 A.D.2d 188, 674 N.Y.S.2d 17 (1st Dept. 1998) (defendants' multiple representation of a seller and purchaser in a real estate transaction raised a genuine issue of material fact precluding summary judgment).

Brooklyn Navy Yard Cogeneration Partners v. PMNC, 663 N.Y.S.2d 499 (Sup. Ct. Kings Co. 1997) (concurrent representation caused by an attorney's representation of a party to a lawsuit while simultaneously representing the opposing party in another matter poses the risk of taint to the trial as it undermines the attorney's vigor in pursuing the interests of one of his current clients. To determine whether the "possibility of disclosure" exists, consider (1) the nature of the law firm and the informal or formal character of its practice insofar as it sheds light upon whether confidential client information would have been shared among the members of the firm, and (2) the type of legal work done for the client insofar as it may have put the firm in the position of acquiring confidential information that could be used in an adversarial manner).

Booth v. Cont'l Ins. Co., 167 Misc.2d 429, 634 N.Y.S.2d 650 (Sup. Ct. Westchester Co. 1995) (in most instances, a lawyer may not represent an insured and an insurer in the same action even with full disclosure and consent where they have adverse interests.).

Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976) (one firm in which attorney is a partner is suing an actively represented client of another firm in which the same attorney is a partner. Where the relationship is a continuing one, adverse representation is prima facie improper, and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation.).

VII.2 Personal Interests Conflicts

Decker v. Nagel Rice LLC 2010 WL 1050355 (S.D.N.Y. 2010) (lawyer could not be admitted *pro hac vice* in a case where defendants intended to name him as a third-party defendant).

Cogliandro v. Nahmany, N.Y.L.J. col. 1, at 18 (Nov. 28, 2005) (Sup. Ct. N.Y. Co. 2005) (court disqualifies the defendants' attorney in a derivative action because the attorney also owns one-third of the corporate defendant).

VII.3 Advance Conflict Waivers

In re Sheehan, 72 A.D.3d 1270, 897 N.Y.S.2d 916 (3d Dept. 2010) (attorney violated the Rules of Professional Conduct rule 1.7(b)(4) because he failed to "obtain informed consent in writing with respect to his representation of the seller, the buyer, and the lender in the closing of the sale of complainant's property).

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Rule 1.8: Current Clients: Specific Conflicts of Interest Rules

EDITORS' NOTE: Due to the size and complexity of Rule 1.8, to facilitate research under the Rule, the text of the Rule, NYSBA Commentary, Cross References, Practice Pointers, Analysis, Annotations of Opinions, Annotations of Cases and Bibliographies for each subsection of Rule 1.8 are organized in sequential order below.

RULE 1.8(A) BUSINESS TRANSACTIONS BETWEEN CLIENT AND LAWYER

I. TEXT OF RULE 1.8(A):[1]

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

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II. NYSBA COMMENTARY TO 1.8(A)

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer's investment on behalf of a client. For these reasons business transactions between a lawyer and client are not advisable. If a lawyer nevertheless elects to enter into a business transaction with a current client, the requirements of paragraph (a) must be met if the client and lawyer have differing interests in the transaction and the client expects the lawyer to exercise professional judgment therein for the benefit of the client. This will ordinarily be the case even when the transaction is not related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, such as the sale of title insurance or investment services to existing clients of the lawyer's legal practice. *See* Rule 5.7. It also applies to lawyers purchasing property from estates they represent.

[2] Paragraphs (a)(1), (a)(2) and (a)(3) set out the conditions that a lawyer must satisfy under this Rule. Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated in writing to the client in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised in writing of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement and the existence of reasonably available alternatives, and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(j) for the definition of "informed consent."

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially adversely affected by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the client's expense. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction. A lawyer has a continuing duty to monitor the inherent conflicts of interest that arise out of the lawyer's business transaction with a client or because the lawyer has an ownership interest in property in which the client also has an interest. A lawyer is also required to make such additional disclosures to the client

as are necessary to obtain the client's informed consent to the continuation of the representation.

[3A] The self-interest of a lawyer resulting from a business transaction with a client may interfere with the lawyer's exercise of independent judgment on behalf of the client. If such interference will occur should a lawyer agree to represent a prospective client, the lawyer should decline the proffered employment. After accepting employment, a lawyer should not acquire property rights that would adversely affect the lawyer's professional judgment in representing the client. Even if the property interests of a lawyer do not presently interfere with the exercise of independent judgment, but the likelihood of interference can be reasonably foreseen by the lawyer, the lawyer should explain the situation to the client and should decline employment or withdraw unless the client gives informed consent to the continued representation, confirmed in writing. A lawyer should not seek to persuade a client to permit the lawyer to invest in an undertaking of the client nor make improper use of a professional relationship to influence the client to invest in an enterprise in which the lawyer is interested.

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

[4A] Rule 1.8(a) does not apply to business transactions with former clients, but the line between current and former clients is not always clear. A lawyer entering into a business transaction with a former client may not use information relating to the representation to the disadvantage of the former client unless the information has become generally known. *See* Rule 1.9(c).

[4B] The Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[4C] This Rule also does not apply to ordinary fee arrangements between client and lawyer reached at the inception of the client-lawyer relationship, which are governed by Rule 1.5. The requirements of the Rule ordinarily must be met, however, when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee. For example, the requirements of paragraph (a) must ordinarily be met if a lawyer agrees to take stock (or stock options) in the client in lieu of cash fees. Such an exchange creates a risk that the lawyer's judgment will be skewed in favor of closing a transaction to such an extent that the lawyer may fail to exercise professional judgment as to whether it is in the client's best interest for the transaction to close. This may occur where the client expects the lawyer to provide professional advice in structuring a securities-for-services exchange. If the lawyer is

expected to play any role in advising the client regarding the securities-for-services exchange, especially if the client lacks sophistication, the requirements of fairness, full disclosure and written consent set forth in paragraph (a) must be met. When a lawyer represents a client in a transaction concerning literary property, Rule 1.8(d) does not prohibit the lawyer from agreeing that the lawyer's fee shall consist of a share of the ownership of the literary property or a share of the royalties or license fees from the property, but the lawyer must ordinarily comply with Rule 1.8(a).

[4D] An exchange of securities for legal services will also trigger the requirements of Rule 1.7 if the lawyer's ownership interest in the client would, or reasonably may, affect the lawyer's exercise of professional judgment on behalf of the client. For example, where a lawyer has agreed to accept securities in a client corporation as a fee for negotiating and documenting an equity investment, or for representing a client in connection with an initial public offering, there is a risk that the lawyer's judgment will be skewed in favor of closing the transaction to such an extent that that the lawyer may fail to exercise professional judgment. (The lawyer's judgment may be skewed because unless the transaction closes, the securities will be worthless.) Unless a lawyer reasonably concludes that he or she will be able to provide competent, diligent and loyal representation to the client, the lawyer may not undertake or continue the representation, even with the client's consent. To determine whether a reasonable possibility of such an adverse effect on the representation exists, the lawyer should analyze the nature and relationship of the particular interest and the specific legal services to be rendered. Some salient factors may be (i) the size of the lawyer's investment in proportion to the holdings of other investors, (ii) the potential value of the investment in relation to the lawyer's or law firm's earnings or other assets, and (iii) whether the investment is active or passive.

[4E] If the lawyer reasonably concludes that the lawyer's representation of the client will not be adversely affected by the agreement to accept client securities as a legal fee, the Rules permit the representation, but only if full disclosure is made to the client and the client's informed consent is obtained and confirmed in writing. *See* Rules 1.0(e) (defining "confirmed in writing"), 1.0(j) (defining "informed consent"), and 1.7.

[4F] A lawyer must also consider whether accepting securities in a client as payment for legal services constitutes charging or collecting an unreasonable or excessive fee in violation of Rule 1.5. Determining whether a fee accepted in the form of securities is unreasonable or excessive requires a determination of the value of the securities at the time the agreement is reached and may require the lawyer to engage the services of an investment professional to appraise the value of the securities to be given. The lawyer and client can then make their own advised decisions as to whether the securities-for-fees exchange results in a reasonable fee.

III. CROSS-REFERENCES TO RULE 1.8(A)

III.1 Former NY Code of Professional Responsibility:

Substantially the same as DR 5-104(A).

III.2 ABA Model Rules:

- Although NY Rule 1.8(a) only prohibits entering into a business transaction with a client, ABA Rule 1.8(a) also prohibits knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client, unless certain conditions are met (which are identical under both rules).
- In contrast to NY Rule 1.8(a), ABA Rule 1.8(a) does not include the phrase "if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client."

IV. PRACTICE POINTERS

1. Although there is no per se rule prohibiting business transactions between lawyers and clients, lawyers should observe the flashing red light that these situations create. Proceed with caution!
2. Generally a lawyer should not enter into business transactions with clients when they have differing interests and the client expects the lawyer to use his or her professional judgment to protect the client.
3. Extreme care should be exercised when structuring a legal fee arrangement whereby the lawyer or firm takes an interest in the client's business or other nonmonetary property such as stock in lieu of fees.
4. When an attorney enters into a business transaction with a client, the attorney must be diligent in disclosing in writing his or her role in the transaction and whether he or she is indeed representing the client in the transaction. The business transaction must be "fair and reasonable."
5. The attorney should further explain in writing the nature of the transaction, the risks presented by the attorney's involvement, the reasonably available alternatives, and the degree to which the transaction's terms potentially protect the lawyer's interests at the expense of the client. Good practice suggests attaching a copy of any contracts between the lawyer and the client to the writing disclosing the lawyer's role in the transaction and incorporating those documents by reference into that writing.
6. The attorney *must* advise the client in writing of the desirability of seeking the advice of independent legal counsel in the transaction.
7. Attorneys should avoid giving clients suggestions as to who to go to for independent legal counsel. If a client specifically asks for a referral or such advice cannot be avoided, attorneys should give the client names of several attorneys who are truly independent of the conflicted attorney.
8. Clients must be given a "reasonable time" to seek independent counsel. What constitutes a reasonable time must be evaluated in terms of the circumstances, experience, sophistication, and background of the client and the nature and complexity of the business transaction.

V. ANALYSIS

V.1 Purpose of Rule 1.8(a)

It is commonly understood attorneys should be extremely wary of, and perhaps avoid, entering into business transactions with their current clients due to the heightened risk of impaired professional judgment. Such a business arrangement can pose a real threat to the client-lawyer relationship because it can seriously impair a lawyer's independent professional judgment.

Under Rule 1.8(a), a lawyer shall not enter into business transactions with a client if they have (1) differing interests, and (2) the client expects the lawyer to exercise professional judgment for the client's protection. Both of these elements are likely to be present in any client-lawyer business dealings. This prohibition does not apply if (1) the transaction is fair and reasonable to the client, and (2) the terms of the transaction are fully disclosed in writing to the client in a way that is easy for the client to understand.

If the client is already independently represented in the transaction by another attorney, the requirement of subsection (a)(2) that the client be advised "in writing of the desirability of seeking. . . the advice of independent legal counsel on the transaction" is satisfied if a writing is executed by the attorney or the client's independent counsel.

V.2 New Rule Has Broader Scope

Rule 1.8(a) is substantially the same as former DR 5-104(A) dealing with business transactions with clients, except that the new Rule adds some important requirements emphasizing the ultimate goal of maintaining a fiduciary relationship. Previously it was considered that the limitation applied only when the client was a "seller" and the attorney essentially a "buyer," as DR 5-104(A)(1) employed the language "the terms on which the lawyer acquires the interest." The new Rule has broadened its reach to situations where the attorney is in effect selling goods or services related to the practice of law, selling title insurance or investment services to existing clients, borrowing and lending money, investing in real estate transactions, and buying property from an estate the attorney represents.

V.3 Do Fee Arrangements Constitute "Business Transactions?"

While fee arrangements have traditionally been excluded from the intent of the Rule, in some situations a fee arrangement may be characterized as a business transaction. This can occur, for example, when a lawyer takes an interest in the client's business or other nonmonetary property (such as stock or stock options) as payment for legal services. This practice has evolved over time. For example, if a client was experiencing

serious cash flow issues, or was a start-up company, a law firm may accept stock in payment for all or part of its fee. Many times this was the only way a firm could expect to receive any payment at all for its services. While the Rule does not flatly prohibit such conduct, the transaction still must be "fair and reasonable," which can prove most troublesome with regard to stock valuation. For example, at some point before an initial public offering (IPO) a firm may have accepted stock in payment of its legal fee. While the firm cannot sell the stock during a lock-up period after the IPO, the stock's value may increase by a multiplier of a hundred by the time the waiting period has expired. While there is general agreement that the appropriate measurement of fairness and reasonableness is to be taken as of the time the law firm and the client entered into the transaction, courts and disciplinary authorities may nevertheless be skeptical if there is a very high return on the initial investment and question whether it is excessive in considering payment to the lawyer.

V.4 Investing in the Client's Business

Attorneys and law firms invest in clients' businesses for many reasons, including, as a way to win client loyalty or solidify the client-attorney relationship, complying with a client invitation, as a reward for outstanding service, or to make money in a sound investment. Yet the public policy underlying the Rule allowing such investments only under specific conditions is straightforward—the more a lawyer's personal interest is at risk in a representation, the more likely it is that the lawyer will fail to exercise independent professional judgment on the client's behalf as is required. Aside from ethical concerns, a lawyer or firm can also be exposed to liability for breach of a fiduciary duty or malpractice if the attorney takes advantage of the client in structuring the business deal.

V.5 To Whom Does the Rule Apply?

The Rule only applies to current clients. Former clients are not covered, although attorneys are prohibited from using information about a former client to the former client's detriment in any future business transaction. An exception exists where such information has become generally known. See Rule 1.9(c), infra.

V.6 Exceptions to the Rule

When the transaction involves a client who is engaged in commercial transactions for products or services which the client also markets to others (such as medical services or products manufactured or distributed by the client), the attorney does not have an unfair advantage in dealing with the client, and thus the provisions of the Rule do not apply.

V.7 "Differing Interests"

The Rule limits its applicability to situations in which the client and lawyer have "different interests" in the transaction and the client expects the lawyer to exercise *independent professional judgment* for the protection of the client in connection with the transaction—unless the terms are "fair and reasonable" and *fully disclosed in writing* to the client in a manner that is *easily understandable*. However, determining just what is "fair and reasonable" under the circumstances is not always an easy task.

"Differing interests" is broadly defined in Rule 1.0(f) as including "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." It is difficult to imagine any fact pattern involving a lawyer and a client entering into a business transaction in which they would not have "differing interests." The most likely circumstance in which a client would not expect a lawyer to exercise professional judgment on the client's behalf would be when the lawyer is not providing legal services to the client in connection with the transaction. Even in this circumstance, caution is in order. If the business transaction involves ongoing contact between the lawyer and the client (e.g., the management of property jointly owned by the lawyer and the client), the client may claim that over the course of time, the lawyer assumed a counseling function advised the client on legal matters relating to the client's interest in the property, and therefore owed the client an ethical duty to comply with Rule 1.8(a) and a fiduciary duty to provide conflict-free advice.

V.8 Full Disclosure

The Rule departs from the language of former DR 5-104(A) requiring objective reasonableness in the transaction and disclosure of the "terms on which the lawyer acquires the interest." Instead, Rule 1.8(a)(1) simply states that the "terms of the transaction" must be fully disclosed in a manner that can be "reasonably understood by the client." The lawyer's ability to satisfy the full disclosure requirement in a manner that is reasonably understandable by the client may depend upon the client's level of experience and sophistication.

"Fair" and "reasonable" are subjective terms. A judge, jury, or disciplinary panel reviewing a transaction that at the time appeared to be nothing more than a simple business deal in which both the client's and lawyer's interests were fully protected, over time with the benefit of hindsight, can appear to be lopsided or overreaching. Moreover, a disclosure the lawyer thought adequate in light of the client's education, experience, and business sophistication may appear incomplete and cursory to a fact finder whose only contact with the client is the client's testimony.

V.9 Disclosure of Attorney's Role and Representation

Attorneys must disclose their role when entering a business transaction with a client, including whether they are representing the client in the business transaction.

They should explain the risks presented by the attorneys' involvement as well as what reasonable alternatives are available and why the advice of independent counsel is desirable. Indeed, some commentators believe that whether a client is independently represented by another attorney is relevant in evaluating whether the terms were "fair and reasonable" to the client. Presumably, a client represented by independent outside counsel is more likely to be safeguarded from unreasonable terms than one who is not represented by a lawyer other than the one involved in the transaction.

V.10 "Reasonable Time" to Seek "Independent Legal Counsel"

A lawyer must now advise the client *in writing* of the desirability of seeking the advice of independent legal counsel in the transaction. The former provision merely required the attorney to advise the client to seek outside advice. The introduction of the writing requirement emphasizes the importance of an outside advisor to avoid any appearance of disparity in the transaction.

The Rule does not define "independent." Obviously, any lawyer who is an associate, partner, or of counsel with the conflicted attorney would be excluded. If the client asks the conflicted lawyer for advice on seeking independent counsel, the best response would be to decline. If that is not practical, however, the lawyer should give the client several suggestions of attorneys who are truly independent of the conflicted attorney—or risk being subjected to disciplinary proceedings or possible civil liability.

Further, the Rule does not spell out what constitutes a "reasonable time" to seek independent counsel. This is an area that may give rise to controversy and litigation as there does not seem to be an objective rule of thumb that can be applied. What may seem to be a "reasonable" period of time for a sophisticated investor who has an arsenal of attorneys and other professional advisors at his or her disposal would be inadequate for a new investor or naïve businessperson. It does seem clear that absent unusual circumstances, an attorney should not expect a client to make quick and uncounseled decisions in choosing independent legal advice.

V.11 Client's Informed Consent

Under new Rule 1.8(a)(3), the attorney must disclose the "essential" terms of the transaction and the lawyer's role in it, including whether the lawyer is representing the client in the transaction. The client must then give informed consent in writing to those terms and the lawyer's role in the transaction.

V.12 Signed Writing by Client

Normally the facts and circumstances will dictate what constitutes full written disclosure required by the Rule, including the client's education, experience, business

acumen, and financial sophistication. The complexity of the transaction, obvious and hidden risks to the client if the transaction fails, and the degree to which the transaction's terms protect the lawyer's interests at the expense of the client should also be detailed. Although not required by the Rule, good practice also suggests that a copy of any contracts between the client and lawyer be attached to the writing and incorporated in the writing by reference. A description of the conflict is more problematic. The lawyer runs the risk of saying too little (leaving the lawyer open to a claim that the client was not fully informed) or saying too much (overdramatizing risks and skewing the client's perspective about the transaction). Yet having a writing forces the lawyer to carefully articulate the nature of any conflicts of interest and can facilitate communication between the client and independent counsel about the issues at hand. The more comprehensive the writing, the better it can serve as evidence of the lawyer's good faith in entering into the transaction in the event of a future conflict with the client.

VI. ANNOTATIONS OF ETHICS COMMITTEE OPINIONS

N.Y.C. Bar Op. 2007-02 (2007) (if a host firm pays a law firm for a lawyer's secondment, the firm must satisfy the requirements of former DR 5-104).

N.Y.S. Bar Op. 755 (2002) (former DR 5-104(A) does not apply to a lawyer's recommendation that a client employ a distinct lawyer-owned ancillary business provided that the requirements of former DR 1-106(A) are observed).

N.Y.C. Bar Op. 2000-3 (2000) (lawyer may accept securities in a corporate client in exchange for legal services to be performed provided that the fee arrangement does not violate former DRs 2-106, 5-101, 5-104, and 5-105).

N.Y.S. Bar. Op. 711 (1998) (lawyer representing clients in estate planning may not sell long-term care insurance to clients).

NYCLA Bar Op. 693 (1993) (client cannot consent to a conflict of interest under former DR 5-104(A)).

VII. ANNOTATIONS OF CASES

New York: Matter of Puleo, 46 A.D.3d 19, 850 N.Y.S.2d 724 (App. Div. 2007) (attorney violated former DRs 5-101(A) and 5-104(A) by entering into a transaction with a client where he had a financial interest without making adequate disclosures and obtaining client consent).

Veneski v. Queens-Long Island Med. Group, P.C., 15 Misc. 3d 1108(A), 2007 WL 852109 (Sup. Ct. N.Y. Co., 2007) (referring a lawyer's conduct to the applicable Disciplinary Committee on the ground that the lawyer may have improperly pressured his client to loan him money).

Klembczyk v. Di Nardo, 265 A.D.2d 934, 705 N.Y.S.2d 743 (4th Dep't 1999) (mem.) (noting (in the course of reversing an order dismissing an action for fraud and constructive fraud) the defendant-lawyer's violation of former DR 5-104(A)).

Federal: Stamell v. Kirkpatrick & Lockhart, LLP, 252 B.R. 8 (E.D.N.Y. 2000) (law firm did not violate former DR 5-104(A) in renegotiating a retainer agreement after the representation had begun and shortly before the trial in the underlying criminal matter).

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Thomas H. Watkins et al., *Legal Ethics: Investing in Clients*, 637 PLI/Pat 629 (2000).

RULE 1.8(B): USE OF INFORMATION RELATING TO A REPRESENTATION

I. TEXT OF RULE 1.8(B)

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

II. NYSBA COMMENTARY TO RULE 1.8(B)

[5] [Reserved.]

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility:

Intent of DR 4-101(B)(2).

III.2 ABA Model Rules:

NY Rule 1.8(b) is identical to ABA Rule 1.8(b).

IV. PRACTICE POINTERS

1. Lawyers owe their clients a duty to protect confidential information.
2. Use of information relating to the representation of a client to the disadvantage of the client is permitted only when the lawyer receives "informed consent" from the client.
3. When evaluating whether informed consent has been given, the lawyer must examine the client's sophistication, experience, and knowledge of the transaction; the nature of the representation; the client's objectives; and the opposing party's likely strategic responses to the lawyer's action plan.
4. An attorney should carefully lay out the advantages and disadvantages of the use of the protected client information during the course of the representation.
5. A lawyer must use best judgment when evaluating whether the NY Rules authorize the lawyer to use the information to the detriment of the client.
6. Keep in mind that other NY Rules may require or permit disclosure of otherwise confidential information.

V. ANALYSIS

V.1 Duty of Loyalty to a Client

A lawyer owes a duty of undivided loyalty to a client. This loyalty includes an obligation to protect confidential client information and to make disclosures only when permitted by law or required by the Rules of Professional Conduct. Prohibited use of information relating to the representation of a client to the disadvantage of the client violates a lawyer's duty of loyalty. Rule 1.6, together with its companion Rule 1.8(b), governs this obligation. While Rule 1.6 is the primary ethical standard governing the release of information gained in the course of the professional relationship, Rule 1.8(b)'s focus is narrower: avoiding conflicts of interest.

V.2 Rules 1.8(b) and 1.6: Redundant or Different?

Rule 1.8(b) is not redundant to Rule 1.6. A closer comparison reveals subtle, yet significant differences. Rule 1.6(a) uses the term "confidential information", while Rule 1.8(b) uses the term "information relating to the representation." Rule 1.6(a) defines "confidential information" as "information gained during or relating to the representation of a client." The definition of "confidential information" includes "relating to representation." Rule 1.6(a) was meant to be broader than Rule 1.8(b). As a result, when a lawyer is confronted with a conflict of interest, a narrower definition applies.

Rule 1.8(b) prohibits the "use of information relating to the representation of a client to the disadvantage of the client." First, it should be noted that Rule 1.8(b) governs the *use*, not the *disclosure* of information; Rule 1.6 prohibits the knowing revelation of confidential information. Second, Rule 1.8(b) applies to using information relating to the representation of a client to the disadvantage of the client. Rule 1.8(b) does not apply if the lawyer uses the information relating to the representation of a client in a way that does not disadvantage the client.[2]

V.3 Informed Consent to Use the Information

Rule 1.8(b) permits the use of information relating to the representation of a client to the disadvantage of the client if the lawyer receives informed consent. Rule 1.0(j) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." To satisfy this requirement, a lawyer should initially examine the nature of the representation, the client's goals, and the opposing party's likely strategic responses to the lawyer's own action plan. The lawyer should then discuss the results of this examination with the client, laying out the advantages and disadvantages of the use of protected information at various points during the course of the representation.

VI. ANNOTATIONS OF ETHICS OPINIONS [RESERVED]

VII. ANNOTATIONS OF CASE DECISIONS [RESERVED]

VIII. BIBLIOGRAPHY [RESERVED]

RULE 1.8(C): GIFTS TO LAWYERS

I. TEXT OF RULE 1.8(C)[3]

(c) A lawyer shall not:

(1) solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or

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2 In contrast, Rule 1.6 applies to the disclosure of information to the disadvantage of a client *or for the advantage of the lawyer or a third person*. Absent Rule 1.8(b), the use of information to the advantage of the lawyer or third person would be barred by Rule 1.6.

3 The editors would like to thank Jean Chou and Pinella Tajcher for their research and cite-checking assistance.

(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.

For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative, or individual with whom the lawyer or the client maintains a close, familial relationship.

II. NYSBA COMMENTARY TO RULE 1.8(C)

[6] A lawyer may accept a gift from a client if the transaction meets general standards of fairness. If a client offers the lawyer a gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client. Before accepting a gift offered by a client, a lawyer should urge the client to secure disinterested advice from an independent, competent person who is cognizant of all of the circumstances. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a gift be made to the lawyer or for the lawyer's benefit.

[6A] This Rule does not apply to success fees, bonuses and the like from clients for legal services. These are governed by Rule 1.5.

[7] If effectuation of a gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is related to the donee and a reasonable lawyer would conclude that the transaction is fair and reasonable, as set forth in paragraph (c).

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or named to another fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will adversely affect the lawyer's professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility:

Deals with concepts formerly dealt with only in EC 5-5 of the former Code.

III.2 ABA Model Rules:

- NY Rule 1.8(c) flatly prohibits lawyers from soliciting "any" gifts from clients. In contrast, ABA Rule 1.8(c) applies only to "substantial gifts."
- Unlike ABA NY Rule 1.8(c), NY Rule 1.8(c) qualifies the prohibition on soliciting gifts from clients by adding "for the benefit of the lawyer or a person related to the lawyer."
- While both the ABA and New York Rules apply the same family exception to the prohibition on lawyers preparing instruments for gifts from clients, Rule 1.8(c) goes further by requiring that "a reasonable lawyer would conclude that the transaction is fair and reasonable."

IV. PRACTICE POINTERS

1. Attorneys may not request a gift or bequest of any sort from their clients for the benefit of the lawyer or a relative of the lawyer.
2. A gift may be accepted by an attorney or a relative of the lawyer's family if it meets the standards of fairness.
3. If a client insists on giving a gift to his or her attorney or a relative of the attorney through an instrument or a conveyance, the lawyer should strongly advise the client to have the instrument drafted by an independent, disinterested attorney.

V. ANALYSIS

V.1 Purpose of Rule 1.8(c)

An important role of an attorney is to act as an adviser to the client. Hallmarks of the client-lawyer relationship are professionalism, confidentiality, and trust. Many times the lawyer is the only individual with knowledge of the client's personal and financial matters. While the nature of the client-attorney relationship allows the lawyer to best represent the client's interests, inherently it also provides the attorney with a great deal of influence over the client and his or her affairs. It is imperative that the attorney not abuse this power to improperly influence the client's decisions, especially where they relate to actions that can personally benefit the attorney.

Subsection (c) of Rule 1.8 addresses a concept that was previously covered only in the former EC 5-5. The Ethical Considerations contained a presumption that a lawyer engaged in unethical behavior if he or she used undue influence to secure a gift or bequest from a client, although such conduct was not expressly prohibited.

The new Rule provides a per se prohibition on the solicitation of "any" gift from a client, including testamentary gifts, for the lawyer or a relative of the lawyer.

V.2 Solicitation of Gifts from Clients

Under Rule 1.8(c)(1), the solicitation of any gift for the benefit of the lawyer or lawyer's relative (through the preparation of any instrument or otherwise and regardless of its nature or size) is expressly prohibited. The key word is "solicit"—meaning the lawyer may not take the initiative in requesting a gift or bequest of any sort from the client.

It may be permissible for a client to take the initiative in giving a gift to the lawyer as long as the general standards of fairness are met and the attorney is not involved in drafting legal instruments.[4] For example, simple gifts given at holidays or special occasions or items given to the attorney as tokens of appreciation are not prohibited.[5]

Yet lawyers should exercise extreme caution in accepting any gift from a client, as such conduct may be subjected to scrutiny and could raise questions of undue influence and overreaching by the lawyer. If the attorney's conduct is questioned by a client or other affected third party, the lawyer bears the burden of proving that the transaction was entered into in a fair and reasonable manner. While ABA Model Rule 1.8(c) prohibits the solicitation of "substantial" gifts from clients, in adopting the new Rules, the New York Courts eliminated the word "substantial," thereby creating a more stringent policy.[6]

V.3 Preparation of an Instrument

Under Rule 1.8(c)(2), if a client offers to give a gift to the lawyer or lawyer's relative through some instrument or conveyance, the lawyer should advise the client to have the instrument drafted by an independent, disinterested attorney.[7] Normally this situation arises during the drafting of a will or trust document. Although Rule 1.8(c) does not prohibit the appointment of the lawyer as an executor of a client's estate, the attorney should take care to subordinate his or her interests in the estate to that of the other interested parties.[8] Subsection (c)(2) only permits an attorney-draftsperson to prepare a will or other document in which the attorney is also named as beneficiary only where a familial relationship exists and a reasonable lawyer would conclude the transaction was fair and reasonable.

If a client does want to convey a gift to his or her lawyer, the client should strongly be encouraged to seek an independent counsel to prepare the gift-bearing instrument to guard against even the appearance of impropriety.

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4 Annotated Model Rules of Professional Conduct, Rule 1.8 n2, Report No. 121 (1995).

5 *Id*.

6 M.R.P.C. Rule 1.8(c).

7 N.Y.S. Bar Op. 610 (1990).

8 *Id*.

V.4 Disinterested Independent Counsel

Although the Rule does not expressly state the procedures for the lawyer to undertake when a client seeks to give a gift or bequest to the lawyer, similar steps should be taken to the ones provided in former EC 5-5.

If a client voluntarily offers to make a gift to the lawyer, the lawyer may accept the gift, but before doing so, should urge the client to secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. That person does not have to be a lawyer or other professional. Other than in the family exception discussed above, a lawyer should insist that an instrument in which the client desires to name the lawyer as a beneficiary be prepared by another lawyer independently selected by the client.[9]

V.5 Related Persons

The subsection carves out one exception to the general prohibition against attorney-draftspersons or their relatives receiving gifts from their clients: where the lawyer or lawyer's relative is in a close, familial relationship with the client and the transaction satisfies the "fair and reasonable standard."

"Related persons" are defined as including "a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship." It should be noted that domestic partners were expressly omitted from the list, thereby creating an "ambiguity" as to their status.[10] However, arguably domestic partners might fall within the catchall at the end of the definition, which states "or other… individual with whom the lawyer… maintains a close… relationship."

Despite the family exception, the case of *In re Putnam* warns that bequests, even to a family member, be avoided due to the inference of undue influence.[11] Where such an inference arises, the attorney may be subjected to a Putnam Hearing. To prevail, the attorney must explain all of the circumstances related to the transaction and rebut the presumption of undue influence. The Court of Appeals stated: "The law, recognizing the delicacy of the situation, requires the lawyer who drafts himself a bequest to explain the circumstances and to show in the first instance that the gift was freely and willingly made."

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9 Former Ethical Consideration 5-5.

10 Steven C. Krane*, Meet the New Rules of Professional Conduct*, © Proskauer Rose LLP (2009).

11 *In re* Putnam, 257 N.Y. 140 (1931).

V.6 Fair and Reasonable Standard

In determining the reasonableness of a transaction under this subsection, the Rules define "reasonableness" as conduct of a reasonably prudent and competent lawyer. See Rule 1.0(q.) Further, a "reasonable lawyer" is defined as one acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.[12] "Fairly and reasonably" generally denotes that full disclosure about the circumstances and the possible ramifications arising out of the transaction were provided to the client.[13] It has long been established that absent a showing that the transaction was fair and fully intended by the client, the gift is presumptively void.[14]

VI. ANNOTATIONS OF OPINIONS

N.Y.S. Bar. Op. 610 (1990) (if a client offers to give a gift to the lawyer or lawyer's relative through an instrument or conveyance, the lawyer should strongly advise the client to have the instrument drafted by an independent, disinterested attorney. Only in limited circumstances (e.g., a close familial relationship) may an attorney-draftsperson prepare a will in which the attorney-draftsperson is named as executor and beneficiary.).

N.Y.S. Bar Op. 356 (1974)(while an attorney is not prohibited from being appointed as an executor of a client's estate, "in all instances the attorney must subordinate his personal interests in the estate to that of the other interested parties").

VII. ANNOTATIONS OF CASES

In re Estate of Tracey, 195 A.D.2d 469, 470–71 (2d Dept. 1993) (presumption of undue influence was rebutted by evidence that the attorney-draftsperson had been a legatee under prior wills not drafted by the attorney in question).

In re Delorey, 529 N.Y.S.2d 153 (2d Dept. 1988) (attorney, who was unrelated to the client, was the draftsperson of the client's will that left attorney as the sole legatee. Where the attorney conceded that he had failed to advise the client to seek independent counsel, the facts of the case were insufficient to overcome the presumption of undue influence during a Putnam Hearing).

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12 Professor Stephen Wechsler, Wechsler on The New York Rules of Professional Conduct, Legal/Business Community, LexisNexis (Apr. 27, 2009).

13 Lawrence v. Miller, 11 N.Y.3d 588, 596 (2008) (opining that courts will enforce written agreements given that parties are competent adults and no showing of deception has been made); King v. Fox, 7 N.Y.3d 181, 190 (2006) (stating that client may ratify what otherwise would be a breach of the attorney's fiduciary duty so long as the client is competent and fully informed of the relevant facts).

14 Radin v. Opperman, 64 A.D.2d 820 (4th Dept. 1978).

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RULE 1.8(D): LITERARY OR MEDIA RIGHTS

I. TEXT OF RULE 1.8(D)[15]

(d) Prior to conclusion of all aspects of the matter giving rise to the representation or proposed representation of the client or prospective client, a lawyer shall not negotiate or enter into any arrangement or understanding with:

(1) a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the representation or proposed representation; or

(2) any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of the representation of a client or prospective client.

II. NYSBA COMMENTARY TO RULE 1.8(D)

[9] An agreement by which a lawyer acquires literary or media rights concerning the subject matter of the representation creates a conflict between the interest of the client and the personal interests of the lawyer. The lawyer may be tempted to subordinate the interests of the client to the lawyer's own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from the client television, radio, motion picture, newspaper, magazine, book, or other literary or media rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of the literary or media rights to the prejudice of the client. To prevent this adverse impact on the representation, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the representation, even though the representation has previously ended. Likewise, arrangements with third parties, such as book, newspaper or magazine publishers or television, radio or motion picture producers, pursuant to which the lawyer conveys whatever literary or media rights the lawyer may have, should not be entered into prior to the conclusion of all aspects of the matter giving rise to the representation.

[9A] Rule 1.8(d) does not prohibit a lawyer representing a client in a transaction concerning intellectual property from agreeing that the lawyer's fee shall consist of an

15 The editors would like to thank Matt Baum and Pinella Tajcher for their research and cite-checking assistance.

ownership share in the property, if the arrangement conforms to paragraph (a) and Rule 1.5.

III. CROSS-REFERENCES:

III.1 Former New York Code of Professional Responsibility:

The same as former DR5-104(B).

III.2 ABA Model Rules:

ABA Rule 1.8(d) provides that before representation of a client concludes, a lawyer "shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation." Unlike NY Rule 1.8(d), the ABA Rule does not specifically preclude the lawyer from contracting with a third party for the transfer or assignment of any interests in literary or media rights relating to the representation.

IV. PRACTICE POINTERS

1. A lawyer cannot acquire from a client or a prospective client an interest in literary or media rights with respect to the subject of the representation prior to the conclusion of all aspects of the matter giving rise to the representation.
2. A lawyer cannot negotiate or sell any media or literary rights prior to the conclusion of all aspects of the matter giving rise to the representation.

V. ANALYSIS

V.1 Timing Matters

The content of new Rule 1.8(d) remains unchanged from former DR 5-104(B) and governs the conduct of lawyers entering into transactions with clients or prospective clients involving literary or media rights. The risk that such a transaction poses is obvious. If a lawyer holds literary or media rights associated with the client's "story," those rights are likely to precipitate a conflict between the lawyer's self-interest in maximizing the profitability of the holding and the client's interest in settling a matter on terms most favorable to it. For example, the value of the literary or media rights in a notorious case might be significantly greater if a trial took place, whereas a plea bargain might best serve the client's interests. Accordingly, subsection (d)(1) flatly prohibits a lawyer from acquiring "an interest in literary or media rights with respect

to the subject matter of the representation or proposed representation" from a client prior to the conclusion of all aspects of the matter giving rise to that representation.

V.2 Third-Party Transactions

Subsection (d)(2) extends the prohibition to include third parties. A lawyer cannot negotiate or enter into any arrangement or understanding with any other person to which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of the representation until the conclusion of the matter. In other words, the lawyer may neither sell nor negotiate to sell the "story" prior to the conclusion of all aspects of the matter giving rise to the representation. The lawyer's duty under both subsections (d)(1) and (d)(2) extends to any related appeal or associated proceeding.[16]

V.3 Relation to Other Ethics Rules

Rule 1.8(d) is part of a tapestry of ethics rules that deal with client-lawyer conflicts; therefore, case law and ethics opinions relating to other ethics rules should be consulted for supplemental guidance. See e.g., Rule 1.8(i) (Avoiding Acquisition of Proprietary Interest in Litigation). Particular attention should be paid to Rule 1.7 (Conflicts of Interest—Lawyer's Own Interest), since a transaction that satisfies Rule 1.8 may still violate Rule 1.7.[17] See also Rule 1.8(a) (Prohibited Business Transactions Between Client and Lawyer).

VI. ANNOTATIONS OF ETHICS OPINIONS

N.Y.C. Bar Op. 1988-6 (1988) (law firm that represented a client in a criminal matter and continues to represent the client on appeal from the conviction and is acting as a "consultant" on a related civil matter, may not execute a contract for the production rights to the story of the client's criminal trial until the conclusion of all aspects of the matter giving rise to the employment).

VII. ANNOTATIONS OF COURT CASES [RESERVED]

VIII. BIBLIOGRAPHY [RESERVED]

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16 See N.Y.C. Bar Op. 1988-6 (1988) (a law firm that represented a client in a criminal matter and continues to represent the client on appeal from the conviction and is acting as a "consultant" on a related civil matter may not execute a contract for the production rights to the story of the client's criminal trial until the conclusion of all aspects of the matter giving rise to the employment).

17 See N.Y.C. Bar Op. 2000-3 (2000).

RULE 1.8(E): FINANCIAL ASSISTANCE

I. TEXT OF RULE 1.8(E)[18]

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

II. NYSBA COMMENTARY TO RULE 1.8(E)

[9B] Paragraph (e) eliminates the former requirement that the client remain "ultimately liable" to repay any costs and expenses of litigation that were advanced by the lawyer regardless of whether the client obtained a recovery. Accordingly, a lawyer may make repayment from the client contingent on the outcome of the litigation, and may forgo repayment if the client obtains no recovery or a recovery less than the amount of the advanced costs and expenses. A lawyer may also, in an action in which the lawyer's fee is payable in whole or in part as a percentage of the recovery, pay court costs and litigation expenses on the lawyer's own account. However, like the former New York rule, paragraph (e) limits permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above.

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence,

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18 The editors would like to thank Luna Bloom and Pinella Tajcher for their research and cite-checking assistance.

because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility:

The same as DR 5-103(B).

ABA Model Rules:

- While ABA Rule 1.8(e) generally prohibits a lawyer from providing "financial assistance to the client," the NY Rule specifically bans the "advance or guarantee" of financial assistance to the client.
- ABA Rule 1.8(e) does not include the third exception contained in the New York Rule which permits a lawyer on a contingent fee to pay court costs and litigation expenses on the lawyer's own account, and to recover the amount as part of the contingent fee.

IV. PRACTICE POINTERS

1. Attorneys may enter into contingency fee arrangements with their clients and advance court costs and expenses of the litigation, repayment of which is contingent on the outcome of the case.
2. Attorneys no longer have to include in contingency fee arrangements a provision stating that the client will be "ultimately liable" for the advanced fees and expenses.
3. Lawyers may give up any rights they have to repayment of costs and expenses from their clients if the client fails to prevail in the lawsuit, or the recovery is less than the amount advanced.
4. Lawyers may also pay on their own account costs and litigation expenses in cases where their fees are in whole or in part payable as a percentage of the recovery.
5. Attorneys representing indigent or pro bono clients may pay court costs and the litigation expenses associated with their clients' cases, regardless of whether those funds will eventually be repaid.
6. Expenses that may be covered include filing fees, investigation expenses, medical diagnostic work and treatment required for the diagnosis, and costs relating to obtaining and preserving evidence. Not covered are living and nondiagnostic medical expenses.

V. ANALYSIS

V.1 Purpose of Rule 1.8(e)

Rule 1.8(e) is adopted from and remains unchanged from former DR 5-103(B) of the Code, as amended effective 2007. Prior to 2007, the rule was different; a lawyer was prohibited from advancing or guaranteeing the expenses of litigation for non-indigent clients, unless the non-indigent client remained "ultimately liable for such expenses." Thus, it was common practice for lawyers in contingent fee cases to include the "ultimately liable" language in their letters of engagement. As a practical matter, attorneys did not pursue their right to collect those expenses from non-indigent clients whose claims were not successful.

V.2 Contingency Fees

The 2007 amendment to former DR 5-103(B), now adopted in Rule 1.8(e), allows lawyers to advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter. The requirement that clients in contingency fee cases "ultimately are liable" for costs and expenses of the litigation has been eliminated. Lawyers may give up their rights to repayment of costs and expenses advanced by the attorney if the client fails to prevail in the lawsuit, or the ultimate recovery is less than the amount advanced by the lawyer. Lawyers may also pay on their own account costs and litigation expenses in cases where their fees are in whole or in part payable as a percentage of the recovery.

The attorney's financial assistance is limited to costs directly related to the litigation, such as filing fees, investigation expenses, medical diagnostic work and treatment required for the diagnosis, and costs related to obtaining and presenting evidence. Living expenses and medical expenses, other than those discussed above, are not permitted to be paid by the attorney. Allowing attorneys to sponsor litigation or administrative proceedings brought by their clients would give the attorneys "too great a financial stake in the litigation" and would probably result in the filing of frivolous lawsuits.[19] Attorneys may lend their clients money for court costs and litigation expenses as the loans are "virtually indistinguishable" from contingency fee arrangements[20] and help ensure equal access to the courts.

V.3 Payment of Expenses and Court Costs in Pro Bono Cases

Under Rule 1.8(e)(2), attorneys representing indigent or pro bono clients may pay court costs and the litigation expenses associated with their clients' cases, and may prospectively release such clients from repayment obligations.

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19 NYSBA Comments to the New Disciplinary Rules.

20 Id.

VI. ANNOTATIONS OF ETHICS OPINIONS

N.Y.S. Bar Op. 840 (2010) (NYSBA reconsidered N.Y.S. Bar Op. 786 decided under former DR 5-103(B)(2) and decided that under the new Rules a lawyer representing a client on a pro bono basis may pay that client's court costs and litigation expenses regardless of whether the pro bono client is indigent. Rule 1.8(e)(2) eliminates the need for the pro bono client to be indigent for the costs to be paid.).

N.Y.S. Bar Op. 754 (2002) (lawyer in a contingent fee litigation may, under certain conditions, pass on to the client as costs the interest charged to the lawyer by a third party on borrowings made to fund litigation expenses).

N.Y.S. Bar Op. 744 (2001) (if a client retains a lawyer in multiple lawsuits, the client must remain liable for the expenses of litigation in each matter, but the lawyer and the client may agree that expenses arising from unsuccessful lawsuits will be paid out of the recoveries in the successful lawsuits, provided that the total amount of the recovery is greater than the total cost of the litigation).

VII. ANNOTATIONS OF CASES

New York: In re Moran, 42 A.D.3d 272; 840 N.Y.S.2d 847; (2007) (advancing non-litigation expenses to clients through an intermediary violated former DR5-103(B)).

King v. Fox, 7 N.Y.3d 181, 851 N.E.2d 1184, 818 N.Y.S.2d 833 (2006) (analyzing the circumstances under which a contingent fee may be unconscionable).

Federal: In re WorldCom, Inc., 219 F.R.D. 267 (S.D.N.Y. 2003) (subsection (b) of former DR 5-103 is not applicable in federal class action suits).

Itar-Tass Russian News Agency v. Russian Kurier, Inc., 1999 WL 58680, at ∗13 (S.D.N.Y., Feb. 4, 1999) (rejecting the claim that a lawyer had acquired a proprietary interest in a litigation by allowing his finances to become "precarious").

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Geoffrey P. Miller, *Payment of Expenses in Securities Class Actions: Ethical Dilemmas, Class Counsel, and Congressional Intent*, 22 Rev. Litig. 557 (2003).

Paying Litigation Expenses for Indigent Litigation Service Providers 2005Paying Litigation Expenses for Indigent Litigation Service Providers, N.Y. Prof. Resp. Rep. 3 (July 2005).

RULE 1.8(F): PERSON PAYING FOR A LAWYER'S SERVICES

I. TEXT OF RULE 1.8(F)[21]

(f) A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and

(3) the client's confidential information is protected as required by Rule 1.6.

II. NYSBA COMMENTARY TO RULE 1.8(F)

[11] Lawyers are frequently asked to represent clients under circumstances in which a third person will compensate them, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Third-party payers frequently have interests that may differ from those of the client. A lawyer is therefore prohibited from accepting or continuing such a representation unless the lawyer determines that there will be no interference with the lawyer's professional judgment and there is informed consent from the client. *See also* Rule 5.4(c), prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another.

[12] Sometimes it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest may exist if the lawyer will be involved in representing differing interests or if there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing. *See* Rules 1.0(e) (definition of "confirmed in writing"), 1.0(j) (definition of "informed consent"), and 1.0(x) (definition of "writing" or "written").

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21 The editors would like to thank Andrea Mauro and Pinella Tajcher for their research and cite-checking assistance.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility:

The same as DR 5-107(A) and (B).

III.2 ABA Model Rules:

NY Rule 1.8(f) is substantially similar to ABA Rule 1.8(f), except that in addition to prohibiting acceptance from a third party of any compensation for representing a client, the New York rule also precludes acceptance of "anything of value related to the lawyer's representation of the client."

IV. PRACTICE POINTERS

1. Prior to accepting a client whose fees will be paid by a third party, the attorney must obtain the client's consent and be confident that the third party will not influence the client-lawyer relationship.
2. Before a client can provide informed consent to having a third party pay his or her attorneys fees, the attorney must disclose all relevant facts to the client, including: the identity of the payor or donor, the fee structure or value of the donation, whether the lawyer has had a long-standing relationship with the payor/donor, if there are any conflicts between the lawyer's interests and the client's interests, and if any conditions have been attached to the payment of the fees.
3. Before a client consents to the attorney disclosing confidential or privileged information to the third party payor, the client must be advised of the risks and advantages of such disclosure.
4. If the client agrees, the client and attorney can establish specific guidelines concerning how the attorney will deal with the third party payeor.

V. ANALYSIS

V.1 Purpose of Rule 1.8(f)

Subsection (f) of Rule 1.8 is essentially the same as former DR 5-107(A) and (B) of the Code [Avoiding Influence by Others than the Client]. The purpose of the subsection is to prevent any hidden outside influences to the client-attorney relationship. Of particular concern is the fact that a lawyer may be tempted to put the interests of the third-party payor, or in a criminal matter, another defendant or putative defendant, ahead of the interests of the client. Or, an attorney could allow a third party payor to direct or control the attorney's professional judgment in the case.

The bar against accepting payment from a third party is similar to the other prohibitions in Rule 1.7 that seek to prevent lawyers from allowing their financial,

business, property, or personal interests to interfere with the exercise of sound professional judgment on behalf of their clients. In some circumstances, abiding by the Rule's prohibition can require lawyers to be especially rigorous in ensuring that their duty of loyalty is to the client, not the third party payor (where for example, the third party payor is a family member of the client or a social service organization). The "insurance triangle," where insurance companies hire lawyers to represent insureds in personal injury or malpractice cases, is another example. A problem is not likely to arise if the entire claim is covered by the insurance. However, there may be circumstances where this is not so, and the insurer's obligation to defend may be broader than its obligation to indemnify and the interests of the insured and insurer are in conflict. If the lawyer's duty to the insured is to defeat liability on any ground and his or her duty to the insurer would require that the lawyer defeat liability on grounds that would create liability for the insured, independent representation of the insured is necessary.[22]

V.2 Client Consent

Subsection (f) provides an exception to the prohibition of accepting payments from third parties. A client may consent to the payment arrangement after being fully apprised of all the details surrounding the payment. The attorney must fully disclose all relevant facts to the client, including (1) the identity of the payor or donor, (2) the fee structure or value of the donation, (3) whether the lawyer has had a long-standing relationship with the payor/donor (as often exists between a law firm and an insurance company), (4) if there are any conflicts between the lawyer's interests and the client's interests, and (5) if any conditions have been attached to the payment of the fees.

The public policy behind subsection 1.8(f)(1) is to make sure that the client has enough information to make an informed decision about whether to retain the lawyer, and to alert the client to any facts the client might need to monitor during the course of the representation. This is evident from subsection (f)(2), which states that there must be "no interference with the lawyer's independent professional judgment or with the client-lawyer relationship."

While some prosecutors suggest that third-party fee arrangements are inherently unethical, criminal defense attorneys should not accept this argument. Indeed, "by its very terms," subsection (f) provides that such arrangements are ethical as long as all the safeguards enumerated in the Rule are also followed.[23]

V.3 Protection of Client Confidences

Under Rule 1.8(f)(3), an attorney accepting a third-party payment for a client must also be sure that all of the client's confidences are protected as required by Rule 1.6. Many

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22 See Pub. Serv. Mut. Ins. Co. v. Goldfarb, 52 N.Y.2d 392, 425 N.E.2d 810, 442 N.Y.S.2d 422 (1981).

23 Steven C. Krane, *Meet the New York Rules of Professional Conduct*, © 2009 Proskauer Rose LLP.

times a third party payor may ask a lawyer for confidential or privileged information about the client. This situation often puts the client in a difficult position, forcing him or her to consent to the disclosure out of fear that the third party will stop paying the legal bills. Therefore, it is imperative that before accepting a client whose fees will be paid by a third party, the attorney is convinced that the third party will not influence the client-lawyer relationship. If the client is agreeable, the attorney and client can work out specific guidelines concerning how the attorney will deal with the third party payor. Above all, the client must be advised of the risks and advantages of any disclosure of the client's confidential information before the client gives any informed consent.

VI. ANNOTATIONS OF ETHICS OPINIONS

Nassau County Bar Ass'n Op. 2005-2 (2005) (attorney may not accept a fee from a brokerage firm, even after full disclosure to the client, for the purpose of participating in a plan helping the brokerage firm manage their clients' bond and/or stock portfolios).

N.Y.C. Bar Op. 2004-1 (2004) (former DR 5-107 applies to the lawyer-client relationship in class actions as well as two instances of individual representation).

N.Y.S. Bar Op. 769 (2003) (exploring how former DR 5-107 applies when a lawyer who represents a plaintiff in a personal injury action also represents the client in a transaction with a litigation).

N.Y.S. Bar Op. 721 (1999) (attorney representing an insured should disclose the insurer's contractual rights under the insurance contract and should disclose any limitation or requirement that the insurance company imposes on the lawyer pursuant to the insurance contract or the insurer's policies).

N.Y.S. Bar Op. 716 (1999) (lawyer representing an insured may not submit legal bills to an independent audit company employed by the insurance carrier without the consent of the insured after full disclosure).

Nassau County Bar Op. 94-7 (1997) (provided that the dictates of former DR 5-107 are adhered to, there is no ethical prohibition against a lawyer entering into a retainer by which the criminal defendant's sister agrees to pay her brother's legal fees).

N.Y.C. Bar Op. 1995-1 (1995) (lawyer may enter into a relationship with a company that finances the payment of legal fees but must avoid having his or her professional judgment on behalf of a client affected by the company).

VII. ANNOTATIONS OF CASES

New York: Nelson Elec. Contracting Corp. v. Transcontinental Ins. Co., 231 A.D.2d 207, 660 N.Y.S.2d 220 (3d Dept. 1997) (the insured, not the insurance company, is the lawyer's client, and the insurance company may not disclaim coverage because it disagrees with a strategic decision made by the insured's counsel).

Feliberty v. Damon, 72 N.Y.2d 112, 527 N.E.2d 261, 531 N.Y.S.2d 778 (1988) (refusing to impose vicarious liability on an insurer for the alleged malpractice of an insured's lawyer on the ground, inter alia, that the insurer is prohibited from controlling the lawyer's decisions).

Federal: Baker v. David Alan Dorfman, P.L.L.C., 232 F.3d 121 (2d Cir. 2000) (remanding district court order appointing a receiver for a law firm until a malpractice judgment was satisfied on the ground that the district court had not considered, inter alia, former DR 5-107).

Amiel v. United States, 209 F.3d 195 (2d Cir. 2000) (ordering a post-conviction hearing into the claim that the payment of legal fees by the petitioner's codefendant mother led the petitioner's counsel to shortchanging her defense, thereby violating the Sixth Amendment guarantee of the effective assistance of counsel).

United States v. Duran-Benitez, 110 F.Supp. 2d 133 (E.D.N.Y. 2000) (concluding the defendant, who was arrested for alleged drug trafficking, was denied the effective assistance of counsel because his counsel's fees were paid by a third party, an alleged drug king).

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RULE 1.8(G): AGGREGATE SETTLEMENTS

I. TEXT OF RULE 1.8(G)[24]

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client. The lawyer's

24 The editors would like to thank Daniel S. Kotler and Pinella Tajcher for their research and cite-checking assistance.

disclosure shall include the existence and nature of all the claims involved and of the participation of each person in the settlement.

II. NYSBA COMMENTARY [RULE 1.8(G)]

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consents. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement. Paragraph (g) is a corollary of both these Rules and provides that, before any settlement offer is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement is accepted. *See also* Rule 1.0(j) (definition of "informed consent"). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility:

Substantially the same as DR 5-106(A), with a new exemption and a requirement that each client give informed consent in writing to the settlement.

III.2 ABA Model Rules of Professional Conduct (2009)

- ABA Rule 1.8(g) is similar to NY Rule 1.8(g), but includes as an additional prohibition aggregate agreements as to guilty or nolo contendere pleas in criminal cases.
- Unlike ABA Rule 1.8(g), NY Rule 1.8(g) includes a "court approved" exception.

IV. PRACTICE POINTERS

1. Because the disclosures required to provide informed consent under Rule 1.8(g) might require clients to waive certain confidences (cf. Rule 1.6), the lawyer should consider seeking consent for such disclosures from all clients at the outset of the representation.
2. Clients may not waive the requirement of informed consent.

3. It is not sufficient to get client consent for multiple representation at the outset of the representation, as subsequent developments (including events occurring at the time of settlement) may give rise to conflicts.
4. An attorney must disclose sufficient information to each client before he or she can give informed consent to an aggregate settlement. The disclosure should include such information as: (1) the total amount of the aggregate settlement; (2) a description of the existence and nature of all claims involved; (3) the terms of each client's participation in the settlement (including the settlement consideration to be contributed and/or received by each client); (4) the total fees and costs to be paid to the lawyer pursuant to the settlement if they will be paid (in whole or in part) from settlement proceeds or by an opposing party or parties; (5) the method for apportioning fees and costs among clients; (6) the material risks in accepting or rejecting the settlement; and (7) the reasonably available alternatives to accepting the settlement.

V. ANALYSIS

V.1 Purpose of Rule 1.8(g)

Rule 1.8(g) addresses the possibility of conflicts that might arise when an attorney attempts to arrange a settlement on behalf of multiple clients regardless of whether they are individuals or corporate clients. It applies across-the-board to both plaintiffs' and defendants' lawyers., since it applies to "an aggregate settlement of the claims *of or against* the clients." The essential purpose of Rule 1.8(g) is to ensure that each of the lawyer's multiple clients receives sufficient information to make an intelligent, independent, and informed evaluation of an aggregate settlement.

Subsection (g) resembles former DR 5-106(A) except that it specifically exempts settlements approved by the court. The Rule requires that informed consent by each client to an aggregate settlement be in writing and signed. The requirement that "the lawyer's disclosure shall include the existence and nature of all claims involved and of the participation of each person in the settlement" appears in both the Rule and the old Code. However, "informed consent," newly defined in Rule 1.0(j), varies slightly from the requirement of former DR 5-106(A). Where former DR 5-106(A) required that "each client has consented after full disclosure of the implications of the aggregate settlement and the advantages and risks involved," Rule 1.0(j) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives."

V.2 What is an Aggregate Settlement?

Neither Rule 1.8(g), its predecessor DR 5-106, the ABA Model Rules, nor the comments to the New York Rules or ABA Model Rules, define an "aggregate settlement." It has

been suggested that an aggregate settlement occurs "when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas,"[25] when the attorney represents several clients in a single matter, or when claims in several separate cases are settled for whatever reason in one settlement agreement.[26] A key issue in determining if a settlement is an aggregate settlement is whether the settlement has collective conditions.[27] The mere fact that a group of clients settle does not necessarily mean that there is an aggregate settlement if the settlements are negotiated on an individual basis for each client and each client retains the independent ability to accept or decline the settlement. In contrast, if the settlement is conditioned on acceptance by a minimum number of the clients, or if the settlement is for a fixed amount the clients must divide among themselves, then collective conditions exist, rendering it an aggregate settlement.

Note that a settlement agreement need not be all or nothing. Even if the agreement did not require every client to accept the settlement, but only required most or many, the conflicts of interest created by an aggregate agreement might still exist.[28]

V.3 Mass Tort and Class Actions

Former DR 5-106 did not expressly exempt aggregate settlements approved by a court from its prohibitions. Thus, the old aggregate settlement rule was particularly burdensome in mass tort and class action cases where the sheer number of clients could impose extreme administrative burdens and confidentiality problems. The Rule's exemption for aggregate settlements approved by the court should help limit the cases to which the aggregate settlement rule applies.

It should be noted, however, that a recent ethics opinion concludes that absent court approval, the disclosure and consent required by Rule 1.8(g) can never be waived or avoided. The opinion acknowledges academic criticism of the use of the aggregate settlement rule in the mass tort context, but states that a denial of waivers is the position

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25 N.Y. C. Bar Op. 2009-06, *quoting,* ABA Formal Op. 06-438 (2006) ("It is not necessary that all of the lawyer's clients facing criminal charges, having claims against the same parties, or having defenses against the same claims, participate in the matter's resolution for it to be an aggregate settlement or an aggregated settlement. The rule applies when any two or more clients consent to have their matters resolved together.").

26 ABA Formal Op. 06-438 (2006).

27 *See In re* New York Diet Drug Litig, 15 Misc. 3d 1114(A), 2007 WL 969426, ∗3–4 (N.Y.Sup.), *citing* Howard M. Erichson, *A Typology of Aggregate Settlements,* 80 Notre Dame L. Rev. 1769 (May 2005).

28 "It is not necessary that all of the lawyer's clients… participate in the matter's resolution for it to be an aggregate settlement or an aggregated settlement." N.Y.C. Bar Op. 2009-06, *quoting* ABA Formal Op. 06-438 (2006). *See also New York Diet Drug Litigation*, 2007 WL 969426 at ∗3–4 (N.Y. Sup.Ct. 2007). Howard Erichson has suggested that at least theoretically, even nonsimultaneous settlements might constitute an aggregate settlement if the total settlements were subject to an implicit or explicit cap. Erichson states that actual application of the aggregate settlement rule to such circumstances would probably be unworkable, however. *See* Erichson, *supra* note 27.

of a clear majority of courts and ethics opinions. Further, the burdens imposed by disclosure are outweighed by the importance of the protection provided by the Rule.[29]

V.4 What Should the Attorney Disclose to Obtain Informed Consent?

Under subsection (g) of Rule 1.8, each client can give "informed consent" in writing to an aggregate settlement. The subsection goes on to state that the lawyer must disclose to each client "the existence and nature of all claims involved and of the participation of each person in the settlement." The NYSBA Comments to the Rule further clarify that "what the other clients will receive or pay if the settlement is accepted" is part of the material terms of the settlement that the attorney must disclose.

It is further recommended that the disclosure include information adequate for an informed decision, such as:[30]

- The total amount of the aggregate settlement;
- A description of the existence and nature of all claims involved;
- The terms of each client's participation in the settlement, including the settlement consideration to be contributed and/or received by each client;
- The total fees and costs to be paid to the lawyer pursuant to the settlement if they will be paid (in whole or in part) from settlement proceeds or by an opposing party or parties;
- The method for apportioning fees and costs among clients;
- The material risks in accepting or rejecting the settlement; and
- The reasonably available alternatives to accepting the settlement.

This list is by no means exhaustive, and the disclosures required in any particular case may be heavily context-dependent.[31]

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29 The New York City Bar expressly rejects the ALI's *Principles of the Law of Aggregate Litigation*, §3.17 (approved May, 2009), which would permit such waivers. N.Y.C. Bar Op. 2009-06, n. 3. Roy Simon notes that "New York's CPLR, which is enacted by the Legislature, contains no mechanism for court approval of an aggregate settlement in any setting other than a class action (or its close cousin, the derivative action)." Roy Simon, *Simon & the New Rules—Part III: Rule 1.8—10 Conflict Rules in 1*, N.Y. Prof. Resp. Rep. 5 (June 2009).

30 N.Y.C. Bar Op. 2009-06, *citing* ABA Formal Op. 06-438 (2006).

31 *See* ABA Formal Op. 06-438, n. 11. It should be noted that Rule 1.8(g)'s application might be construed broadly. Applying former DR 5-106, the court in *New York Diet Drug Litig.* states that, "the duty to fully disclose to the client was not to be determined by slavish adherence to the aggregate settlement rule, but rather the duty to insure informed consent." 2007 WL 969426 at *5.

In mass tort litigation, it may not be necessary to precisely identify the award of each individual client, provided the attorney discloses information on the number of claimants, the total amount of the settlement, and any formula or other method to determine each individual award.[32] It is not clear if New York courts or ethics committees would accept this approach.

V.5 Get it in Writing

Clients must provide informed consent in a signed writing. This is new. Former DR 5-106, like some of the other former Code provisions (e.g., DRs 5-105 and 5-108), did not require a writing, although it was certainly best practice. "Writing" and "signed" are defined in Rule 1.0(x).

VI. ANNOTATIONS OF ETHICS OPINIONS

New York: N.Y.C Bar Op. 2009-6 (2009) (under Rule 1.8(g), a client cannot waive individual approval of an aggregate settlement. The client cannot delegate this authority, or agree to be bound by a settlement approved by a certain number or percentage of clients. The attorney must obtain written and signed informed consent from each client. The Opinion expressly rejects the ALI's *Principles of the Law of Aggregate Litigation*, §3.17 (approved May, 2009), which proposes to permit such waivers. The opinion states that the NYC Bar's position has been adopted by the majority of courts and ethics committees, and that the protections of the aggregate settlement rule outweigh its burdens. This opinion also embraces an ABA definition of aggregate settlement and description of what information an attorney must disclose in order to obtain informed consent.).

N.Y.S. Bar Op. 639 (1992) (attorney inquired whether it would be permissible to represent separate plaintiffs injured in a single incident by one defendant, where the defendant would probably have insufficient assets to satisfy both claims. Although the opinion mostly addresses the requirements of former DR 5-105, it emphasizes "these protections [of DR 5-106] are in addition to, and not in lieu of, the protections afforded by former DR 5-105. A multiple representation that appeared appropriate at the outset may nevertheless require the lawyer to withdraw from representing either client if the circumstances—such as an aggregate settlement proposal—place the clients in an irreconcilable conflict.").

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32 See, e.g. Matt Garretson, A Practical Approach to Avoiding Aggregate Settlement Conflicts (As Well as Managing and Satisfying the Problem-Solving Expectations of Individual Mass Tort Clients) (2004), http://www.settlementplan.com/pdf/aggregate_settlements.pdf; Howard M. Erichson, Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation, 2003 U. Chi. Legal F. 519 (May 2003).

ABA: ABA Formal Op. 06-438 (2006) (provides a general overview of the requirements of Model Rule 1.8, including a definition of "aggregate settlement" and a discussion of disclosures necessary for informed consent. In a footnote, this opinion states that it does not treat mass tort as aggregate settlement. See discussion in §5.C, supra, on the mass tort context.).

VII. ANNOTATIONS OF CASES

New York: In re New York Diet Drug Litig., 15 Misc. 3d 1114(A), (N.Y.Sup. Ct. 2007) (the court considered a settlement agreement involving over 5,000 claimants, which had previously received court approval. The court held that the settlement was an aggregate or collective agreement because the settlement created only a single collective damages pool over which the individual claimants would then have to compete with each other to divide up. The claimants did not receive the disclosures necessary for them to be able to consent because their attorney misled them into believing that each claimant's settlement award was offered individually by the defendant, rather than divided up by the attorney from the collective pool, and because they were misled about the type of oversight the settlement received.).

Allegretti-Freeman v. Baltis, 205 A.D.2d 859, 613, N.Y.S.2d 449 (3d Dept. 1994) (an agreement among several plaintiffs not to settle, without the majority approval of the other plaintiffs, did not inherently constitute a conflict of interest, although it would require vigilance. This opinion does not apply former DR 5-106 or NY Rule 1.8, but nonetheless illustrates a contrast to the waiver forbidden by N.Y.C. Bar Op. 2009-6, which stated that individual clients could not waive or delegate their right to informed consent under Rule 1.8(g). N.Y.C. Bar Op. 2009-6 forbids an arrangement whereby a client could be forced into a settlement, whereas *Allegretti* hesitantly permits an arrangement where a client could be prevented from entering a settlement.).

Federal: Amchem Prods v. Windsor, 521 U.S. 591, 117 S. Ct. 2231 (1997) (under Rule 23 of the Federal Rules of Civil Procedure, where a class could not be certified for the purpose of litigating a set of claims, those claims could also not be settled as a group).

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RULE 1.8(H): LIMITING LIABILITY AND SETTLING MALPRACTICE CLAIMS

I. TEXT OF RULE 1.8(H)[33]

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.

33 The editors would like to thank Jocelyn Ryan and Pinella Tajcher for their research and cite-checking assistance.

II. NYSBA COMMENTARY [RULE 1.8(H)]

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are currently represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for the lawyer's own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility:

Substantially the same as former DR 6-102(A), but now the lawyer must inform the client in writing of the advisability of seeking independent legal counsel's advice in the transaction and the client must be given a reasonable amount of time to obtain that advice.

III.2 ABA Model Rules:

NY Rule 1.8(h) flatly bans a lawyer from making an agreement that prospectively limits malpractice liability to the client, whereas ABA Rule 1.8(h) permits it if the client is independently represented in making such an agreement.

IV. PRACTICE POINTERS

1. Rule 1.8(h) prohibits prospective agreements to limit any potential claims of malpractice. Such an agreement cannot be included in a retainer agreement.

2. A retainer agreement can contain a provision that disputes between clients and the attorney will be subject to arbitration, as long as the clients are fully informed about the scope and effect of the agreement.
3. A malpractice claim against an attorney may be settled as long as the attorney informs the client in writing of the value of seeking independent legal counsel regarding the matter and the client is given sufficient time to secure advice from independent counsel.

V. ANALYSIS

V.1 Purpose of Rule 1.8(h)

Rule 1.8(h) is substantially the same as former DR 6-102(A), except for the added requirement in the new Rule that when settling a claim or potential claim for legal malpractice, the lawyer must now advise the client in writing of the desirability of seeking the advice of independent legal counsel, and must give the client a reasonable opportunity to seek the independent counsel's advice.

The public policy against attorneys entering into agreements with clients to limit any potential claims of malpractice against them is well-founded. Such agreement could undercut the lawyer's diligent and competent representation of the client. Further, unsophisticated clients would not be able to adequately assess what rights they were signing away. To protect the fiduciary responsibility of the attorney in the client-lawyer relationship, prudence dictates prohibiting such agreement.

While an agreement settling a claim or potential claim of malpractice is not per se forbidden by the Rule, in light of the attorney's unfair competitive advantage in any settlement negotiations with a client, subsection (h) does require the attorney to advise the client in writing of the appropriateness of seeking independent legal counsel in connection with the settlement proposal, and to afford the client a reasonable amount of time to seek out independent counsel.

V.2 Limiting Prospective Malpractice Liability

NY Rule (h) focuses on two aspects of lawyer conduct. First, Section (h)(1) prohibits a lawyer from prospectively limiting malpractice liability. A lawyer may not obtain a client's advance consent that, in the event of a malpractice claim, the client's potential damages against the lawyer will be capped. For example, a lawyer may not include such a stipulation in a retainer letter. This prohibition applies regardless of whether the client is independently represented by counsel.[34]

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34 The form of the rule initially proposed followed ABA Rule 1.8(h), which allows a lawyer to enter into a liability-limiting agreement provided that an independent lawyer represented the client regarding the agreement. This language was removed from the proposed rule. The enacted form of the rule carries forward the substance of former DR 6-102(A), which prohibits

A lawyer is also prohibited from limiting his or her ethical obligations in a retainer agreement. Since the client-lawyer relationship is inherently fiduciary in nature,[35] "a firm may not circumscribe its professional obligations by purporting to transform the attorney-client relationship into an arm's length commercial affiliation."[36]

The Comments to the Rule make it clear, however, that an attorney may enter into an agreement to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed about the scope and effect of the agreement. Similarly, attorneys are not proscribed from practicing in the form of a limited liability entity where allowed by law and where each lawyer remains personally liable to the client for his or her own professional conduct. Agreements may also be reached defining the scope of an attorney's representation of the client as long as the requirements of Rule 1.2 are met, and the scope of employment is not so narrowly defined as to make the attorney's obligations illusory.

V.3 Settling Malpractice Claims

The second aspect of lawyer conduct that NY Rule (h) focuses on is in section (h)(2), which provides that in the event that a prospective, current, or former client brings or threatens to bring a claim against a lawyer, the lawyer is prohibited from settling the claim with an unrepresented client unless two conditions are met. First, the client must be informed in writing of the value in seeking independent counsel regarding the claim and settlement. Second, the client must also be given a reasonable amount of time to obtain independent counsel.

While these restrictions are important to prevent a lawyer from taking advantage of an unrepresented client, this policy must be balanced with the desirability of limiting litigation through a fair settlement agreement. Thus the Rule does not prohibit the settlement of a malpractice claim, as long as the proper precautions are taken.

VI. ANNOTATIONS OF ETHICS OPINIONS

NYCLA Bar Op. 773 (1997) (with the exception of a retainer agreement in a domestic relations matter, a retainer agreement may provide that all disputes between the lawyer and the client (including claims for malpractice) are subject to arbitration before an established arbitral forum that adheres to standards similar to those of the American Arbitration Association. However, insofar as New York law permits the award of

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a lawyer from prospectively limiting malpractice liability, without exception. *Comments on the Proposed New York Rules of Professional Conduct,* NYCLA Task Force on Ethics Reform (2007).

35 Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, et al., 56 A.D.3d. 1 (2008).

36 *Id*. at 8 (in *Ulico*, the defendant claimed that its fiduciary duty of loyalty was limited based on contractual language that allowed the defendant to accept other employment of a similar character during its representation of the plaintiff. Such language will not limit a lawyer's ethical obligations, and thus will not prevent the client from bringing a malpractice claim based on violation of those obligations.).

punitive damages against a lawyer for malpractice, the arbitrator or arbitral body must have the authority to award such damages. Furthermore, the lawyer must fully explain the consequences of the arbitration clause to the client and afford the client the opportunity to seek independent counsel if the client so chooses.).

N.Y.C. Bar Op. 1996-6 (1996) (New York law firm that is organized as a limited liability partnership need not indicate on its letterhead that certain of its partners are themselves professional corporations).

N.Y.C. Bar Op 1995-7 (1995) (lawyer does not violate former DR 6-102(A) by organizing the lawyer's practice as a limited liability corporation (LLC) or a limited liability partnership (LLP) because the lawyer remains liable for the lawyer's own acts of malpractice and those of the persons in the LLC or LLP who are subject to the lawyer's "direct supervision or control").

VII. ANNOTATIONS OF CASES

Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, et al., 56 A.D.3d. 1 (2008) (defendant claimed that its fiduciary duty of loyalty was limited based on contractual language that allowed the defendant to accept other employment of a similar character during its representation of the plaintiff. Such language will not limit a lawyer's ethical obligations, and thus will not prevent the client from bringing a malpractice claim based on a violation of those obligations.).

Weil, Gotshal & Manges LLP v. Fashion Boutique of Short Hills, et al., 56 A.D.3d 334, 868 N.Y.S.2d. 24 (A.D. 1st Dept. 2008) (clients will be bound by a settlement agreement releasing former counsel from malpractice liability if represented by independent counsel during negotiation of the release. Such an agreement does not violate former DR 6-102. Although clients claimed to never have agreed to the release, client's counsel had actual and apparent authority, and clients enjoyed the benefits of the agreement. Here, the agreement was embodied in a court order.).

Swift v. Choe, 674 A.D.2d 188, 674 N.Y.S.2d 17 (1st Dept. 1998) (a release obtained in violation of former DR 6-102 cannot shield a lawyer from liability).

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RULE 1.8(I): ACQUIRING PROPRIETARY INTEREST IN LITIGATION

I. TEXT OF RULE 1.8(I)[37]

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

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37 The editors would like to thank Adam Young and Pinella Tajcher for their research and cite-checking assistance.

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil matter subject to Rule 1.5(d) or other law or court rule.

II. NYSBA COMMENTARY TO RULE 1.8(I)

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. These may include liens granted by statute, liens originating in common law, and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil matters are governed by Rule 1.5.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility:

Substantially the same as DR 5-103(A).

III.2 ABA Model Rules

NY Rule 1.8(i) is substantially similar to ABA Rule 1.8(i), except the exemption in the NY Rule that allows a lawyer to contract for a reasonable contingency fee in a civil matter is "subject to Rule 1.5(d) or other law or court rule."

IV. PRACTICE POINTERS

1. Attorneys are generally prohibited from acquiring a proprietary interest in a client's cause of action or the subject matter of the litigation.
2. An attorney may acquire a lien authorized by law to secure the lawyer's fees or expenses when authorized by statute or acquired by contract with the client.

3. A lawyer may contract with a client for a reasonable contingency fee in a civil matter according to the provision detailed in Rule 1.5.

V. ANALYSIS

V.1 Purpose of Rule 1.8(i)

Subsection (i) of the Rule is essentially the same as former DR 5-103(A). The Rule prohibits a lawyer from acquiring a financial or economic interest in a client's lawsuit, with specific exceptions: certain advances of the costs of litigation, liens authorized by law to secure attorneys' fees or expenses, and contracts for reasonable contingency fees.[38] The Rule is intended to insure that lawyers continue to maintain independent judgment while representing a client in a lawsuit.

It has long been the view that allowing a lawyer to acquire a financial interest in a client's lawsuit would encourage the filing of frivolous suits, as individuals who might not proceed with a claim would nonetheless be willing to sell their causes of action to attorneys who would have no such hesitation. Clients willing to give their attorneys a proprietary interest in the litigation may lack the sophistication necessary to properly evaluate the monetary potential of the claim, thus giving the lawyer an unfair advantage in valuing the cause of action. Further, some lawyers might ultimately engage in bidding wars over the right to obtain an interest in the client's cause of action, which could damage the reputation of the profession. When an attorney has an interest in the subject of the litigation, it might also make it harder for the client to dismiss the attorney.

V.2 When the Rule Does Not Apply

Although the Rule adopts the traditional view that lawyers are prohibited from acquiring a proprietary interest in the litigation, certain exceptions are allowed.

The Rule allows a lawyer to acquire a lien authorized by law to secure the lawyer's fee or expenses. The liens include those granted by statute, liens originating in common law, and liens acquired by contract with the client. The NYSBA Commentary to the Rule points out that when a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, the lawyer has engaged in a business or financial transaction with the client and is subject to the provisions of Rule 1.8(a).

The Rule also allows attorneys to contract with a client for a reasonable contingency fee in a civil matter, subject to the provisions of Rule 1.5.

While the first exception allows a lawyer to acquire a lien to secure fees or expenses, the second exception permits contracting with a client for reasonable contingency fees in a civil matter. There is no "reasonableness" requirement for fees in the first exception.

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38 *See* Rule 1.8(e) and NYSBA Commentary to Rule 1.8 [16].

VI. ANNOTATIONS OF ETHICS OPINIONS [RESERVED]

VII. ANNOTATIONS OF COURT CASES

In re WestPoint Stevens, Incn. 600 F.3d 231 (2d Cir. 2010) (lawyers are prohibited from acquiring a proprietary interest in the subject of the litigation from the client or receiving property or security interests that are adverse to a client).

Association for Holocaust Victims for Restitution of Artwork and Masterpieces v. Bank Austria Creditanstalt AG, 2005 WL 2001888 (S.D.N.Y. Aug. 19, 2005) (sanctioning a lawyer, inter alia, for acquiring a prohibited interest in the subject matter of the litigation).

Sauer v. Xerox Corp., 85 F. Supp. 2d 198 (W.D.N.Y. 2000) (denying a motion to disqualify, even though the lawyer had violated former DR 5-103 by acquiring an interest in the equipment that was the subject matter of the litigation).

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RULES 1.8(J) AND (K) CLIENT-LAWYER SEXUAL RELATIONSHIPS AND IMPUTATION OF PROHIBITIONS

I. TEXT OF RULES 1.8(J) AND (K)[39]

(j) A lawyer shall not:

(i) as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person;

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39 The editors would like to thank Frank Badalato and Pinella Tajcher for their research and cite-checking assistance.

(ii) employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer's firm; or

(iii) in domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.

(2) Rule 1.8(j)(1) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.

(k) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.

II. NYSBA COMMENTARY

NYSBA Commentary to Rule 1.8(j)

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is often unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that if the sexual relationship leads to the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairing the lawyer's exercise of professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict the extent to which client confidences will be protected by the attorney-client evidentiary privilege. A client's sexual involvement with the client's lawyer, especially if the sexual relations create emotional involvement, will often render it unlikely that the client could rationally determine whether to consent to the conflict created by the sexual relations. If a client were to consent to the conflict created by the sexual relations without fully appreciating the nature and implications of that conflict, there is a significant risk of harm to client interests. Therefore, sexual relations between lawyers and their clients are dangerous and inadvisable. Out of respect for the desires of consenting adults, however, paragraph (j) does not flatly prohibit client-lawyer sexual relations in matters other than domestic relations matters. Even when sexual relations between a lawyer and client are permitted under paragraph (j), however, they may lead to incompetent representation in violation of Rule 1.1. Because domestic relations clients are often emotionally vulnerable, domestic relations matters entail a heightened risk of exploitation of the client. Accordingly, lawyers are flatly prohibited from entering into sexual relations with domestic relations clients during the course of the representation even if the sexual relationship is consensual and even if prejudice to the client is not immediately apparent. For a definition of "sexual relations" for the purposes of this Rule, see Rule 1.0(u).

[17A] The prohibitions in paragraph (j)(1) apply to all lawyers in a firm who know of the representation, whether or not they are personally representing the client. The Rule prohibits any lawyer in the firm from exploiting the client-lawyer relationship by directly or indirectly requiring or demanding sexual relations as a condition of representation by the lawyer or the lawyer's firm. Paragraph (j)(1)(i) thus seeks to prevent a situation where a client may fear that a willingness or unwillingness to have sexual relations with a lawyer in the firm may have an impact on the representation, or even on the firm's willingness to represent or continue representing the client. The Rule also prohibits the use of coercion, undue influence or intimidation to obtain sexual relations with a person known to that lawyer to be a client or a prospective client of the firm. Paragraph (j)(1)(ii) thus seeks to prevent a lawyer from exploiting the professional relationship between the client and the lawyer's firm. Even if a lawyer does not know that the firm represents a person, the lawyer's use of coercion or intimidation to obtain sexual relations with that person might well violate other Rules or substantive law. Where the representation of the client involves a domestic relations matter, the restrictions stated in paragraphs (j)(1)(i) and (j)(1)(ii), and not the per se prohibition imposed by paragraph (j)(1)(iii), apply to lawyers in a firm who know of the representation but who are not personally representing the client. Nevertheless, because domestic relations matters may be volatile and may entail a heightened risk of exploitation of the client, the risk that a sexual relationship with a client of the firm may result in a violation of other Rules is likewise heightened, even if the sexual relations are not per se prohibited by paragraph (j).

[17B] A law firm's failure to educate lawyers about the restrictions on sexual relations or a firm's failure to enforce those restrictions against lawyers who violate them may constitute a violation of Rule 5.1, which obligates a law firm to make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

[18] Sexual relationships between spouses or those that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the sexual relationship and therefore constitute an impermissible conflict of interest. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) applies to sexual relations between a lawyer for the organization (whether inside counsel or outside counsel) and a constituent of the organization who supervises, directs or regularly consults with that lawyer or a lawyer in that lawyer's firm concerning the organization's legal matters.

NYSBA Commentary to Rule 1.8(k)

[20] Where a lawyer who is not personally representing a client has sexual relations with a client of the firm in violation of paragraph (j), the other lawyers in the firm are

not subject to discipline solely because those improper sexual relations occurred. There may be circumstances, however, where a violation of paragraph (j) by one lawyer in a firm gives rise to violations of other Rules by the other lawyers in the firm through imputation. For example, sexual relations between a lawyer and a client may give rise to a violation of Rule 1.7(a), and such a conflict under Rule 1.7 may be imputed to all other lawyers in the firm under Rule 1.10(a).

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility:

Rule 1.8(j) and (k) is the successor to former Disciplinary Rule 5-111 (the version in effect immediately prior to the April 1, 2009 amendments). Specifically:

- The current NY Rules and the former New York Code differ in their placement of the definition of "sexual relations." The current Rules place the definition of "sexual relations" in its Terminology section under Rule 1.0(u). The definition is not found in Rule 1.8, the rule governing attorney-client sexual relations. The former Code places the definition of "sexual relations" within the rule governing attorney-client sexual relations, DR 5-111, and does not define "sexual relations" in its separate "Definitions" section.
- The definition of "sexual relations" under Rule 1.0(u) and DR 5-111(A) are very similar. The only difference between the definitions is that Rule 1.0(u) uses the phrase "an intimate part of the lawyer or another person for the purpose of sexual arousal," whereas DR 5-111(A) uses the phrase "an intimate part of another person for the purpose of sexual arousal."
- Rule 1.8(j)(1)(i) and (ii) is the successor to DR 5-111(B)(1) and (2). Rule 1.8(j)(1)(i) and (ii) has been revised for clarity, but does not change the meaning of DR 5-111(B)(1) and (2). The specific differences in the language of the rules are as follows:
  - Rule 1.8(j)(1)(i) states, "A lawyer shall not, as a condition of *entering into or continuing* any professional representation *by the lawyer or the lawyer's firm*, require or demand sexual relations with *any person*." In contrast, DR 5-111(B)(1) states, "A lawyer shall not require or demand sexual relations with *a client or third party incident to or as a condition of* any professional representation."
  - Rule 1.8(j)(1)(ii) states, "A lawyer shall not employ coercion, intimidation or undue influence in entering into sexual relations *incident to any professional representation by the lawyer or the lawyer's firm.*" In contrast, DR 5-111(B)(2) states, "A lawyer shall not employ coercion, intimidation or undue influence in entering into sexual relations *with a client.*"
- Rule 1.8(j)(1)(iii) is identical to DR 5-111(B)(3).
- Rule 1.8(j)(2) is identical to DR 5-111(C), except for the conforming change from "DR 5-111(B) shall not apply" to "Rule 1.8(j)(1) shall not apply."
- Rule 1.8(k) is identical to DR 5-111(D), except for the trivial modification of "rule" to "Rule."

III.2 ABA Model Rules of Professional Conduct (2009):

- ABA Rule 1.8(j) creates an unqualified, across-the-board prohibition on attorney-client sexual relations. The ABA Rule bans attorney-client sexual relations in all situations, except when a consensual sexual relationship predated the attorney-client relationship. In contrast, NY Rule 1.8(j)(1) and (2) imposes a qualified prohibition on attorney-client sexual relations, prohibiting attorney-client sexual relations only in certain situations. The situations where attorney-client sexual relations are banned by Rule 1.8(j) and (k) are as follows:
- Rule 1.8(j)(1)(i) prohibits a lawyer from "requiring" or "demanding" sexual relations with any person "as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm."
- Rule 1.8(j)(1)(ii) prohibits a lawyer from engaging in sexual relations with a client through the use of "coercion, intimidation or undue influence."
- Rule 1.8(j)(1)(iii) prohibits an attorney from engaging in sexual relations with a client during the course of representation in a domestic relations matter.
- Notably, Rule 1.8(j)(2) exempts sexual relations between spouses and ongoing consensual sexual relationships predating the initiation of the lawyer-client relationship from Rule 1.8(j)(1).
- NY Rule 1.8(k) and ABA Rule 1.8(k) deal with conflicts of interest created when sexual relations occur between a firm's client and that same firm's attorney who does not participate in the representation of the client. NY Rule 1.8(k) states: "Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations." Under ABA Rule 1.8(k), when lawyers are associated in a firm, the prohibitions set forth in ABA Rule 1.8(a)–(i) that apply to attorneys individually shall also apply to the entire firm. Notably, ABA Rule 1.8(j), the subdivision addressing attorney-client sexual relations, is excluded. This exclusion has the effect of preventing a violation of ABA Rule 1.8(j) by an individual attorney from being imputed to the entire firm.

IV. PRACTICE POINTERS

1. Determine whether the conduct in question constitutes "sexual relations" as defined by Rule 1.0(u).
2. Rule 1.8(j) does not impose a blanket prohibition of attorney-client sexual relations. Instead, attorney-client sexual relations are barred in certain specifically enumerated situations. When deciding whether Rule 1.8(j) has been violated, determine whether the questionable behavior falls within one of the enumerated categories of prohibited behavior.
3. Exercise caution in pursuing a romantic, emotional, or flirtatious relationship with a client that may provide a basis for the client's later claim the Rule has been violated. Such conduct may create the risk of a swearing contest between lawyer and client that a prudent lawyer will want to avoid.

4. Remember that different rules apply in domestic relations matters. Rule 1.8(j)(1)(iii) greatly restricts the boundaries of permissible attorney-client sexual relations in domestic relations matters.
5. Determine whether the sexual relations occurred between spouses as this situation receives special treatment under Rule 1.8(j)(2).
6. It is important to determine when the attorney-client sexual relationship began. Sexual relationships predating the initiation of the client-lawyer relationship are treated differently than sexual relations beginning after the initiation of the client-lawyer relationship.
7. Determine which attorneys are actually participating in the representation of the client. A sexual relationship between a firm's client and an attorney at that firm may not violate Rule 1.8 if the attorney does not participate in the representation of the client.

V. ANALYSIS

V.1 General Purpose of Rule 1.8(j) and (k)

Rule 1.8(j) and (k) governs attorney-client sexual relations. The Rule is designed to curtail client exploitation and prevent attorney-client sexual relations from adversely impacting legal representation, while also recognizing that the Rule should not intrude into intimate personal relationships when it is not necessary to do so. Thus, the New York Rule retains a more nuanced approach to this issue in contrast to the ABA's across-the-board ban.

V.2 Unfair Exploitation of the Client

Rule 1.8 attempts to prevent attorneys from unfairly exploiting clients by detailing particular situations where attorney-client sexual relations may be appropriate. "The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence."[40] Rule 1.8 recognizes the importance of the attorney-client fiduciary relationship and attempts to prevent attorneys from unfairly taking advantage of their client's trust for the purpose of engaging in sexual relations.

The primary purpose of Rule 1.8 is to protect vulnerable clients from predatory attorneys. Rule 1.8 bans the quid pro quo exchange of sexual services for legal representation and making legal representation contingent upon sexual relations. "Presumably the Rule is… intended to cover the situation in which a client says, "I don't have any money to pay you but I will sleep with you if you represent me," as well as the situation where a lawyer says to a client, "I will not represent you unless you have sex with me.'"[41] Attorneys frequently represent clients in distress, whether it is

40 NYSBA Commentary to Rule 1.8 [17].
41 Roy Simon, Simon's Code of Professional Responsibility Annotated 1159 (2008).

financial, emotional, or other forms of distress. Rule 1.8 prohibits attorneys from using the distressed state of their clients to engage in sexual relations.

V.3 Compromising Effective Legal Representation

Rule 1.8(j) seeks to avoid situations where legal representation is compromised by attorney-client sexual relations. When attorneys and clients engage in sexual relations, the possibility exists that the sexual relationship will strain the professional relationship and generate conflicts of interest.

When an attorney and client are involved in a sexual relationship, there is a heightened possibility that the professional and personal relationships will become inextricably intertwined. Turbulence in or termination of the personal relationship can negatively impact the attorney-client relationship. "If the couple breaks up or has a fight during the lawyer-client relationship, that may seriously affect the representation—perhaps so seriously that the jilted lover files a grievance or a legal malpractice claim against the lawyer."[42]

Another concern is that an attorney-client sexual relationship will impair an attorney's professional judgment. "The lawyer's efforts in representation must be for the benefit of the client."[43] A sexual relationship between an attorney and client could impact the attorney's decision making and cause him to make decisions based on personal feelings instead of acting objectively and independently in the best interest of his client. "For example, a lawyer who begins a sexual relationship with a current client might have an incentive to hurry or delay or otherwise alter the representation for personal reasons."[44] Rule 1.8 tries to prevent this potential conflict of interest and preclude sexual relationships from affecting the quality and/or effectiveness of legal services.

An attorney-client sexual relationship may also compromise the attorney-client evidentiary privilege. It is possible that certain conversations may lose the protection of the attorney-client privilege based on the circumstances under which the conversation occurred. Rule 1.8 attempts to preserve the attorney-client privilege by restricting incidences of attorney-client sexual relations.

V.4 What are "Sexual Relations?"

Rule 1.8(j) governs attorney-client "sexual relations." "Sexual relations" is defined under Rule 1.0(u) as "sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse." The term is used only in Rule 1.8 and not under any other provision of the Rules. Sexual relations do not include dating, dinner, dancing, or drinking with a

42 *Id*. at, 1163.

43 Restatement (Third) of Law Governing Lawyers (2001).

44 Simon, *supra* note 41, at 1158.

client. Romantic feelings and ordinary social activities are not within the definition of "sexual relations."[45] As defined by the Rules, sexual relations are limited to two specific types of conduct, which are discussed in further detail in the following subsections.

V.5 Prohibited Behavior

"Out of respect for the desires of consenting adults…paragraph (j) does not flatly prohibit client-lawyer sexual relations other than in domestic relations matters."[46] "The courts have decided to prohibit sexual relations with clients only in two specific situations: (1) where the lawyer makes sexual relations as a condition of the lawyer's representation; and (2) where the lawyer goads a client into sexual relations through coercion, intimidation, or undue influence."[47] Situation one "means that a lawyer may not agree to exchange legal services for sexual favors from any person."[48] Situation two "makes clear that if a lawyer does begin having sexual relations with a client during the lawyer-client relationship, the sex had better be genuinely consensual. A lawyer who uses his power or his position of authority to influence a client is violating this provision."[49] Therefore, when determining whether Rule 1.8 has been violated, one must closely examine the questionable behavior. Unless another exception applies, if the questionable conduct does not fall under one of the above two situations, then it is not a violation of Rule 1.8.

V.6 Domestic Relations Matters

"Domestic relations matter" is defined under Rule 1.0(g) as "representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support or alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding." If the questionable sexual relations occur in a domestic relations matter, the conduct falls outside the purview of Rule 1.8(j)(1)(i) and (ii) and directly within the scope of subdivision (iii). Subdivision (iii) places a wholesale ban on attorney-client sexual relations during the course of representation in a domestic relations matter.

Rule 1.8(j) imposes an all-encompassing, unqualified prohibition on attorney-client sexual relations in domestic relations situations, unlike in any other type of matter. "Because domestic relations clients are often emotionally vulnerable, domestic

45 *Id*. at, 1156.
46 NYSBA Commentary to Rule 1.8 [17].
47 Simon, *supra* note 41, at 1158.
48 *Id*.
49 *Id.* at, 1159.

relations matters entail a heightened risk of exploitation of the client."[50] Clients are perceived as being especially vulnerable to attorney exploitations. The unqualified privilege banning attorney-client sexual relations in domestic relations matters attempts to protect these clients.

V.7 Spouses and Preexisting Sexual Relationships

Pursuant to Rule 1.8(j)(2), Rule 1.8(j)(1) does not apply to sexual relations between lawyers and their spouses or sexual relations that predate the client-lawyer relationship. This exception is in effect because many of the negative consequences associated with attorney-client sexual relations are less pertinent and possibly inapplicable when the sexual relationship is between spouses or predates the attorney-client relationship. "Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship."[51] Further, it appears unseemly to intrude into the personal affairs of married and other established couples when it is not necessary.

V.8 Imputation

Rule 1.8(k) governs situations where a firm attorney not participating in the representation of a particular firm client engages in sexual relations with that client.

The Rule states that in this situation, the other attorneys in the firm shall not be subject to discipline solely because of the occurrence of such sexual relations. Under the imputed disqualification rule (Rule 1.10(a)), a Rule violation by one firm attorney will be considered a violation by the entire firm. That is not necessarily true of Rule 1.8(k) violations. However, "there may be circumstances… where a violation of paragraph (j) by one lawyer in a firm gives rise to violations of other Rules by the other attorneys in the firm through imputation."52[52] For example, if sexual relations between a client and a lawyer results in a conflict of interest in violation of Rule 1.7(a) (i.e., there is a significant risk that the lawyer's professional judgment regarding a client's matter will be adversely affected by the lawyer's personal interest), then such a conflict may be imputed to all other lawyers in the firm, possibly leading to disqualification of the firm. To reduce the risk of such occurrences, firms may consider developing an awareness among their lawyers of what constitutes prohibited sexual relations with a client resulting in a possible ethical violation, professional discipline, and/or imputed disqualification of the firm. Under Rule 5.1, firms are responsible to make reasonable efforts to ensure all lawyers in the firm conform to the Rules.

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50 NYSBA Commentary to Rule 1.8 [17].
51 NYSBA Commentary to Rule 1.8 [18].
52 NYSBA Commentary to Rule 1.8 [20].

VI. ANNOTATIONS OF ETHICS OPINIONS [RESERVED]

VII. ANNOTATIONS OF CASES

Guiles v. Simser, 804 N.Y.S.2d 904, (Sup. Ct. Broome County, 2005) (plaintiff asserted a claim inter alia for intentional infliction of mental distress, negligent misrepresentation, and breach of fiduciary duty. Plaintiff and her attorney, the defendant, engaged in sexual relations on two occasions during the course of the defendant's retainer by plaintiff in a domestic relations matter. The court stated that a violation of the disciplinary rules does not per se create a cause of action in favor of the affected client. When a Rules violation exists, the attorney will be subject to discipline; however, the court must still determine whether the Rule violation is sufficient to provide the affected client with a cause of action. The court held that the attorney's conduct, while a violation of the Rules, did not provide the affected client with a cognizable claim.).

VIII. BIBLIOGRAPHY

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Rule 1.9: Duties to Former Clients

I. TEXT OF RULE 1.9[1]

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

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

II. NYSBA COMMENTARY

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent

1 Rules Editors Devika Kewalramani, Esq. and Carol L. Ziegler, Esq. The editors would like to thank Pinella Tajcher for her research and cite-checking assistance.

another client except in conformity with these Rules. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of a former client. So also, a lawyer who has prosecuted an accused person could not properly represent that person in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type, even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation. On the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information

learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

[4] [Moved to Comment to Rule 1.10.]

[5] [Moved to Comment to Rule 1.10.]

[6] [Moved to Comment to Rule 1.10.]

[7] Independent of the prohibition against subsequent representation, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6, 1.9(c).

[8] Paragraph (c) generally extends the confidentiality protections of Rule 1.6 to a lawyer's former clients. Paragraph (c)(1) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Paragraph (c)(2) provides that a lawyer may not reveal information acquired in the course of representing a client except as these Rules would permit or require with respect to a current client. See Rules 1.6, 3.3.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraph (a). See also Rule 1.0(j) for the definition of "informed consent." With regard to the effectiveness of an advance waiver, see Rule 1.7, Comments [22]–[22A]. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility:

Substantially the same as former DR 5-108(A), (B), with the addition that informed consent by a former client must be "confirmed in writing."

III.2 ABA Model Rules:

Substantially the same as ABA Rule 1.9, except the NY Rule draws attention to the term "informed consent" by placing it at the beginning of paragraph (b), instead of including it in a subparagraph, as is the case in the ABA Rule.

IV. PRACTICE POINTERS

1. Determine if the proposed adverse party is a "former" client. This is not always obvious. A lawyer may acquire a client inadvertently by failing to disabuse a person seeking legal services of that person's reasonable belief that the lawyer will provide such services or because the lawyer seeks and obtains confidential information from that person.
2. A lawyer may retain a client inadvertently by failing to inform a former client that the lawyer's services have been terminated.
3. Correctly identifying whether the client is a "current", "former," or "prospective" client can be dispositive in determining whether there is a disqualifying conflict of interest. The Rules do not define who is a "current" or "former" client, and a lawyer should consult the case law. *See* Rule 1.18, infra, on the definition of a "prospective" client.
4. An attorney may not represent a new client in the "same or a substantially related matter" if the new client's interests are materially adverse to those of the former client. Determining whether the matters are the same is relatively easy. Determining whether the matters are "substantially related" may be more difficult.
5. As a general rule, a "substantial relationship" exists if a reasonable lawyer would conclude that there is a substantial risk that confidential information that would normally be obtained in the prior representation would materially advance the new client's position in the subsequent matter.
6. In analyzing whether a "substantial relationship" exists, consider the issues, facts, and the totality of the circumstances of the prior representation. Consult the NYSBA Comments and the relevant court's case law. Keep in mind that New York state courts and federal courts in the Second Circuit differ on what is "substantially related."
7. "Informed consent, confirmed in writing" cures a former client conflict.
8. When a lawyer makes a lateral move to a new firm that is representing a client whose interests are adverse to those of a client represented by the lawyer's former firm, the lawyer is potentially disqualified if the lawyer acquired confidential client information that is material to the matter.
9. A lawyer may not use otherwise confidential client information unless it is generally known. A lawyer may use legal knowledge or the familiarity with the workings of a regulatory body that the lawyer gained in a prior representation.

V. ANALYSIS

V.1. Purpose of Rule 1.9

Rule 1.9 focuses on the lawyer's continuing duty to preserve a client's confidential information even after the lawyer-client relationship has ended and to avoid conflicts of interest between a current client and a former client. Rule 1.9 carries forward the standard of former DR 5-108, "Conflict of Interest—Former Client," but adds the

requirement that a former client conflict can only be waived if the former client gives "informed consent, confirmed in writing."

A lawyer should carefully evaluate the facts and circumstances before reaching a conclusion on the propriety of representing a client in a matter adverse to a former client. Violation of Rule 1.9, as well as the other Rules of professional conduct governing conflicts of interest, can result in professional discipline. But even more frequently, conflicts of interest issues arise in the context of a disqualification motion or as a basis for a malpractice or breach-of- fiduciary-duty claim.

To what extent do the interests served by the rules of professional conduct differ from those that courts seek to protect? Although both courts and ethics authorities begin with the same interest in assuring that lawyers exercise independent professional judgment in competently and diligently representing the interests of their clients, courts perceive their overriding concern to be the prompt resolution of disputes, not the disciplining of lawyers who run afoul of the ethics rules. Indeed, the New York Court of Appeals has specifically cautioned against a "mechanical application of blanket rules" when a former client seeks to disqualify counsel.[2] Resolution of these conflicts is even further complicated because of inconsistencies in the jurisprudence of the state and federal courts.[3]

Courts differ among themselves on the standards they impose for disqualification, depending in part on the kind—and seriousness of the alleged conflict, the motivation of the party bringing the motion to disqualify, and the impact on the client who will have to retain new counsel if the motion is granted.

Over the past two decades, New York, like most jurisdictions, has modified its ethics rules. Changes in the rules dealing with conflicts have often been in response not only to changes in the structure and operation of law practice, but also in response to case law developed in the disqualification context. Some jurisdictions have gone farther than others in permitting representations that the old rules would have prohibited. But, as a general proposition, the gap between the conduct proscribed by the ethics rules and the conduct that will result in disqualification persists.

Despite the fact that some courts may refuse to disqualify counsel notwithstanding a violation of the rules of professional conduct dealing with conflicts of interest, these rules matter not only because no lawyer relishes being either on the receiving end of a motion to disqualify or subject to the continuing risk of malpractice liability or professional discipline, but also because most lawyers do not want to behave in ways that the rules condemn.

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2 Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 132, 674 N.E.2d 663, 667, 651 N.Y.S.2d 954, 958 (1996) (the court sets out three inquiries that must be satisfied by the party seeking the disqualification of counsel: (1) whether there exists a prior attorney-client relationship, (2) whether the matters involved in both representations are substantially related. and (3) whether the interests of the present client are materially adverse to the interests of the former client).

3 *Compare* Gov't of India v. Cook Indus., Inc., 569 F.2d 737, 739 (2d Cir. 1978) (issues involved in the prior representation must be identical or essentially the same) *with Tekni-Plex*.

V.2. Lawyers' Duties to Former Clients

Rule 1.9(a) is triggered when a lawyer encounters a potential conflict between a former client and a current client. The Rule prohibits representation of the new client in the "same or a substantially related matter" if the new client's interests are materially adverse to the former client. The subsection does permit a lawyer to represent the new client, provided the *former* client gives informed consent in writing.

V.3. To Whom Does Rule 1.9(a) Apply?

Rule 1.9(a) applies to all lawyers regardless of their type of practice or the size of their law firms. Former DR 5-108(A) clearly stated that lawyers who currently, or had previously been employed in government service escaped its reach and were instead governed by former DR 9-101. Although Rule 1.9 has no language distinguishing government lawyers from any other lawyers, it implicitly does so because Rule 1.11 specifically applies to former and current government officers and employees.[4]

V.4. Who is a Former Client?

Subsection (a) applies to a lawyer "who has represented a client in a matter"—in other words, a lawyer who has personally represented the former client. Under this subsection, representation by the law firm that previously employed the lawyer is not sufficient, on its own, to bar the lawyer from representing the new client.[5] Imputed disqualification is covered in subsections (b) and (c) of Rule 1.9.

To determine whether Rule 1.9(a) applies, a lawyer must initially resolve two issues:

- First, was the prospective adverse party ever really the lawyer's client?
- Second, if so, has the lawyer's representation been terminated?

The first issue is more complicated than its phrasing suggests. For example, a prospective client whom the lawyer declined to represent may be considered a former client if the prospective client communicated confidential information to the lawyer. Under some circumstances, corporate affiliates may be considered a client, even though the lawyer provided legal services to only one of them. While the representation of a trade association or an organization does not imply the representation of the association's individual members or the organization's constituents,[6] respectively, such representations can be tricky and on occasion lead to a court's finding of the

4 *See also* NYSBA Comments to Rule 1.9.

5 *See* N.Y.S. Bar Op. 723 (1999); Nassau Country Bar Op. 96-16 (1996).

6 N.Y.C. Bar Op. 1999-1 (1991).

establishment of a client-attorney relationship with the member[7] or constituent.[8] In criminal cases, representation of one defendant may be deemed to also be representation of a codefendant, if the lawyer received confidential information from the codefendant.

Determining when the representation of a client has terminated is not always an easy matter. If the lawyer has been providing legal services to the client steadily over the course of time, a court may find that the relationship is a current one, even if no matter is presently pending and no time has recently been billed to the client. That finding is particularly significant as it means that the stricter prohibitions in Rule 1.7 apply to the conflict.

V.5. What Constitutes a "Matter" or a "Substantially Related Matter?"

If a lawyer "has represented a client in a matter," the lawyer may not, without written and informed consent, represent another person in the same or substantially related matter "where that person's interests are materially adverse to the interests of the former client."

Determining whether the matters are the same is normally not too difficult;[9] determining whether they are substantially related or materially adverse is more problematic. No single set of standards exists by which to measure the "substantial relationship'" of two matters. In determining whether a substantial relationship exists, courts examine the legal issues, facts, and the totality of the circumstances of the prior representation. Courts are particularly sensitive to the risk that confidential client information gained in the course of representing a former client may be used in a way that is adverse to the former client. Without establishing a substantial relationship between the former and subsequent representations, the "appearance of impropriety" alone is insufficient to support disqualification.[10]

A "substantial relationship" exists if the matters involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.[11] However, such a relationship can even be found to exist if previous knowledge about the matter helps the lawyer in determining "what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, what lines of attack to abandon and what lines to pursue, what settlements to accept and what offers to reject. . . ."[12] In certain circumstances, such as where there is

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7 *E.g.*, Glueck v. Jonathan Logan, Inc., 653 F.2d 746 (2d Cir.1981).

8 *E.g.*, Dembitzer v. Chera, 525 A.D.2d 285, 728 N.Y.S.2d 78 (2d Dept. 2001) (a law firm's ongoing relationship with a partnership precludes it from representing a plaintiff in an action against a fifty percent general partner).

9 *E.g.*, Alicea v. Bencivenga, 270 A.D.2d 125, 704 N.Y.S.2d 578 (1st Dept. 2000).

10 Pacheco Ross Architects, P.C. v, Mitchell Assoc. Architects, 2009 WL 1514482 (N.D.N.Y. 2009).

11 See NYSBA Commentary to 1.9 [3].

12 *See e.g.*, Ullrich v. Hearst Corp., 809 F. Supp. 229, 236 (S.D.N.Y. 1992); Clairmont v. Kessler, 269 A.D.2d 168, 169, 703 N.Y.S.2d 25, 26 (1st Dept. 2000) (plaintiff's lawyer properly

a question of joint prior representation, the substantial relationship test may not even apply.[13]

There are also varying degrees of "material adversity," which further complicates determining if a conflict exists. Obviously, if the person who is seeking to retain the lawyer is a named defendant in an action brought by a former client, their interests are materially adverse. However, it may be more difficult to draw this conclusion if the former client will only be a witness in the action and it is not clear if (or to what extent) the testimony will harm the prospective client.[14]

V.6. Where Lawyers Move from One Law Firm to Another

Rule 1.9(b) addresses the increasingly frequent situation where a lawyer moves from one law firm to another (carrying potential conflicts baggage), and the new firm is representing a client whose interests are adverse to those of a client represented by the lawyer's former firm. In such a situation, the lawyer is not disqualified from representing the new client under Rule 1.9(a), since he or she did not personally represent the opposing client while employed at the former firm. The lawyer may, however, be disqualified under Rule 1.9(b) if two criteria are present:

- The interests of the two firms' clients are materially adverse; and
- The lawyer has acquired information at the former firm protected by Rule 1.6 or 1.9(c)[15] that is material to the matter, or there is a substantial risk that the lawyer has acquired such information.

As with subsection (a), the lawyer may proceed in representing the new client if the former client gives his or her informed consent to the representation.

The factors constituting "materially adverse" interests for purposes of applying Rule 1.9(b) are no different than those considered in applying subsection (a) of the Rule.

In determining whether a lawyer has acquired information at the former firm that is protected by Rule 1.6 or 1.9 (c) that is material to the matter, courts are reluctant to examine actual communications concerning client matters among partners, associates, paraprofessionals, and staff members. Instead, they examine the totality of the

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disqualified in a medical malpractice action because he had previously represented the defendant doctor and had likely acquired confidential information, "including defendant's surgical experience and techniques and methods of handling patients. . . ."). *See also* Nassau County Bar Op. 93-37 (1993) ("totality of the circumstances" determines if a lawyer who formerly represented physicians and hospitals in medical malpractice actions may now represent plaintiffs in medical malpractice actions against the former clients).

13 Rocchigiani v. World Boxing Counsel, 82 F. Supp.2d 182 (S.D.N.Y. 2000); Felix v. Balkin, 49 F. Supp.2d 260 (S.D.N.Y. 1999). *See also* N.Y.C. Bar Op. 1999-7 (1999).

14 *But see* Fernandez v. City of New York, 2000 WL 297175, at ∗1–2 (S.D.N.Y. Mar. 21, 2000).

15 Rules 1.6 and 1.9(c) apply to confidential information about a client that must not be disclosed without authorized consent or as otherwise permitted by Rule 1.6.

circumstances, including law firm organization and access to databases to determine the likelihood the lawyer had access to protected information. Although the Rule makes no distinction based on law firm size, it will likely prove more difficult for a lawyer from a small law firm to rebut a presumption of shared confidences as smaller firms tend to be characterized by "informality" and "constant cross-pollination."[16]

V.7. Protecting a Former Client's "Confidential Information"

Subsection (c) of the Rule protects confidential information that a lawyer may have learned from representing a former client or by working for a firm who represented the former client. In essence, by making disclosure of a former client's confidences or secrets subject to Rule 1.6, Rule 1.9(c) is placing the same ethical obligations on a lawyer with respect to a former client as it does with respect to current clients.

While a lawyer may not use confidential information unless it has become generally known, a lawyer may use the knowledge of the law or the familiarity with the workings of a regulatory body that the lawyer gained in a prior representation. Learning information about the former client that may be advantageous to the new client is not enough on its own to disqualify a lawyer, as this information may have become obsolete through the passage of time, or may have become public knowledge since the lawyer first learned of it.[17]

Determining if a confidence has become generally known can also be a daunting task. "Generally known" appears to be a function of dissemination of the otherwise protected information. For example, a lawyer may not reveal a former client's criminal conviction, even though it is a matter of public record, unless the crime was "particularly infamous."[18] On the other hand, a lawyer may submit an affidavit explaining the corporate structure of a company related to the one that formerly employed him as in-house counsel if the information was available in trade periodicals and filings with state and federal regulators.19[19]

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Lawyers' Duties to Former Clients

N.Y.C. Bar Op. 2005-5 (2005) (although a lawyer may withdraw from the representation of one client in a "thrust upon" conflict, the continued representation of the other client must comply with former DR 5-108).

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16 Kassis v. Teacher's Ins. & Annuity Ass'n, 93 N.Y.2d 611, 617–18, 717 N.E.2d 674, 678, 695 N.Y.S.2d 515, 519 (1999).

17 NYSBA Comments to Rule 1.9 [3].

18 Nassau County Bar Op. 96-7 (1996).

19 Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 N.Y.2d 631, 637–38, 707 N.E.2d 414, 417, 684 N.Y.S.2d 459, 462 (1998).

VI.2 To Whom Does Rule 1.9(a) Apply?

N.Y.S. Bar Op. 793 (2006) (analyzing the circumstances under which former-client conflicts will be imputed to of counsel lawyers and their affiliated law firms and between two law firms that share an of-counsel relationship).

Nassau County Bar Op. 93-9 (1993) (lawyer disqualified pursuant to former DR 5-108 may only keep the fees the lawyer has earned if the attorney's representation was permissible until the disqualification).

VI.3 Who is a Former Client?

N.Y.C. Bar Op. 2005-3 (2005) (analyzing the circumstances under which a lawyer may provide testimony concerning the lawyer's representation of a former client).

N.Y.S. Bar Op. 720 (1999) (under certain circumstances, a lawyer may reveal the names of clients for whom the lawyer worked at a prior a law firm to enable the law firm to conduct a conflicts check).

VI.4 What Constitutes a "Matter" or a "Substantially Related Matter?"

N.Y.S. Bar Op. 787 (2005) (lawyer who represents a wife in a personal injury matter and her husband on a loss of consortium claim cannot continue to represent either if the wife wishes to accept a settlement offer that would bar the husband's claim and the lawyer cannot locate the husband).

N.Y.C. Bar Op. 2005-02 (2005) (analyzing the circumstances in which a lawyer may represent Client A even though the lawyer possesses confidential information relating to former Client B that might be relevant to Client A's representation).

N.Y.S. Bar Op. 723 (1999) (applying former DR 5-108 to a series of related fact patterns).

Nassau County Bar Op. 93-37 (1993) (the "totality of the circumstances" determines if a lawyer who formerly represented physicians and hospitals in medical malpractice actions may now represent plaintiffs in medical malpractice actions against the former clients).

VI.5 Situations Where Lawyers Move from One Law Firm to Another

N.Y.C. Bar Op. 2009-3 (2009) (in a case of conflicts arising in connection with hiring a law school graduate who represented pro bono clients at the school's legal clinic, whose interests directly conflicted with the firm's current clients, normally the law firm can continue representing its clients while screening the graduate from

any involvement in the matter in question or the lawyers handling it. The firm must withdraw from the case, however, in those situations where screening would not protect the confidentiality interests of the graduate's former clients, unless the firm can obtain the former clients' consent to the representation after full disclosure.).

VII. ANNOTATIONS OF CASES

VII.1 Purpose of the Rule

Schertz v. Jenkins, 4 Misc. 3d 298, 777 N.Y.S.2d 290 (Civ. Ct. N.Y. Co. 2004) (denying a landlord's motion to disqualify a tenant's lawyer in a suit for unpaid rent, noting that the judges in the Housing Part and Civil Court should "be concerned that too strict applications of the [ethical] rules developed in other contexts" be applied to frustrate "'the public policies favoring client choice and… an attorney's ability to practice law'").

VII.2 Lawyers' Duties to Former Clients

In re Estate of Goodman, N.Y.L.J. 29, col. 3 (Sept. 20, 2009) (although a party has a right to be represented by the counsel of his or her own choosing, where a prior client-attorney relationship existed between the lawyer and the petitioner's adversary, the matters involved were substantially the same and the interests of the lawyer's present client were materially adverse to the former client's, the attorney should be disqualified under former DR 5-108).

Edwards v. Haas, Greenstein, Samson, Cohen & Gerstein, P.C., 17 A.D.3d 517, 793 N.Y.S.2d 167 (2d Dept. 2005) (proof of a violation of former DR 5-108 does not constitute a prima facie case of legal malpractice).

VII.3 To Whom Does Rule 1.9(a) Apply?

New York: St. Barnabas Hosp. v. New York City Health & Hosp. Corp., 7 A.D.3d 83, 775 N.Y.S.2d 9 (1st Dept. 2004) (reversing an order granting disqualification on the grounds that the waiver letter executed by the plaintiff constituted informed consent and that its delay in making the motion constituted laches).

Mulhern v. Calder, 196 Misc. 3d 818, 763 N.Y.S.2d 741 (Sup. Ct. Albany Co. 2003) (nonlawyer employees of a law firm are not directly subject to the former Code; measures taken to screen a secretary were adequate).

Federal: Arifi v. De Transport du Cocher, Inc., 290 F. Supp.2d 344 (E.D.N.Y. 2003) (disqualifying a small law firm despite its very limited representation of a former client and imputing the disqualification to the entire firm).

Young v. Cent. Square Cent. Sch. Dist., 213 F. Supp.2d 202 (N.D.N.Y. 2002) (while screening devices may be used in some circumstances, the law firm's measures were inadequate).

Mitchell v. Metro. Life Ins., Inc., 2002 WL 441194 (S.D.N.Y. Mar. 21, 2002) (rejecting screening measures as inadequate based in part on the timing of their implementation and the small size of the law firm).

VII.4 Who is a Former Client?

New York: Purchase Partners II, LLC v. Westreich, 2007 WL 329027 (Sup. Ct. N.Y. Co. Jan. 23, 2007) (in the context of complex real estate arrangements, the court declined to find an attorney-client relationship between an individual shareholder and the lawyer for the entity in which the shareholder held an interest).

Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., 31 A.D.3 144, 816 N.Y.S.2d 424 (1st Dept. 2006) (concluding that the lower court erroneously applied the test for adjudicating simultaneous rather than successive conflicts and rejecting the plaintiffs' arguments for disqualification on the grounds of the absence of an attorney-client relationship and an effective waiver of any conflict by the actual former client).

In re Tchalla D., 196 Misc. 2d 636, 766 N.Y.S.2d 500 (Fam. Ct., Kings Co. 2003) (declining to disqualify the Juvenile Rights Division (JRD) of the Legal Aid Society despite the fact that the organization's Criminal Defense Division previously represented a client with interests adverse to the JRD's client in a related matter).

Morgan Stanley DW Inc. v. Carlinsky, 306 A.D.2d 190, 763 N.Y.S.2d 549 (1st Dept. 2003) (plaintiff's lawyer's prior representation of a division of the defendant's firm as in-house counsel did not bar him from representing the firm's former employees).

Schairer v. Schairer, 192 Misc. 2d 155, 745 N.Y.S.2d 410 (Sup. Ct. Nassau Co. 2002) (disqualifying the law firm that represented the husband in an action for divorce on the ground the law firm previously represented the court-appointed forensic expert).

Federal: Lankler, Siffert & Wohl, LLP v. Rossi, 287 F. Supp.2d 398 (S.D.N.Y. 2003) (refusing to disqualify a law firm in an action for unpaid fees from jointly representing itself and several experts whom it had retained on behalf of a former client).

United States v. Massino, 303 F. Supp.2d 258 (E.D.N.Y. 2003) (disqualifying court-appointed death counsel on the ground the lawyer's prior representation of a witness constituted an unwaivable conflict of interest).

United States v. Oberoi, 331 F.3d 44 (2d Cir. 2003) (district court abused its discretion in denying the motion of a public defender to withdraw from representing a client. The representation would have required the public defender to cross-examine a witness who was also a client of the public defender's office. The witness's consent was not a sufficient reason for denying the motion.).

VII.5 What Constitutes a "Matter" or a "Substantially Related Matter?"

New York: Pacheco Ross Architects, P.C. v, Mitchell Assoc. Architects, 2009 WL 1514482 (N.D.N.Y. 2009) ("in cases of successive representation, the degree to which an appearance of impropriety exists under [former] Canon 9 is not normally reciprocal to the substantial relatedness of the representation under Canon 5." Without establishing a substantial relationship between the former and subsequent representations, the "appearance of impropriety" alone is insufficient in and of itself to support disqualification.).

Hoeffner v. Orrick, Herrington & Sutcliffe LLP, 14 Misc. 3d 324, 823 N.Y.S.2d 873 (Sup. Ct. N.Y. Co. 2006) (finding that a former client's desire not to be involved in any way in an action brought by a subsequent client with a similar claim against the same defendant did not warrant disqualification of the plaintiff's counsel in the context of an employment dispute between a former associate and a law firm).

Crawford v. Antonacci, 297 A.D.2d 419, 746 N.Y.S.2d 94 (3d Dept. 2002) (refusing in a personal injury action to disqualify the defendants' attorney who had previously represented the plaintiff in a worker's compensation matter).

Credit Index, L.L.C. v. Riskwise Int'l L.L.C., 192 Misc. 2d 755, 746 N.Y.S.2d 885 (Sup. Ct. N.Y. Co.), *aff'd*, 296 A.D.2d 318, 744 N.Y.S.2d 326 (mem.) (1st Dept. 2002) (disqualifying the law firm representing the defendant on the ground that the firm had previously represented the plaintiff's principal shareholder in a "closely intertwined" matter).

Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 674 N.E.2d 663, 651 N.Y.S.2d 954 (1996) (disqualifying a law firm from representing the former owner of a predecessor corporation in an arbitration commenced by the successor corporation alleging breach of warranties in the merger agreement).

Federal: In re Successor Corp., 321 B.R. 640 (Bk. S.D.N.Y. 2005) (court disqualified a law firm that had represented the debtor while the debtor was solvent from representing the debtor's officers and directors in an action claiming breech of fiduciary duty to the company itself).

Guerrilla Girls, Inc. v. Kaz, 2004 WL 2238510 (S.D.N.Y. Oct. 4, 2004) (representation of an unincorporated association is the same as the representation of each of the association's individual members).

UCAR Int'l, Inc. v. Union Carbide Corp., 2002 WL 31519616 (S.D.N.Y. Nov. 8, 2002) (disqualifying plaintiff's attorney in a complex commercial litigation matter arising out of the structuring of a joint venture and forbidding the attorney from communicating with cocounsel or successor counsel).

Regal Mktg., Inc. v. Sonny & Son Produce Corp., 2002 WL 1788026 (S.D.N.Y. Aug. 1, 2002) (refusing to disqualify the plaintiff's attorney on the grounds that (1) an "of counsel" relationship was too attenuated to merit the imputation of a law firm's conflicts to the of-counsel attorney and (2) a prior regulatory representation of the defendant was not substantially related to the current claim).

Ullrich v. Hearst Corp., 809 F. Supp. 229 (S.D.N.Y. 1992) (concluding that a general familiarity with the business operations of a former client may be sufficient grounds for disqualification).

VII.6 Protecting a Former Client's "Confidential Information"

New York: Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 N.Y.2d 631, 707 N.E.2d 414, 684 N.Y.S.2d 459 (1998) (lawyer may disclose information about the interrelationship of companies affiliated with his former employer, if the information has been disseminated in trade journals and documents filed with regulators).

Kassis v. Teacher's Ins. & Annuity Ass'n, 93 N.Y.2d 611, 717 N.E.2d 674, 695 N.Y.S.2d 515 (1999) (the smaller the size of the law firm, the greater the likelihood that a lawyer will have acquired material client confidences; given the lawyer's involvement in the underlying matter, the erection of a "Chinese Wall" was inconsequential).

Galanos v. Galanos, 20 A.D.3d 450, 797 N.Y.S.2d 774 (2d Dept. 2005) (disqualifying husband's law firm in a divorce action because the law firm previously represented the wife's father and had access to the father's confidential financial information).

R.M. Buck Constr. Corp. v. Village of Shelburne, 292 A.D.2d 36, 740 N.Y.S.2d 154 (3d Dept. 2002) (disqualifying a law firm that had failed to both rebut the presumption of shared confidences and implement adequate screening measures).

Federal: Leslie Dick Worldwide, Ltd. v. Soros, 2009 WL 2190207 (S.D.N.Y. July 22, 2009) (no credible basis for finding the lawyers at a firm secured or were likely to have access to information about plaintiff that would give them an unfair advantage in the current case or otherwise "taint" the proceeding. Even if a substantial relationship existed between the firm's work for plaintiff and the firm's current representation of defendant, the firm rebutted any presumption of access to relevant confidential information that could be "exploited" in this action.).

VII.7 Where Lawyers Move from One Law Firm to Another

Papyrus Tech. Corp. v. New York Stock Exchange, Inc., 325 F. Supp.2d 270 (S.D.N.Y. 2004) (court refused to disqualify the plaintiff's law firm in a patent infringement action, even though it concluded that an associate of the law firm had been exposed to the defendant's confidences or secrets during his prior employment. The court also approved the screening measures the plaintiff's firm put in place.).

VII.8 Protecting a Former Client's "Confidential Information"

Blue Planet Software, Inc. v. Games Int'l, LLC, 331 F. Supp.2d 273 (S.D.N.Y. 2004) (disqualifying the plaintiff's lawyer who had access to a third party's confidential information in an earlier action involving the defendant's predecessor company).

Human Elec., Inc. v. Emerson Radio Corp., 375 F. Supp.2d 102, (N.D.N.Y. 2004) (financial structure of a law firm is not a client confidence for purposes of disqualification. The screening mechanisms implemented by the defendant's law firm were adequate to prevent its disqualification).

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Rule 1.10: Imputation of Conflicts of Interest

1. TEXT OF RULE 1.10[1]

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.

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

(e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

(1) the firm agrees to represent a new client;

(2) the firm agrees to represent an existing client in a new matter;

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1 Rules Editor Bruce Green, Louis Stein Professor, Fordham University School of Law. Professor Green wishes to thank Daniel M. Rosenblum, Matt Baum and Carmela Romeo for their cite-checking and research assistance.

(3) the firm hires or associates with another lawyer; or

(4) an additional party is named or appears in a pending matter.

(f) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless of whether there is another violation of these Rules.

(g) Where a violation of paragraph (e) by a law firm is a substantial factor in causing a violation of paragraph (a) by a lawyer, the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a).

(h) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

II. NYSBA COMMENTARY

Definition of "Firm"

[1] For purposes of these Rules, the term "firm" includes, but is not limited to, (i) a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law, and (ii) lawyers employed in a legal services organization, a government law office or the legal department of a corporation or other organization. See Rule 1.0(h). Whether two or more lawyers constitute a "firm" within this definition will depend on the specific facts. See Rule 1.0, Comments [2]-[4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).

[3] [Reserved]

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events that took place before admission to the bar, such as work that the person did while a law student. Such persons, however,

ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. *See* Rules 1.0(t), 5.3.

Lawyers Moving Between Firms

[4A] The principles of imputed disqualification are modified when lawyers have been associated in a firm and then end their association. The nature of contemporary law practice and the organization of law firms have made the fiction that the law firm is the same as a single lawyer unrealistic in certain situations. In crafting a rule to govern imputed conflicts, there are several competing considerations. First, the former client must be reasonably assured that the client's confidentiality interests are not compromised. Second, the principles of imputed disqualification should not be so broadly cast as to preclude others from having reasonable choice of counsel. Third, the principles of imputed disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after leaving a firm. In this connection, it should be recognized that today most lawyers practice in firms, that many limit their practice to, or otherwise concentrate in, one area of law, and that many move from one association to another multiple times in their careers. If the principles of imputed disqualification were defined too strictly, the result would be undue curtailment of the opportunity of lawyers to move from one practice setting to another, of the opportunity of clients to choose counsel, and of the opportunity of firms to retain qualified lawyers. For these reasons, a functional analysis that focuses on preserving the former client's reasonable confidentiality interests is appropriate in balancing the competing interests.

[5] Paragraph (b) permits a law firm, under certain circumstances, to represent a client with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, under Rule 1.7 the law firm may not represent a client with interests adverse to those of a current client of the firm. Moreover, the firm may not represent the client where the matter is the same or substantially related to a matter in which (i) the formerly associated lawyer represented the client, and (ii) the firm or any lawyer currently in the firm has material information protected by Rule 1.6 and Rule 1.9(c) that is likely to be significant to the matter.

[5A] In addition to information that may be in the possession of one or more of the lawyers remaining in the firm, information in documents or files retained by the firm itself may preclude the firm from opposing the former client in the same or substantially related matter.

[5B] Rule 1.10(c) permits a law firm to represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or the firm with which the lawyer was previously associated, represented a client whose interests are materially adverse to that client, provided the newly associated lawyer did not acquire any confidential information of the previously represented client that is material to the current matter.

Client Consent

[6] Rule 1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict cannot be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comments [22]-[22A]. For a definition of "informed consent," see Rule 1.0(j).

Former Government Lawyers

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b), not this Rule.

Relationship Between this Rule and Rule 1.8(k)

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8(a) through (i), this Rule imputes that prohibition to other lawyers associated in a firm with the personally prohibited lawyer. Under Rule 1.8(k), however, where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the other lawyers in the firm are not subject to discipline under Rule 1.8 solely because such sexual relations occur.

Conflict-Checking Procedures

[9] Under paragraph (e), every law firm, no matter how large or small (including sole practitioners), is responsible for creating, implementing and maintaining a system to check proposed engagements against current and previous engagements and against new parties in pending matters. The system must be adequate to detect conflicts that will or reasonably may arise if: (i) the firm agrees to represent a new client, (ii) the firm agrees to represent an existing client in a new matter, (iii) the firm hires or associates with another lawyer, or (iv) an additional party is named or appears in a pending matter. The system will thus render effective assistance to lawyers in the firm in avoiding conflicts of interest. *See also* Rule 5.1.

[9A] Failure to create, implement and maintain a conflict-checking system adequate for this purpose is a violation of this Rule by the firm. In cases in which a lawyer, despite reasonably diligent efforts to do so, could not acquire the information that would have revealed a conflict because of the firm's failure to maintain an adequate conflict-checking system, the firm shall be responsible for the violation. However, a

lawyer who knows or should know of a conflict in a matter that the lawyer is handling remains individually responsible for the violation of these Rules, whether or not the firm's conflict-checking system has identified the conflict. In cases in which a violation of paragraph (e) by the firm is a substantial factor in causing a violation of these Rules by a lawyer, the firm, as well as the individual lawyer, is responsible for the violation. As to whether a client lawyer relationship exists or is continuing, see Scope [9]-[10]; Rule 1.3, Comment [4].

[9B] The records required to be maintained under paragraph (e) must be in written form. *See* Rule 1.0(x) for the definition of "written," which includes tangible or electronic records. To be effective, a conflict-checking system may also need to supplement written information with recourse to the memory of the firm's lawyers through in-person, telephonic, or electronic communications. An effective conflict-checking system as required by this Rule may not, however, depend solely on recourse to lawyers' memories or other such informal sources of information.

[9C] The nature of the records needed to render effective assistance to lawyers will vary depending on the size, structure, history, and nature of the firm's practice. At a minimum, however, a firm must record information that will enable the firm to identify (i) each client that the firm represents, (ii) each party in a litigated, transactional or other matter whose interests are materially adverse to the firm's clients, and (iii) the general nature of each matter.

[9D] To the extent that the records made and maintained for the purpose of complying with this Rule contain confidential information, a firm must exercise reasonable care to protect the confidentiality of these records. *See* Rule 1.6(c).

[9E] The nature of a firm's conflict-checking system may vary depending on a number of factors, including the size and structure of the firm, the nature of the firm's practice, the number and location of the firm offices, and the relationship among the firm's separate offices. In all cases, however, an effective conflict-checking system should record and maintain information in a way that permits the information to be checked systematically and accurately when the firm is considering a proposed engagement. A small firm or a firm with a small number of engagements may be able to create and maintain an effective conflict-checking system through the use of hard-copy rather than electronic records. But larger firms, or firms with a large number of engagements, may need to create and maintain records in electronic form so that the information can be accessed quickly and efficiently.

Organizational Clients

[9F] Representation of corporate or other organizational clients makes it prudent for a firm to maintain additional information in its conflict-checking system. For example, absent an agreement with the client to the contrary, a conflict may arise when a firm desires to oppose an entity that is part of a current or former client's corporate family

(*e.g.*, an affiliate, subsidiary, parent or sister organization). *See* Rule 1.7, Comments [34]-[34B]. Although a law firm is not required to maintain records showing every corporate affiliate of every corporate client, if a law firm frequently represents corporations that belong to large corporate families, the law firm should make reasonable efforts to institute and maintain a system for alerting the firm to potential conflicts with the members of the corporate client's family.

[9G] Under certain circumstances, a law firm may also need to include information about the constituents of a corporate client. Although Rule 1.13 provides that a firm is the lawyer for the entity and not for any of its constituents, confusion may arise when a law firm represents small or closely held corporations with few shareholders, or when a firm represents both the corporation and individual officers or employees but bills the corporate client for the legal services. In other situations, a client-lawyer relationship may develop unintentionally between the law firm and one or more individual constituents of the entity. Accordingly, a firm that represents corporate clients may need a system for determining whether or not the law firm has a client-lawyer relationship with individual constituents of an organizational client. If so, the law firm should add the names of those constituents to the database of its conflict-checking system.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Subsection (a) corresponds to former DR 5-105(D); subsection (b) corresponds to former DR 5-108(C); subsection (c) corresponds to former DR 5-108; subsection (d) corresponds to former DRs 5-101 and 5-105; subsections (e), (f) and (g) correspond to former DR 5-105; subsection (h) corresponds to former DR 9-101(D).

III.2 ABA Model Rules

ABA Model Rule 1.10 covers Imputation of Conflicts of Interest: General Rule, but has many differences from its New York counterpart.

- The ABA Model Rules take a different approach to the imputation of personal interest conflicts. Under ABA Model Rule 1.10(a), a lawyer's conflict of interest is not imputed to other lawyers of the firm if "the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."
- ABA Model Rule 1.10(a) does not cover conflicts arising under Rule 1.8.
- ABA Model Rule 1.10 has a screening provision.
- The ABA Model Rules do not include a provision on maintaining and utilizing a conflicts-checking system.

IV. PRACTICE POINTERS

1. Check conflicts early and often: before taking on a new client, before taking on a new matter for an existing client, and before a new lawyer joins the firm.
2. Keep good records to facilitate conflicts checking, including records of all prior and current engagements. Include as much information about the engagements as reasonably possible to enable the firm later to ascertain whether a new engagement will give rise to a conflict of interest.
3. Know the conflict rules, so that you know what to look for when you check for conflicts.
4. At a minimum, when you check for conflicts, determine whether you will be directly "adverse" in a litigation, transaction, or advice-giving capacity, either to a current client or a former client of the firm or one of the lawyers associated with the firm. If so, you must then analyze, under the applicable conflict-of-interest rules, whether the representation is permissible and, if so, whether client consent must first be obtained.
5. Remember to check not only the law firm's own current and past engagements but also those of individual lawyers who practiced elsewhere before coming to the firm, those of individual lawyers (e.g., "of counsel" lawyers) who maintain practices outside the firm, and those of other law firms with whom yours is in an "of counsel" relationship.
6. This means you. Even if you are not the firm's managing partner, you should insure your firm has an adequate conflicts-checking system because you are subject to discipline if you unwittingly violate the imputed conflicts rule because of the firm's inadequate system.
7. Yes, this really means you: the obligation to check for conflicts and to avoid imputed conflicts applies to government law offices, corporate law departments, and legal services offices no less than to private practitioners.

V. ANALYSIS

V.1 Purpose of Rule 1.10

Rule 1.10 addresses the "imputation of conflicts of interest." In general, when one lawyer in a firm has a conflict of interest, the rule treats other lawyers in the firm as if they have the same conflict. The rule requires firms to maintain records and check for certain types of conflicts—specifically, those arising out of current and former representations by the firm or its lawyers.

Rule 1.10 permits clients and former client to waive most imputed conflicts. Additionally, in limited situations, law firms may avoid the imputation of certain conflicts even without client consent by screening the personally disqualified lawyer. The Rule permits this in the case of conflicts arising out of a lawyer's work before joining the firm or arising out of the work of a lawyer who has since left the firm. Finally, the Rule addresses conflicts arising out of family relationships between

opposing counsel in a matter and excludes these conflicts from the general rule of imputation.

V.2 The General Rule of Imputed Conflicts (Rule 1.10(a))

[a] In General Rule 1.10(a) is the rule of "imputed" or "vicarious" disqualification for conflicts of interest. It treats lawyers in a firm as if they are all one lawyer for purposes of conflicts of interest arising under Rules 1.7, 1.8, and 1.9. If any lawyer in the firm "practicing alone" would be prohibited, or personally disqualified, from representing a client under one of these rules, then no other lawyer in the firm may "knowingly" represent that client. Ordinarily, imputed disqualification of all the firm's lawyers may be avoided only if informed consent is given by the affected former or current client(s) in accordance with Rule 1.10(d) (the waiver rule), which is discussed below.[2]

[b] The "Knowledge" Requirement "Knowingly" is a key but potentially deceptive term in Rule 1.10(a). The term is defined by Rule 1.10(k) to denote "actual knowledge of the fact in question." Consequently, if one lawyer in a firm, practicing alone, would be forbidden from taking on a representation, a second lawyer in the firm would ordinarily be subject to discipline for undertaking the representation only if the second lawyer *knows* (i.e., has actual knowledge of) the facts that would make the first lawyer personally disqualified. However, this should not be taken to suggest that lawyers are better off not learning about imputed conflicts, however. Lawyers should avoid putting their heads in the sand for several reasons.

First, as discussed below, if the second lawyer's lack of knowledge is attributable to the firm's failure to maintain and implement a system for checking conflicts that satisfies the conflict-checking rule (Rule 1.10(e)), then under Rule 1.10(g) the second lawyer is subject to discipline despite being unaware of the imputed conflict.

Second, if a lawyer does not know of the relevant facts before undertaking a representation but learns of them later in the representation, and consent is not then given by the affected clients or former clients, the lawyer will ordinarily be required by Rule 1.16 to withdraw from the representation to avoid the ongoing violation of Rule 1.10(a).[3] (Suffice it to say that it is often easier to obtain consent before beginning a representation than midstream.)

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2 Separate rules govern the imputation of conflicts of interest that arise under other rules or exclude certain conflicts of interest from the ordinary restriction of Rule 1.10(a). For example, Rule 1.10(a) governs a firm's conflicts relating to a particular lawyer who has since left the firm. Rule 1.10(b) governs conflicts relating to the prior work of a lawyer who has since joined the firm. Rule 1.10(h) governs conflicts arising out of family relationships among lawyers of different firms. Rule 1.11 governs conflicts that arise when a lawyer joins or leaves government service. Rule 1.12 governs certain conflicts of former judges and other lawyers formerly involved in adjudication or dispute resolution (e.g., arbitrators, mediators, and other third-party neutrals.) Rule 1.18 deals with representations adverse to a "prospective client." Rule 6.5 addresses conflicts in the context of limited pro bono legal services programs.

3 In litigation, courts may relax the rules requiring imputed disqualification, especially when the conflict is not discovered until mid-representation. The state and federal courts of New York

Third, a lawyer may be subject to civil liability (e.g., for breach of the fiduciary duty of loyalty) on the basis of a conflict of interest, even an unwitting one. Even if no damages result, the lawyer may be subject to fee forfeiture.

[c] Illustrations Assume Lawyer A and Lawyer B are associated in a law firm. Whether the law firm has three lawyers or 300 lawyers, and whether the relevant clients are unsophisticated individuals or giant corporations, the basic principles of imputed disqualification are the same. Here are some examples of imputed conflicts:

CONCURRENT CONFLICT—DIRECT ADVERSITY IN LITIGATION

Lawyer A represents Businessman in tax matters. Under Rule 1.7(a)(1), Lawyer A may not represent a client in an unrelated lawsuit against Businessman, who is represented in the lawsuit by a different firm. The conflict is imputed to all of the other lawyers in Lawyer A's firm. Therefore, Lawyer B also may not represent the other party in the litigation against Businessman unless both the affected clients waive the conflict. This is true even if the lawsuit has no relationship to the tax matters and even if nothing that Lawyer A learns in confidence from Businessman in the tax matters will have any conceivable relevance to the lawsuit.

CONCURRENT CONFLICTS—DIRECT ADVERSITY IN A TRANSACTION

Lawyer A represents a retail business in tax matters. Under Rule 1.7(a)(1), Lawyer A may be forbidden from representing a wholesaler in a transaction with the retailer (who is represented by another firm in the transaction) without both clients' consent. If so, the conflict is imputed to the other lawyers in the firm. Therefore Lawyer B also may not represent the wholesaler in the transaction with the retailer unless the affected clients waive the conflict.

FORMER CLIENT CONFLICTS[4]

Lawyer A previously represented the seller of a business in connection with the sale. A year after the deal closed and the representation ended, Lawyer A may not represent the buyer in a lawsuit against the seller alleging that the seller made misrepresentations leading to the transaction. Rule 1.9(a) would forbid this representation without the seller's consent because Lawyer A's new client (the buyer) would be adverse to the seller, a former client, in a litigation substantially related to the transaction in which Lawyer A represented the seller. (Under Rule 1.7, the buyer's consent would also be needed because of the risk that Lawyer A would pull punches to avoid using the former client's relevant client confidences.) Therefore, Lawyer B also may not represent the buyer, at least without the requisite consents.

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generally take different approaches to deciding disqualification motions, and the decisions are not always a sure guide as to how the imputed disqualification rule is interpreted for disciplinary purposes.

4 *See, e.g.*, N.Y.S. Bar Op. 761 (2003) ("A lawyer who accepts employment on behalf of a husband to represent him in obtaining permanent residency status for his wife may not… thereafter represent the wife in seeking residency based on the alleged abuse of the husband.").

PERSONAL-INTEREST CONFLICTS

Lawyer A is negotiating to move to a different law firm. A buyer asks Lawyer A to represent her in a lawsuit against a seller represented by the other firm. Lawyer A would have a personal-interest conflict under Rule 1.7(a)(2) if she were to represent the buyer in the lawsuit while, at the same time, negotiating for possible employment with the seller's firm.[5] Lawyer A could represent the buyer, if at all, only with the buyer's informed consent. Because Lawyer A's conflict is imputed to all the lawyers of the firm, Lawyer B is also forbidden from representing the buyer without the buyer's informed consent, confirmed in writing.

In this scenario, Lawyer B will not be violating Rule 1.10(a) unless Lawyer B *knows* that Lawyer A is negotiating for employment with the seller's firm. If Lawyer B does not know, then presumably, the representation will be entirely unaffected by Lawyer A's possible interest in working for the opposing firm. Nevertheless, Lawyer A may have an obligation to disclose her negotiations with the other firm even though she is uninvolved in the lawsuit.

The ABA Model Rules take a different approach to the imputation of personal-interest conflicts. Under ABA Model Rule 1.10(a), a lawyer's conflict of interest is not imputed to other lawyers of the firm if "the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." New York bar associations have urged New York's judiciary to adopt this exception. Their view has been that in many situations involving personal-interest conflicts (including where one lawyer of a firm is seeking employment with the opposing law firm), other lawyers in the firm are not reasonably likely to be affected, and therefore the imputed conflict rule serves no purpose. The New York judiciary, however, has not adopted the bar associations' proposal to take the ABA's approach.[6]

RULE 1.8 CONFLICTS

Lawyer A seeks to sell his home to a buyer. If Lawyer A were to represent the buyer in the sale, Lawyer A would have a conflict of interest under Rule 1.8(a), which governs business transactions with clients. Rule 1.8(a) establishes various procedural safeguards to protect the client from exploitation. Among other things, the transaction must be fair and reasonable to the client, and the client must be advised in writing of the desirability of seeking independent legal advice. Under Rule 1.10(a), conflicts arising under Rule 1.8 are imputed throughout the firm. If the buyer sought to retain Lawyer B, therefore, the procedural protections of Rule 1.8(a) would apply to Lawyer B no less than to Lawyer A.

This is another important respect in which New York's rule of imputed conflicts differs from ABA Model Rule 1.10(a), which does not cover conflicts arising under Rule 1.8. New York lawyers may be left with questions because the imputation rule

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5 *See* NYSBA Comments to Rule 1.7, [10].

6 Rule 1.10(e) is the one exception: it implicitly excludes personal-interest conflicts from the imputed disqualification rule if they arise out of a family relationship between opposing lawyers.

does not seem relevant to all the provisions of Rule 1.8 It seems relevant to several, however. For example, Rule 1.8(d) restricts a lawyer from negotiating with a current or prospective client for literary or media rights relating to the representation. Under Rule 1.10(a), other lawyers of the firm who did not represent the particular client would still have the same restriction. Likewise, all lawyers of the firm would be restricted by Rule 1.8(c) from soliciting a gift from a client of the firm or from preparing an instrument giving a gift to a lawyer of the firm; by Rule 1.8(e) from advancing financial assistance to a client of the firm; and by Rule 1.8(i) from acquiring the proprietary interest in a cause of action or subject matter of litigation being conducted by the firm.

[d] What is a "Firm?" The term is defined by Rule 1.0(h), but the examples given are not exclusive: "'Firm' or 'law firm' includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization." Notably, government law offices were not included in the former Code definition, but are included in the current definition. The term is also generally understood to include nonprofit law offices.

Bar association ethics opinions express the view that informal arrangements among lawyers who share office space and staff and who are in other nontraditional arrangements may be viewed as "firms" for purposes of the imputed-disqualification rule, at least in certain situations,[7] because of the difficulty of maintaining confidences between the different lawyers in these arrangements.[8] The opinions also take the view that "of counsel" arrangements between different firms (or between their lawyers) require that the firms be treated as if they were one law firm for purposes of imputed conflicts.[9]

[e] When are Lawyers "Associated" in a Firm? Lawyers are "associated" in a firm for purposes of the imputed disqualification rule when they are partners or associates

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7 N.Y.S. Bar Op. 807 (2007) (stating that unlike other conflicts, the personal-interest conflicts of a lawyer who is "of counsel" to the firm should not be imputed to others in the firm").

8 *See, e.g.*, N.Y.S. Bar Op. 794 (2006) ("If the various divisions of a law school legal clinic share common office space and file space, the conflicts of the entire clinic are imputed to the firms of lawyers who supervise only one clinic division or project, and the conflicts of the law firms are imputed to the clinic"); N.Y.C. Bar Op. 2003-3 (2003), *citing* N.Y.C. Bar Op. 80-63 (1980) (two firms sharing offices could not represent opposing parties in litigation because of the "strong likelihood" that the separate law firms could not maintain the confidences and secrets of their respective clients); NYCLA Bar Op. 680 (1990) ("Even though lawyers who share office space are not partners, they may be treated as if they were partners for some purposes under the Code (particularly the provisions for vicarious disqualification in the event of a conflict of interest)" if they share confidential information).

9 *See* N.Y.C. Bar Op. 2003-3 (2003), *citing* N.Y.C. Bar Op. 1995-8 (1995) (when law firms are "of counsel" to each other, one-unit conflicts checking is required); N.Y.C. Bar Op. 1996-08 (1996) ("'[O]f counsel' relationships are treated as if the 'counsel' and the firm are one unit.").

of a private law firm. Lawyers working part-time may be "associated" in a firm or, for that matter, in multiple firms.[10]

Lawyers are generally considered "associated" in a firm for purposes of this rule when they have the kind of close, sustained relationship with a firm typified by an "of counsel" relationship.[11] The mere characterization of a relationship as "of counsel" is not dispositive. What matters is the substance of the relationship. Thus, at least for purposes of ruling on disqualification motions in federal litigation, the Second Circuit found in *Hempstead Video, Inc. v. Inc. Village of Valley Stream*[12] *that:*

> We believe the better approach for deciding whether to impute an "of counsel" attorney's conflict to his firm for purposes of ordering disqualification in a suit in federal court is to examine the substance of the relationship under review and the procedures in place. The closer and broader the affiliation of an "of counsel" attorney with the firm, and the greater the likelihood that operating procedures adopted may permit one to become privy, whether intentionally or unintentionally, to the pertinent client confidences of the other, the more appropriate will be a rebuttable imputation of the conflict of one to the other. Conversely, the more narrowly limited the relationship between the "of counsel" attorney and the firm, and the more secure and effective the isolation of nonshared matters, the less appropriate imputation will be. Imputation is not always necessary to preserve high standards of professional conduct. Furthermore, imputation might well interfere with a party's entitlement to choose counsel and create opportunities for abusive disqualification motions.

V.3 Waiver of Imputed Conflicts (Rule 1.10(d))

[a] In General Rule 1.10(d) provides that an imputed disqualification arising under Rule 1.10(a), (b), or (c) may be waived by the affected client or former client under the conditions for client consent set forth in Rule 1.7. This provision providing for waiver of imputed conflicts does not derive from the former New York Code but is based on ABA Model Rule 1.10(c).

The four requirements for waiver, based on Rule 1.7(b) are: (1) the lawyer to whom the conflict is otherwise imputed must reasonably believe that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation must not be prohibited by law;[13] (3) the representation must not involve

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10 N.Y.S. Bar Op. 807 (2007) ("A part-time associate of a law firm is 'associated' with the law firm for the purpose of imputation of conflicts of interest" where the part-time lawyer is regularly available to consult with the firm and its clients on a variety of matters, albeit during limited hours).

11 N.Y.S. Bar Op. 807 (2007) (taking the view that although one lawyer's personal-interest conflict is ordinarily imputed to other lawyers associated in a firm, an "of counsel" attorney's personal-interest conflict is not necessarily imputed to others in the firm).

12 409 F.3d 127, 135–36 (2d Cir. 2005).

13 E.g., bankruptcy law or other law governing the particular matter.

the assertion of a claim by one client against another client of the firm;[14] and (4) each affected client or former client must give "informed consent, confirmed in writing." (See Rules 1.0((e) and (j) for definitions of "confirmed in writing" and "informed consent.")

[b] Nonwaivable Imputed Conflicts In some cases, a lawyer of the firm—or even all the lawyers of a firm—will be barred from a representation because it will not be reasonable to believe that the lawyer(s) to whom a conflict is imputed can competently and diligently represent the client. For example, N.Y.S. Bar Op. 807 (2007) concluded that "a buyer and seller of residential real estate may not engage separate attorneys in the same firm to advance each side's interests against the other, even if the clients give informed consent to the conflict of interest." The opinion, which drew on the Code's prohibition of conflict waivers except when "a disinterested lawyer would believe that the lawyer can competently represent the interest" of each client, reasoned: "The parties' decision at the outset that they should be represented by two different lawyers [who were originally in two different firms] reflects an actual adversity and conflict of interest between them that would require the two lawyers to negotiate or bargain against each other as adversaries. . . . In such a situation, a disinterested lawyer would not conclude that the two lawyers could 'competently represent the interests of each.'" The analysis would not change under the new Rules, which preserves (with slight rewording) the earlier one on conflict waivers.

[c] Screening Some firms have endeavored to escape imputation by building a "screen" or "firewall" around the personally disqualified (or "tainted") lawyer. The imputation of certain specific kinds of conflicts of interest can be avoided through screening—i.e., those arising under Rules 1.11, 1.12, and 1.18. But screening will not in itself avoid the imputation of conflicts under Rule 1.10(a); the lawyer requires the affected client's consent.[15] In litigation, courts sometimes allow screening to avoid disqualification. But screens are sometimes disfavored,[16] especially if they are constructed in a small law firm.[17]

A law firm seeking to screen a personally disqualified (or "tainted") lawyer should consult the relevant disqualification cases and also ethics opinions interpreting

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14 In other words, lawyers of the same firm may not represent parties opposed to each other in litigation. *See, e.g.*, N.Y.S. Bar Op. 788 (2005) ("A lawyer who has a private practice and serves as a part-time assistant district attorney may not represent a client in a civil matter where the client is being prosecuted by the district attorney's office. The conflict cannot be cured by consent.").

15 Clients can, and often do, condition their consent on creating a firewall and will negotiate vigorously with the requesting law firm about the firewall's precise terms.

16 See, e.g., Aversa v. Taubes, 194 A.D.2d 579, 598 N.Y.S.2d 804 (2d Dept. 1993); Trustco Bank New York v. Melino, 164 Misc. 2d 999, 625 N.Y.S.2d 803 (Sup.Ct. Albany Co. 1995).

17 Compare Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 610 N.Y.S.2d 128, 632 N.E.2d 437 (1994) with Cardinale v. Golinello, 43 N.Y.2d 288, 401 N.Y.S.2d 191, 372 N.E.2d 26 (1977); see also N.Y.S. Bar Op. 715 (1999) (analyzing conflicts and imputation issues arising in the context of employment as a contract lawyer by one or more law firms).

Rule 1.11 (and its predecessor, DR 9-101) for guidance. At a minimum, to pass muster the firm should assure that the tainted lawyer is screened from any involvement in, or communications regarding, the relevant matter, and that the law firm's lawyers and staff are aware of the screen. Among the measures most frequently implemented are providing written instructions to the tainted lawyer and the lawyers and staff assigned to the matter that they should have absolutely no contact with one another concerning the matter; renewing these instructions on a regular basis; adopting a procedure to ensure that as new lawyers and staff are assigned to the matter, they are immediately given a copy of the instructions; storing the matter's files in a space physically separate from the rest of the firm's files and unavailable to the tainted lawyer (and maintaining a similar quarantine of any relevant files of the tainted lawyer); and calculating the tainted lawyer's compensation in such a manner that the lawyer does not share in the fees the matter generates.

V.4 When a Personally Disqualified Lawyer Leaves a Firm (Rule 1.10(b)

Subsection (b) addresses conflicts with a former client conflict when a personally disqualified lawyer leaves a firm. The answer to this question is based directly on the New York Court of Appeals decision in *Solow v. W.R. Grace & Co*., 83 N.Y.2d 303, 632 N.E.2d 437, 610 N.Y.S.2d 128 (1994). Subsection (b) permits the firm to represent a person with interests materially adverse to those of a client represented by the formerly associated lawyer provided that neither the firm nor any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c). To satisfy Subsection (b), the firm must scrupulously examine its hard-copy files, recordkeeping procedures, and computer tapes and backup systems and conduct exacting conversations with its personnel. Subsection (b) is substantively the same as its predecessor, DR 5-108(C).

V.5 When a New Lawyer Joins a Firm (Rule 1.10(c))

Rule 1.10(c) addresses a conflict-of-interest question that arises when a lawyer moves from one firm to another and the new firm is representing a client whose interests are adverse to those of a client represented by the lawyer's former firm. In such an instance, *both the lawyer and the firm* will be disqualified if two criteria are satisfied. First, the interests of the new firm's client are materially adverse to a client of the former firm in a matter that is the same or substantially related to the one in which the lawyer's former firm represented the opposing party. This is essentially the restriction of Rule 1.9(a). Second, the lawyer must have acquired at the former firm information both protected (i.e., information covered by Rule 1.6(a)) and material to the matter. Thus, even if the lateral lawyer did not personally represent the opposing party while working at her former firm, the lawyer will be disqualified if the lawyer possesses material confidences of that party (e.g., confidences learned in the course of speaking with the lawyers responsible for that representation), and the firm will be disqualified as well.

In litigation, courts ruling on disqualification motions are loathe to examine actual communications concerning client matters among partners, associates, paraprofessionals, and staff members. They ordinarily examine the totality of the circumstances to determine the likelihood that the lawyer who changed firms (the "lateral lawyer") had access to protected information. It is difficult for a lawyer from a small law firm to rebut a presumption of shared confidences. Such a firm tends to be characterized by "informality" and "constant cross-pollination."[18] Determining what information is material to a matter requires a facts-and-circumstances analysis.

If the lateral lawyer did not learn material confidences arising out of the former firm's representation of the opposing party, it does not follow that the lawyer can personally undertake the representation of the new firm's client in a matter that is the same as or substantially related to the former firm's representation. Case law indicates that the lateral lawyer should be screened from the representation as a "belt and suspenders" measure and to avoid an appearance that the lateral lawyer might be in a position to misuse confidential information.[19]

Unlike ABA Model Rule 1.10, the New York Rule does not allow for screening the lateral lawyer to avoid the firm's disqualification. However, the former firm's client will be more likely to give its consent to the representation by the new firm pursuant to Rule 1.10(d) (discussed below) if the lateral lawyer is screened. It is important to check for conflicts before the new lawyer joins a firm, so that, if necessary, consent can be sought and a screen implemented before the new lawyer begins work. (Disclosures for conflict-checking purposes must stay within the bounds of the confidentiality rules, Rules 1.6 and 1.9.)

V.6 Maintaining a Conflicts-Checking System and Checking for Conflicts (Rules 1.10(e), (f), & (g))

The rules on conflicts checking are based on former DR 5-105(e), which was unique to New York.[20] The ABA Model Rules do not include a provision on maintaining and utilizing a conflict-checking system,[21] and therefore one cannot look to authorities outside New York for the meaning of New York's provisions.

Subsections (e), (f), and (g) together govern the law firm's obligations to maintain records of current and past engagements, and to employ these records to check for conflicts, *in order* to avoid imputed conflicts under Rule 1.10(a).

Subsection (e) imposes a recordkeeping requirement *on law firms* to assist the avoiding of conflicts of interest. (Remember that in New York, law firms as well as

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18 Kassis v. Teacher's Ins. & Annuity Ass'n, 93 N.Y.2d 611, 617-18, 717 N.E.2d 674, 678, 695 N.Y.S.2d 515, 519 (1999).

19 *See id*.; N.Y.S. Bar Op. 723 (1999).

20 The original Code provision took effect in May 2006. The judiciary adopted it on its own, not on a recommendation of a bar association. *See* N.Y.C. Bar Op. 2003-03 (2003).

21 Outside New York, provisions such as ABA Model Rule 5.1 on the obligations of law firm partners may subject lawyers to liability for failing to maintain an adequate system for checking for conflicts of interest.

individual lawyers are subject to discipline.)[22] The conditions imposed require a law firm first, to maintain records "at or near the time of each new engagement"; and second, to "maintain a system" by which proposed engagements are checked against current and previous engagements to enable lawyers in the firm to comply with Rule 1.10(a).

Subsection (f) provides that the law firm's failure to maintain the records and implement a system violates the Rule even if no specific conflict results. As a practical matter, inadequate recordkeeping and conflicts checking are unlikely to come to light until the firm is found potentially to have violated the imputed-disqualification rule. Nonetheless, inadequate recordkeeping and conflict checking are disciplinary violations in themselves.

Subsection (g) provides that if a violation of Rule 1.10(e) is a "substantial factor in causing a violation" of Rule 1.10(a) (the general rule on imputed disqualification), both the law firm and the individual lawyer are subject to discipline. This is essentially the same as its predecessor DR 5-105(E). This provision qualifies Rule 1.10(a), which subjects a lawyer to discipline for "knowingly" representing a client when another lawyer in the firm has a conflict of interest under Rules 1.7, 1.8, or 1.9. If a violation of the recordkeeping and conflict-checking rule is a substantial factor in the lawyer's lack of knowledge of an imputed conflict, the lawyer is responsible for the violation despite the lack of knowledge. This is true even if the lawyer was not in a managerial position or otherwise responsible for the firm's conflict-checking system generally. Consequently, any lawyer in a firm who represents a client has an incentive to ensure that the firm has an adequate conflict-checking system.

Subsection (e) differs from its predecessor by listing explicitly the four circumstances under which record checking should take place: (1) when the firm agrees to represent a new client; (2) when the firm agrees to represent an existing client in a new matter; (3) when the firm hires or associates with another lawyer; and (4) when an additional party is named or appears in a pending matter.[23] (Note that Rule 6.5(a) creates an exception to the duty to check for conflicts when the lawyer is providing "short-term limited legal services to a client" in specified pro bono contexts.)

The rule does not provide detailed guidance concerning the types of information a law firm should put into its conflicts-checking system. However, several bar association ethics opinions elaborate on the recordkeeping and conflict-checking requirements. Here are the key points made in N.Y.C. Bar Op. 2003-03:[24]

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22 Although Rule 1.10(e) by its terms applies exclusively to law firms, lawyers with management responsibilities can be subject to discipline under Rule 5.1(b)(1) for failing to take reasonable steps to ensure that the law firm has a conflict-checking system adequate to ensure that the firm's lawyers comply with the conflict-of-interest rules.

23 The conflicts-checking and recordkeeping requirements may pose particular challenges for a law firm that maintains an active Internet site that enables prospective and existing clients to communicate with the firm. Subsection (e) does not by its terms require a firm to keep a record of potential engagements. It requires a record only of actual new engagements. Therefore, a firm would not be required to keep a record of everyone to whom general information (as opposed to legal advice) is provided. Further, while requiring a conflicts check before taking on a new client or new matter, the provision does not require conflict checking before giving general information to a non-client.

24 *See also* N.Y.S. Bar Op.720 (1999) (focusing on checking conflicts when a new lawyer joins the firm).

- *Required "Records"*

"Records" means "written or electronic records," not just information kept in the lawyer's head. Information inside a lawyer's head that has not been written down does not qualify as "records." Thus, even solo practitioners must keep written or electronic records to comply with Rule 1.10(e).

- *How Should Records Be Maintained and Made Accessible?*

Records, as stated in N.Y.C. Bar Op. 2003-03:

> [M]ust be maintained in a way that allows them to be quickly and accurately checked for possible conflicts. Thus, the mere fact that the law firm has information about clients and engagements written down in the individual files pertaining to each matter does not satisfy the 'records' requirement. It is simply not realistic to think that a law firm can search through every paper file and folder to look for conflicts each time the firm considers a proposed new engagement. However, if the law firm opens electronic files on all of the law firm's clients and prospective clients, and if those records are electronically searchable (as all word processing programs and law practice management programs appear to be), then those electronic files will qualify… . [T]he information [must be capable of being] systematically and accurately checked when the law firm is considering a proposed new engagement.[25]

- *How Far Back in Time Must Records Go?*

New York firms have been required to maintain records for conflicts-checking purposes since May 22, 1996, when the Code conflicts-checking provision went into effect. Nothing in the Rule suggests a firm may, at a certain point, purge its files of the information it has maintained for conflicts-checking purposes regarding former representations. (With respect to certain other records that must be preserved, see Rule 1.15(d), infra.)

- *What Records Must Be Kept?*

The Rule does not specify what information about prior and current engagements must be recorded. The answer will vary depending on the nature of the firm and its practice. At a minimum, no matter how small and specialized a firm may be, it must keep (1) client names, (2) adverse party names (i.e., "[t]he precise names of parties involved in a matter whose interests are materially adverse to each party the firm represents"), and (3) a "brief description of each engagement or prospective engagement."

In general, this should be enough to identify the *possibility* of a conflict of interest arising out of a current or past representation. At that point, a firm "may need to conduct factual and legal investigation to determine whether a prohibited conflict actually exists or is likely to develop."[26]

Many kinds of conflicts of interest—and especially types of imputed conflicts—will not come to light if minimal records are kept. For example, a representation

25 N.Y.C. Bar Op. 2003-03 (2003).

26 *Id*.

adverse to a corporate client's affiliate will sometimes comprise a conflict of interest. Prudent firms will keep records of the corporate affiliates of clients and opposing parties. An individual lawyer's personal-interest conflict will be imputed to all the lawyers of a firm, and some imputed personal-interest conflicts are foreseeable (such as those that may arise when one lawyer of the firm represents a corporate client on whose board another lawyer of the firm sits). Prudent firms will keep records of the companies with whom its lawyers have such affiliations even though the Rule does not require it. Similarly, a conflict might arise under Rule 1.18 ("Duties to Prospective Clients") if a lawyer in the firm takes on a representation materially adverse to a former "prospective client" of the firm—i.e., a person who discusses with one of the firm's lawyers the possibility of forming a relationship with respect to a matter. Therefore, firms would be well advised to keep records of prospective clients who do not ultimately engage a lawyer in the firm.

Also keep in mind that Rule 1.10(e) might not be the only rule requiring lawyers to check for conflicts. Rule 5.1(a) requires a law firm to "make reasonable efforts to ensure that all lawyers in the firm conform to" the Rules of Professional Conduct. It is conceivable that if a firm reasonably anticipates recurring conflicts of interest not specifically covered by Rule 1.10(c), the firm must maintain a system for identifying them as part of its efforts to ensure conformity with the conflict-of-interest rules.

- *What is a Conflict-Checking "System"?*

The Rule requires a firm to implement a "system" to check conflicts. At a minimum, this includes checking the firm's records at necessary times (i.e., when taking on a new client or new matter, when hiring a new lawyer, or when an additional party enters an ongoing matter). But if checking records alone is not sufficiently effective, additional measures might be necessary. "Small firms may be able to do this through personal communications among key partners (or all partners) at the firm, either in writing or orally. Larger firms, especially those with more than one office, may need to supplement their records with e-mail, formal written memos circulated throughout the firm, or other communication methods—electronic and traditional—designed to reach lawyers who may have relevant information about possible conflicts."[27]

- *Checking Conflicts When New Lawyers Join a Firm*

Absent the former client's informed consent, a law firm that hires a lateral lawyer may be disqualified from acting adversely to a client of the lateral's former law firm in a matter substantially related to the former firm's representation of that client. This is true even if the lateral lawyer never personally represented the client in question at the former firm as long as the lateral lawyer, while at the former firm, acquired client confidences material to the matter.

Accordingly, if a firm hires lawyers laterally from other law firms, the hiring firm should include in its conflict-checking system a means to determine which clients the lateral lawyer personally represented while at the former firm. At the same time, although not required under Rule 1.10(e), it would be prudent for the firm to consider

27 N.Y.C. Bar Op. 2003-3 (2003).

what, if any, other steps it might take with regard to other matters about which the lateral lawyer acquired protected information while at the former firm. In either event, the information from the lateral's former firm should be obtained only insofar as it is possible to do so in a manner consistent with the lateral's confidentiality obligations to the former firm and its clients. See, e.g., N.Y.S. Bar Op. 720 (1999).

V.7 Conflicts of Interest Arising out of Family Relationships

Subsection (h), which is based on former DR 9-101(d), deals with a particular type of personal-interest conflict, namely, conflicts arising out of family relationships among opposing lawyers. It applies when a lawyer is related to another lawyer "as parent, child, sibling or spouse." If the identified relationship exists, the lawyer may not represent "in any matter a client whose interests differ from those of the other party to the matter who the lawyer knows is represented by the other lawyer." Although hardly a model of drafting clarity, Subsection (h) prohibits related lawyers from being on the opposite sides of a litigation or transaction. This reflects the concern that lawyers may pull their punches when close family members are on opposite sides of a "matter." (Rule 1.0(l) defines "matter," which includes, among others, a litigation, arbitration, or negotiation.)

The restriction can be removed if the client consents to the representation "after full disclosure" and if the lawyer concludes that "the lawyer can adequately represent the interests of the client." Full disclosure should not be too difficult. The lawyer must describe the relationship and explain how it could interfere with the representation. Presumably, before asking for consent, the lawyer has determined that he or she can adequately represent the client's interests, and that fact should be stated as well. Although Subsection (h) contains no requirement of a written consent, a lawyer would be foolish to proceed without one.

Subsection (h) does not impute the conflict caused by a familial relationship to the lawyer's firm. Another lawyer in the firm is free to assume the representation. Assigning the matter to another lawyer might not be the complete answer to the question of conflict-of-interest, however. Questions might still remain due to close social relationships and friendships among the newly assigned lawyer, the conflicted lawyer, and the lawyer on the other side of the matter. If the newly assigned lawyer has a daily working relationship with the conflicted lawyer, legitimate issues may be raised about the degree of independence and zeal that the lawyer will exercise in a matter in which the opposing lawyer is a parent, child, sibling, or spouse of the conflicted lawyer.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Opinions Covering Subjects under Rule 1.10(a)

What is a "Firm?" N.Y.S. Bar Op. 804 (2006) ("law firm" is defined to include a qualified legal assistance organization. Therefore, an attorney for a small legal services

corporation may not represent a private client as a respondent in a legal proceeding in which the petitioner is represented by the legal services corporation because two lawyers from the same "law firm" would be representing opposing parties in a single litigation.).

N.Y.S. Bar Op. 794 (2006) (if the students participating in a law school clinic work in a "common space" and have "shared access to physical files," the entire legal clinic constitutes a "law firm").

N.Y.S. Bar Op. 788 (2005) ("law firm" is defined to include the legal department of a corporation or other organization. A district attorney's office has been repeatedly treated as a law firm.).

N.Y.C. Bar Op. 2004-03 (2004) (government lawyers are subject to the same rules that govern the attorney-client relationship, including rules that address conflicts of interest and entity representation issues).

N.Y.C. Bar Op. 2003-03 (2003) (term "law firm" includes (but is not limited to) a professional legal corporation, a limited liability company or partnership engaged in the practice of law, the legal department of a corporation or other organization, and a qualified legal assistance organization. "This definition of course encompasses large law firms, corporate legal departments, governmental legal departments, and non-profit law firms. We also believe that a solo law practice, whether or not it is organized as a professional corporation or a limited liability company, is a 'law firm.'").

NYCLA Bar Op. 680 (1990)(for purposes of conflicts of interest and vicarious disqualification, lawyers who are not partners but share office space may be considered a "law firm" depending on the circumstances).

When Lawyers are "Associated" in a Firm N.Y.S. Bar Op. 807 (2007) ("part-time" associate of a law firm is "associated" with the law firm for the purpose of imputation of conflicts of interest. Therefore, a law firm may not consent to be the representative for one party in a real estate transaction when a part-time associate of the law firm consents to be the representative of the adverse party in the same transaction in his or her private-firm capacity.).

N.Y.C. Bar Op. 2007-02 (2007) ("A law firm may second a lawyer to a host organization without subjecting the law firm to the imputation of conflicts if, during the secondment, the lawyer does not remain 'associated' with the firm. The seconded lawyer will not remain associated with the firm if any ongoing relationship between them is narrowly limited, and if the lawyer is securely and effectively screened from the confidences and secrets of the firm's clients." Association is determined by a fact-specific inquiry into the nature of the relationship.).

N.Y.C. Bar Op. 2004-03 (2004) (government lawyers are subject to the same rules that govern the attorney-client relationship, including rules that address conflicts of interest and entity representation issues).

N.Y.S. Bar Op. 773 (2004) (lawyers who are "of counsel" to a law firm are "associated" with the law firm, and therefore, the firm is disqualified from appearing before a municipal board when one of its lawyers sits on the board, unless the client gives informed consent).

N.Y.C. Bar Op. 2000-4 (2000) (attorneys and law firms may describe a cooperative firm as an "affiliate," so long as the relationship is "close and regular, continuing and semi-permanent." When attorneys and firms are "affiliated," they must consider all the clients of each constituent entity in determining whether a conflict of interest exists. This also applies to the relationship between an "of-counsel" lawyer and a law firm.).

N.Y.S. Bar Op. 715 (1999) (contract lawyer may be "associated" with his or her employing firm. A determination of this question requires a fact-specific inquiry into the nature of the relationship.).

NYCLA Bar Op.680 (1990) (under some circumstances, lawyers who are not partners but share office space may be considered a "law firm," and thus associated for purposes of conflicts of interest and vicarious disqualification).

The General Rule of Imputed Conflicts N.Y.S. Bar Op. 807 (2007) ("part-time" associate of a law firm is "associated" with the law firm for the purpose of imputation of conflicts of interest. Therefore, a law firm may not consent to be the representative for one party in a real transaction when a part-time associate of the law firm consents to be the representative of the adverse party in the same transaction in his or her private-firm capacity.).

N.Y.C. Bar Op. 2007- 02 (2007) ("A law firm may second a lawyer to a host organization without subjecting the law firm to the imputation of conflicts if, during the secondment, the lawyer does not remain "'associated"' with the firm. The seconded lawyer will not remain associated with the firm if any ongoing relationship between them is narrowly limited, and if the lawyer is securely and effectively screened from the confidences and secrets of the firm's clients.").

N.Y.S. Bar Op 793 (2006) (where two firms share an of-counsel relationship, conflicts of one firm will be imputed to the other. Conflicts of one attorney or more with an of-counsel relationship to a firm will also be imputed to all lawyers in that firm.).

N.Y.S. Bar Op. 798 (2006) (lawyer/county legislator may not represent a criminal defendant in a case involving members of a police department or district attorney's office over which the legislature has budget or appointment authority. However, other lawyers in the legislator's law firm are not per se disqualified from representing the defendant, but imputed disqualification may be appropriate where members of the public are likely to suspect that the lawyer/legislator's influence will have an effect on the prosecution of the case.).

N.Y.C. Bar Op. 2006- 02 (2006) (even if an individual attorney is disqualified from representation of a client because of having participated in a beauty contest, the presumption that other attorneys at the law firm have knowledge of the disabling confidences or secrets can be rebutted under certain circumstances. Ethical screens, for example, are an appropriate means of rebutting the presumption of shared confidences or secrets.).

N.Y.S. Bar Op. 794 (2006) (if the students participating in a law school clinic work in a "common space" and have "shared access to physical files," the entire legal clinic constitutes a "law firm" and its conflicts will be imputed to the lawyers' firms working with the clinic, and vice versa).

N.Y.S. Bar Op. 788 (2005) (lawyer who has a private practice and serves as a part-time district attorney may not represent a client in a civil matter where the client is being prosecuted by the district attorney's office. There is "a greater need to avoid the appearance of impropriety in government," such that "the imputation of conflicts that applies to most 'of counsel' lawyers applies to a part-time prosecutor.'").

N.Y.S. Bar Op. 773 (2004) (lawyers who are "of counsel" to a law firm are "associated" with the law firm and therefore, the firm is disqualified from appearing before a municipal board when one of its lawyers sits on that board, unless the client gives informed consent).

VI.2 Opinions Covering Subjects under Rule 1.10(c)

When a New Lawyer Joins a Firm N.Y.C. Bar Op. 2009-3 (2009) (in the case of conflicts arising in connection with hiring a law school graduate who represented pro bono clients at a school's legal clinic whose interests directly conflict with the law firm's current clients, normally the law firm can continue representing its clients while screening the graduate from any involvement in the matter in question or the lawyers handling it. The firm must withdraw from the case, however, in those situations where screening would not protect the confidentiality interests of the graduate's former client, unless the firm can obtain the former client's consent to the representation after full disclosure.).

N.Y.C. Bar Op. 2003-03 (2003) (when a lawyer moves from one private law firm to another private law firm, the clients that the lawyer personally represented at his or her prior law firm are potential sources of conflict for the new law firm).

N.Y.S. Bar Op. 723 (1999) (absent consent of the former client, a lawyer changing firms may not undertake representation adverse to the former client if (1) the moving lawyer personally "represented" the client or otherwise acquired relevant confidences or secrets of the client, and (2) the moving lawyer would be undertaking representation in the same matter or in a matter that is substantially related to one in which the moving lawyer or the old firm previously represented the former client. Without a former client's consent, if the moving lawyer is disqualified, the moving lawyer's new law firm will also be disqualified.).

VI.3 Opinions Covering Subjects under Rule 1.10(d)

Nonwaivable Imputed Conflicts N.Y.S. Bar Op. 807 (2007) ("part-time" associate of a law firm is "associated" with the law firm for the purpose of imputation of conflicts of interest. Therefore, a law firm may not consent to be the representative for one party in a real estate transaction when a part-time associate of the law firm consents to be the representative of the adverse party in the same transaction in his or her private-firm capacity. In such a situation, a disinterested lawyer would not conclude that the two lawyers could competently represent the interests of each party.).

N.Y.S. Bar Op. 788 (2005) (lawyer who has a private practice and serves as a part-time district attorney may not represent a client in a civil matter where the client is

being prosecuted by the district attorney's office. There is "a greater need to avoid the appearance of impropriety in government," such that "the imputation of conflicts that applies to most 'of counsel' lawyers applies to a part-time prosecutor.'" The role of a prosecutor and a defense lawyer are inherently opposed such that consent cannot cure the conflict because it is not obvious that the lawyer can adequately represent the Town and the private client.).

Screening N.Y.C. Bar Op. 2009-3 (2009) (in the case of conflicts arising in connection with hiring a law school graduate who represented pro bono clients at a school's legal clinic whose interests directly conflict with the law firm's current clients, normally the law firm can continue representing its clients, while screening the graduate from any involvement in the matter in question or the lawyers handling it. The firm must withdraw from the case, however, in those situations where screening would not protect the confidentiality interests of the graduate's former client, unless the firm can obtain the former client's consent to the representation after full disclosure.).

Waiving Conflicts N.Y.C. Bar Op. 2006-01 (2006) (law firm may ethically request a client to waive future conflicts under the following circumstances: (1) the law firm appropriately discloses the relevant implications, advantages, and risks to the client so that he or she may make an informed decision about whether to consent, and (2) a disinterested lawyer would believe the law firm can competently represent the interests of all affected clients. "Blanket" or "open-ended" advance waivers should be limited to sophisticated clients and certain circumstances.).

NYCLA Bar Op. Op. 724 (1998) (lawyer's request for an advance waiver of conflicts from a prospective or existing client is not per se unethical).

VI.4 Opinions Covering Subjects under Rule 1.10(e), (f), & (g)

A Law Firm's Duty to Keep Records: A New Hire N.Y.C. Bar Op. 2003-03 (2003) (when a lawyer moves from one private law firm to another private law firm, the clients the lawyer personally represented at his or her prior law firm are potential sources of conflict for the new law firm. The hiring firm should include in its conflict-checking system a means for determining which clients the lateral lawyer personally represented while at the former firm such that potential conflicts of interest can be detected.). This opinion gives guidance on how to create a proper conflict-checking system.

N.Y.S. Bar Op. 720 (1999) (when a law firm hires a lateral lawyer, it must add to its recordkeeping system information about the clients represented by the lateral hire in his or her former employment).

VI.5 Opinions Covering Subjects under Rule 1.10(h)

Conflicts of Interest Arising Out of Family Relationships N.Y.S. Bar Op. 654 (1993) (district attorney's spouse or sibling may not represent a defendant in a case prosecuted

by the district attorney). However, Rule 1.10(h) does not impute the conflict caused by a familial relationship to the lawyer's firm. Accordingly, another lawyer is free to assume representation, but questions may still remain due to close social relationships and friendships among the newly assigned lawyer, the conflicted lawyer, and the lawyer on the other side of the matter.).

VII. ANNOTATIONS OF CASES

VII.1 Cases Covering Subjects under Rule 1.10(a)

What is a "Firm?" In re Tchalla D., 196 Misc. 2d 636, 766 N.Y.S.2d 500 (Fam. Ct. Kings Co. 2003) (it is necessary to treat the separate divisions of the Legal Aid Society as a single "firm" to protect the clients' interests).

When are Lawyers "Associated" in a Firm? Hempstead Video, Inc. v. Inc. Village of Valley Stream, 409 F.3d 127 (2d Cir. 2005) (plaintiff's former attorney was not "associated" with law firm representing defendant only on account of his "of counsel" status because: (1) the former attorney became "of counsel" for the limited purpose of providing transitional services for several selected clients; (2) the former attorney continued representing all his other clients in his independent capacity, (3) the defense law firm had no access to the confidences of the former attorney's private clients, and (4) the former attorney maintained separate files for those clients in his private office).

Regal Mrtg., Inc. v. Sonny & Son Produce Corp., 2002 WL 1788026 (S.D.N.Y. Aug. 1, 2002) (on occasion, New York federal and state courts have refused to disqualify an attorney or a law firm on the grounds of their "of counsel" or "special counsel" relationships with a law firm, even though these relationships are generally treated as one unit for the purposes of analyzing conflicts of interests. In this case, however, the relationship of the "of counsel" lawyer to the law firm is too attenuated because the "of counsel" lawyer only engages in occasional collaborative efforts with the law firm and hence provides the law firm only with sporadic assistance.).

The General Rule of Imputed Conflicts

New York: HRH Const. LLC v. Palazzo, 15 Misc. 3d 1130(A) (Sup. Ct. N.Y. Co. 2007) (disqualifying the defendant's law firm on the ground that it represented the plaintiff in an ongoing litigation even though the lawyers of the firm working on the defendant's case alleged that no information was received from the lawyers of the firm working on the plaintiff's case).

Purchase Partners II, LLC v. Westreich, 2007 WL 329027 (Sup. Ct. N.Y. Co. Jan. 23, 2007) (before a law firm can be disqualified due to an imputed conflict, the party seeking disqualification must show that there was an attorney-client relationship between the moving party and opposing counsel, that the matters were substantially related, and that the interests of the present client and the former client are adverse).

Galanos v. Galanos, 20 A.D.3d 450, 797 N.Y.S.2d 774 (2d Dept. 2005) (disqualifying husband's law firm in a divorce action because the law firm previously represented the wife's father and had access to the father's confidential financial information).

In re Stephanie X, 6 A.D.3d 778, 773 N.Y.S.2d 766 (3d Dept. 2004) (disqualification of the entire Department of Social Services legal department was not required based on the legal department attorney's prior representation of the mother in neglect proceedings, notwithstanding the appearance of impropriety, where the attorney was not responsible for the prosecution of the instant proceeding, and prior to the attorney's employment, the legal unit implemented screening procedures that insulated the attorney from participation in the prosecution of matters in which the attorney may have had a conflict of interest).

In re Tchalla D., 196 Misc. 2d 636, 766 N.Y.S.2d 500 (Fam. Ct. Kings Co. 2003) (declining to disqualify the Juvenile Rights Division (JRD) of the Legal Aid Society despite the fact that the organization's Criminal Defense Division was simultaneously representing a client with interests adverse to the JRD's client).

Morgan Stanley DW Inc. v. Carlinsky, 306 A.D.2d 190, 763 N.Y.S.2d 549 (1st Dept. 2003) (Plaintiff's lawyer's prior representation of a division of the defendant's firm as in-house counsel did not bar him or his law firm from representing the firm's former employees, where employees never worked for the division and there was no indication that the attorney was likely to have obtained confidential information in his prior representation of division that he could use to benefit his current clients in arbitration proceedings).

R.M. Buck Constr. Corp. v. Village of Shelburne, 292 A.D.2d 36, 740 N.Y.S.2d 154 (3d Dept. 2002) (generally, where an attorney working in a law firm is disqualified from representing a client whose interests are opposed to a former client, all the attorneys in that firm are likewise precluded from representing the client. However, not all situations involving imputed disqualification mandate that other members of the firm be barred from representation. In this case, the law firm is disqualified by virtue of its failure to both rebut the presumption of shared confidences and to implement adequate screening measures.).

Kassis v. Teacher's Ins. & Annuity Ass'n, 93 N.Y.2d 611, 617–18, 717 N.E.2d 674, 695 N.Y.S.2d 515, 519 (1999) (where one attorney is disqualified as a result of having acquired confidential client information at a former law firm, the presumption that the entirety of the attorney's current firm must be disqualified may be rebutted).

Federal: Crews v. County of Nassau, 2007 WL316568 (E.D.N.Y. Jan. 30, 2007) (court first disqualified the individual lawyer in a civil litigation case from representing the plaintiff, and then imputed the individual lawyer's disqualification to the remaining members of the law firm because of the law firm's failure to contest disqualification).

Planet Software, Inc. v. Games Int'l, LLC, 331 F. Supp. 2d 273 (S.D.N.Y. 2004) (in action to determine ownership of intellectual property rights, the court imputed the disqualification of an individual lawyer to his law firm because (1) there was no evidence that the individual lawyer played a minimal role in the prior work; (2) it was presumed that he had access to confidential access without evidence to the contrary,

and (3) it was too late to remedy the conflict and preclude imputation through a screening procedure).

Arifi v. De Transport du Cocher, Inc., 290 F. Supp.2d 344 (E.D.N.Y. 2003) (disqualifying a small law firm despite its very limited representation of a former client and imputing the disqualification to the entire firm because of the lack of evidence regarding screening measures presented by the law firm and the effect of lack of screening measures in light of the law firm's small size).

Crudele v. New York City Police Dept. of Correction, 2001 WL 1033539 (S.D.N.Y. Sept. 7, 2001) (court disqualified an entire 15-lawyer firm from representation of a client due to a conflict of interest despite the firm's implementation of extensive screening mechanisms, concluding that the danger of inadvertent disclosure and the appearance of impropriety was still too great given the firm's small size.).

VII.2 Cases Covering Subjects under Rule 1.10(b)

When a Personally Disqualified Lawyer Leaves a Firm Solow v. W.R. Grace & Co., 83 N.Y. 2d 303 (1994) (firm may represent a client with interests materially adverse to those of a client represented by a former associated lawyer provided neither the firm nor any lawyer remaining in the firm has protected information).

VII.3 Cases Covering Subjects NY Rule 1.10(c)

When a New Lawyer Joins a Firm

New York: Kassis v. Teacher's Ins. & Annuity Ass'n, 93 N.Y.2d 611, 617–18, 717 N.E.2d 674, 678, 695 N.Y.S.2d 515, 519 (1999) (where one attorney is disqualified as a result of having acquired confidential client information at a former law firm, the presumption that the entirety of the attorney's current firm must be disqualified may be rebutted).

Federal: Papyrus Tech. Corp. v. New York Stock Exch., Inc., 325 F. Supp. 2d 220 (S.D.N.Y. 2004) (court refused to disqualify the plaintiff's law firm in a patent infringement action, even though it concluded that an associate of the law firm had been exposed to the defendant's confidences or secrets in his prior employment in part because it approved the screening measures that the plaintiff's firm had put in place).

Human Elec., Inc. v. Emerson Radio Corp., 375 F. Supp.2d 102, (N.D.N.Y. 2004) (even though the defendant's lawyer was disqualified because he was a former partner of a law firm that represented the plaintiff in a patent case, screening mechanisms implemented by the defendant's law firm were adequate to prevent disqualification from being imputed).

Young v. Cent. Square Cent. Sch. Dist., 213 F. Supp.2d 202 (N.D.N.Y. 2002) (disqualification of law firm on account of one of its lawyer's disqualification because

the firm had in place no formal mechanisms before or after the disqualified lawyer's arrival at the firm that would have insulated her from the case).

VII.4 Cases Covering Subjects under Rule 1.10(d)

Nonwaivable Imputed Conflicts Wheat v. United States, 486 U.S. 153, 160 (1988) (although the representation of multiple defendants in a criminal matter does not automatically violate the Sixth Amendment, "a court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel." District courts must be allowed substantial latitude in refusing waivers of conflicts of interests.).

Screening *In re* Stephanie X, 6 A.D. 778, 773 N.Y.S. 766 (3d Dept. 2004) (disqualification of the entire department of Social Services legal department was not required based on legal department attorney's prior representation of mother in neglect proceedings, notwithstanding the appearance, where the attorney was not responsible for the prosecution of the instant proceeding, and, prior to the attorney's employment, the legal unit implemented screening procedures which insulated attorney from participation in the prosecution of matters in which the attorney may have had a conflict of interest).

Federal: Papyrus Tech. Corp. v. New York Stock Exch., Inc., 325 F. Supp. 2d 220 (S.D.N.Y. 2004) (court refused to disqualify the plaintiff's law firm in a patent infringement action, even though it concluded that an associate of the law firm had been exposed to the defendant's confidences or secrets in his prior employment, in part because it approved the screening measures that the plaintiff's firm had put in place).

Human Elec., Inc. v. Emerson Radio Corp., 375 F. Supp.2d 102, (N.D.N.Y. 2004) (even though the defendant's lawyer was disqualified because he was a former partner of a law firm that represented the plaintiff in a patent case, screening mechanisms implemented by the defendant's law firm were adequate to prevent disqualification from being imputed).

Planet Software, Inc. v. Games Int'l, LLC, 331 F. Supp.2d 273 (S.D.N.Y. 2004) (in an action to determine ownership of intellectual property rights, the court imputed the disqualification of an individual lawyer to his law firm because (1) there was no evidence that the individual lawyer played a minimal role in the prior work, (2) it was presumed that he had access to confidential access without evidence to the contrary, and (3) it was too late to remedy the conflict and preclude imputation through a screening procedure).

Arifi v. De Transport du Cocher, Inc., 290 F. Supp. 2d 344 (E.D.N.Y. 2003) (disqualifying a small law firm despite its very limited representation of a former client and imputing the disqualification to the entire firm because of the lack of evidence regarding screening measures presented by the law firm and the effect of lack of screening measures in light of the law firm's small size).

Mitchell v. Metro. Life Ins., Inc., 2002 WL 441194 (S.D.N.Y. Mar. 21, 2002) (rejecting a law firm's screening measures as inadequate based in part on the timing of their implementation and the size of the law firm).

Young v. Cent. Square Cent. Sch. Dist., 213 F. Supp.2d 202 (N.D.N.Y. 2002) (disqualification of law firm on account of one of its lawyer's disqualification because the firm had in place no formal mechanisms before or after the disqualified lawyer's arrival at the firm that would have insulated her from the case).

Crudele v. New York City Police Dept. of Correction, 2001 EL 1033539 (S.D.N.Y. Sept. 7, 2001) (court disqualified an entire 15-lawyer firm from representation of a client due to a conflict of interest despite the firm's implementation of extensive screening mechanisms, concluding the danger of inadvertent disclosure and the appearance of impropriety was still too great given the firm's small size.).

Waiving Conflicts St. Barnabas Hosp. v. New York City Health & Hosp. Corp., 83 A.D.3d 83, 775 N.Y.S.2d 9 (1st Dept. 2004) (law firm's prior representation of a hospital did not warrant disqualification of the firm as counsel to the hospital's former affiliate in the hospital's action against it because the hospital waived any objection to the firm's adverse representation of the affiliate with knowledge of all the relevant facts.).

Hoeffner v. Orrick, Herrington & Sutcliffe, LLP, 14 Misc. 3d 324, 823 N.Y.S.2d 873 (Sup. Ct. N.Y. Co. 2006) (finding a former client's desire not to be involved in any way in an action brought by a subsequent client with a similar claim against the same defendant did not warrant disqualification of the plaintiff's counsel in the context of an employment dispute between a former associate and a law firm because of implied consent with full knowledge of relevant facts).

VII.5 Cases Covering Subjects under Rule 1.10(e), (f), and (g)

A Law Firm's Duty to Keep Records Finkelman v. Greenbaum, 14 Misc. 3d 1217(A) (2007) (law firms are required under NY rules to keep records of its prior engagements so it can determine whether potential conflicts exist).

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Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees

I. TEXT OF RULE 1.11[1]

(a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:

(1) shall comply with Rule 1.9(c); and

(2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and

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1 Rules Editor Bruce Green, Louis Stein Professor, Fordham University School of Law. Professor Green wishes to thank Daniel M. Rosenblum, Matt Baum, and Carmela Romeo for their cite-checking and research assistance.

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

(e) As used in this Rule, the term "matter" as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions.

(f) A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

II. NYSBA COMMENTARY

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition

against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflicts of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(j) for the definition of "informed consent."

[2] Paragraphs (a), (d) and (f) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth special imputation rules for former government lawyers, with screening and notice provisions. See Comments [6] - [7B] concerning imputation of the conflicts of former government lawyers.

[3] Paragraphs (a)(2), (d) and (f) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so. As with paragraph (a)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by paragraphs (a)(2), (d) and (f).

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. A former government lawyer is therefore disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent to entering public service. The limitation on disqualification in paragraphs (a)(2) and (d) to matters involving a specific party or specific parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[4A] By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. Accordingly, unless

the information acquired during government service is "generally known" or these Rules would otherwise permit or require its use or disclosure, the information may not be used or revealed to the government's disadvantage. This provision applies regardless of whether the lawyer was working in a "legal" capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by Rule 1.11(a)(1). Paragraph (c) of Rule 1.11 adds further protections against exploitation of confidential information. Paragraph (c) prohibits a lawyer who has information about a person acquired when the lawyer was a public officer or employee, that the lawyer knows is confidential government information, from representing a private client whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage. A firm with which the lawyer is associated may undertake or continue representation in the matter only if the lawyer who possesses the confidential government information is timely and effectively screened. Thus, the purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the lawyer's subsequent private client from obtaining an unfair advantage because the lawyer has confidential government information about the client's adversary.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a municipality and subsequently is employed by a federal agency. The question whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. *See* Rule 1.13, Comment [9].

Former Government Lawyers: Using Screening to Avoid Imputed Disqualification

[6] Paragraphs (b) and (c) contemplate the use of screening procedures that permit the law firm of a personally disqualified former government lawyer to avoid imputed disqualification. There may be circumstances where representation by the personally disqualified lawyer's firm may undermine the public's confidence in the integrity of the legal system. Such a circumstance may arise, for example, where the personally disqualified lawyer occupied a highly visible government position prior to entering private practice, or where the facts and circumstances of the representation itself create a risk that the representation will appear to be improper. Where the particular circumstances create such a risk, a law firm may find it prudent to decline the representation, but Rule 1.11 does not require it to do so. See Rule 1.0(t) for the definition of "screened" and "screening."

[7] A firm seeking to avoid disqualification under this Rule should also consider its ability to implement, maintain, and monitor the screening procedures permitted by paragraphs (b) and (c) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm should consider a number of factors, including how

the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraphs (b) and (c).

[7A] In order to prevent any lawyer in the firm from acquiring confidential information about the matter from the newly associated lawyer, it is essential that notification be given and screening procedures implemented promptly. If the matter requiring screening is already pending before the personally disqualified lawyer joins the firm, the procedures required by this Rule should be implemented before the lawyer joins the firm. If a newly associated lawyer joins a firm before a conflict requiring screening arises, the requirements of this Rule should be satisfied as soon as practicable after the conflict arises. If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the personally disqualified lawyer and other lawyers in the firm in a given matter.

[7B] Notice to the appropriate government agency, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information. It does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraph (a) does not prohibit a lawyer from representing a private party and a government agency jointly when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e), a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider

the extent to which (i) the matters involve the same basic facts, (ii) the matters involve the same or related parties, and (iii) time has elapsed between the matters.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Subsections (a), (b), and (c) correspond to former DR 9-101(B)(1) and (2), but are worded differently. Subsection (d) corresponds to former DR 9-101(B)(3).

III.2 ABA Model Rules

Subsections (a), (b), and (c) are based on Rules 1.11(a), (b), and (c) of the ABA Model Rules of Professional Conduct. Rule 1.11(d) is largely based on ABA Model Rule 1.11(d).

IV. PRACTICE POINTERS

1. The Rule addresses the "revolving door" whereby lawyers move from private to public or public to private sector employment.
2. The reach of the Rule is not limited to lawyers who worked as lawyers in the government, but also applies to lawyers who were employed in any public capacity.
3. Lawyers who move from government to private practice must pay close attention to the meaning of the terms "participated personally and substantially" and "matter."
4. The more liberal treatment of former government lawyers' conflicts reflects a public policy decision that a more restrictive approach would discourage lawyers from seeking government employment.
5. A former government lawyer who concludes that he or she participated personally and substantially as a public officer or employee in a matter may not then represent a private client unless the appropriate government agency gives its informed consent, confirmed in writing.
6. When a former government employee or officer is personally disqualified from participating in a matter, the current firm need not be disqualified if proper screening of the disqualified lawyer is employed and the notification requirements are satisfied.
7. A disqualified lawyer should acknowledge in writing his or her disqualification, the obligation not to discuss any aspect of the matter with anyone at the firm, and the fact that he or she will not share in any fees from the matter.
8. To implement a proper screening plan, the firm should issue a clear directive describing the lawyer's disqualification and admonishing the legal and non-legal staff not to discuss the matter with the disqualified lawyer. Further, a memo should be sent to any accounting personnel advising that the disqualified lawyer will not share in any fees from the matter. The measures should be repeated twice a year, and new firm members should be informed about the policy. The files in the tainted

matter should be kept in a separate location, accessible by password only by those working on the matter.

9. A public lawyer is banned from negotiating for private employment with any person involved as a party or a lawyer for a party in a matter in which the lawyer is participating personally and substantially. This prohibition cannot be waived. If a lawyer wants to negotiate for private employment under these circumstances, he or she must withdraw from the representation.

V. ANALYSIS

V.1 Purpose of Rule 1.11

"Revolving door" is the term generally used to describe the movement of a lawyer from private to public or public to private sector employment. Rule 1.11 addresses the obligations of lawyers who move to or from government employment. It focuses on their obligations to avoid conflicts of interest and to preserve confidences as well as the obligation not to misuse one's public position. Importantly, the rule regarding the imputation of conflicts of interest for lawyers moving from government to private practice is less demanding than the ordinary rule governing the imputation of conflicts of interest between lawyers in a private law firm (Rule 1.10(a)). The reason is not that current and former government lawyers are more trustworthy than other lawyers, but that important countervailing interests are at stake in this context.

A long tradition in the United States encourages lawyers to accept public sector employment for a part of their career. Underlying this tradition is the belief that the Republic is strengthened if government lawyers are exposed to the client-centered perspective of private sector lawyers and private sector lawyers are exposed to the public-interest perspective of government lawyers. The ordinary restrictions regarding conflicts of interest have been modified to encourage the movement between the public and private sectors.[2]

V.2 Movement from Public Employment (Rule 1.11(a)–(c), (e))

[a] In General Rules 1.11(a), (b), and (c) deal with lawyers who leave public office or employment— e.g., a prosecutor, a lawyer for a government agency, or a municipal lawyer who leaves to establish a private practice, to work at a private law firm, or to serve as an in-house corporate lawyer.[3] The provisions are based on Rules 1.11(a), (b),

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2 Federal and state law may also bear on the question of under what circumstances a lawyer may accept employment in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee; *e.g.*, 18 U.S.C. §§ 202–03, 207–08 & 1905 (2006); N.Y. Pub. Officers L. § 73 (McKinney 2006).

3 According to N.Y.S. Bar Op. 810 (2007), the term "employee" would also include "independent contractors who perform legal services for a public entity, such as the county."

and (c) of the ABA Model Rules of Professional Conduct. They correspond to former DR 9-101(B)(1) and (2) of the New York Code of Professional Responsibility ("Code") but are worded differently from the provisions of the former Code.

The reach of these provisions is not limited to lawyers who worked *as lawyers* in the government. The Rule applies to lawyers employed in any public capacity (e.g., to lawyers who worked as heads of public agencies). The Rule does not apply to judges. Judges are covered by Rule 1.12, infra.

Further, these provisions are not necessarily limited to lawyers who leave public employment to move to private practice, although that is the most common scenario. They may also apply to a lawyer who moves from one level, branch, or office of government to another—for example e.g., a lawyer who moves from federal to state government. The Rule itself is ambiguous, and the state bar's comments recognize but do not resolve the question of whether and how the rule applies when a lawyer moves from one government office to another.[4]

[b] Confidentiality Duty Under Rule 1.11(a)(1), the basic confidentiality obligation of a former public officer or employee is to "comply with Rule 1.9(c)," which establishes a lawyer's confidentiality duties to any former client. Subject to exceptions, Rule 1.9(c) requires lawyers to maintain the confidential information of their own former clients and their former firms' clients and forbids using that confidential information to the former clients' disadvantage. Keep in mind that "confidential information," as defined in the Rules, covers much more than just attorney-client privileged information, as i. In general, it also includes any other information gained during or relating to the representation of a client, whatever its source, "that is… likely to be embarrassing or detrimental to the client if disclosed" or "information that the client has requested be kept confidential." See discussion of Rule 1.6(a), supra.

The disciplinary provision requiring the former government lawyer to preserve client confidences might not apply to a former government employee who was not working as a lawyer and who, therefore, did not have a government agency or entity as a "client." But all lawyers who formerly worked in government, whether or not as lawyers, may have obligations under government conflict-of-interest law, agency law, or other law to maintain the confidentiality of confidential government information. Rule 1.11(c), discussed below, builds on lawyers' legal obligations to preserve the confidentiality of "government confidential information." It is important, therefore, to look elsewhere besides the Rules to determine one's confidentiality obligation (as well as other obligations) upon leaving government employment.

[c] Conflict-of-Interest Restriction Where the Former Government Lawyer "Participated Personally and Substantially in the Matter" Rule 1.11 includes two different conflict-of-interest restrictions for former government lawyers. The first, Rule 1.11(a)(2), provides that a former government officer or employee "shall not

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Further, the provision would apply to part-time government lawyers who also maintain a private practice. *Id*.

4 NYSBA Comments to Rule 1.11, [5].

represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation." The primary purpose of this rule is "to avoid 'the manifest possibility that… [a former government lawyer's] action as a public legal official might be influenced (or open to a charge that it had been influenced) by the hope of later being employed privately to uphold or upset what had been done.'"[5] Additionally, the Rule protects against "the exploitation of secrets learned" while in government employ.[6]

A lawyer who has moved from government to private practice must pay close attention to the meaning of the terms "participated personally and substantially" and "matter."

"Participated personally and substantially" suggests that direct involvement and consequential activities are required.[7] For example, merely having attended meetings where a matter was discussed would not appear to meet the test of personal and substantial participation. In interpreting the analogous term "substantial responsibility" that appeared in the ABA Model Code of Professional Responsibility, the ABA Committee on Ethics and Professional Responsibility emphasized the necessity of "a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question… It is sufficient that [the public employee or official] had such a heavy responsibility for the matter in question that is it unlikely he did not become personally and substantially involved in the investigative or deliberative processes regarding that matter." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975).[8] Judicial decisions arising out of disqualification motions hold that a former government lawyer must not have participated in the matter "to a significant extent" while in government employ,[9] and that this "contemplates a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question."[10]

"Matter" is defined in Rule 1.0, the Terminology provision of the Rules, for purposes of the various provisions in which the term is used. Rule 1.0(l) provides that "Matter" includes "any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge,

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5 Twin Laboratories, Inc. v. Weider Health & Fitness, 1989 U.S. Dist. LEXIS 4693 at ∗7–8 (S.D.N.Y. 1989) (*quoting* Gen. Motors Corp. v. City of New York, 501 F.2d 639, 649 (2d Cir. 1974)).

6 *Id. See also* United States v. Escobar-Orejuela, 910 F. Supp. at 97 (quoting United States v. Brothers, 856 F. Supp. 370, 375 (M.D. Tenn. 1992)).

7 *See* N.Y.S. Bar Op. 748 (2001) ("A former prosecutor may represent criminal defendants investigated and prosecuted during former prosecutor's tenure with a district attorney's office if he or she did not participate personally and substantially in the investigation or prosecution of the defendant, and where doing so violates neither the duty to represent the new client zealously nor the duty to protect the former client's (the government's) confidences and secrets.").

8 *See also* 18 U.S.C. § 202 (defining *official responsibility* as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action").

9 N.Y.S. Bar Op. 748 (2001).

10 *Id*. (quoting ABA Op. 342 (1975)).

accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties." Rule 1.11(e), however, narrows (or refines) the definition by providing: "As used in this Rule, the term 'matter' as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions." The counterpart provision of the Code, DR 9-101, did not define the term "matter," but left it to courts, ethics committees, and others to interpret the term.[11] Court decisions on disqualification motions have said that a "matter" is "'a discrete and isolatable transaction or set of transactions between identifiable parties.'"[12]

Under the former Code, it was explicit that this provision superseded the ordinary conflict-of-interest rule governing representations adverse to former clients.[13] Rule 1.9(a), the new provision on representations adverse to a former client, does not explicitly exclude former government lawyers, but one can assume that the more specific rule (Rule 1.11(a)(2)) trumps the general rule (Rule 1.9(a)), consistent with the long-held understanding.

The rule governing former government lawyers is narrower than the general former-client disqualification rule in two important respects. First, the disqualification rule for former government lawyers is triggered only if the lawyer participated in the *same* matter while in government employ, whereas the general rule forbids a lawyer from appearing against a former client "in the same or a *substantially related* matter." Second, as noted above, the Rule for former government lawyers applies only if the lawyer "participated *personally and substantially"* in the matter while in government employ, whereas the general rule forbids a lawyer from appearing against a former client if the lawyer had *any* role in the matter. The more liberal treatment of former government lawyers' conflicts reflects a policy concern that a more restrictive approach would discourage lawyers from seeking government employment. "'If service with the government will tend to sterilize an attorney in too large an area of law for too long a time, or will prevent him from engaging in practice of the very specialty for which the government sought his service… the sacrifices of entering government service will be too great for most [individuals] to make.'"[14]

Former government lawyers who conclude that they participated personally and substantially as a public officer or employee in a matter may not subsequently represent a private client "unless the appropriate government agency gives its informed consent,

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11 This provision might have the effect of "overruling" N.Y.C. Bar Op. 889 (1976), which concluded that "matter" includes those instances in which "a lawyer has specifically analyzed and passed on the validity of a regulation."

12 McBean v. City of New York, 2003 U.S. Dist. LEXIS 9186 at ∗5 (S.D.N.Y. June 3, 2003) (quoting Int'l Union UAW v. Nat'l Caucus, 466 F. Supp. 564, 568 (S.D.N.Y. 1979)); *see also* Twin Laboratories, Inc. v. Weider Health & Fitness, 1989 U.S. Dist. LEXIS 4693 at ∗13 (S.D.N.Y. 1989) ("[A] lawyer should not be disqualified [under DR 9-101(B)] unless the issues he seeks to litigate are identical to or essentially the same as the issues he litigated as a government lawyer, and the issues involved in [the present action] and his former government employment is patently clear.").

13 Former DR 5-108, the ordinary conflict-of-interest rule governing representations adverse to former clients, by its terms applied "[e]xcept as provided in [former] DR 9-101(B)."

14 Spinner v. City of New York, 2004 U.S. Dist. LEXIS 2541 at ∗30 (quoting United States v. Standard Oil Co., 136 F. Supp. 345, 363 (S.D.N.Y. 1955)).

confirmed in writing, to the representation." This is in contrast to former DR 9-101(A)(1), which did not expressly allow for the government agency to consent to the conflict of interest.

Even if the former government employee or officer is personally disqualified from participating in a matter, the lawyer's current firm need not be disqualified, and in this respect Rule 1.11 is less restrictive than the ordinary imputation rule (Rule 1.10). Rule 1.11(b) imputes the disqualification to the lawyers in the same firm as the former public officer or employee, but at the same time allows for the removal of the imputation if "the firm acts promptly and reasonably" to take various steps (including screening the disqualified lawyer) and "there are no other circumstances in the particular representation that create an appearance of impropriety."

The conditions to be satisfied promptly to avoid imputation of the conflict fall into two categories. First, Rule 1.11(b)(1)(i), (ii), and (iii) focus on screening the disqualified lawyer. These provisions require the firm to "implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm." Additionally, they require the firm to "notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client," and "ensure that the disqualified lawyer is apportioned no part of the fee therefrom." Second, Rule 1.11(b)(1)(iv) is a notice provision. It requires the firm to "give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule."

Constructing an effective screen is not a difficult task. It essentially consists of separate measures directed to the disqualified lawyer and to the law firm's legal and non-legal personnel.[15] As for the disqualified lawyers they should acknowledge in writing the fact of the disqualification, and the obligation not to discuss any aspect of the matter with anyone at the firm and not to share in the fees derived therefrom. As for the firm, its management should issue a clear directive describing the lawyer's disqualification and admonishing both the legal and non-legal staffs not to discuss the matter with the lawyer. The firm should also send an appropriate memorandum to its comptroller regarding the disqualified lawyer's nonparticipation in the fees generated in the matter. It would be prudent to repeat these measures twice a year to lessen the possibility of their being forgotten. As new members of the legal and non-legal staff are hired, the firm should also inform them of these restrictions. Finally, it is preferable to have the files in the tainted matter placed in an area separate from the firm's other client files and made accessible with codes known only to the team members working on the matter. A firm should consider using a separate computer system for the tainted matter as well.

In constructing a screen, a law firm should act with haste. For example, if it knows that a lawyer who is about to join the firm is disqualified from a representation, it

15 *See* RESTATEMENT [THIRD] OF THE LAW GOVERNING LAWYERS § 124 cmt. d (2000); Christopher J. Dunnigan, *The Art Formerly Known As the Chinese Wall: Screening in Law Firms: Why, When, Where, and How*, 11 GEO. J. LEGAL ETHICS 291 (1998); Lee E. Hejmanowski, Note *An Ethical Treatment of Attorneys' Personal Conflicts of Interest*, 66 SO. CAL. L. REV. 88, 923–27 (1993).

should have the screen in place on the first day of the lawyer's employment. If it learns of the tainting label, it should act immediately.

The creation of an effective and timely screen should insulate a law firm from a successful motion for disqualification. The rule creates a certain amount of unpredictability, however, insofar as it provides that even if the screening and notice conditions are met, the disqualified lawyer's taint may still be imputed to the law firm if "other circumstances in the particular representation… create an appearance of impropriety."

[d] Conflict of interest Restrictions Where the Former Government Lawyer Has "Confidential Government Information" That Can Be Used Against the Opposing Party Rule 1.11(c) is the Rule's other conflict-of-interest restriction for former government lawyers. This restriction corresponds to DR 9-101(B)(2) of the Code.[16] The Rule's aim is first to prevent former public officials or employees from using confidential government information learned during the course of their employment, and second, to preserve the public's confidence in the integrity of the legal system by prohibiting a lawyer from representing a client in circumstances in which it might appear that the lawyer was using such information.

The Rule addresses the situation in which the lawyer acquired "confidential government information about a person… when the lawyer was a public officer or employee." In that event, the lawyer personally "may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person." For example, if a prosecutor conducts an investigation and thereby learns confidential government information about a person, the lawyer may not later represent a private client in a lawsuit against that person if the information could be used to the person's material disadvantage.

The Rule does not allow the former government employee or officer to avoid disqualification by securing the consent of either the government agency or the person about whom the lawyer acquired confidential government information. The disqualification of the individual lawyer is absolute.

Unlike the counterpart provision of the former Code, the Rule defines the phrase "confidential government information" This term encompasses "information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public." This might include information that must be kept from public disclosure notwithstanding freedom of information laws, grand jury transcripts, and confidential information, as well as information protected from disclosure under the attorney-client privilege and work-product doctrine.

The Rule does not apply when the former government lawyer possesses only ordinary "confidential information" protected by Rules 1.6 and 1.9(c) that might be used against a person, but does not possess relevant information that falls within the narrower definition of "confidential government information." But the ordinary

16 One difference is that Rule 1.11(C) expressly acknowledges that the restriction may be superseded by other law; another is that Rule 1.11(C) defines "confidential government information."

information protected by Rule 1.9(c) still may not be revealed. Some bar association opinions suggest that the possession of important confidential information that the lawyer must refrain from revealing in a representation may in itself give rise to a conflict of interest.17[17]

Like Rule 1.11(b), Rule 1.11(c) allows the personally disqualified lawyer's firm to avoid the imputation of this conflict. It provides: "A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b)." Rule 1.11(c) does not contain "other circumstances" language similar to that found in Rule 1.11(b)(2), but its absence is probably not significant.

V.3 Movement to Public Employment (Rule 1.11(d) & (e))

Rule 1.11 addresses the ethical obligations of a lawyer who is serving as a public official or employee.

[a] Conflict-of-Interest Restriction Where the Government Lawyer Previously Participated in the Matter While in Private Practice Rule 1.11 bars a lawyer who is serving as a public official or employee from participating "in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment." This language parallels the restriction in Rule 1.11(a)(2) on lawyers moving in the opposite direction—i.e., from public to private practice. Rule 1.11(d) deals with the other turn of the revolving door, so to speak. The considerations addressed above in connection with Rule 1.11(a)(2) also apply here.

Rule 1.11(d)(1), which corresponds to former DR 9-101(B)(3)(a) of the Code, contains one exception. The lawyer is disqualified "unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter." This "rule of necessity" is intended to cover those rare situations in which the disqualification would have the practical effect of paralyzing government action. See N.Y.S. Bar Op. 638 (1992) (discussing the Rule's necessity exception under the counterpart Code provision); see also N.Y. County L. § 701. The exception is not a complete panacea, however. The lawyer remains subject to the professional norms of confidentiality in Rule 1.9(c).

If a lawyer currently serving as a public officer or employee is personally disqualified under Rule 1.11(d)(1) from participating in the matter, other lawyers in the government office or agency may presumably participate in the matter unless they personally have conflicts of interest. In other words, conflicts of interest arising under Rule 1.11(d) are not imputed within the office. Unlike Rule 1.11(a) and (c), which deal with *former* government employees and officers, Rule 1.11(d) contains no provision saying that the current government lawyer's conflict under this provision is imputed to the lawyer's office, and the general imputation rule, Rule 1.10(a), does not refer to conflicts arising under Rule 1.11(d), but only to conflicts arising out of Rules 1.7, 1.8, or 1.9.

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17 *See* N.Y.C. Bar Op. 2005-02 (2005); N.Y.S. Bar Op. 628 (1992).

But that does not necessarily mean that a government lawyer's conflicts are *never* imputed to the lawyer's office. On this question, the Rules are somewhat ambiguous and await judicial interpretation. New York's Rule 1.11(d) is largely based on ABA Model Rule 1.11(d), which expressly provides that a lawyer currently serving as a public officer or employee is subject to two other conflicts rules, Rules 1.7 and 1.9. Rule 1.7 governs concurrent conflicts of interest. Rule 1.9 forbids a lawyer from a representation adverse to a former client on the same or a substantially related subject matter to the one in which the lawyer formerly represented that client. When the New York judiciary decided not to include the ABA provision, did it mean to suggest that Rules 1.7 and 1.9 do not apply to government lawyers, or did it simply decide not to restate the obvious, which is that those provisions apply to all lawyers, including government lawyers?

It seems unlikely that the court meant to exempt government lawyers from Rules 1.7 and 1.9. The harder question is this: If those rules apply to government lawyers, then are conflicts arising under those rules ordinarily imputed within a government law office (subject to other law or court rulings)? Under a plain reading of the Rules, these conflicts would be imputed, because Rule 1.10 provides that "lawyers in a firm" may not knowingly represent a client when any one of them has a conflict of interest under Rules 1.7 and 1.9 (as well as Rule 1.8), and Rule 1.0(h) defines a firm to include "a government law office." See N.Y.S. Bar Op. 638 (1992) (taking the view that conflicts arising under the former-client rule [now Rule 1.9] apply to government lawyers, subject to the rule of necessity, although the general imputation rule does not expressly recognize a "necessity" exception).

[b] Negotiating for Private Employment Rule 1.11(d)(2), which corresponds with DR 9-101(B)(3)(b) of the former Code, is designed to foster public confidence in government by forbidding a lawyer from negotiating "for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially." It applies across-the-board to all the parties and their lawyers in a matter. It does not make a difference that the party or lawyer with whom the government lawyer proposes to negotiate is aligned with the government's interest in the matter.

The public policy rationale is straightforward. There would be an appearance of impropriety if these negotiations could take place. The suspicion would linger that government lawyers diminished the zealousness of their representation to curry favor with a prospective employer. The public would perceive government jobs as nothing more than stepping-stones to private employment. It would become suspicious of actions taken by government lawyers, wondering whose interests were really being served—the public's, the lawyer's, or a prospective employer's. See N.Y.C. Bar Op. 1991-1 (1991) ("[T]he drafters were concerned that prospective employment of a government lawyer may affect the independent judgment of the lawyer and, thereby, affect the lawyer's fair representation of the client.").

The ban on negotiations for private employment under these circumstances may not be waived. If a lawyer wants to negotiate for private employment with a party or

an attorney for a party, the lawyer must withdraw from the representation. That withdrawal may trigger its own set of ethical issues under Rule 1.16.

V.4 Misuse of Official Position (Rule 1.11(f))

Rule 1.11(f) forbids public officers from exploiting their positions in any of the following three ways: They may not (1) "use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest," (2) "use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client," or (3) "accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official."

The State bar's long-held view is that this Rule also includes an implicit disqualification provision, that is, lawyers with part-time public positions must avoid undertaking matters (as must their law firms) when there is too great a risk they will exploit their public position for the private client's benefit. For example, in N.Y.S. Bar Op. 798 (2006), the State Bar's Ethics Committee held that a county legislator in part-time private practice may not represent criminal defendants in cases involving members of a police department or district attorney's office over which the legislature has budget or appointment authority. The opinion explained:

> The purpose of ethical restrictions on the practice of criminal law by legislators is to prevent private clients from retaining a part-time public official in the hope of gaining an improper advantage as a result of the lawyer's public office. . . . They also are designed to prevent public suspicion that the client may be gaining some improper advantage by retaining the public official. . . . For example, if the lawyer/legislator would be adverse to law enforcement authorities (e.g., because he or she would have to cross-examine them) or prosecutors over whom the legislature has budgetary control or influence, we believe that the lawyer/legislator should be disqualified because of the possibility that the law enforcement officers or prosecutors would exercise undue caution in handling the case.

Further, the committee held that if "the lawyer/legislator is employed by a law firm, other lawyers in the firm are not per se vicariously disqualified, but imputed disqualification may be appropriate where members of the public are likely to suspect that the lawyer/legislator's influence will have an effect on the prosecution of the case."

IV. ANNOTATIONS OF ETHICS OPINIONS

IV.1 Opinions Covering Subjects under NY Rule 1.11(a)

Movement from Public Employment N.Y.S. Bar Op. 776 (2004) (former prosecutor is prohibited from serving as defense counsel for an accused if the lawyer

participated personally and substantially in prosecuting the accused on the same charges).

N.Y.S. Bar Op. 748 (2001) (where a former assistant district attorney is disqualified from representing a defendant because he or she participated in a material way in the investigation or prosecution of that defendant, his or her law office may represent the defendant provided that the office screens the former prosecutor, the former prosecutor receives no part of the fee earned by the law office, and no circumstances create an appearance of impropriety).

Nassau County Bar Op. 93-35 (1993) (former assistant district attorney who successfully prosecuted a defendant may not subsequently represent the complaining witness in a civil lawsuit against the defendant, unless expressly allowed by law).

N.Y.S. Bar Op. 634 (1992) (concluding that the definition of "public officer" is not to be construed narrowly. The term includes: (1) any lawyer who receives a regular paycheck from the government, and (2) any lawyer elected or appointed to public office.).

Conflict of Interest Restriction Where the Former Government Lawyer "Participated Personally and Substantially in the Matter" N.Y.S. Bar Op. 748 (2001) (relevant facts in determining whether a former prosecutor has participated personally and substantially in the investigation or prosecution of a defendant include, but are not limited to (1) the extent to which the former prosecutor served in a more than nominal supervisory role; (2) the extent to which the former prosecutor had knowledge of government confidences and secrets relevant to the proposed representation of the same defendants; (3) the extent to which the former prosecutor provided coverage for other ADAs; (4) the extent to which the former prosecutor was kept apprised of cases in the office; and (5) the extent of the former prosecutor's access to the case files and other information regarding cases in the prosecutor's office).

IV.2 Opinions Covering Subjects under NY Rule 1.11(b)

Effectiveness of Screening Measures N.Y.C. Bar Op. 2006-02 (2006) (in assessing whether a law firm has effectively screened a personally prohibited lawyer from the rest of the firm, courts evaluate a number of factors including: (1) whether the firm's implementation of the screen was timely,; (2) whether the screen is efficient in relation to the size of the firm, (3) whether the personally prohibited lawyer works in proximity to the lawyers at the firm who will represent the client, (4) whether there are affidavits submitted (a) by the personally prohibited lawyer stating that the lawyer has not shared the confidences or secrets with others at the firm and (b) the other lawyers at the firm confirming that they have not received those confidences or secrets, (5) whether the personally prohibited lawyer works on other matters with the lawyers representing the

client, and (6) whether the personally/prohibited lawyer maintains files containing the confidences or secrets).

IV.3 Opinions Covering Subjects under NY Rule 1.11(c)

Confidentiality Duty N.Y. Bar Op. 748 (2001) (even where a former government prosecutor did not participate personally and substantially in the investigation or prosecution of the criminal defendant that the lawyer now wishes to represent, he or she has a duty to protect confidences and secrets learned as a result of her former position as a government prosecutor).

IV.4 Opinions Covering Subjects under NY Rule 1.11(d)

Movement to Public Employment N.Y.S. Bar Op. 767 (2003) (lawyer seeking to maintain his or her current private practice of representing parents of students with disabilities while becoming a part-time certified impartial hearing officer (IHO) may not represent parents of students with disabilities (1) in his or her private practice if the lawyer previously was an IHO in a matter concerning the same child and disability, or (2) in his capacity as an IHO under the same circumstances).

N.Y.S. Bar Op. 634 (1992) (concluding that the definition of "public officer" is not to be construed narrowly; the term includes (1) any lawyer who receives a regular paycheck from the government, and (2) any lawyer elected or appointed to public office).

IV.5 Opinions Covering Subjects under NY Rule 1.11(f)

Misuse of Official Position N.Y.S. Bar Op. 798 (2006) (county legislator who also has a part-time private practice may not represent criminal defendants in cases involving members of a department over which the legislature has budget or appointment authority).

N.Y.S. Bar Op. 637 (1992) (informing a client that a lawyer in a firm is a former judge may lead that client to infer that the lawyer could improperly influence a court. This is a fact-specific inquiry into the nature of the circumstances).

VII. ANNOTATIONS OF CASES

VII.1 Cases Covering Subjects under NY Rule 1.11(a)

Movement from Public Employment *In re* Stephanie X, 6 A.D.3d 778, 773 N.Y.S.2d 766 (3d Dept. 2004) (though not addressed directly by the facts of the case, the court

noted that "[a]lthough both provisions of the Code of Professional Responsibility require disqualification of the attorney who has the conflict of interest, disqualification of all associated attorneys is imputed only where the attorney with the conflict moves from the public sector to the private sector. Where the attorney with the conflict of interest moves from the private sector to the public sector, the provision presumes other attorneys are available to litigate the matter and does not preclude them from acting.").

Norton v. Town of Islip, 2007 WL 2120399 (E.D.N.Y. July 23, 2006) (private law firm is not considered a public employee by virtue of its representation of a municipality).

United States v. Escobar-Orejuela, 910 F. Supp. 92 (E.D.N.Y. 1995) (court declined to disqualify a lawyer acting as defense counsel who, as a former prosecutor, had learned "background information" about the relationship among the defendants while he was employed by the U.S. Attorney's Office, because the government failed to establish a substantial relationship between the subject matter of the prior case and the present prosecution or that during the former prosecutor's tenure he had access, or was likely to have access, to relevant privileged information).

Conflict of Interest Restriction Where the Former Government Lawyer "Participated Personally and Substantially in the Matter" In re Coleman, 69 A.D.3d 846 N.Y.S.2d 122, 125 (2d Dept. 2010) (former chief court attorney and his current law firm were not disqualified merely because he administratively reviewed cases to assign them to appropriate subordinate court attorneys).

In re Coleman, 2010 WL 189984 (A.D. 2010) (petitioner's attorney did not "participate personally and substantially" in every case referred to the law department while he served as Chief Court Attorney simply because his stated duties required him to review every case to assign it to the appropriate subordinate lawyer. For argument's sake, even if he did actually review each case, the review would be administrative, not substantive and not directly affecting the merits of a case. Further, his involvement in the development of Law Department policies and procedures was not a proper ground for disqualification under Rule 1.11(a)(2).).

In re Gordon, 2007 WL 4414805 (Sur. Ct. Nassau Ct. Dec. 14, 2007) (the phrase "participated personally and substantially" from the former DR 9-101 has been interpreted as meaning to "contemplate a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberate process regarding the transactions or facts in question." Rule 1.11 similarly uses the term "participated personally and substantially.").

VI.2 Cases Covering Subjects under NY Rule 1.11(b)

Effectiveness of Screening Measures In re Essex Equity Holdings USA, LLC v. Lehman Bros., Inc., 2010 WL 2331407 (Sup. Ct. 2010) (firm's efforts to isolate newly hired attorney from potential conflict were inadequate).

Crudele v. New York City Police Dep't of Correction, 2001 WL 1033539 (S.D.N.Y. Sept. 7, 2001) (despite the firm's implementation of extensive screening mechanisms, the court disqualified a firm comprised of 15 lawyers because the danger of inadvertent disclosure and the appearance of impropriety was too great given the firm's small size).

VI.3 Cases Covering Subjects under NY Rule 1.11(d)

Confidential duty United States v. Escobar-Orejuela, 910 F. Supp. 92 (E.D.N.Y. 1995) (court declined to disqualify a lawyer acting as defense counsel who, as a former prosecutor, had learned "background information" about the relationship among the defendants while he was employed by the U.S. Attorney's Office because the government failed to establish that a relationship existed between the subject matter of the prior case and the present prosecution or that during the former prosecutor's tenure he had access, or was likely to have access, to relevant privileged information).

Movement to Public Employment

New York: In re Stephanie X, 6 A.D.3d 778, 773 N.Y.S.2d 766 (3d Dept. 2004) (though not addressed directly by the facts of the case, the court notes "[a]lthough both provisions of the Code of Professional Responsibility require disqualification of the attorney who has the conflict of interest, disqualification of all associated attorneys is imputed only where the attorney with the conflict moves from the public sector to the private sector. Where the attorney with the conflict of interest moves from the private sector to the public sector, the provision presumes other attorneys are available to litigate the matter and does not preclude them from acting").

Federal: Norton v. Town of Islip, 2007 WL 2120399 (E.D.N.Y. July 23, 2006) (private law firm is not considered a public employee by virtue of its representation of a municipality.)

Conflict-of-Interest Restriction Where the Current Government Lawyer "Participated Personally and Substantially in the Matter" In re Gordon, 2007 WL 4414805 (Sur. Ct. Nassau Ct. Dec. 14, 2007) (phrase "participated personally and substantially" from the former DR 9-101 has been interpreted to "contemplate a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question." Rule 1.11 similarly uses the term "participated personally and substantially").

VI.4 Cases Covering Subjects under NY Rule 1.11(e)

What is a "Matter"? McBean v. City of New York, 2003 WL 21277115 (S.D.N.Y. June 3, 2003) (court refused to disqualify plaintiffs' attorney, a former Assistant

Corporation Counsel, concluding that the substantially related test was not satisfied because although the same government agency was involved in a case dealing with improper treatment of arrestees, the fact that multiple individual and class action lawsuits had been filed and litigated regarding the same policy of that government agency did not indicate that all injuries traceable to that policy were the same "matter" or the result of a single transaction or set of transactions).

VI.5 Cases Covering Subjects under NY Rule 1.11(f)

Misuse of Official Position Schachenmayr v. Town of North Elba Bd. of Assessors, 221 A.D. 884, 634 N.Y.S.2d 239 (3d Dept. 1995) (attorney who was also a town justice created an appearance of impropriety by representing taxpayers in certiorari proceedings against the town board of assessors. This impropriety ended, however, when the attorney resigned his position as town justice. Moreover, looking at the totality of the circumstances, there was no allegation he acquired any confidential information as a result of his former position or had engaged in actual misconduct.).

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Rule 1.12: Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals

I. TEXT OF RULE 1.12[1]

(a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.

(b) Except as stated in paragraph (e), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

(1) an arbitrator, mediator or other third-party neutral; or

(2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral.

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.

(d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

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(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

II. NYSBA COMMENTARY

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also, the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. *See* Rule 1.11, Comment [4]. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Canons have the same meaning.

[2] Like a former judge, a lawyer who has served as an arbitrator, mediator or other third-party neutral may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consents, confirmed in writing. *See* Rules 1.0(j), (e). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not obtain information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Paragraph (d) therefore provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in paragraph (d). "Screened" and "screening" are defined in Rule 1.0(t).

[4A] The bookkeeping and accounting problems that may arise from prohibiting a personally disqualified lawyer from being apportioned a share of the fees from a matter make it inadvisable to impose an unqualified rule prohibiting this practice. Although this Rule does not prohibit a personally disqualified lawyer from being apportioned a share of the fees in the matter, if the disqualified lawyer's share of the fee would represent a significant increase in that lawyer's compensation over what the lawyer would otherwise earn, permitting the lawyer to be apportioned a share in the fee may create incentives that would call into question the effectiveness of the screening procedures. In such situations, a firm seeking to avoid imputed disqualification under this Rule would be well-advised to prohibit the personally disqualified lawyer from sharing in the fees in the matter.

[4B] A firm seeking to avoid disqualification under this Rule should also consider its ability to implement, maintain, and monitor the screening procedures permitted by paragraph (d) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (d).

[4C] In order to prevent any lawyer in the firm from acquiring confidential information about the matter from the newly associated lawyer, it is essential that notification be given and screening procedures implemented promptly. If the matter requiring screening is already pending before the personally disqualified lawyer joins the firm, the procedures required by this Rule should be implemented before the lawyer joins the firm. If a newly associated lawyer joins a firm before a conflict requiring screening arises, the requirements of this Rule should be satisfied as soon as practicable after the conflict arises. If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective

in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the personally disqualified lawyer and others in the firm in a given matter.

[5] Notice to the parties and any appropriate tribunal, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

The Rule is mostly new to New York, as only a small part was included in the former New York Code in DR 9-101(A).

III.2 ABA Model Rules

- The Rule is based on, but not identical to, ABA Model Rule 1.12.
- ABA Model Rule 1.12(a) allows a former judge to avoid disqualification with all parties' consent.
- The ABA provision applies only when the former judge "participated personally and substantially" in connection with the matter.
- Under the ABA provision, a judge would not be disqualified if he or she exercised insubstantial administrative responsibilities in the particular matter. For example, under the ABA provision, the former judge can serve as counsel in a lawsuit if his or her only prior judicial act in the matter was to assign the case to another judge to conduct a scheduling conference while the presiding judge in the case was unavailable, but without making decisions on the merits of the action or deciding the parties' substantive rights.
- ABA Model Rule 1.12(c) expressly allows a law clerk to negotiate for private employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially as long as the clerk first notifies the judge or other adjudicative officer for whom he or she worked.

IV. PRACTICE POINTERS

1. A judge who acts in any way in a lawsuit, regardless of how trivial the judicial act, will be disqualified from serving as a lawyer in the matter.
2. A lawyer who was formerly an arbitrator, mediator, or other third-party neutral, or who was formerly a law clerk, may not represent anyone in connection with a matter in which he or she participated "personally or substantially," unless all parties to the proceeding gives informed consent in writing.

3. Restrictions on employment besides those in Rule 1.12 may also be applicable (e.g., the rules of the arbitral or other dispute-resolution provider or forum, or by case law).
4. If a lawyer in a firm is disqualified under Rule 1.12, other lawyers in the firm can avoid disqualification if the firm promptly establishes a reasonable screening mechanism and gives notice to the parties and any appropriate tribunal.
5. A judge, adjudicative officer, or third-party neutral may not make or entertain any inquiries about possible employment with lawyers or parties in pending matters.
6. A law clerk must be relieved from personal and substantial involvement in a matter (with the permission of the judge or adjudicative officer for whom he or she works) to negotiate for a job with a lawyer or party in the matter.

V. ANALYSIS

V.I Purpose of Rule 1.12

This provision addresses conflicts of interest arising out of a lawyer's former work as a judge, arbitrator, mediator, other third-party neutral, or as a law clerk to a judge, other adjudicative officer, or third-party neutral. It is mostly new to New York. Only a small part of it was included in the former New York Code. It is based on ABA Model Rule 1.12, but is not identical to that Rule.

The Rule's purpose is not so much to protect against the misuse of confidential information as it is to protect the integrity of the adjudicative process by removing the incentive for a judge, third-party neutral, or law clerk to make decisions with the conscious or unconscious objective of currying favor with a potential future employer or client. There is little relevant guidance in New York case law and ethics opinions. Authorities outside New York, however, have interpreted comparable provisions.

V.2 Disqualification of Former Judges

The Rule treats former judges more restrictively than others to whom it applies. Rule 1.12(a), based on former DR 9-101(A), absolutely forbids a former judge from accepting private employment in a "matter" in which the lawyer previously "acted in a judicial capacity." "Matter" is defined in Rule 1.0(l).[2] This differs from ABA Model Rule 1.12(a) in two important respects.

First, ABA Model Rule 1.12(a) allows the former judge to avoid disqualification with all the parties' consent, but the New York rule does not.

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2 *See, e.g.*, Ohio Op. 2005-5 (2005) (magistrate who adjudicated divorce action may not later represent a party to the action in "post-decree matters (such as modifying child custody, parenting time, or child support, or defending or initiating a contempt order to enforce a prior court order)").

Second, the ABA provision applies only when the former judge "participated personally and substantially" in connection with the matter, while the New York Rule applies whenever the judge "acted in a judicial capacity" in the matter. (The New York State Bar Association's Comments do not appear to pick up on the fact that the New York Rules maintained the earlier Code formulation, which is more restrictive than the ABA counterpart.)

Under the New York provision, judges who acted in any way in a particular lawsuit, regardless of how trivial the judicial act, would evidently be disqualified from later serving as a lawyer in the matter. In contrast, under the ABA provision, a judge would not be disqualified if he or she exercised insubstantial administrative responsibilities in the particular matter. For example, under the ABA provision, the former judge can serve as counsel in a lawsuit if her only prior judicial act in the matter was to assign the case to another judge or to conduct a scheduling conference while the judge presiding in the case was unavailable, but without making decisions on the merits of the action or deciding the parties' substantive rights. One might argue that under the New York Rule a similar result can be reached by distinguishing between conduct taken by a judge in a lawsuit in a "judicial capacity" and an "administrative capacity." But the more plausible interpretation is that any act undertaken by a judge in an individual lawsuit is taken in a judicial capacity.

V.3 Disqualification of Other Former Adjudicative Officers, Third-Party Neutrals, and Law Clerks

The disqualification rule is more liberal for those other than judges involved in adjudication and dispute resolution. Rule 1.12(b) applies to a lawyer who was formerly an arbitrator, mediator, or other third-party neutral or who was formerly a law clerk to a judge or other adjudicative officer or to an arbitrator, mediator, or other third-party neutral. In general, these individuals may not represent anyone in connection with a matter in which they participated "personally or substantially" as a third-party neutral or law clerk. (See the chapter on Rule 1.11, supra, for a discussion of the phrase "personally and substantially.")

The Rule provides an exception when "all parties to the proceeding give informed consent, confirmed in writing." (See Rule 1.0(e) and (j) for the definitions of "confirmed in writing" and "informed consent.") Additionally, Rule 1.12(e) excludes from the prohibition "[a]n arbitrator selected as a partisan of a party in a multimember arbitration panel."[3]

One implication of the "informed consent" provision is that a lawyer who successfully mediates a dispute may subsequently represent one or both parties, with their "informed

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3 *See* Feinberg v. Katz, 2003 WL 260571 (S.D.N.Y. Feb. 5, 2003) (denying motion to disqualify former partisan arbitrator from later representing a party to the arbitration in a related matter); *cf. In re* Astoria Med. Group (Health Ins.), 11 N.Y.2d 128, 134, 227 N.Y.S.2d 401, 405, 182 N.E.2d 85, 87 (1962) (Fuld, J.) (In "tri-partite arbitration… each party's arbitrator 'is not individually expected to be neutral.'").

consent, confirmed in writing"—for example, in drafting legal documents giving effect to the parties' agreement. Of course, representing both parties would be permissible only if the representation comports with the restrictions of Rule 1.7 ("Conflict of Interest: Current Clients").[4]

Note that restrictions aside from those of Rule 1.12 might apply. For example, a former arbitrator or mediator may be governed by rules of the arbitral or other dispute-resolution provider or forum or by case law that might affect the ability to accept a representation relating to a dispute that the lawyer arbitrated or mediated.

V.4 Screening to Avoid Imputed Disqualification

Rule 1.12(d) provides that if a lawyer in a firm is disqualified under this Rule because of his or her previous work as a judge, third-party neutral, or law clerk, other lawyers in the firm can avoid disqualification if "the firm acts promptly and reasonably to" establish an effective screening mechanism and give notice to the parties and any appropriate tribunal. The screening and notice provisions of Rule 1.12(d) track those for former government lawyers in Rule 1.11(d). Those provisions are discussed in the earlier chapter on Rule 1.11, supra.

If the firm fails to adopt and abide by the screening and notice provisions—e.g., if the firm communicates with the personally disqualified judge about the matter—the firm violates the Rule. A firm might also be subject to disqualification when it seeks assistance from a former judge who is personally disqualified under Rule 1.12(a), even if the judge is not associated with the firm.[5]

V.5 Negotiating for Private Employment

Rule 1.12(c) is a restriction on negotiating for private employment. The Rule parallels the one in Rule 1.11(d)(2) for lawyers in government service. It forbids the current judge, other adjudicative officer, or third-party neutral (including an arbitrator or mediator) from "negotiat[ing] for employment with any person who is involved as a party or as a lawyer for a party in a manner in which the lawyer is participating personally and substantially" in his or her adjudicative or dispute-resolution role.[6] The restriction would forbid the judge, adjudicative officer, or third-party neutral from

4 *See* N.Y.S. Bar Op. 763 (2001) (dual representation may be possible following a divorce mediation where "the parties are firmly committed to the terms arrived at in mediation, the terms are faithful to both spouses' objectives and consistent with their legal rights, there are no remaining points of contention, and the lawyer can competently fashion the settlement agreement and divorce documents.").

5 *See* Ill. Op. 94-9 (1994).

6 Another jurisdiction's ethics committee inferred from this provision that a lawyer may not serve as an arbitrator (even a partisan arbitrator) if the lawyer currently represents a party to the arbitration, even in an unrelated matter. *See* Indiana Op. 1992-93/5 (1993); Vt. Op. 2003-01; *but see* Phil. Op. 2003-8 (2003) (lawyer who is "of counsel" to a firm that represents a party to

making or entertaining any inquiries about possible employment with lawyers or parties in pending matters.[7]

Rule 1.12(c) does not apply to a judicial law clerk, but Rule 1.11(d)(2) probably does. The New York Rule does not incorporate terms of ABA Model Rule 1.12(c), which expressly allow a law clerk to negotiate for private employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially as long as the clerk first notifies the judge or other adjudicative officer for whom he or she worked. It is unclear what to make of the omission. Looking at Rule 1.12(c) alone, one might infer that law clerks may undertake these negotiations even without notice to the judge, but that would be a mistake. A law clerk to a judge or to another public adjudicative officer is "a lawyer currently serving as a public officer or employee" under Rule 1.11(d)(2) and therefore is forbidden by that rule from "negotiating for private employment with any person who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially."8[8] The bottom line is that the law clerk will have to be relieved from personal and substantial involvement in a matter—presumably with the permission of the judge or adjudicative officer for whom he or she works—to negotiate for a job with a lawyer or party in that matter.

Other rules (e.g., provisions of the applicable Code of Judicial Conduct) may also restrict the ability of judges and their law clerks to seek private employment.

VI. ANNOTATIONS OF ETHICS OPINIONS

Illinois: Ill. Bar Op. 94-9 (1994) (former judge may not participate in a matter in which he was previously substantially involved as a judge. A firm failing to screen or prevent a former judge's participation in a case in which he was substantially involved results in the firm's disqualification).

Ill. Bar Op. 800 (1983) (former judge who has participated judicially in the merits of a matter is disqualified from all further involvement in that matter).

Ohio: Ohio Bar Op. 2005-5 (2005) (magistrate who adjudicated a divorce action may not later represent a party to the action in "post-decree matters (such as modifying

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the arbitration may serve as a partisan arbitrator in the arbitration as long as he is screened from communicating with firm lawyers about the matter).

7 *See* Ill. Op. 07-01 (2007) ("A judge's impartiality is reasonably questioned when a law firm appears before a judge and the judge is in negotiations, even preliminary negotiations, with the firm for future employment. Disqualification from matters involving the firm is not required, however, unless the judge or judge's agent solicits or invites the contact or otherwise participates in the employment discussion. An unsolicited approach by a firm or lawyer that is unequivocally and immediately terminated by the judge does not give rise to a reasonable question as to the judge's impartiality and therefore does not require the judge's disqualification.").

8 Unlike the counterpart ABA provision, New York Rule 1.11(d)(2) does not exempt law clerks who notify the judges or other adjudicative officers for whom they work.

child custody, parenting time, or child support, or defending or initiating a contempt order to enforce a prior court order)").

VII. ANNOTATIONS OF CASES

New York: Shomrom v. Fuks, 730 N.Y.S.2d 90 (2001) (law firm disqualified from representing a client because of its relationship with the arbitrator, who was a former partner of and a current consultant to an accounting firm that provided services to (and was occasionally a client of) the law firm).

Tennessee: State v. Tate, 925 S.W.2d 548 (Tenn. Crim. App. 1995) (conflict of interest existed where a trial judge received confidential communications from the defendant during ex parte proceedings and then acted as prosecutor in that same case. Court also imputed disqualification to the prosecutor's district attorney's office.).

Wyoming: Ross v. State, 8 Wyo. 351, 57 P. 924 (1899) (conflict of interest did not exist where the prosecutor, in his former employment as a judge, had merely denied the defendant bail).

Federal: United States v. Hasarafally, 529 F.3d 125 (2d Cir. 2008) (court denied defendant's request on appeal of his criminal conviction to recuse the U.S. Department of Justice as the government's counsel because no conflict of interest existed where the Attorney General presided as trial judge over the defendant's trial prior to his appointment. Moreover, even if there were a conflict of interest, imputed disqualification is not favored when it comes to the office of a U.S. attorney. Moreover, there was no claim that the Attorney General had received any privileged communications while acting as judge, there was no claim that the Attorney General had any personal interest in the case, and the Department of Justice has screening mechanisms to prevent conflicts of interest.).

Pepsico v. McMillen, 764 F.2d 458 (7th Cir. 1985) (a judge cannot negotiate future employment upon retiring from the bench with a lawyer or law firm or party in the case before him, even if that negotiation is only preliminary, tentative, indirect, unintentional, or ultimately unsuccessful).

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Rule 1.13: Organization as Client

I. TEXT OF RULE 1.13[1]

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

1. asking reconsideration of the matter;

2. advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and

3. referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

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(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

II. NYSBA COMMENTARY

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, members, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Rule apply equally to unincorporated associations. "Other constituents" as used in this Rule means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, for example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews between the lawyer and the client's employees or other constituents made in the course of that investigation are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[2A] There are times when the organization's interests may differ from those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent whose interest differs from that of the organization: (i) that a conflict or potential conflict of interest exists, (ii) that the lawyer does not represent the constituent in connection with the matter, unless the representation has been approved in accordance with Rule 1.13(d), (iii) that the constituent may wish to obtain independent representation, and (iv) that any attorney-client privilege that applies to discussions between the lawyer and the constituent belongs to the organization and may be waived by the organization. Care must be taken to ensure that the constituent understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent, and that discussions between the lawyer for the organization and the constituent may not be privileged.

[2B] Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

Acting in the Best Interest of the Organization

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer, even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. Under Rule 1.0(k), a lawyer's knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. The terms "reasonable" and "reasonably" connote a range of conduct that will satisfy the requirements of Rule 1.13. In determining what is reasonable in the best interest of the organization, the circumstances at the time of determination are relevant. Such circumstances may include, among others, the lawyer's area of expertise, the time constraints under which the lawyer is acting, and the lawyer's previous experience and familiarity with the client.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility within the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Measures to be taken may include, among others, asking the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it may be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. *See* Rule 1.4.

[5] The organization's highest authority to which a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, Rule 1.8, Rule 1.16, Rule 3.3 or Rule 4.1. Rules 1.6(b)(2) and (b)(3) may permit the lawyer in some circumstances to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event withdrawal from the representation under Rule 1.16(b)(1) may be required.

[7] The authority of a lawyer to disclose information relating to a representation under Rule 1.6 does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged past violation of law. Having a lawyer who cannot disclose confidential information concerning past acts relevant to the representation for which the lawyer was retained enables an organizational client to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer for an organization who reasonably believes that the lawyer's discharge was because of actions taken pursuant to paragraph (b), or who withdraws in circumstances that require or permit the lawyer to take action under paragraph (b), must proceed as "reasonably necessary in the best interest of the organization." Under some circumstances, the duty of communication under Rule 1.4 and the duty under Rule 1.16(e) to protect a client's interest upon termination of the representation, in conjunction with this Rule, may require the lawyer to inform the organization's highest authority of the lawyer's discharge or withdrawal, and of what the lawyer reasonably believes to be the basis for the discharge or withdrawal.

Government Agency

[9] The duties defined in this Rule apply to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules. *See* Scope [9]. Moreover, in a matter involving the conduct of government officials, a government lawyer may have greater authority under applicable law to question such conduct than would a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality

and assuring that the wrongful act is prevented or rectified. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. *See* Scope.

[10] *See* Comment [2A].

[11] *See* Comment [2B].

Concurrent Representation

[12] Paragraph (d) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder, subject to the provisions of Rule 1.7. If the corporation's informed consent to such a concurrent representation is needed, the lawyer should advise the principal officer or major shareholder that any consent given on behalf of the corporation by the conflicted officer or shareholder may not be valid, and the lawyer should explain the potential consequences of an invalid consent.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are normal incidents of an organization's affairs, to be defended by the organization's lawyer like any other suits. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 1.13 is the successor to former Disciplinary Rule 5-109 (the version in effect immediately prior to the April 1, 2009 amendments). Specifically:

- Rule 1.13(a) is identical to former DR 5-109(A).
- Rule 1.13(b) is identical to DR 5-109(B), except with trivial additions ((i), a comma, (ii), "then and an").

- Rule 1.13(c) is identical to DR 5-109(C), except that "*a* violation of law" became "*in* violation of law" and the following phrase was added: "the lawyer may reveal confidential information only if permitted by Rule 1.6."
- Rule 1.13(d) is new and was not contained in DR 5-109. Its roots, however, can be traced to former Ethical Consideration 5-18, which reads in pertinent part:

> Occasionally a lawyer for an entity is requested to represent a shareholder, director, officer, employee, representative, or other person connected with the entity in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present. Representation of a corporation or similar entity does not necessarily constitute representation of all of its affiliates. A number of factors should be considered before undertaking a representation adverse to the affiliate of a client including, without limitation, the nature and extent of the relationship between the entities, the nature and extent of the relationship between the matters, and the reasonable understanding of the organizational client as to whether its affiliates fall within the scope of the representation.

III.2 ABA Model Rules

- New York Rule 1.13(a) is substantially similar to ABA Rule 1.13(a) and (f), except the New York Rule says "interests may differ" while the ABA Rule says "interests are adverse."[2]
- The first sentence of New York Rule 1.13(b) is identical to the first sentence of ABA Rule 1.13(b), except for the addition of numbering and the deletion of a comma. Although New York offers a range of factors and options for the lawyer to consider in the second sentence of New York Rule 1.13(b), ABA Rule 1.13(b)'s second sentence simply states that the lawyer should report the matter as high as warranted in the organization unless the lawyer believes it is not in the organization's best interest to do so.
- Both New York Rule 1.13(c) and ABA Rule 1.13(c) address reporting that fails to bring satisfactory change by the organization. In substance, both say that if the highest authority in the organization is unresponsive and the clear violation of law will likely bring substantial injury to the organization, the lawyer may reveal confidential information. However New York states that the lawyer may reveal information only if permitted by Rule 1.6, whereas the ABA says the lawyer may reveal information *whether or not* Rule 1.6 permits disclosure to the extent necessary to prevent substantial injury to the organization. Unlike the ABA Rule, the New York Rule 1.13(c) permits the lawyer to resign in accordance with Rule 1.16.
- New York Rule 1.13(d) is identical to ABA Rule 1.13(g) except that the ABA says "*dual* representation" while New York says "*concurrent* representation."[3]
- New York Rule 1.13 does not incorporate ABA Rule 1.13(e) regarding a discharged or withdrawing lawyer, but some of Rule 1.13(e)'s language can be found in Comment 8.[4]

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2 NYSBA Report and Recommendations of Committee on Standards of Attorney Conduct, Albany, New York (Sept. 30, 2005), v.1 ("COSAC Report") at 190.

3 COSAC Report at 191.

4 COSAC Report at 199.

The official Comments to Rule 1.13 are very similar to the ABA comments, with COSAC adjustments for the substantive language differences.[5]

IV. PRACTICE POINTERS

1. Decide upfront who specifically will be the client: the organization, one or more of its constituents, or both.
2. Remember that the businessperson at the organization who happens to refer the organization's legal work to you is not the client unless you specifically agree to represent the individual for a specific matter (after analyzing respective interests in accordance with Rule 1.7 and Rule 1.10). Policies of the organization (such as policies that require that the organization's legal department approve all work by outside counsel) or the general organization's well-being might on occasion require that you act in a manner contrary to your contact's wishes, or, in a worst-case scenario, to report your contact's malfeasance with the expectation that your contact will be disciplined or terminated.
3. Clearly document the attorney-client relationship(s) in an engagement letter and conflict waiver when necessary. If it is unclear exactly whom you represent, and you proceed in the face of ambiguity, the authorities will likely give the benefit of the doubt to anyone who reasonably believed you were representing him or her.
4. When representing (or contemplating the representation of) large organizations, beware of benign-looking "outside counsel policies" from their legal departments; buried within may be provisions that say that your firm agrees to represent the entire corporate family, including affiliates or officers, for conflict purposes.
5. Master the art of knowing when to give the so-called corporate Miranda warning ("I only represent the organization and not you," etc.). Decide on your preferred wording and have individuals sign it to memorialize both (1) the fact that you gave it, and (2) the actual wording used.
6. It is not necessarily a conflict to represent the organization and one or more of its constituents.

V. ANALYSIS[6]

V.1 Purpose of Rule 1.13

New York State has long been a center for commercial, fashion and design, business, financial, and not-for-profit organizations. Rule 1.13 exists to provide guidance to the lawyers who represent such organizations.

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5 COSAC Report at 192.

6 Parts of this Commentary are adapted from Mary C. Daly, Who Is Your Client—The Business or Its Owners, N.Y. Prof. Res. Rep. 1 (Mar. 2001) (hereinafter Daly, 3/2001); Mary C. Daly, Identifying the Client in a Closely Held Business, N.Y. Prof. Res. Rep. 1 (Oct. 2000). The publisher's permission to use the selected excerpts is gratefully acknowledged.

Originally adopted in 1970, the former New York Lawyers' Code of Professional Responsibility did not contain a specific disciplinary rule addressing the representation of an organization. The only pertinent guidance the Code provided were Ethical Considerations 5-18 and 5-24. because the Code was adopted almost verbatim from the ABA Model Code of Professional Responsibility, a document that was similarly silent on this topic. In 1983, the ABA House of Delegates adopted the Model Rules of Professional Conduct and included a specific rule addressing the representation of an organization—Rule 1.13. In 1990, the New York State Bar Association House of Delegates amended the former Code to include a new disciplinary rule, DR 5-109. Entitled "Conflicts of Interest—Organization as Client," the disciplinary rule focused on how a lawyer should proceed when "the organization's interests may differ from those of the constituents with whom the lawyer is dealing." It was not until the 1999 amendments that New York fell into step with the majority of other states by adopting a more detailed disciplinary rule relating to the representation of an organization. The amended version of former DR 5-109 included a substantial portion of the text of Rule 1.13.

V.2 The Entity Theory of Representation

The core principle of Rule 1.13 is the entity theory of representation, whereby a lawyer represents the organization and not its constituents.[7] It applies equally to in-house and outside counsel.[8] The entity theory is firmly rooted in New York jurisprudence.[9]

The entity principle is perhaps easier to comply with if the entity under consideration is a large, widely held company. The more that the management and ownership of a business are separate and independent and the ownership is dispersed among a large number of individuals, the easier it is for a lawyer to remember that the entity has a distinct legal existence of its own. These characteristics also make it easier for an entity's constituents (such as its shareholders and directors) to understand that they do not have a personal professional relationship with the lawyer.

Correspondingly, the more that the management and ownership are concentrated in a small number of individuals, the easier it is for a lawyer to lose sight of the entity principle of representation and to treat those individuals as the lawyer's clients. From the individuals' perspective, it becomes equally, if not more, difficult to appreciate the

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7 Although many of the discussions of the entity theory take place in the context of business organizations, the rule applies to the representation of all organizations; e.g., N.Y. S. Bar Op. 743 (2001) (applying former DR 5-109 to a lawyer's representation of a union member in an arbitration proceeding).

8 It is not unusual for a client to ask either its in-house or outside counsel to join the organization's board of directors. Rule 1.13 does not address the propriety of board membership directly, but Rule 1.7, cmt. 35 cautions the lawyer to consider the various conflicts of interest that may be generated by accepting the client's invitation.

9 See e.g., Kushner v. Herman, 215 A.D.2d 633, 628 N.Y.S.2d 123 (2d Dept. 1995) (representation of a corporation is not representation of its shareholders); N.Y.C. Bar Op. 1986-2 ("primary allegiance" is owed to the client partnership, not to the individual partners).

distinction between an entity and its constituents, and that it is not they but the entity that is the lawyer's client. Once the client confusion exists, especially if enabled by the attorney, courts and ethics committees have sometimes concluded that a lawyer owes ethical obligations to a constituent. The attorney may have assisted a conflict of interest! The smaller the organization, the more reasonable it may be "for each shareholder to believe that the corporate counsel is in effect his own individual attorney."[10] A lawyer's failure to appreciate the nuances of the entity theory can have serious repercussions, including the imposition of disciplinary sanctions, disqualification, and liability for malpractice and breach of fiduciary duty.[11]

Rule 1.13 subsections (a), (b), and (d) refer to lists of organizational constituents. The lists are illustrative rather than comprehensive.

V.3 Forming an Attorney-Client Relationship

Rule 1.13 presumes that an attorney-client relationship exists between the attorney and the organization. Ethics rules do not always clarify the question of when an attorney-client relationship is created, although in some cases they recognize that certain duties exist without a relationship (e.g., the duties to prospective clients in Rule 1.18). The question whether the relationship exists is generally one of contract. The *Restatement of Law (Third) Governing Lawyers* §14 sets forth this standard:

> A relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
>
> (a) the lawyer manifests to the person consent to do so; or
>
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
>
> (2) a tribunal with the power to do so appoints the lawyer to provide the services.

The question of when the lawyer-client relationship ends, to the extent it began, can likewise be a facts-and-circumstances analysis.[12]

It can be tempting for a lawyer to take advantage of ambiguity on this point. When a client is not materially significant to a lawyer's practice, the lawyer may hasten to formalize the relationship's termination as soon as possible to avoid future conflict issues with the now-former client. However, the same lawyer may also wish to keep the door open for future business and thus encourage occasional, non-billed phone

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10 Rosman v. Shapiro, 653 F. Supp.1441, 1445 (S.D.N.Y. 1987); accord Steinfeld v. Marks, 1997 WL 563340 n.3 (S.D.N.Y. Sept. 8, 1997) (court did not hold that attorney for a joint venture always represents the individual joint venturers, only that in this case plaintiff had alleged facts sufficient to withstand a motion to dismiss). See also ABA Formal Opinion 91-361.

11 For a brief overview of the entity theory's application to actions for malpractice and breach of fiduciary duty, *see Daly 3/2001*. supra note 6, at 1.

12 *See, e.g,* Ronald C. Minkoff, *Who's My Client? Part I—The Intermittent Client*, N.Y. Prof. Resp. Rep. 6–8 (Feb. 2008).

calls from the client. Such ambiguity becomes more sensitive when a lawyer represents the organization and a constituent of the organization.

What steps should a lawyer take to clarify who is the client? The engagement letter and billing statements are obvious places to start. The engagement letter should identify the client with precision. It should state, for example, that "ABC Corporation has engaged the law firm to deliver legal services in connection with a given matter." Ideally, it should contain an express statement that ABC Corporation alone is the firm's client, not its individual shareholders or partners. For example: "As lawyers, we owe professional obligations to our clients. Here, we owe those duties to ABC Corporation (and not, for example, to any of its affiliates, shareholders, agents, or employees)." If the retention relates to the formation of ABC Corporation, it should state that A, B, and C have engaged the law firm to establish the ABC Corporation and perform related legal services for its benefit, and that the ABC Corporation upon its incorporation will be deemed the law firm's client from the time of the initial engagement. The law firm should submit all bills to the corporation, not to the individual shareholders.[13] If the law firm also represents a shareholder or partner individually on other matters,[14] it should keep careful billing records, making a clear distinction between the two representations.

In dismissing shareholder malpractice actions, the courts have weighed heavily both (1) the absence of a retainer agreement with an individual shareholder in connection with a law firm's work for a business organization, and (2) billing records showing that the firm had billed the shareholder in connection with other representations, but not for work related to the business organization.[15]

A law firm should refrain from offering individual legal advice to the principals of a corporation or partnership in connection with the transaction or litigation in which the firm is representing the entity unless the firm has analyzed potential conflicts, consulted with the organization, and determined that it is prepared to form an attorney-client relationship with such constituents in addition to the extant relationship with the organization.[16] To the extent that a shareholder can prove that the law firm "'advised me directly on aspects of the negotiations that were particular to my individual interests' such as [my] salary, stock options, and the non-recourse nature of the bridge loan,"[17] the shareholder may be able to demonstrate an implied client-lawyer relationship or the existence of a fiduciary duty.

A law firm should consider carefully whether to provide representation to an entity in connection with a transaction in which a familial relationship exists between the lawyer and the shareholder. Such a relationship may make it easier for the

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13 Cf. C.K. Indus. Corp. v. C.M. Indus. Corp., 213 A.D.2d 846, 623 N.Y.S.2d 410 (3d Dept. 1995) (shareholder failed to demonstrate that an attorney-client relationship was formed with lawyer and thus could not bring claims against lawyer); Benedek v. Heit, 139 A.D. 2d 393, 531 N.Y.S.2d 266 (1st Dept. 1988) (another failure to demonstrate attorney-client relationship was formed).

14 A law firm should be alert to the possibility it cannot undertake the two representations without a conflicts waiver.

15 E.g., Catizone v. Wolff, 71 F. Supp. 2d 365 (S.D.N.Y. 1999).

16 Gupta v. Rubin, 2001 WL 59237 (S.D.N.Y. Jan. 24, 2001).

17 Id. at *6.

family-member shareholder to establish a reasonable belief that the law firm was acting as the shareholder's personal lawyer in the transaction.[18]

V.4 Warning Organizational Constituents

In May 2006, Irell & Manella LLP (I&M) undertook dual representations of Broadcom Corporation and its CFO Bill Ruehle. I&M represented Broadcom in connection with the company's internal investigation of its stock option-granting practices while representing Ruehle in connection with two shareholder lawsuits filed against him regarding those same stock option granting practices. In June 2006, I&M lawyers met with Ruehle at his office to discuss Broadcom's stock option-granting practices. Subsequently, Broadcom directed I&M to disclose statements made by Ruehle at that meeting to Broadcom's outside auditors, the SEC, and the U.S. Attorney's Office. I&M made these disclosures without Ruehle's consent. In its order, the court rejected the government's attempt to use these statements against Ruehle at trial.

There is some question about whether I&M gave Ruehle an *Upjohn* (aka corporate *Miranda*) warning at the meeting. What is an "*Upjohn* warning"? "In essence, an *Upjohn* warning is a disclaimer issued by an attorney for a company to an employee of the company, wherein the employee is advised that the attorney does not represent the employee, but rather the company as a legal entity."[19] The term "*Upjohn* warning" derives from the U.S. Supreme Court decision *Upjohn v. United States*, 449 U.S. 383, 386–96 (1981), in which "the Court promulgated the rule that the attorney-client privilege is maintained between counsel and client-company when counsel for the company communicates with various employees of such company."[20] One commentator offers the following *Upjohn* warning formulation:

> We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. If there is a conflict, the attorney-client privilege belongs to the company. You are free to consult with your own lawyer at any time.[21]

Note that such formulation includes the language of Rule 1.13(a) to the effect that the lawyers only represent the company and not the employee, with the addition not referenced in Rule 1.13(a) that any privilege attaching to the discussion will be controlled by the company and not the employee.[22]

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18 McLenithan v. McLenithan, 273 A.D.2d 757, 710 N.Y.S.2d 674 (3d Dept. 2000).

19 Ivonee Mena King & Nicholas A. Fromherz, *Getting the Upjohn Warning Right in Internal Investigations*, 17 The Practical Litigator (Mar. 2006).

20 Id.

21 *Id*.—attached "Practice Checklist."

22 *See* Shari A. Brandt & James Q. Walker, *Can an Upjohn Warning Avoid Representational Ambiguity?* 27 N.Y. State Bar Assoc. Inside 1, 5 (Spring/Summer 2009) (available at http://www.nysba.org/AM/Template.cfm?Section=Home&CONTENTID=26846&TEMPLATE=/CM/ContentDisplay.cfm).

With respect to the formulation, we would add at the end of the first sentence "We represent the company only, and do not represent anyone but the company", to foreclose the possibility that the person will later claim to have had a "reasonable expectation" that the lawyer would consider representing him or her.[23] We would lean toward deleting "If there is a conflict" from the formulation above, because it might imply that the employee shares the privilege without conflict, and instead adding a sentence: that "This means that even if a conflict of interests later develops between you and the company, the company is free to waive the attorney-client privilege and disclose information you provide to us in connection with a court proceeding."

Because the evidentiary issue of privilege is related to but separate from whether the lawyer owes the employee a duty of confidentiality,[24] it might also behoove the lawyer to add to the formulation: that "We also only owe the company, not you, a duty of confidentiality, which means that, even if there is no court proceeding, we need only the company's consent to use or disclose information you provide to third parties for the company's benefit." The benefit of this clarification is to ensure that the individual is not characterized in retrospect as a "prospective client" under Rule 1.18.

Here is a proposed, buffed-up formulation:

> We represent the company only and do not represent you. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. This means that even if a conflict of interests later develops between you and the company, the company is free to waive the attorney-client privilege and disclose information you provide to us in connection with a court proceeding. On a related note, we also owe only the company, not you, a duty of confidentiality, which means that, even if there is no court proceeding, we need only the company's consent to use or disclose information you provide to third parties for the company's benefit. You are free to retain and consult with your own lawyer at any time.

The ambiguity of whether an *Upjohn* warning was given to Mr. Ruehle is a lesson for lawyers: a *written* warning *signed by the individual* will help to minimize ambiguity if memories later fail as to (1) whether a warning was in fact given, and (2) what the wording of the warning was exactly. The court wrote: that "[W]whether an Upjohn warning was or was not given is irrelevant in light of the undisputed attorney-client relationship between Irell and Mr. Ruehle… An oral warning, as opposed to a written waiver of the clear conflict presented by Irell's representation of both Broadcom and Mr. Ruehle, is simply not sufficient to suspend or dissolve an existing attorney-client relationship and to waive the privilege." Finding that Ruehle reasonably believed an attorney-client relationship existed between himself and I&M, the court held that the

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23 Rule 1.18(e) clarifies that to qualify as a "prospective client," an individual must have a "reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship."

24 Rule 1.6 defines "confidential information" to include information "protected by the attorney-client privilege" in addition to other information (not necessarily privileged) that would be (1) embarrassing or detrimental to the client if disclosed, or (2) that the client has requested be kept confidential.

disclosures he made in the meeting were privileged, and also indicated it would be referring the I&M lawyers for discipline.[25]

After giving an *Upjohn* warning, a lawyer should be careful not to withdraw or undo the warning through word or deed. For example, a lawyer should not advise employees being interviewed that the attorney "may," "can," or "could" represent them "as long as no conflict appears" or "until such time as a conflict appears."[26]

V.5 Joint Representation of an Organization and Organizational Constituents

Rule 1.13 assumes that the lawyer does not also represent the constituent, but often a lawyer is ethically permitted to represent constituents in addition to the organization (sometimes with conflict waivers, sometimes without). *Nicholas* is a reminder of the importance of an up-front, written agreement as to confidentiality in joint representations. For example: will all confidential information be shared both ways, or only flow to the organization, or will the lawyer exercise discretion as to if and when to share information from one party with the other? If a nonconsentable conflict arises, is the lawyer permitted to drop the employee and continue with the organization?

Under Rule 1.9, such conflict situations will often require the employee's consent (as a former client under Rule 1.9) for the lawyer to continue to represent the organization in a substantially related matter now adverse to the employee. In addition, Rule 1.16 makes clear that lawyers cannot simply drop a client in all circumstances, which is another benefit to obtaining advance consent to withdrawal. Rule 1.16(c)(10) permits withdrawal if the client "knowingly and freely assents"; we believe this assent can be given in advance subject to the following caution.

Rule 1.7, Comment 18 provides that: "When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved." For more extensive comments and guidance on joint representation issues, see Rule 1.7, Comments 29–33.

A New York State Bar ethics opinion, N.Y.S. Bar Op. 719 (1999), concluded that a domestic relations retainer agreement may not provide for a client's advance consent to withdrawal based on the client's failure to pay fees because for assent to be knowing, it must be made at the time of the termination. N.Y.S. Bar Op. 805 (2007) opined that the "same is true outside the domestic relations context." In our view, both opinions are aimed at ensuring that lawyers do not withdraw as soon as a bill goes unpaid. Now that Rule 1.7, Comment 22, recognizes the effectiveness of advance waiver of *conflicts*

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25 United States v. Nicholas, Docket No. 338, Case No. 8:08-00139 (*C.D. Cal. April 1, 2009). For more analysis of the decision, *see* David A. Kettel & Danette R. Edwards, *"United States v. Nicholas": Expanding the "Upjohn" Suppression Remedy*, BNA's Corp. Counsel Wkly. Newsl., 24 CCW 176 (June 10, 2009).

26 King & Fromherz, *supra* note 19 [attached "Practice Checklist"].

in various circumstances, we see no reason that a client should not be able to consent in advance to the lawyer's *withdrawal* based on conflict, especially when the reason advance consent is sought is that a nonconsentable conflict may develop later on, and so an organizational client may only be willing to agree to the lawyer representing its individual employees on the condition that they give this consent in advance.

Rule 1.13(a) requires not only that counsel be aware of this potential dichotomy, but also that when a conflict situation arises between the organization and its constituent, the lawyer provides a suitable explanation to the organization.

V.6 Reporting Up the Organizational Ladder

Rule 1.13(b), the "reporting up" section, consists of three interrelated provisions. The first provision, which consists of one lengthy and complex sentence, defines the circumstances in which a lawyer must take action upon learning of misconduct within the organization. The second provision describes the general considerations that a lawyer should take into account in deciding how to respond to the misconduct. Finally, the third provision describes three concrete steps the lawyer may initiate, including referral to the "highest authority."[27]

The subsection relates only to "the representation." What is a lawyer to do if, in the course of representing an organization in the X matter only, the lawyer learns of wrongful conduct in the Y matter? The answer to this question may possibly be found in the law of agency and in discussions of the fiduciary duty a lawyer as agent owes to a client in principle.

The type of action with which Rule 1.13(b) is concerned falls into one of two categories: "a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization." The former includes breaches of fiduciary duty such as defalcation or usurpation of a corporate opportunity. The latter includes most torts and statutory and regulatory misconduct. If a question exists whether the conduct falls into either category, research into its legal impact will be necessary. Not all decisions with which the lawyer disagrees will be a violation. Comment 3 cautions that when constituents make decisions for the organization, "the decisions must ordinarily be accepted by the lawyer, even if their utility or prudence is doubtful."

A violation alone is not enough to trigger a lawyer's ethical obligation to act. Subsection (b) also requires that the violation "is likely to result in substantial injury to the organization." Substantial injury is, of course, a facts-and-circumstances determination. A $50,000,000 judgment or fine might not result in a substantial injury

27 As the language of the text suggests, identifying the "highest authority… as determined by applicable law" will require research into the substantive law of the governance of business or not-for-profit organizations. It is not a matter of legal ethics. The qualifier "as determined by applicable law" provides clarity for lawyers representing religious non-profit organizations for whom the determination of "highest authority" might otherwise raise religious questions.

to a Fortune 500 company, but a $50,000 judgment or fine might bankrupt a mom-and-pop business.

The provision addresses ongoing or future contemplated action, not past actions of the organization. It is less zealous than the SEC attorney conduct rules promulgated pursuant to Sarbanes Oxley ("SOX Rules"), located at 17 CFR Part 205. The SOX Rules focus on a lawyer's obligation to report evidence of a material violation (as defined therein), whereas the New York rule does not assume that "reporting up" will always be in the organization's best interest. New York's rule suggests that requesting reconsideration of a matter or advising that a second opinion be sought are acceptable alternatives to reporting up. As a rule of thumb, the SOX Rules apply to a lawyer when representing an issuer of securities. Immediately following the promulgation of the SOX rules, some law firms adopted internal policies, reporting structures, and committees regarding how reports would be made (1) to the organizational client, and (2) to the SEC if the organization is unresponsive to reports.

Taking a step back from both the New York rule and SOX Rules, the concept of reporting up the ladder of an organization makes sense. If someone is acting in a way harmful to the organization and insists on maintaining that course of action, it is possible that the only way for the organization to correct the problem will be if its "eyes and ears" are informed by counsel to the organization. Even if Rule 1.13 did not exist, a lawyer would still have an ethical obligation under Rule 1.4 to communicate with the client regarding material developments and status, as well as to ensure that the client makes informed decisions. Although the Rule does not address an organization's past actions, if a lawyer were to become aware of such, the lawyer will often conclude that it is necessary to ensure the organization is aware (e.g., if the perpetrator continues to be employed, there remains a potential liability as a result, etc.).

V.7 Organizational Response to the Lawyer's Report

Rule 1.13(c) addresses the nightmarish situation in which the lawyer's efforts to convince the organization to stop the illegal, injurious action or to rectify the ongoing omission are unsuccessful. The Rule states that the lawyer in the situation is *permitted*, but not required, to do one or both of the following: reveal confidential information if permitted by Rule 1.6[28] and resign in accordance with Rule 1.16. Subsection (c) does not really provide new authority; it is more of a reminder and signpost about the lawyer's options under other rules.

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28 E.g., N.Y.C. Bar Op. 1994-10 (1994) (analyzing what disclosures a lawyer for a partnership may make to limited partners and non-clients concerning improprieties committed by a general partner). But see N.Y. State 555 (1984) (disclosing of the wrongdoing of one partner in a two-person partnership because the partner "specifically in advance designated his communication as confidential, and the lawyer did not demur"). See also N.Y. State 649 (1993) (analyzing what disclosures the lawyer for an executor may make to the estate's beneficiaries and the probate court concerning the executor's wrongdoing).

Rule 1.6(b) permits, but does not require, a lawyer to reveal confidential information to "prevent the client from committing a crime" and, among other permissive grounds, "to comply with other law or court order." The SOX Rules impose a duty to report evidence of a material violation that "has occurred" (see, e.g., the definition of "appropriate response" in § 205.2(b)(1)). The SOX Rules permit, but do not require, a lawyer in this situation to report to the SEC (§ 205.3(d)(2)):

> An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:
> (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
> (ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. § 1621; suborning perjury, proscribed in 18 U.S.C. § 1622; or committing any act proscribed in 18 U.S.C. § 1001 that is likely to perpetrate a fraud upon the Commission; or
> (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

A lawyer representing an issuer and dealing with a past act to be rectified must consider whether reporting to the SEC under this option provided by federal law is "comply[ing]" under the meaning of New York Rule 1.6(b). On July 26, 2003, the Washington State Bar Association approved an interim ethics opinion that lawyers may not avail themselves of the SOX Rule option because it is just that; an option, and not mandatory (so a lawyer would never be required to "comply").[29] On July 23, 2003, a few days before the opinion's issuance, the SEC's General Counsel (who had been invited by the bar association's president to comment on the then-draft opinion) begged to differ. He pointed out that where "a conflict arises because a state rule prohibits an attorney from exercising the discretion provided by a federal regulation, the federal regulation will take priority."[30]

V.8 Conflicts Analysis

Rule 1.13(d) clarifies that it is not, as some have assumed, a per se conflict for a lawyer to represent both an organization and one or more of the organization's constituents. It also codifies what has always been the ideal practice when a conflict exists, namely that the organization's consent should be given by someone other than the employee

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29 Interim Formal Ethics Opinion Re: The Effect of the SEC's Sarbanes-Oxley Regulations on Washington Attorneys' Obligations Under the RPCs. The opinion appears to remain outstanding (available at www.wsba.org/lawyers/GROUPS/ethics2003/formalopinion.doc).

30 See Letter Regarding Washington State Bar Association's Proposed Opinion on the Effect of the SEC's Attorney Conduct Rules 2 (July 23, 2003) (available at www.sec.gov/news/speech/spch072303gpp.htm).

who is jointly represented. For helpful guidance when a lawyer is asked to represent a corporation and its constituent in a government investigation, see N.Y.C. Bar Op. 2004-02 (2004).

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Forming an Attorney-Client Relationship

N.Y.S. Bar Op. 789 (2005) (law firm is permitted to form an attorney-client relationship with one or more lawyers of the firm to obtain advice on matters of professional responsibility concerning client representations. The firm does not ordinarily need to disclose the fact of its consultation with the firm lawyers, but it might need to disclose its conclusion that the firm's error gives rise to a colorable malpractice claim, is injurious to the client, or is capable of correction.).

N.Y.C. Bar Op. 2007-3 (analyzes the situation in which a law firm is approached to represent a client adversely to an affiliate of a current corporate client. A firm in that situation should determine (1) whether the engagement letter with the client addressed which affiliates are, or are not, also to be treated as clients and included an advance conflicts waiver; (2) whether the firm's dealings with the affiliate have otherwise communicated a relationship; (3) whether there is a risk of material limitation; and (4) whether the firm has acquired confidential information of the affiliate material to the prospective matter.).[31]

N.Y.C. Bar Op. 2004-3 (opinion addresses the ethical obligations of a government lawyer analyzing potential conflicts of interest among government agency clients and between an agency and its constituents).

Nassau County Bar Op. 97-4 (lawyer retained by an organization represents the entity, not the entity's constituents).

N.Y.C. Bar Op. 1994-10 (lawyer for a limited partnership must disclose to the limited partners any information concerning a general partner's wrongdoing, but may not reveal the information to non-clients unless necessary to prevent a crime).

N.Y.S. Bar Op. 649 (1993) (opinion gives guidance to an executor's attorney when the executor is engaged in wrongdoing to the estate's detriment).

N.Y.C. Bar Op. 1986-2 (lawyer's primary allegiance is owed to the client partnership, not to the individual partners).

VI.2 Warning Organizational Constituents

N.Y.S. Bar Op. 743 (2001) (when an attorney in a labor union law department is asked to represent a union member in an arbitration in which the member is a party, the attorney owes the member a duty of confidentiality and may not disseminate copies of an arbitration decision containing the member's secrets. When representing the union

31 See Rule 1.7, cmts. 34, 34A, and 34B for more recent guidance on this issue.

as a party under a collective bargaining agreement, the attorney must explain to the union member that the attorney represents only the union and that information imparted by the member may be shared with the union and disseminated more broadly at the union's direction.).

N.Y.S. Bar Op. 674 (1995) (analyzing the confidentiality and conflicts issues that arise when a corporate officer/co-client of a lawyer's organizational client commits perjury).

N.Y.S. Bar Op. 650 (1993) (opinion generally affirms the use and language of an "adverse interest script" proposed by a company's legal department for use in connection with the company's "compliance with law" hotline (inspired by Federal Sentencing Guidelines), but notes that the script is not the only means available to comply with former DR 5-109 and former DR 7-104 (the "no contact" rule, now codified as Rule 4.2)).

VI.3 Joint Representation of an Organization and Organizational Constituents

New York: N.Y.C. Bar Op. 2004-2 (if and when a lawyer is permitted to represent both a corporation and one or more of its employees in a government investigation).

N.Y.S. Bar Op. 743 (2001) (when an attorney in a labor union law department is asked to represent a union member in an arbitration in which the member is a party, the attorney owes the member a duty of confidentiality and may not disseminate copies of an arbitration decision containing the member's secrets. When representing the union as a party under a collective bargaining agreement, the attorney must explain to the union member that the attorney represents only the union and that information imparted by the member may be shared with the union and disseminated more broadly at the union's direction.).

ABA:[32] ABA Formal Op. 08-453 (addresses issues that arise with in-house ethics consultation in law firms).

ABA Formal Op. 02-426 (issues that arise for a lawyer serving as fiduciary for an estate or trust).

ABA Formal Op. 98-410 (general guidelines for a lawyer to follow after agreeing to serve on the board of a corporate client).

ABA Formal Op. 97-405 (conflict analysis when a lawyer representing a government entity also represents private clients against another government entity in the same jurisdiction).

ABA Formal Op. 95-390 (conflict analysis in the corporate family context).

ABA Formal Op. 94-380 (issues for a lawyer representing the fiduciary in a trust or estate matter).

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32 American Bar Association Standing Committee on Ethics and Professional Responsibility. Copies of these opinions are available for downloading at www.abanet.org/cpr/pubs/ethicopinions.html, but there is a download charge for non-ABA members.

ABA Formal Op. 93-375 (analysis of a lawyer's obligation to disclose information adverse to the client in the context of a bank examination).

ABA Formal Op. 92-366 (ethical guidance when a lawyer's opinion is being used by constituents of a client company to perpetrate a fraud).

ABA Formal Op. 92-365 (conflict analysis regarding a trade association and its members).

ABA Formal Op. 92-364 (analyzing the issue of a lawyer's sexual relations with an employee of the corporate client).

ABA Formal Op. 91-361 (clarifies that a partnership is an organization within the meaning of Rule 1.13, and analyzes conflict and confidentiality issues in the context of a lawyer's representation of a partnership).

Other Jurisdictions: District of Columbia Bar Op. 328 (2005) (conflict analysis when an attorney is representing a constituent of an organization and what issues the lawyer should address upfront with the client). (Full opinion available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions.cfm.)

Illinois Bar Op. 07-01 (conflict analysis regarding state governmental agencies. The opinion notes that there is no one governmental agency comprising all agencies). (Full opinion available only to Illinois State Bar members at http://www.isba.org/resources/ethics/index.html.)

California Bar Op. 2001-156 (conflict analysis when city subentities, such as the city council and mayor, separately seek legal advice from the city attorney on the same matter and their interests are antagonistic). (Full opinion available at http://calbar.ca.gov/state/calbar/calbar_home.jsp under Attorney Resources/Ethics Information/Ethics Opinions.)

Delaware Bar Op. 1988-1 (conflict analysis when a lawyer is retained by an insurance company to defend a church in an action brought by the church's pastor and the church is organized as a membership corporation governed by a Board of Elders). (Full opinion available at http://www.dsba.org/ethics/index.htm.)

VII. ANNOTATIONS OF CASES

VII.1 Forming an Attorney-Client Relationship

New York: Kushner v. Herman, 215 A.D.2d 633, 628 N.Y.S.2d 123 (2d Dept. 1995) (representation of a corporation is not representation of its shareholders).

Federal: In re Metlife Demutualization Litig., 09-3716-CV (Sept., 9, /30/2009) N.Y.L.J. 25, col. 3 (2d Cir. 2009) (in a case where plaintiff moved to disqualify defendant's law firm shortly before trial, the court held that because the firm represented the company in a 2000 action, that did not mean that it had an attorney-client relationship with policyholders of the company as well. The policyholders of the insurance company are not clients of the insurance company's outside counsel. It is clear that not

every beneficiary of a lawyer's advice will in fact be a client in accordance with Rule 1.13.).

Hirsch v. Columbia Univ., 293 F. Supp. 2d 372, 376 (S.D.N.Y. 2003) (unsuccessful claim of client status made by corporate constituent).

Brown & Williamson Tobacco Corp. v. Pataki, 152 F. Supp. 2d 276 (S.D.N.Y. 2001) ("who's the client?" in the government agency context).

First Hawaiian Bank v. Russell & Volkening, 861 F. Supp. 233, 237 (S.D.N.Y. 1994) (held former DR 5-109 inapposite because defendants were never employees or constituents of the organization).

Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (the smaller the organization, the more reasonable it may be "for each shareholder to believe that the corporate counsel is in effect his own individual attorney").

Mason Tenders Dist. Council Pension Fund v. Messera, 4 F. Supp. 2d 293, 301–02 (S.D.N.Y. 1908) (court held former DR 5-109 inapposite to counsel for an individual who did not also represent the organization).

VII.2 Warning Organizational Constituents

New York: McCagg v. Schulte Roth & Zabel LLP, 20 Misc. 3d 1139(A) (Sup. Ct. N.Y. Co. 2008) (when the interests of an organization and an associated individual were aligned, the lawyer for the organization was not obligated to give the "not your lawyer" warning to the individual).

Talvy v. Am. Red Cross, 205 A.D.2d 143, 149–150 (1st Dept. 1994) (plaintiff-employee was unsuccessful in disqualifying counsel for employer because the court found that the employee had no reason to believe that his previous communications with counsel would not be shared with the employer. The court noted that the Second Circuit had held that even when counsel jointly represents an employee individually and employer, that the employer is not disqualified because the employee could not have reasonably assumed that counsel would withhold from the employer the information received) (citing Allegaert v Perot, 565 F.2d 246, 250–51 (2d Cir 1977); *see also* Kempner v Oppenheimer & Co., 662 F. Supp 1271, 1277–78 (S.D.N.Y. 1987).).

Federal: United States v. Int'l Bhd. of Teamsters, 961 F. Supp. 665, 674 (S.D.N.Y. 1997) (Former DR 5-109 did not address whether the lawyer should make the required explanation to an organizational constituent immediately and without hesitation).

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Rule 1.14: Client with Diminished Capacity

I. TEXT OF RULE 1.14[1]

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

II. NYSBA COMMENTARY

[1] The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. The conventional client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities upon the lawyer. When the client is a minor or suffers from a diminished mental capacity, maintaining the conventional client-lawyer relationship

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may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client attentively and with respect.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. The lawyer should consider whether the presence of such persons will affect the attorney-client privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, with or without a disability, the question whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and reasonably believes that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See* Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a conventional client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take reasonably necessary protective measures. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interest, and the goals of minimizing intrusion into the client's decision-making autonomy and maximizing respect for the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: (i) the client's ability to articulate reasoning leading to a decision, (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and (iii) the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that a minor or a person with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be unnecessarily expensive or traumatic for the client. Seeking a guardian or conservator without the client's consent (including doing so over the client's objection) is appropriate only in the limited circumstances where a client's diminished capacity is such that the lawyer reasonably believes that no other practical method of protecting the client's interests is readily available. The lawyer should always consider less restrictive protective actions before seeking the appointment of a guardian or conservator. The lawyer should act as petitioner in such a proceeding only when no other person is available to do so.

[7A] Prior to withdrawing from the representation of a client whose capacity is in question, the lawyer should consider taking reasonable protective action. *See* Rule 1.16(e).

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 1.14 did not previously exist as a Disciplinary Rule, but certain Comments trace their roots to previous Ethical Considerations 7-11 and 7-12, as follows:

> EC 7-11 The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an

> illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.
>
> EC 7-12 Any mental or physical condition that renders a client incapable of making a considered judgment on his or her own behalf casts additional responsibilities upon the lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, the lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his or her interests, regardless of whether the client is legally disqualified from performing certain acts, the lawyer should obtain from the client all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for the client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of the client. But obviously a lawyer cannot perform any act or make any decision which the law requires the client to perform or make, either acting alone if competent, or by a duly constituted representative if legally incompetent.

Comment 7 incorporates the reasoning of N.Y.S. Bar Op. 746 (2001) to the effect that a lawyer should seek the appointment of a guardian only as a last resort.[2] Specifically, Opinion 746 concluded the lawyer must first have determined that the client is incapacitated, that there is no practical alternative through use of power of attorney or otherwise to protect the client's best interests, and that no one else is available to serve as the petitioner.

III.2 ABA Model Rules

- Rule 1.14(a) is identical to ABA Model Rule 1.14(a) except that it replaces the ABA formulation "normal client-lawyer" relationship with "conventional relationship."
- Rule 1.14(b) is identical to ABA Model Rule 1.14(b).
- Rule 1.14(c) is identical to ABA Model Rule 1.14(c).
- The Comments are generally based on the ABA Model Rule Comments albeit with heavy editing, and New York did not adopt ABA Comments 9 and 10 regarding emergency legal assistance.[3] Tracking the difference between provisions (a) noted above, Comment 5 to the New York Rule uses the term "conventional" instead of the ABA's term "normal."[4]

IV. PRACTICE POINTERS

1. As soon as you believe your client has diminished capacity, immediately familiarize yourself with this rule and the NYSBA comments.

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2 NYSBA Report and Recommendations of Committee on Standards of Attorney Conduct, Albany, New York, Sept. 30, 2005, v.1 ("COSAC Report") at 204.

3 COSAC Report at 202.

4 COSAC Report at 203.

2. Remember that the "capacity" in question is the client's capacity to make decisions. (Comment 6 gives some helpful indicia to consider.). If the client's capacity *to make decisions* is not diminished, this rule is not implicated even though the client may not be "conventional" in every sense of the word.
3. If diminished capacity is the only issue, the lawyer's only special duty is to attempt reasonably to maintain a conventional professional relationship with the client.
4. If there is also a risk of harm to the client and the lawyer needs help in protecting the client from that harm, the rule gives the lawyer some options for outside help and recognizes a limited, impliedly authorized disclosure exception.
5. Before you take "protective action" in reliance on the rule, be reasonably confident that the action will protect (rather than adversely affect) the client's interests. Specifically, consider whether disclosure could lead to proceedings for involuntary commitment.

V. ANALYSIS

V.1 Purpose of Rule 1.14

On November 3, 2007, the New York State Bar Association's House of Delegates approved a report proposing new rules of professional conduct in the format of the ABA Model Rules of Professional Conduct along with comments. The report was submitted to the Appellate Division of New York State Supreme Court on February 1, 2008. A footnote to the report's introduction observed that "about one-third" of the states adopting the ABA Model Rules in some form have also chosen to adopt comments.[5]

The Appellate Division chose not to adopt the comments, so the comments bear only the NYSBA's imprimatur. In addition, with respect to Rule 1.14, the Appellate Division chose not to adopt sections (d) and (e) as proposed by the State Bar, perhaps because the concept of emergency legal assistance was deemed too controversial.

The NYSBA Proposed Rules included a reporter's note for Rule 1.14 to the effect that the rule "deserves a place in the mandatory rules" because it provides new guidance in the area and protects lawyers who intervene when justified to protect their client against harm.[6]

V.2 Diminished Capacity

If the rule's title were precise rather than summary, it would be "Client with Diminished Capacity to Make Adequately Considered Decisions in Connection with a Representation." The reason for the focus on this capacity is illustrated by other rules,

5 New York State Bar Association's Proposed Rules of Professional Conduct, at xvi, n.9 (Albany, New York, Feb. 1, 2008).

6 NYSBA Proposed Rules at 100.

such as Rule 1.2(a), which requires a lawyer to abide by a client's *decisions* concerning the representation, and Rule 1.4(b), which requires a lawyer to explain a matter sufficiently "to permit the client to make informed *decisions* regarding the representation."[7] The lawyer-client relationship is premised on service of a client's articulated goals and decisions, so when the client's ability to make decisions is called into question, therefore, a new paradigm is required for the lawyer's decision making. To be clear, a client may be of full capacity with respect to other decision making but, theoretically of diminished capacity only with respect to the representation. For example, a lawyer may be representing a client in a matter involving great psychological trauma so that the client is completely blocking the underlying incidents, problems, or repercussions out of his or her mind. The client may be able to make considered decisions in work or personal life but be of diminished capacity solely with respect to the representation. In such cases, presumably a third party will have retained the lawyer to look out for the client's interest. Of course, if the client in these cases indicates an unwillingness to be represented, the very existence of the lawyer-client relationship is called into question and may be an issue for the tribunal to decide. See ABA 07-448 (when a lawyer is appointed to represent a person who declines the representation, the person refusing representation is not entitled to expect of the lawyer the duties arising out of the client-lawyer relationship).

To determine whether the client has diminished decision-making capacity, the lawyer makes a kind of diagnosis. Comment 6 to the rule provides three factors for the lawyer to consider: (i) the client's ability to articulate the reasoning behind a decision, (ii) "variability of state of mind" and an ability to appreciate the consequences and "substantive fairness" of a decision, and (iii) the consistency of a decision with the "known long-term commitments and values of the client."

An examination of each factor in isolation reveals just how challenging the diagnosis can be. Starting with (i) lawyers are generally better trained and skilled at articulation of the reasons behind our decision making than our clients (which is one reason they hire us). In addition, someone in a state of incapacity could be highly articulate at stating reasons even though those reasons may have no reasonable relationship to the decision being asserted. Lawyers put in the position of evaluating the client's decision making are forced to determine what basis they will use to decide what constitutes an adequate "ability to articulate."

Rule 2.2 permits a lawyer, when rendering advice, to refer not only to the law but also to other considerations, such as moral, economic, and political factors that "may be relevant to the client's situation." This implies that a client is free to draw upon these non-legal considerations when making decisions as well. So, for example, a client may want to proceed with a litigation "to make a point to the government" even though the lawyer believes that the client will ultimately fail or even though the lawyer does not believe that the case will have a measurable impact. Clients may also cite religious or moral reasons for their decision-making, which raises the question of what types of motivations the lawyer is permitted to second-guess. Overall, factor (i) seems

7 Emphasis added.

to be about evaluating a client's ability to express thoughts combined with an analysis of their coherence of those thoughts.

With respect to factor (ii) cited in Comment 6 to Rule 1.14, "variability of state of mind" can be contrasted with a fixed or consistent state of mind, bringing to mind Emerson's warning about "foolish consistency." Variability might be manifested in erratic conduct or decision making, which the lawyer will be forced to compare with his or her concept of conventional behavior. But variability must refer to something more than simply changing one's mind or direction. The second part of (ii), the client's ability to appreciate the consequences and "substantive fairness" of a decision, seems to be the most straightforward criteria for a lawyer.

Although the reference to "substantive" fairness harkens to the constitutional contrasting of substantive with procedural due process (how do we, let alone laypersons, distinguish between substantive and procedural *fairness*?), a client's apparent ability to appreciate the consequences is something a lawyer can legitimately seek to gauge. For example, if a client expresses a desire to do X, the lawyer can explain and illustrate the potential consequences of X. Of course, the client may not always make the same decision the lawyer would if the roles were reversed, but the issue is not whether the lawyer agrees with the client's decision but simply whether the lawyer believes that the client can grasp that X will result in Y. For example, a lawyer for a child in a divorce matter may seek to explain that if the child chooses to live with one parent instead of the other, that the child will be forced to leave the child's school and friends and live in a different climate and in a different situation. If the child responds "Yes, but I will see my friends every day at school and my mommy and daddy at home," that may indicate that the child has not grasped what "leaving" means or is unable or willing to accept the reality of the parents' divorce.

Factor (iii) cited by Comment 6, in which the lawyer evaluates the consistency of a decision with the "known long-term commitments and values of the client," must be evaluated in context. For example, people sometimes "turn over a new leaf." A workaholic wakes up one day and decides that family or leisure are more important, or a laze-about suddenly develops a desire for a career. People change religious faiths or reject religion altogether, change political parties, etc. So factor (iii) may be getting at the need to determine whether a client's long-term commitments and values have changed or whether the client is temporarily blocked from relating to his or her "true self."

Comment 6 offers the helpful observation that "in appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician." This is helpful in that the lawyer has permission to seek guidance, but the lawyer is stuck deciding what are "appropriate circumstances" and who is an "appropriate diagnostician." "Appropriate circumstances" might be circumstances in which there are possible red flags, but the lawyer wants to be sure that his or her value judgments are not coloring the diminished capacity determination. The "appropriate diagnostician" reference may be a warning against turning the consultation into a bad-faith way to disclose the client's condition to others. Given that a mental health professional is most likely to be a safe choice under the rule, a lawyer must then decide who is going to pay for the professional's services and how the client is likely to react if the lawyer seeks the consultation without obtaining the client's permission. An interesting and related question is whether the

consultations would be protected by doctor-patient privilege if the lawyer is consulting the doctor on such a basis. Of course, written resources might be a useful alternative to consulting a person.[8]

Even if a lawyer concludes the client's decision-making capacity is so diminished that Rule 1.14 is triggered, the Rule applies only so long as the capacity remains diminished. There may be instances in which the client has a short period of anger, depression, or reaction to physical trauma that the lawyer has reason to believe will pass quickly and therefore simply waits until the client is able to regain capacity to proceed in the representation. In these instances, once capacity is no longer diminished, Rule 1.14 no longer applies, but the lawyer's conduct during the period of diminished capacity will remain protected under the rule.

V.3 Conventional Relationship

Although ABA Rule 1.14 exhorts the lawyer to seek to maintain a "normal" relationship with the client, New York's version opts for the word "conventional," chosen perhaps as a more neutral term ("abnormal" connotes that something is wrong whereas unconventional simply connotes a deviation from the norm).

Comment 1 observes that the "conventional lawyer-client relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters." So when Rule 1.14(a) admonishes the lawyer with a diminished-capacity client to "as far as reasonably possible, maintain a conventional relationship with the client," it is apparently calling the lawyer to conduct the relationship as much as possible as if the client in fact did not have diminished capacity. This is a bit of a Catch 22 because the basis, as set forth by Comment 1, for a "conventional" relationship is the missing ingredient.

There will be gray areas for lawyers in this context, but one can imagine examples of clear violations. For instance, a lawyer who determines that a client is of diminished capacity may not then simply cease attempts to communicate with the client regarding significant decisions or steps the lawyer proposes to take. Communication by the lawyer will give the client at least the opportunity to weigh in, and the client may at times surprise the lawyer by understanding and reacting to more than the lawyer expected.

Similarly, the lawyer may not resort to perfunctory communications without explanation or opportunity for discussion ("I plan to do X, good-bye") or inaccessible communications (such as sending e-mail missives when the lawyer knows that the

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8 The following resources are recommended in an ABA publication: Stephen J. Anderer, *A Model for Determining Competency in Guardianship Proceedings*, 7 MENTAL HEALTH & PHYSICAL DISABILITY L. REP. 107 (1990); Charles P. Sabatino, *Representing a Client with Diminished Capacity: How Do You Know It and What Do You Do About It?,* 16 J. AM. ACAD. MATRIM. LAW. 481 (2000); Charles P. Sabatino, *Assessing Clients with Diminished Capacity*, ABA Comm'n on Legal Problems of the Elderly (undated). *Annotated Model Rules of Professional Conduct*, 5d., ABA Center for Professional Responsibility at 240.

client cannot access e-mail). Another example of a clear violation would be the case of a lawyer who heard the client communicate representational objectives prior to the onset of diminished capacity, and then proceeds to recklessly disregard those objectives once the client's capacity is diminished. It may be useful to consider by analogy the legal doctrine of "Cy Pres" (French for "as close as possible") applied when a gift made by donor instructions in a will or trust cannot be made because the named recipient no longer exists so that the judge, estate, or trustee seeks to fulfill the donor's wishes as nearly as possible.

Generally, maintaining a conventional relationship will entail protecting the client's rights, interests, and funds as well as communications. Comment 2 notes that a lawyer is always obligated to "treat the client attentively and with respect." Comment 5 notes that section (b) is the backup to (a), so that (b) addresses those situations in which the lawyer concludes that a conventional relationship cannot be maintained because the client is at risk of harming him- or herself.

V.4 Risk of Harm

Section (b) is permissive, not mandatory. It recognizes that in cases of diminished capacity a lawyer may be faced with the reality that, whatever the scope of engagement was ab initio, it would be inhumane simply to proceed with blinders on by ignoring the client's likely self-destruction. For example, the lawyer may have been hired by a client to draft an agreement, and in the middle of negotiations might find that the client is of diminished capacity due to suicidal depression, and that if the lawyer ignores the client's condition, the client may not live to benefit from the signed agreement. See also Rule 1.6(b)(1) (permitting a lawyer to reveal confidential information to prevent "reasonably certain death or substantial bodily harm").

Section (a) assumes that the client's capacity is diminished as an objective test without reference to the lawyer's determination of such (perhaps because if (a) is triggered, the lawyer's only obligation is the uncontroversial one of seeking to maintain a conventional relationship with the client). Section (b), however, requires that the lawyer "reasonably" believe the client has diminished capacity. Whether this test is substantively different than (a) is only theoretical because it is unlikely that lawyers will have to defend their determination that (a) applied, whereas a lawyer's reliance on (b) is more likely to be challenged in retrospect. Section (b) refers to "diminished capacity" without explaining that the capacity in question is one of decision making in the representation, but it is understood that (b) continues the same concept as (a).

For (b) to be triggered, the lawyer must first reasonably believe that the client has diminished capacity to make adequately considered decisions in connection with the representation. Second, the lawyer must reasonably believe that the client is "at risk of substantial physical, financial or other harm unless action is taken" and that the client "cannot adequately act in the client's own interest." The concept of "at risk" implies something other than a theoretical risk (e.g., .000001% probability of occurrence is still a "risk"); it requires the lawyer to estimate the likelihood of harm if the lawyer does not intervene.

Because lawyers will inevitably be challenged in retrospect for their decisions in this regard, a cautious lawyer will want to take advantage of the subsection (b) permissions only if the lawyer perceives the risk of harm to be significant. By definition, risk is something less than 100% certainty, so one hopes that disciplinary authorities and courts (1) will give lawyers the benefit of the doubt when they act in good faith, and (2) will remember that predicting human behavior is one of the trickier endeavors imaginable. A lawyer's decision is more likely to be questioned when the lawyer benefits personally from the intervention. A lawyer in such a situation would be well-advised to seek the advice of an objective third party before taking protective action. See Rule 1.6(b)(4) (an exception to the confidentiality rule permitting a lawyer to seek ethical advice).

Third, the lawyer must reasonably believe that the client "cannot adequately act in the client's own interest." Until now, the analysis of client capacity has been confined to mental capacity, but it seems that a client's ability to act may also encompass physical capacity and perhaps circumstances as well. If the lawyer reasonably believes that the client's decision-making capacity is diminished, and that the client is at risk of self-inflicted harm, then the lawyer is permitted to take reasonably necessary protective action, if the lawyer reasonably believes that the client is unable to protect his or herself *for whatever reason*.

V.5 Reasonably Necessary Protective Action

Section (b) provides that protective action may include consulting with parties able to take protective action and, "in appropriate cases," seeking the appointment of a guardian ad litem, conservator, or guardian. A legal guardian is someone with court-granted decision-making authority over a person ("Guardian of the Person") and/or property ("Guardian of the Property" and sometimes called the "conservator" of the property of a person).[9] A guardian ad litem is a guardian appointed for a person with respect to a single action or proceeding.

Comment 5 suggests other possible measures: consulting with family members, using a reconsideration period to allow for the client's capacity to return, and using voluntary surrogate decision-making tools such as durable powers of attorney. Other parties noted by the comment for possible consultation are support groups, professional services, and adult-protective agencies. The comment concludes that when taking protective action, the lawyer should be guided by factors including (1) the known wishes and values of the client, (2) the client's best interest, and (3) the goals of

9 New York State Bar Association Guidelines for Guardians at 1 (NYSBA Elder Law Section, Jan. 2007). New York Mental Hygiene Law § 81.03 defines a guardian as a "person who is eighteen years of age or older, a corporation, or a public agency, including a local department of social services, appointed in accordance with terms of this article by the supreme court, the surrogate's court, or the county court to act on behalf of an incapacitated person in providing for personal needs and/or for property management." *See generally* New York Mental Hygiene Law Art. 81 for details about appointment.

minimizing intrusion into the client's decision-making autonomy and maximizing respect for the client's family and social connections. Taking protective action is thus a delicate balancing act, and is not likely to be undertaken lightly by lawyers who presumably have other things to do in their practice. When taking such actions, lawyers will be highly cognizant of the risks of being second-guessed as well as the awkward issue of deciding whether to bill the client for actions not authorized by the client.

Comment 7 notes that in "many circumstances," appointment of a legal representative may be "unnecessarily expensive or traumatic" for the client so that seeking such an appointment without the client's consent and/or over the client's objection is appropriate only when the lawyer reasonably believes that no other practical method for protecting the client's interests is available. A lawyer should "always consider" the availability of "less restrictive protective actions" before seeking appointment of a legal representative. See N.Y.S. Bar Op. 746 (2001).

V.6 Impliedly Authorized Revelations

Section (c) notes with helpful redundancy that information relating to representing a client with diminished capacity is protected by Rule 1.6. Presumably, (c) is not intended to expand the universe of information that would otherwise be protected by Rule 1.6 as "confidential information."[10]

Section (c) goes on to state that when a lawyer takes protective action under (b), the lawyer is impliedly authorized under Rule 1.6(a) (2) to reveal information about the client, "but only to the extent reasonably necessary to protect the client's interests." Comment 8 reminds us that disclosing the client's diminished capacity could adversely affect the client's interests. For example, it notes that disclosure could lead to proceedings for involuntary commitment.

Although it is not clear from the comment, presumably the lawyer may in some cases conclude that involuntary commitment is in the client's best interest, notwithstanding the resulting loss of autonomy and possible reputational consequences. For example, if the client is at risk of substantial self-harm, the costs of involuntary commitment are likely to be outweighed by the benefits of commitment for the client's physical and psychological well-being. Moreover, commitment may spare the client from making statements or engaging in conduct that would have worse reputational effects than commitment. It appears, therefore, that the lawyer's responsibility is to weigh the various possible consequences and make the determination that yields a net positive result for the client. It might be helpful in these situations for the lawyer to imagine conversing with the client before loss of capacity and asking how he or she would like to proceed. Or, the lawyer may wish to imagine conversing with the client

10 Rule 1.6(a) defines "confidential information" as information gained during or relating to the representation of a client that is protected by privilege, that is likely to be embarrassing or detrimental to the client if disclosed, or that the client has asked be kept confidential. A lawyer's legal knowledge and research is exempted as is information generally known in the local community or field to which the information relates.

after capacity is regained and explaining, face-to-face, the actions taken by the lawyer.

One value of consulting with professionals (as opposed to friends or family of the client) is that aside from the added objectivity of arms-length consultation, the client's reputation is less likely to be impacted and the information more likely to be compartmentalized by professionals accustomed to dealing with such information. For example, it takes only one frantic relative who posts a "plea for help for my relative X who is suffering from mental problems" on a social networking site to leave a permanent record of X's plight (to be discovered later, perhaps, by a potential employer who Googles X), even though X may quickly recover and wish to put the episode behind himself permanently.

Two approaches that lawyers may employ to minimize information disclosure is using a hypothetical or keeping the client's identity anonymous (e.g., "If a person is manifesting the following types of behavior, should I be concerned?"). Of course, if the lawyer ultimately determines to seek appointment of a legal representative, the client's identity and reasons for concern would need to be disclosed to the necessary persons.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Conventional Relationship

N.Y.S. Bar Op. 775 (2004) ("When a possibly incapacitated former client asks a lawyer to return the former client's original will, the lawyer may communicate with the former client and others to ascertain the former client's condition and wishes").

N.Y.C. Bar Op. 1995-6 (lawyer who has successfully negotiated a settlement of a lawsuit on behalf of an incompetent client, received the settlement proceeds and holds those proceeds in a trust account, but who cannot release the proceeds to the client without delivering a general release to the defendant, should take steps necessary to obtain a valid release or equivalent measures).

N.Y.S. Bar Op. 648 (1993) (addresses the questions of whether a lawyer appointed law guardian in a child protective proceeding may represent (1) the child in a subsequent civil action seeking money damages from the parent/alleged abuser, and (2) the other parent).

Nassau County Bar Op. 89-20 (lawyers who learn that their client, a conservator for an incompetent individual, has breached his fiduciary relationship to that individual, may not reveal the violation to the court or others because of the lawyer's duty of confidentiality. Instead, the lawyer must call upon his client to remedy the situation and, if the client refuses, the lawyer must move to withdraw from representation.). [*Note*: This result might change under new Rule 3.3(a).]

Nassau County Bar Op. 87-29 (counsel for the seller in a pending real estate transaction may not also represent the seller's relatives in seeking to have the seller declared incompetent after the seller is involuntarily committed to a mental institution).

VI.2 Reasonably Necessary Protective Action

N.Y.S. Bar Op. 746 (2001) ("A lawyer serving as a client's attorney-in-fact may not petition for the appointment of a guardian without the client's consent unless the lawyer determines that the client is incapacitated; there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests; and there is no one else available to serve as petitioner. Subject to conflict of interest restrictions, if the lawyer petitions for the appointment of a guardian, the client does not oppose the petition, and the lawyer will not be a witness in a contested hearing, the lawyer may represent him- or herself in the proceeding.").

N.Y.C. Bar Op. 1997-2 (lawyer employed by a social services agency must generally preserve a minor client's confidential information relating to the abuse or mistreatment unless the client consents to disclosure. However, the lawyer may make disclosure without the minor client's consent if disclosure is required by law, necessary to protect the client from killing/maiming or being killed/maimed, or the client is unable to make a reasoned decision about whether to make disclosure and the lawyer concludes on analysis that disclosure would be in the client's best interest. Subject to limitations, the minor client may consent in advance to the lawyer's disclosure of information concerning abuse or mistreatment; that consent may later be revoked by the client.).

N.Y.C. Bar Op. 1987-7 (lawyer whose client is an alcoholic may seek to have a conservator appointed and may disclose confidential information in order to protect the client's interests).

N.Y.S. Bar Op. 486 (1978) (other guidelines when lawyer's client discloses an intent to commit suicide including permission to take appropriate preventative action such as disclosure of client's intentions).

VI.3 Implied Authorized Revelations

New York: N.Y.S. Bar Op. 496 (1978) (addresses whether the attorney for the guardian of an infant should disclose the guardian's unwillingness to comply with a court order directing the disposition of the infant's funds).

ABA:[11] ABA Formal Op. 07-448 (when a lawyer is appointed to represent a person who declines the representation, the person refusing representation is not entitled to expect of the lawyer the duties arising out of the client-lawyer relationship. In these circumstances, the lawyer's legal duties—if any—are defined by the order of the assigning tribunal, and the lawyer's ethical duties are limited to those a lawyer owes to tribunals or to persons other than a client.).

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11 American Bar Association Standing Committee on Ethics and Professional Responsibility. Copies of these opinions are available for downloading at www.abanet.org/cpr/pubs/ethicopinions.html, but there is a download charge for non-ABA members.

ABA Formal Op. 96-404 ("A lawyer who reasonably determines that his client has become incompetent to handle his own affairs may take protective action on behalf of the client, including petitioning for the appointment of a guardian. Withdrawal is appropriate only if it can be accomplished without prejudice to the client. The protective action should be the least restrictive under the circumstances… With proper disclosure to the court of the lawyer's self-interest, the lawyer may recommend or support the appointment of a guardian who the lawyer reasonably believes would be a fit guardian, even if the lawyer anticipates that the recommended guardian will hire the lawyer to handle the legal matters of the guardianship estate. However, a lawyer with a disabled client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client.").

ABA Informal Op. 89-1530 (lawyer may consult a client's physician concerning a medical condition that interferes with the client's ability to communicate or make decisions concerning the representation even without the client's consent).

VII. ANNOTATIONS OF CASES

VII.1 Diminished Capacity

Watson v. Menikoff, 19 Misc. 3d 1130A; 866 N.Y.S.2d 96, n.11 (Sup. Ct., Kings Cty. 2008) (citing former EC 7-12, law firm's failure to address conflicts between multiple clients in a real estate transaction was "particularly egregious" where one client's mental limitations "should have been apparent").

VII.2 Conventional Relationship

Scott L. v. Bruce N., 134 Misc. 2d 240; 509 N.Y.S.2d 971 (Fam. Ct. N.Y. Co. 1986.) (citing former EC 7-12 in holding that a child with a guardian ad litem had sufficient protection and therefore did not need a law guardian appointed).

VII.3 Reasonably Necessary Protective Action

New York: Estate of Theresa Macinnes, N.Y.L.J. 36 (Apr. 6, 2009) (citing new Rule 1.14(b) for the proposition that a lawyer may take protective action in certain cases).

Cheney v. Wells, 23 Misc. 3d 161, 877 N.Y.S.2s 605 (Surr. Ct. N.Y. Cty. 2008) (in approving lawyer's withdrawal from representation of a client, the court noted that numerous attorneys had withdrawn from representing the same client and that it was apparent to the court not only that the client was incapable of managing the litigation before the court but also that she was unable to appreciate the consequences of her own incapacity. The court found no ethical impediment to the attorney's bringing a limited

guardianship proceeding for the client, and to disclosing necessary information to the court in a proceeding under Mental Hygiene Law art. 81 as such a proceeding was the least restrictive alternative available, and the attorney was the only available person with significant knowledge to bring it. Further, the court order released the attorney from liability for disclosure under former DR 4-101(C)(2) (which is now Rule 1.6(b)(6).).

In re Amkia P., 179 Misc. 2d 387, 684 N.Y.S.2d 761 (Fam. Ct. Bronx Co. 1999) (law guardian for a ten-year-old child may attempt to persuade the court of a position that, in the law guardian's independent judgment, would best promote the child's interest, even if that position is contrary to the child's wishes. This is especially true where the child is afflicted with a chronic, debilitating, and life-threatening illness, and is even more true where that child appears to have little comprehension of the severity and complexity of her medical situation.).

Federal: Galu v. Attias, 923 F. Supp. 590 (S.D.N.Y. 1996) (citing Rule 1.14(b) in a case of alleged malpractice, the court held that where a criminal defense attorney reasonably believes the client may be incompetent, and the client admits her need for institutionalization, the lawyer's refusal to seek vacatur of a court-ordered competency exam is reasonable as a matter of law).

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Rule 1.15: Preserving Identity of Funds and Property of Others; Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping; Examination of Records

I. TEXT OF RULE 1.15[1]

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property. A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such

1 Executive Editor Wallace Larson, Jr., Cleary Gottlieb's Professional Responsibility Counsel.

funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

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

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.
A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

(vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

II. NYSBA COMMENTARY

[1] A lawyer should hold the funds and property of others using the care required of a professional fiduciary. Securities and other property should be kept in a safe deposit box,

except when some other form of safekeeping is warranted by special circumstances. All property that is The property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts, including an account established pursuant to the "Interest on Lawyer Accounts" law where appropriate. *See* State Finance Law § 97-v(4)(a); Judiciary Law § 497(2); 21 N.Y.C.R.R. § 7000.10. Separate trust accounts may be warranted or required when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b)(3) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which portion of the funds belongs to the lawyer.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold undisputed funds to coerce a client into accepting the lawyer's contention. Furthermore, the disputed portion of the funds must be kept in or transferred into a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. Notice to the client of the right to arbitrate fee disputes is required in some circumstances. The undisputed portion of the funds is to be distributed promptly.

[4] When in the course of representation a lawyer is in possession of funds in which two or more persons (other than the lawyer) claim interests, the funds should be kept separate by the lawyer until the dispute is resolved, by agreement of the parties or court order or commencement by the lawyer of an interpleader action and deposit of the property into court. The lawyer should distribute promptly all portions of the funds as to which the interests are not in dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

The title of Rule 1.15 is identical to former Disciplinary Rule 9-102.

Rule 1.15(a) is former DR 9-102(A) verbatim, including the section heading.

Rule 1.15(b) is identical in substance to former DR 9-102(B) with the following nonsubstantive changes:

- (b)(1) added 22 N.Y.C.R.R. to the Part 1300 references (and deleted "of the joint rules of the Appellate Divisions"; replaced two "he or she" references with "the lawyer"; changed a "which" to "that" and another "which" to "such", changed "the State of New York" to "New York State" and in the final sentence changed "which specifies" to "specifying."

- (b)(2) adjusted to the reference to DR 9-102 to Rule 1.5 and replaced "or" with a comma between the first two account title options.
- (b)(3) is verbatim as to former (B)(3).
- (b)(4) changed "presently" to "currently."

Rule 1.15(c) is identical to former DR 9-102(C), except that subsections (1)–(4) were formerly separate sentences with a period at the end but are now connected with semicolons and a period only at the end of (4).

Rule 1.15(d) made the same change to its subsections. Aside from additional renumbering, it is former DR 9-102(D) verbatim except for the following:

- (d)(1) replaced "which" with "that."
- (d)(1)(i) replaced "which" with "that."
- (d)(1)(viii) deleted the following phrase after "slips": "with respect to the special accounts specified in DR 9-102(B) and any other bank account which records the operations of the lawyer's practice of law."

Rule 1.15(e) is identical to former DR 9-102(E), except that "an attorney" became "a lawyer."

Rule 1.15(f) is identical to former DR 9-102(F).

Rule 1.15(g) is identical to former DR 9-102(G), except that (g)(1) adds a comma after "special account."

Rule 1.15(h) is identical to former DR 9-102(H) except that a comma is added after "maintenance" and "successor firm" and the following (which used to be the second sentence of this subsection) was deleted in the new rule: "In the absence of agreement on such arrangements, any partner or former partner or member of a firm in dissolution may apply to the Appellate Division in which the principal office of the law firm is located or its designee for direction and such direction shall be binding upon all partner, former partners or members."

Rule 1.15(i) is identical to former DR 9-102(I) except the "Rule" was "subdivision" and "attorney"-client privilege was "lawyer"-client privilege.

Rule 1.15(j) is identical to former DR 9-102(J) except "Disciplinary" was removed from the phrase "this Disciplinary Rule."

The only former Ethical Consideration of note was EC 9-6: "Separation of the funds of a client from those of the lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided." EC 9-6 was not included in the comments to the new rule.

III.2 ABA Model Rules

ABA Rule 1.15 is the closest analogue to New York Rule 1.15 in the ABA Model Rules, but is much shorter, as illustrated by its title:

> Rule 1.15 Safekeeping Property
>
> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.

> Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.
>
> (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.
>
> (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.
>
> (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
>
> (e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

The first sentence of ABA Rule 1.15(a) only commands separateness of accounts, whereas New York Rule 1.15(a) also prohibits misappropriation of such funds. The second sentence of ABA Rule 1.15(a) is a summary version of New York Rule 1.15(b)(1), as is the third sentence of ABA Rule 1.15(a) regarding "other property" a summary version of New York Rule 1.15(c). The fourth sentence of ABA Rule 1.15(a) requiring "complete records" preserved for "[five years]" (the brackets apparently denoting that five is a flexible time period), is a summary version of New York Rule 1.15(b)(2), (c)(2)–(3), and (d).

ABA Rule 1.15(b) permits a lawyer to deposit the lawyer's own funds for the "sole" purpose of paying bank charges "but only in an amount necessary for that purpose." New York Rule 1.15(b)(3), in contrast, permits "funds reasonably sufficient to maintain the account or to pay account charges" without the "sole" modifier of the ABA formulation.

ABA Rule 1.15(c) states that a lawyer should deposit into a client trust account "legal fees and expenses" paid in advance, to be withdrawn by the lawyer "only as fees are earned or expenses incurred." New York Rule 1.15(b)(4) states that: "Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved."

ABA Rule 1.15(d)'s first sentence, regarding a lawyer's duty to notify the client or third person of receipt of their property, is similar to New York Rule 1.15(c)(1). The second sentence of ABA Rule 1.15(d), regarding prompt delivery and, upon request, prompt accounting for such property, is similar to New York Rule 1.15(c)(3) and (4).

ABA Rule 1.15(e) is similar to New York Rule 1.15(b)(4) in addressing a lawyer's possession or property in which two or more parties claim an interest.

Comments 1-3 to both the ABA and New York versions of Rule 1.15 are substantially the same; here is the New York version of the comments marked to conform to the ABA version:

> [1] A lawyer should hold the ~~funds and~~ property of others using the care required of a professional fiduciary. Securities and other property should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts~~, including an account established pursuant to the "Interest on Lawyer Accounts" law where appropriate. See State Finance Law § 97-v(4)(a); Judiciary Law § 497(2); 21 N.Y.C.R.R. § 7000.10.~~ Separate trust accounts may be warranted ~~or required~~ when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.
>
> [2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b)~~(3)~~ provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which portion of the funds ~~belongs to~~ are the lawyer's.
>
> [3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold ~~undisputed~~ funds to coerce a client into accepting the lawyer's contention. ~~Furthermore,~~ the disputed portion of the funds must be kept in ~~or transferred into~~ a trust account~~,~~ and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. ~~Notice to the client of the right to arbitrate fee disputes is required in some circumstances~~. The undisputed portion of the funds ~~is to~~ shall be distributed promptly.

Comment 4 to the ABA rule addresses the same subject matter as New York Comment 4, but in substantially different language. It reads as follows:

> [4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Comment 5 to both rules is identical. The ABA Rule 1.15 includes a Comment 6 not adopted by the NYSBA for the New York Rule:

> [6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

IV. PRACTICE POINTERS

1. When you or your firm takes possession of someone else's property, you should keep such property separate from the property of yourself or your firm.
2. You may not "borrow" from a client's escrow account—not even for a minute and not even if you will be receiving a very high interest rate.
3. Know that this rule governs choice of banking institution, how you label accounts, how you pay charges on the accounts, and how you deal with property in dispute.
4. You are required to notify interested persons when you receive their property, to identify and label the property and place it in safekeeping, to keep complete records of it, and to deliver the property promptly upon request from its owner.
5. You must maintain various bookkeeping records listed in the Rule for seven years after the events they record; the Rule also governs when these records must be produced.
6. The rule regulates who can make withdrawals from accounts holding others' property.
7. The rule provides useful guidance on how to deal with money payable to a missing client, how to access the accounts maintained by a deceased lawyer, and how to deal with the dissolution of a law firm.
8. As a law practice or firm grows in number of lawyers and clients as well as property in its possession, the supervising lawyers should not allow billing practices and records to be an afterthought. There is a reason that large firms have departments comprised of bookkeepers, accountants, and billing personnel.

V. ANALYSIS

V.1 Purpose of Rule 1.15

New York Rule 1.15 is the same as former DR 9-102 with minor revisions and thereby remains a more detailed rule than ABA Rule 1.15.[2] After complaints of matter neglect and non-communication (which seem to be the most common source of client

2 *See* "Cross-References", section III, *supra.*, for a comparison of the language of the New York rule with both the predecessor and ABA rules.

disgruntlement), it is our impression that property mishandling is the most common source of complaints against lawyers.

This reality is not surprising when we pause to consider the lawyer-client relationship from the client's perspective. In the final analysis, a client wants to (1i) know that the lawyer is doing what the lawyer was hired to do, and (2) be comfortable that when it is necessary to entrust the lawyer with the client's property, that the lawyer will do right by the client. It is easy for a lawyer to allow various other pressures and goals to interfere with honoring these simple client desires (which are also ethical obligations pursuant to Rule 1.4 on communication and this Rule 1.15), but no matter how large the firm or how sophisticated the practice, we must endeavor to keep them foremost in our thoughts.

Although Rule 1.15 is one of the longest, and most detailed rules, lawyers can be grateful for guidance that is more detailed than the ABA Model Rule on the theory that specific language lessens guesswork.

In New York, the Lawyers' Fund for Client Protection has an Internet page with helpful links to various rules, regulations, and interpretations regarding lawyers' handling of client property (e.g., list of approved banking institutions, dishonored check notice rule, model down payment-escrow agreement, etc). The page is at http://www.nylawfund.org/esc.html.

V.2 Rule 1.15(a): What Does It Mean for the Lawyer to be a Fiduciary?

When this section states that a lawyer in possession of another person's property incident to law practice is a fiduciary, it is probably more descriptive than prescriptive. In other words, the lawyer in such circumstances would be considered a fiduciary whether or not this section said so. Likewise, the statement that the lawyer must not misappropriate or commingle property is more descriptive than prescriptive.

What does it mean to say that a lawyer is a fiduciary? In our view, it is to place lawyers within a wider group of persons (such as bankers, real estate agents, or executors) who because of their power vis-à-vis the clients they serve are by tradition and necessity expected and required to conduct themselves according to a higher standard than typical commercial dealings. One might observe that "fiduciary duty" generally includes a duty of loyalty, a duty of care, and a duty of confidentiality, although the contours and extent of each duty will vary in context (consider, for example, the extent of a company director's duty of confidentiality as opposed to the duty of confidentiality of the company's lawyer). Professor Stephen Gillers notes: that "Lawyers are, in fact, not garden-variety fiduciaries… . Some fiduciaries have higher obligations than other fiduciaries, and lawyers have among the highest."[3]

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3 Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 76 (8th ed. 2009). Gillers cites Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537 (2d Cir. 1994), and *In re* Cooperman, 633 N.E.2d 1069 (N.Y. 1994).

In short, to say that a lawyer is a fiduciary is more of a contextual statement than a specifically informative one—the Rules of Professional Conduct provide the specifics of lawyers' duties. The duty of loyalty, common to various types of fiduciaries, is tailored for lawyers in the Rules of Professional Conduct in the conflict rules Rule 1.7–1.12; the duty of confidentiality is manifested in Rules 1.6 and 1.18 and also reflected both explicitly and implicitly in the conflict rules. The duty of care is manifested in rules such as Rule 1.1 on competence, Rule 1.3 on diligence, and Rule 1.4 on communication.

But when subsection (a) of Rule 1.15 says that a lawyer is a fiduciary, it does not apparently mean to invoke the broad panoply of duties set forth in the Rules; rather, it is explaining why a lawyer must not misappropriate or commingle a third party's property—and perhaps invoking what the drafters understand to be the general obligations of fiduciaries in possession of others' property.

V.3 Rule 1.15(a): The Prohibition Against Commingling and Misappropriation of Client Funds or Property

[a] In General Leave it to lawyers to turn a friendly, social word such as "mingling" into a dreaded disciplinary violation. There is good reason: the mixing of our property with the property of our clients is the root of all kinds of unpleasantness. Of course, a "bad lawyer" will always find ways to be bad, but the lack of care evidenced by commingling can result in a lawyer's inadvertent misuse of client property, such as spending money that was not the lawyer's to spend in the first place. Subsection (b)(3) provides, reasonably, a commingling carve-out for the funds necessary to maintain the account or pay related fees.

The Rule seems simple in its brevity, until one stops to consider the question of who "owns" something. Take for example the client's file (a general term meaning different things in different jurisdictions but, as a general matter, the product of the lawyer's work on behalf of the client, such as final agreements or pleadings). The ethics committee of the New York State Bar Association has noted the ethics rules do "not provide guidance on which documents the client is entitled to receive as a matter of law." N.Y.S. Bar Op. 780 (2004). It did, however, observe "New York case law appears to recognize that both the client and the lawyer have an interest in the file." Id. In a footnote, the committee explained:

> In *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30, 37 (1997), the Court of Appeals observed that courts have "refused to recognize a property right of the attorney in the file superior to that of the client." The New York Supreme Court case cited in Sage for that proposition is *Bronx Jewish Boys v. Uniglobe, Inc.*:
>
> > Under New York law, an attorney has a general possessory retaining lien which allows an attorney to keep a client's file until his/her legal fee is paid. Implied in this is the rule that attorneys have no possessory rights in the client files other than to protect their fee. In other words, the file belongs to the client.

Bronx Jewish Boys v. Uniglobe, Inc., 166 Misc. 2d 347, 350, 633 N.Y.S.2d 711, 713 (Sup. Ct. 1995) (citation omitted; emphasis added). Although Bronx Jewish Boys held that the "file belongs to the client," the Court of Appeals in Sage observed that both the lawyer and client have an interest in the "client's" file.[4]

The Committee went on to conclude that when a lawyer's client requests that the file be returned, the lawyer may retain a copy of the file over the client's objection or, in the alternative, insist upon a release of malpractice liability as a condition of returning the file without retaining a copy. Related, intriguing questions emerge when a lawyer leaves one firm to join another. For a helpful overview of the various property issues, see Douglas R. Richmond, *Yours, Mine and Ours: Law Firm Property Disputes,* 30 N. Ill. L. Rev. 1 (2009).

Comment 1 states that securities "and other property" should be kept in a safe-deposit box, except when some other form of safekeeping is warranted by special circumstances. A prudent lawyer will avoid taking possession, and thus responsibility, for client property unless there is a good reason to do so. The larger the firm, the more resources proper administration and accounting will require, and such tasks are likely done more efficiently by other persons or institutions, such as banks.

A similar precaution is in order for lawyers asked to serve as escrow agents in matters where they represent a party. N.Y.C. Bar Op. 1986-5 concluded that a lawyer may represent a client in a transaction and act as escrow agent in the same transaction if all parties consent after full disclosure (and the escrow agreement should provide the means to resolve any conflict of interest and state that the lawyer may continue to represent her client in the event of a dispute over funds). However, the opinion noted that if a lawyer is put in the position of having to assert a lien on the escrowed funds on the client's behalf, the appearance of impropriety may be so great that the lawyer should resign as escrow agent.

Other than certain real estate transactions in which it is traditional for counsel to a party to hold a deposit in escrow pursuant to the transaction documents, it would seem preferable for a lawyer to point requesting parties to a bank rather than agreeing to act as escrow agent or to agree to hold collateral on behalf of a secured party in connection with a financing. Trust companies and other financial institutions ordinarily have well-developed procedures and infrastructure for drafting and tailoring the escrow agreement to the situation at hand, properly handling situations when disputes arise between parties about whether an escrow release event has occurred or misunderstandings happen about whether the funds must bear interest or how they otherwise should be invested, and for generally ensuring that the property is not misplaced or lost.

As a practical matter, the thorniest issues will arise from funds received by the lawyer. Take, for example, the amorphous concept of the "retainer," which is as generic as the "retainer agreement." To understand the ethical implications and constraints, one must inquire into the terms on which the payment is made to understand whose money it is when.

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4 *Id.* at n.1.

[b] Classic or General Retainer The terms "classic" or "general" are sometimes used to describe a payment made to a lawyer solely to ensure that the lawyer will be available on demand (and, perhaps, to be unavailable to others); pursuant to this kind of retainer, the client understands that the lawyer will additionally charge the client for any actual work performed. The arrangement might be compared to joining an eating club, where someone pays a membership fee but then also pays for each meal consumed at the club. One presumes that a lawyer will be able to accept a classic retainer only from a limited number of clients to ensure the lawyer will be available upon demand.

Classic retainers must be examined in the context of Rule 1.5(d)(4), which provides that a lawyer shall not "enter into an arrangement for, charge or collect a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated." The version of Rule 1.5(d) sent by the New York State Bar Association to the Justices of the Appellate Division did not include this provision, so it was clearly inserted by the courts, presumably to codify *In re Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (1994),[5] which upheld the discipline of attorney Cooperman for his use of "nonrefundable retainer fee agreements." One of the agreements used by Cooperman included the language that this "is the minimum fee no matter how much or how little work I do in this investigatory stage… and will remain the minimum fee and not refundable even if you decide prior to my completion of the investigation that you wish to discontinue the use of my services for any reason whatsoever." *Cooperman* 83 N.Y.2d at 470, 611 N.Y.S. at 466.

It remains to be seen how Rule 1.5(d)(4) will be interpreted, but our view is that neither *Cooperman* nor this provision intended to eliminate the classic retainer. The Court of Appeals in *Cooperman* noted that "Minimum fee arrangements and general retainers that provide for fees, not laden with the nonrefundability impediment irrespective of any services, will continue to be valid and not subject in and of themselves to professional discipline." 83 N.Y.2d at 476; 611 N.Y.S. at 470. However, to ensure that a classic retainer does not emit a nonrefundable odor, it should be clear the "service" being provided is availability, pure and simple. Moreover, based on Cooperman's experience, it is advisable that the term of availability be specified, so that if the client, for whatever reason, chooses to discharge the lawyer mid-stream, it will be clear what the lawyer has "earned," for example, 50 percent of the general retainer with the other 50 percent being returned to the client in accordance with Rule 1.16(e). That rule provides upon termination of a representation, the lawyer shall deliver to the client all property to which the client is entitled, including refunding "any part of a fee paid in advance that has not been earned."

Where does a lawyer in receipt of a classic retainer deposit the funds? Let us consider that question after examining the other recognized categories of retainers.

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5 This decision, although it does not cite it, may have been influenced by N.Y.S. Bar Op. 599 (1989), which concluded that (subject to narrow exceptions) it is improper for a fee agreement to include a nonrefundable fee minimum.

[c] Advance Fee Retainer N.Y.S. Bar Op. 570 (1985) considered the practice of a lawyer receiving from a new client "advance payment of legal fees expected to be earned in the course of the representation" where the lawyer agrees to return the fees not actually earned, in whole or in part, during the representation. One common reason for such an arrangement would be to give the lawyer a sense of confidence in being paid where a client's circumstances or credit history give pause. Another cited by the opinion is "so that [lawyers] will not be subject to a client's refusal to pay for legal services after they are rendered."

Opinion 570 concluded that "absent an agreement to treat an advance fee payment as client property," the advance fee is the lawyer's property and thus should not be placed in a client trust account. This conclusion was premised on the Committee's observation that the Code predecessor to Rule 1.15, DR 9-102(A), made no explicit reference to advance fee payments, while the Code predecessor to Rule 1.16(e), former DR 2-110(A), treated "fee advances and client property as different things." N.Y.S. Bar Op. 570 at 4. It also concluded that if the advance fee is the lawyer's property, then if any unearned portion needs to be refunded, that any interest earned on the advance payment would belong to the lawyer. Of course, if the lawyer agreed to treat an advance fee payment as client property, interest earned upon it would go to the client.

Opinion 570, by its own admission, "is contrary to the majority of opinions by other ethics committees that have addressed the issue, which would require that advance payments of legal fees be deposited in a client trust account and retained there until earned." It is worth considering whether any ethics committee has the authority to opine on a question of property law. The question, when posed that way, answers itself: ethics committees are generally empowered by their bar association charters only to interpret the rules of professional conduct in their jurisdiction. However, if the ethics committees are instead gap-filling for a common situation in which neither lawyer nor client is likely to have considered the question (and on which there is no applicable property law), and thereby interpreting (as in New York) the phrase "fee paid in advance that has not been earned" under Rule 1.16(e), the ethics committees might be seen to be helpfully filling a void.

In the final analysis, one might construe Opinion 570 as inviting the courts or legislature to step into this void and overrule the default "advance fees are the lawyer's" rule if they so desire. After all, the Committee cited no legal authority for its assertion that "[n]ormally, when one pays in advance for services to be rendered or property to be delivered, ownership of the funds passes upon payment, absent an express agreement that the payment be held in trust or escrow, and notwithstanding the payee's obligation to perform or to refund the payment." Perhaps the Committee was implicitly viewing the advance fees as collateral for payment, and that given the apparent requirement that every dollar fall into one bucket or another, it makes more sense to label them as belonging to the lawyer absent a third category or agreement to the contrary.

It is worth noting that we have heard a Chief Disciplinary Counsel for one of the Departments state definitively that advance fees should go in the law firm's account, and not the client's trust account, and that a best practice of large law firms is to keep advance fees in an "Advance Fee" account of the firm to ensure that the firm will always have sufficient monies to refund unearned portions. The latter is a "best practice" but is not required.

The State Bar ethics committee revisited Opinion 570 twenty-two years later in N.Y.S. Bar Op. 816 (2007). Opinion 816 noted that even though former DR 9-102, the Code predecessor to Rule 1.15, had been "substantially amended" in the intervening years, that "the standards delineated in N.Y.S. Bar Op. 570 for advance payment retainers are still valid today."

Opinion 816 did add that "[a]lthough the advance payment retainer is not client property, the client retains an interest in that portion of the retainer that is not yet earned by the lawyer." It also concluded that an attorney may request advance payment retainers for final fees that will accrue at the end of the matter, with interim fees billed out as performed. Finally, it noted that if the advance payment retainer is contingent on specific services' performance, these services must be described in the written agreement and, accordingly, if the services are not performed, that portion of the advance payment must be promptly returned.

[d] Security Retainer Other jurisdictions may recognize a third type of retainer called a "security retainer," "which is held by a lawyer to secure payment of fees for future services." NYCLA Bar Op. 690 (1992); see *In re McDonald Bros. Construction, Inc.*, 114 B.R. 989, 999 (N.D. Ill. 1990) (security retainer remains the property of the debtor-client until the attorney applies it to charges for services as rendered). That neither N.Y.S. Bar Op. 570 nor 816 referred to a "security retainer" may reflect the State Bar Committee's view (whether it consciously considered it or not) that a so-called security retainer is simply an advance fee retainer the lawyer and client have agreed will remain the client's property until the funds are applied to services actually rendered.

[e] Where to Deposit the Various Retainers It has been generally accepted in New York that a classic/general retainer is "earned upon receipt" and thus should be deposited in the lawyer's account, not the client's. N.Y.S. Bar Op. 816 (2007); NYCLA Bar Op. 690 (1992) (it "is entirely earned by the lawyer upon payment"). As mentioned above, *Cooperman* as codified in Rule 1.5(d)(4) now makes it advisable for a lawyer to make explicit the term of accessibility for which the client is paying. In this sense, the only distinction between a general retainer and an advance fee retainer is that a general retainer buys only the lawyer's availability, whereas an advance fee retainer buys specific services, although in both cases the client probably retains an interest in the unearned portion, which portion will be refundable if the engagement is terminated. Opinion 816 clarifies the lawyer and client may agree an advance fee retainer be treated as client property, which would therefore be deposited in the client's trust account until earned by the lawyer.

V.4 Rule 1.15(b): The Separate Account Requirement

Subsection (a) prohibits commingling; subsection (b) of Rule 1.15 naturally flows with specific instructions for how to avoid commingling funds through the use of separate accounts with related guidance.

Although the rule does not specifically reference an "IOLA" account, Comment 12 refers to "an account established pursuant to the 'Interest on Lawyer Accounts' law

where appropriate," and IOLA accounts are often discussed as synonymous with trust accounts. It behooves us, therefore, to explain what an IOLA account is. The answer requires a little background. Rule 1.15(b)(1) requires a lawyer to maintain funds belong to another person incident to the lawyer's practice of law in a "special account" separate from any personal or business accounts of the lawyer and separate also from accounts the lawyer may maintain as executor, guardian, trustee, receiver, or any other fiduciary capacity. Rule 1.15(b)(2) provides naming conventions for such accounts, a practical requirement that can spare much angst down the road when, for example, an attorney may otherwise lose track of to whom the funds belong. These accounts are sometimes called special accounts, attorney trust accounts, or attorney escrow accounts. For consistency's sake, we will call them "special accounts."

An IOLA account is a type of special account created by statute, namely New York Judiciary Law § 497. IOLA stands for "interest on lawyer account" and is an "unsegregated interest-bearing deposit account with a banking institution for the deposit by an attorney of qualified funds."[6] "Qualified funds" are moneys received by an attorney from a third party that are too small in amount to generate sufficient interest to justify the expense of administering a separate special account for such purpose.

State Finance Law § 97-v established in the custody of the state comptroller a fiduciary fund known as the New York IOLA fund. The fund is to be administered by a governor-appointed board of 15 trustees. This board has established that a deposit of client funds is "qualified" under section 497 if the escrow deposit would not generate $150 in interest. For example, if funds are expected to remain in the lawyer's possession for a year and the rate of interest is expected to be around 2 percent, a deposit of $7500 would be the threshold. Of course, if the time of possession and rate of expected interest are reduced, the triggering deposit amount would increase.

Banks that participate in the IOLA program remit the earned interest on the accounts (net of bank service charges and fees) to the IOLA state agency, whose trustees then distribute the revenue, in the form of grants, to legal aid organizations and projects that improve the administration of justice in New York.[7]

Subsection (b)(1) regulates the lawyer's options when in possession of another person's funds to (1) a New York banking institution that provides dishonored check reports or (2) a bank outside New York that provides such reports, provided the lawyer obtains the prior written approval of the person to whom the funds belong. "Dishonored check" is a polite way of referring to a bounced check. A list of approved banking institutions can be found at http://www.nylawfund.org/applist.pdf. Title 22 NYCRR 1300.1(b) states that a participating bank should file its agreement to provide bounced check reports with the Lawyers' Fund for Client Protection. Title 22 NYCRR 1300.1(c) explains that the bank must file a report with the Fund whenever a "properly payable instrument" is presented against an attorney's special, trust, or escrow account and the bank dishonors the instrument for reason of insufficient funds. 22 NYCRR 1300.1(e) provides that the actual dishonored check report should be mailed to the Fund within

6 N.Y. Judiciary Law § 497(1).

7 *Interest on Lawyer Account (IOLA) Program* (available at http://www.nylawfund.org/iola.pdf).

five banking days after the date of presentment against insufficient available funds. 22 NYCRR 1300.1(f) notes that the Fund will hold such a report for ten business days to enable the bank to withdraw the report if it was made in error, presumably to give the lawyer (who will be contacted as in any case of a bounced check) enough time to investigate and alert the bank if an error is suspected. The Rule notes that curing of the insufficiency by depositing additional funds is not a reason to withdraw a bounced check report. If ten days pass and the bank has no reason to withdraw the report, the Fund then forwards it to the applicable disciplinary committee (based on the law office address of the lawyer) "for such inquiry and action that attorney disciplinary committee deems appropriate." 22 NYCRR 1300.1(g).

Section (b)(2) requires that the separate account be labeled in such a manner as to make its status apparent on the face of the account and the associated checks and deposit slips. Although the first sentence of (b)(2) seems to require that one of three designations be used on each client account (namely "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account"), the second sentence seems to imply that there is wiggle room: "Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm." For example, if a special account were established for Janet Summerville with the title "Jane Doe, Esq. as Escrow Agent for Joseph Summerville," that would seem to convey effectively the nature of the account although not hewing to the letter of the law.

Subsection (b)(3) is intended as a safe harbor, or "carve out," from (a). It permits the lawyer to deposit the lawyer's own funds into the separate account to maintain the account or pay account charges. Without (b)(3), a lawyer would be faced with an intractable problem: from the strict fiduciary perspective reflected by (a), a lawyer should deposit only funds belonging to a client or third party in the lawyer's separate account. Banks charge a fee for maintaining these accounts, however, and insist on directly deducting the fee from the accounts. These deductions would constitute a "theft" of the client or third party's funds. Accordingly, Subdivision 3 allows a lawyer to deposit those amounts that are "reasonably sufficient" to cover the bank's fees. Presumably, banks have a mechanism for cooperating with lawyers to take advantage of (b)(3) and avoid technical violations. NYSBA Comment [2] to the Rule notes: "Accurate records must be kept regarding which portion of the funds belong to the lawyer."

Subsection (b)(4) addresses the sometimes troublesome issue of withdrawals from a separate account to pay a lawyer's fees. It allows the lawyer to withdraw the portion of the funds belonging to the lawyer unless that amount is disputed. In the event of a disagreement, "the disputed portion shall not be withdrawn until the dispute is finally resolved." Adherence to this proscription is often difficult for a lawyer. When a fee dispute arises, it is not at all uncommon for the attorney-client relationship to disintegrate into acrimonious exchanges. The lawyer will frequently feel cheated and betrayed by the client. In the lawyer's eyes, the client received the benefit of the bargain he or she struck (i.e., the lawyer delivered the agreed-upon legal services in connection with a litigation or a transaction), and now the client is reneging on the deal.

No matter how wrong the client might be, (b)(4) is crystal clear: the lawyer may not withdraw the disputed portion of the fee until the dispute is finally resolved. "Disputed" presumably does not require the filing of a claim or notice of arbitration, and includes a simple assertion by the client that the lawyer does not or cannot rebut or explain to the client's satisfaction. NYSBA Comment [4] notes that a dispute between two or more persons other than the lawyer may be resolved "by agreements of the parties or court order or commencement by the lawyer of an interpleader action and deposit of the property into court."

NYSBA Comment [5] reminds lawyers that the obligations of Rule 1.15, including (b)(4), are independent of arising from the provision of non-legal services. A lawyer serving only as escrow agent is governed by applicable fiduciary law even if Rule 1.15 does not apply.

V.5 Rule 1.15(c): Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property

Subsection (c) is a common-sense approach to the question of how a lawyer should handle clients' property, and is the answer most laypeople would come up with if they thought about it.

Subsection (c) consists of four provisions. Subdivisions (1) and (4) set forth a lawyer's obligations of notification and payment with respect to a client or third person. Subdivisions (2) and (3) concern a lawyer's "housekeeping" responsibilities to identify the property of a client or third person and maintain complete records of the property. All four subdivisions are straightforward and easy to comply with.

Subsection (c)(1) requires the lawyer promptly notify a client or third person of receipt of funds, securities, and other property in which the client or third person has an interest. A lawyer might develop a set of standard e-mails or letters that can be used for the purpose of notification. Office procedures should be implemented to ensure that the appropriate notice is sent as close to the time of receipt as possible. Noncompliance would mean that the clients or third person have received property with which they may wish to do a variety of things, but they are unable to do so for lack of simple notice.

In the same vein, subsection (c)(4) requires prompt payment to the client or third person upon request. Here too, compliance can be accomplished through the use of standard e-mails, letters, and office procedures. A lawyer should exercise care, however, before releasing the funds, securities, or other property. If a lawyer knowingly disregards the liens or security interests of a third person, that person may have a valid cause of action for malpractice or breach of fiduciary duty; E.g., *Leon v. Martinez*, 84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994). If the lawyer is uncertain about the enforceability of the third person's interest or the client disputes the interest, the lawyer may not pay out the disputed amount until the claim is resolved or, alternatively, the lawyer may commence an interpleader action. N.Y.S. Bar Op. 717 (1999).

Subsections (c)(1) and (c)(4) each use terms requiring a legal conclusion, namely when a client or third person "has an interest" in property, and when the client or

third person "is entitled to receive" property. In most cases, the lawyer's conclusion will not require legal research, but there may be close cases requiring further investigation.

There may be circumstances in which a client under (c)(4) (and similarly, Rule 1.16(d)(4)) asks for the return of files. One question that might arise is whether the lawyer may retain a copy even if the client objects. N.Y.S. Bar Op. 780 (2004) noted that "New York case law appears to recognize that both the client and the lawyer have an interest in the file" in finding that it is generally proper for a lawyer to retain copies of a client's file at the lawyer's own expense and to require a release of malpractice liability as a condition of returning the file without retaining copies.

Another question that might arise is whether the lawyer must supply a copy of the "file" to the client if the client has not yet paid for the lawyer's services. Rule 1.8(h)(2)(i)(1) permits a lawyer to "acquire a lien authorized by law to secure the lawyer's fee or expenses." See also N.Y.S. Bar Op. 567 (1984) (lawyer holding funds under retaining lien not required to sue client to resolve fee dispute if proceeding in good faith); *Hae Sook Moon v. New York City*, 255 A.D.2d 292, 679 N.Y.S.2d 648 (2d Dept. 1998) (counsel who withdraws from case without good cause "automatically" forfeits the right to assert a retaining lien). NYCLA Bar Op. 718 (1996) noted that N.Y. Judiciary Law Sec. 475 is the course of an attorney's "charging lien" (a lien on the proceeds of a judgment) whereas a retaining lien (a claim on a client's property that comes into the lawyer's possession during employment) exists under New York common law (citing *In re Cooper*, 291 N.Y. 255 (1943). Because (c)(4) qualifies the lawyer's obligation to where the client "is entitled to receive" the same, it would seem, as a matter of ethics, that if the retaining lien is legally recognized, that the firm is ethically permitted to decline to provide a copy of the file. However, if for example, a court were to determine that the urgency of the situation overrides the policy of upholding the attorney's lien, then the client would be "entitled" to receive the files in question.

Subsections (c)(2) and (c)(3) are critical to the protection of the funds, securities, or other property belonging to a client or person that come into a lawyer's possession, but they are also simple. They require that the lawyer "identify and label securities and properties of the client or a third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable" and "maintain complete records of all funds, securities, or properties… and render appropriate accounts to the client or third person regarding them." Compliance requires common-sense office procedures that competent lawyers would implement even if they were not ethically mandated. However, these requirements are a reminder that law practice, even by a solo practitioner, will require a level of office infrastructure and time spent on non-legal practice. No matter how qualified the lawyer or glamorous the practice, at the end of the day clients will quickly forget the quality of the lawyer's services if the client's property cannot be found or accounted for.

V.6 Rule 1.15(d): Record Retention Generally Rule 1.15(d)(1) provides a lawyer should retain various documents relating to billing and client property for seven years after the events they record. It is a common perception among lawyers that (d)(1)

applies to the "client file"[8] generally, but the Rules are silent regarding how long the client's file should be retained. Such lawyers' perception is not unreasonable, given that another state bar ethics committee used its own Rule 1.15 retention period for billing records as a yardstick for file retention generally. See Arizona Opinion 08-02. Specifically, it said:

> Indefinite file retention for probate or estate matters, homicide cases, life sentence cases and lifetime probation cases is appropriate. File retention of five years for most other matters is appropriate. An appropriate period of retention will vary depending upon the lawyer's judgment of the client's reasonable need for the file materials. This judgment should include consideration of applicable statutes of limitations, the length of the client's sentence or probation, and the uses by the former client of the material.

Id. (quoting Arizona Opinion 98-07). Other states have resisted suggesting or providing such a period, perhaps because of the factors cited by Arizona and other unforeseen circumstances that might arise.

So long as paper has been the predominant medium for file storage and warehouse storage/retrieval cost and inconvenience have been the primary considerations, lawyers have tended to focus on the question "how soon can I destroy?" But as electronic storage increasingly becomes the norm and continues to decrease in cost as memory grows cheaper, lawyers may find themselves focusing on a different question: "what is in our best interest and the client's best interest?"

In our view, it can be in the interest of both lawyer and client for the file to be "cleaned" upon the closing of the matter. "Cleaned" means that the file is culled so that significant documents such as signed agreements in a commercial context or filed pleadings in a litigation context are organized and indexed while insignificant correspondence, drafts, and informal notes are destroyed. Handwritten does not necessarily mean "informal." A rule of thumb might be: if the clients were to later ask a lawyer to represent them in a similar matter and follow the same approach you did, would the file you pass on to them enable the new counsel simply and easily to grasp what you did? There is an art to this judgment, because too many documents will make it messy and time-consuming, and too few documents will leave a silent record, but if lawyers put themselves in the shoes of the successor counsel, they will generally get this right.

There is a school of thought that says a lawyer should retain all documents relating to a matter—period—because if the lawyer and/or client is ever sued on the basis of such documents, it will be much easier to mount a defense if the lawyer has the documents at hand. This applies especially to external e-mails, because even if the lawyer destroys them, the sender may preserve them. The lawyer might consider this before cleaning the file or destroying it completely. Of course, there are legal requirements that a lawyer preserve documents when litigation can be reasonably anticipated, so we are speaking only of file retention in other circumstances.

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8 For a discussion of what constitutes the "client's file" in New York (versus which documents belong solely to the law firm), *see* Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, 689 N.E.2d 879 (N.Y. 1977).

V.7 Rule 1.15(d): Required Bookkeeping Records

The Lawyers' Fund for Client Protection has published written materials and produced a video to assist lawyers in maintaining the required books and records. Law firms should consult these resources to benchmark the firms' current practices and procedures.

Subsection (d)(1) lists eight specific items to be retained for the specified seven years. Lawyers probably do not pay enough attention to (d)(iii) regarding retention of copies of retainer and compensation agreements. Although large firms tend to put a great deal of time into drafting their forms of engagement letters, it pays to have a well-developed electronic system of storing such letters (in their final, signed form) not only to memorialize fee arrangements but also other issues that firms address in engagement letters, such as who the client is (and is not), advance conflict-of-interest waivers, and how files will be dealt with. Moreover, some large companies deliver their own "outside counsel policies" with the types of information that might fall under the retainer/compensation agreement category. Ideally, all such documents would be saved centrally in electronic form so that if a question arises, any senior lawyer serving that client can access the information. For example, if a conflict question arises, the answer may depend on (1) how applicable engagement letters or outside counsel policies define a conflict, and (2) whether the "client" is defined to include subsidiaries or affiliates of the parent company. If the agreement resides only in paper form in a warehouse box, no matter how effectively it was drafted and negotiated, it will be of little use when another client is waiting expectantly and impatiently to hear whether you have a conflict issue.

Subsection (d)(vi) requires that copies be retained of all records showing payments to persons "not in the lawyer's regular employ" for services rendered or performed. One might assume that these payments are restricted to ones that (1) were made in the course of a client representation, and (2) were charged to the client, although a firm would likely have its own reasons for keeping records relating to (x) payments made to persons on a contract basis for office-general type work and (y) payments made to persons in the course of a client representation that the firm ultimately determined not to charge to the client. Subsection (d)(2)'s sweeping "all financial transactions" recordkeeping requirement might point toward a more inclusive construction of (d)(vi) (see below).

With one exception, nothing in subsection (d) prevents lawyers from electronically storing the records they are required to keep. Subdivision (d)(3) provides that a lawyer may satisfy the requirement of maintaining "copies" by, inter alia, selecting "any medium that preserves an image of the document that cannot be altered without detection." Thus, in selecting an electronic storage system, a lawyer must make careful inquiry to ensure that both requirements are met. The records must be preserved in their entirety, and any alteration must be detectable. See generally N.Y.S. Bar Op. 680 (1996).

The one exception is (d)(viii), relating to checkbooks, check stubs, bank statements, prenumbered canceled checks, and duplicate deposit slips. According to N.Y.S. Bar Op. 680 (1996), electronically stored copies are forbidden and a lawyer must maintain

the originals of these records in paper form. N.Y.S. Bar Op. 680 did not address the possibility that checkbooks, etc, might originate in electronic form, but it did note that the requirements regarding records and books of account (Rule 1.15(d)(1)(i), (ii), and (d)(2)) do not mandate that these records "be made in the first instance on paper as distinguished from in the form of electronic data entry." The Committee concluded that "any such records that are created in electronic form may be retained in that form. Records described by these provisions that are created by entries on paper books of account, ledgers, or other such tangible items, however, should be retained in their original form."

One might have predicted that if the Committee were to consider the evolution of banking technology and practices, it would apply a similar principle to (d)(viii) if checkbooks, check stubs, bank statements, or prenumbered canceled checks become electronic in nature so that if they originate as an electronic document, they need to be reduced to paper but may be stored electronically. Such a prognosticator was proven correct when the Committee issued N.Y.S. Bar Op. 758 (2002), concluding the lawyer should "retain the listed items in their original form, be it paper or electronic." The Committee went on to say that if the items are returned to the lawyer in paper form in the ordinary course of business, the lawyer should retain them in paper form, but that a lawyer "is not required to undertake extraordinary effort or incur extra expense to obtain these items in paper form."

Subsection (d)(2) requires lawyers to "make accurate entries of all financial transactions" because inaccuracy would defeat the purpose of keeping records. Presumably the rule permits a lawyer to hire nonlawyers (bookkeepers, accountants, and billing personnel) who will be the ones to actually make such entries under the supervision of the lawyer. This subsection, under the old Code regime, was lumped under the list of things a lawyer must maintain for seven years, which did not really make sense because it is not an item requirement per se but rather an accuracy requirement that applies to the various items. So it is a drafting improvement that this provision is now a separate subsection vis-à-vis (d)(1).[9]

What is less clear is why (d)(2) applies an accuracy requirement to all the lawyer's records of financial transactions, but (d)(1) only applies a retention requirement to the items specified thereunder. The general theme of (d)(1) is documentation of financial transactions relating to client representations, although a law practice may also have financial transactions such as payments to vendors, salaries, bank loans, or letters of credit that do not implicate clients of the firm. In short, there may be an ambiguity as to whether records of financial transactions involving non-clients must be preserved for seven years, but the conservative approach would be to retain all firm financial records for seven years whether relating to client work or not.

Subsection (e) sets forth three requirements that must be met before a lawyer releases funds from a special account. First, the withdrawal must be made to a named payee and not payable to "cash." This seems intended to provide accountability. Second, the

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9 COSAC's proposal to the courts continued to lump this as an "item." So the courts deserve credit for catching this and fixing it in the rules promulgated on April 1, 2009. *See Proposed Rules of Professional Conduct*, Albany, New York (Feb. 1, 2008) (NYSBA).

withdrawal must be made by a check only unless the payee has previously given permission for a transfer of the funds by wire. Consequently, payment by cash or money order is prohibited. Third, only a lawyer admitted to practice in New York may be an authorized signatory for a trust account. A lawyer will not violate this last prohibition by permitting an employee to use a stamp bearing the lawyer's signature to execute checks drawn on a client escrow account. N.Y.S. Bar Op. 693 (1997). However, the lawyer must exercise caution in selecting and diligence in supervising the employee because the lawyer remains ultimately responsible for complying with (e). See also Rule 5.3 regarding a lawyer's responsibility for conduct of nonlawyers.

Subsection (f) deals with the possibility that the client may disappear in the middle of the representation. Missing clients can be major headache for a lawyer, especially if the lawyer is holding property that belongs to the client or a settlement payment out of which the lawyer's fees are to be paid. The key to the ethical disbursement of these funds is the approval of a court. Subsection (f) directs a lawyer who cannot locate a client "to apply to the court in which the action was pending if in a unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law. . . ." The court will direct the payment of the lawyer's fees and any disbursements owed by the client and order any remaining funds to be transferred to the Lawyer's Fund for Client Protection for safeguarding and disbursement to the persons entitled to them. Under no circumstances may the lawyer sua sponte compute the amount of the fees and disbursements that the lawyer is owed and deduct that sum from the funds that the lawyer is holding. Such conduct clearly violates subdivision (f) and subjects the lawyer to sanction. A sample form of pleadings for use in New York County is provided in Volume 2.[10]

Of course, a missing client poses other challenges as well, but those challenges are not directly addressed by the New York Rules of Professional Conduct. For example, how does a lawyer comport with his or her duties of diligence (Rule 1.3) and communication (Rule 1.4) if the client cannot be found?

Other jurisdictions have found that a lawyer in these situations must make a reasonable effort (such as sending a letter to the last known address) to locate the missing client before proceeding as if the client is indeed "missing." See Louisiana Opinion 05-RPCC_001; Ohio Opinion 2005-10; South Carolina Opinion 98-07. Once the lawyer has confirmed the client's missing status, what (if anything) the lawyer can or should do will depend on the circumstances. For example, N.Y.S. Bar Op. 787 (2005) concluded a lawyer who jointly represents a wife in a personal injury claim and her missing husband in a derivative loss of consortium claim may not settle the wife's claim and thereby lose the husband's claim without his consent, so that if the husband cannot be found, the lawyer must withdraw from both representations. See Illinois Opinion 03-04 (lawyer hired by foreign client now missing should not file suit even if

10 The form is not tailored to every set of facts, and we neither certify its compliance with applicable rules and law nor undertake to update the form based upon changes of rule or law. The form is intended only as a helpful starting point for a lawyer seeking to proceed based on Rule 1.15(e).

limitations period ends imminently because the client is not able to make an informed decision under Rule 1.4). Alaska's ethics committee noted that its version of Rule 1.3 requires a lawyer to file suit on behalf of a missing client if the limitation period is about to expire, the client had implied authorization earlier, and withdrawal would not be appropriate. Alaska Opinion 2004-3.

Subsection (g) addresses the designation of successor signatories because, on occasion, only one lawyer may be designated as the authorized signatory on an attorney trust, escrow, or special account. Upon that lawyer's death, the funds are effectively "frozen" because no other lawyer possesses the right to disburse them. Subsection (g) creates a procedure that allows specified individuals to apply to a court for an order designating a successor signatory. The application must be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. In a procedure resembling that set forth in (f), the court is charged with the responsibility of ordering the disbursement of the funds to the persons entitled to them. Any remaining funds are to be transferred to the Lawyers' Fund for Client Protection for safeguarding and disbursement to the persons entitled to them.

Ideally clients would not be left fending for themselves in the wake of their lawyer's passing, but the fact lawyers may not charge for assisting with the application may make the client's process of finding assistance more difficult. Therefore, the New York State Bar Association has a helpful guide for solo practitioners, available for free downloading online, called "Planning Ahead: A Guide for Solo Practitioners."[11] The guide notes that a threshold question for a sole practitioner seeking to plan ahead for the event of the lawyer's passing is whether to appoint a cosignatory in advance or to grant access to the account at a specified future event, and includes proposed forms for various approaches.

Subsection (h) moves us from death to dissolution. The dissolution of a law firm is often marked by rancor and disagreement among the dissolving firm's partners. In the accompanying maelstrom, the protection of clients' interests and property (and even the lawyers' own ethical obligations) may fall to the wayside. Subsection (h) mandates, therefore, that the partners make "appropriate arrangements by one of them or by a successor law firm" for the maintenance of the records specified in (d). In the event that the partners cannot agree, (h) authorizes a partner, former partner, or member of a firm in dissolution to apply to the Appellate Division in which the principal office of the firm is located or its designee for direction, which direction is binding. Although (h) addresses the question of records in the wake of a firm's dissolution, it does not purport to address the panoply of resultant issues.

Subsection (i) deals with the availability of financial records. In light of the importance earlier subsections place on keeping financial records, it is not surprising subsection (i) aims to ensure those records are available for inspection by bar counsel. It mandates the production of the "financial records required by this Rule" upon receipt

11 It is available, along with related forms, at http://www.nysba.org/Content/NavigationMenu/Publications/ForSolosPlanningAheadGuide/Planning_Ahead_Guide.htm. *Planning Ahead: A Guide for Solo Practitioners* 4–5, New York State Bar Association (2005).

of a notice or subpoena duces tecum issued in connection with a disciplinary investigation or proceeding. Subsection (i) also affirms the confidentiality of the books and records produced and prohibits their disclosure in violation of the attorney-client privilege; the sole exception is disclosure made "for the purpose of the particular proceeding." If the records are privileged, once they are disclosed to the bar committee the privilege might be lost because the documents are being disclosed to a non-privileged party.

Subsection (j) provides that a lawyer who fails to maintain and keep the mandated accounts and records or who does not produce them when required to do so "shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings." The absence of harm to a client or third person is apparently irrelevant. One wonders whether, as a matter of drafting, subsection (j) was truly necessary, given that most rules do not have a (j)-equivalent (it is simply understood, for example, that violation of the rules on confidentiality or diligence will subject a lawyer to disciplinary proceedings). It might simply exist as a matter of emphasis and clarity.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 What Does It Mean for the Lawyer to be a Fiduciary?

N.Y.S. Bar Op 769 (2003) (transaction between a client in a personal injury case and a litigation financing company may trigger a lawyer's duties under former DR 9-102).

VI.2 Prohibition Against Commingling and Misappropriation of Client Funds or Property

N.Y.S. Bar Op. 819 (2007) (court may direct a lawyer, and the lawyer would be required in the absence of an overriding contractual arrangement, to refund to the client amounts previously paid by the client that the lawyer receives from the adverse party in satisfaction of an award made in accordance with NY Domestic Relations Law § 237).

N.Y.S. Bar Op. 766 (2003) (former client and/or successor counsel is presumptively entitled to access to all attorney files. Opinion 766 overruled N.Y.S. Bar Op. 398 (1975).

N.Y.S. Bar Op. 710 (1998) (lawyer who serves as an escrow agent may only release funds to the client in conformity with the terms of the agreement).

NYCLA Bar Op. 690 (1992) (analyzing a lawyer's ethical obligations under former DR 9-102 with respect to credit card payments made by a client as an initial retainer payment and thereafter for the monthly payments of legal fees).

Nassau County Bar Op. 90-27 (analyzing the obligations of a law firm to turn over the files of clients who desire the continued representation of a lawyer who is leaving the firm).

VI.3 Advance Payment Retainer

N.Y.S. Bar Op. 816 (2007) (lawyer may ethically accept an "advance payment retainer," place such funds in the lawyer's own account, and retain the interest earned thereon. A lawyer may also request an advance payment retainer for final fees that accrue at the very end of the relationship, with interim fees billed out as the work is performed.).

VI.4 Separate Account Requirement

N.Y.S. Bar Op. 759 (2002) (lawyer may use an ATM to make a deposit into a special account but not make withdrawals).

N.Y.C. Bar Op. 2002-2 (2002) (analyzing the duty of a lawyer to pay interest on client funds deposited in an interest-bearing account where the retainer agreement does not require the attorney to pay interest to the client).

N.Y.S. Bar Op. 737 (2001) (lawyer may not issue a check from an attorney escrow account drawn against a bank or certified check that has not been deposited or has not cleared).

NYCLA Bar Op. 690 (1992) (analyzing a lawyer's ethical obligations under former DR 9-102 with respect to credit card payments made by a client as an initial retainer payment and thereafter for the monthly payments of legal fees).

Monroe County Bar Op. 86-1 (1986) (concludes to the effect of Rule 1.15(b)(4) (lawyer must maintain disputed funds until dispute is resolved) and Rule 1.15(c) (lawyer must promptly pay what client is entitled to receive) and notes that an attorney must be zealous in efforts to avoid a dispute with the client or to settle it amicably. The opinion concludes that whether an attorney has a right to assert a lien against a client's fund is a legal, not ethical question.).[12]

V1.5 Notification of Receipt of Property, Safekeeping; Rendering Accounts; Payment or Delivery of Property

N.Y.S. Bar Op. 780 (2004) (lawyer may retain copies of a client's file over the client's objection and may demand a release from liability as a condition of not retaining copies).

N.Y.S. Bar Op. 759 (2002) (lawyer may use an ATM to make a deposit into a special account but not make withdrawals).

N.Y.S. Bar Op. 737 (2001) (lawyer may not issue a check from an attorney escrow account drawn against a bank or certified check that has not been deposited or has not cleared).

N.Y.S. Bar Op. 717 (1999) (analyzing a lawyer's ethical obligations in releasing funds from a settlement check where the proceeds are or may be subject to a valid lien

12 Based on the digest in ABA/BNA Lawyers' Manual on Professional Conduct.

and discussing how to proceed if a provider with a valid lien is no longer in business).

N.Y.C. Bar Op. 1995-5 (analyzing how a lawyer should proceed if the lawyer cannot release settlement funds because the client, who is incompetent, cannot give a general release).

Nassau County Bar Op. 92-32 (1992) (former DR 9-101 applies to "funds, securities, or other properties in the possession of the lawyer," but does not speak to "information").

Nassau County Bar Op. 92-28 (1992) (analyzing how a lawyer should dispose of funds held on behalf of a defunct collection agency).

Nassau County Bar Op. 90-28 (analyzing the circumstances under which a lawyer may assert a retaining lien. See also Nassau County Bar Op. 91-1).

Nassau County Bar Op. 90-15 (1990) (lawyer may not provide the originals of documents to an adversary after the lawyer has withdrawn from representing the client, even though the lawyer had previously provided photocopies of the documents during the course of the representation).

NYCLA Bar Op. 678 (1990) (analyzing the circumstances under which a lawyer may assert a retaining lien).

Monroe County Bar Op. 86-1 (1986) (concludes to the effect of Rule 1.15(b)(4) (lawyer must maintain disputed funds until dispute is resolved) and Rule 1.15(c) (lawyer must promptly pay what client is entitled to receive) and notes that an attorney must be zealous in efforts to avoid a dispute with the client or to settle it amicably. The opinion concludes that whether an attorney has a right to assert a lien against a client's fund is a legal, not ethical question).[13]

VI.6 Record Retention Generally

N.Y.C. Bar Op. 2008-1 (lawyer is not required to organize or store electronic documents or e-mails in any particular medium).

Nassau County Bar Op. (2006-02) (analyzing the circumstances under which an attorney may charge each client a one-time fee for the continued storage of files after closing the client's matter).

N.Y.S. Bar Op. 780 (2004) (lawyer may retain copies of a client's file over the client's objection and may demand a release from liability as a condition of not retaining copies).

N.Y.S. Bar Op. 758 (2002) (items listed in former DR 9-102(D)(8) should be maintained in their original form. A lawyer is not required to take extraordinary effort or incur extra expense to obtain paper copies of these items if their original form is electronic.).

NYCLA Bar Op. 725 (1998) (analyzing a lawyer's ethical obligations with respect to discarding closed files).

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13 *Id*.

N.Y.S. Bar Op. 680 (1996) (analyzing the kinds of records that may be stored electronically and those that must be kept in their original form).

N.Y.C. Bar Op. 1995-5 (analyzing how a lawyer should proceed if the lawyer cannot release settlement funds because the client, who is incompetent, cannot give a general release).

N.Y.S. Bar Op. 623 (1991) (analyzing the procedures a law firm should follow to dispose of closed files and the partners' ethical obligations upon the firm's dissolution).

VI.7 Required Bookkeeping Records

New York: N.Y.C. Bar Op. 2008-1 (2008) (lawyer is not required to organize or store electronic documents or e-mails in any particular medium).

Nassau County Bar Op. 2006-02 (2006) (analyzing the circumstances under which an attorney may charge each client a one-time fee for the continued storage of files after closing the client's matter).

N.Y.S. Bar Op. 760 (2003) (lawyer may obtain and use a revocable power of attorney that authorizes the lawyer to endorse the client's name to a settlement check subject to certain conditions, including compliance with former DR 9-102).

NYCLA Bar Op. 725 (1998) (analyzing a lawyer's ethical obligations with respect to discarding closed files).

N.Y.S. Bar Op. 693 (1997) (under specified circumstances, a lawyer may permit a paralegal to use a stamp bearing the lawyer's signature to execute checks drawn on a client escrow account).

Nassau County Bar Op. 94-22 (1994) (analyzing how a lawyer should dispose of funds belonging to a missing client).

N.Y.S. Bar Op. 623 (1991) (analyzing the procedures a law firm should follow to dispose of closed files and the partners' ethical obligations upon the firm's dissolution).

ABA[14] ABA Formal Op. 02-427 (lawyer may acquire a contractual security interest in a client's property to secure the payment of fees earned or to be earned, provided the lawyer complies with Model Rule 1.8 (transaction with client). A lawyer may acquire a security interest in the subject matter of litigation in which the lawyer represents the client provided the acquisition of that interest is authorized by law (as required by Model Rule 1.8).).

ABA Formal Op. 99-414 (when a lawyer changes firms, applicable client files and property must be retained or transferred per the client's direction (and pending client instructions) must be held in accordance with Model Rule 1.15).

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14 American Bar Association Standing Committee on Ethics and Professional Responsibility. Copies of these opinions are available for downloading at www.abanet.org/cpr/pubs/ethicopinions.html, but there is a download charge for non-ABA members.

ABA Formal Op. 92-369 (provides guidance about the disposition of a deceased sole practitioner's client files and property).

Other Jurisdictions District of Columbia Bar Op. 293 (2000) ("just claim" that a lawyer must honor under Rule 1.15 is one relating to specific funds in the lawyer's possession as opposed to the client's general unsecured obligations).

New Jersey Bar Op. 701 (2006) (lawyer may digitize and retain in electronic format copies of client documents except for wills, deeds, and other documents that by their nature must be retained in original form).

VII. ANNOTATIONS OF CASES

VII.1 What Does It Mean for the Lawyer to be a Fiduciary?

New York: In re The Law Firm of Wilens & Baker, 9 A.D.3d 213, 777 N.Y.S.2d 116 (1st Dept. 2004) (publicly disciplining a law firm and a lawyer for, inter alia, violating former DR 9-102).

Federal: Bernstein v. New York, 2007 WL 438169 (E.D.N.Y. Feb. 9, 2007) (discussing the doctrines of claim preclusion and Rooker-Feldman in the context of an action for a declaratory judgment filed by a lawyer who was disbarred for violating former DR 9-102).

VII.2 Prohibition Against Commingling and Misappropriation of Client Funds or Property

Levin & Glasser, P.C. v. Kenmore Property, LLC 896 N.Y.S.2d 311 (A.D., 1st Dept. 2010) (law firm was not entitled to withhold its legal fee that was in dispute from the client's escrow account

In re Posner, 73 A.D.3d 68, 894 N.Y.S.2d 761 (2010) (attorney breached his fiduciary duty regarding the maintenance of client escrow funds and made misrepresentations to a tribunal in connection with pending litigation).

In re Sossner, 72 A.D.3d 1268, 897 N.Y.S.2d 658, 659 (3d Dept. 2010) (attorney converted funds in a escrow account and failed to comply with the registration requirements timely).

Mendelsohn v, Farber, 887 N.Y.S.2d 494 (Sup. Ct. 2009) (plaintiff lawyer alleged that retained fees paid to her former law firm by her clients were not exhausted at the time she was hired to represent the clients and that the former law firm's refusal to transfer the money to her from the retained fees was a misappropriation of money received incident to the practice of law under Rule 1.15(a). The court found that since the retainer agreements were made between the clients and the lawyer's former firm, the lawyer was not the intended beneficiary of those retainer agreements and thus had no standing to bring a cause of action against her former firm for breach of the retainer agreement.).

Bazinet v. Kluge, 14 A.D.3d 324, 788 N.Y.S.2d 77 (1st Dept. 2005) (there is no requirement imposed by law that an attorney-escrow agent place escrow funds in an account fully insured by the FDIC).

VII.3 Separate Account Requirement

New York: In the Matter of Rosenberg, 907 N.Y.S.2d 713 (2010) (attorney admitted that he improperly used his escrow account to pay personal bills after his attorney operating account was closed by the bank. He also failed to maintain required escrow account records and books, which may have contributed to the issuance of checks against insufficient funds from his escrow account, his inaccurate testimony concerning the escrow account at an examination under oath before petitioner, and his failure to promptly and completely cooperate with petitioner's investigation. Attorney also improperly issued two checks payable to cash from his escrow account, has not paid the stenographic bills for his examinations under oath pursuant to subpoena and has failed to comply with the attorney registration requirements. These actions violate Rules 1.15[a], [b][1]; [c], [d], [e]; rule 8.4[c], [d], [h].).

Alizio v. Perpignano, 2005 WL 1802974 (Sup. Ct. Nassau Co., July 5, 2005) (lawyer violated former DR 9-102 by failing to have the proper title on an IOLA account).

Doe v. Roe, 190 Misc. 2d 517, 739 N.Y.S.2d 542 (Dist. Ct. Nassau Co. 2002) (defendant-lawyer violated former DR 9-102(C)(4) by failing to comply with an order of the Unemployment Insurance Appeal Board to refund a fee).

Federal: Brown v. Legal Foundation of Washington, 538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003) (state law mandating a lawyer deposit into an IOLTA account client funds that could not otherwise generate net earnings for the client does not violate the Fifth Amendment).

VII.4 Notification of Receipt of Property, Safekeeping; Rendering Accounts; Payment or Delivery of Property

New York: BPD Int'l Bank v. Petitto, 13 Misc. 3d 1147(A), 841 N.YS.2d 825 (Civ. Co. 2007) (court cited the defendant lawyer's obvious failure to comply with former DR 9-102 in granting summary judgment to a former client seeking to recover monies the lawyer collected on the client's behalf).

Radio Eng'g. Indus., Inc. v. Denton, 30 A.D.3d 672, 817 N.YS.2d 170 (3d Dept. 2006) (although an attorney is not liable to a third party for violating former DR 9-102, the attorney may be liable in tort to the third party for knowingly facilitating the misappropriation of another's property).

Doe v. Roe, 190 Misc. 2d 517, 739 N.Y.S.2d 542 (Dist. Ct. Nassau Co. 2002) (defendant-lawyer violated former DR 9-102(C)(4) by failing to comply with an order of the Unemployment Insurance Appeal Board to refund a fee).

Bank of India v. Weg & Myers, P.C., 257 A.D.2d 183, 691 N.Y.S.2d 439 (1st Dept. 1999) (law firm for a borrower that paid the proceeds of an insurance settlement to the

client-borrower rather than to a lender holding a security interest is liable to the lender for conversion).

Shapiro v. McNeil, 92 N.Y.2d 91, 699 N.E.2d 407, 677 N.Y.S.2d 48 (1998) (under the circumstances alleged, the lawyer did not have a duty to notify a third party of the receipt of funds; the violation of a disciplinary rule, in and of itself, does not give rise to a cause of action that would not otherwise exist at law).

Sage Realty Corp. v. Proskaeur Rose Goetz & Mendelsohn, 91 N.Y.2d 30, 689 N.E.2d 879, 666 N.Y.S.2d 985 (1997) (former client has a presumptive right of access to its former attorney's entire file unless the attorney can demonstrate good cause to refuse access).

Leon v. Martinez, 84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994) (action for malpractice or breach of fiduciary duty may be brought against lawyer who releases funds to a client if the lawyer knows that the client has executed an enforceable assignment of the funds to a third party).

Federal: Lerner v. Fleet Bank, N.A., 318 F.3d 113 (2d Cir. 2003) (plaintiffs lack standing to pursue their claims under the Racketeer Influenced and Corrupt Organizations Act. The failure of the defendant-banks to provide "dishonored check reports" to the Lawyer's Fund for Client Protection was not the proximate cause of the plaintiffs' injury).

Steinfeld v. Marks, 1997 WL 563340 (S.D.N.Y. 1997) (lawyer's release of funds to one party to a joint venture may constitute malpractice, depending upon the circumstances).

VII.5 Record Retention Generally

In the Matter of Rosenberg, 907 N.Y.S.2d 713 (2010) (attorney admitted that he improperly used his escrow account to pay personal bills after his attorney operating account was closed by the bank. He also failed to maintain required escrow account records and books, which may have contributed to the issuance of checks against insufficient funds from his escrow account, his inaccurate testimony concerning the escrow account at an examination under oath before petitioner, and his failure to promptly and completely cooperate with petitioner's investigation. Attorney also improperly issued two checks payable to cash from his escrow account, has not paid the stenographic bills for his examinations under oath pursuant to subpoena and has failed to comply with the attorney registration requirements. These actions violate Rules 1.15[a], [b][1]; [c], [d], [e]; rule 8.4[c], [d], [h].).

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Rule 1.16: Declining or Terminating Representation

I. TEXT OF RULE 1.16[1]

(a) A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

(1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

(1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged; or

(4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

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(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action with which the lawyer has a fundamental disagreement;

(5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;

(8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

(9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(10) the client knowingly and freely assents to termination of the employment;

(11) withdrawal is permitted under Rule 1.13(c) or other law;

(12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or

(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

II. NYSBA COMMENTARY

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. *See* Rules 1.2(c), 6.5; *see also* Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation under paragraph (a), (b)(1) or (b)(4), as the case may be, if the client demands that the lawyer engage in conduct that is illegal or that violates these Rules or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] Court approval or notice to the court is often required by applicable law, and when so required by applicable law is also required by paragraph (d), before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rule 1.6 and Rule 3.3.

Discharge

[4] As provided in paragraph (b)(3), a client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14(b).

Optional Withdrawal

[7] Under paragraph (c), a lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if withdrawal can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past, even if withdrawal would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action with which the lawyer has a fundamental disagreement.

[7A] In accordance with paragraph (c)(4), a lawyer should use reasonable foresight in determining whether a proposed representation will involve client objectives or instructions with which the lawyer has a fundamental disagreement. A client's intended action does not create a fundamental disagreement simply because the lawyer disagrees with it. *See* Rule 1.2 regarding the allocation of responsibility between client and lawyer. The client has the right, for example, to accept or reject a settlement proposal; a client's decision on settlement involves a fundamental disagreement only when no reasonable person in the client's position, having regard for the hazards of litigation, would have declined the settlement. In addition, the client should be given notice of intent to withdraw and an opportunity to reconsider.

[8] Under paragraph (c)(5), a lawyer may withdraw if the client refuses to abide by the terms of an agreement concerning fees or court costs (or other expenses or disbursements).

[8A] Continuing to represent a client may impose an unreasonable burden unexpected by the client and lawyer at the outset of the representation. However, lawyers are ordinarily better suited than clients to foresee and provide for the burdens of representation. The burdens of uncertainty should therefore ordinarily fall on lawyers rather than clients unless they are attributable to client misconduct. That a representation will require more work or significantly larger advances of expenses than the lawyer contemplated when the fee was fixed is not grounds for withdrawal under paragraph (c)(5).

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, under paragraph (c) a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. *See* Rule 1.15.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

DR 2-109. (22 NYCRR § 1200.14), Acceptance of Employment

DR 2-110. (22 NYCRR § 1200.15), Withdrawal from Employment
Ethical Considerations 2-26, 2-30, 2-31, 2-32, 4-6, 7-5, and 7-8

III.2 ABA Model Rules:

ABA Model Rules of Professional Conduct, Rules 1.6, 1.16, 3.1, & 4.4

III.3 Other Sources:

Federal Rules of Civil Procedure, Rule 11 Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

IV. PRACTICE POINTERS

1. Have a frank discussion with the prospective client up-front and before accepting the employment regarding the client's goals and the methods the client wishes to use to achieve them.
2. Obtain a signed engagement agreement before performing any substantive work on the matter. See 22 NYCRR Part 1215 et seq.
3. Keep detailed time records to substantiate the time worked on the matter to date in case of withdrawal.
4. Make sure the retainer agreement specifies that moneys advanced by the client are returnable to the client if they are unearned at the end of the representation, or if the lawyer withdraws or is terminated.
5. In the event that permission to withdraw from representation must be sought from a tribunal, remember your obligation to preserve client confidential materials under Rule 1.6 and be as stinting as possible in disclosing them.
6. Always remember in your dealings with judges and other court personnel that you may need future permission from a tribunal to withdraw from a case, and that a judge has the power, in some circumstances, to convert what you originally thought was a paying matter into an involuntary pro bono case.

V. ANALYSIS

V.1 Purpose of Rule 1.16

Rule 1.16 is a new rule that combines the previous code provisions DR 2-109 (Obligation to Decline Employment) and DR 2-110 (Withdrawal of Employment).

Section (a) is largely unchanged from former DR 2-109, except that the phrase "it is obvious" has been replaced by "reasonably should know;" while subsections (a)(1) and (a)(2) substitute the phrase "in a matter" for the previous phrase "in litigation."

The definition of "Matter" in Rule 1.0 is extremely broad. It is clear that the new rule applies to representation of a client in almost any context, not just in litigation.

V.2 Obligation to Decline Employment

Subsection (a)(1) of Rule 1.16, prohibits a lawyer from accepting employment if the client is using the lawyer's services "merely for the purpose of harassing or maliciously injuring any person." Section (a)(1), perhaps unfortunately, carries over the term "merely" in the phrase specifying the intent of the prospective client that would obligate the lawyer to decline the employment. Commentators such as the late Dean Mary Daley have opined that the use of the word "merely" renders the rule toothless. Surely the drafters did not intend for employment to be acceptable where the main goal is to harass or maliciously injure another, provided that there is some other minor but marginally acceptable goal. Furthermore, this Rule might prove difficult to enforce, as few clients will acknowledge having such a singular and malicious intention.

Subsection (a)(2), which deals with advancing claims or defenses that are not warranted under existing law, continues what Mary Daley opined was the previous rule's attempts to strike a delicate balance. This portion of the rule wrestles with two competing interests: (1) growth of the common law legal system (which is propelled by incremental advances of the law based on arguments for the extension, modification, or reversal of existing law); and (2) lawyers who advance totally unfounded legal arguments that make a mockery of the judicial system and deplete the resources of the court, the opposing party, and the party's lawyers. Furthermore, as noted by Professor Roy Simon, the use of the phrase "good faith" defies any attempt to establish a bright-line test about the exact nature of a claim or defense that would violate this prohibition.

Rule 1.16 (a)(2) should be read together with Rule 3.1 (nonmeritorious claims and contentions), discussed infra, and substantive court rules prohibiting frivolous claims. See e.g., Rule 11 of the Federal Rules of Civil Procedure, CPLR § 8303-a, and 22 NYCRR Part 130. The Rules of Professional Conduct cannot possibly define what is or is not "warranted under existing law" because the substantive law is constantly changing and evolving, and depends on the judgment of the courts. The Departmental Disciplinary Committees and Appellate Divisions, understandably, tend to follow the courts (equally changing) in interpreting what is a frivolous claim or defense under the substantive law. A judicial decision sanctioning a lawyer for frivolous conduct is likely to catch the attention of the Departmental Disciplinary Committee. Conversely, the disciplinary authorities are unlikely to second-guess a prior judicial finding that a claim or defense was meritorious within the meaning of Federal Rule 11 or 22 NYCRR Rule 130. After all, it is the same judicial body that will determine whether a claim has merit as a matter of substantive law, and whether the lawyer advocating that position acted professionally. Thus, the lawyer must exercise professional judgment in determining which positions are likely to be consonant with existing law as interpreted by the Appellate Divisions and other courts.

V.3 Withdrawal from Employment

After the employment has begun, it is sometimes necessary for the lawyer and the client to part ways. Some of the issues that arise between lawyer and client are fee disputes, settlement negotiations and offers, and overall strategy. In some circumstances, client fraud or other unlawful conduct might require withdrawal—or even noisy withdrawal—under Rules 1.13 and 3.3. See discussion of Rule 1.13, supra.

The Rules provide some guidance about terminating the client-attorney relationship. Sections (b), (c), (d), and (e) are similar to the provisions of former DR 2-110, although reorganized. Section (b) deals with mandatory withdrawal, while Section (c) addresses permissive withdrawal. Section (d) requires a lawyer withdrawing from representation of a client (whether mandatory or permissive) to seek the permission of the relevant tribunal if the tribunal's rules so require. This rule might require the lawyer to continue representing the client even when withdrawal from representation is otherwise mandatory if the tribunal will not consent to the lawyer's withdrawal. This might leave the lawyer in the untenable position of having to represent a client despite conditions that would warrant a withdrawal. Finally, Section (e) provides that even if withdrawal is permitted or required, the lawyer must take steps to avoid foreseeable prejudice to the former client, such as giving reasonable notice to the client of the withdrawal, allowing the client reasonable time to retain new counsel, delivering to the client all papers and other property to which the client is entitled, and returning any unearned funds. Moreover, the lawyer must ensure the protection of client confidential information under Rule 1.6.

V.4. Mandatory Withdrawal

Section (b) identifies four circumstances in which withdrawal is mandatory. Subsection (b)(1) requires withdrawal if "the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law." "Knows or reasonably should know" means that a lawyer's conduct will be judged by either the subjective standard of the lawyer's actual knowledge or an objective standard of what a reasonable lawyer in similar circumstances would have concluded.

Subsection (b)(2) focuses exclusively on the health of the lawyer and whether the lawyer can effectively represent the client. This rule requires a lawyer to withdraw if the "lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client." This represents a change from the former rule, which used the phrase "renders it unreasonably difficult to carry out the employment effectively." Unfortunately, the Rules do not define "materially impairs." Furthermore, it is not clear who is to determine when the effects of the lawyer's physical or mental condition materially impairs an ability to perform the job. Interestingly, as noted by Mary Daley regarding former DR 1-10, this subsection appears to focus on the *effect* of the lawyer's mental or physical condition on the employment, not on the *seriousness* of the lawyer's mental or physical condition. This rule undoubtedly is intertwined with the concepts of effective representation, competence (Rule 1.1), and diligence (Rule 1.3). A lawyer

may be seriously ill and still able to represent a client effectively. On the other hand, a lawyer who is mentally or emotionally distracted by even a relatively minor illness—or the serious illness of a loved one—might not be able to provide effective representation. If lawyers doubt whether they can provide effective representation under the circumstances, it is probably best for the lawyers to withdraw.

A privately retained client may discharge an attorney at any time for any reason. Subsection (b)(3) confirms the client's right to discharge counsel by calling for the mandatory withdrawal of a lawyer discharged by a client. A lawyer must comply with the client's instructions and withdraw from the representation even though the client's motivation is improper, the client has not paid the lawyer's legitimate fees, or if the lawyer believes (as many terminated lawyers are likely to feel) that the client's decision is flatly contrary to the client's best interests. The lawyer may not do anything to interfere with the client's right to discharge her lawyer; hence the proscription on non-refundable retainers. See *In re Cooperman,* 83 N.Y.2d 468 (1994); Rule 1.5(d)(4). Of course, the client's right to discharge the lawyer may be subject to judicial approval in some circumstances. See Rule 1.16 (d).

Finally, Subsection 4 mirrors the language in Rule 1.16(a)(1), and requires withdrawal where the client is making a claim or defense "merely for the purpose of harassing or maliciously injuring any person." This makes it clear that such conduct by the client obligates the lawyer to withdraw. The inclusion of the term "merely" raises the same issues here as it does in Section (a)(1).

V.5 Permissive Withdrawal

Section (c) deals with permissive withdrawal, which may occur in situations that are not covered in Section (b). The Rule lists thirteen situations in which a lawyer may, but is not required to, withdraw from representing the client. These thirteen situations are disjunctive.

Subsection (c)(1) provides for withdrawal when it "can be accomplished without material adverse effect on the interests of the client." It is unclear, however, who should decide whether the withdrawal will have a material adverse effect on the client. Commentators such as Mary Daley have pointed out that a lawyer looking to jettison a now-undesirable client (perhaps one who is unable to pay the lawyer's legal bills) may underestimate the effect that the lawyer's withdrawal may have on the client. This issue comes up in the conflict-of-interest context where a law firm is approached by a new client with prospective business that may be contrary to the interests of an existing client. In this regard, counsel should be aware of the so-called "hot potato" doctrine, which prohibits a lawyer from jettisoning a smaller, older client in favor of a new, more lucrative client. For an egregious illustration of the hot potato doctrine, see *Maritrans v. Pepper Hamilton & Sheetz*, 602 A.D.2d 1277 (1990) (lawyers engaged in elaborate ruse to drop long-standing client in favor of new clients); see also *FreivogelonConflicts.com*; see also discussion of Rule 1.7, supra.

Subsection (c)(2) allows the lawyer to withdraw when "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal

or fraudulent." By using the phrase "that the lawyer reasonably believes," the rule makes it clear that the lawyer is the one to decide whether the client's conduct is arguably criminal or fraudulent. This is important, because it allows the lawyer to withdraw upon a reasonable belief that the conduct is criminal or fraudulent. Lawyers may not delegate this judgment to some future prosecutor, but must exercise their own professional judgment in this regard. Moreover, the rule incorporates both subjective and objective factors; the lawyer must actually subjectively believe that the conduct is fraudulent or illegal, and the lawyer's belief must be "reasonable." In the event of a disciplinary proceeding, the Appellate Division will decide based upon the facts of the case whether the lawyer's belief is reasonable.

Subsection (c)(3) permits withdrawal where the client "has used the lawyer's services to perpetrate a crime or fraud." The main difference between the previous subsection and this one is that here the crime or fraud has already been committed. With regard to what confidential information a lawyer may reveal to help rectify a fraud upon a tribunal, see Rules 3.3, infra., and 1.6, supra. Rule 1.6 further permits a lawyer to reveal client confidential information in order to "withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud."

Subsection (c)(4) is a new provision that was not part of the former DR 2-110. It allows the lawyer to withdraw when the client "insists upon taking action with which the lawyer has a fundamental disagreement." This rule does not contemplate criminal or fraudulent activity, but the use of the term "fundamental disagreement" implies something more than a difference of opinion over strategy. This provision should be read in tandem with Rule 1.2, which obligates a lawyer to "abide by a client's decisions concerning the objectives of the representation," and to *consult* with the client about "the means by which they are to be pursued." Because the client has ultimate authority concerning the objectives of the case (including the decision whether to settle or try a civil case or whether to accept a plea in a criminal case), the lawyer must defer to the client in these areas and should not seek to withdraw because of a disagreement about fundamental objectives. Thus, this provision contemplates a disagreement about the means of achieving the client's objectives. The disagreement must be so serious the lawyer cannot continue to work with the client. An example may be the client's refusal to respond to discovery demands despite several discovery orders threatening sanctions.

Subsection (c)(5) allows for withdrawal when the client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees." "Deliberately disregards" connotes an intentional refusal to pay, not a temporary financial hardship caused by a job loss, death of the primary breadwinner, or the like. Thus the client's sincere inability is not necessarily grounds for withdrawal. *George v. George*, 217 A.D.2d 913, 629 N.Y.S.2d 602 (4th Dept. 1995). The lawyer should anticipate this problem and address it at the time of the retainer agreement.

Subsection (c)(6) repeats the language of (a)(2) and permits withdrawal if the client "insists upon presenting a claim or defense that is not warranted under existing law and

cannot be supported by good faith argument for an extension, modification, or reversal of existing law." Thus if a client insists on a course of action that could subject the lawyer to professional discipline under Rule 3.1, the lawyer may seek leave to withdraw, consistent with Rule 1.16(d), which requires leave of a tribunal when appropriate. A request to withdraw could get complicated, since a lawyer seeking permission to withdraw under those circumstances should avoid explaining to the court too many details about the grounds for withdrawal. Imagine a judge being informed that the lawyer wishes to withdraw because the client wishes to pursue a position that the lawyer believes to be frivolous. Such a conversation could easily invoke the injunction in Rule 1.16(e) that a withdrawing attorney "shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client…" Disclosing to a judge that the client wishes to assert a position that the lawyer herself believes to be frivolous raises issues—and eyebrows—under Rule 1.16(e).

Subsection (c)(7) allows withdrawal where the client "fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out the employment effectively." These situations might include refusing on multiple occasions to appear for a scheduled deposition, repeatedly refusing to provide responses to discovery demands, refusing to communicate with the lawyer, and becoming antagonistic at the lawyer's suggestions and recommendations. See *Kiernan v. Kiernan*, 233 A.D.2d 867, 649 N.Y.S.2d 612 (4th Dept. 1996).

Subsections (c)(8) and (c)(9) turn the attention away from the client and toward the lawyer. The former allows the lawyer to withdraw when "the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal." Unfortunately, such differences do arise between attorneys, and sometimes it is best if one of the lawyers simply withdraws rather than forces the client to choose between counsel. Subsection (c)(9) allows for withdrawal where "the lawyer's physical or mental condition renders it difficult for the lawyer to carry out the representation effectively." This differs slightly from subsection (b)(2), which called for mandatory withdrawal where the lawyer's physical or mental condition "materially impairs the lawyer's ability to represent the client." "Renders it difficult" is arguably a lesser degree of disability than "materially impairs," and thus in (c)(9) the withdrawal is not mandatory. Again, however, it is unclear who is to make the determination regarding the degree of impairment and whether the lawyer should continue to represent the client.

Subsection (c)(10) shines the spotlight back on the client again, if only partially, because it allows for withdrawal where the client "knowingly and freely assents to termination of the employment." This obviously implies communication between the lawyer and the client in which the lawyer informs the client that the lawyer thinks it would be best if they parted ways.

Subsection (c)(11) allows for withdrawal when permitted under Rule 1.13, which deals with situations in which an organization is the client.

Subsection (c)(12) is a sort of "safe harbor" catchall provision for the lawyer, as it allows for withdrawal if "the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal."

Finally, Subsection (c)(13) allows for withdrawal where "the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these rules." This is similar to Subsection (b)(2) except that the conduct is occurring after the representation has commenced.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Obligation to Decline Employment

N.Y.S. Bar Op. 613 (1990) (lawyer may draft pleadings for a pro se litigant only if the lawyer has adequately researched the law, investigated the facts, concluded that the suit is being filed in good faith, and disclosed the lawyer's participation to opposing counsel and the court).

N.Y.S. Bar Op. 475 (1977) (lawyer may not file a complaint after the statute of limitations has expired if the statutory time period is an element of the plaintiff's case. However, the lawyer may file the complaint if the passage of time merely gives rise to an affirmative defense that may be waived.).

N.Y.S. Bar Op. 472 (1977) (general counsel of a corporation is not required to file a lawsuit he believes has no merit).

N.Y.S. Bar Op. 469 (1977) (if a client does not have a valid defense, a lawyer may not ethically include a general denial in the answer to the plaintiff's complaint).

VI.2 Withdrawal from Employment

N.Y.S. Bar Op. 719 (1999) (after analyzing specific clauses in a proposed retainer agreement in a domestic relations matter, the Committee concludes that the clauses are misleading with respect to their description of the circumstances under which a lawyer may withdraw from a representation).

NYCLA Bar Op. 728 (1999) (under certain conditions, a law firm must notify its clients of a partner's withdrawal from the firm partnership and discontinue the representation).

Nassau County Bar Op. 93-40 (1993) (upon resigning from a law firm a lawyer must affirmatively protect the clients to whom the lawyer personally provided legal services from any prejudice resulting from the lawyer's withdrawal).

VI.3 Mandatory Withdrawal

N.Y.C. Bar Op. 1999-2 (1999) (representation of a fugitive in a civil matter does not require the mandatory withdrawal of a lawyer provided that such continued representation does not violate a Disciplinary Rule).

Nassau County Bar Op. 97-10 (1997) (in view of the confusion surrounding the question of the identity of the client in the course of the representation of an estate

(i.e., is the client the estate or the executor?) and the lawyer's knowledge of the executor's misconduct, the lawyer must withdraw from the representation and give notice to both the executor and beneficiaries, advising them to retain independent counsel promptly).

V1.4 Permissive Withdrawal

N.Y.S. Bar Op. 95-681 (1995) (if a court-appointed lawyer learns that an allegedly indigent client has the means to retain counsel, the lawyer may apply to a tribunal for leave to withdraw from the representation. The lawyer may not reveal client confidences or secrets, however.).

N.Y.S. Bar Op. 93-653 (1993) (analyzing the circumstances under which a lawyer may withdraw from a representation if the client refuses to pay litigation expenses in advance).

VII. ANNOTATIONS OF CASES

VII.1 Obligation to Decline Employment

New York: Abrams v. Pecile, N.Y.L.J. 25, col. 3 (Nov. 5, 2009) (where plaintiff's complaint had no basis in law or fact and was brought merely to harass defendant and her attorney, plaintiff's lawyer's conduct was "frivolous" under Rule 3.1(b)(2) and violated Rule 1.16(a)(1)).

Entm't Partners Group, Inc. v. Davis, 155 Misc. 2d 894, 590 N.Y.S.2d 979 (Sup. Ct. N.Y. Co. 1992), aff'd, 198 A.D.2d 63, 603 N.Y.S.2d 439 (1st Dept. 1993) (*citing* former DR 2-109 in sanctioning the plaintiff and plaintiff's counsel for litigating a SLAPP-like suit).

Federal: Harb v. Gallagher, 131 F.R.D. 381 (S.D.N.Y. 1990) (imposing sanctions under Rule 11 on the plaintiff's lawyer, concluding that the lawyer violated former DR 2-109(A)(2), and voiding the lawyer's agreement with a relative of the plaintiff to indemnify the lawyer in the event that a court imposed Rule 11 sanctions in connection with the underlying lawsuit).

VII.2 Withdrawal from Employment

New York: Kelly v. Rancich, 221 A.D.2d 855, 633 N.Y.S.2d 872 (3d Dept. 1995) (having represented the defendant in a related matter, the plaintiff's lawyers demonstrated good and sufficient cause for withdrawal even though both their initial representation of the plaintiff and their subsequent representation of the defendant were ethically permissible).

Federal: US v. Morales, 2010 WL 2400120 (E.D.N.Y. 2010) (two attorneys representing a client indicted and subsequently convicted on four narcotics- related charges failed to appear on his behalf numerous times, failed to obey court orders to file notices of appearance and to file status reports, failed to submit timely motions, delayed the required presentencing interview by misleading the Probation Department as to who was representing the client, all of which resulted in a delay between conviction and sentencing of more than one year. The Court found that both attorneys violated Rule 1.3 in that neither attorney's representation of the client was diligent; that one attorney violated Rule 1.16 by unilaterally terminating his representation of the client; and that the other attorney violated Rule 7.5 in using the other's letterhead after his separation from the firm in a manner that caused confusion to the Court and both violated the Rules by repeatedly ignoring the Court's orders.).

In re James v Enterprise, 2010 WL 3394668 (E.D.N.Y. 2010) (attorney attempts to withdraw, arguing since the client gave deposition testimony undermining is own case, the Rules of Professional Conduct prohibit him from prosecuting what would essentially be a frivolous claim. Court does not allow attorney to withdraw saying that attorney had been aware of the difficulties involved with this representation but had agreed to meet those challenges for a client whom the attorney had believed was wronged. Also while the court recognized that plaintiff's deposition testimony may have made the case unwinnable, it rejected the notion that plaintiff's performance in the deposition revealed the claim to be frivolous.).

Whiting v. Lacara, 187 F.3d 317 (2d Cir. 1999) (court has jurisdiction to entertain an appeal from a denial of a motion to withdraw under the collateral order doctrine. Based on the client's statements to the court in the oral argument on appeal insisting that the lawyer implement the client's preferred trial strategy and suggesting that the client might sue the lawyer for malpractice, the court reversed the denial of a motion to withdraw.).

VII.3 Permissive Withdrawal

New York: Kiernan v. Kiernan, 233 A.D.2d 867, 649 N.Y.S.2d 612 (4th Dept. 1996) (law firm was entitled to withdraw from representing the plaintiff-wife in a matrimonial action because the client's questioning of her lawyers' competence, strategy, and ethics rendered it unreasonably difficult for the firm to carry out its employment effectively).

George v. George, 217 A.D.2d 913, 629 N.Y.S.2d 602 (4th Dept. 1995) (fact that a client fails to pay an attorney for services rendered does not, without more, entitle the attorney to withdraw).

In re Busby, 207 A.D.2d 886, 616 N.Y.S.2d 755 (2d Dept. 1994) (fact that a client-administrator of an estate refused to execute documents necessary to effectuate a previously agreed-to settlement was not sufficient to justify the withdrawal of the administrator's lawyer).

Bankers Trust Co. v. Hogan, 187 A.D.2d 305, 589 N.Y.S.2d 338 (1st Dept. 1992) (court should grant a motion for withdrawal if the record shows that the client

continually questioned the lawyers' work, blamed them for adverse decisions, made verbal threats against the firm, and insisted that the law firm make arguments contrary to the law and the lawyers' professional judgment).

Federal: Deflumer v. Leschack & Grodensky, P.C., 2000 WL 654608 (N.D.N.Y. 2000) (court refused to permit the moving law firm to withdraw as counsel for one of the plaintiffs even though the particular plaintiff did not object to the motion and the practical consequence of the court's decision might be to derail the action's "mass settlement").

Joseph Brenner Assoc., Inc. v. Starmaker Entm't., Inc., 82 F.3d 55 (2d Cir. 1996) (affirming the lower court's order permitting a lawyer to withdraw, noting that the client had insisted on his son's participation in the litigation despite existing hostility between the lawyer and the son that arose in a previous matter, that the son had hired outside counsel to advise him, and that the client had refused to continue to pay the lawyer's fees).

Wong v. Kennedy, P.C., 853 F. Supp. 73 (E.D.N.Y. 1994) (analyzing the difference between a special nonrefundable retainer agreement and a general retainer agreement).

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Rule 1.17: Sale of Law Practice

I. TEXT OF RULE 1.17[1]

(a) A lawyer retiring from a private practice of law; a law firm, one or more members of which are retiring from the private practice of law with the firm; or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice. The seller and the buyer may agree on reasonable restrictions on the seller's private practice of law, notwithstanding any other provision of these Rules. Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted.

(b) Confidential information.

(1) With respect to each matter subject to the contemplated sale, the seller may provide prospective buyers with any information not protected as confidential information under Rule 1.6.

(2) Notwithstanding Rule 1.6, the seller may provide the prospective buyer with information as to individual clients:

(i) concerning the identity of the client, except as provided in paragraph (b)(6);

(ii) concerning the status and general nature of the matter;

(iii) available in public court files; and

(iv) concerning the financial terms of the client-lawyer relationship and the payment status of the client's account.

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(3) Prior to making any disclosure of confidential information that may be permitted under paragraph (b)(2), the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidential information, the seller may make the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists, subject to paragraph (b)(6). If the prospective buyer determines that conflicts of interest exist prior to reviewing the information, or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review the information unless the seller shall have obtained the consent of the client in accordance with Rule 1.6(a)(1).

(4) Prospective buyers shall maintain the confidentiality of and shall not use any client information received in connection with the proposed sale in the same manner and to the same extent as if the prospective buyers represented the client.

(5) Absent the consent of the client after full disclosure, a seller shall not provide a prospective buyer with information if doing so would cause a violation of the attorney-client privilege.

(6) If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes confidential information in the circumstances, the seller may not provide such information to a prospective buyer without first advising the client of the identity of the prospective buyer and obtaining the client's consent to the proposed disclosure.

(c) Written notice of the sale shall be given jointly by the seller and the buyer to each of the seller's clients and shall include information regarding

(1) the client's right to retain other counsel or to take possession of the file;

(2) the fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;

(3) the fact that agreements between the seller and the seller's clients as to fees will be honored by the buyer;

(4) proposed fee increases, if any, permitted under paragraph (e); and

(5) the identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in New York State, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to resell the practice.

(d) When the buyer's representation of a client of the seller would give rise to a waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.

(e) The fee charged a client by the buyer shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

II. NYSBA COMMENTARY

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice, as may withdrawing partners of law firms.

Termination of Practice by Seller

[2] The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the buyers. The fact that a number of the seller's clients decide not to be represented by the buyers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position. Although the requirements of this Rule may not be violated in these situations, contractual provisions in the agreement governing the sale of the practice may contain reasonable restrictions on a lawyer's resuming private practice. *See* Rule 5.6, Comment [1], regarding restrictions on right to practice.

[3] The private practice of law refers to a private law firm or lawyer, not to a public agency, legal services entity, or in-house counsel to a business. The requirement that the seller cease to engage in the private practice of law therefore does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within a geographic area, defined as the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted. Its provisions therefore accommodate the lawyer who sells the practice on the occasion of moving to another city and county that does not border on the city or county within New York State.

[5] [Reserved.]

Sale of Entire Practice

[6] The Rule requires that the seller's entire practice be sold. The prohibition against sale of less than an entire practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee generating matters. The buyers are required to undertake all client

matters in the practice, subject to client consent. This requirement is not violated even if a buyer is unable to undertake a particular client matter because of a conflict of interest and the seller therefore remains as attorney of record for the matter in question.

Client Confidences, Consent and Notice

[7] Giving the buyer access to client-specific information relating to the representation and to the file requires client consent. Rule 1.17 provides that before such information can be disclosed by the seller to the buyer, the client must be given actual written notice of the contemplated sale, including the identity of the buyer, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed under paragraph (c)(2).

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. The selling lawyer must make a good-faith effort to notify all of the lawyer's current clients. Where clients cannot be given actual notice and therefore cannot themselves consent to the purchase or direct any other disposition of their files, they are nevertheless protected by the fact that the buyer has the duty to maintain their confidences under paragraph (b)(4).

[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Buyer

[10] The sale may not be financed by increases in fees charged to the clients of the purchased practice except to the extent permitted by subparagraph (e) of this Rule. Under subparagraph (e), the buyer must honor existing arrangements between the seller and the client as to fees unless the seller's retainer agreement with the client permits a fee increase or the buyer obtains a client's specific agreement to a fee increase in compliance with the strict standards of Rule 1.8(a) (governing business transactions between lawyers and clients).

Other Applicable Ethical Standards

[11] Lawyers participating in the sale or purchase of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. Examples include (i) the seller's obligation to exercise competence in identifying a buyer qualified to assume the practice and the buyer's obligation to undertake the representation competently under Rule 1.1, (ii) the obligation of the seller and the buyer to avoid disqualifying conflicts, and to secure the client's informed consent for

those conflicts that can be agreed to under Rule 1.7, and (iii) the obligation of the seller and the buyer to protect information relating to the representation under Rule 1.6 and Rule 1.9. *See also* Rule 1.0(j) for the definition of "informed consent."

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale. *See* Rule 1.16. If a tribunal refuses to give its permission for the substitution and the seller therefore must continue in the matter, the seller does not thereby violate the portion of this Rule requiring the seller to cease practice in the described geographic area.

Applicability of the Rule

[13] [Reserved.]

[14] This Rule does not apply to: (i) admission to or retirement from a law partnership or professional association, (ii) retirement plans and similar arrangements, (iii) a sale of tangible assets of a law practice, or (iv) the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice. This Rule governs the sale of an entire law practice upon retirement, which is defined in paragraph (a) as the cessation of the private practice of law in a given geographic area. Rule 5.4(a)(2) provides for the compensation of a lawyer who undertakes to complete one or more unfinished pieces of legal business of a deceased lawyer.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

DR 2-111 (22 NYCRR § 1200.15-a) Sale of Law Practice
Ethical Considerations 2-34, 2-35, and 2-36

III.2 ABA Model Rules

Rule 1.17

IV. PRACTICE POINTERS

1. The sale of a practice is permitted only when the sole practitioner or one or more of the partners in a multi-attorney law firm retires from private practice, dies, or goes missing.
2. The entire practice must be offered for sale and be purchased, subject to client approval of substitution of counsel.

3. Steps must be taken to ensure that client confidences are preserved in the review process. Conflict checks must also be performed.
4. Written notice of the impending sale must be given jointly by the buyer and seller to each of the seller's clients and must include specific information about the buyer.
5. Generally, fees may not be increased merely because of the sale, and the fees charged must conform to the previous retainer agreement the client had with the seller.

V. ANALYSIS

V.1 Purpose of Rule 1.17

Rule 1.17 was adopted verbatim from the former DR 2-111, and expressly permits the sale of a law practice. The Rule requires that the entire practice be sold. Thus, in the simplest example, if sole practitioners wish to retire, they may sell their entire practice to another lawyer or law firm, but may not engage in cherry-picking by agreeing to sell only a portion of it. The rule provides that the purchasing attorney or firm does not automatically acquire the retiring lawyer's entire client base, as the clients have the option of staying with the new firm or retaining new counsel of their own choosing. It may be better said that the purchaser is acquiring the right to continue to represent the seller's clients if they choose to remain with the purchaser; it is always the clients' decision whether to stay or to find different counsel, so the clients are not being "sold" to the buyer.

V.2 Reasonable Restrictions on Practice

The purchase agreement may also place "reasonable restrictions" on the seller's private practice of law. "Reasonable restrictions" are not defined in the rules; however, Section 1 (a) provides that "Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted." Rule 5.6, supra, deals with restrictions on the right to practice law.

V.3 Confidential Information

A prospective buyer must be able to review the client roster being offered for sale so as to perform conflict checks. The seller must be careful, however, not to reveal any confidential information to the prospective buyer without the consent of the client. Furthermore, the buyer must also protect and maintain the confidentiality of any information learned during the review process.

V.4 Notice

The seller and buyer must give joint notice to all the seller's clients that a sale of the practice is imminent. If the clients do not take any action or object to the sale, their consent to the sale will be presumed, subject to any court rule or statute requiring express approval by the client or court. Sections (c)(1)–(5) provide details regarding the information that must be given to the clients regarding the prospective sale.

VI. ANNOTATIONS OF ETHICS OPINIONS

N.Y.S. Bar Op. 707 (1999) (lawyer may not sell a portion of the lawyer's practice and continue practicing in other limited or specific fields in the same geographic area).

N.Y.S. Bar Op. 699 (1998) (newly elected judge may not sell a law practice for a price that is contingent upon the future success of the acquiring firm in attracting and retaining work from the judge's former clients).

VII. ANNOTATIONS OF CASES

Baker v. Dorfman, 2006 WL 662342 (S.D.N.Y. Mar. 16, 2006) (sale by a judgment debtor of a small law practice for $2,000 did not constitute a fraudulent conveyance, as the negative publicity surrounding the lawyer and his inability to consistently generate profits rendered difficult the valuation of the firm and what little goodwill it may have had).

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Rule 1.18: Duties to Prospective Clients

I. TEXT OF RULE 1.18[1]

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client."

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and non lawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

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(ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;

(iii) the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) written notice is promptly given to the prospective client; and

(3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.

(e) A person who:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client within the meaning of paragraph (a).

II. NYSBA COMMENTARY

[1] Prospective clients, like current clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Prospective clients should therefore receive some, but not all, of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. As provided in paragraph (e), a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a). Similarly, a person who communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter is not entitled to the protection of this Rule. A lawyer may not encourage or induce a person to communicate with a lawyer or lawyers for that improper purpose. *See* Rules 3.1(b)(2), 4.4, 8.4(a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7 or Rule 1.9, then consent from all affected current or former clients must be obtained before accepting the representation. The representation must be declined if the lawyer will be unable to provide competent, diligent and adequate representation to the affected current and former clients and the prospective client.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(j) for the definition of "informed consent." If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Under paragraph (c), even in the absence of an agreement the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in that matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened, and written notice is promptly given to the prospective client. *See* Rule 1.10. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[7A] Paragraph (d)(2) sets out the basic procedural requirements that a law firm must satisfy to ensure that a personally disqualified lawyer is effectively screened from participation in the matter. This Rule requires that the firm promptly: (i) notify, as appropriate, lawyers and relevant nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client, and (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and others in the firm.

[7B] A firm seeking to avoid disqualification under this Rule should also consider its ability to implement, maintain, and monitor the screening procedures permitted by paragraph (d)(2) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm should consider a number of factors, including how

the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, but it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (d)(2).

[7C] In order to prevent any other lawyer in the firm from acquiring confidential information about the matter from the disqualified lawyer, it is essential that notification be given and screening procedures implemented promptly. If any lawyer in the firm acquires confidential information about the matter from the disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the disqualified lawyer and other lawyers in the firm in a given matter.

[8] Notice under paragraph (d)(2), including a general description of the subject matter about which the lawyer was consulted and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, U*see*U Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Subsection (a) of Rule 1.18 did not have a counterpart under the former Code. Subsection (b) is similar to former DR 4-101(B) and former DR 5-108(A)(2). Subsection (c) is similar to former DR 5-105(D) and former DR 5-108(A)(1). Subsections (d) and (e) do not have counterparts under the former Code.

Certain definitions in the new Rules are also important in understanding Rule 1.18:
Rule 1.0(j) Definition—"Informed Consent"
Rule 1.0(q) Definition—"Reasonable"
Rule 1.0(t) Definition—"Screening"
Rule 1.6—Confidentiality of Information
Rule 1.7—Conflicts of Interest
Rule 1.9—Duties to Former Clients
Rule 1.10—Imputation of Conflicts of Interest

III.2 ABA Model Rules

The New York Rule sections 1.18(a)–(d) mirror ABA Model Rule sections 1.18(a)–(d) (2002). However, the New York Rules provide additional clarification of the term "prospective client" in Rule 1.18(e).

IV. PRACTICE POINTERS

1. Limit information at any initial consultation with a prospective client to the minimum required to clear conflicts and to ascertain you are able to act before proceeding to obtain confidential information about the matter.
2. Consider how you will deal with new inquiries/unsolicited communications from existing clients as well as prospective clients as part of your general approach to handling conflict-of-interest situations.
3. Prepare appropriate conflict waiver agreements/statements for use with prospective clients.
4. Run a conflict check before meeting with the prospective client for an in-depth interview.
5. Ensure any conflict waivers or disclaimers regarding unsolicited information from prospective clients are appropriately worded and featured prominently in the appropriate section of your firm's Web site.
6. Consider using "click wrap" technology on the Web site so you can demonstrate clients understand that they have signed up for your firm's policies.
7. Consider and establish the firm's screening procedures in advance of potential conflicts issues arising in practice.
8. Ensure all lawyers within the firm are aware of the firm's screening procedures.
9. Where potential conflicts arise, ascertain whether both the affected client and prospective client are prepared to consent to waive the conflict after the position is properly explained to them (Rule 1.18(d)(1)). If not, the firm may still act in the circumstances set out in Rule 1.18(d)(2), but only if an effective screening practice is established.
10. Ensure screening procedures are implemented promptly in relevant cases and vigilance is maintained in their continued operation.

11. Use moderation. Remember that too broad a disclaimer might backfire and could result in certain sensitive information not being protected by the usual attorney-client privilege if the prospective client later becomes your paying client.

V. ANALYSIS

V.1 Purpose of Rule 1.18

The provisions of 1.18(b) are similar to the provisions of former DR 4-101(B) and former DR 5-108(a)(2), but make it clear that the obligations apply even when no client-lawyer relationship ensues. In requiring a lawyer to preserve the confidences and secrets of one who has employed "or sought to employ" the lawyer, Rule 1.18(b) raises the first sentence of former EC 4-1 to the status of a Rule.

Rule 1.18(c) is similar in concept to former DR 5-105(D) and former DR 5-108(A)(1), but combines disqualification and imputation and applies the concepts to prospective clients. Rule 1.18(c) disqualifies a lawyer from opposing a former prospective client in a substantially related matter only if the lawyer received information that "could be significantly harmful" to the prospective client, subject to the further exceptions identified in Rule 1.18(d).

Rule 1.18(d) and (e) contain new provisions. In particular, they enable a firm not only to act where potential conflicts are waived by both the affected and prospective clients, but also in some circumstances absent such consent provided the conditions in the Rule are met and screening of the disqualified lawyer in the firm who is in receipt of confidential information can be and is promptly established and maintained.

Attorneys should be aware that in specific areas of law (e.g., bankruptcy), lawyers may need to comply with certain other legal or statutory requirements in addition to Rule 1.18. These might mean an attorney must decline the representation even where it would appear to be permitted under Rule 1.18.

V.2 An Attorney's Professional Duties Can Extend to Prospective Clients

New York courts have recognized that a fiduciary relationship can arise when a lawyer is consulted by a prospective client even when a lawyer does not represent the prospective client (see, *Burton v. Burton*, 139 A.D.2d 554, 527 N.Y.S.2d 53 (1988); *Seeley v. Seeley,* 129 A.D.2d 625, 514 N.Y.S.2d 110 (1987)).

Rule 1.18 recognizes an attorney may owe certain professional and ethical duties to prospective clients. For example, if free assistance may be available to the prospective client, or a small estate could be settled by the appointment of an administrator directly from the surrogate's court without the services of a lawyer, the attorney has a duty so to inform the prospective client. (see N.Y.S. Eth. Op. 569 (1985); NYCLA Eth. Op. 371 (1945)).

V.3 Balancing a Desire for Knowledge Against the Potential for Conflict Problems to Arise by Learning Too Much from a Prospective Client

Attorneys should determine the amount of information they actually require from a prospective client before agreeing to take on any new matter. A balancing act clearly exists between receiving sufficient information to determine whether a lawyer can represent and advise a prospective client on a matter and the risk the lawyer will receive confidential information adverse to an existing client of the lawyer or law firm. To avoid acquiring disqualifying information from a prospective client, a lawyer considering whether to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. In addition, a lawyer is well-advised to run a conflicts check before meeting with the prospective client and learning the details of the case.

V.4 Remote Prospective Clients and the Lawyer in the Middle

Referral situations can become complex. Consider the situation in which a prospective client contacts Lawyer A to discuss a commercial dispute under a distribution agreement. Lawyer A is conscious of his duty of competence (see Rule 1.1). and practices mainly matrimonial and real property law. Lawyer A does not think he can assist the prospective client, but knows that Lawyer B specializes in commercial litigation and thinks she would be better positioned to help. Lawyer A offers to speak to Lawyer B about the problem on the prospective client's behalf and the client agrees. Upon learning about the dispute, Lawyer B determines she has a conflict of interest and cannot act. Does Lawyer B have any duty to safeguard the information she receives? This question was the subject of an ethics opinion from the District of Columbia Bar Association Ethics Committee. D.C. Bar Ethics Opinion 346 concluded that Lawyer B has an obligation under Rule 1.6 and Rule 1.18 to treat the information received from the referring attorney as confidential even if receiving counsel never spoke directly to the client.

V.5 A Lawyer's Existing Client Has a New Problem

Law firms should consider how they will deal with any unsolicited communications (particularly by e-mail or voicemail) that they may receive about a prospective new matter from an existing client, as conflict-of-interest issues could arise in such situations as well. It is not uncommon for existing clients to approach and seek advice from a lawyer with whom the clients have an existing relationship. In the course of seeking advice on the new matter, the prospective client—who is also an existing client—may potentially reveal confidential and secret information. A firm's procedures and conflict waiver provisions should consider and address this scenario.

V.6 Reasonable Expectations—Rule 1:18(e)(1)

Whether a prospective client may have "any reasonable expectation" of confidentiality is likely to be fact-specific. "Reasonable expectation" is not defined in the Rule. Rule 1.0(q) defines "reasonable" in terms of the conduct or perspective of a lawyer, rather than a client's expectations. According to Rule 1.0(q):

> "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.

Although Rule 1.0 defines what is reasonable conduct by a lawyer, Rule 1.18 speaks to the reasonable expectation of a prospective client. N.Y.C. Bar. Op. 2001-1 (2001) noted that if the prospective client was aware or had any reason to believe that the law firm to which the information was transmitted was currently representing a client whose interests are in conflict in the same or another matter, it could not reasonably expect that its communication would be confidential (see N.Y.C. Bar Op. 2001-1 at n.1; ABA 90-358 (1990)).

V.7 E-mail/Web Page Considerations

It is becoming increasingly common for attorneys' Web sites to invite communications from prospective clients by way of e-mail inquiries. The mere fact that a firm has a Web site that contains e-mail addresses of the firm's attorneys may not suffice to create a reasonable expectation for prospective clients that unsolicited e-mails would be treated with confidentiality (see N.Y.C. Bar Op. 2001-1 (2001), adopting ABA Formal Opinion 90-358). Nonetheless, a law firm should consider whether its Web page or other promotional material invites potentially disqualifying communications. Also consider whether any appropriate caveats should be given before a prospective client provides confidential information and whether the express agreement of the prospective client should be obtained as to the terms and conditions upon which such information will be received and handled by the firm.

Until initial conflict checks have cleared, attorneys may seek to limit receipt of detailed and significant information from prospective clients. This may reduce the risk of receiving confidential information adverse to an existing client that might require the attorney or firm to be disqualified from representing that client. A two-stage process involving basic client conflict screening before receiving further information might be appropriate and could afford better protection of prospective client confidences.

Careful thought should be given as to whether and how to add appropriate disclaimers to a law firm's Web page. An appropriately worded disclaimer could help avoid unsolicited lay e-mails being treated as confidential. However, as Hricik and Scott point out, the use of such a disclaimer might be too effective and strip the client inquiry

from protection as an attorney/client privileged communication in the event the firm goes on to represent the prospective client.

V.8 Parties and Social Networking

Lawyers also need to be aware of the potential for a prospective client relationship to arise informally, through questions put to them at parties, through social networking sites, or at speaking engagements. Again, lawyers should consider in each situation whether there would be any reasonable expectation of confidentiality. A response to a general question broadcast across a conference hall in front of several hundred other delegates at a CLE seminar is very different from someone sidling up to the lawyer after a Q&A session with what the person says is "a quick question" about a current problem specific to a particular situation.

V.9 Electronic Social Networking: Internet Blogs, Tweets, and LinkedIn Exchanges

Lawyers also need to consider the potential for attorney and prospective client relationships to be created through different forms of electronic communication (such as blogs, tweets, or LinkedIn exchanges) that fall within the scope of Rule 1.18.

Would a layperson sending an unsolicited e-mail to a lawyer through a social network site have a reasonable expectation of confidentiality? Unlike a law firm's Web site, a lawyer might not be able to issue any advance disclaimer before receiving e-mails from third persons through a site such as LinkedIn. A blog that is open so it can be read by anyone clearly should not attract an expectation of any confidentiality. However, what if the blog invites readers to contact the attorney by writing in with their problems, and provides the lay public with an e-mail address for that purpose? Could such a blog expose the attorney to potentially receiving confidential communications from prospective clients and create potential future conflicts of interest for the attorney? Might the lawyer be able to limit such disqualifying information by careful disclaimer and express warning to people not to disclose to the attorney confidential information? How prominent would such a notice need to be—and would it require "click wrap" type settings to evidence the sender's acceptance of such terms?

V.10 Conflict Waivers and Informed Consent

A conflict waiver by a client or prospective client requires *informed consent*. Rule 1.0(j) defines "informed consent" as follows:

> "Informed Consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the

person the material risks of the proposed course of conduct and reasonably available alternatives.

Under the new Rules, a conflict waiver should be confirmed in writing, and if circumstances are such that it is not feasible to obtain a written waiver at the time and an oral waiver is given, this should be followed up in writing within a reasonable time thereafter, (Rule 1.7(b) and Rule 1.0(e) "confirmed in writing"). Where, following conflict searches, a lawyer learns that a prospective client has a matter which is potentially adverse to an existing client, but it involves a matter unrelated to those on which the attorney or law firm act for the existing client, an appropriate written conflict waiver might enable the firm to represent the prospective client (see Rule 1.7(b) supra.) Although consent to waive future conflicts in appropriate circumstances may have been given by an existing client, courts have been known to scrutinize and sometimes invalidate advance waivers. (See the section on Conflicts of Interest, Rule 1.7(b), supra, for more information).

If a law firm has a section on its Web page inviting e-mail communications from potential clients (e.g., a section inviting people to contact the firm or individual attorneys about a problem by e-mail), the firm might include disclaimer and informed consent language to limit the potential for disclosure of confidential information and associated conflicts-of-interest problems to arise. The existence of any such terms or conditions should be brought clearly to the attention of any prospective client. Merely including a disclaimer on the firm's Web site may be insufficient unless the waiver is brought clearly to the prospective client's attention and the client's affirmative assent to its terms is obtained. Commentators (see, e.g., Schnell at 561) have advised that the use of "click wraps" requiring the user to physically click a button to accept the firm's terms would be advisable in such circumstances, particularly in light of the Second Circuit decision in *Specht v. Netscape Commcations Corp*., 306 F.3d 17 (2d. Cir. 2002) (discussed infra.).

In drafting language for prospective client conflict waivers, lawyers should be aware that the law of lawyer's contracts may be different from that of the business community at large, and lawyers should ensure that the terms of any prospective waiver are clear, reasonable, and fair to the prospective client. Larger ethical and professional considerations could preclude or affect the terms of contracts between lawyers and their clients (see Joseph M. Perillo, *The Law of Lawyers' Contracts is Different,* 67 FORDHAM L. REV. 443 (1998)). Contracts between lawyers and laypersons will be subject to scrutiny, and will not be enforced if inconsistent with the Rules of Professional Conduct. *See In re Cooperman*, 633 N.E.2d 1069, 83 N.Y.2d 468 (1994) (nonrefundable retainer agreement unenforceable when inconsistent with former Code of Professional Responsibility).

V.11 Lawyers and Beauty Contests

Sometimes corporate clients invite prospective law firms to participate in so-called "beauty contests" in which the lawyers seek to impress the prospective clients with

their legal prowess, academic credentials, strong interpersonal skills, and efficient fees. Lawyers who walk the proverbial runway in a client beauty pageant should be aware of the potential for disqualifying information to be disclosed during these preliminary discussions. Such information could give rise to conflict problems should the unsuccessful suitor not be retained and then wish to represent another party in a matter adverse to the prospective client who held the beauty contest. This matter was considered under the former Code in N.Y.C. Bar Op. 2006-2 (2006), which concluded a lawyer is not personally prohibited from later representing a client with materially adverse interests in a substantially related matter if the lawyer did not learn confidences or secrets of the prospective client during the beauty contest. Even if the lawyer did learn confidential information, the lawyer may nonetheless later represent a client with materially adverse interests in a substantially related matter in the following situations:

(a) if, before the beauty contest, the lawyer obtained the prospective client's advance waiver of any conflict that might result from the prospective client sharing confidences or secrets;
(b) if it can be established that the prospective client revealed confidences or secrets with no intention of retaining the lawyer, but for the purpose of disqualifying the lawyer's firm from later representing possibly adverse parties.

In addition, if the lawyer did not receive any disqualifying confidences, then the rejected law firm should be free to accept representation adverse to the prospective client. Moreover, even if the individual lawyer described above is personally prohibited from later representing a client with materially adverse interests in a substantially related matter, the presumption that other lawyers at the law firm have knowledge of the prospective client's confidences or secrets may be rebutted under the circumstances discussed in Rule 1.18(d). That rule indicates that a law firm may avoid disqualification by promptly imposing ethical screens between the tainted lawyer and other lawyers in the firm and ensuring that the tainted lawyer does not participate in any portion of the fee from the matter. See discussion infra.

V.12 Screening

If a lawyer does become aware of harmful or sensitive information from a prospective client about an existing client of the firm, can the tainted lawyer be screened and the firm continue to act for the existing client? Rule 1.18 does permit screening a lawyer in certain instances set out in Rule 1.18(d), and with careful and appropriate steps, a law firm should be able to establish an effective screening arrangement.

The screening mechanism in Rule 1.18(d) represents a significant practice development, particularly insofar as it permits representation in some circumstances in which a firm is unable to obtain the consent of both the affected client and the prospective client. Significantly, Rule 1.18(d)(2) sets out circumstances where a firm may continue to act even without the consent of both the affected client and the prospective client if screening arrangements are put in place.

The Rule and NYSBA Commentary recognize that different screening procedures may be appropriate for different firms. The screening procedures adopted by any firm should take account of (1) the firm's size, (2) the firm's structure, (3) whether there are partners handling similar matters on the same or different floors or in different buildings, and (4) how work is generally divided up and handled within the law practice. In a small and intimate practice, effective screening might not be feasible. In addition, if the screen is not established promptly or vigilantly maintained by the firm, then there is a risk that confidential information could pass beyond the tainted and disqualified lawyer. As a result, the law firm may not be able to cure the potential conflict and may need to stand down.

Before the problem arises in practice, law firms should consider what screening procedures they can establish and how these will operate. This way the procedures will be well-thought out and not merely reactive. Lawyers in the firm should be made aware of the existence and details of the firm's screening procedures. Obviously, some modification to the firm's existing screening procedures may be required in specific instances.

V.13 Taint-Shoppers Are Not "Prospective Clients"

In the "Whitecaps" episode of the award-winning TV series *The Sopranos* (Season 4, Episode 52), beach-house attorney Alan Sapinsly counsels wise-guy Tony Soprano about his marital problems. Sapinsky suggests that Tony preemptively consult with the leading matrimonial lawyers in town, in the process indiscreetly disclosing confidential information, with the intention of disqualifying the local hotshot lawyers from representing Tony's wife Carmela in any future matrimonial dispute. This practice is sometimes known as "taint-shopping," whereby a prospective client purports to seek legal assistance and interview a law firm for the purpose of disqualifying the firm from future adverse representation. Sapinsky's sleazy *Sopranos* advice was roundly condemned by ethicist James Altman in the *New York State Bar Journal*'s Attorney Professional Forum (*see Wondering About a Wise Guy*, Attorney Professional Forum, NYSB J. 27–28 (June 2004)). As Altman pointed out in his column, any attorney advocating such steps in real life would run afoul of the disciplinary rules. Conversely, the former Rules of Professional Conduct anticipated and frowned upon taint-shopping. So far as any prospective taint-shopping client is concerned, the issue is clearly addressed in new Rule 1.18(e)(2), which provides that a person who "communicates" with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not "a prospective client" for the purposes of the Rule. However, in practice it may not be so easy to identify and distinguish the innocent prospective client from the crafty taint-shopper. When in doubt, the wise lawyer will assume Rule 1.18 will apply and that she is dealing with a bona fide prospective client.

In practice, "taint-shopping" by existing clients can occur without appearing obvious or deliberate. For example a bank may give some work to the majority or all of the lawyers in a small town, thereby seeking to prevent the lawyers from taking on new

matters adverse to the bank in the future. The same could occur in connection with a niche specialty field of law, where a client may have numerous cases and the field of lawyers knowledgeable in that area is relatively small. Rule 1.18 does not address such a scenario. To try and counter the risk and the potentially damaging effects of more subtle business conflicts, an attorney may seek to draft client conflict-waiver provisions in retainer letters.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Secret information

N.Y.S. Bar Op. 525 (1980) (lawyer cannot disclose secret imparted to him by potential client without potential client's consent, and cannot continue to represent that client or existing client with respect to subject matter of that secret (citing former DRs 2-110 (B)(2), 4-101 (A), (B), and (C), 5-105 (A), (B), and (C)). Opinion limited to situation where secret information imparted in good faith, as not unmindful of taint-shopping).).

N.Y.C. Bar Op. 225 (1932) (secret information).

N.Y.C. Bar Op. 109 (1928–1929) (secret information).

N.Y.C. Bar Op. 88 (1928–1929) (secret Information, cf. N.Y.C. Bar Op. 225 (1932).).

NYCLA Bar Op. 243 (1926) (lawyer forbidden to reveal a secret imparted in good faith by a prospective client seeking to retain a lawyer—fact that lawyer makes no charge and declines retainer irrelevant).

NYCLA Bar Op. 241 (1926) (secret information cannot be used to inform existing client or to a prospective client's disadvantage without prospective client's consent).

VI.2 Unsolicited E-mails and Reasonable Expectations

N.Y.S. Bar Op. 833 (under Rule 1.18(a), an attorney is under no obligation to respond to unsolicited letters from incarcerated individuals requesting representation. Such individuals will not be considered "prospective clients").

N.Y.C. Bar Op. 2001-1 (2001) (disqualification by the firm is not mandated by the receipt and review of an unsolicited communication (adopting in this context ABA Formal Opinion 90-358). However, unsolicited Information may not be disclosed or used against the interests of the would-be client).

VI.3 Advance Client Waivers/Beauty Contests

N.Y.C. Bar Op. 2006-2 (2006) (lawyer participating in a "beauty contest" with a prospective client, but who ultimately is not retained by the prospective client, is not personally prohibited from later representing a client with materially adverse interests

in a substantially related matter if the lawyer did not learn confidences or secrets of the prospective client during the beauty contest. If the lawyer learned confidences or secrets of the prospective client, the lawyer may nonetheless later represent a client with materially adverse interests in a substantially related matter: (1) if, before the beauty contest, the lawyer obtained the prospective client's advance waiver of any conflict that might result from the prospective client sharing confidences or secrets; (2) without an advance waiver, unless the confidences or secrets could be significantly harmful to the prospective client; or (3) if it can be established that the prospective client revealed confidences or secrets with no intention of retaining the lawyer, but rather for the purpose of disqualifying the lawyer's firm from later representing possibly adverse parties. Moreover, even if the individual lawyer described above is personally prohibited from later representing a client with materially adverse interests in a substantially related matter, the presumption that other lawyers at the law firm have knowledge of the prospective client's confidences or secrets may be rebutted, under the circumstances discussed below, by using ethical screens.).

VI.4 Existing Counsel Not a Bar to Conferring with Prospective Client

N.Y.S. Bar Op. 305 (1973) (lawyer may properly confer with a prospective client who is already represented by counsel in the same matter, without first notifying the lawyer previously retained; lawyer may not replace or serve as cocounsel with a lawyer previously retained, unless that lawyer consents or his or her employment is terminated (citing former Canon 1, 9, EC 2-30, 9-1, 9-2, 9-6 DR 1-102 (A), 2-104, and 2-110 (A), (B)).

VI.5 Duty as Advisor to Give Professional Opinion (see Rule 2.1) Can Extend to a Prospective Client

N.Y.S. Bar Op. 569 (1995) (lawyer should advise in appropriate circumstances that the services of a lawyer may not be required. Duty to exercise independent professional judgment solely for the client's benefit free of compromising influences and loyalties can extend to a prospective client.).

NYCLA Bar Op. 371 (1945) (duty to provide an honest evaluation to a prospective client).

VI.6 Conflict Waiver

New York: N.Y.S. Bar Op. 829 (2009) (no need to obtain anew a consent to a conflict of interest that was validly given prior to the effective date of the new Rules solely on account of the adoption of the new Rules).

ABA: ABA 90-358 (1990) (on "taint-shopping". Note this Opinion was issued prior to the adoption of ABA Model Rule 1.18 on which Rule 1.18 is based and that now provides for client screening to enable a law firm to continue to act in a matter if certain requirements are met. Therefore, some of the views expressed in this Opinion on when a law firm must withdraw or decline representation have to some extent been superseded by Rule 1.18.).

Other Jurisdictions: DC Ethics Opinion 346 (addresses the Required Elements for Triggering a Duty of Confidentiality to a Prospective Client. Duty of confidentiality owed to prospective client even where the consultation is via another lawyer on behalf of the prospective client (DC has adopted the relevant provisions of the ABA Model Code including Rule 1.18)).

Nicole Lindquist's article *Ethical Duties to Prospective Clients Who Send Unsolicited Emails* contains a review of authorities considering the ethical issues raised by unsolicited e-mails from prospective clients. A recent Iowa Bar Opinion may be of particular relevance as in August 2007, Iowa adopted the ABA Model Rule of Professional Conduct 1.18 on which New York Rule 1.18 is based (see Iowa Rule 32:1.18 and Iowa State Bar Association Committee on Ethics and Practice Guidelines, Op. 07-02 (2007)).

VII. ANNOTATIONS OF CASES

VII.1 Fiduciary Duties Can Extend to Prospective Clients

Burton v Burton, 139 A.D.2d 554, 527 N.Y.S.2d 53 (1988).
Seeley v Seeley, 129 A.D.2d 625, 514 N.Y.S.2d 110 (1987).

VII.2 Presumption of Shared Confidences

Cummin v Cummin, 264 A.D.2d 637 (1999) (presumption of "shared confidences" that prevents an attorney in firm taking on representation where an attorney in the firm has formerly represented an adversary in a related matter and thereby acquired relevant confidential data, is rebuttable).

Kassis v Teacher's Ins. & Annuity Ass'n., 93 N.Y.2d 611 at 617 (1998) (court of appeals implied presumption of "shared confidences" could be rebutted where confidential information previously acquired by a large firm, but never shared among its associates could be physically isolated, such as the creation of a screening system).

VII.3 Prospective Client Consultations

Bonnie Lee v. Jose Miguel Cintron, 2009 NY Slip Op 52023U; 2009 N.Y. Misc. LEXIS 2752 (Sup. Ct., Queens County, Oct. 6, 2009) (attorney disqualified from

acting for defendant in action for damages for assault where plaintiff as a prospective client had had an initial consultation with the attorney regarding a child custody and support dispute with defendant involving common issues, but plaintiff chose not to retain them. Case was decided under the previous Code).

Limprevil v. Limprevil, 6/29/2009 N.Y.L.J. 27, col 1 (Nassau County, June 25, 2009) (case decided under new Rule 1.18. Prior consult by husband more than one year before to "possibly act" as attorney did not bar firm from acting for wife absent a clear showing that disqualification is warranted).

VII.4 Effectiveness of Electronic Contract Terms and "Click-Wraps"

Specht v. Netscape Commc'ns Corp., 306 F.3d 17 (2d. Cir. 2002) (reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have "integrity and credibility." Case concerned whether plaintiffs had assented to the terms of a license agreement governing the downloading of Netscape's computer software. A click-wrap license presents the user with a message on his or her computer screen requiring that the user manifest assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked. The acceptance button was not in a "click-wrap" form and the details of the license terms and conditions were on the next scrollable screen below the "Download now" option button. The court noted that the Web page screen was printed in such a manner that it tended to conceal the fact that there was an express acceptance of Netscape's rules and regulations if the consumer proceeded. The court held that defendant had failed to provide sufficient notice of the contract terms to bind consumers. It concluded plaintiffs neither received reasonable notice of the existence of the license terms nor manifested unambiguous assent to those terms before acting on the Web page's invitation to download the plug-in program. Accordingly, Netscape was unable to rely upon or enforce the arbitration provisions found in those terms and conditions.).

VI1.5 Taint-Shoppers Are Not "Prospective Clients"

Limprevil v. Limprevil, N.Y.L.J. 27, col. 1 (June 29, 2009) (where plaintiff could have engaged in communication with the law firm to create a "conflict" (as is expressly prohibited in new Rule 1.18), the court ordered a hearing to determine whether the facts supported that conclusion).

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Rule 2.1: Advisor

I. TEXT OF RULE 2.1[1]

In representing a client, a lawyer shall exercise professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

II. NYSBA COMMENTARY

Scope of Advice

[1] This Rule is not intended to be enforced through the disciplinary process. However, it is important to remind lawyers that a client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. Nevertheless, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

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1 Rules Editor Barry R. Temkin, Mound Cotton Wollan & Greengrass. The Editor would like to thank Daniel Markewich, Partner, Mound Cotton Wollan & Greengrass, Philip H. Atkinson, Associate, Mound Cotton Wollan & Greengrass, Kenneth R. Lange, Associate, Mound Cotton Wollan & Greengrass, and Daniel M. Rosenblum for their contributions.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibilities as advisor may include the responsibility to indicate that more may be involved than strictly legal considerations. For the allocation of responsibility in decision making between lawyer and client, see Rule 1.2.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial or public relations specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

None, though similar in concept to Ethical Considerations EC 5-1 and EC 7-8

III.2 ABA Model Rule

Rule 2.1 mirrors ABA Model Code 2.1, save for the addition in the New York Rule of a reference to "psychological" factors as one of the considerations that may be relevant to the client's situation.

IV. PRACTICE POINTERS

1. Do not be afraid to exercise your professional judgment. It is why your clients are coming to you.
2. Standing by your ethical and moral principles may not always win you the client, but acting with the highest integrity and remaining a respected member of the profession is far better than risking your career and reputation. It is also likely to mean that your clients receive sound counsel from you that will serve them well in the long term and for which you will be remembered by them.
3. This rule is not a license to impose your own moral values upon your client. You should respect your client's autonomy (See Rule 1.2), even if you disagree with your client's judgments.

V. ANALYSIS

V.1 Purpose of Rule 2.1

Rule 2.1 provides a reminder of a lawyer's duty to provide candid professional opinion and advice to clients. Exhortatory in nature, the NYSBA commentary indicates that this Rule is not intended to be enforced through the disciplinary process.[2] It is difficult to imagine a client formally complaining to disciplinary authorities that a lawyer provided competent, yet morally hollow or shortsighted advice. Yet it is not difficult to imagine a lawyer who disserves a client by telling the client what she wants to hear, or by damaging economic or family relations by aggressive, but competent, representation. Classic depictions of such Pyrrhic victories can be found in the field of family law, where aggressive representation of one party can cause damage to other relationships.

V.2 Exercise Professional Judgment

Rule 2.1 raises several philosophical questions. Should a lawyer's sole focus be the immediate needs of an individual client within narrow confines, or does a lawyer bear a larger social responsibility when providing advice to a client? To what extent does this Rule open up the potential for lawyers to bring their own moral and/or religious background to bear on the advice they are providing to their clients? To what extent should they take account of political factors when providing such advice?

Rule 2.1 refers to the lawyer as advisor and the professional judgment being referred to in this Rule appears to be focused on the giving of such advice. Lawyers should consider the factors identified in Rule 2.1 when offering advice, particularly when dealing with legal ambiguities. As the NYSBA Commentary notes, it is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although

2 NYSBA Comments to Rule 2.1, [1].

a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon many legal questions and may decisively influence how the law will be applied.

This Rule is not limited to lawyers advising the public or government, though the requirement to take into account important moral and social factors may be particularly significant in such a context.

Some clients may not appreciate a holistic approach from their lawyers, and may resent lawyers who meddle with their intellectual autonomy. A criminal defendant may be more concerned with gaining his freedom than a lecture on morality or reforming his supposedly errant ways. A sophisticated business executive may be more interested in the bottom line than in moral or social issues. And lawyers should be sensitive to clients' autonomy, and avoid imposing the lawyer's own moral and political values upon a client who may or may not share them. Some clients may have values that the client does not wish to share or discuss with their lawyer.

Moreover, sometimes the factors identified in Rule 2.1 can compete against each other. A situation may arise where the political approach, which may be based upon existing social structures and norms, does not mirror the moral one.

V.3 The Lawyer for the Situation

Some may advocate that lawyers need to consider client problems within a wider context and advise for the client's situation as a whole, rather than for the specific legal issue raised by a particular court case or corporate transaction. The idea of the lawyer acting as "a lawyer for the situation" was advocated by Louis D. Brandeis prior to his judicial appointment. It has been said that Brandeis' philosophy "rejects slavish adherence to the interests of one client, and rather suggests that lawyers should facilitate common goals among multiple parties."[3] Brandeis' 1916 nomination to the Supreme Court Justice by Woodrow Wilson was hotly contested. During his judicial confirmation process questions were publicly raised by several senators as to whether Brandeis was "trustworthy" due to his unconventional views on the broad scope of legal advice that lawyers should give clients.[4]

V.4 Holistic Advocacy

Some fields of practice are amenable to a holistic approach to lawyering. In the field of indigent criminal defense work, The Bronx Defenders have developed a philosophy in which they view clients not as "cases" but as whole people. "Our staff of attorneys, social workers, investigators, administrative support, and community organizers is

3 Robert Robinson, *The Model Rules of Professional Conduct and Serving the Non-Legal Needs of Clients: Professional Regulation in a Time of Change*, J. PROF. LAW. 121 (Oct. 17, 2008).

4 *See Brandeis Losing Votes for Supreme Justice*, N.Y. TIMES, March 18, 1916, reporting on the Brandeis nomination hearings: "*Impressed by the Evidence Concerning Trustworthiness as a Lawyer, Three Senators Say They Are Going to Read the Testimony Carefully."*

committed to working with our clients, their families and their communities to address the critical issues that circumscribe their lives."[5] These lawyers view clients in their social context.

V.5 Economic Factors and Dealing with an Undue Emphasis on Economic Interest When Advising Business in a Commercial Setting

In practice, most lawyers are adept at considering economic factors and how they may impact their client's affairs. Indeed, in commercial settings there is a danger that this might become the overriding and most important factor that a lawyer considers when providing advice to clients.

Purely legal or economic advice may backfire. In certain settings, advice that ignores any moral element, while legally accurate, could result in harmful consequences to a client's reputation and financial position. Consider, for example, a legal issue involving an environmental or social impact on society. While the immediate problem may have a discrete legal solution, society (and the consuming public) may respond more positively to a company that acknowledges and remedies any adverse consequences of its actions, rather than taking a narrow defensive posture.

V.6 Moral Factors

Moral factors can arise in a variety of forms. In many instances, these are likely to be reflected in the applicable legal principles.

In the structured finance world, for example, issues may arise as to whether a lawyer should provide a third-party opinion letter to facilitate a subset of transactions structured for the purpose of earnings management where the transaction may be legally permissible and does not contradict existing norms. Differing views on this question have been expressed in the exchange of articles between Stephen Schwarz and Professor Simon. See discussion under Rule 2.4, infra.

In *Teaching Enron*,[6] Milton C. Regan Jr. points out that proposed transactions do not come labeled as problematic, and intricate legal structures may not be obviously fraudulent. He notes that behaving ethically requires cultivating powers of perception that are sensitive to and recognize events that carry ethical significance.

V.7 Social Factors

A lawyer may advise that a client consider social factors, such as the impact of contemplated actions on others. In a family or elder law situation or in advising a client facing criminal charges this factor can be readily identified. In other situations, it may

5 *Quoted in* Robert Robinson, *supra* note 3.

6 Milton C. Regan Jr., *Teaching Enron*, 74 Fordham L. Rev. (December 2005).

not be as apparent. Nevertheless the potential for social factors to impinge on commercial matters should not be overlooked.

V.8 "Psychological Factors"

Unlike the ABA Model Rule, NY Rule 2.1 includes reference to "psychological factors." These are factors that involve the relationship of the individual's role and status to that of the total group or community as they affect individual behavior, attitudes, or beliefs.

V.9 When to Refer a Client to Other Professionals?

The Rule recognizes that a lawyer is not always the best person to advise a client on all aspects of a many-faceted problem. In some cases, the client would be well-served by consulting with other professionals, such as an accountant, doctor, or therapist. When a lawyer should refer a client to another professional is likely to depend upon the particular fact pattern and an exercise of the attorney's professional judgment.

V.10 The Client Who Doesn't Want to Hear It and "Raw Meat Ralph"

Speaking the truth to a client can come with costs. Clients want many things from lawyers. If asked the question directly, most clients will tell their lawyers that they want objective, disinterested analysis of their situations. Particularly in litigation, however, clients want loyalty, advocacy, partisanship, and passion. It is not always easy to tell a client that the client's adversary may be correct, particularly early on in the client-lawyer relationship. In most disputes it is human nature for clients to profess strong convictions that they are in the right and that their counterparty has wronged them. Matthew Lalli has written that clients virtually always believe that their positions are correct and that their adversary acted wrongly.[7] In this context, clients may want the lawyer to facilitate or defend their actions, not act as their conscience. A column in the New York State Bar Journal's Attorney Professionalism Forum, *"Raw Meat Wannabe,"* considered the position of a lawyer who provides his honest professional opinion and keeps losing work to "Raw Meat Ralph," a fiery litigator who tells his clients what they want to hear. The column suggests that better management of client relations and expectations can go a long way to assisting in this regard. At the same time, lawyers need to:

- demonstrate to their client their zealous advocacy on behalf of the client and faith in the client's position,

7 *Avoiding Legal Malpractice Claims*, 15 UTAH B.J. 8 (Feb. 2002).

- win over the client's trust and confidence while truly conveying to the client an honest assessment of the case,
- effectively manage the client's expectations.

A lawyer may do well to demonstrate sympathy for the client and the client's legal predicament while sensitively advising on the client's available legal options. In many ways, the profession may need to play a part in better managing client expectations while simultaneously conveying zeal and loyalty on the client's behalf.[8]

VI. ANNOTATIONS OF ETHICS OPINIONS [RESERVED]

VII. ANNOTATIONS OF CASES [RESERVED]

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VIII.2 The Lawyer for the Situation

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VIII.3 The Bronx Defenders

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VIII.4 The Professional Ideology

Professor Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U.L. REV. 1229 (1995) and his follow-up article, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law-As-Business Paradigm*, 27 FLA. ST. U.L. REV 9 (1999).

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8 *See also*, NYS Standards of Civility, *discussed in* Gerald Lebovits, *Professionalism in the Legal Profession*, 5 RICHMOND COUNTY B. ASS'N J. 8 (Summer 2006).

Professor Robert Robinson, *The Model Rules of Professional Conduct and Serving the Non-Legal Needs of Clients: Professional Regulation in a Time of Change*, J. PROF. LAW. 119 (2008).

VIII.5 Maintaining Professional Integrity When Advising the Client

See the NYSBA Attorney Professionalism Forum Article, *Raw Meat Wannabe.*

Gerald Lebovits, *Professionalism in the Legal Profession*, 5 RICHMOND COUNTY B. ASS'N J. 8 (Summer 2006).

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Rule 2.2: [Reserved]

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Rule 2.3: Evaluation for Use by Third Persons

I. TEXT OF RULE 2.3[1]

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Unless disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is protected by Rule 1.6.

II. NYSBA COMMENTARY

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. *See* Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties: for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency: for example, an opinion concerning the legality of securities registered for sale under the securities laws. In other instances, the evaluation

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may be required by a third person, such as a purchaser of a business, or of intellectual property or a similar asset.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer or by special counsel employed by the government is not an "evaluation" as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to a client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, because such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken on behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of the search may be limited by time constraints or the non-cooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If, after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law having reference to the terms of

the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted knowingly to make a false statement of material fact or law in providing an evaluation under this Rule. *See* Rule 4.1. A knowing omission of material information that must be disclosed to make material statements in the evaluation not false or misleading may violate this Rule.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. *See* Rule 1.6(a)(2). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the lawyer has consulted with the client and the client has been adequately informed concerning the conditions of the evaluation, the nature of the information to be disclosed and important possible effects on the client's interests. *See* Rules 1.0(j), 1.6(a).

Financial Auditors' Requests for Information

[6] When a question is raised by the client's financial auditor concerning the legal situation of a client, and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

This is a new Rule with no former New York Code equivalent.

See also the following new Rules*:* Rule 1.0(j), Terminology—"Informed Consent"; Rule 1.0(k), Terminology— "knows"; Rule 1.0(q),Terminology—"reasonably"; Rule 1.0(r), Terminology—"Reasonable belief"; Rule 1.6, Confidentiality of Information; Rule 1.7, Conflicts of Interest: Current Clients; Rule 1.8, Conflicts of Interest: Specific Conflict of Interest Rules; Rule 4.1, Truthfulness in Statements to Others.

III.2 ABA Model Rule

NY Rule 2.3 is identical to ABA Model Rule 2.3.

IV. PRACTICE POINTERS

1. If contacted directly by a third party with an evaluation request, check with your client that it is a genuine request, and that the client is aware of the request and its implications, and authorizes the lawyer to respond to the request.
2. Consider whether the request has any potential to create duties to the third party to whom you are providing the opinion. Consider whether the use of appropriate disclaimers may be appropriate—or enforceable.
3. Remember the lawyer's duty of confidentiality to the client (Rule 1.6). Rule 2.3 does not provide any exceptions for evaluations for use by third persons.
4. Where appropriate, after fully explaining the position to the client, obtain the client's written agreement and "sign-off" to release of sensitive information. This should assist in demonstrating that informed consent has been given under Rule 2.3(b).
5. Do not assume that attorney-client privilege or work product privilege will automatically attach to the work you do—you should analyze the work that is being carried out to assess this.
6. Be alert to the potential for unintentional waiver of the attorney-client privilege or the work product privilege when responding to requests for third-party opinions.
7. Be prepared to decline a request for a third-party evaluation that is likely to have a materially adverse effect on the client's interests.
8. Where appropriate, reference recommended and recognized forms for the opinion, particularly the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information.

V. ANALYSIS

V.1 Purpose of Rule 2.3

This is a new Rule and one that is likely to be the focus of considerable attention in years to come, as the law in the area of third-party legal opinions is still developing. There are many contexts in which a lawyer may be asked to provide formal written opinions to third parties. The provision of opinions to third parties is a common aspect of practice for the transactional lawyer. The litigation lawyer may be asked by an auditor preparing a client's annual financial returns to comment upon pending litigation to assist in preparing financial reports or public securities filings. Or a lawyer retained by an insurance company to defend a policyholder may be asked by an insurance company to evaluate the client's conduct for liability or coverage purposes. The propriety of the lawyer's conduct must be evaluated in light of the lawyer's other obligations under the Rules of Professional Conduct. The NYSBA Commentary provides the example of a lawyer acting as advocate in defending the client against charges of fraud, concluding that it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction (*see* NYSBA Comments to Rule 2.3, [3]).

Rule 2.3 is a cautionary rule, and indicates that the lawyer's other duties to the client take precedence over a third-party request for an evaluation. Under Rule 2.3(a) a lawyer may provide an "evaluation" to a third party if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client. The permissive language used in this Rule suggests that even if it may be compatible, a lawyer is not required to provide such an evaluation. Moreover, Rule 2.3 (b) requires a lawyer to turn down a request for a third-party evaluation that is likely to have a materially adverse effect on the client's interest.

If the lawyer reasonably believes that the requested evaluation is not compatible with other aspects of the lawyer's relationship with the client then the lawyer may not provide the opinion. This rule should be read together with the other rules. The lawyer's role as evaluator should be subordinated to the lawyer's other duties to clients and others; there is no exception in this rule that trumps or supersedes any other such duties.

V.2 Informed Consent Required When Providing an Opinion That Is Likely to Have a Materially Adverse Effect Upon the Client

Rule 2.3(b) provides that when the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent. Rule 1.0(k), defining actual knowledge of the fact in question, specifies that knowledge may be inferred from the circumstances. Furthermore, Rule 2.3(b) also applies where the lawyer "reasonably should know" of the likely material adverse impact to the client. This is likely to be judged by the standard of a reasonably prudent and competent lawyer (by virtue of Rule 1.0(q).

Under Rule 1.0, "informed consent" is defined as: "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." (Rule 1.0(j)) Accordingly, in such circumstances a lawyer will need to consider and discuss with the client the material risks involved in the provision of a requested opinion to a third party and whether there are any reasonably available alternatives.

V.3 Disclosure of Client Confidences

Under Rule 1.6, the lawyer owes a duty of confidentiality to the client. If asked to provide an opinion letter for a third party, a lawyer might consider the possibility that complying with the request would require the lawyer to disclose certain client confidential information. A lawyer needs to remember in such circumstances the duty of confidentiality. In some circumstances providing the opinion may not be compatible with that duty. In others, the lawyer may be able to provide the opinion with the client's

agreement provided that the evaluation and its potential consequences have been explained adequately to and consented by the client. As Rule 2.3(c) makes clear, unless disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is protected by Rule 1.6, and may be disclosed only with the client's informed consent. (Rule 1.6. (a) (1)), or one of the grounds enumerated in Rule 1.6 (b)).

A lawyer may need to set out within the lawyer's opinion qualifications that limit or bear upon the scope of the opinion that the lawyer is providing. In some cases, the lawyer may be unable to provide the opinion that is being requested. Sometimes not providing the evaluation can have adverse consequences. The consequences that might follow from informing the third party that the lawyer is not able to provide the evaluation may need to be discussed with the client in advance.

In no circumstance is the lawyer permitted knowingly to make a false statement of material fact or law in providing an evaluation under this Rule (*see* Rule 4.1), and in some circumstances, a knowing omission of material information may violate Rule 4.1.[2]

V.4 Conflicts of Interest

A request to provide a third-party evaluation could, in some situations, give rise to potential conflicts of interest. The interests of the third party in such a scenario may be different from those of the lawyer's client. This aspect may raise an additional level of complexity since the conflict rules in Rule 1.7 are designed to prevent a lawyer, absent proper waiver, from "representing differing interests" (Rule 1.7 (a) (1)). Rule 1.7 also comes into play when the lawyer's "professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Rule 1.7. (a) (2). A lawyer who seeks to obtain a significant fee from the evaluation—or significant recurring future business—may, under some circumstances, come within the ambit of Rule 1.7. In this regard, the lawyer should be aware of the risk of potential or actual conflicts between the interest of the client and the interests of others, including the lawyer's own interests.[3] See generally *U.S. v. Schwarz,* 259 F.3d 59 (1st Cir. 2001) (lawyer who signs $10 million contract with labor union may not represent constituent member in criminal prosecution in which unnamed accomplice may be union officer).

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2 *See* NYSBA Commentary to Rule, 2.4,[4]; Barry R. Temkin, *Misrepresentation by Omission In Settlement Negotiations: Should There Be A Silent, Safe Harbor*? 18 GEO. J. L. ETHICS 179 (2004).

3 S*ee also* Crossland Savings FSB v. Rockwood Insurance Company, 700 F. Supp 1274, 1282-3 (S.D.N.Y. 1988); Vereins-und Westbank, AG v. Carter, 691 F. Supp 704, 715-16) (S.D.N.Y. 1986)). This is an area of substantive law beyond the scope of the Rules of Professional Conduct.

V.5 Potential for Lawyer Providing Opinion to Owe a Duty to the Third Party

A lawyer who is asked to provide a third-party evaluation will need to consider whether, in doing so, the lawyer may owe a duty to the third party. The existence of such a duty is a matter of substantive law, and outside the scope of the Rules of Professional Conduct.

When providing a third-party evaluation the lawyer has a duty not to knowingly make a false statements of fact or law to a third person. (Rule 4.1). See Barry R. Temkin, *Misrepresentation by Omission In Settlement Negotiations: Should There Be A Silent, Safe Harbor?* 18 Geo. J. L. Ethics 179 (2004).

In addition, a lawyer may owe a non-client a duty of care in certain situations. This may open up the potential for liability in respect of negligent misstatements, not merely knowingly false ones. Whether a duty of care arises will depend upon the particular facts, and upon substantive law. In *Prudential Insurance Company of America v. Dewey Ballantine Bushby and Woods,* 80 N.Y.2d 377, 590 N.Y.S.2d 831 (1992), the Court considered an opinion letter provided by a law firm to a third party in connection with the client's debt-restructuring that allegedly contained incorrect assurances. The Court stated that under some circumstances the law firm might have a duty running to third parties, although on the facts of that case the Court concluded that the assertion in the opinion letter had not caused the plaintiff's loss.

V.6 Attorney-client/Work-product Privilege

An important and developing issue in the context of third-party opinions is the extent to which a lawyer's work in preparing an advisory opinion is protected from disclosure by attorney-client and/or work-product privilege. Lawyers requested to provide third-party opinions should consider any potential waiver of privilege in providing the opinion requested. Courts generally hold that disclosure of attorney-client communications to auditors, as independent third parties, constitutes a waiver (see *In re Pfizer Inc Securities Litig.*, 1993 WL 561125, at 6* (S.D.N.Y. 1993). The attorney-client privilege is unlikely to protect the final evaluation provided to the third party, but it may attach to communications with the lawyer's client in connection with the preparation of the evaluation in appropriate circumstances. The work-product privilege may apply in some circumstances, but lawyers need to be particularly aware of the potential for waiver if the lawyer provides information and documents to a third party that does not share a common interest with the client. *See, e.g., United States v. Adlman*, 134 F.3d 1194 (2d Cir.) (tax report created by accountant, at request of lawyer, because of anticipated litigation, is work-product within Fed. R. Civ. P. 26(b)(3)).

V.7 Specific Forms of Evaluation

There are a number of areas in which evaluation for use by a third party may be requested.

[a] Opinions in Response to Auditors' Inquiries It is common for lawyers to receive requests for information from their clients' auditors. Lawyers should be aware that an auditor is viewed as independent and therefore questions regarding potential waiver of privilege may arise and should be considered when providing information. It may be appropriate for a lawyer when providing a response to an auditor to state that the client does not intend to waive the attorney-client privilege with respect to any information which that the company has provided to the lawyer and that the lawyer's response should not in any way be viewed as a waiver of the protection of any applicable privilege.

As indicated in comment [6], above, useful guidance on responding to auditor's enquiries has been provided by the American Bar Association (ABA). NYSBA Comments to Rule 2.3, [6] The ABA *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information* should be consulted and incorporated by reference in auditor letters.

When expressing a judgment on the outcome of litigation the terms "probable" and "remote" have designated meanings. The ABA *Statement of Policy* advises that in view of the inherent uncertainties of litigation a lawyer should normally refrain from expressing judgments as to outcome save in those relatively few clear cases where it appears to the lawyer that an unfavorable outcome is either "probable" or "remote". A "probable" liability exists "if the prospects of the claimant not succeeding are judged to be extremely doubtful and the prospects for success by the client in its defense are judged to be slight." The term "remote" signifies "the prospects for the client not succeeding in its defense are judged extremely doubtful and the prospects of success by the claimant are judged to be slight."

[b] Transaction/Closing Opinions Lawyers are frequently asked to opine on the legal ability of their clients to enter into a particular transaction to satisfy the requirements of a third party. The type of legal opinions sought can vary considerably and depend upon the particular transaction.

For example, it may be the requirement of a bank loan that the borrower's law firm provide a written legal opinion confirming that counsel is not aware of any legal reason why the client cannot enter into the agreement. In corporate acquisitions, lawyers may be asked to provide an opinion upon the legal ability of the client to enter into the transaction, and/or the possible adverse impact of certain litigation. In the context of legal opinions for transactions, counsel should consult the ABA's *Third-Party Legal Opinion Report including the Legal Opinion Accord* (1991). In addition, guidance as to what constitutes customary practice on a national level can be found in the reports on closing opinions issued by the TriBar Opinion Committee and Committees of the ABA Section of Business Law. The ABA and TRIBAR reports contain recommendations designed to limit a lawyer's potential exposure when providing such opinions.

[c] Tax Opinions Lawyers providing opinions on tax matters need to be aware of IRS requirements. IRS Circular 230 Rules specify content requirements and conditions under which tax professionals may issue opinions.

In addition, the ABA has issued Ethics Opinion 346 on the provision of tax opinions. ABA Formal Opinion 346 provides that a tax opinion must:

1. Include full disclosure of the structure and intended operations of the venture;
2. Provide complete access to all relevant information;
3. Include an accurate and complete statement of all material facts in offering materials;
4. Provide clear and complete identification of all representations and intended future activities;
5. Relate the law to the actual facts of the transaction, and identify assumed facts;
6. Ascertain that a good faith effort has been made to address legal issues other than those to be addressed in the tax shelter opinion;
7. Assure all material tax issues have been considered that have a reasonable possibility of being challenged by the IRS;
8. Include an opinion as to the likely outcome of each material issue and the extent to which the tax benefits are likely to be realized; and
9. Assure offering materials correctly represent the nature and extent of the tax shelter opinion.

A lawyer may not issue a tax opinion if these standards are not met. It will obviously be important for a lawyer advising in such matters to stress to the client the importance of the client providing complete access to all relevant information so that the lawyer can comply with these standards.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Duty to Make Adequate Inquiry of Client When Providing Opinion

ABA Formal Op. 335 (guidelines for Lawyers providing an assumed facts opinion in sale of unregistered securities. Duty to make inquiry of client. If any of the alleged facts, or the alleged facts taken as a whole, are incomplete in a material respect; or are suspect; or are inconsistent; or either on their face or on the basis of other known facts are open to question, the lawyer should make further inquiry.).

VI.2 Tax Opinions

ABA Formal Op. 85-352 (1982) (lawyer's duties and applicable standards when providing tax opinions).

VI.3 Tax Shelters

ABA Formal Op. 346 (1982) (addressing tax opinions addressing minimizing of tax liability/tax shelters. Mirrors the provisions in IRS Circular 230. Lawyer should not

issue opinion if standards not met. Refers to Formal Opinion 335 requirement to make inquiry of client as to the relevant facts and receive answers. If any of the alleged facts, or the alleged facts taken as a whole, are incomplete in a material respect; or are suspect; or are inconsistent; or either on their face or on the basis of other known facts are open to question, the lawyer should make further inquiry. If the lawyer concludes that further inquiry of a reasonable nature would not give them sufficient confidence as to all the relevant facts, or for any other reason the lawyer does not make the appropriate further inquiries, the lawyer should refuse to give an opinion.).

VI.4 Opinions and Evaluations Requested by Client's Insurance Carrier

Federal: ABA Formal Op. 01-421 (2001) (ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions).

Other Jurisdictions: Opinions and evaluations requested by client's insurance carrier: Opinion for insurance carrier on insured's liability and value of claim for settlement purposes

Massachusetts Bar Op. 91-5 (1992) (once an attorney hired by an insurance carrier to represent an insured makes a good faith determination that there is a potential for an award in excess of the policy limits, the attorney may not provide the carrier with the attorney's opinion as to the merits of the claim or its value for settlement purposes if the attorney knows or has strong reason to believe that the case can be settled within the policy limits. The insurer must retain separate counsel for such purposes. "[W]here the claim is in excess of the policy limits, or where the insured is otherwise defending its insured under a reservation of rights, the interests of the insured and insurer are clearly adverse… When the attorney is requested by the carrier to provide a professional opinion as to the merits of the claim or its value for settlement purposes, the attorney cannot even begin to consider the matter objectively without adversely affecting the attorney's obligation to the insured to settle the case for any amount up to the policy limit. DR 5-105(A) thus prohibits the dual representation.").

Kansas Bar Op. No. 94-7 (1994) (committee disagrees with the Massachusetts Opinion on the ethical requirements of counsel when an excess claim is made by plaintiff. Under the Model Rules counsel cannot take any action which may harm the interests of the insured, and may be required to withdraw from the case altogether. The attorney may seek an informed consent but such consent requires full disclosure of the pertinent facts and circumstances. Absent such informed consent, a conflict arises that is irreconcilable and counsel may need to withdraw.).

RI Eth. Op. 92-88 (1993) (attorney who compiled a title report for an out-of-state lending institution, including charts and abstracts for the attorney's own benefit, forwarded a title report to the lender, for use in a possible foreclosure proceeding. Soon thereafter, attorney was informed that a third party purchased the loan. Through counsel, the third party demanded the entire contents of the attorney's file. Concluded that under

Rule 2.3 the attorney may not give out the information to a purchaser of the loan without the consent of the third party.).

RI Eth. Op. 91-13 (1991) (attorney is expressly authorized to render third-party opinions so long as the attorney possesses a reasonable belief that making the evaluation is compatible with other aspects of his or her relationship with the client and that the client consents to such evaluation). (*See also* In re Ethics Advisory Panel Opinion, 554 A.2d 1033, 1034 (R.I. 1989)).

VII. ANNOTATIONS OF CASES

VII.1 Duty to Third Parties

Ossining Union Free School District v. Anderson LaRocca Anderson, 73 N.Y.2d 417 (1989) (case concerned duty of care of Engineering Consultants. Held that for a party to recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity—such a requirement is necessary in order to provide fair and manageable bounds to what otherwise could prove to be limitless liability.). *See also* Credit Alliance Corp. v. Arthur Andersen & Co., 65 N.Y.2d 536 (1985) (applying similar principles in context of accountants' duty of care).

Ultramares Corp. v. Touche (255 N.Y. 170, 188) and Glanzer v. Shepard (233 N.Y. 236, 240) (court suggested that in the right circumstances pecuniary recovery might be had from lawyers).

The Prudential Insurance Company of America v. Dewey Ballantine and others. 80 N.Y.2d 377, 605 N.E.2d 318, 590 N.Y.S.2d 831 (1992) (duty of care arose on facts of case where law firm was asked to provide opinion letter, was aware of the purpose of the opinion letter and that the third party would rely on the letter when deciding whether to agree to debt restructuring arrangement with their client).

Dean Foods Co. v. Pappathanasi, 18 Mass. L. Rptr. 598, ∗ 22 (Mass. Super. Ct. 2004).

VII.2 Work-product/attorney-client Privilege

In re Pfizer Inc Securities Litig., 1993 WL 561125, at 6 (S.D.N.Y. 1993) (disclosure of attorney-client communications to auditors as independent third parties constitutes a waiver of the attorney-client privilege and "destroys the confidentiality seal." The case also considered work-product privilege.).

Medinol, Ltd. v. Boston Scientific Corp., 214 F.R.D. 113 (S.D.N.Y. 2002) (disclosure of work product to auditors not protected under work-product privilege and constituted a waiver since auditors considered independent and did not share a "common interest" in the litigation).

Hickman v. Taylor 329, U.S. 495 (1947) (work-product privilege upheld in respect of documents and other tangible materials prepared in anticipation of litigation or for trial- principle since embodied in s.26(b)(3) of the Federal Rules of Civil Procedure).

United States v. Adlman, 134 F.3d 1194 (2d Cir. 1939) (work-product privilege considering the position where the dual purpose of anticipating litigation and a business purpose coexist. See the "because of" test explained by Judge Leval at 1202-03, which asks whether in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained *because of* the prospect of litigation.).

United States v. Textron Inc. and Subsidiaries, Case No. 07-2631, U.S. Court of Appeals (1st Cir.) (Opinion En Banc, August 13, 2009) (majority decision of Circuit Judge Boudin, Chief Judge Lynch, and Circuit Judge Howard) ("tax accrual work papers"—attorney work product doctrine did not shield material prepared by lawyers and others in Textron's Tax Department to support Textron's calculation of its tax reserves for its audited corporate financial statements. The work-product privilege did not apply where the work papers were independently required by statutory and audit requirements—these were "tax documents" rather than "case preparation" materials. It was not enough to trigger work-product protection that the subject matter of a document relates to a subject that might conceivably be litigated. Judges Torruella and Lipez' forceful dissent noted the majority in the case had departed from the "because of" test—whether the document can be fairly said to have been prepared or obtained *because of* the prospect of litigation—set out in Adlman and Maine v. United States Dept. of the Interior, 298 F.3d 60, 68 (1st Cir. 2002). *Note also* the Fifth Circuit's "primary purpose" test in this context.).

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Rule 2.4: Lawyer Serving as Third-Party Neutral

I. TEXT OF RULE 2.4[1]

(a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

II. NYSBA COMMENTARY

[1] Alternative dispute resolution has become a substantial part of the civil justice system. In addition to representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A "third-party neutral" is a person such as a mediator, arbitrator, conciliator, or evaluator or a person serving in another capacity that assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator, or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

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[2] The role of a third-party neutral is not unique to lawyers although, in some court connected contexts, only lawyers are permitted to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that applies either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as a third-party neutral and as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral may be asked subsequently to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (*see* Rule 1.0(w)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

This is a new NY Rule with no New York Code equivalent. It touches upon a similar area to former EC5-20, but Rule 2.4 is wider in scope and deals with persons who are not clients, whereas EC5-20 concerned mediation involving "present or former clients."

See also the following Rules: 1.12 Special Conflict Rules for Former Judges, Arbitrators, Mediators or other Third-Party Neutrals; 1.7-1.8 Conflicts of Interest; Rule 3.3 A Party Representative Lawyer's Duty of Candor; Rule 4.1 A Party

Representative Lawyer's Duty of Candor; Rule 3.4 Fairness to Opposing Party & Counsel; Rule 3.5 Maintaining and Preserving the Impartiality of Tribunals and Jurors.

III.2 ABA Model Rule

NY Rule 2.4 is identical to ABA Model Rule 2.4.

IV. PRACTICE POINTERS

1. If a party is not represented by a lawyer, make sure you explain that you are not representing her as a lawyer. Explain what your role is, by reference to the terms of your appointment.
2. In addition to providing an oral explanation, consider providing the parties with a short written explanation of your role in the matter which they can keep.
3. Prepare a written explanation of your role that includes a section for a party to sign and acknowledge receipt of the explanation that you have provided to demonstrate compliance with Rule 2.4.
4. Consider explaining: the purpose and scope of the arbitration/mediation under which you have been appointed; that in taking on the role of a third-party neutral, no attorney-client relationship is being created between you and that party; that in your role as a third-party neutral you are not acting as the lawyer for either side; that any communications that party has with you, while potentially confidential within the terms of your appointment as mediator, would not be subject to attorney-client privilege.
5. Consider and remain alert in connection with potential conflicts and disclosure obligations.
6. Consult the rules of the host forum for specific guidance on the role of party-arbitrators.

V. ANALYSIS

V.1 Purpose of Rule 2.4

There was no predecessor to Rule 2.4 in the previous Code. Rule 2.4 is identical to the ABA Model Rule 2.4. Rule 2.4 concerns a lawyer who serves as a third-party neutral, whether as an arbitrator, mediator, or in some other form of alternative dispute resolution capacity. The role of a third-party neutral is not unique to lawyers, but lawyers being appointed to such a role need to be aware of the additional ethical obligations imposed upon them under Rule 2.4.

The Rule is relatively limited in its scope. A lawyer acting as a third-party neutral must inform the parties that the neutral does not act as advocate or advisor to

either side. Where it is apparent that a party does not understand the lawyer's role as third-party neutral, then the lawyer-mediator needs to explain her role in accordance with the provisions of Rule 2.4(b).

It is not entirely clear whether the provision in the second sentence of Rule 2.4(b) is predicated and conditional upon the first sentence. Would the second sentence provision apply in a situation where a party is legally represented, but where it appears to the third-party neutral that the party for some reason does not understand their role? The NYSBA Commentary and COSAC Report appear to assume that the provisions in Rule 2.4(b) are intended to apply only where a party is not represented by counsel. However, regardless of any disciplinary requirement under Rule 2.4(b), prudence and common sense would dictate that a third-party neutral should reiterate her role in a clear and concise manner—even to parties represented by counsel in the proceeding.

Lawyers taking on the role of third-party neutral should be aware that, in addition to Rule 2.4, there may be other ethical considerations or rules governing their appointment, depending on the forum and the contractual basis upon which they have been appointed. A neutral's appointment may be predicated upon being appropriately qualified and a member of a particular organization that has set out the ethical standards to be employed by its members. As the NYSBA Comments note, a neutral may have been appointed as an arbitrator under the American Arbitration Association's Rules and be subject to the AAA/ABA Code of Ethics for Arbitration in Commercial Disputes. Alternatively, a neutral may be appointed as a mediator in accordance with the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association, and Society of Professionals in Dispute Resolution. In the case of an arbitrator's appointment contractual provisions may be relevant, such as an "honorable engagement" clause, whereby the neutral would not necessarily need to follow and strictly apply applicable law in order to reach a just and equitable result. Moreover, neutrals serving in ADR proceedings must comport with other dictates of the Rules, such as the mandate in Rule 8.4 to avoid conduct involving dishonesty, fraud and misrepresentations.

V.2 What is the "Third-party Neutral's Role"?

While Rule 2.4 requires third-party neutrals to explain to an unrepresented party that the neutral role does not include a client-attorney relationship, the rule provides little guidance on the actual substance of that explanation. Should there be a form of neutral *Miranda* warnings? The comment that the extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute resolution process selected, is of relatively little assistance from a practical point of view. The NYSBA comments and COSAC Report point to the most obvious, namely inapplicability of the attorney-client evidentiary privilege. Any explanation to an unrepresented party should clearly reference the nature of the arrangement which governs the terms of the third-party neutral's appointment, for example the neutral's role as an arbitrator or mediator.

The neutral should then proceed to explain that in that role the neutral does not represent any party and will not provide any legal advice or advocacy.

The rule's reference to whether a lawyer knows or "reasonably should know that a party does not understand the lawyer's role in the matter" may be something of a hostage to fortune. A lawyer acting as a third-party neutral who assumes an unrepresented party understands his role runs the risk that the unrepresented party did not so understand. Any uncertainty over this issue is most likely to be resolved in favor of the unrepresented party and against the lawyer. A neutral should be willing and ready to provide a full explanation of his role to each party even where the neutral believes that a party may already appreciate the neutral's role, rather than leave things to chance and optimistic assumptions.

V.3 Can a Third-party Neutral Later Act for One of the Parties in the Same Matter?

In addition to the actual requirements found in Rule 2.4, some further guidance is provided in the NYSBA's Comments and COSAC Report for the situation where a lawyer has served as a third-party neutral and is later asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12. The COSAC Report notes that for disqualification and imputed disqualification, purposes a lawyer who has served as a third-party neutral is to be treated on par with a judge.

V.4 The Ambiguous Position of a Party Arbitrator

In some forms of arbitration, the concept of "neutral" is harder to define. In some forms of tri-panel arbitration, the arbitration clause or rules of a private forum may provide for each party to appoint a "party arbitrator," and for the two party arbitrators then to jointly select a third arbitrator as a neutral umpire. In this context, an issue arises as to whether the Rule 2.4 is intended to encompass the role of a party arbitrator or merely that of the neutral umpire. The role of a party-appointed arbitrator is somewhat ambiguous, since the decision-maker can be expected to have some level of affinity with the party-sponsor who selected the party arbitrator. In some circumstances, party arbitrators have engaged in ex parte communications with the party appointing them and taking on an advocacy role for that party during the course of the arbitration. As acknowledged by one court of appeals, "in the main party-appointed arbitrators are *supposed* to be advocates." *Sphere Drake Insurance Ltd. v. All American Life Insurance Company,* 307 F.3d 617 (2002). Have these party arbitrators crossed the line? As noted by David Branson in *American Party-Appointed Arbitrators—Not the Three Monkeys*, advocacy by party-arbitrators has been described by some as unethical and by others as inappropriate. The difficulty in acting both "sympathetically" and impartially may put a party arbitrator in an untenable position and give rise to conflicting duties. On the other hand, courts may be supportive of the parties' freedom to contract should they

desire to appoint partisan party arbitrators with a third impartial umpire to break any deadlock rather than impose any higher public standard. Allan Scott Rau has defended the role of partisan party-appointed arbitrators (see Symposium *The Lawyer's Duties and Responsibilities in Dispute Resolution: Article: Integrity in Private Judging*, 38 S. Tex. L. Rev. 485 (1997) (*reprinted in* 14 Arb. Int. 115 (1998)).

Case law across the United States is divided regarding the role and impartiality of a party-appointed arbitrator and there is no clear guidance in New York case law. "Evident partiality" in an arbitrator, however, is a ground for setting aside an arbitration demand under both the New York Arbitration Act and the Federal Arbitration Act. Under the AAA Commercial Arbitration Rules, not only the neutral arbitrator but also the party appointed arbitrators are required to be independent and impartial (unless the parties expressly choose otherwise).

The 2009 Rules of Professional Conduct have sidestepped this substantive issue. Rule 2.4 mandates no level of impartiality by a third-party neutral, which is a matter of private contract or substantive law outside the scope of the Rules of Professional Conduct. Rather, all that Rule 2.4 requires is that the lawyer-neutral explain to the parties that the neutral does not represent either side in the controversy. How the third-party neutral then conducts the arbitration or mediation may or may not comport with the parties' arbitration agreement, the Federal Arbitration Act or the rules of the host forum. And a third-party neutral who engages in deceit, misrepresentation, or fraud may run afoul of the mandates of Rule 8.4. But substantive questions of bias or advocacy would not seem to raise an issue under the narrow language of Rule 2.4. In sum, there is no evidence that the Appellate Divisions, in adopting Rule 2.4, consciously intended to change the practice of private arbitration with party arbitrators, or to change the practice of those party arbitrators, aside from the giving of neutral "*Miranda* warnings" mentioned in Rule 2.4 (b).

VI. ANNOTATIONS OF ETHICS OPINIONS [RESERVED]

VII. ANNOTATIONS OF CASES

VII.1 Party-appointed Arbitrators

Sphere Drake Insurance Ltd. v. All American Life Insurance Company, 307 F.3d 617 (2002).

ATSA of California, Inc v. Continental Ins. Co., *C.A.*, 702 F.2d 172 (Cal. 1983).

Commonwealth Coatings Corp v. Continental Casualty Co., 393 U.S. 145, 21 L.Ed. 2d 301, 89 S. Ct. 337 (1968) (party-appointed arbitrators are not governed by the norms under which neutrals operate under Federal Arbitration Act).

VII.2 Partiality

Federman v. Farber, 73 N.Y.S.2d 682 (1947) (disclosing views, in advance of formal decision, did not show partiality).

L. N. Jackson & Co. v. Compania Gasoliba Soc. Anon, 282 App. Div. 125, 121 N.Y.S.2d 624, *motion to dismiss app withdrawn*, 306 NY 596, 115 NE2d 826 (1953) (failure of petitioner to disclose to respondent that its president was member of committee which appointed arbitrators does not vitiate and nullify award).

Knickerbocker Textile Corp. v. Sheila-Lynn, Inc., 172 Misc. 1015, 16 N.Y.S.2d 435, (1939), *affd*, 259 App. Div. 992, 20 N.Y.S.2d 985 (1940) (award was set aside where A's participation as arbitrator in the proceeding without disclosing his connection with the president of the other party to the proceeding was not in consonance with the right or with the principles of fair play. The award must be set aside despite the fact that it was unanimous and that an award by the two other arbitrators alone would have been valid. The unanimity of the three arbitrators does not dissolve and clear the cloud of disqualification of the one.).

Milliken Woolens, Inc. v. Weber Knit Sportswear, Inc., 11 App. Div. 2d 166, 202 N.Y.S.2d 431 (1st Dept. 1960), *affd,* 9 N.Y.2d 878, 216 N.Y.S.2d 696, 175 N.E.2d 826, *reh. den.,* 10 N.Y.2d 750 (1961) (award was vacated where record disclosed that because one arbitrator, an attorney, had been on staff of same legal firm as respondent's counsel, and another arbitrator, a businessman had as purchasing agent for his firm bought much of his requirements from respondent, both arbitrators were disqualified and since these relationships were unknown, or inadequately disclosed to appellant, they could not be deemed to have been waived).

In re Amtorg Trading Corp., 277 App. Div. 531, 100 N.Y.S.2d 747 (1950), *affd*, 304 N.Y. 519, 109 N.E.2d 606. (1952) (interest in result does not disqualify arbitrator, where circumstances are disclosed to adversary).

Atlantic Rayon Corp. v. Goldsmith, 277 App. Div. 554, 100 N.Y.S.2d 849, *reh and app den*, 278 App. Div. 567, 102 N.Y.S.2d 452 *and app dismd* 100 N.E.2d 40. (1951) (business relations with either party to arbitration does not disqualify arbitrator).

In re Application of Siegal, 153 N.Y.S.2d 673, 30 CCH LC P 69978 (1956) (where arbitrator failed to disclose that he had been business partner of sole owner of stock of corporation involved as party to arbitration proceeding, he was disqualified to act as arbitrator).

Zinger v. Rolling Hills Realty Corp., 224 N.Y.S.2d 40 (1961) (arbitrator's membership in a country club similar to the club which was a party to the arbitration could not be assumed to lead to prejudice where he volunteered the information and also stated that he was having difficulty with his club).

Janet Shops, Inc. v. Tweens, Inc., 82 N.Y.S.2d 185 (1948) (business relations with subsidiary of party did not disqualify arbitrator).

St. George Textile Corp. v. Brookside Mills, Inc., 85 N.Y.S.2d 621 (1948) (fact that arbitrator, selected by respondent, was president of corporation which was customer of different corporation whose president was personally respondent's sales agent, did not disqualify arbitrator).

Petroleum Cargo Carriers, Ltd. v. Unitas, Inc., 31 Misc. 2d 222, 220 N.Y.S.2d 724 (1961), *aff'd*, 15 App. Div. 2d 735, 224 N.Y.S.2d 654, *motion den and reh den*, 16 App. Div. 2d 625 (1962) (arbitrator's failure, however unintentional, to disclose his

membership in firm which was employed by, and earned large sums of money from, one of parties to the arbitration from business transactions which were neither incidental nor usual in shipping industry, disqualified him as arbitrator).

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Rule 3.1: Non-Meritorious Claims and Contentions

I. TEXT OF RULE 3.1[1]

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

II. NYSBA COMMENTARY

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

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[2] The filing of a claim or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Lawyers are required, however, to inform themselves about the facts of their clients' cases and the applicable law, and determine that they can make good-faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the action has no substantial purpose other than to harass or maliciously injure a person, or if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification or reversal of existing law (which includes the establishment of new judge-made law).

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 3.1 is the successor to former Disciplinary Rules 2-109(A) and 7-102(A)(1), (2) and (5) (the version in effect immediately prior to the April 1, 2009 amendments). Specifically:

- Rule 3.1(a) is similar to former DR 7-102(A)(1) (in representing a client, a lawyer shall not "file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of a client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another") and also similar to former 7-102(A)(2) (in representing a client, a lawyer shall not "knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law"). Rule 3.1(a) is also similar to former DR 2-109 (a lawyer shall not accept employment on behalf of a client if the lawyer knows or it is obvious that the client wishes to "bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person" or "present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law"). The use of the term "frivolous" is derived from New York court rules, 22 NYCRR Part 130.
- Rule 3.1(b)(1) is identical to former DR 7-102(A)(2) and substantively similar to former DR 2-109(A)(2).
- Rule 3.1(b)(2) is similar to former DR 7-102(A)(1) and former DR 2-109(A)(1) in that these rules prohibit conduct that serves "merely to harass or maliciously injure

another;" however, the first clause of Rule 3.1(b)(2) prohibiting conduct that "has no reasonable purpose other than to delay or prolong the resolution of litigation" has no counterpart in the Disciplinary Rules.
- Rule 3.1(b)(3) is similar to former DR 7-102(A)(5), in that both prohibit a lawyer from knowingly making a false statement of fact, however former DR 7-102(A)(5) forbids a "false statement of law or fact" while Rule 3.3(b)(3) prohibits "material factual statements that are false," but does not include false statements concerning the law.

III.2 ABA Model Rules of Professional Conduct (2009)

- Rule 3.1(a) is substantially similar to ABA Rule 3.1. The only change is that the phrase "which includes a good faith argument for an extension, modification or reversal of existing law", which appears at the end of the first sentence in ABA Rule 3.1 (and in Comment [2]), is now part of NY Rule 3.1(b), which defines "frivolous" conduct. ABA Rule 3.1 does not have a separate subsection (b) defining frivolous conduct.
- Rule 3.1(b)(1) has no counterpart in the ABA Rules, except that subsection (b)(1) incorporates language from ABA Rule 3.1 and Comment [2].
- Rules 3.1(b)(2) and (3) have no counterpart in the ABA Rules.

The NYSBA Comments are substantially similar to the ABA Comments. One interesting addition to New York Comment [2] is the recognition that a lawyer may properly make a non-frivolous argument "which includes the establishment of new judge-made law" without violating Rule 3.1.

IV. PRACTICE POINTERS

1. Make sure you know who your client is and what you are being hired to do. Some goals, and some means of achieving those goals, are unethical under this Rule.
2. Obtain the facts from the client or the client's employees or representatives. Ask for more information if you have questions.
3. Although a lawyer may accept a client's statements and is not obliged to conduct a preliminary investigation into the truth of those statements, as a practical matter, it is better to be as prepared as possible under the circumstances.
4. When submitting documents to a court, make sure that you are on solid ground in that there is a firm factual and legal basis for your client's position.
5. If you are arguing for an extension of the law, make sure that you have a good faith argument for such an extension.
6. While a client's bad motives in bringing or defending a lawsuit are not necessarily fatal to the chances of success in the litigation, a lawyer may not assist a client in conduct that merely serves to harass or maliciously injure an adversary. Be sure that you have a reasonable basis for your conduct.

7. The rule prohibiting frivolous litigation is not intended to deprive lawyers or litigants of the opportunity to make new law or persuade courts to extend the law to address issues. Lawyers may be creative and bold on behalf of their clients, provided that they are not engaged in making frivolous claims.

V. ANALYSIS

V.1 Purpose of Rule 3.1

New York litigators are familiar with the sanctions rules in federal and state courts for frivolous pleadings and conduct. Rule 11 of the Federal Rules of Civil Procedure, Part 130 of the Rules of the Chief Administrator of the Courts of New York (22 NYCRR Part 130), and CPLR 8303 restrict the conduct of lawyers who appear on behalf of their clients in federal and state proceedings. Lawyers are forbidden from engaging in frivolous conduct and may be sanctioned if they do so.

One critical distinction between the sanctions rules and the Rules of Professional Conduct is that the sanctions rules may reach conduct not proscribed by the disciplinary rules. Sanctions may be imposed in matters in which professional discipline is not warranted.

V.2 Fiduciary Duty of Zealous Representation

Of course, lawyers must be careful because the Rules appear to proscribe conduct that a lawyer's fiduciary duty of zealous representation (meaning, the duties of competence and diligence) might otherwise require, e.g., such as delaying eviction from an apartment or the foreclosure sale of a home, when the client has been unable to afford to pay the rent or the mortgage after losing employment. A diligent and competent advocate might counsel the client that eviction or foreclosure is inevitable and that there is no factual or legal basis for avoiding that result, but that delay of the inevitable will assist the client in getting his or her affairs in order and, perhaps in having a place to live (other than a homeless shelter) until the client can find new employment or other relief.

The Rules of Professional Conduct did not eviscerate a lawyer's fiduciary duty of zealous representation, but rather defined that duty to include the duties of competence and diligence. While a lawyer may not engage in frivolous conduct, in the example cited above, it would be entirely proper and ethical for a lawyer to seek to delay an eviction or foreclosure sale on behalf of a financially-needy and potentially homeless client, even though there is no other factual or legal basis for the contrary result.

In such instances, a prudent lawyer will make sure of the client's bona fide position (i.e., that the client is indeed in desperate financial straits or faces imminent homelessness), for a lawyer may not knowingly assist a client in perpetrating a fraud on an adversary or tribunal.

V.3 Frivolous Conduct

Rule 3.1(b)(3) defines frivolous conduct as the knowing assertion of "material factual statements that are false." This is notably different than the formulation in former DR 7-102(A)(5), which prohibits a lawyer from "knowingly" making a "false statement of law or fact" and contains no materiality requirement. See also Rule 8.4(c), prohibiting a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation," which has been construed by many courts to require proof of intent to mislead or deceive. The addition of the "materiality" element to Rule 3.1 means that non-material false statements do not violate this rule.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Fiduciary Duty of Zealous Representation

N.Y.S. Bar Op. 469 (1977) (Lawyer may not file general denial if lawyer knows client does not have any valid defense. "It is the right of every defendant accused of criminal conduct to insist upon proof of his guilt. No similar right exists in civil actions.").

N.Y.S. Bar Op. 472 (1977) (general counsel for corporation not ethically required to file lawsuit he believes has no merit, despite client's request that he do so).

N.Y.S. Bar Op. 475 (1977) (lawyer may file action after statute of limitations has run if statutory time period is a defense to the claim rather than a necessary element of plaintiff's cause of action. If the law is unclear as to when client's cause of action is extinguished, lawyer must give client the benefit of the doubt and commence the action, although lawyer should advise client of potential assertion of the defense.).

NYCLA Bar Op. 95 (1916) (lawyer cannot raise points in litigation that the lawyer knows are without merit).

VI.2 Frivolous Conduct

N.Y.S. Bar Op. 781 (2004)(lawyer should withdraw client's financial statement in matrimonial action when lawyer learns that it contains a material omission. Lawyer certified, initially, that client's financial statement was accurate, as required by section 130, which defines frivolous conduct to include false statements submitted to courts. Note that Rule 3.1 defines frivolous conduct differently for disciplinary purposes the lawyer may not "knowingly" make a false statement of material fact.).

VII. ANNOTATIONS OF CASES

VII.1 Frivolous Conduct

Matter of Klarer, 66 A.D.3d 247, 889 N.Y.S.2d 584 (2d Dept. 2009) (attorney suspended for three years for knowingly making a false statement of fact, in violation

of former DR 7-102(A)(5), and engaging in frivolous conduct, in violation of 22 NYCRR Part 130-1.1, by failing to advise the Family Court that relief he was seeking had been denied by two other courts, by falsely asserting in an affirmation that he had verbally advised the Family Court of prior applications and determinations and by filing a deficient record on appeal).

Matter of Tillem, 56 A.D.3d 94, 865 N.Y.S.2d 78 (1st Dept. 2008) (attorney suspended for one year for filing frivolous lawsuit against individual who filed a complaint against him with the Disciplinary Committee and for abandoning, without notice to the complainant, his motion for summary judgment, in violation of former DR 7-102(A)(1); no mitigation and aggravation included prior admonitions issued to the lawyer, including one for harassing a debtor, in violation of former DR 7-102(A)(1)).

Matter of Kimm, 54 A.D.3d 62, 861 N.Y.S.2d 395 (2d Dept. 2008) (in reciprocal discipline proceeding based on public censure of attorney in New Jersey, New York court publicly censured attorney for bringing a frivolous RICO action on behalf of a client, exceeding the "limits of zealous advocacy." The Supreme Court of New Jersey Disciplinary Review Board found that the conduct violated Rule 3.1 and dismissed the attorney's defense that he was seeking to "extend or modify the law, by 'lowering the threshold for civil RICO litigation and making the cause of action easier to substantiate at trial.'" The Court upheld that Ethics Committee's finding that "it is 'inherently unacceptable for litigants and/or their attorneys to attempt to achieve victory through these sorts of strategically intimidating and overpowering litigation tactics.'").

Matter of Babigian, 247 A.D.2d 817, 669 N.Y.S.2d 686 (3rd Dept. 1998) (collateral estoppel effect accorded to federal district court's findings that attorney engaged in frivolous conduct in filing a lawsuit against the Chief Justice of the United States (and sixty other parties), concerning unsuccessful claims dating back twenty years; six-month suspension imposed).

Matter of Yao, 231 A.D.2d 346, 661 N.Y.S.2d 199 (1st Dept. 1997) (attorney suspended on interim basis for entering into oral contract with businessman to pay him $10,000 per month, for life, in exchange for attorney's promise not to publicize certain embarrassing information about the businessman; one payment made and then respondent sued to enforce the contract; trial court dismissed, finding that action to enforce was frivolous, in violation of former DR 7-102(A)(1) and former DR 7-102(A)(2); collateral estoppel effect given to trial court's findings; after mitigation hearing, attorney disbarred, *Matter of Yao*, 250 A.D.2d 221, 680 N.Y.S.2d 546 (1998)).

Matter of Schiff, 190 A.D.2d 293, 599 N.Y.S.2d 242 (1st Dept. 1993) (during a deposition of the plaintiff in a personal injury action, attorney, who represented the plaintiff, made "vulgar, obscene and sexist" remarks to the female attorney representing the defendant. Respondent, who was admitted to practice for only four years, lost his job and had to pay monetary sanctions imposed by the civil court. In the subsequent disciplinary proceeding, the Appellate Division imposed a public censure and warned respondent that he faced suspension the next time. The Court found that respondent's conduct violated former DR 7-106(C)(6) ("In appearing before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to the tribunal"), former DR 7-102(A)(1) ("In the representation of a client, a lawyer shall not… assert a position, conduct a defense… or take other action on behalf of the client

when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another"), and former DR 1-102(A)(7) ("A lawyer or law firm shall not engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.")).

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ABA/BNA Lawyers' Manual on Professional Conduct, 61:101–129.

Lazar Emanuel, *Wrong Plaintiff? Wrong Defendant? Beware a Motion for Sanctions*, N.Y. PROF. RESP. REP. 1 (Aug. 2008).

Restatement (Third) of the Law Governing Lawyers, § 110 (Frivolous Advocacy).

David C. Singer and Cecilie Howard, *The Duty of Good Faith in Mediation Proceedings*, N.Y.L.J. 4 (Aug. 25, 2010).

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Rule 3.2: Delay Of Litigation

I. TEXT OF RULE 3.2[1]

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

II. NYSBA COMMENTS

[1] Dilatory practices bring the administration of justice into disrepute. Such tactics are prohibited if their only substantial purpose is to frustrate an opposing party's attempt to obtain rightful redress or repose. It is not a justification that such tactics are often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay or needless expense. Seeking or realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

- There is no comparable provision or disciplinary rule in the Code of Professional Responsibility.

III.2 ABA Model Rules of Professional Conduct (2009)

- ABA Model Rule 3.2 provides that "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client," in contrast to NY Rule 3.2, which prohibits a lawyer from using "means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense."

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IV. PRACTICE POINTERS

1. Make sure that you have a reasonable basis for your conduct on behalf of the client.
2. Review applicable rules, such as Rule 3.1 and, depending on the court in which the matter is pending, the applicable sanctions rules pertaining to frivolous litigation.
3. Talk to the client about the client's goals and what the client hopes to accomplish in the litigation.
4. If the client has absolutely no basis for bringing or defending the litigation, consider whether you are comfortable continuing to represent the client.
5. It is not unethical for a lawyer to represent a client in a litigated matter even if the lawyer believes that the client will not prevail or is not likely to ultimately prevail, provided the lawyer complies with the requirements of Rule 3.1 and does not use improper litigation tactics in violation of another Rule.
6. Provided the lawyer does not utilize improper tactics in the litigation and otherwise complies with the ethics Rules, the lawyer's conduct does not violate this Rule.

V. ANALYSIS

Rule 3.2 prohibits lawyers from utilizing unreasonable and unwarranted tactics of delay or increased cost in litigation and defines such tactics as those that have "no substantial purpose" other than "delay" or "needless expense." The New York Rule, unlike the ABA Rule, does not require a lawyer to expedite litigation. It does require the lawyer to have a reasonable, good faith basis for how a matter is handled. Provided the lawyer's conduct is not otherwise objectionable and does not violate another Rule, Rule 3.2 will not be implicated.

A lawyer's conduct under Rule 3.2 should be judged using an objective standard, namely, would a reasonable and competent lawyer acting in good faith regard the conduct as having some substantial purpose other than delay or increased cost?

In evaluating a lawyer's conduct under this Rule, it is important to know whether the lawyer had a good faith belief in the propriety of the conduct and a goal on behalf of the client other than merely delaying the proceeding or increasing the expense to the client's adversary.

Thus, if a lawyer utilizes ethically-permitted litigation tactics which do not violate another Rule, such as Rule 3.1 prohibiting frivolous conduct, the lawyer's conduct ordinarily will be ethical and will not violate this Rule.

VI. ANNOTATIONS OF ETHICS OPINIONS

N.Y.S. Bar Op. 469 (1977) (lawyer may not file general denial if lawyer knows client does not have any valid defense. "It is the right of every defendant accused of criminal conduct to insist upon proof of his guilt. No similar right exists in civil actions.").

VII. ANNOTATIONS OF CASES

Rakowicz v. Fashion Institute of Technology, 65 A.D.3d 536, 882 N.Y.S.2d 909 (2d Dept. 2009) (court reversed trial court's dismissal of action when plaintiff's counsel was unable to proceed to trial, despite three-day adjournment, because he was actually engaged in trial of another matter; appellate court reinstated action, on condition that plaintiff's counsel pay a sanction of $4,000 to defendant; court found that there was no evidence that plaintiff's counsel engaged in "a pattern of delay or willful neglect," he was actually engaged in another trial and the three-day adjournment was not sufficient to complete the other trial or find counsel ready to immediately begin a trial on this matter; trial court abused discretion by dismissing action for counsel's failure to proceed; sanction should have been imposed instead).

Burchard v. City of Elmira, 52 A.D.3d 881, 859 N.Y.S.2d 276 (3rd Dept. 2008) (court ruled that trial court did not abuse its discretion in denying defendants' motion to dismiss the complaint for failure to prosecute, despite failure of plaintiff's counsel to "offer a specific excuse for the delay" in filing the note of issue, where plaintiff had proof of her injuries, plaintiff's counsel's delay in filing note of issue was only matter of days, and defendants were not prejudiced).

Guzetti v. City of New York, 32 A.D.3d 234, 820 N.Y.S.2d 29 (1st Dept. 2006) (affirming trial court's denial of plaintiff's motion for default judgment against individual defendant where defendants demonstrated a "reasonable excuse" for their delay in answering the complaint and affirming trial court's refusal to strike answer since plaintiff failed to establish that defendants' delay in submitting personnel file for court's in camera review was "willful or contumacious").

Matter of Abrahams, 5 A.D.3d 21, 26, 770 N.Y.S.2d 369 (2d Dept. 2003) (attorney suspended for five years for engaging in a "pattern and practice of frivolous misconduct, disregarding court orders and judgments, and providing misleading information to tribunals," indicating a "disrespect for the courts and the judicial process," also had "extensive disciplinary history" of four letters of caution and four letters of admonition).

Matter of Osborne, 1 A.D.3d 31, 766 N.Y.S.2d 33 (1st Dept. 2003) (attorney, a former chief disciplinary counsel, suspended six months for engaging in a pattern of misconduct resulting in the imposition of civil sanctions in three separate cases: failing to follow court scheduling orders; ignoring court deadlines; disobeying court orders regarding disclosure; "obstructing the resolution of the litigation"; delaying completion of a deposition by means of interruptions, speeches and instructions not to answer; court rejected one-year suspension because that "could mean the end of [his] career, which we do not believe is warranted").

Matter of Klein, 231 A.D.2d 232, 660 N.Y.S.2d 136 (2d Dept. 1997) (attorney suspended for five years for engaging in frivolous conduct and litigation abuses, making "abusive" filings in bankruptcy matter, designed to "frustrate the legitimate rights" of the adversary bank, filing untimely second bankruptcy petition to delay a foreclosure, and filing pleadings despite court order requiring that court permission be granted before additional motions or court filings were permitted; court found attorney intended to halt litigation with a "sea of frivolous motions").

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Lazar Emanuel, *Wrong Plaintiff? Wrong Defendant? Beware a Motion for Sanctions*, N.Y. Prof. Resp. Rep. 1 (Aug. 2008).

Rule 3.3: Conduct Before a Tribunal

I. TEXT OF RULE 3.3[1]

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

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(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

II. NYSBA COMMENTARY

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. *See* Rule 1.0(w) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein because litigation documents ordinarily present assertions by the client or by someone on the client's behalf and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be based on the lawyer's own knowledge, as in an affidavit or declaration by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. *See also* Rule 8.4(b), Comments [2]-[3].

Legal Argument

[4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Paragraph (a)(2) requires an advocate to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.

Offering or Using False Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer or use evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce or use false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false.

[6A] The prohibition against offering and using false evidence ordinarily requires a prosecutor to correct any false evidence that has been offered by the government, inform the tribunal when the prosecutor reasonably believes that a prosecution witness has testified falsely, and correct any material errors in a presentence report that are detrimental to a defendant.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If the criminal defendant insists on testifying and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form. The lawyer's ethical duty may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

[8] The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's actual knowledge that evidence is false, however, can be inferred from the circumstances. *See* Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) prohibits a lawyer from offering or using evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes to be false. Offering such proof may impair the integrity of an adjudicatory proceeding. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of a criminal defense client where the lawyer reasonably believes, but does not know, that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the criminal defendant's decision to testify.

Remedial Measures

[10] A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as making a statement about the matter to the trier of fact, ordering a mistrial, taking other appropriate steps or doing nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. *See* Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. The client could therefore in effect coerce the lawyer into being a party to a fraud on the court.

Preserving Integrity of the Adjudicative Process

[12] Lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative

process. Accordingly, paragraph (b) requires a lawyer who represents a client in an adjudicative proceeding to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding. Such conduct includes, among other things, bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding; unlawfully destroying or concealing documents or other evidence related to the proceeding; and failing to disclose information to the tribunal when required by law to do so. For example, under some circumstances a person's omission of a material fact may constitute a crime or fraud on the tribunal.

[12A] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered or used the evidence in question. A lawyer's duty to take reasonable remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

[13] [Omitted.]

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the opposing position is expected to be presented by the adverse party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there may be no presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the opposing party, if absent, just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] A lawyer's compliance with the duty of candor imposed by this Rule does not automatically require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer, however, may be required by Rule 1.16(d) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. *See also* Rule 1.16(c) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the

extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 3.3 is the successor to former Disciplinary Rules 7-102(A)(4), (5); 7-102(B); 7-106(B)(1)-(2); 7-106(C)(5), (6), (7); and 7-108(G). Specifically:

- Rule 3.3(a)(1) is similar in substance to former DR 7-102(A)(5), except that Rule 3.3(a)(1) applies only to a false statement "to a tribunal" and adds that a lawyer shall not knowingly "fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."
- Rule 3.3(a)(2)) is substantively "almost identical to former DR 7-106(B)(1), but Rule 3.3(a)(2) is phrased in the negative ("shall not knowingly… fail to disclose") rather than the positive ("shall disclose")."
- Rule 3.3(a)(3) (first sentence) is substantively similar to former DR 7-102(A)(4), except the first sentence of Rule 3.3(a)(3) provides that a lawyer shall not knowingly "offer or use evidence that the lawyer knows to be false" while former DR 7-102(A)(4) provides that a lawyer shall not "knowingly use perjured testimony or false evidence."
- Rule 3.3(a)(3) (second sentence) is distinctly different than former DR 7-102(B)(1), but substantively similar to former DR 7-102(B)(2). Rule 3.3(a)(3) requires a lawyer who "comes to know" that "the lawyer, the lawyer's client, or a witness called by the lawyer" has offered false material evidence to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." In sharp contrast, former DR 7-102(B)(1) provides that a lawyer who receives information "clearly establishing" that a client has perpetrated a fraud on a "person or tribunal" shall call upon the client to rectify the fraud and if the client refuses (or is unable to correct), the lawyer shall reveal the fraud to the "affected person or tribunal, except when the information is protected as a confidence or secret." There are, thus, two distinct differences in this part of the rule: 1) Rule 3.3(a)(3) only applies to frauds on a tribunal, whereas former DR 7-102(B)(1) applies to frauds on a "person or tribunal" and 2) Rule 3.3(a)(3) requires a lawyer to make disclosure to the tribunal if remedial measures fail, whereas former DR 7-102(B)(1) does not require a lawyer to make disclosure when the information is confidential, which covers most situations. However, when it comes to non-clients, Rule 3.3(a)(3) is similar to former DR 7-102(B)(2), in that both rules require a lawyer to reveal the non-client's fraud to the tribunal.
- Rule 3.3(a)(3) (third sentence) has no corresponding Disciplinary Rule. Former DR 7-102(A)(4) provides that a lawyer shall not knowingly use perjured testimony or false evidence and former EC 7-26 advises that a lawyer should present evidence that the client would like presented, unless the lawyer knows or should know that

such evidence is false, fraudulent, or perjured. However, Rule 3.3(a)(3) explicitly gives a lawyer the discretion to refuse to offer evidence, other than the testimony of the defendant in a criminal matter, which the lawyer "reasonably believes" is false.

- Rule 3.3(b) is much broader than any former Disciplinary Rule, for it requires a lawyer representing a client before a tribunal who knows that someone intends to engage, is engaging, or has engaged in "criminal or fraudulent conduct related to the proceeding" to take reasonable remedial measures, including disclosure to the tribunal. By contrast, former DR 7-108(G) merely requires a lawyer to disclose to the court improper conduct by or toward a juror or family member of a juror. Rule 3.3(b) requires a lawyer to report jury tampering, corruption of the court or court officials, unlawful destruction and concealment of documents, and other forms of criminal or fraudulent conduct that would impair the integrity of the proceeding.
- Rule 3.3(c) is substantively similar to former DR 7-102(B) in that disclosure of misconduct with respect to jurors and disclosure of fraud on a tribunal by a non-client is mandatory under Rule 3.3(c), as it is under former DR 7-108(G) and 7-102(B)(2), respectively. In addition, Rule 3.3(c) makes clear that disclosure of a client's fraud on a tribunal is mandatory, even though the lawyer's information is otherwise ethically protected. Note that Rule 3.3 emphasizes that disclosure is only required if reasonable remedial measures do not work.
- Rule 3.3(d) has no corresponding Disciplinary Rule.
- Rule 3.3(e) is identical to former DR 7-106(B)(2).
- Rule 3.3(f)(1), (2) and (3) is nearly identical to former DR 7-106(C)(5),(6) and (7), except that Rule 3.3(f)(2) simply states that in appearing as a lawyer before a tribunal, a lawyer shall not engage in "undignified or discourteous conduct", while former DR 7-106(C)(6) prohibited "undignified or discourteous conduct which is degrading to a tribunal."
- Rule 3.3(f)(4) has no corresponding Disciplinary Rule.

III.2 ABA Model Rules of Professional Conduct (2009)

- Rule 3.3(a)(1) is identical to its ABA counterpart.
- Rule 3.3(a)(2) is identical to its ABA counterpart, except that it carries forward from former DR 7-106(b)(1) the term "controlling legal authority" rather than the ABA's term, "legal authority in the controlling jurisdiction."
- Rule 3.3(a)(3) is identical to its ABA counterpart, except that it follows former DR 7-102(A)(4) and specifically states that a lawyer shall not "offer or use" false evidence, whereas the ABA Rule prohibits a lawyer from offering false evidence.
- Rule 3.3(b) is identical to its ABA counterpart, except that it substitutes "before a tribunal" for "in an adjudicative proceeding."
- Rule 3.3(c) is similar to its ABA counterpart, except in one important respect, for it omits the ABA's limitation on the reporting obligation, which continues "to the conclusion of the proceeding," while the New York Rule has no such limitation.

- Rule 3.3(d) is identical to its ABA counterpart.
- Rule 3.3(e) has no ABA counterpart.
- Rules 3.3(f)(1), (2) and (3) have no ABA counterparts.
- Rule 3.3(e)(f)(4) is identical to ABA Model Rule 3.5(d), except that it is limited to a lawyer's appearance "as a lawyer before a tribunal" and does not apply to a lawyer's appearance as a witness or a party before a tribunal.
- The definition of the terms "belief" or "believe" (defined in NY Rule 1.0(b) and used in NY Rule 3.3(a)(3)) is almost identical to ABA Rule 1.0(a), except that NY Rule 1.0(b) underscores the subjective nature of "belief" by stating that it denotes that the person involved "actually believes the fact in question to be true" whereas ABA Rule 1.0(a) states that it means that the person "actually supposed the fact in question to be true."
- The definition of the terms "fraud" or "fraudulent" (defined in NY Rule 1.0(i) and used in NY Rule 3.3(b)) is similar to ABA Rule 1.0(d), except that the NY Rule goes further and retains the specific definition of "fraud" in the former New York Code of Professional Responsibility, which provided that "fraud" does not include conduct that "although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another."
- The definition of the terms "knowingly," "known," "know," and "knows" (defined in NY Rule 1.0(k) and used in NY Rule 3.3(a), (b) and (d)) is identical to ABA Rule 1.0(f). Both specifically state that the terms denote "actual knowledge of the fact in question" and that a "person's knowledge may be inferred from circumstances."
- The definition of the terms "reasonable" or "reasonably" (defined in NY Rule 1.0(q) and used in NY Rule 3.3(a)(3) and Rule 3.3(b)) is identical to ABA Rule 1.0(h), although the NY definition further defines the term for purposes of conflicts analysis.
- The definition of the term "reasonable belief" or "reasonably believes" (defined in NY Rule 1.0(r) and used in NY Rule 3.3(a)(3)) is identical to ABA Rule 1.0(i).
- The definition of the term "tribunal" (defined in NY Rule 1.0(w) and used in NY Rule 3.3) is substantially similar to ABA Rule 1.0(m), except that the NY Rule is broader and includes all arbitration and adjudicative proceedings, whereas the ABA Rule limits the term "tribunal" to include only "binding" arbitrations and other defined proceedings that will result in a "binding" legal judgment directly affecting a party's interests in a particular matter.

IV. PRACTICE POINTERS

1. This rule governs a lawyer's conduct before a tribunal. It does not apply to transactional work. However, it does apply to matters before legislative bodies, administrative agencies and arbitration panels where a client's interests will be determined by the tribunal's adjudication or "legal judgment."
2. A lawyer should not make a false statement of fact or law to a tribunal. Judges and adjudicators may ask questions that a lawyer cannot answer honestly because an honest and candid answer will reveal protected client information. In that case, the

lawyer may not knowingly lie to the tribunal and the lawyer also may not harm the client's interests by disclosing information that the lawyer is not authorized to disclose, such as, for example, whether the client "really did it" or what the client's bottom line is on settlement. Telling the tribunal that the question is improper or that the lawyer cannot answer it may be as damaging to the client as a truthful answer.

3. Lawyers have special duties to tribunals, potentially at odds with their duties to clients. A lawyer should discuss these special duties with clients at any point when it appears that these duties might be in conflict.
4. A lawyer should make sure that the client understands that the lawyer's duty of loyalty and confidentiality may be limited or trumped by the lawyer's duty of candor to the tribunal under certain circumstances.
5. Clients sometimes believe that the truth is not attractive (and sometimes they are right) and that it will harm their prospects in the pending matter. Careful and thorough preparation is important, to avoid unpleasant surprises.
6. A lawyer should carefully and diligently prepare a client in a litigated matter (and discuss anticipated issues before the matter is commenced). Responses to discovery demands, including requests for documents and deposition testimony, generate an inordinate number of problems for litigators. It is generally easier to represent a client knowing what the "bad facts" and pitfalls are in advance than to attempt to correct them afterwards without harm to the client's interests.
7. Despite the most thorough preparation, however, it does happen that clients engage in fraudulent conduct before tribunals—they lie at depositions and fail to produce in discovery documents that have been requested. A lawyer who "knows" that a client has given materially false testimony or perhaps produced a "doctored" document in discovery must remedy the misrepresentation.
8. Ordinarily the lawyer will be able to convince the client to correct the material false evidence. (Note that this is not limited to perjured testimony, but includes other material falsehoods.) Once the client realizes the hazards of leaving the material falsity uncorrected, the client generally will follow the lawyer's advice.
9. Only if the client refuses to correct the material falsity, despite the lawyer's best and most persistent efforts, must the lawyer take the final and draconian step of disclosing the misrepresentation to the tribunal.
10. Reporting a client's fraud to the tribunal is mandatory only when all else has failed. It is not a step to be lightly taken. The lawyer must be absolutely sure that the conduct is covered by this rule and that disclosure is actually required. It may be advisable to seek an opinion on the matter.

V. ANALYSIS

V.1 Purpose of Rule 3.3

Lawyers have important dual responsibilities as fiduciaries and advocates for their clients and as officers of the courts. No rule better illustrates the tensions that may occur when these duties are in conflict than Rule 3.3. What happens when a lawyer's

client lies about an important issue at a deposition or at trial? Unless the lie is corrected, the tribunal is misled and the integrity of the process is undermined. The lawyer should try to persuade the client to tell the truth, for any number of reasons. If the client refuses to correct the lie, Rule 3.3 requires the lawyer to advise the tribunal of the client's lie, a step which may trigger draconian consequences for the client, including loss of the case and, in some circumstances, a potential perjury prosecution.

V.2 Background and the Former Rule

For many years, New York lawyers were duty-bound to preserve their clients' confidentiality, even when their clients lied or engaged in fraudulent conduct. While lawyers were obliged, under former DR 7-102(B)(1), to report a client's fraud on a tribunal (or, in transactional matters, on a person), that obligation was effectively trumped by the obligation to maintain the client's confidences. Lawyers were permitted, under former DR 4-101, to disclose certain confidences, such as a client's intent to commit a crime, but reporting was not mandatory and, as a practical matter, occurred relatively infrequently. Maintaining client confidentiality has long been viewed as a lawyer's sacred obligation—the image of the lawyer going to the grave with lips sealed and client secrets still undisclosed has sustained many practicing lawyers through trying times (and clients).

And yet, that leaves the problem of the problem client, the one with an aversion to the truth or an understandable concern about the consequences if the truth be told. For a variety of reasons, clients lie—they tell big lies and little lies, lies that are really pleas for sympathy and understanding, lies to bolster otherwise truthful accounts (who can believe that justice will be afforded a blemished client), and lies because sometimes it's just easier.

Experienced lawyers have encountered client lies frequently enough that the thought of them is hardly surprising. The difficult part may be developing the client's trust sufficiently to avoid problems.

Often the lawyer learns of the client's proposed lie before it is trotted out in court or in a deposition—it may occur first in the lawyer's office. This is a great opportunity to have a full and frank conversation with the client about the possible consequences of a lie before a tribunal. Those consequences may include loss of the case, erosion of the client's credibility on other issues, possible perjury prosecution, and, perhaps most importantly to the client, the undermining of the lawyer's ability to represent the client effectively or even at all.

V.3 No False Statements to Tribunals

Rule 3.3(a)(1) provides that a lawyer shall not knowingly make a false statement of law or fact to a tribunal. The Rule goes on to provide that a lawyer must not "fail to correct" a false statement of material fact or law the lawyer has previously made to the tribunal.

This means that the lawyer who realizes afterwards that the lawyer has made an inaccurate statement, either about the facts or the law in a particular matter, must correct the record if it was a "material" fact or statement about the law. Mistakes or misstatements as to non-material matters do not need to be corrected.

V.4 Making Legal Arguments to Tribunals

Rule 3.3(a)(2) requires a lawyer not to knowingly fail to disclose any directly adverse "controlling legal authority." If opposing counsel has cited the adverse authority, disclosure is not required by this rule. If an adversary has missed a controlling precedent, however, and the lawyer is aware of it, the lawyer must cite it to the tribunal.

V.5 Offering or Using False Evidence

Rule 3.3(a)(3) bars a lawyer from knowingly offering or using evidence the lawyer knows is false. The Rule has a double knowledge requirement in that the lawyer may not "knowingly" offer evidence that the lawyer "knows" to be false.

The Rule goes on to provide that if the lawyer learns after the fact that the lawyer, or the lawyer's client, or a witness called by the lawyer, has offered material evidence that the lawyer "comes to know" is false, then the lawyer must take reasonable remedial measures, including, if all else fails or nothing else will do, disclosure to the tribunal.

V.6 Knowledge

The first important question is what is "knowledge" and when does a lawyer "know"? The terms are defined in Rule 1.0(k), which says that the terms denote "actual knowledge" of the fact in question. This means that a belief or a suspicion or a hunch or an intuition will not trigger the rule, as these things are not the same as "actual knowledge." Rule 1.0(k), however, provides that a lawyer's actual knowledge "may be inferred from circumstances."

In *Doe v. Federal Grievance Committee*, 847 F.2d 57 (2d Cir.1988), the Second Circuit held that a lawyer must have "actual knowledge" of the fraud before the reporting requirement is triggered. Mere suspicions of fraud are insufficient to mandate disclosure of "possible" perjury or false statements. In *Doe*, the issue was a lawyer's "belief" that an adverse witness had lied at a deposition. The lawyer believed that the witness had lied, but had no firm proof. The federal district court found that he should have reported his belief and suspended him for six months. The Court of Appeals disagreed and dismissed the charges, holding that only "actual knowledge" triggered the reporting requirement in former DR 7-102(b), which applied at the time. *Doe* is still good law and applies to Rule 3.3 as well.

While a lawyer's belief or suspicion that a client or witness has offered false evidence need not be reported, in some cases it may lead to further inquiry by the lawyer. Lawyers are entitled to trust their clients and rely on their good faith and truthfulness. A lawyer is not required to investigate or cross-examine the client, although to be sure, there are circumstances where a little investigation or friendly cross-examination may be in the client's best interest and ultimately helpful. But the rules do not require this.

V.7 Reasonable Remedial Measures

If a lawyer does come to "know" that the lawyer has offered material evidence which is false, or that the client has offered material false evidence, the lawyer must take "reasonable remedial measures."

Typically this means talking to the client and convincing the client to correct or withdraw the falsity. There are a lot of reasons why it makes sense to correct false evidence, particularly before the adversary discovers it and has a field day at the client's expense. Correcting the record before anyone else knows there is a problem is generally less painful than "explaining" matters in response to cross-examination by the adversary or the tribunal.

The lawyer's conversation with the client about correcting or withdrawing the false evidence should be done in a confidential setting. Neither the adversary nor the tribunal is entitled to be privy to this conversation, which may be critically important to the client's ability to go forward with the matter.

V.8 Reporting to the Tribunal

If the lawyer cannot persuade the client to correct or withdraw the materially false evidence, Rule 3.3(a)(3) requires the lawyer to make "disclosure to the tribunal." The Rule does not specify how that disclosure should be made or what exactly must be disclosed.

The rationale for this reporting requirement is that unless the fraudulent evidence is withdrawn or corrected, the lawyer is essentially helping the client deceive the court or the tribunal.[2] While NYSBA Comment [11] acknowledges that disclosure can have "grave consequences" for the client, it focuses on the lawyer's obligation as an officer of the court to uphold the integrity of the process. The Comment notes that the "grave consequences" might include a sense of betrayal, loss of the case, and even prosecution for perjury. This, in the view of at least some commentators, is the end of the adversary system we are familiar with.

This new rule—the most serious change in these new Rules of Professional Conduct—arguably has the potential to undermine the important relationship of trust between attorney and client. After all, whose side is the lawyer on and how does

2 *See* NYSBA Comments to Rule 3.3, Comment [11]

the client know whether the lawyer will turn into the witness-in-chief for the prosecution?

The old New York rule, former DR 7-102(b), required a lawyer to remonstrate with the client if the lawyer learned that the client had lied to a tribunal or a person. If the client refused to correct the lie, the lawyer was obliged to disclose the misrepresentation to the tribunal or the person unless the information was protected as a confidence or secret (previously defined in former DR 4-101 and now subsumed in the New York definition of confidential client information in Rule 1.6). This was the exception that "swallowed the rule" and lawyers and tribunals functioned effectively with the rule and the exception for more than a quarter of a century.

(Interestingly, the new Rule 3.3 is limited to frauds on a tribunal and has no corresponding rule requiring a lawyer to correct a fraud on a person.)

There are several problems with the reporting requirement in Rule 3.3(a)(3). First, there may be a constitutional impediment, at least in criminal cases. Defendants in criminal matters have an absolute right to testify in their own defense and a lawyer may not interfere with that right. When a criminal defendant advises a lawyer that he will lie in his testimony, the classic response in New York had been that the lawyer remonstrated with the client, in most cases successfully dissuading the client from lying in court. When the lawyer could not dissuade the client and "knew" that the client would lie, the lawyer refrained from offering or using the false testimony. The lawyer made an application to the court for permission to have the client testify, in part, in the narrative, so that the lawyer was not eliciting the false evidence with questions. Then the lawyer carefully ignored the part of the defendant's testimony he knew to be false and carried on with the defense in all other respects. The judge and the prosecutor knew what had occurred—although experienced, ethical lawyers were careful not to actually state that their client would lie. The jury was not informed of the matter and may have missed what had occurred. This time-honored approach served the ends of justice in New York for many years.

Some practitioners took an intermediate step of moving to be relieved, citing, without specifics, the ethical requirement that they withdraw from further representation. Courts understood what was meant and generally denied the applications, often made on the eve of trial, largely because any new lawyer would likely face the same issue. Other practitioners took a more direct approach, approved by the eminent ethics professor and author Monroe Freedman, and simply proceeded with an ordinary direct examination (no narrative), but then refrained from citing those portions of the client's testimony, which the lawyer knew to be false. That approach has been somewhat less favored by courts, which wanted to be kept in the loop, but is just as efficacious, given the competing interests and practicalities.

What then is required by Rule 3.3(a)(3) in the case of a criminal defendant who is going to lie or offer material false evidence? It seems to this commentator that the practice in New York will be largely unchanged from the old rule, former DR 7-102(b). Remonstration is still required and, as has been the practice, if remonstration is ineffective, the lawyer will notify the tribunal, which will still have to permit the criminal defendant to testify as is constitutionally required. Lawyers and courts will continue to use the narrative, as there really is no viable alternative.

Civil cases, however, are where the potential for mischief will lurk. Indeed, some practitioners have long asserted that there is more wrongdoing in civil litigation than in most criminal cases. Here, parties can in fact have their cases dismissed and sanctions imposed and referrals made for criminal prosecution—yikes!

Sadly, before adopting the new Rule requiring disclosure, there was no study done of the incidence of false evidence in the legal system. There were anecdotes to be sure and there were some astonishing cases involving client and witness misconduct, but there was no showing that the legal system was inundated with a raft of false witnesses and bogus evidence, such that lawyers had to be required to police their clients.

The second problem with the reporting requirement in Rule 3.3(a) is that it appears to undermine the guarantee in CPLR 4503 that attorney-client confidences must be held sacrosanct. The resolution of this conflict will await action by the courts. Traditionalists will hope that the courts uphold the attorney-client privilege and ultimately conclude that it makes more sense not to turn lawyers into witnesses. Obviously lawyers must refrain from using false evidence and should be powerful advocates for (and to) their clients in seeking to dissuade them from presenting false evidence, but there is no indication that the best way to do this is to require lawyers to bear witness against their errant clients.

V.9 When Must Client Fraud Be Reported?

The Rule is silent as to when a lawyer must disclose a client's fraud to the tribunal. Clearly, every effort must be made first to remedy the problem; if it is corrected, disclosure to the tribunal is not required. If correction is ultimately unsuccessful, a report to the tribunal should be made in a timely fashion, so that the tribunal can take appropriate action (or decide to take no action at all). There is no bright-line test for when this must occur, but it will have to be decided on a case-by-case basis, with regard for the status of the matter and the importance of the false evidence to a resolution of the matter.

Oddly, the Rule does not provide that the duty to correct terminates when the proceeding is concluded. The ABA version of Rule 3.3(c) has such a provision, but it was not incorporated into the New York Rule. An eternal reporting duty makes little sense and would be an exercise in futility if reporting were required years after the proceeding had ended. There would be no remedy possible, except perhaps a criminal prosecution of the client. Therefore, as the New York State Bar Association Committee on Ethics concluded in a recent opinion, to make sense of the requirement, one must read a "reasonableness" element into the reporting rule. N.Y.S. Bar Op. 831 (2009) held that the obligation to disclose under Rule 3.3 extends "for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding—but not forever. If disclosure could not remedy the effect of the conduct on the proceeding, but could merely result in punishment of the client, we do not believe the Rule 3.3 disclosure duty applies."

In addition, lawyers should consider to whom a report should actually be made, the trier of fact or an administrative judge. Since a report may be highly prejudicial to the client in many cases, some reports may be made to an administrative judge so that the trier of fact, for example, the judge in a matrimonial matter, is not barraged with collateral matters that may affect an ability to fairly determine a matter on the merits. In many other cases, the administrative judge will be the proper recipient of the lawyer's report and will wisely determine the most appropriate course of action.

Reports may be made under seal and on an ex parte basis. And, in making a report, a lawyer must continue to preserve the client's confidences as much as possible. Rarely will it be necessary to disclose all the sordid details of the misrepresentation; withdrawal of the prior testimony or evidence may be sufficient to comply with the rule.

V.10 Withdrawal From the Representation

Under Rule 3.3, it appears not to be sufficient for a lawyer to withdraw from representing a client who is engaged in fraudulent conduct. The Rule, on its face, requires that the lawyer disclose if the client will not correct or permit correction of the fraud. Under the old DR 2-110, the lawyer could have withdrawn from representing the client without disclosing the specifics, but simply stating that withdrawal was ethically mandated. Experienced jurists understood what was meant and invariably permitted the withdrawal without detailed inquiry into the specifics of the client's communications with the lawyer. Now it appears that although a lawyer may withdraw, such withdrawal will not be sufficient compliance with Rule 3.3 and that disclosure may still be required. This rule arguably creates more problems than it solves. However, unless and until it is modified, lawyers are well-advised to comply with it.

We look forward to further commentary, decisions, and perhaps modification of portions of this Rule. Lawyers are duty bound, as officers of the court, to do their best to insure that proceedings are conducted honestly and with integrity. Their function as advocates for their clients makes it imperative that they be free of the obligation to simultaneously serve as policemen and potential adverse witnesses. There will always be appropriate instances in which lawyers will, and should, exercise their discretion to report client misconduct. Despite the absence of empirical evidence of a systemic problem of client fraud before tribunals, the Rule has changed a discretionary option into a mandatory reporting rule. All lawyers, but litigators especially, must be very familiar with the requirements of this new Rule.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Background

N.Y.C. Bar Op. 2009-5 (2009) (lawyer may ask properly witnesses to refrain from cooperating with the lawyer's adversary. A lawyer may also ethically inform

unrepresented witnesses that they have no obligation to cooperate with a lawyer's adversary, and may suggest that witnesses consider retaining their own counsel. This does not constitute conduct prejudicial to the administration of the justice and is not forbidden by the Rules of Professional Conduct.).

Nassau County Bar Op. 01-01 (2001) (in a transactional matter, a lawyer may not alter a standard printed form without alerting the lawyer for the other party to the transaction to the changes. Failure to alert the other party would be a misrepresentation as all parties are familiar with the standard clauses in the printed forms. This opinion is likely to be revisited in light of Rule 3.3, which does not prohibit frauds on a person, only on a tribunal. *See* Rule 4.1.).

VI.2 No False Statements to Tribunals

N.Y.C. Bar Op. 1995-4 (1995) (attorney may not sign judgment executions "in blank," before the forms have been completed, and may not allow his signature to be placed on dunning letters stating that the sheriff is in receipt of an execution when sheriff may or may not be in actual receipt of an execution. Signing such forms in blank is a misrepresentation to the court that the information on the completed forms was reviewed by the lawyer and is accurate. The result is a fraud on the court.).

VI.3 Correcting Prior False Statement

Nassau County Bar Op. 05-03 (2005) (analyzes the circumstances in which a lawyer representing a defendant in a personal injury action must correct information concerning the defendant's insurance coverage that lawyer had previously provided to the plaintiff and has now learned is incorrect).

VI.4 Knowledge

NYCLA Bar Op. 741 (2010) (NYCLA Bar Op. 712, concluding that a lawyer may not use admitted false testimony, while at the same time may not reveal it, is superseded by NYCLA Bar Op. 741. The later opinion was based on the prior Code of Professional Responsibility. The new Rules make it clear that a lawyer has a duty to remedy false statements when he or she comes to know after the fact that the client made them, by disclosure of confidential information, if necessary, while at the same time also seeking to minimize the disclosure of confidential information as much as possible. Actual knowledge is required to trigger the duty to report the fraud, not the mere suspicion. Actual knowledge, however, may be gleamed from the circumstances.).

NYCLA Bar Op. 712 (1996) (lawyer whose client advises him, after his deposition, that some of his testimony was untrue may not knowingly use any of the false testimony. If the false testimony is so critical to the case that the lawyer could not effectively defend or settle without using it, the lawyer must withdraw. Since the client refused to

follow the lawyer's advice to correct the deposition transcript, the lawyer may not reveal the falsity, as it is a confidence or secret. This opinion is no longer valid under Rule 3.3.).

NYCLA Bar Op. 698 (1993) (lawyer representing a claimant in a social security disability hearing may refrain from producing relevant medical information if no request is made for it, if rules governing such proceedings do not independently require disclosure, and if the adverse medical information (which is known to the lawyer) does not constitute knowledge that the claim is false. This opinion is likely to be revisited in light of Rule 3.3 and changes to discovery rules.).

VI.5 Reasonable Remedial Measures

NYCLA Bar Op. 741 (2010) (NYCLA Bar Op. 712, concluding that a lawyer may not use admitted false testimony, while at the same time may not reveal it, is superseded by NYCLA Bar Op. 741. The later opinion was based on the prior Code of Professional Responsibility. The new Rules make it clear that a lawyer who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case must employ reasonable remedial measures, including counseling the client to correct the testimony, If the remedial efforts prove fruitless, then the lawyer must take additional remedial measures, including disclosure to the tribunal, if necessary. If the client's false statement is disclosed, the lawyer must seek to minimize the disclosure of confidential information. Under the new Ethics Rules, the lawyer cannot simply withdraw from representation while maintaining the confidence.).

N.Y.S. Bar Op. 797 (2006) (lawyer who files a probate petition on behalf of a client who is named executor and sole beneficiary in decedent's will, and later learns that the client is statutorily ineligible to serve as executor of the estate because of a prior undisclosed felony conviction, must try to persuade the client to disclose client's ineligibility to the court. If the client refuses, the attorney must withdraw the petition. The Opinion argues, without foundation, that the client's information is not protected under former DR 4-101 if it is permitted to be disclosed. Nonetheless, the result is correct. The lawyer certified under 22 NYCRR 130.1-1, that the statements contained in the petition were accurate and the lawyer now knows that they were not. Therefore, the lawyer must correct the lawyer's prior false certification to the tribunal or face sanctions. The result should be the same under Rule 3.3.).

N.Y.S. Bar Op. 781 (2004) (where a client committed a fraud upon a tribunal by submitting a financial statement in a matrimonial matter that contains a material omission of fact, lawyer must ask client to correct the statement and if client refuses, attorney must withdraw the financial statement since lawyer certified its accuracy. While the Opinion argues that the lawyer's knowledge is not protected as a confidence or secret (because the lawyer is permitted by DR 4-101(C)(5) to withdraw the prior certification to the court), and therefore must be corrected (since it is not protected), in fact, the lawyer is obliged under court rules, 22 NYCRR § 130.1-1, to correct the financial statement because it was certified by the lawyer and the lawyer now knows it was inaccurate. The result should be the same under Rule 3.3.).

N.Y.S. Bar Op. 681 (1996) (lawyer who learns that the client lied on an affidavit of indigency must try to persuade the client to rectify the fraud. If that is unsuccessful, the lawyer may move to withdraw, but may not disclose any client secrets in the motion to withdraw unless the court orders him to do so. This opinion may no longer be valid under Rule 3.3.).

NYCLA Bar Op. 712 (1996) (lawyer whose client advises him, after his deposition, that some of his testimony was untrue may not knowingly use any of the false testimony. If the false testimony is so critical to the case that the lawyer could not effectively defend or settle without using it, the lawyer must withdraw. Since the client refused to follow the lawyer's advice to correct the deposition transcript, the lawyer may not reveal the falsity, as it is a confidence or secret. This opinion is no longer valid under Rule 3.3.).

N.Y.S. Bar Op. 649 (1993) (lawyer for an executor who learns that the executor plans to breach his fiduciary duties must not assist, but should try to persuade the executor to honor his obligations to the estate and withdraw if the executor refuses. If the executor commits a breach, the lawyer must withdraw from representation if the executor refuses to remedy it, and must not assist in any misleading conduct. This opinion is likely to be revisited in light of Rule 3.3.).

VI.6 Reporting to the Tribunal

N.Y.S. Bar Op. 831 (2009) (lawyer learns that a client committed a fraud on a tribunal before April 1, 2009, the effective date of the new N.Y. Rules of Professional Conduct, the lawyer's obligation to disclose the fraud is governed by the former rule, DR 7-102(B)(1), which generally prohibited disclosure of client confidences or secrets, and not by new Rule 3.3. It is irrelevant that lawyer may have learned after April 1, 2009, if the client's conduct—here, client's false statement to the court that client had "stayed out of trouble" for six months, which was a condition of avoiding jail on a misdemeanor plea—occurred prior to April 1, 2009. The Opinion also notes that the disclosure obligations under Rule 3.3 do not extend "forever." "If disclosure could not remedy the effect of the conduct on the proceeding, but could merely result in punishment of the client, we do not believe the Rule 3.3 disclosure duty applies." Finally, the Opinion raises the issue of whether Rule 3.3 is inconsistent with the federal and state constitutional protections afforded criminal defendants and also whether Rule 3.3 can override the "statutory protection of the attorney-client privilege afforded by CPLR § 4503(a).").

N.Y.S. Bar Op. 797 (2006) (lawyer who files a probate petition on behalf of a client who is named executor and sole beneficiary in decedent's will, and later learns that the client is statutorily ineligible to serve as executor of the estate because of a prior undisclosed felony conviction, must try to persuade the client to disclose client's ineligibility to the court. If the client refuses, the attorney must withdraw the petition. The Opinion argues, without foundation, that the client's information is not protected under former DR 4-101 if it is permitted to be disclosed. Nonetheless, the result is correct. The lawyer certified under 22 NYCRR 130.1-1 that the statements contained

in the petition were accurate and the lawyer now knows that they were not. Therefore, the lawyer must correct the lawyer's prior false certification to the tribunal or face sanctions. The result should be the same under Rule 3.3.).

N.Y.S. Bar Op. 781 (2004) (where a client committed a fraud upon a tribunal by submitting a financial statement in a matrimonial matter that contains a material omission of fact, lawyer must ask client to correct the statement and if client refuses, attorney must withdraw the financial statement since lawyer certified its accuracy. While the Opinion argues that the lawyer's knowledge is not protected as a confidence or secret (because the lawyer is permitted by DR 4-101(C)(5) to withdraw the prior certification to the court), and therefore must be corrected (since it is not protected), in fact, the lawyer is obliged under court rules, 22 NYCRR § 130.1-1, to correct the financial statement because it was certified by the lawyer and the lawyer now knows it was inaccurate. The result should be the same under Rule 3.3.).

Nassau County Bar Op. 01-08 (2001) (lawyer may be obligated to report a fraud perpetrated by prior counsel in a matrimonial action. This opinion is likely to be revisited in light of Rule 3.3.).

Nassau County Bar Op. 01-07 (2001) (analyzes the circumstances in which a lawyer who is retained to handle an estate and later discharged may reveal the criminal conduct of the former client in connection with the subsequent administration of the estate. This opinion is likely to be revisited in light of Rule 3.3.).

N.Y.S. Bar Op. 700 (1998) (lawyer who receives an unsolicited communication from a former employee of an adversary's law firm alleging alteration of documents may not communicate further with the employee. If the communication alleges criminal or fraudulent conduct by opposing counsel, the lawyer should, on notice to opposing counsel, notify the hearing officer presiding over the matter and may seek further guidance as to the use of the information, which may or may not be protected. The lawyer may report the allegation of document alteration to another court or other appropriate authority, such as law enforcement or disciplinary authorities, if the lawyer reasonably concludes that it would not be appropriate to notify opposing counsel in the first instance.).

NYCLA Bar Op. 706 (1995) (lawyer who learns that a former client committed fraud during an administrative agency proceeding may not reveal the fraud to the tribunal, which is investigating the matter and has asked the lawyer to appear voluntarily, because the information is a client secret. The past perjury must be disclosed to the tribunal, pursuant to former DR 7-102, provided there is either client consent or a court order, as required by former DR 4-101(C). Disclosure is not permitted without consent or a court order. Interestingly, the opinion notes that the duty to report continues even though the underlying original proceeding is no longer pending. This opinion is likely to be revisited in light of Rule 3.3.).

NYCLA Bar Op. 686 (1991) (lawyer who makes a statement in negotiation that he later learns is materially inaccurate and still being relied upon is not obliged to withdraw or correct the statement, although under former DR 4-101(C)(5) the lawyer may do so, even if the client objects. The Opinion held that disclosure was not required by former DR 7-101(B)(1), since the information received from the client was still protected as a "secret" even though it was not protected as a confidence of the

crime-fraud exception to the attorney-client privilege. The Opinion makes it clear that the NYSBA Ethics Committee's interpretation of confidences and secrets as defined in former DR 4-101 (if client information may be disclosed under an exception in former DR 4-101, then it is not protected as a confidence or secret) is a modern construct and without foundation. *See* N.Y.S. Bar Ops.781 and 797. Interestingly, Rule 3.3 is much narrower than former DR 7-102(b), for it does not require disclosure of a client's fraud on a person, only on a tribunal. Rule 4.1 does not require disclosure of the client's fraud to the defrauded person. This opinion is likely to be revisited in light of Rule 3.3 and 4.1.).

VI.7 When Client Fraud Must Be Reported

N.Y.S. Bar Op. 831 (2009) (lawyer learns that a client committed a fraud on a tribunal before April 1, 2009, the effective date of the new N.Y. Rules of Professional Conduct, the lawyer's obligation to disclose the fraud is governed by the former rule, DR 7-102(B)(1), which generally prohibited disclosure of client confidences or secrets, and not by new Rule 3.3. It is irrelevant that lawyer may have learned after April 1, 2009, if the client's conduct—here, client's false statement to the court that client had "stayed out of trouble" for six months, which was a condition of avoiding jail on a misdemeanor plea—occurred prior to April 1, 2009. The Opinion also notes that the disclosure obligations under Rule 3.3 do not extend "forever." "If disclosure could not remedy the effect of the conduct on the proceeding, but could merely result in punishment of the client, we do not believe the Rule 3.3 disclosure duty applies." Finally, the Opinion raises the issue of whether Rule 3.3 is inconsistent with the federal and state constitutional protections afforded criminal defendants and also whether Rule 3.3 can override the "statutory protection of the attorney-client privilege afforded by CPLR § 4503(a).").

VI.8 Withdrawal from Representation

NYCLA Bar Op. 741 (2010) (a lawyer who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case must employ reasonable remedial measures, including counseling the client to correct the testimony, If the remedial efforts prove fruitless, then the lawyer must take additional remedial measures, including disclosure to the tribunal, if necessary. If the client's false statement is disclosed, the lawyer must seek to minimize the disclosure of confidential information. Under the new Ethics Rules, the lawyer cannot simply withdraw from representation while maintaining the confidence.).

Nassau County Bar Op. 97-10 (1997) (lawyer representing the executor of an estate must withdraw from the representation if the executor refuses to rectify the fraud, and under some circumstances may have to reveal the fraud. This opinion is likely to be revisited in light of Rule 3.3 which would likely require disclosure of the fraud to the tribunal.)

VII. ANNOTATIONS OF CASES

VII.1 No False Statements to Tribunals

New York: Matter of Hancock, 55 A.D.3d 216, 863 N.Y.S.2d 804 (2d Dept. 2008) (attorney who signed court documents prepared by disbarred attorney and made false statements to the court regarding legal fees received and the disbarred attorney's involvement in proceedings, in violation of former DR 7-102(B)(2), disbarred).

Matter of Goel, 46 A.D.3d 26, 844 N.Y.S.2d 537 (4th Dept. 2007) (attorney suspended for one year for making false statements to Surrogate in support of husband's application for pro hac vice admission where husband was a disbarred attorney, and for allowing him access to her law office, in violation of former DR 7-102(A)(5); former DR 7-102(B)(2) and other rules).

Matter of Pu, 37 A.D.3d 56, 826 N.Y.S.2d 43 (1st Dept. 2006) (in reciprocal discipline proceeding based on six-month suspension imposed by federal district court on attorney who made false statements to the court, violated court orders and engaged in discovery abuses, court imposed one-year suspension, basing sanction on other matters involving similar misconduct.)

Matter of Berglas, 16 A.D.3d 1, 790 N.Y.S.2d 119 (1st Dept. 2005) (attorney suspended for one year for submitting false filings to the Immigration and Naturalization Service, by assisting clients in filing applications for political asylum listing a false residence in New York and for making a false statement to a tribunal, in violation of former DR 7-102(A)(5)).

Matter of Bunting, 10 A.D.3d 146, 781 N.Y.S.2d 153 (2d Dept. 2004) (attorney disbarred for falsely creating, signing, and notarizing documents in connection with client's personal injury action; filing notice of appeal that contained the false documents without client's knowledge; and making false statements under oath).

Matter of Truong, 2 A.D.3d 27, 768 N.Y.S.2d 450 (1st Dept. 2003) (attorney suspended for six months based on trial court's sanctions and findings that attorney offered a forged lease into evidence and gave false testimony in support of document, as well as for frivolous and contemptuous conduct during litigation).

Matter of Diller, 308 A.D.2d 14, 763 N.Y.S.2d 827 (2d Dept. 2003) (attorney suspended for three years where, while representing herself and husband in bankruptcy proceeding, she fraudulently conveyed marital residence to herself, offered a fraudulent marital separation agreement, and gave false testimony to bankruptcy court).

Matter of Forrest, 265 A.D.2d 12, 706 N.Y.S.2d 15 (1st Dept. 2000) (attorney suspended for six months, based on discipline imposed in New Jersey, for failing to advise adversary that client had died for reasons unrelated to car accident which gave rise to law suit, failing to advise arbitrator of client's death, and for misrepresenting to arbitrator that client was "unavailable" when asked by arbitrator; lawyer failed to disclose material fact, in violation of NJ Rule 3.3(a), and unlawfully obstructed another party's access to potentially valuable evidence).

Matter of Jagiela, 217 A.D.2d 104, 633 N.Y.S.2d 778 (1st Dept. 1995) (attorney suspended based upon similar sanction imposed in Minnesota for violations of

Rules 3.3(a)(1), 3.3(a)(4); attorney created back-dated document for client's use in bankruptcy proceeding, which lawyer submitted to adversary counsel, and also made false statements to court about document and about amount of attorneys fees paid to co-counsel).

Matter of Friedman, 192 A.D.2d 200, 601 N.Y.S.2d 500 (2d Dept. 1993) (attorney disbarred for instructing client to give false testimony at deposition—and for commingling personal funds with escrow funds and failing to safeguard client funds in escrow).

Federal: In re John E. Star, 2010 WL 3239090, 2010 BL187945 (E.D.N.Y. 2010) (counsel did not earn the $2,000 in fees paid to him by Debtor in a Chapter 13 Bankruptcy case where he violated Rule 1.1 regarding competence, Rule 1.3 regarding diligence and Rule 1.1.3 regarding honesty and candor with a tribunal).

Other Jurisdictions: Daniels v. Alander, 268 Conn. 320, 844 A.2d 182 (Conn. 2004) (holding that trial court's reprimand of attorney and client was proper, where attorney did not correct misrepresentations made to the court in an ex parte proceeding, in violation of 3.3(a)(1) and (d) of the Connecticut Rules of Professional Conduct).

VII.2 Offering or Using False Evidence

Matter of Hancock, 55 A.D.3d 216, 863 N.Y.S.2d 804 (2d Dept. 2008) (attorney who signed court documents prepared by disbarred attorney and made false statements to the court regarding legal fees received and the disbarred attorney's involvement in proceedings, in violation of former DR 7-102(B)(2), disbarred).

Matter of Berg, 54 A.D.3d 66, 862 N.Y.S.2d 225 (4th Dept. 2008) (attorney suspended for one year for advising client in bankruptcy matter to transfer ownership of real estate to the client's wife in exchange for nominal consideration and concealing transfer from court; falsely notarizing a document; and making false statements in pleadings, among other misconduct).

Matter of Berglas, 16 A.D.3d 1, 790 N.Y.S.2d 119 (1st Dept. 2005) (attorney suspended for one year for submitting false filings to the Immigration and Naturalization Service, by assisting clients in filing applications for political asylum listing a false residence in New York and for making a false statement to a tribunal, in violation of former DR 7-102(A)(5).).

Matter of Bunting, 10 A.D.3d 146, 781 N.Y.S.2d 153 (2d Dept. 2004) (attorney disbarred for falsely creating, signing, and notarizing documents in connection with client's personal injury action, filing notice of appeal that contained the false documents without client's knowledge, and making false statements under oath).

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Matter of Janoff, 242 A.D.2d 27, 672 N.Y.S.2d 89 (1st Dept. 1998) (attorney suspended for four years for "serious crime" convictions and additional disciplinary charges, based on lawyer's submission of false bills of particulars, failure to correct client's false deposition testimony and filing of false medical reports to obtain favorable settlements for clients in personal injury actions over a 15-year period).

Matter of Donofrio, 231 A.D.2d 365, 661 N.Y.S.2d 206 (1st Dept. 1997) (attorney suspended for one year for misrepresenting to Administrative Law Judge that his wife was in hospital awaiting birth, falsely completing documents indicating that his summonses were dismissed, forging judge's name on documents and submitting forged documents to Parking Violations Bureau to obtain release of towed vehicle).

Matter of Jagiela, 217 A.D.2d 104, 633 N.Y.S.2d 778 (1st Dept. 1995) (attorney suspended based upon similar sanction imposed in Minnesota for violations of Rules 3.3(a)(1), 3.3(a)(4); attorney created back-dated document for client's use in bankruptcy proceeding, which lawyer submitted to adversary counsel, and also made false statements to court about document and about amount of attorneys fees paid to co-counsel).

Matter of Friedman, 196 A.D.2d 280, 609 N.Y.S.2d 578 (1st Dept. 1994) (attorney disbarred for filing knowingly false and misleading affidavit, asking witness to give false testimony at trial, and not revealing material false testimony of another witness to tribunal).

Matter of Singh, 195 A.D.2d 197, 607 N.Y.S.2d 250 (1st Dept. 1994) (attorney disciplined for falsifying date of client's signature on affidavit and verification).

Matter of Seidman, 194 A.D.2d 269, 606 N.Y.S.2d 477 (4th Dept. 1993) (attorney censured for signing client's name on affidavits and falsely representing that client had sworn to truth of the statements in affidavits and had signed affidavits in attorney's presence).

VII.3 Reasonable Remedial Measures

New York: Fried v. Village of Patchogue, 11 Misc.3d 1068(A), 816 N.Y.S.2d 695, 2006 WL 738909 (Suffolk Co. Sup. Ct., 2006) (excellent discussion by trial court of "the interplay between an attorney's duty to prevent fraud from being perpetrated on the tribunal or on a third party and the often conflicting responsibility to preserve the confidences and secrets of a client," focusing on former DR 4-101(C)(5) and former DR 7-102 and N.Y.S. Bar Op. 781 (2004)).

People v. Andrades, 4 N.Y.3d 355, 795 N.Y.S.2d 497 (2005) (analyzing how a defense attorney should ethically proceed if the defense attorney believes that the client will commit perjury in trial testimony).

People v. Darrett, 2 A.D.3d 16, 769 N.Y.S.2d 14 (1st Dept. 2003) (defense counsel made premature and unnecessarily detailed disclosure to court of her suspicion that client intended to commit perjury at *Huntley* hearing; excellent analysis of lawyer's obligations and compliance with former Code and *People v. DePallo* when lawyer believes that client intends to commit perjury; good practical guidance concerning the conversations that lawyer should have).

People v. DePallo, 96 N.Y.2d 437, 754 N.E.2d 751, 729 N.Y.S.2d 649 (2001) (analyzing how defense attorney should proceed if defense attorney believes that client has committed perjury.)

Federal: Mason Agency Ltd. v. Eastwind Hellas SA, Slip Copy, 2009 WL 3169567 (S.D.N.Y. Sept. 29, 2009) (if a lawyer learns that material evidence previously offered by him to a tribunal as true was in fact false, the lawyer must take "reasonable remedial measures," including if necessary, disclosure of the error to the tribunal under Rule 3.3(a)).

Doe v. Federal Grievance Committee, 847 F.2d 57 (2d Cir. 1988) (court reversed district court's six-month suspension of attorney who had suspicion, but not actual knowledge, that a witness had lied at a deposition and failed to report it to court; excellent analysis of requirement to report fraud on a tribunal and discussion of "knowledge" standard).

VII.4 Reporting to the Tribunal

Fried v. Village of Patchogue, 11 Misc.3d 1068(A), 816 N.Y.S.2d 695, 2006 WL 738909 (Suffolk Co. Sup. Ct., 2006) (excellent discussion by trial court of "the interplay between an attorney's duty to prevent fraud from being perpetrated on the tribunal or on a third party and the often conflicting responsibility to preserve the confidences and secrets of a client," focusing on former DR 4-101(C)(5) and former DR 7-102 and N.Y.S. Bar Op. 781 (2004)).

People v. Andrades, 4 N.Y.3d 355, 795 N.Y.S.2d 497 (2005) (analyzing how a defense attorney should ethically proceed if the defense attorney believes that the client will commit perjury in trial testimony).

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People v. DePallo, 96 N.Y.2d 437, 754 N.E.2d 751, 729 N.Y.S.2d 649 (2001) (analyzing how defense attorney should proceed if defense attorney believes that client has committed perjury.)

VII.5 Knowledge

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Rule 3.4: Fairness to Opposing Party and Counsel

I. TEXT OF RULE 3.4[1]

A lawyer shall not:

(a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

1 Editorial Director Bari R. Chase, Esq. The editor would like to thank Luna Bloom for her research assistance.

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

II. NYSBA COMMENTARY

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructionist tactics in discovery procedure, and the like. The Rule applies to any conduct that falls within its general terms (for example, "obstruct another party's access to evidence") that is a crime, an intentional tort or prohibited by rules or a ruling of a tribunal. An example is "advis[ing] or caus[ing] a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein."

[2] Documents and other evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Paragraph (a) protects that right. Evidence that has been properly requested must be produced unless there is a good-faith basis for not doing so. Applicable state and federal law may make it an offense to destroy material for the purpose of impairing its availability in a pending or reasonably foreseeable proceeding, even though no specific request to reveal or produce evidence has been made. Paragraph (a) applies to evidentiary material generally, including computerized information.

[2A] Falsifying evidence, dealt with in paragraph (a), is also generally a criminal offense. Of additional relevance is Rule 3.3(a)(3), dealing with use of false evidence in

a proceeding before a tribunal. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] Paragraph (b) applies generally to any inducement to a witness that is prohibited by law. It is not improper to pay a witness's reasonable expenses or to compensate an expert witness on terms permitted by law. However, any fee contingent upon the content of a witness' testimony or the outcome of the case is prohibited.

[3A] Paragraph (d) deals with improper statements relating to the merits of a case when representing a client before a tribunal: alluding to irrelevant matters, asserting personal knowledge of facts in issue, and asserting a personal opinion on issues to be decided by the trier of fact. *See also* Rule 4.4, prohibiting the use of any means that have no substantial purpose other than to embarrass or harm a third person. However, a lawyer may argue, upon analysis of the evidence, for any position or conclusion supported by the record. The term "admissible evidence" refers to evidence considered admissible in the particular context. For example, admission of evidence in an administrative adjudication or an arbitration proceeding may be governed by different standards than those applied in a jury trial.

[4] In general, a lawyer is prohibited from giving legal advice to an unrepresented person, other than the advice to secure counsel, when the interests of that person are or may have a reasonable possibility of being in conflict with the interests of the lawyer's client. *See* Rule 4.3.

[5] The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).

III. CROSS-REFERENCES[2]

III.1 Former New York Code of Professional Responsibility:

The new Rule incorporates under one catch-all a number of provisions of the old Code, including former DR 7-102, 7-105, 7-106, and 7-109.

2 *See* Meet the New York Rules of Professional Conduct, by Steven C. Krane, Proskauer Rose LLP 2009.

III.2 ABA Model Rules:

The new Rule is substantially similar to ABA Model Rule 3.4. The ABA Model Rule does not, however, contain a provision similar to subsection (e) of new Rule 3.4.

IV. PRACTICE POINTERS

1. Lawyers cannot knowingly use perjured or false evidence, improperly influence witnesses, or advise or cause persons to hide or leave a jurisdiction of a tribunal for the purpose of making the person unavailable as a witness.
2. Attorneys should consider the substantive nature of the evidence or conduct and applicable federal, state, and local law when determining whether evidence is untainted.
3. If an attorney learns after the fact that a settlement agreement was reached based all or in part on tainted evidence, the lawyer may not proceed with the settlement and must either seek to have his or client correct the testimony or, where necessary reveal the falsity. If disclosure is ultimately necessary, the amount of confidential information disclosed must be minimized.
4. Attorneys may not offer inducements to witnesses to testify for an expected content or dependent on the outcome of the case.
5. Attorneys may pay reasonable compensation to witnesses for their litigation related time and expenses (and reasonable fees and expenses to expert witnesses) to the extent permitted by law, as long as the payment is not contingent upon the outcome of the case.
6. A lawyer may not disregard or advise a client to disregard a ruling of a tribunal made in the course of a proceeding.
7. Lawyers may, in good faith, test the validity of a tribunal's rule or ruling.
8. When appearing before tribunals on behalf of a client, attorneys may not allude to irrelevant matters; assert personal knowledge of facts in issue, other than when testifying as a witness, or assert a personal opinion on issues to be decided by the trier of fact.
9. After analyzing the evidence, and if supported by the record, attorneys may argue for a particular position or conclusion with respect to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.
10. A lawyer may not threaten to present criminal charges against another person solely to gain an advantage in a civil matter.

V. ANALYSIS

V.1 Purpose of Rule 3.4

New Rule 3.4 is a catch-all provision that incorporates the concepts of a number of former Disciplinary Rules. The Rule is designed to ensure fairness in the adversary

system to the opposing parties and their counsel. The prohibitions in new Rule 3.4 are designed to keep an attorney's over-zealous representation of his or her clients under control and protect the integrity of the litigation process.

V.2 Limits on Attorneys' Conduct: Presentation of Evidence

Subsection (a) of Rule 3.4 seeks to ensure that the evidence presented by both sides to a controversy is reasonably obtained and presented. This cannot be accomplished if a lawyer suppresses evidence, facilitates the unavailability of witnesses, conceals what should be disclosed, protects or uses false testimony or evidence, or otherwise ignores the rules.

The integrity of the evidence presented at the adjudicatory proceedings must be assured, and the opposing parties' right to obtain evidence through the discovery process, absent a claim of privilege, is essential. Federal and state law may make it a crime to conceal, destroy, falsify, or alter evidence.

V.3 Inducements to Witnesses

Subsection (b) of Rule 3.4 prohibits attorneys from paying for favorable testimony. Attorneys cannot offer an inducement to a witness that is prohibited by law or pay, offer to pay, or consent to the payment of compensation to a witness that is dependent on the content of the witness' testimony or the outcome of the matter. Attorneys may still pay reasonable compensation to witnesses for their time and expenses necessary to engage in the court process. Attorneys make also pay reasonable fees and expenses to expert witnesses. In any event, compensation cannot be contingent upon the outcome of the case.

V.4 Disregarding a Rule or Ruling of a Tribunal

The purpose behind subsection (c) of Rule 3.4 is to encourage respect for the rule of law and the administration of justice by prohibiting a lawyer from disregarding or advising a client to disregards a ruling of a tribunal. Compliance with this subsection seems to be fairly straightforward. Yet in certain highly charged matters, such as child custody disputes, matrimonial actions or civil rights cases, emotions can sometimes hold sway. Lawyers should take great care to avoid getting emotionally involved in their clients' cases, as it may lead to impaired judgment and ultimately a violation of subsection (c). The new Rule does not prohibit, however, a lawyer from acting in good faith to test the validity of a tribunal's rule or ruling.

V.5 Speaking Before a Tribunal

When before a tribunal, remember where you are. Our courts are the safety valve for private disputes, and if attorneys do not respect the institution, no one else will.

In court especially, attorneys should "keep it real." Allusions should be to the relevant and supportable. Attorneys should not provide testimony except when actually testifying and should keep personal opinions to themselves while engaging in good faith argumentation. Of course, attorneys may still argue the meaning of the evidence, and if supported by the record, for a particular position or conclusion with respect to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused. We cannot cruelly ask questions to degrade a witness or anyone else.

V.6 Use of Threats

Under Rule 3.4(e), a lawyer may not threaten to present criminal charges against another person "solely" to gain an advantage in a civil matter. Not all threats of bringing criminal charges are improper. For example, if a lawyer's client was a victim of a robbery, the lawyer's threat made to the third party to report the crime to the police would not constitute extortion when the attorney honestly made the statement in an effort to obtain restitution or indemnification for the harm done to the client. On the other hand, if the threat revolves around conduct of the third party unrelated to the criminal harm, extortion would be committed, for example by threatening to report undocumented immigration status that is unrelated to obtaining civil restitution.[3]

The ABA Model Rules do not include a provision similar to Rule 3.4(e), nor do the rules of many other states that have followed the ABA's lead.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Presentation of Evidence

NYCLA Bar Op. 741 (2010) (once a lawyer becomes aware after the fact that his or her client gave material false testimony at a deposition, the lawyer cannot allow the false testimony to be preserved or used by the other party. Indeed, if a settlement is based in part upon the tainted evidence, the lawyer may not ethically proceed with the settlement. The false testimony must be corrected or revealed prior to settlement. If disclosure is ultimately necessary, the lawyer must seek to minimize the disclosure of confidential information.).

N.Y.S. Bar Op. 797 (2006) (analyzing the ethical obligations of a trusts and estates lawyer who files a probate petition on behalf of a client and later learns that the client is statutorily ineligible to serve as the executor of the estate).

NYCLA Bar Op. 734 (2005) (legal services organization is subject to the same ethical obligations as other law offices and therefore must report to a client a significant error or omission that may give rise to a malpractice claim and may be required to withdraw from the representation).

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3 *Id.*

Nassau County Bar Ass'n Op. 05-03 (2005) (analyzing the circumstances in which a lawyer representing a defendant in a personal injury action must correct information concerning the defendant's insurance coverage that lawyer had previously provided to the plaintiff and has now learned is incorrect).

N.Y.S. Bar Op. 781 (2004) (analyzing a lawyer's ethical obligations when a client has committed a fraud upon a tribunal by submitting a financial statement that contains a material omission of fact).

Nassau County Bar Ass'n Op. 03-01 (2003) (lawyer appointed to represent an allegedly indigent client may not reveal the client's financial ability to pay for the representation).

Nassau County Bar Ass'n Op. 01-08 (2001) (lawyer may be obligated to report the fraud perpetrated by prior counsel in a matrimonial action).

Nassau County Bar Ass'n Op. 01-07 (2001) (analyzing the circumstances in which a lawyer who is retained to handle an estate and later discharged may reveal the criminal conduct of the former client in connection with the subsequent administration of the estate).

Nassau County Bar Ass'n Op. 01-01 (2001) (since it is the essence of misrepresentation to pass off something for what it is not, a lawyer may not alter a standard printed form without alerting the lawyer for the other party in a transaction to the changes).

Nassau County Bar Ass'n Op. 97-10 (1997) (lawyer representing the executor of an estate must withdraw from the representation if the executor refuses to rectify the fraud, and under some circumstances may have to reveal the fraud).

Nassau County Bar Ass'n Op. 96-01 (1996) (analyzing when successor counsel must report that prior counsel committed a fraud upon a tribunal).

VI.2 Inducements to Witnesses:

N.Y.C. Bar Op. 2009-5 (2009) (lawyers may ask an unrepresented witness not to voluntarily provide information to another party. Misleading or deceptive conduct, however, is not permitted. Lawyers should identify themselves and make clear who they represent, as well as the fact that their client's interests may differ from those of the unrepresented witness. Lawyers must comply with Rule 3.4 and may never bribe, intimidate or otherwise unlawfully communicate with a witness.).

NYCLA Bar Op. 729 (2000) (analyzing the circumstances under which a lawyer may agree to advance counsel fees to a third-party witness).

N.Y.S. Bar Op. 714 (1999) (lawyer called to testify on behalf of a current or former client with respect to a prior representation may agree to accept compensation for the lawyer's time spent in preparing to testify and in testifying).

NYCLA Bar Op. 711 (1996) (criminal defense lawyer may contact a complainant to discuss dropping the charges against the defendant without the consent of the prosecutor).

VI.3 Use of Threats:

N.Y.C. Bar Op. 2009-5 (2009) (lawyers may ask an unrepresented witness not to voluntarily provide information to another party. Misleading or deceptive conduct, however, is not permitted. Lawyers should identify themselves and make clear who they represent, as well as the fact that their client's interests may differ from those of the unrepresented witness. Lawyers must comply with Rule 3.4 and may never bribe, intimidate or otherwise unlawfully communicate with a witness.).

N.Y.S. Bar Op. 772 (2003) (analyzing the circumstances under which a lawyer may present or threaten to present criminal charges to effect the resolution of a civil suit).

Nassau County Bar Ass'n Op. 98-12 (1998) (threatening to file a grievance against a lawyer may under some circumstances be the equivalent of threatening to file criminal charges and consequently violate former DR 7-103).

N.Y.C. Bar Op. 1995-13 (1995) (lawyer who represents a client against whom civil and criminal charges may be brought may ethically offer to settle the civil claim on the condition that the adversary not bring the criminal matter to the attention of law enforcement agencies).

Nassau County Bar Ass'n Op. 94-20 (1994) (attorney who represents a defendant in a personal injury action and who learns in a deposition that the plaintiff is an illegal alien may not report or threaten to report the plaintiff's immigration status "solely to obtain an advantage in a civil matter").

VII. ANNOTATIONS OF CASES

VII.1 Presentation of evidence

New York State: People v. Andrades, 4 N.Y.3d 355, 828 N.E.2d 599, 795 N.Y.S.2d 497 (2005) (analyzing how a defense attorney should proceed if the defense attorney believes that his or her client will commit perjury).

People v. DePallo, 96 N.Y.2d 347, 754 N.E.2d 751, 729 N.Y.S.2d 649 (2001) (analyzing how a defense attorney should proceed if the defense attorney believes that his or her client has committed perjury). See also DePallo v. Burge, 296 F. Supp. 282 (E.D.N.Y. 2003) (denying the defendant's habeas corpus petition).

Federal: DePallo v. Burge, 296 F. Supp. 282 (E.D.N.Y. 2003) (denying a habeas corpus petition challenging the NY Court of Appeals' decision in People v. DePallo, 96 N.Y.2d 347, 754 N.E.2d 751, 729 N.Y.S.2d 649 (2001) in which the court analyzed how a defense attorney should proceed if the defense attorney concluded that his or her client had committed perjury).

VII.2 Inducements to Witnesses:

Martinez v. Port Authority of New York and New Jersey, 2005 WL 2143333 (S.D.N.Y., Sept. 2, 2005) (payment of reasonable compensation for the loss of time to a fact witness does not render the witness an expert).

VII.3 Improper Statements before a Tribunal:

Matter of Robert A. Kahn, 16 A.D.3d 7, 791 N.Y.S.2d 36 (1st Dept. 2005) (suspending a lawyer for making sexually oriented and other offensive comments directed to female attorneys).

VII.4 Use of Threats:

Jalor Color Graphics, Inc. v. Universal Advertising Systems, Inc., 2 A.D.3d 165, 767 N.Y.S.2d 615 (1st Dep't 2003) (sanctioning the defendant's lawyer for, inter alia, threatening criminal prosecution of the plaintiff).

People v. Harper, 75 N.Y.2d 313, 552 N.Y.S.2d 900, 552 N.E.2d 148 (1990) (concluding that a "release agreement" in which one party agreed to drop criminal and civil charges in exchange for money and other consideration did not violate Penal Law § 215.05).

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Mary C. Daly, *The Shoals to Avoid When Paying Potential Witnesses*, N.Y. Prof. Resp. Rep., July 2003, at 1.

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Rule 3.5: Maintaining and Preserving the Impartiality of Tribunals and Jurors

I. TEXT OF RULE 3.5[1]

(a) A lawyer shall not:

(1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Part 100 of the Rules of the Chief Administrator of the Courts;

(2) in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except:

(i) in the course of official proceedings in the matter;

(ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer;

(iii) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or

(iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts;

(3) seek to or cause another person to influence a juror or prospective juror by means prohibited by law;

(4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial

1 Editorial Director Bari R. Chase, Esq. The editor who would like to thank Luna Bloom for her research assistance.

of a case, with any member of the jury unless authorized to do so by law or court order;

(5) communicate with a juror or prospective juror after discharge of the jury if:

(i) the communication is prohibited by law or court order;

(ii) the juror has made known to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress or harassment; or

(iv) the communication is an attempt to influence the juror's actions in future jury service; or

(6) conduct a vexatious or harassing investigation of either a member of the venire or a juror or, by financial support or otherwise, cause another to do so.

(b) During the trial of a case a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(c) All restrictions imposed by this Rule also apply to communications with or investigations of members of a family of a member of the venire or a juror.

(d) A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge.

II. NYSBA COMMENTARY

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. In addition, gifts and loans to judges and judicial employees, as well as contributions to candidates for judicial election, are regulated by the New York Code of Judicial Conduct, with which an advocate should be familiar. *See* New York Code of Judicial Conduct, Canon 4(D)(5), 22 N.Y.C.R.R. § 100.4(D)(5) (prohibition of a judge's receipt of a gift, loan, etc., and exceptions) and Canon 5(A)(5), 22 N.Y.C.R.R. § 100.5(A)(5) (concerning lawyer contributions to the campaign committee of a candidate for judicial office). A lawyer is prohibited from aiding a violation of such provisions. Limitations on contributions in the Election Law may also be relevant.

[2] Unless authorized to do so by law or court order, a lawyer is prohibited from communicating ex parte with persons serving in a judicial capacity in an adjudicative proceeding, such as judges, masters or jurors, or to employees who assist them, such as law clerks. *See* New York Code of Judicial Conduct, Canon 3(B)(6), 22 N.Y.C.R.R. § 100.3(B)(6).

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. Paragraph (a)(5) permits a lawyer to do so unless the communication is prohibited by law or a court order, but the lawyer must respect

the desire of a juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's misbehavior is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

III. CROSS-REFERENCES

III.1 Former New York State Code of Professional Responsibility:

The Rule includes topics previously addressed in former DR 7-108 and 7-110.

III.2 ABA Model Rules:

Model Rule 3.5.

IV. PRACTICE POINTERS

1. A lawyer is limited in the kinds of contacts he or she may have with and in the kinds of gifts or loans he or she may give to a judge, official, or employee of a tribunal, and is prohibited from giving gifts or lending anything of value or causing another person to do so.
2. Lawyers must abstain from influencing jurors, prospective jurors, or a member of the jury venire from which the jury will be selected by means prohibited by law.
3. Lawyers must not circumvent the restrictions on unlawfully influencing jurors through the actions of others.
4. Good practice dictates that lawyers advise their clients, clients' families, and friends not to communicate with members of a venire or jury, as well as families of a member of the venire or jury.
5. A lawyer may communicate with jurors after the jury has been discharged as long as the communication is not prohibited by law or court order, the juror has not indicated an unwillingness to speak to the lawyer, and the lawyer otherwise communicates pursuant to the limitations of Rule 3.5 (a) (5).
6. A lawyer must promptly reveal to the court any improper conduct by a member of the venire or jury, or conduct by another person or his or her family toward a member of the venire or jury.

V. ANALYSIS

V.1 Purpose of Rule 3.5

New Rule 3.5 assembles in one place prohibitions against lawyers engaging in conduct that is prejudicial to the impartiality of the judicial system. Thus the Rule places limits on the types of contacts lawyers may have with a judge, official or employee of a tribunal. These restrictions are in addition to the proscriptions found in criminal law and the New York Code of Judicial Conduct.[2]

The new Rule also seeks to preserve the integrity of the jury system by governing a lawyer's conduct before, during, and after a trial. It also explicitly forbids a lawyer from circumventing these specific restrictions through the actions of a third party.

V.2 Contact with Judges, Officials or Employees of Tribunals

Rule 3.5 fosters an impartial judiciary by placing limits on the kinds of contacts a lawyer may have with a judge, official, or employee of a tribunal. Subsection (a)(1) prohibits a lawyer from wrongfully attempting to influence a judge, official, or employee of a tribunal or from wrongfully giving or lending anything to such judge, official, or employee.

Subsection (a)(2) is designed to protect judges and other officials and employees of tribunals from ex parte communications in adversary proceedings that might bias them or give rise to the appearance of bias. The subsection restricts certain communications with tribunals but provides four exceptions:

(i) Communications in the course of official proceedings in a matter.
(ii) Communications in writing, if the lawyer promptly delivers a copy to the other parties' lawyers or to the other parties if not represented.
(iii) Oral communications, upon adequate notice to the parties' lawyers or the other parties if unrepresented.
(iv) Communications authorized by law or Part 100 of the Rules of the Chief Administrator of the Courts.

V.3 Communications with Members of the Jury

Rule 3.5(a)(3)-(6) and (b)-(d) seeks to uphold the integrity of the decision-making process by juries by explicitly forbidding certain conduct. Not only must the lawyer abstain from improperly influencing a juror, a prospective juror or a member of the jury venire from which the jury will be selected, but the attorney is also explicitly

2 *See* NYSBA Commentary to Rule 3.5, [1].

forbidden from evading the ban through the actions of others. Good practice dictates that lawyers advise their clients, the clients' families, and friends about the restrictions on communicating with, and investigating, the members of a venire or jury and their families. While non-lawyers are not subject to the provisions of Rule 3.5, the conduct prescribed in the Rule may also constitute criminal wrongdoing, such as jury tampering or obstruction of justice.

Subsection (5) permits a lawyer to communicate with a juror or prospective juror after the jury has been discharged, as long as the communication is not prohibited by law or court order, the communication does not involve any misrepresentation, coercion, duress, or harassment, nor is the communication an attempt to influence a juror's actions in the future. If the juror does not wish to speak with the lawyer, the lawyer must respect those wishes.

V.4 Duty to Report Improper Conduct

Rule 3.5(d) mandates that a lawyer must "promptly" reveal to the court any known improper conduct by a member of the venire or jury, or improper conduct by another person or his or her family toward a member of the venire or jury. What is "prompt" depends on the circumstances; a lawyer who delays does so at his peril.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Contact with Judges, Officials or Employees of Tribunals

N.Y.S. Bar Op. 700 (1998) (lawyer who receives an unsolicited communication from a former employee of an adversary's law firm regarding the alleged unlawful alteration of documents produced in an administrative proceeding may not make an ex parte disclosure of the communication to the court, but may make an ex parte disclosure to another court, law enforcement authority, or disciplinary authority).

N.Y.S. Bar Op. 706 (1998) (lawyer may not ethically host a holiday party exclusively for all the judges of a local court and their law clerks).

Nassau County Bar Ass'n Op. 93-30 (1993) (former DR 7-110 applied to the relationship between a lawyer and a judge, not the relationship between a defense counsel and a district attorney).

VI.2 Communications with Members of the Jury

Nassau County Bar Ass'n Op. 96-03 (1996) (lawyer may communicate with the members of a jury by letter asking them to talk with him about the trial and may use the information in a book he subsequently writes).

VII. ANNOTATIONS OF CASES

VII.1 Contact with Judges, Officials or Employees of Tribunals

Costalas v. Amalfitano, 23 A.D.3d 303, 808 N.Y.S.2d 24 (1st Dept. 2005) (lawyer does not violate former DR 7-110 by initiating an ex parte communication with a court, if the court has previously dismissed the action and if the communication related solely procedural matters).

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Rule 3.6: Trial Publicity

I. TEXT OF RULE 3.6[1]

(a) A lawyer who is participating in or has participated in a criminal or civil matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness or the expected testimony of a party or witness;

(2) in a criminal matter that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal matter that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

1 Editorial Director Bari R. Chase, Esq. The editor would like to thank Luna Bloom for her research assistance.

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Provided that the statement complies with paragraph (a), a lawyer may state the following without elaboration:

(1) the claim, offense or defense and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal matter:

(i) the identity, age, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the identity of investigating and arresting officers or agencies and the length of the investigation; and

(iv) the fact, time and place of arrest, resistance, pursuit and use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission or statement.

(d) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

II. NYSBA COMMENTARY

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are

vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, and mental disability proceedings and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer making statements that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. It recognizes that the public value of informed commentary is great and that the likelihood of prejudice to a proceeding because of the commentary of a lawyer who is not involved in the proceeding is small. Thus, the Rule applies only to lawyers who are participating or have participated in the investigation or litigation of a matter and their associates.

[4] There are certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. Paragraph (b) specifies certain statements that ordinarily will have prejudicial effect.

[5] Paragraph (c) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice. Nevertheless, some statements in criminal cases are also required to meet the fundamental requirements of paragraph (a), for example, those identified in paragraph (c)(7)(iv). Paragraph (c) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement; statements on other matters may be permissible under paragraph (a).

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Paragraph (d) permits such responsive statements, provided they contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8 Comment [5] for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

III. CROSS-REFERENCES

III.1 Former New York State Code of Professional Responsibility:

DR 7-107
Ethical Consideration 7-33

III.2 ABA Model Rules

ABA Model Rules of Professional Conduct, Rule 3.6 (a)-(c)

IV. PRACTICE POINTERS

1. A lawyer may not make an out-of-court statement that he or she reasonably knows will be publically communicated and is substantially likely to materially prejudice a legal proceeding involving his or her client.
2. The Rule provides a non-exhaustive list of prejudicial statements. Attorneys should consult Rule 3.6(b) for the list.
3. A lawyer may make an extrajudicial statement that is normally prohibited by the Rule when a reasonable lawyer would believe it is necessary to protect the client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. Statements made under this "retaliatory exception" are limited to the information necessary to mitigate the impact of the recently damaging publicity on their clients.
4. Rule 3.6 (a) applies not only to the lawyer participating in the matter, but also to any "associated" lawyer.

V. ANALYSIS

V.1 Purpose of Rule 3.6

Rule 3.6 applies to trial publicity and the statements that a lawyer may or may not be permitted to make concerning a criminal or civil matter. The Rule is essentially the same as former DR 7-107, with only minor changes. Rule 3.6 aims to protect the integrity of the adjudication process by limiting the extrajudicial statements that a lawyer may make in a civil or criminal matter about a client, the opposing party, potential witnesses, and the representation in general. The rule balances the right to a fair trial, the right to free expression, and the public's right to know about legal proceedings, especially ones involving threats to national security, matters of general public concern and cases involving public policy.[2]

2 *See* NYSBA Commentary to Rule 3.6, [1].

V.2 Prejudicial Statements

Not all out-of-court statements are prohibited. Under Subsection (a) of the Rule, only those statements that the lawyer knows will be publically communicated and are substantially likely to "materially" prejudice an adjudicative proceeding are banned. Subsection (a) is applicable to lawyers actively participating, or who have participated, in a criminal or civil matter and "associated lawyers."

Rule 3.6(a) is similar to former DR 7-107A, except that the new Rule disallows statements that the *lawyer* "reasonably should know" would be publically disseminated and will likely prejudice the proceedings. Former DR 7-107A employed a "reasonable person" standard. This difference could lead to stricter scrutiny of attorneys' statements, as it is reasonable to conclude that an attorney will be more knowledgeable about what will materially prejudice a legal proceeding than the proverbial "reasonable person."

Rule 3.6(b) enumerates six statements that are ordinarily presumed to have a prejudicial effect on an adjudicatory proceeding when they relate to a civil matter that is tried by a jury, a criminal matter, or any other proceeding that could result in incarceration.

V.3 Permissible Statements

Subsection (c) takes a different approach from subsections (a) and (b) of Rule 3.6, focusing on out of court statements that a lawyer is permitted to make provided that the statement complies with paragraph (a). The context of a statement has an effect on whether an extrajudicial statement is prejudicial. Statements made in connection with a criminal jury trial will be subjected to the highest degree of scrutiny, while statements made with regard to non-jury hearings or arbitration proceedings may be given more leeway.

V.4 Retaliatory Statement Exception

Subsection (d) provides an exception to the prohibitions of Rule 3.6(a) when a "reasonable lawyer" would believe that an out-of-court statement is necessary to protect the client from the substantial prejudicial effect of recent public statements made by another party, another party's lawyer or third persons.[3] Lawyers do not have carte blanche when making retaliatory statements and must make sure that the comments are limited to the information necessary to lessen the impact of the damaging publicity on their clients.

3 *Id*. at Comment [7].

V.5 To Whom the Rule Applies

The prohibitions against prejudicial extrajudicial statements apply to lawyers participating in a civil or criminal matter, lawyers who have participated in the civil or criminal matter, as well as a lawyer "associated in a firm or government agency with a lawyer subject to paragraph (a)." See rule 3.6(e).

VI. ANNOTATIONS OF ETHICS OPINIONS

N.Y.S. Bar Op. 620 (1991) (district attorney may issue a press release describing the physical evidence seized at the time of arrest, but may not state whether such evidence will be presented at trial).

VII. ANNOTATIONS OF CASES

Mena v. Key Food Stores Co-Operative, Inc., 195 Misc.2d 402, 758 N.Y.S. 2d 246 (King's Co. Sup. Ct. 2003) (declining to disqualify the plaintiffs' counsel or to suppress tapes of conversations and telephone calls recorded by the plaintiff and made available to the television and print media).

Doe v. Zeder, 5 Misc. 3d 574, 782 N.Y.S. 2d 349 (Sup. Ct. Onondaga Co. 2004) (denying a "gag" order sought under the authority of former DR 7-107).

Seaman v. Wyckoff Heights Medical Center, Inc., 8 Misc.3d 628, 798 N.Y.S.2d 866 (Nassau Co. Sup. Ct. 2005) (sanctioning plaintiff's attorneys in a wrongful discharge action for releasing a copy of a deposition to the media).

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Rule 3.7: Lawyer as Witness

I. TEXT OF RULE 3.7[1]

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) anotherr lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

II. NYSBA COMMENTARY

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and also can create a conflict of interest between the lawyer and client.

1 Editorial Director Bari R. Chase, Esq. The editor would like to thank Luna Bloom for her research assistance.

Advocate-Witness Rule

[2] The tribunal may properly object when the trier of fact may be confused or misled by a lawyer's serving as both advocate and witness. The opposing party may properly object where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof. The requirement that the testimony of the advocate-witness be on a significant issue of fact provides a materiality limitation.

[3] To protect the tribunal, the Rule prohibits a lawyer from simultaneously serving as advocate and witness except in those circumstances specified in paragraph (a). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Testimony relating solely to a formality is uncontested when the lawyer reasonably believes that no substantial evidence will be offered in opposition to the testimony. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyer to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required among the interests of the client, of the tribunal, and of the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rule 1.7, 1.9, and 1.10, which may separately require disqualification of the lawyer-advocate, have no application to the tribunal's determination of the balancing of judicial and party interests required by paragraph (a)(3).

[5] [Reserved.]

Conflict of Interest

[6] In determining whether it is permissible to act as advocate before a tribunal in which the lawyer will be a witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rule 1.7 or Rule 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest

that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to serve simultaneously as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. *See* Rule 1.7. See Rule 1.0(e) for the definition of "confirmed in writing" and Rule 1.0(j) for the definition of "informed consent."

III. CROSS-REFERENCES

III.1 Former New York State Code of Professional Responsibility:

Substantially similar to former DR 5-102.

III.2 ABA Model Rules:

ABA Model Rules of Professional Conduct, Rule 3.7.

IV. PRACTICE POINTERS

1. A motion for disqualification based on opposing counsel calling the lawyer as a witness is subject to "strict scrutiny" because of the potential for abuse. The burden rests on the moving party.
2. It must be reasonably foreseeable that a lawyer would probably be called as a witness for the lawyer to be prohibited from acting as an advocate for his her client as well. The prohibitions of Rule 3.7(a) apply if it is likely that the lawyer is likely to be a witness and none of the subsection's exceptions are applicable.
3. A lawyer may testify as a witness if the testimony relates solely to an uncontested issue.
4. A lawyer may testify to the "nature and value of legal services rendered in the matter."
5. A lawyer may testify "if disqualification of the lawyer would work a substantial hardship on the client."
6. A lawyer may testify when "the testimony will relate solely to a matter of formality" and it is reasonable to believe that no substantial evidence will be offered in opposition to the testimony.
7. A lawyer may testify if the testimony is "authorized by the tribunal."

8. If another lawyer in a lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client that may be prejudicial to the lawyer's client, the lawyer may not act as an advocate before a tribunal in the matter.
9. A lawyer must evaluate whether a conflict of interest with a current client or former client is present which would prohibit him or her from acting as a witness and advocate. If a conflict exists, the lawyer must secure the client's informed consent in writing, unless expressly prohibited by the Rules. *See* discussions, Rules 1.7 and 1.9 *supra*.

V. ANALYSIS

V.1 Purpose of Rule 3.7

Rule 3.7, Lawyer as Witness, governs the conduct of a lawyer who seeks to serve as an advocate and a witness in the same matter and is substantially similar to former DR 5-102. Traditionally the prohibition on the proverbial "wearing two hats" by an attorney is seen as a potential client-lawyer conflict as well as a threat to the integrity of the judicial process. An attorney who acts as an advocate takes the facts involved in a case as they emerge from the discovery process and positions them in the best possible light for the benefit of the client. A witness, on the other hand, should testify as to the facts, without regard to their impact to either party in the case.

V.2 Policy Reasons for Limiting a Lawyer's Role as a witness

Several policy reasons support the adoption of a disciplinary rule to limit a lawyer's assumption of both roles in a single litigation matter.

It is doubtful that a lawyer can ever really set aside his or her advocacy mentality and assume that of a neutral fact witness. This is especially true if the lawyer is fearful of a vigorous cross-examination. Even a lawyer who has the best intentions to testify neutrally may be unconsciously biased to slant facts in favor of the client.[2]

Further, the opposing party's lawyer may feel inhibited in conducting discovery of the witness/advocate, anticipating that the lawyer will need the witness/advocate's cooperation on a number of scheduling and other housekeeping issues. Conducting a vigorous discovery runs the risk of antagonizing the witness/advocate and ruining the possibility of cooperative conduct in the case.

Moreover, a jury may not be able to distinguish between a lawyer qua witness and a lawyer qua advocate. For example, having the lawyer argue his or her own testimony in summation may cause confusion. Additionally, allowing the lawyer to be both

2 See United States. v. Gonzalez, 105 F. Supp. 2d 220, 224–25 (S.D.N.Y. 2000). This case refers to former DR 5-102, but retains its applicability to the extent it discusses human nature, which remains unchanged even when the applicable law does not.

a witness and an advocate provides the lawyer with two separate occasions to sway the jury, as opposed to only one occasion for the opponent's lawyer.

V.3 Motions to Disqualify Lawyer as a "Necessary" Witness

Even with these strong public policy arguments, courts are reluctant to disqualify a client's choice for representation. A motion for disqualification after having called the lawyer as a witness is subject to "'strict scrutiny due to the 'strong potential for abuse'".[3] In such a situation, the burden of proof rests on the moving party.[4] In an illustrative case, plaintiff's motion to disqualify defendant's lawyer as a witness was denied where the lawyer's testimony was deemed not "necessary." The court found that the matters in question could have been established by the testimony of other individuals, including the plaintiff. [5]

V.4 Lawyer as Advocate and Witness

Subsection (a) of Rule 3.7 prohibits a lawyer from acting "as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact. . ." unless the lawyer's testimony falls into one of the exceptions. Basically, it must be at least reasonably foreseeable that a lawyer would be called as a witness for the lawyer to be prohibited from acting as an advocate as well.[6] This standard represents a departure from former DR 5-102(A), which required a lawyer to contemplate whether he or she *ought* to be called as a witness and applied not only prior to the representation, but also throughout the continuing representation.[7] Further, under former DR 5-102(A), a lawyer must have either "known or it [must have been] obvious" that the lawyer

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3 Norman Reitman, Co. v. IRB-Brasil Resseguros S.A., 2001 WL 1132015, at 2 (S.D.N.Y. Sept. 25, 2001) (collecting cases). This statement refers to former DR 5-102; however, a court would likely apply a similar test under Rule 3.7.

4 See, e.g., Bristol-Meyers Squibb Co. v. Rhone-Poulenc Rorer, Inc., 2000 WL 1006235, at 1 (S.D.N.Y. July 19, 2000). This statement refers to the scrutiny applied under former DR 5-102; however, a court would likely apply the same standard of scrutiny under Rule 3.7, applying the burden of proof on the party moving to disqualify the lawyer.

5 Jews for Jesus, Inc. v. Town of Oyster Bay, 2010 WL 256670 (E.D.N.Y. 2010).

6 *See* NYSBA Commentary to Rule 3.7, [4].

7 "Ought to be called" means that a court could disqualify a lawyer only "when it [was] likely that the testimony to be given by the witness [was] necessary." See, e.g., Norman Reitman Co., 2001 WL 1132015, at ∗3 Or when "the attorney's testimony could be significantly useful to his client." A.V. By Versace, Inc. v. Gianni Versace S.p.A., 2001 WL 959160, at 5 (S.D.N.Y. Aug. 23, 2001). A lawyer who was heavily involved in the underlying transaction was particularly sensitive to former Subsection (A)'s prohibition. For example, a lawyer who "merely observed negotiations would not be considered necessary, while a lawyer who negotiated, executed, and administered a contract would be necessary." See, e.g., Norman Reitman Co., 2001 WL 1132015, at 3.

would be a witness. Rule 3.7(a), applies a more objective standard, requiring a determination about whether the lawyer is likely to be a witness.[8]

In *Estate of Goodman*, a lawyer's prior conversations with a decedent made it obvious that the lawyer would be called as a "necessary witness" on the issue of decedent's testamentary intentions, especially since the facts were not apparently available from other sources and the intentions, once proven, were "likely to have a direct bearing on the resolution of the issue of undue influence and fraud" which were before the court. Thus, even under the standard of former DR 5-102(A), the lawyer/witness was disqualified.[9]

The exceptions enumerated Subsection (a) are relatively straightforward. Subdivision (a)(1) allows a lawyer to testify as a witness if the testimony relates solely "to an uncontested issue". An uncontested issue is one the opposing side does not object to, or one that might be resolved by a stipulation between the parties' lawyers. Subdivision (a)(2) allows a lawyer to testify to the "nature and value of legal services rendered in the matter." This exception facilitates the recoupment of legal fees. Without it, a lawyer would be forced to hire another lawyer to represent him or her in fee dispute with a client or in the fee-shifting portion of a civil rights action. Further, in such cases the judge knows about the issue and there is less of a need to test the credibility of the lawyer's testimony in an adversarial proceeding.[10]

Subsection (a)(3) permits the lawyer to testify "if disqualification of the lawyer would work a substantial hardship on the client." In such situations, courts generally engage in a balancing act: the likelihood that the tribunal will be misled or that the opposing party will be prejudiced vs. the effect of the disqualification on the lawyer's client. The court will look at the nature of the case, the probability that the lawyer's testimony will conflict with other witnesses, the importance of the lawyer's testimony, and whether one or both parties could have reasonably foreseen that the lawyer would probably be called as a witness. Since Rule 3.7 "lends itself to opportunistic abuse," courts guard against parties using motions to disqualify for tactical advantages. Thus, the movant for disqualification of a lawyer/witness bears the burden of specifically showing how and to what issues prejudice may occur if the lawyer is also called to testify.[11] The conflict of interest principles of Rules 1.7, 1.9 and 1.10 are not applied in such determinations.[12]

Under the straightforward provision in subsection (a)(4), a lawyer is allowed to testify when "the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony".

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8 Although the standard under former DR 5-102(A) appeared to be more subjective, in actuality it was applied in a more objective manner. *See e.g.,* Bristol-Meyers Squibb Co. *supra* note 4.

9 In re Estate of Goodman, N.Y.L.J. May 20, 2009, at 29.

10 *See* NYSBA Commentary to Rule 3.7, [3].

11 Murray v. Metropolitan Life Insurance Co., 583 F.3d 173 (2d Cir. 2009).

12 *See* NYSBA Commentary to Rule 3.7, [4].

Subsection (a)(5) provides discretion to the court. It allows a lawyer to testify before a tribunal if "the testimony is authorized by the tribunal."

V.5 Associated Lawyer as Opposing Witness

Subsection (b)(1) prohibits a lawyer from acting as an advocate before a tribunal if another lawyer in the lawyer's firm is likely to be called "as a witness on a significant issue other than on behalf of the client and it is apparent that the testimony may be prejudicial to the [lawyer's] client."

Using an objective standard to analyze the application of Subsection (b)(1),[13] it is necessary to keep several points in mind. First, a party other than the lawyer's client must be calling another lawyer in the firm as a witness. Second, the issue on which the associated lawyer's testimony will be given must be significant. Third, the testimony must appear to be prejudicial to the lawyer's client.

In imputation cases, the movant for disqualification must meet an even higher standard of proving by clear and convincing evidence that the lawyer/witness will provide testimony prejudicial to the client and that the judicial system will suffer as a result.[14]

V.6 Conflicts of Interest

Subsection (b)(2) prohibits a lawyer from acting as an advocate before a tribunal if he or she is "precluded from doing so by Rule 1.7 [Conflict of Interest: Current Clients] or Rule 1.9 [Duties to Former Clients]". Thus conflicts of interest with current or former clients can preclude a lawyer from simultaneously serving as advocate and witness, even if he or she would not be prohibited under Rule 3.7(a).[15] The lawyer must evaluate whether a conflict or interest is present, and if so must obtain the client's informed consent in writing, unless expressly prohibited under the Rules.

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13 This subsection differs in language from the parallel provision in former Rule, 5-102(B), in that the previous rule stated that neither the lawyer nor the lawyer's firm may accept "employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyers' firm may be called as a witness… ."

14 Murray v. Metropolitan Life Insurance Co., 583 F.3d 173 (2d Cir. 2009) (where four lawyers from the firm were likely to be called as witnesses, three of whom were transactional lawyers and one who was a litigator and part of the trial team, but who would not be an advocate before the jury, none of the witnesses would be considered trial counsel. The court was unwilling to disqualify the firm under subsection (b) where defendant corporation clearly wanted to keep its counsel; it would cost a lot of time and money to bring in new counsel, especially where the legal issues were complex, pretrial litigation had been ongoing for more than nine years, and the disqualification motion occurred on the eve of trial. Further, plaintiffs' lengthy and unexcused delay in bringing the motion to disqualify weighed against granting the motion and suggested an "opportunistic and tactical" motive instead of an adverse impact on the integrity of the judicial system.)

15 *See* NYSBA Commentary to Rule 3.7, [6]. *See also* Rule 1.7, Rule 1.0(e) and 1.0(j).

VI. ANNOTATIONS OF ETHICS OPINIONS [RESERVED]

VII. ANNOTATIONS OF CASES

VII.1 Purpose of Rule

New York: Giannicos v. Bellevue Hospital Medical Center, 7 Misc.3d 403, 793 N.Y.S.2d 893 (Sup. Ct. N.Y. Co. 2005) (quashing a subpoena seeking the testimony of the plaintiff's lawyer with respect to the plaintiff's mental capacity and demeanor).

Federal: Norma Reitman, Co. v. IRB-Brasil Reasseguros S.A., 2001 WL 1132015, at 3 (S.D.N.Y. Sept. 25, 2001) ("[o]ught to be called" means under [former] Subsections A and C that a court may disqualify a lawyer only "'when it is likely that the testimony to be given by the witness is necessary'").

A.V. By Versace, Inc. v. Gianni Versace S.p.A., 2001 WL 959160, at 5 (S.D.N.Y. Aug. 23, 2001) ("[o]ught to be called" under [former] Subsection A means that a court may disqualify a lawyer only when "the attorney's testimony could be significantly useful to his client").

M.K.B. v. Eggleston, 414 F. Supp.2d 469 (S.D.N.Y. 2006) (advocate-witness rule does not apply to paralegals and interns).

VII.2 Motions to Disqualify Lawyer as a "Necessary" Witness

Jews for Jesus, Inc. v. Town of Oyster Bay, 2010 WL 256670 (E.D.N.Y. 2010) (lawyer's testimony was deemed not "necessary" since the matters in question could have been established by the testimony of other individuals, including the plaintiff).

VII.3 Lawyer as Advocate and Witness

New York: Deans v. Aranbayer, 2010 NY Slip Op. 51402, 2010 BL 183927 (2010) (while attorney in all likelihood would need to testify at trial, for plaintiff to replace him would be a substantial hardship due to extensive legal preparation and the lack of evidence that his testimony would in fact be prejudicial).

Torres v D'Alesso, 2010 NY Slip Op. 07127, 2010 WL 3909984. 2010 BL 237542 (App. Div., 1st Dept. 2010) (since seller in a real estate transaction was entitled to summary judgment, there was no longer any reason for seller's attorney to be called as a witness. Any issue of potential conflict was rendered moot, and in any event the attorney's testimony would not have been prejudicial to his client. Thus there was no basis for disqualification.).

Falk v. Gallo, 2010 WL 1798472, 1 (A.D., 2d Dept. 2010) (where plaintiff's attorney was the only witness who had knowledge of the oral agreement underlying the litigation, the attorney was disqualified to represent plaintiff)

Falk v. Gallo, 901 N.Y.S.2d 99, 100 (A.D., 2d Dept. 2010) (lawyer as advocate and witness disqualifies).

Ramchair v. Conway, 601 F.3d 66, 75 (2d Cir. 2010) (attorney shall withdraw from representation before a tribunal if the attorney learns or it is obvious that the attorney ought to be called as a witness on behalf of the client).

In re Estate of Goodman, N.Y.L.J. May 20, 2009, p.29, col. 3 (2009) (lawyer's prior conversations with a decedent made it obvious that the lawyer would be called as a "necessary witness" on the issue of decedent's testamentary intentions, especially since the facts were not apparently available from other sources and the intentions, once proven, were "likely to have a direct bearing on the resolution of the issue of undue influence and fraud" which were before the court. Thus, even under the standard of former DR 5-102(A), the lawyer/witness was disqualified.).

Ahrens v. Chisena, 40 A.D.3d 787, 836 N.Y.S.2d 278 (2d Dept. 2007) (court properly permitted the plaintiff's counsel to testify as to service of process on the defendant and disqualification of plaintiff's counsel was not required).

Smolenski v. T.G.I. Friday's Inc., 15 Misc.3d 792, 834 N.Y.S.2d 436 (Sup. Ct. 2007) (disqualifying husband-lawyer from representing plaintiff-spouse on the ground that he was a witness to the underlying event).

Omanksy v. Bermont Holdings Ltd., 15 Misc.3d 11, 832 N.Y.S.2d 379 (Sup. Ct., App. Term 2007) (reversing an order disqualifying the defendant's lawyer who was one of two shareholders in the defendant limited liability corporation).

Skiff-Murray v. Murray, 3 A.D.3d 610, 771 N.YS.2d 230 (3d Dept. 2004) (disqualifying the plaintiff's lawyer because she was a necessary witness to establish the plaintiff's claim that the creditor had actual notice of the allegedly fraudulent nature of certain conveyances).

Zaccaro v. Bowers, 2 Misc.3d 733, 771 N.Y.S.2d 332 (Civ. Ct. N.Y. Co. 2003) (disqualifying both the landlord's and tenant's lawyers in a holdover proceeding because both lawyers had specific noncumulative personal knowledge regarding offers of comparable housing, but permitted the parties' respective law firms to continue the representations).

Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 A.D.2d 64, 747 N.Y.S.2d 441 (1st Dep't 2002) (in a dispute arising out of a failed law firm merger, the attorney for the defendant firm was disqualified because his testimony was necessary on behalf of his own clients. His law firm, however, was permitted to continue the representation).

In re Grand Jury Investigation in New York County, 191 Misc.2d 800, 745 N.Y.S.2d 399 (Sup. Ct. N.Y. Co. 2002) (court is allowed "substantial latitude" in deciding conflict issues relating to the witness/advocate rule in pretrial proceedings).

Toren v. Anderson, Kill & Olick, P.C., 185 Misc.2d 23, 710 N.Y.S.2d 799 (Sup. Ct. N.Y. Co. 2000) (denying disqualification on the ground that the moving party had not clearly shown that any testimony by the opposing lawyer would be adverse to the lawyer's client).

Federal: Decker v. Nagel Rice LLC, 2010 WL 1050355, 2 (S.D.N.Y. 2010) (to disqualify an attorney on the basis of the advocate-witness rule, a party must demonstrate that the testimony is both necessary and substantially likely to be prejudicial).

Murray v. Metropolitan Life Insurance Co., 583 F.3d 173 (2d Cir. 2009) (movant for disqualification of a lawyer/witness bears the burden of specifically showing how and to what issues prejudice may occur if the lawyer is also called to testify).

Crews v. County of Nassau, 2007 WL 316568 (E.D.N.Y. Jan. 30, 2007) (disqualifying plaintiffs' counsel on the ground that he represented the plaintiff in the underlying criminal action that gave rise to this action for false arrest, unlawful imprisonment, malicious prosecution and abuse of process).

In re Subpoena Issued to Dennis Friedman, 350 F.3d 65 (2d Cir. 2003) (analyzing the circumstances in which a lawyer may be deposed in a civil action).

United States v. McDonald, 2002 WL 31956106 (E.D.N.Y. May 9, 2002) (disqualifying the defendant's lawyer because the government had met its burden of showing that the communications between the defendant and his lawyer were subject to the crime-fraud exception and that therefore the lawyer could be compelled to testify before the grand jury).

United States v. McDonald, 2002 WL 31056622 (E.D.N.Y. Aug. 6, 2002) (refusing to disqualify defense counsel even if the government called him as a witness to testify to the "nature and value of legal services rendered" to his client; rejecting the government's invocation of the unsworn witness doctrine).

Renner v. Townsend Financial Services Corp., 2002 WL 1013234 (S.D.N.Y. May 20, 2002) (disqualifying the defendants' lawyer and law firm because the lawyer was a necessary witness for the plaintiff and his testimony would be prejudicial to his client).

Renner v. Chase Manhattan Bank, 2002 WL 87665 (S.D.N.Y. Jan. 22, 2002).

Ulster Scientific, Inc. v. Guest Elchrom Scientific AG, 181 F.Supp.2d 95 (N.D.N.Y. 2001) (disqualifying plaintiff's counsel because it was "inevitable" that counsel would be a witness for the plaintiff and rejecting the plaintiff's claim of substantial hardship).

United States v. Gonzalez, 105 F.Supp.2d 220, 224–25 (S.D.N.Y. 2000) (disqualifying criminal defense counsel under former Subsection A on the ground that the lawyer might have to testify about a conversation with a witness).

Bristol-Meyers Squibb Co. v. Rhone-Poulenc Rorer, Inc., 2000 WL 1006235 (S.D.N.Y. July 19, 2000) (offering a lawyer's opinion letter at trial is not the equivalent of offering the lawyer's testimony).

VII.4 Associated Lawyer as Opposing Witness

New York: Old Saratoga Square Partnership v. Compton, 2005 WL 1414485 (3d Dep't June 16, 2005) (lawyer who is a partner in the plaintiff-partnership may

represent the partnership even though the lawyer is also a potential witness in the litigation).

Fernandes v. Jamron, 9 A.D.3d 379, 780 N.Y.S2d 164 (2d Dep't 2004) (disqualifying a law firm on the ground that several of its lawyers were "essential witnesses" in a litigation arising out of a real estate transaction).

Price v. Price, 289 A.D.2d 11, 733 N.Y.S.2d 420 (1st Dep't 2001) (court disqualified all the members of the law firm representing the plaintiff-wife in a matrimonial dispute because the client's claim required it to attack the firm's prior representation of the client).

Federal: Murray v. Metropolitan Life Insurance Co., 583 F.3d 173 (2d Cir. 2009) (where four lawyers from the firm were likely to be called as witnesses, three of whom were transactional lawyers and one who was a litigator and part of the trial team, but who would not be an advocate before the jury, none of the witnesses would be considered trial counsel. The court was unwilling to disqualify the firm under subsection (b) where defendant corporation clearly wanted to keep its counsel; it would cost a lot of time and money to bring in new counsel, especially where the legal issues were complex, pretrial litigation had been ongoing for more than nine years and the disqualification motion occurred on the eve of trial. Further, plaintiffs' lengthy and unexcused delay in bringing the motion to disqualify weighed against granting the motion and suggested an "opportunistic and tactical" motive instead of an adverse impact on the integrity of the judicial system.).

Corona v. Hotel and Allied Services Union Local 758, 2005 WL 2086326 (S.D.N.Y. Aug. 30, 2005) (disqualifying a union's law firm and the law firm's associate under both subsections C and D of former DR 5-102 and noting that without disqualification of both the associate and the law firm the associate-witness would be put in the untenable position of being cross-examined by one of his own law firm's partners).

New York Islanders Hockey Club, LLP v. Comeria Bank-Texas, 115 F.Supp.2d 348 (E.D.N.Y. 2000) (refusing to disqualify a law firm because under agency law principles the interests of client and law firm were identical).

VII.5 Conflicts of Interest

People v. Berroa, 99 N.Y.2d 134, 782 N.E.2d 1148, 753 N.Y.S.2d 12 (2002) (defense counsel's stipulation to facts directly contradicting defense witnesses' statements created a conflict of interest, requiring a new trial).

Johanson Resources, Inc. v. La Vallee, 298 A.D.2d 659, 748 N.Y.S.2d 435 (3d Dept. 2002) (even though the statements made in a settlement conference are ordinarily confidential, a party can waive that confidentiality by making the statements the basis of an affirmative claim. Therefore, the party's lawyer ought to be called as a witness and should be disqualified.).

People v. Lewis, 2 N.Y.3d 224, 809 N.E.2d 1106, 77 N.Y.S.2d 798 (2004) (reversing a defendant's conviction and ordering a new trial because his lawyer testified against him at a hearing).

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Rule 3.8: Special Responsibilities of Prosecutors and Other Government Lawyers

I. TEXT OF RULE 3.8[1]

(a) A prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.

(b) A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.

II. NYSBA COMMENTARY

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Applicable state or federal law may require other measures by the prosecutor, and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4. A government lawyer in a criminal case is considered a "prosecutor" for purposes of this Rule.

[2] A defendant who has no counsel may waive a preliminary hearing or other important pretrial rights and thereby lose a valuable opportunity to challenge probable cause.

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Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. This would not be applicable, however, to an accused appearing pro se with the approval of the tribunal, or to the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (b) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] [Reserved.]

[5] Rule 3.6 prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium against the accused. A prosecutor in a criminal case should make reasonable efforts to prevent persons under the prosecutor's supervisory authority, which may include investigators, law enforcement personnel, employees and other persons assisting or associated with the prosecutor, from making extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.6. See Rule 5.3. Nothing in this Comment is intended to restrict the statements that a prosecutor may make that comply with Rule 3.6(c) or Rule 3.6(d).

[6] Like other lawyers, prosecutors are subject to Rule 5.1 and Rule 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Prosecutors should bear in mind the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case, and should exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[6A] Reference to a "prosecutor" in this Rule includes the office of the prosecutor and lawyers affiliated with the prosecutor's office who are responsible for the prosecution function. Like other lawyers, prosecutors are subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when the lawyer comes to know of its falsity. *See* Rule 3.3, Comment [6A].

[6B] The prosecutor's duty to seek justice has traditionally been understood not only to require the prosecutor to take precautions to avoid convicting innocent individuals, but also to require the prosecutor to take reasonable remedial measures when it appears likely that an innocent person was wrongly convicted. Accordingly, when a prosecutor comes to know of new and material evidence creating a reasonable likelihood that a person was wrongly convicted, the prosecutor should examine the evidence and

undertake such further inquiry or investigation as may be necessary to determine whether the conviction was wrongful. The scope of the inquiry will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of the inquiry or investigation should be such as to provide a "reasonable belief," as defined in Rule 1.0(r), that the conviction should or should not be set aside.

[6C] When a prosecutor comes to know of clear and convincing evidence establishing that a conviction was wrongful, the prosecutor should disclose the new evidence to the defendant so that defense counsel may conduct any necessary investigation and make any appropriate motions directed at setting aside the verdict, and should disclose the new evidence to the court or other appropriate authority so that the court can determine whether to initiate its own inquiry. The evidence should be disclosed in a timely manner, depending on the particular circumstances. For example, disclosure of the evidence might be deferred where it could prejudice the prosecutor's investigation into the matter. If the convicted defendant is unrepresented and cannot afford to retain counsel, the prosecutor should request that the court appoint counsel for purposes of these post-conviction proceedings. The post-conviction disclosure duty raised by this Comment applies to new and material evidence of innocence, regardless of whether it could previously have been discovered by the defense.

[6D] If the prosecutor comes to know of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor should seek to remedy the injustice by taking appropriate steps to remedy the wrongful conviction. These steps may include, depending on the particular circumstances, disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor believes that the defendant was wrongfully convicted.

[6E] The duties in Comments [6B], [6C] and [6D] apply whether the new evidence comes to the attention of the prosecutor who obtained the defendant's conviction or to a different prosecutor. If the evidence comes to the attention of a prosecutor in a different prosecutor's office, the prosecutor should notify the office of the prosecutor who obtained the conviction.

III. CROSS-REFERENCES

III.1 Former NY Code of Professional Responsibility:

Rule 3.8 is the successor to former DR 7-103.

Specifically, Rule 3.8 (a) is identical to DR 7-103 (a).

Rule 3.8 (b) is almost identical but Rule 3.8 (b) replaces the word "evidence" with the phrase "evidence or information"; replaces the word "punishment" with "sentence" and adds an exception when the prosecutor or other government lawyer is "relieved of this responsibility by a protective order of a tribunal."

III.2 ABA Model Rules:

ABA Model Rule 3.8 (a) provides that the prosecutor shall "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."

ABA Model Rule 3.8(d) is similar in substantial respects to NY Rule 3.8(b). It provides that a prosecutor shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."

III.3 ABA Model Rule 3.8 contains additional prosecutorial obligations including:

- 3.8 (b): Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- 3.8 (c): Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- 3.8 (e): Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  (1) the information sought is not protected from disclosure by any applicable privilege;
  (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  (3) there is no other feasible alternative to obtain the information;
- 3.8 (f): Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- 3.8 (g): When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
  (1) promptly disclose that evidence to an appropriate court or authority, and
  (2) if the conviction was obtained in the prosecutor's jurisdiction,
    (A) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(B) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

- 3.8 (h): When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

IV. PRACTICE POINTERS

1. A prosecutor has an obligation to insure that charges are based upon probable cause. The new Rule does not address the standard for a prosecutor to bring a charge to conclusion by either plea or trial.
2. Some prosecutors' offices and individual prosecutors take the position that a prosecutor should believe the person to be guilty beyond a reasonable doubt before taking that case to trial or resolving it by a guilty plea.
3. Under Rule 3.8(b), the prosecutor's disclosure obligation is more extensive than that required by law.

V. ANALYSIS

V.1 General Purpose of Rule 3.8

New Rule 3.8 provides guidance to prosecutors concerning their minimum disciplinary responsibilities. The expectation is that, as a minister of justice, prosecutors routinely will and should go beyond the minimum requirements.

To fulfill the prosecutor's mission, some offices have manuals that contain provisions and practices to guide the prosecutor toward best practices.

V.2 Prosecutor's Obligation to Insure Charges are Based Upon Probable Cause

Rule 3.8(a) affirms the prosecutor's obligation to insure that charges are based upon probable cause. It does not address the standard for a prosecutor to bring a charge to conclusion by either a plea or trial. Some offices and individual prosecutors take the position that a prosecutor should believe the person to be guilty beyond a reasonable doubt before taking that case to trial or resolving it by guilty plea.

V.3 Prosecutor's Disclosure Obligations

Under new Rule 3.8 (b), the prosecutor's disclosure obligation is more extensive than that required by law. The distinctions between the legal and ethical obligations are

clearly set forth in ABA Op. 09-454 which provides a useful overview for prosecutors in New York.

Formal Opinion 09-454 makes clear that the prosecutor's ethical disclosure requirement under Model Rule 3.8(d) is separate, and in many respects more expansive, than disclosure obligations under the Constitution. ABA Model Rule 3.8(d), which mirrors the New York Rule, requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and the tribunal all unprivileged mitigating information known to the prosecutor." The opinion explains that Rule 3.8(d) requires disclosure of evidence or *information* favorable to the defense without regard to its materially, which is more expansive than the prosecutor's constitutional obligation under *Brady v. Maryland*,[2] and the *Brady* line of cases, which extends only to favorable *evidence* that is "material." The committee described *Brady's* materiality requirement to limiting a constitutional right only to disclosure of evidence "likely to lead to an acquittal." According to the ethics opinion, Rule 3.8(d) does not have such a materiality limitation, and while the ethical "obligation may overlap with a prosecutor's other legal obligations" it is more expansive.

The committee explained that ABA Model Rule 3.8(d) has no "de minimis" exception that would excuse disclosure of favorable evidence or information if a prosecutor believes the material would have only a minimal tendency to negate the defendant's guilt or that the information is unreliable. Instead, the opinion states that prosecutors should "give the defense the opportunity to decide whether the evidence can be put to effective use."

The opinion also addresses the timing of disclosure, and states that disclosure must be made early enough so that defense counsel may use the evidence and information effectively. Reasoning that defense counsel can use favorable evidence and information most effectively the sooner it is received, ABA Model Rule 3.8(d) requires disclosure of such evidence and information "as soon as reasonably practical" once it is known to the prosecutor.

Focusing on how important defense counsel's evaluation of the strength of the prosecutor's case is to a defendant considering whether to plead guilty, the opinion states that timely disclosure under ABA Model Rule 3.8(d) requires disclosure of evidence and information "prior to a guilty plea proceeding, which may occur concurrently with the defendant's arraignment." If the prosecutor believes that early disclosure or disclosure of evidence or information may compromise an ongoing investigation or prosecution witness' safety, the opinion advises the prosecutor to seek a protective order.

The opinion also makes clear that a defendant may not waive or consent to the prosecutor's abrogation of the ethical disclosure duty, and "a prosecutor may not solicit, accept or rely on the defendant's consent" as a mechanism to avoid ABA Model Rule 3.8(d). The opinion notes that a third party may not absolve a lawyer of an ethical duty except in specifically authorized instances, such as consent to certain conflicts of

2 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

interest. ABA Model Rule 3.8(d) does not explicitly permit third-party consent or waiver of the prosecutor's disclosure obligation.

The opinion states that ABA Model Rule 3.8(d) is designed both to protect the defendant and "to promote the public's interest in fairness and reliability of the justice system, which requires that defendants be able to make informed decisions." Allowing the prosecutor to obtain a defendant's waiver of disclosure of favorable evidence and information undermines defense counsel's ability to advise the defendant whether to plead guilty and may lead a factually innocent defendant to plead guilty.

The committee emphasized, however, that ABA Model Rule 3.8(d) requires disclosure only of evidence and information "known to the prosecutor," and "does not require prosecutors to conduct searches or investigations for favorable evidence that may possibly exist but of which they are unaware." Still, the committee cautioned that a prosecutor cannot ignore the obvious or turn a blind eye to the existence of favorable information or evidence.

The opinion notes that ABA Model Rule 3.8(d) requires disclosure to be made "in connection with sentencing," which requires disclosure to the tribunal as well as to the defense, sufficiently before sentencing for the defense to use the information effectively and for the sentencing court to consider it fully.

V.4 Duties of Lawyers with Managerial Responsibilities in Prosecutors' Offices

ABA Formal Op. 09-454 also provides guidance to lawyers with managerial responsibility in the prosecutor's office. Those supervisory lawyers are obligated to ensure that subordinate lawyers comply with ABA Model Rule 3.8(d). The supervisory lawyer who directly oversees a trial prosecutor must ensure that the trial prosecutor meets his or her ethical disclosure obligation. A supervisory lawyer is "subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations." The opinion advises such managerial lawyers to promote compliance with ABA Model Rule 3.8(d) by adequately training subordinate lawyers and by having internal office procedures that facilitate compliance. This supervisory obligation includes establishing procedures to ensure that the prosecutor responsible for making disclosure receives and has access to information from other lawyers working on the same or related cases.

V.5 Prosecutor's Obligation for Post-conviction Duty Upon Learning of Evidence of Innocence

The NYSBA Comments 6 [B] through 6[E] to new Rule 3.8 address the prosecutor's obligation for post conviction duty upon learning of evidence of innocence. The ABA has adopted these provisions as Rule 3.8(g) and (h). The rules had their genesis in a 2005 Report of the Professional Responsibility Committee of the Association of the Bar of the City of New York (ABCNY). The Report was adopted and published by the

Association in 2006.[3] The Report considered various aspects of prosecutors' duties. Among other provisions, against the background of recent knowledge about the fallibility of the criminal justice process, the Report proposed a rule regarding the prosecutor's obligation to the wrongfully convicted. The report stated: "In light of the large number of cases in which defendants have been exonerated… it is appropriate to obligate prosecutors' offices to"… consider "credible post-conviction claims of innocence."[4] The premise of the proposal was that prosecutors have ethical responsibilities upon learning of new and material evidence that shows that it is likely that the convicted person was innocent. These responsibilities include a duty to disclose the evidence, to conduct an appropriate investigation, and, upon becoming convinced that a miscarriage of justice occurred, to take steps to remedy it. The ABCNY proposal was presented to the state bar's Committee on Standards of Attorney Conduct (COSAC) which proposed a revised version of Rules 3.8(g) and (h) that was the result of comments from a wide range of state and federal prosecutors and district attorneys' organizations, defense organizations, and bar associations. Yet the Courts rejected these proposals and the new Rules do not contain Rule 3.8(g) and (h).

VI. ANNOTATIONS OF ETHICS OPINIONS

New York: N.Y.S. Bar Op. 770 (2003) (prosecutor may agree to plea bargain to require defendant to make donation to nonprofit organization so long as district attorney's office does not coordinate the program and has no personal interest in it).

N.Y.S. Bar Op. 821 (2001) (prosecutor may propose a civil resolution to a potential criminal charge only if after sufficient investigation the prosecutor has probable cause to support the charge and believes that it is provable).

ABA: ABA Formal Op. 09-454 (that the prosecutor's ethical disclosure requirement under Model Rule 3.8(d) is separate, and in many respects more expansive, than disclosure obligations under the Constitution. *See* more expansive discussion of the Opinion, *supra*.).

VII. ANNOTATIONS OF CASES

Friedman v Rehal, No. 08-0297-pr, 2010 WL 3211054, 2010 BL 188437 (2d Cir. 2010) (petitioner, upon plea of guilty, was convicted in state court for sodomy in the first degree, use of child in sexual performance, sexual abuse in the first degree, attempted sexual abuse in the first degree, and endangering welfare of minor. State court denied his request for post-conviction relief, and petitioner filed federal petition for writ of habeas corpus. The United States District Court for the Eastern District of

3 Proposed Prosecution Ethics Rules, The Committee on Professional Responsibility, 61 The Record of the Association of the Bar of the City of New York 69 (2006).

4 *Id*. at 73.

New York, dismissed petition and granted certificate of appealability. Petitioner appealed. While the court did not provide the legal relief requested, it found the New York District Attorney had a continuing ethical obligation under Rules 3.8 to seek justice because the record suggested "a reasonable likelihood" that Petitioner was wrongfully convicted.).

People v. Almendarez, 876 N.Y.S.2d 861 (1st Dept. 2009) (where prosecutor becomes aware that the wrong person has been charged with driving while intoxicated, the prosecutor cannot simply amend the name of the defendant. The prosecutor must dismiss the charge against the innocent party and file a separate action against the correct defendant.).

People v. Miller, 539 N.Y.S.2d 782 (2d Dept. 1989) (prosecutor's fundamental obligation is to seek justice, not just convict. Prosecutor made an improper attack on the defendant's lifestyle and intentionally mischaracterized the defense.).

People v. Gelfand, 499 N.Y.S.2d 573 (Kings County, 1986) (as officers of the court, prosecutor has duty to insure that valid indictment is obtained. Prosecutors must take action to correct defects, such as notifying the court when a substantial number of jurors are absent from a Grand Jury proceeding.).

People v. Unroach 64 N.Y. 2d 905 (1985) (usually a prosecutor has an obligation to bring a discrepancy in testimony to the attention of the court. However, where the discrepancy was already known to the trial judge through an in camera hearing, the trial judge should have released so much of the in camera minutes as related to the informant's answer. The judge's failure to do so did not result in an unfair trial in this case.).

People v. Jones, 387 N.Y.S.2d 779; *aff'd* 44 NY 2d 76 (1976); (prosecutors do not have legal duty prior to guilty plea to inform defense counsel that the complaining witness died).

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Niki Kuckes, *Appendix A: Report to the ABA Commission on Evaluation of the Rules of Professional Conduct Concerning Rule 3.8 of the ABA Model Rules of Professional Conduct: Special Responsibilities of a Prosecutor,* 22 GEO. J. LEGAL ETHICS 463 (2009).

Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000,* 22 GEO. J. LEGAL ETHICS 427 (2009).

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Rule 3.9: Advocate in Non-Adjudicative Matters

I. TEXT OF RULE 3.9[1]

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

II. NYSBA COMMENTARY

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues, and advance arguments regarding the matters under consideration. The legislative body or administrative agency is entitled to know that the lawyer is appearing in a representative capacity. Ordinarily the client will consent to being identified, but if not, such as when the lawyer is appearing on behalf of an undisclosed principal, the governmental body at least knows that the lawyer is acting in a representative capacity as opposed to advancing the lawyer's personal opinion as a citizen. Representation in such matters is governed by Rules 4.1 through 4.4, and 8.4.

[1A] Rule 3.9 does not apply to adjudicative proceedings before a tribunal. Court rules and other law require a lawyer, in making an appearance before a tribunal in a representative capacity, to identify the client or clients and provide other information required for communication with the tribunal or other parties.

[2] [Reserved.]

[3] [Reserved.]

1 Executive Editor Wallace Larson, Jr., Cleary Gottlieb's Professional Responsibility Counsel.

III. CROSS-REFERENCES

III.1 New York Code of Professional Responsibility:

There was no comparable provision of the former New York Code of Professional Responsibility. This rule is similar in substance to the first sentence of the former EC 8-4.

III.2 ABA Model Rules:

ABA Model Rule 3.9 has similar provisions and it adds an obligation to conform to Rules 3.3, 3.4 and 3.5.

IV. PRACTICE POINTERS

1. When a lawyer communicates in a representative capacity with a legislative body or administrative agency, he or she must disclose to the agency that the appearance is in a representative capacity.
2. The lawyer does not have to make that disclosure when the information that the lawyer is requesting from the agency is readily available to the general public.
3. New NY Rule 3.9 does not impose obligations upon lawyers to comply with Rules 3.3 through 3.5 in connection with this Rule. The ABA rule imposes such obligations.

V. ANALYSIS

V.1 Purpose of Rule 3.9

A lawyer acts as an advocate when representing a client before a nonadjudicative body engaged in rule making, thus the fundamental duties of loyalty, diligence, and competence apply, as well as the limits on advocacy. The addition in the new Rule is that the lawyer identifies his or her representative capacity. No identification is required if the information the lawyer seeks is available to the general public.

Guidance about the application of Rule 3.9 can be found in the Comments to the ABA Model Rules. ABA Comment 1 to Rule 3.9 emphasizes that the purpose of the rule is for the decision-making body to be able to rely on the integrity of any submissions made by the attorney.[2] A lawyer must deal with an administrative agency honestly, and the decision-making body must be able to rely on the integrity of any submissions made by the attorney.

2 ABA Commentary to Rule 3.9, Comm. [1].

ABA Comment 3 to Rule 3.9 notes that the Rule only applies when the attorney or the attorney's client is presenting evidence or an argument before a nonadjudicative body.[3] Thus it does not apply when a lawyer is representing a client in a negotiation with a governmental agency, or assists a client with a license application or filing income-tax returns. The Rule is also not applicable when an attorney represents a client in an investigation made by government examiners. Model Rules 4.1 through 4.4 pertains to these situations instead.

The Federal Government and all states regulate lawyer-lobbyists. Federal regulations are discussed in *The Lobbying Manual: A Complete Guide to Federal Law Governing Lawyers and Lobbyists* (3d ed. 2005). State and federal laws are discussed in Abner Mikva and Eric Lane, *The Legislative Process* (2d ed. Aspen 2002).

VI. ANNOTATIONS OF ETHICS OPINIONS [RESERVED]

VII. ANNOTATIONS OF CASES

International Paper Co. v. Wilson, 34 Ark. App. 87 (1991) (attorney's submission of an affidavit on behalf of a claimant to a Worker's Compensation Commission was acceptable. Court found that while the Commission constitutes an administrative agency, it was performing an adjudicative role.).

VIII. BIBLIOGRAPHY

Restatement of the Law Governing Lawyers, Sec 104 (takes a broader approach and requires the lawyer to comply with applicable law and regulation).

3 ABA Commentary to Rule 3.9, Comm. [3].

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Rule 4.1: Truthfulness in Statements to Others

I. TEXT OF RULE 4.1[1]

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

II. NYSBA COMMENTARY

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. As to dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category; so is the existence of an undisclosed principal, except where nondisclosure

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of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Illegal or Fraudulent Conduct by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client as to conduct that the lawyer knows is illegal or fraudulent. Ordinarily, a lawyer can avoid assisting a client's illegality or fraud by withdrawing from the representation. *See* Rule 1.16(c)(2). Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. *See* Rules 1.2(d), 1.6(b)(3).

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility:

Rule 4.1 is the successor to the former Disciplinary Rule 7-102(A) (5). It adds the phrase "to a third person."

III.2 ABA Model Rules of Professional Conduct (2009):

New York Rule 4.1 differs from Model Rule 4.1 (a) in that it does not modify "false statement of fact or law" with the term "material." New York did not adopt 4.1(b) which states that the lawyer shall not knowingly "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client unless disclosure is prohibited by Rule 1.6."

IV. PRACTICE POINTERS

1. The lawyer has an obligation in the course of his or her representation not to knowingly make a false statement of fact or law to an adversary or third person.
2. When considering what constitutes a false statement of fact the lawyer needs to evaluate the context of the situation to determine where to draw the line between acceptable puffery and misrepresentation. At the very least, the lawyer must be careful to avoid liability under tort and criminal law.
3. The lawyer must not intentionally misrepresent the law and, in dealing with non-lawyers, must exercise care so as not to make misstatements about the law.
4. As an advocate, a lawyer need not correct an adversary's misunderstandings, as long as he or she did not create that misunderstanding through material misstatements. Under certain circumstances, continued silence can also be thought of as assisting a crime or fraud.

5. A lawyer who knows a client has engaged or intends to engage in a crime or fraud in a matter that is not before a tribunal may not continue to represent the client in that matter if a failure to disclose the crime or fraud constitutes assisting that act.

V. ANALYSIS

V.1 Purpose of Rule 4.1

Rule 4.1 is the assertion of the fundamental principle that a lawyer's word is his or her bond. While a lawyer is expected to be an advocate, the line must be drawn at misrepresentations. The rule is not intended to bringing inconsequential misstatements or minor mistakes into the disciplinary process. Thus, the rule should be read to prohibit false statements of fact or law that are material.

Rule 4.1 is addressed to the lawyer's obligation outside of a tribunal. It relates to the lawyer's obligation to an adversary and any third party, including legislative and administrative bodies. The Rule also applies to negotiations.

The addition of the phrase "to a third person" presumably is to distinguish this rule from the lawyer's obligation to a tribunal. That obligation is governed by Rule 3.3(a)(1) which provides that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of fact or law previously made to the tribunal by the lawyer."

The rule does not prohibit false statements of fact or law to the client. This obligation is governed by other rules including R 8.4, which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation.

V.2 What is Prohibited by the Rule?

The Rule, which is similar to the law of misrepresentation, prohibits lying about material facts. This necessarily calls into question what constitutes "materiality." In negotiations, for instance, puffery about the value of a case is permitted by legal convention, but misrepresentations about significant facts in the matter are not. The line between acceptable puffery and misrepresentation is difficult to draw and varies by context. For example, during negotiations lawyers may not lie about the amounts they are authorized to settle for, but exaggerations regarding a client's goals during the negotiations are typically viewed as puffery. See ABA Formal Op. 06-439. At the very least, lawyers must be careful to avoid liability under tort and criminal law.

Rule 4.1 also applies to misstatements about the law to third persons. The lawyer must not intentionally misrepresent the law and, in dealing with non-lawyers, must exercise care so as not to make misstatements about the law.

The lawyer is an advocate. Thus he or she need not correct an adversary's misunderstandings, but still must insure that he or she does not create that misunderstanding through misstatements. There may be circumstances where continued silence is tantamount to assisting a crime or fraud. This is often governed by law.

A lawyer cannot make empty threats when dealing with third parties on a client's behalf. The ABA has stated that a lawyer may not threaten criminal charges in connection with a civil matter if the lawyer does not intend to follow through with a criminal prosecution. To make such a threat, the lawyer must have a well-founded belief that the evidence establishes that both the civil claim and the criminal charges are warranted. *See* ABA Formal Ethics Op. 92-363. Furthermore, a lawyer can only threaten to file a disciplinary complaint against opposing counsel in a civil matter if the lawyer has actual intent to register the complaint. See ABA Formal Ethics Op. 94-383.

A lawyer who knows a client has engaged or intends to engage in a crime or fraud in a matter that is not before a tribunal may not continue to represent the client in that matter if a failure to disclose the crime or fraud constitutes assisting that act. The lawyer does not have an obligation to take reasonable remedial measure as he or she does under Rule 3.3 when the lawyer is before a tribunal. In this regard, the New York rule differs from jurisdictions that have adopted a version of ABA Model Rule 4.1(b).

VI. ANNOTATION OF ETHICS OPINIONS

New York: N.Y.S. Bar Op. 843 (2010) (lawyer may access and review the public social network pages of a party to a litigation (other than the layer's client) as long as those pages are available to all members of the network, such as Facebook or My Space, and the lawyer does not "friend" the other party or direct someone else to. Rule 8.4 would not be violated by such conduct since the lawyer is not "engaging in deception." Those pages are available to anyone in the network and the information obtained is similar to information retrieved through other online or print media or subscription services.).

N.Y.C. Bar Op. 2010-2 (2010) (lawyers can avail themselves of information on social networking sites through informal discovery techniques but may not use deception or cause an agent to use trickery to obtain on-line information).

ABA: ABA Formal Op. 07-446 (2007) (lawyer may provide undisclosed legal assistance to pro se litigants and help them prepare written submissions to the tribunal, so long as the lawyer does not violate other ethics rules that apply to the lawyer's conduct).

ABA Formal Op. 06-439 (2006) (during negotiations, including caucused mediations, a lawyer may not make a false statement of material fact to a third person. For example, counsel cannot lie about the settlement amount the client has authorized. Statements made about a party's goals from the negotiation are typically categorized as "puffery" and are not considered "false statements of material fact.").

ABA Formal Op. 01-422 (2001) (lawyer may record a conversation without the knowledge or the consent of the parties to the conversation so long as the jurisdiction where the recording occurs does not bar such action. A lawyer may not represent to the parties that the conversation is not being recorded if it is in fact being recorded.).

ABA Formal Op. 95-397 (1995) (lawyer has a duty to disclose the death of client during a settlement negotiation to opposing counsel and the court when the lawyer first communicates with either upon learning this fact. The lawyer may also inform the

adversary that her former client's personal representative will accept the outstanding settlement offer, so long as the lawyer first receives authorization from the personal representative. The Committee has not yet declared whether this would create a binding contract.).

ABA Formal Op. 94-383 (1994) (Model Rules do not expressly prohibit an attorney from threatening to file a disciplinary complaint against their adversary to gain an advantage in a civil case. A lawyer making such a threat without actual intent to follow through with a complaint violates Rule 4.1.).

ABA Formal Op. 94-387 (1994) (lawyer has no duty to disclose to the opposing party that the statute of limitations has run. The lawyer must avoid misrepresenting facts indicating that the claim is time-barred, or implying she will take action to enforce the claim (such as filing suit) if the lawyer has no intention of actually following through).).

ABA Formal Op. 93-370 (1993) (during pretrial settlement negotiations a lawyer should not reveal to a judge the limits regarding settlement authority, or the lawyer's advice to the client regarding settlement, without informed client consent. A lawyer should decline to answer a judge's improper questions rather than make a misrepresentation.).

ABA Formal Op. 93-375 (1993) (a lawyer must not lie to agency officials while representing a client in a bank examination. If the client does all of the talking during the examination, and the lawyer is not present at subsequent meetings, the lawyer does not have an obligation to come forward with information that may not have already been disclosed. As the lawyer's role expands, so does his or her ethical responsibilities to ensure that the examiners are not misled.).

ABA Formal Op. 93-378 (1993) (there is no automatic bar to counsel initiating ex parte contact with his or her adversary's expert witnesses in a civil matter. The lawyer must not imply, either directly or indirectly, that the witness is required to speak with the lawyer. If the matter is brought in federal court or in a jurisdiction using an expert-discovery rule similar to Federal Rule 26(b)(4)(A), such ex parte contact with a witness would likely constitute a violation of Rule 3.4(c).).

ABA Formal Op. 92-363 (1992) (a lawyer may not threaten criminal prosecution in connection with a civil matter if the lawyer does not have actual intent to proceed with the criminal charges).

VII. ANNOTATIONS OF CASES

In re Pu, 826 N.Y.S.2d 43 (1st Dept. 2006) (attorney disciplined for lying to opposing counsel and the court during the course of the litigation to prevent the lawyer's adversary from obtaining evidence and making intentional misrepresentations about document productions).

In re Lowell, 784 N.Y.S.2d 69 (1st Dept. 2004) (holding that it is a material misrepresentation of fact to a third person for an attorney representing a wife in a matrimonial action to advise the husband's broker to hold the proceeds of the sale of the house in escrow, despite the lack of a court order).

In re Robert, 779 N.Y.S. 2d 236 (2d Dept. 2004) (during the course of representing a client, attorney made misrepresentations regarding the amount of money the client had in escrow. The attorney made an additional false statement of material fact by indicating in writing that he had previously made a fair hearing request, which was untrue).

Matter of Lippman, 661 N.Y.S.2d 195 (1st Dept. 1997) (attorney falsely advised client that a judgment had been entered and forwarded for collection).

Matter of Horak, 647 N.Y.S.2d 20 (2d Dept. 1996) (attorney negotiated with third party on behalf of his client for a loan, and claimed that his client agreed to remain fully liable for a loan, even though the client had never made such an agreement).

Matter of Fiss, 625 N.Y.S.2d 668 (2d Dept. 1995) (attorney disciplined for making a false statement to the court in an affirmation on behalf of her client regarding the amount of the retainer agreement).

Matter of Losner, 636 N.Y.S.2d 804 (2d Dept. 1995) (holding that it is a false statement of material fact for a lawyer to imply to his client that a mortgage commitment had been obtained before there is an actual commitment).

Matter of Roman-Perez, 606 N.Y.S.2d 319 (2d Dept. 1994) (attorney disciplined for lying to client claiming that her divorce had been finalized, and faxing a mortgage document falsely representing a divorce judgment).

Matter of Lubell, 599 N.Y.S.2d 557 (1st Dept. 1993) (attorney made a material false statement of fact when knowingly misrepresenting that he maintained his client's funds in an escrow account when he actually kept them in a personal account).

Matter of Ferrucci, 580 N.Y.S.2d 806 (3d Dept. 1992) (in a fee dispute attorney violated former rule DR 7-102(A)(5) for falsely stating that he had made due demand that the client pay a specific amount prior to the institution of the lawsuit).

Matter of Johnson, 572 N.Y.S.2d 223 (4th Dept. 1991) (attorney disciplined for forging a divorce judgment and falsely representing to his client that the divorce was finalized).

Matter of Grubart, 561 N.Y.S.2d 169 (1st Dept. 1990) (finding former DR 7-102(A)(5) was violated when attorney falsely misrepresented to the court that he "had not previously applied for a vacation of a judgment").

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Ethical Guidelines for Settlement Negotiations, http://222.abanet.org/litigation/ethics/settlement/.html.

William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative*, 53 S.C. L. Rev. 527 (2002).

Restatement of the Law Governing Lawyers, § 98(1).

James White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 Am. Bar. Found. Res. 926 (1980).

Rule 4.2: Communication with Person Represented by Counsel

I. TEXT OF RULE 4.2[1]

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

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

II. NYSBA COMMENTARY

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and un-counseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] Paragraph (a) applies even though the represented party initiates or consents to the communication. A lawyer must immediately terminate communication with a party if after commencing communication, the lawyer learns that the party is one with whom communication is not permitted by this Rule.

1 Rules Editors Martin Minkowitz and Robert M. Fettman, Stroock & Stroock & Lavan LLP.

[4] This Rule does not prohibit communication with a represented party or person or an employee or agent of such a party or person concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person or between two organizations does not prohibit a lawyer for either from communicating with non-lawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented party or person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer having independent justification or legal authorization for communicating with a represented party or person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement (as defined by law) of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the state or federal rights of the accused. The fact that a communication does not violate a state or federal right is insufficient to establish that the communication is permissible under this Rule. This Rule is not intended to effect any change in the scope of the anti-contact rule in criminal cases.

[6] [Reserved.]

[7] In the case of a represented organization, paragraph (a) ordinarily prohibits communications with a constituent of the organization who: (i) supervises, directs or regularly consults with the organization's lawyer concerning the matter, (ii) has authority to obligate the organization with respect to the matter, or (iii) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former unrepresented constituent. If an individual constituent of the organization is represented in the matter by the person's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. *See* Rules 1.13, 4.4.

[8] The prohibition on communications with a represented person applies only in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(k) for the definition of "knowledge." Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious.

[9] In the event the party with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[10] A lawyer may not make a communication prohibited by paragraph (a) through the acts of another. *See* Rule 8.4(a).

Client-to-Client Communications

[11] Persons represented in a matter may communicate directly with each other. A lawyer may properly advise a client to communicate directly with a represented person, and may counsel the client with respect to those communications, provided the lawyer complies with paragraph (b). Agents for lawyers, such as investigators, are not considered clients within the meaning of this Rule even where the represented entity is an agency, department, or other organization of the government, and therefore a lawyer may not cause such an agent to communicate with a represented person, unless the lawyer would be authorized by law or a court order to do so. A lawyer may also counsel a client with respect to communications with a represented person, including by drafting papers for the client to present to the represented person. In advising a client in connection with such communications, a lawyer may not advise the client to seek privileged information or other information that the represented person is not personally authorized to disclose or is prohibited from disclosing, such as a trade secret or other information protected by law, or to encourage or invite the represented person to take actions without the advice of counsel.

[12] A lawyer who advises a client with respect to communications with a represented person should be mindful of the obligation to avoid abusive, harassing, or unfair conduct with regard to the represented person. The lawyer should advise the client against such conduct. A lawyer shall not advise a client to communicate with a represented person if the lawyer knows that the represented person is legally incompetent. *See* Rule 4.4.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 4.2 is the successor to former DR 7-104. Specifically:

- Rule 4.2(a) is identical to DR 7-104(A)(1) except for several non-substantive differences.
- Communication with unrepresented persons, previously contained in DR 7-104(A)(2), has been moved to Rule 4.3.
- Rule 4.2(b) is substantially similar to DR 7-104(B) except for the substitution of "person" for "party" and several other non-substantive differences.

III.2 ABA Model Rules of Professional Conduct (2009)

- New York Rule 4.2(a) is identical to ABA Rule 4.2 except for the substitution of "party" for "person."

- New York Rule 4.2(a) also differs from ABA Rule 4.2 in that it requires other lawyers' "prior" consent and does not refer to an exception based on a "court order."
- New York Rule 4.2(b) is absent from ABA Rule 4.2.

IV. PRACTICE POINTERS

1. The prohibition in Rule 4.2 (a) applies even if the represented party initiates the communication.
2. If your client's counterparty arrives at a meeting prior to his or her counsel, avoid any substantive discussions about the legal matter until the opposing counsel is present.
3. Do not send out letters or e-mails to an opposing party (even if simultaneously copying the opposing party's lawyer) without the lawyer's prior consent unless otherwise authorized by law.
4. It is improper to send a settlement offer directly to represented parties, unless their lawyer consents or unless otherwise authorized by law.[2]

V. ANALYSIS

V.1 Purpose of Rule 4.2

Rule 4.2 is the successor and substantially similar to former DR 7-104. The Rule is designed to prevent overreaching by a lawyer, thereby preserving the client-lawyer relationship.

V.2 Direct Contact with Represented Persons

Subsection (a) prevents a lawyer from communicating or causing another to communicate "about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." There are many pitfalls hidden in the subsection's seemingly simple language. For example, "person" as used in subsection (a) and "party" as used in subsection (b) might suggest a different application for each, but they are interchangeable. Courts and bar association opinions have interpreted "party" expansively to apply both before to the commencement of a lawsuit and in non-litigated matters such as transactional representations. The word "knows" connotes actual knowledge. However, a lawyer may not ignore circumstances that suggest a party is represented (See Rule 1.0(k), defining "knowledge"). Hence, a lawyer may not engage in "willful ignorance" or "purposeful avoidance" where

2 *See* ABA Formal Op. 92-362.

circumstances indicate that a party may be represented by counsel. See N.Y.S. Bar Op. 607 (1993).

V.3 Client-to-client Communications

Subsection (b) permits a lawyer under specified circumstances to "cause a client to communicate with a represented party… and counsel the client with respect to those communications… ." This exception does not permit the lawyer to communicate directly with the represented party. The restrictions that subsection (b) imposes on a lawyer are measured. The lawyer may not act if the conduct is prohibited by law or the other party is not legally competent. The lawyer must give "reasonable advance notice to the represented person's counsel that such communication will be taking place." What constitutes "reasonable advance notice" is a fact-and-circumstance determination. Under EC 7-18, "reasonable advance notice" is one provided sufficiently in advance of the direct client-to-client communications, and of sufficient content, so that the represented party's lawyer has an opportunity to advise their client before they take place. To some extent, requiring advance notice may defeat the purpose of allowing free client-to-client contact since upon receipt of such advance notice, many lawyers are likely to advise their clients to reject the other side's outreach.

V.4 Organizations

For purposes of Rule 4.2, an organization such as a corporation is considered a "party" under subsection (a) and a "person" under subsection (b). Thus, before any correspondence or dialogue occurs, an attorney must get prior consent of the organization's counsel as if the organization were a natural person. Employees of a company, however, are not considered a "party" or "person" unless (i) they have the power to bind the company; (ii) their acts are imputed to the company for purposes of civil or criminal liability; or (iii) their actions are undertaken at the advice of the company's counsel. *Neisig v. Team I*, 76 N.Y.2d 363, 559 N.Y.S.2d 493 (1990). In *Neisig*, Judge Kaye distinguished the U.S. Supreme Court holding in *Upjohn v. United States*, 449 U.S. 383 (1981) that a "corporation's attorney-client privilege includes communications with low- and mid-level employees." Judge Kaye reasoned that *Upjohn* applies to privileged communication with counsel but does not immunize factual information to adversaries and that the attorney-client privilege serves the societal objective of encouraging open communication between a client and counsel, which is not enhanced in denying informal access to factual information. *Neisig*, 76 N.Y.2d at 371-372.[3]

Consent of an organization's counsel is not required when talking to its former employees or former members. ABA Rule 4.2 comment 7. This does not, however,

3 *See also* Jeremy R. Feinberg, *Chief Judge Kaye Leaves A Rich Professional Responsibility Legacy*, N.Y. Prof. Resp. Rep., Jan. 2009, at 1.

permit an attorney to request privileged information from the former employee or former member. *Merrill v. City of New York*, 2005 WL 2923520 (S.D.N.Y. 2005).

V.5 Criminal Cases

Criminal defense attorneys should be careful to avoid discussions with co-defendants whom they do not represent and who may be adversarial to their clients. *In re Christopher Chan*, 271 F. Supp. 539 (S.D.N.Y. 2003).

V.6 Public Officials

An exception to the "no-contact" rule might exist for communication with government officials under the First Amendment right to petition the government for redress of grievances so long as (i) the communication concerns only policy issues and (ii) the lawyer gives the government's counsel in the matter reasonable advance notice of the proposed communications.[4]

V.7 Probate Proceeding

Counsel to a party in a probate proceeding should abide by the "no-contact" rule when interacting with a represented executor or administrator to an estate. *In re the Estates of Cipriani*, 11 Misc. 3d 1084(A), 2006 WL 1072042 (Sur. Ct., 2006).

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Direct Contact with Represented Persons

N.Y.C. Bar Op. 2009-01 (2009) (sending simultaneous correspondence to represented persons and their lawyer without the lawyer's prior consent is prohibited under the no-contact rule; this opinion also analyzes when prior consent is implied).

N.Y.S. Bar Op. 785 (2005) (lawyer representing a plaintiff in a personal injury action may generally engage in settlement discussions with a non-lawyer insurance adjuster over the objections of the lawyer representing the defendant-policyholder).

N.Y.C. Bar Op. 2005-04 (2005) (when an insurance company is a party to litigation, an opposing party's counsel may not communicate with an insurance adjuster absent prior consent from the insurance company's lawyer).

N.Y.C. Bar Op. 2004-01 (2004) (analyzing a variety of circumstances under which a lawyer may or may not communicate with members of a class).

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4 Roy Simon, *Are Communications with Public Officials barred by 7-104*, N.Y. Prof. Resp. Rep., Jul. 2008, at 1.

NYCLA Bar Op. 729 Amended (2000) (the predecessor rule applies to a witness represented by a lawyer, not just a party).

VI.2 Client-to-client Communications

N.Y.C. Bar Op. 2002-03 (2002) (in relation to the no-contact rule, a lawyer may advise a client on the substance of a proposed client communication to a represented party under certain circumstances so long as consent is given to that party's counsel or there is authorization by law.)

VI.3 Organizations

N.Y.C. Bar Op. 2007-01 (2007) (no prohibition to communicate with in-house counsel of an organization represented by outside counsel).

N.Y.C. Bar Op. 2004-02 (2004) (questioning whether a corporate employee who is being questioned by the corporation's attorney in connection with a government investigation is a party under the predecessor rule).

N.Y.S. Bar Op. 735 (2001) (analyzing the circumstances under which a lawyer in a civil litigation may communicate with an independent contractor of an adverse corporate party).

VI.4 Public Officials

N.Y.S. Bar Op. 828 (2009) (analyzing communications of state agency investigators with or without the supervision of staff attorneys).

N.Y.S. Bar Op. 812 (2007) (lawyer representing a private party may appear and communicate informally with individual members of a town planning board if limited to policy issues and the board's counsel is given reasonable prior notice).

N.Y.S. Bar Op. 768 (2003) (analyzing the circumstances under which a government lawyer may be present at, and communicate with, a representative of a counterparty to a government contract).

VII. ANNOTATIONS OF CASES

VII.1 Direct Contact with Represented Persons

New York: Park Avenue Bank v. Cong and Yeshiva Ohel Yehoshea, 907 N.Y.S.2d 571 (Sup. Ct., Kings County 2010) (plaintiff's attempt to serve a party with papers whom counsel knew was represented by counsel may have violated Rule 4.2 of the Rules).

Matter of Cristena B., 2010 N.Y. Slip Op. 07165, 2010 BL 238050 (App. Div., 2d Dept. 2010) (Rule 4.2 applies only to attorneys and not Department of Social Service caseworkers interviewing a child in the agency's care. Caseworker did not have to notify child's attorney before interviewing the child, as the issues being discussed were related to the child's safety.).

Arons v. Jutkowitz, 9 N.Y.3d 393, 880 N.E.2d 831 (2007) (attorney may conduct informal pretrial interviews with a treating physician after the adverse party placed their medical condition at issue, subject to HIPPA's procedural requisites being met).

Federal: United States v. Mahaffy 446 F. Supp. 2d 115, (E.D.N.Y. 2006) (finding that the government did not violate the predecessor rule because the scope of the defendant's implicating statements concerned securities fraud and not the witness tampering charges at issue in the defendant's suppression motion).

VII.2 Client-to-client communications

Campolongo v. Campolongo, 2 A.D.3d 476, 768 N.Y.S.2d 498 (2d Dept. 2003) (disqualifying counsel in a matrimonial action who caused a psychiatrist to interview a child who was the subject of a custody dispute without the permission of the child's law guardian. The appointment of a law guardian created an attorney-client relationship whose absence was denied the child's due process rights.).

Mena v. Key Food Stores Co-Operative, Inc., 195 Misc. 2d 402, 758 N.Y.S.2d 246 (Sup. Ct. King's Co. 2003) (client's secret recording of a conversation with the assistance of the client's lawyer did not violate the predecessor rule absent a showing it was at the behest of counsel).

VII.3 Organizations

New York: Muriel Siebert & Co. v. Intuit Inc., 32 A.D.3d 284, 820 N.Y.S.2d 54, 2006 (1st Dept. 2006) (unanimously reversing the disqualification of a lawyer for *ex parte* contact with former executive employee of an adverse party. The court pointed out that the party seeking disqualification did not meet their burden in demonstrating that the lawyer was seeking privileged material.).

Neisig v. Team I, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990) (analyzing the circumstances under which a lawyer may communicate directly with an employee of an adverse corporate party).

Federal: Arista Records LLC v. Lime Group LLC, 2010 WL 2291485, 7 (S.D.N.Y. 2010) (corporate attorneys are covered by the prohibitions of Rule 4.2 where their conduct will bind the corporation, but does not apply to former employees).

Merrill v. City of New York, 2005 WL 2923520 (S.D.N.Y. 2005) (analyzing the circumstances under which a lawyer may contact a former employee of an adversary party).

VII.4 Criminal Cases

In re Christopher Chan, 271 F. Supp. 539 (S.D.N.Y. 2003) (the Grievance Committee for the District Court censured a criminal defense attorney who communicated with a represented co-defendant in the same matter (a conspiracy case) without the co-defendant's counsel's consent).

Grievance Comm. for S.D.N.Y. v. Simels, 48 F.3d 640 (2d Cir. 1995) (a criminal defense attorney did not violate the predecessor rule by communicating with a party on a separate, though related, matter. The Second Circuit refused to give the anti-contact rule expansive interpretation on the theory that it would undercut the ability of criminal defense counsel to provide effective assistance and zealous representation).

VII.5 Public Officials

S.E.C. v. Lines, 669 F. Supp. 2d 460 (S.D.N.Y. 2009) (corporation's president initiated a telephone conversation with SEC attorneys during its investigation. President subsequently moved to exclude telephone voice recording and alleged that SEC attorneys violated Rule 4.2 of Professional Conduct, which prohibited an attorney from communicating with a person the attorney knew to be represented by another attorney without consent of the other attorney. The court denied the president's motion and held that because president did not indicate that he was represented by counsel, SEC's conduct "did not run afoul of any of Rule 4.2's purposes" where a corporation's president initiated a call to SEC attorney and voluntarily provided information relevant to the investigation.).

Nassau Health Care Corp. v. New York State Ethics Comm., 196 Misc. 2d 867, 764 N.Y.S.2d 795 (Sup. Ct. Nassau Co. 2003) (affirming the decision of the New York State Ethics Commission barring corporate counsel from attending the Commission's interviews with corporate employees. The court noted that the privilege under the predecessor rule did not apply because there was no threat of a proceeding to the corporation, the investigations were confidential, and the effect of counsel's advising the employees would prevent the truth from readily coming out to the Commission.).

Schmidt v. New York, 279 A.D.2d 62, 722 N.Y.S.2d 623 (4th Dept. 2000) (plaintiff's attorney did not violate the predecessor rule by contacting employees of the Department of Transportation at a time when there was no pending action arising out of the incident that was the subject matter of the interview. The plaintiff's attorney had merely filed a notice of intention to file a claim, which did not trigger representation by the Attorney General of the DOT crew, nor would the crew have been "parties" had representation been triggered. The court also noted that "[t]he State of New York is always represented by counsel," but this fact does not end the inquiry on whether counsel represents the State on the particular matter in issue. *Id* at 65.).

VII.6 Probate Proceeding

In re Estates of Cipriani, 11 Misc. 3d 1084(A), 2006 WL 1072042 (Sur. Ct., Apr. 24, 2006) (disqualifying counsel who engaged in conversation with a represented adverse party in a surrogate matter, even though the adverse party initiated the conversation and the disqualification would cause a hardship to the lawyer's client. The court noted that it could not find that prejudicial material to the adverse party was not imparted to the counsel in the conversation.).

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Rule 4.3: Communicating with Unrepresented Persons

I. TEXT OF RULE 4.3[1]

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

II. NYSBA COMMENTARY

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. As to misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(a), Comment [2A].

[2] The Rule distinguishes between situations involving unrepresented parties whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented party, as well as the setting in which the behavior

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and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 4.3 is the successor to former DR 7-104(A)(2). Specifically:

- The first two sentences of Rule 4.3 are new and provide more specific guidance than DR 7-104 about what a lawyer may not do. DR 7-104 only prohibited giving "advice" to a non-represented party, other than advice to secure counsel.
- The last sentence of Rule 4.3 is identical to DR 7-104(A)(2) except that a knowledge requirement is added. Rule 4.3 applies only if the lawyer "knows" or "reasonably should know" of the potential conflict with his client, whereas DR 7-104 did not refer to a lawyer's knowledge.
- Rule 4.3 also differs from DR 7-104(A)(2) by substituting "person" for "party," making clearer that this prohibition under Rule 4.3 applies to non-litigative and litigative matters.[2] (Substantively "party" means any person for 4.3). [3]

III.2 ABA Model Rules of Professional Conduct (2009)

NY Rule 4.3 is identical to ABA Rule 4.3 with one non-substantive difference (substituting "communicating" for "dealing").

IV. PRACTICE POINTERS

1. Do not imply you are disinterested if you are not.[4]
2. If you know or suspect that an unrepresented person is misinformed about your role, clarify whose interest you represent.[5]

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2 *See* Roy Simon's New York Code of Professional Responsibility 1265 (2008).
3 N.Y.S. Bar Op. 735 (2001).
4 Restatement (Third) of the Law Governing Lawyers § 103(1) (2000).
5 Restatement (Third) of The Law Governing Lawyers § 103(2) (2000).

3. If someone is representing himself or herself in a matter conflicting with your client, you may, but are not obligated to, advise them to seek counsel without providing legal advice.
4. Non-legal advice such as filing requirements or available court resources may be provided to unrepresented persons.
5. The Rule does not prevent a lawyer from negotiating a transaction or settling a client's dispute with an unrepresented person.[6]
6. Do not engage in "willful ignorance" or "purposeful avoidance" where circumstances indicate that a party might be represented by counsel.[7]
7. As soon as a lawyer learns that another party is represented by a lawyer, any previously commenced discussion or correspondence with that party concerning legal matters should be terminated immediately.
8. Where a lawyer represents an organization or corporation, it may be necessary to advise individual members of the organization or employees of the corporation that the lawyer represents the organization or corporation and not them personally. Circumstances exist, however, where a lawyer may represent both an organization and its constituents (*see* Rule 1.13).

V. ANALYSIS

V.1 Purpose of Rule 4.3

Dealing with an unrepresented party can be especially troublesome for a lawyer. It is common for an unrepresented party not to understand the role of the other party's lawyer and to look to the lawyer for legal advice or even to expect the lawyer to protect the unrepresented party's interests. Rule 4.3 aims to restrict lawyers from overreaching and exerting undue influence when dealing with unrepresented parties. The assumption implicit in the rule is that if a lawyer had unchecked access to an unrepresented person the lawyer would use his or her superior skills to elicit protected information. The rule sets out that, in communicating on their client's behalf lawyers must not imply that they are disinterested and must make a reasonable effort to clear up any misunderstanding an unrepresented person might have concerning the lawyer's role in the subject matter. To further prevent overreaching and undue influence, the Rule prohibits giving legal advice to an unrepresented person (other than advice to secure counsel) if the lawyer "knows or reasonably should know" that the unrepresented person's interest are or may be in conflict with the client's interest.

V.2 Party v. Person

Rule 4.3 covers a lawyer's dealings with unrepresented "persons," rather than adopting the narrower scope of former DR 7-104(A)(2), which pertains to unrepresented "parties."

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6 Comment 2 to ABA Model Rule 4.3.

7 N.Y.S. Bar Op. 607 (1993).

There has been much debate over this substitution in New York as well as under the ABA model rules[8] even though the substantive meaning of "party" has been interpreted to mean "person" under former DR 7-104, the predecessor to Rule 4.2(a), 4.2(b) and 4.3, in both a litigation and transactional context.

V.3 Criminal Cases

Criminal defense attorneys should be careful to avoid discussions violating the "no-contact rule" with co-defendants whom they do not represent and who may be adversarial to their client. *In re Christopher Chan*, 271 F. Supp. 539 (S.D.N.Y. 2003).

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Purpose of Rule 4.3

N.Y.S. Bar Op. 843 (2010) (lawyer may access and review the public social network pages of a party to a litigation (other than the layer's client) as long as those pages are available to all members of the network, such as Facebook or My Space, and the lawyer does not "friend" the other party or direct someone else to. Rule 8.4 would not be violated by such conduct since the lawyer is not "engaging in deception." Those pages are available to anyone in the network and the information obtained is similar to information retrieved through other online or print media or subscription services.).

N.Y.C. Bar Op. 2009-05 (2009) (analyzing communications with non-party witnesses and providing non-legal advice to unrepresented persons).

N.Y.C. Bar Op. 2009-02 (2009) (analyzing ethical duties concerning pro se persons and the scope of advice addressed to those persons to seek their own independent lawyer).

N.Y.S. Bar Op. 812 (2007) (lawyer representing a private party may appear and communicate informally with individual members of a town planning board if limited to policy issues and the board's counsel is given reasonable prior notice).

N.Y.C. Bar Op. 2007-01 (2007) (no prohibition in communicating with in-house counsel of an organization represented by outside counsel).

N.Y.S. Bar Op. 785 (2005) (lawyer representing a plaintiff in a personal injury action generally may engage in settlement discussions with a non-lawyer insurance adjuster over the objections of the lawyer representing the defendant-policyholder).

N.Y.C. Bar Op. 2004-03 (2004) (analyzing the kinds of communications a government lawyer may have with a constituent of the agency and unrepresented third-parties).

N.Y.C. Bar Op. 2004-02 (2004) (questioning whether a corporate employee who is being questioned by the corporation's attorney in connection with a government investigation is a party under the predecessor rule).

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8 Roy Simon, N.Y. Prof. Resp. Rep., Jun. 2007, at 1.

N.Y.C. Bar Op. 2004-01 (2004) (analyzing a variety of circumstances under which a lawyer may or may not communicate with members of a class).

N.Y.S. Bar Op. 768 (2003) (analyzing the circumstances under which a government lawyer may be present at, and communicate with, a representative of a counterparty to a government contract).

N.Y.S. Bar Op. 735 (2001) (analyzing the circumstances under which a lawyer in a civil litigation may communicate with an independent contractor of an adverse corporate party).

N.Y.S. Bar Op. 728 (2000) (analyzing the circumstances under which a municipality's lawyer may advise a pro se claimant about the risk of self-incrimination in connection with testimony being lawfully taken by the lawyer).

VI.2 Criminal Cases

NYCLA Bar Op. 711 (1996) (while a criminal defense lawyer may contact a complainant to discuss dropping the charges against the defendant, the lawyer may not advise the complainant with respect to benefits or disadvantages to same).

VII. ANNOTATIONS OF CASES

VII.1 Purpose of Rule 4.3

New York: Arons v. Jutkowitz, 9 N.Y.3d 393, 880 N.E.2d 831 (2007) (attorney may conduct informal pre-trial interviews with a treating physician after the adverse party placed their medical condition at issue, subject to HIPPA procedural requisites being met).

Muriel Siebert & Co. v. Intuit Inc., 32 A.D.3d 284, 820 N.Y.S.2d 54, 2006 (1st Dept. 2006) (unanimously reversing the disqualification of a lawyer for *ex parte* contact with former executive employee of an adverse party. The court pointed out that the party seeking disqualification did not meet their burden in demonstrating that the lawyer was seeking privileged material.).

Schmidt v. New York, 279 A.D.2d 62, 722 N.Y.S.2d 623 (4th Dept. 2000) (plaintiff's attorney did not violate DR 7-104 by contacting employees of the Department of Transportation at a time when there was no pending action arising out of the incident that was the subject matter of the interview. The plaintiff's attorney had merely filed a notice of intention to file a claim, which did not trigger representation by the Attorney General of the DOT crew, nor would the crew have been "parties" had representation been triggered. The court also noted that "[t]he State of New York is always represented by counsel," but this fact does not end the inquiry on whether counsel represents the State on the particular matter in issue. *Id* at 65.).

Neisig v. Team I, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990) (analyzing the circumstances under which a lawyer may communicate directly with an employee of an adverse corporate party).

Federal: W.T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir. 1976) (holding that counsel for a corporation would not be sanctioned for improper communication with an unrepresented employee. The employee alleged that he was improperly interviewed and advised in violation of the predecessor rule to authorize the company to view his personal financial data. The court found that no violation occurred since the employee was not given legal advice.).

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Rule 4.4: Respect for Rights of Third Persons

I. TEXT OF RULE 4.4[1]

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

II. NYSBA COMMENTARY

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent, produced, or otherwise inadvertently made available by opposing parties or their lawyers. One way to resolve this situation is for lawyers to enter into agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents. In the absence of such an agreement, however, if a lawyer knows or reasonably should know that such a document was sent inadvertently, this Rule requires only that the lawyer promptly notify the sender in order to permit that person to take protective measures. Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion.

1 Rules Editors Martin Minkowitz and Robert M. Fettman, Stroock & Stroock & Lavan LLP.

Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail and other electronically stored information subject to being read or put into readable form.

[3] Refraining from reading or continuing to read a document once a lawyer realizes that it was inadvertently sent to the wrong address and returning the document to the sender honors the policy of these Rules to protect the principles of client confidentiality. Because there are circumstances where a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document, however, this Rule does not subject a lawyer to professional discipline for reading and using that information. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document, or to return the document to the sender, or both. Accordingly, in deciding whether to retain or use an inadvertently received document, some lawyers may take into account whether the attorney-client privilege would attach. But if applicable law or rules do not address the situation, decisions to refrain from reading such documents or to return them, or both, are matters of professional judgment reserved to the lawyer. *See* Rules 1.2, 1.4.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Although Rule 4.4 has no corresponding rule in the former DR 7-102(A)(1) is analogous: "In the representation of a client, a lawyer shall not… File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another…."

III.2 ABA Model Rules of Professional Conduct (2009)

NY Rule 4.4 is identical to ABA Rule 4.4 with several non-substantive differences.

VI. PRACTICE POINTERS

1. If during a trial, you become aware of irrelevant and prejudicial evidence (e.g., an unrelated violation or misdemeanor) that serves no substantial purpose but to embarrass or harm a particular witness, refrain from introducing it.
2. Any methods of embarrassment that violate legal rights are prohibited not just if they are criminal but also if they violate statutes and/or common law.

3. Rule 4.4(b) does not prohibit a lawyer from reading or using an inadvertently sent document but other substantive laws or procedural rules may be applicable.

V. ANALYSIS

V.1 Purpose of Rule 4.4

Rule 4.4 serves to cabin a lawyer's zealousness in representing a client when necessary to foster the administration of justice. Thus, subsection (a) prohibits abusive conduct that has "no substantial purpose other than to embarrass or harm a third person" and obtaining evidence by methods that "violate the legal rights" of the person possessing the evidence. Unlike the previous rule in New York, which looked to the effect of the conduct, Rule 4.4 looks to the conduct's intent or purpose.

Subsection (b) requires prompt notification to the sender when a lawyer obtained a document they should reasonably know was sent in error and is intended to alert the sender to take protective measures.

On balance, Rule 4.4 is an improvement over previous disciplinary rules. As a matter of policy in dealing with improper conduct, looking to the actor's intent appears more reasonable than simply looking at the effect. Otherwise, a fair tactic that is badly executed and produces a seemingly malicious result would be punished, while a lawyer with bad intentions who gets lucky could avoid punishment. In addition, prohibiting illegal methods to investigate a third party is good public policy, particularly given increasing advancements in information technology. With the growing use of technology and e-discovery, inadvertent production will become ever more likely.

V.2 Erroneously Received Documents

Rule 4.4(b) does not require that the lawyer refrain from reading or continuing to read the erroneously received document or that the document be returned to the sender. It simply requires prompt notification of receipt to the sender. Until a few years ago the ABA was of the opinion that a recipient of unintended materials must not examine the materials and should return the document to the sender according to the sender's instructions. See ABA Formal Opinion 92-368 (1992) *withdrawn* by Formal Op. 05-437 (2005). The New York County Lawyer's Association's Ethics Committee agreed with this view.[2]

It is advised that before discovery or e-discovery parties should enter into a stipulation or confidentiality agreement that inadvertently produced documents will be promptly returned without being read by the opposition.[3]

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2 NYCLA Bar Op. 730 (2002).

3 *See* Ronald C. Minkoff, Ethical Issues in E-Discovery, N.Y. Prof. Resp. Rep., Apr. 2009, at 1.

V.3 Attorney-Client Privilege

[a] New York In New York, the privileged status of an inadvertently sent document is not automatically waived. *Manufacturer's Trust Trading Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 398–401, 522 N.Y.S.2d 999, 1003–1005 (4th Dept. 1987). The court reasoned that an intent-based approach should be applied in determining whether the privilege was waived and that courts could still repair some, though not all, of the damage done by released information. The Appellate Division, Fourth Department upheld this intent based approach in *Campbell v. Aerospace Products International*, 37 A.D.3d 1156, 830 N.Y.S.2d 416 (4th Dept. 2007).

That case involved a plaintiff injured as a result of asbestos exposure. In preparation for their first meeting, the plaintiff's attorney had the plaintiff draft a chronology detailing the history of his asbestos exposure. The chronology was inadvertently disclosed to the defense. The *Campbell* court granted a motion for a protective order directing defendants to return the document since it was protected by attorney-client privilege. The court found that the plaintiff's attorney took reasonable precautions to prevent disclosure. The plaintiff did not waive the privilege and the plaintiff's attorney promptly asserted the privilege (within a day of discovery that it was sent). Further, defendant plaintiff failed to assert that the document was reviewed by plaintiff to prepare for a deposition or refresh to his recollection.[4]

The Appellate Division, First Department ruled similarly in *New York Times v. Lehrer McGovern Bovis, Inc., et al.*, 300 A.D.2d 169, 752 N.Y.S.2d 642 (1st Dept. 2002). The newspaper was having difficulties with its underground sewer system designed by defendants (Parsons) and sent Parsons a draft of a complaint it intended to file. Parsons' outside litigation counsel requested a memorandum from Parsons analyzing the claims by the newspaper. Parsons' in-house counsel prepared the memo and labeled it: "Attorney-Client Privileged Communication/Attorney Work Product." The memo was inadvertently sent by Parsons' outside litigation counsel to other defendants in the case during discovery. The Supreme Court, New York County, ruled that a document prepared by Parsons and sent to Parsons' outside litigation counsel was not protected either by attorney-client privilege or as material prepared in anticipation of litigation. The First Department reversed, finding that even if the memo or cover letter did not explicitly state that it was in response to the request, it was protected by the attorney-client privilege since Parsons provided sworn statements and supporting documentation to that effect. The court felt the sworn affidavits established that the sending of the memo was inadvertent and that "Parsons at all times intended for [the] memorandum to remain confidential, subject to the protections of both the attorney-client affidavit and the attorney work-product doctrine."[5]

The Appellate Division, Second Department, however, found the attorney-client privilege was waived in *A.F.A. Protective Systems v. City of New York*, 13 A.D.3d 564, 788 N.Y.S.2d 128 (2d Dept. 2004) for failing to exercise due diligence regarding a 1994 memo found by plaintiff in its office during an office renovation, years after

4 *Id*.

5 *Id.* at 646.

settlement discussions had occurred. The defendant, the City of New York, had labeled the 1994 memo as "Privileged and Confidential Attorney-Client Communication" and limited its disclosure to a small number of personnel. The court found that the City had made only one phone call to object to the memo's intended use after receiving a letter in 1998 from the plaintiff regarding the memo. The court noted that there was no record of the City demanded the memo be returned immediately after learning of its disclosure, or that the City made an effort to discover if the memo was inadvertently or unlawfully disclosed.

[b] Federal Rules Federal Rules of Evidence Sec. 502(b) addresses inadvertent disclosure in a federal proceeding or by a federal agency. It states that there is no waiver of privilege by a disclosure if: (a) the disclosure is inadvertent; (b) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (c) the holder promptly took reasonable steps to rectify the error under Fed. R. Civ. P. 26(b)(5)(B), such as notifying the receiving party that the material was privileged.[6]

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Purpose of Rule 4.4

N.Y.S. Bar Op. 797 (2006) (analyzing the ethical obligations of a trusts and estates lawyer who files a probate petition on behalf of a client and later learns that the client is statutorily ineligible to serve as the executor of the estate).

Nassau County Bar Ass'n Op. 05-03 (2005) (analyzing the circumstances in which a lawyer representing a defendant in a personal injury action must correct information concerning the defendant's insurance coverage that lawyer had previously provided to the plaintiff and has now learned is incorrect).

N.Y.C. Bar Op. 2003-02 (2003) (analyzing the circumstances under which a lawyer may secretly tape a conversation. This Opinion modifies N.Y.C. Bar Ops. 1980-95 and 1995-10.).

N.Y.S. Bar Op. 742 (2001) (lawyer who learns in the course of the representation that a third-party non-lawyer has violated the law may not report the violation if information is protected as a confidence or secret).

VI.2 Erroneously Received Documents

New York: N.Y.C. Bar Op. 2003-04 (2003) (analyzing the ethical obligations of a lawyer who received a misdirected communication including promptly notifying the sender and finding narrow exceptions for when the communication may be used).

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6 *See* Ronald C. Minkoff, Ethical Issues in E-Discovery, N.Y. Prof. Resp. Rep., Apr. 2009, at 1.

NYCLA Bar Op.730 (2002) (analyzing a lawyer's ethical duties regarding inadvertently sent materials and opining that a lawyer must refrain from reading the materials).

ABA: ABA Formal Op. 05-437, Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368 (November 10, 1992) (2005) (discussing that a lawyer must promptly notify the sender of inadvertently sent materials and also withdrawing a previous ABA opinion that a lawyer must not examine the inadvertently sent materials).

VII. ANNOTATIONS OF CASES [RESERVED]

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Rule 4.5: Communication after Incidents Involving Personal Injury or Wrongful Death

I. TEXT OF RULE 4.5[1]

(a) In the event of a specific incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants, before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(b) An unsolicited communication by a lawyer or law firm, seeking to represent an injured individual or the legal representative thereof under the circumstance described in paragraph (a) shall comply with Rule 7.3(e).

II. NYSBA COMMENTARY

[1] Paragraph (a) imposes a 30-day (or 15-day) restriction on solicitations directed to potential claimants relating to a specific incident involving potential claims for personal injury or wrongful death, by lawyers or law firms who represent actual or potential defendants or entities that may defend or indemnify those defendants. However, if potential claimants are represented by counsel, it is proper for defense counsel to communicate with potential plaintiffs' counsel even during the 30-day (or 15-day) period. *See also* Rule 7.3(e).

1 Rules Editors Martin Minkowitz and Robert M. Fettman, Stroock & Stroock & Lavan LLP.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 4.5(a) is the successor to and it closely analogous to former DR 7-111 and DR 2-103(G).

III.2 ABA Model Rules of Professional Conduct (2009)

Rule 4.5 has no corresponding ABA Model Rule.

IV. PRACTICE POINTERS

1. In complying with this rule, a lawyer should also be mindful of Rule 7.3(a)(1), which prohibits solicitation "by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client."

V. ANALYSIS

Subsection (a) creates a "blackout period" after an accident or incident involving a potential personal injury or wrongful death claim during which an attorney representing an actual or potential defendant may not initiate unsolicited communication with potential claimants. This might include, for example, an insurance company hoping to settle a matter quickly.

Subsection (b) restricts the solicitation of potential claimants in accordance with Rule 7.3(e), which prohibits the dissemination of any solicitation within 30 days of a specific incident involving potential claims for personal injury or wrongful death. A lawyer's solicitation of business through direct, in-person communication with the prospective clients has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client. Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978).

VI. ANNOTATIONS OF ETHICS OPINIONS [RESERVED]

VII. ANNOTATIONS OF CASES

Alexander v. Cahill, 2010 WL 842711 (2d Cir. (NY) Mar. 12, 2010) (applying the *Central Hudson* test to New York rules governing attorney commercial speech protected by the First Amendment. The court upheld as constitutional the non-content rule (N.Y. Comp. Codes R, & Regs., tit. 22, § 1200.52) which imposes a "30 day

blackout period" on solicitations following a personal injury or wrongful death while striking down content-based restrictions on attorney advertising.).

Bates v. State Bar of Arizona, 433 U. S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) (holding that truthful advertising of "routine" legal services is protected by the First and Fourteenth Amendments against blanket prohibition).

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Rule 5.1: Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers

I. TEXT OF RULE 5.1[1]

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b) (1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

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(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

II. NYSBA COMMENTARY

[1] Paragraph (a) applies to law firms; paragraph (b) applies to lawyers with management responsibility in a law firm or a lawyer with direct supervisory authority over another lawyer.

[2] Paragraph (b) requires lawyers with management authority within a firm or those having direct supervisory authority over other lawyers to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to these Rules. Such policies and procedures include those designed (i) to detect and resolve conflicts of interest (*see* Rule 1.10 (f), (ii) to identify dates by which actions must be taken in pending matters, (iii) to account for client funds and property, and (iv) to ensure that inexperienced lawyers are appropriately supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (b) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may necessary. Some firms, for example, have a procedure whereby junior lawyers can make a confidential referral of ethical problems to a designated senior partner or special committee. *See* Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and lawyers with management authority may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (d) expresses a general principle of personal responsibility for acts of other lawyers in the law firm. *See also* Rule 8.4 (a).

[5] Paragraph (d) imposes such responsibility on a lawyer who orders, directs or ratifies wrongful conduct and on lawyers who are partners or who have comparable managerial authority in a law firm who know or reasonably should know of the conduct. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Partners and lawyers with comparable authority, as well as those who supervise other lawyers, are indirectly responsible for improper conduct of which they know or should have known in the exercise of reasonable managerial or

supervisory authority. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and seriousness of the misconduct. A supervisor is required to intervene to prevent misconduct or to prevent or mitigate avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (a), (b), or (c) on the part of a law firm, partner, or supervisory lawyer even though it does not entail a violation of paragraph (d) because there was no direction, ratification, or knowledge of the violation or no violation occurred.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have the disciplinary liability for the conduct of another lawyer. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervision of lawyers do not alter the personal duly of each lawyer in a firm to abide by these Rules. *See* Rule 5.2(a).

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 5.1 is essentially similar to former DR 1-104 (A) through (D). DR 1-104 used to house all of the rules related to supervision under the same section. There are now specific Rules relating to Responsibilities of a Subordinate Lawyer and Lawyers Responsibility for Conduct of Nonlawyers. See Rules 5.2 [formerly DR 1-104(E) and (F)] and Rule 5.3 [formerly DR 1-104(C) and (D)], respectively.

- Rule 5.1(a) is identical to DR 1-104(A).
- Rule 5.1(b) is similar to DR 1-104(B) but it breaks the Rule into two sections. Rule 5.1(b)(1) deals with the general management responsibility of a law firm and deletes the phrase "or direct supervisory authority over another lawyer." Rule 5.1(b)(2) picks up the phrase "direct supervisory authority over another lawyer" and expands upon the former DR by requiring the supervisory lawyer to "make reasonable efforts to ensure that the supervised lawyer conforms to these rules."
- Rule 5.1(c) is essentially similar to DR 1-104(C) but the first two sentences expand upon and clarify the role of the law firm and the supervisory lawyer to "ensure" that the work of the other lawyer is "adequately supervised." The remainder of the rule is identical to DR1-104(C).
- Rule 5.1(d) is essentially similar to DR 1-104(D) but deletes any reference to supervision of non-lawyers which, as set forth above is now covered by Rule 5.3 Lawyers Responsibility for Conduct of Nonlawyers. Rule 5.1(D)(1) is identical to DR 1-104(D)(1). However, Rule 5.1(D)(2) expands upon the former DR 1-104(D) (2) in that it sets forth the criteria as to a lawyer's responsibility for the acts of another

lawyer in the firm. Specifically, the Rule still holds "a partner in the law firm" or a lawyer with supervisory responsibility" responsible but adds and thereby also hold "a lawyer who is individually or together with other lawyers possesses comparable managerial responsibility in a law firm" responsible for the acts of another lawyer in the firm. Moreover, in two subsections (i) and (ii), respectively, the Rule separates out "knows of such conduct" from "should have known of the conduct" "so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated."

III.2 ABA Model Rules of Professional Conduct

The New York Rule 5.1 and the ABA Rule 5.1 have some similarities but one striking difference. The New York Rule is stronger in that it adds a section making "a law firm" liable "to ensure that all lawyers in the firm conform to these Rules." See New York Rule 5.1(a).

In addition, N.Y. Rule 5.1(b) is essentially similar to ABA Rule 5.1(A), but it breaks the Rule into two sections. NY Rule 5.1(b)(1) deals with "lawyers with management responsibility in a law firm", while ABA Rule 5.1 (A) states "A partner in a law firm, and lawyer who individually or with other lawyers possesses comparable managerial authority in a law firm" are required to ensure that all lawyers in the firm conform to these Rules. Note that the section taken out of ABA Rule 5.1(A) is now partially incorporated at N.Y. Rule 5.1(d)(2). N.Y. Rule 5.1(b)(2) is identical to ABA Rule 5.1(B).

N.Y. Rule 5.1(d)(1) and (2) is identical to ABA Rule 5.1(C)(1) and (2), with again one exception: it adds two subsections (i) and (ii), respectively. Thus, the Rule separates out "knows of such conduct" from "should have known of the conduct" "so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated."

IV. PRACTICE POINTERS

1. Lawyers with managerial or direct supervisory authority should establish internal policies and procedures designed to ensure that lawyers in the firm conform to the requirements set forth in the Rules.
2. The measures employed to ensure firm compliance with the Rules will depend upon such factors as the size of the firm, the experience of the lawyers in the firm, and the frequency that ethical issues arise.
3. Lawyers with managerial or supervisory authority should be aware of the behavior of the other lawyers in the firm. Managerial/supervisory lawyers cannot choose to look the other way and ignore problematic conduct occurring in the firm, as they may be held responsible for what they "should have known."
4. Supervisory lawyers should intervene to prevent misconduct from occurring.
5. If a supervisory lawyer knows that misconduct has occurred, he or she needs to intervene to prevent or mitigate any avoidable consequences of the misconduct.

V. ANALYSIS

V.1 Purpose of Rule 5.1

Under New York Rule 5.1 as well as the former DR 1-104, *all* law firms and lawyers with managerial responsibility are subject to the Rules and must "make reasonable efforts to ensure that all lawyers in the firm" comply with the Rules. This rule continues the change in New York, enacted in 1996, where law firms became liable for the conduct of the lawyers that they employ.

V.2 "Reasonably" "Know" or "Should Have Known" Standards

The Rule sets forth the standards for what managerial and supervisory lawyers should "reasonably" "know" or "should have known" and requires them to take "reasonable remedial action" to avoid or mitigate the "consequences of the conduct" by a firm lawyer. We also note that under the prior rule, the New York Courts have not only sanctioned a law firm, but have repeatedly sanctioned individual attorneys for what they know or should have known, especially when it comes to a failure to discover a partner's conversion of funds. Accordingly, it is advisable that lawyers with supervisory responsibility be aware of the behavior of the other lawyers in their firms because they may be held responsible for what they should have known if they choose to look the other way.

VI. ANNOTATIONS OF ETHICS OPINIONS

New York: N.Y.S. Bar Op. 814 (2007) (New York office of a multi-state firm may be managed by an associate or of counsel attorney who is admitted in New York, and supervised by an out-of-state partner who is licensed in another state. The law firm is responsible for establishing procedures to ensure that the New York attorney complies with New York's disciplinary rules.).

N.Y.S. Bar Op. 806 (2006) (law firm may participate with a foreign law firm in handling New York legal matters, as long as the foreign firm has similar education, training and ethical standards comparable to American lawyers).

N.Y.S. Bar Op. 804 (2006) (small legal services corporation is like a law firm, and therefore, must ensure that all attorneys it employs comply with the rules).

N.Y.C. Bar Op. 2006-3 (2006) (outsourcing of legal support services overseas to a non-lawyer by a New York lawyer is ethical as long as there is rigorous supervision of the non-lawyer to ensure that the non-lawyer is not engaging in the unauthorized practice of law and that the New York lawyer is rendering competent representation while using the foreign legal support services. Client confidentiality must be observed, conflicts must be avoided, billing must be appropriate, and if necessary, client consent to outsourcing must be obtained.).

N.Y.S. Bar Op. 774 (2004) (law firms must adequately supervise non-lawyers who have previously worked at another firm, including instructing them not to disclose confidential information acquired while at the previous firm, and instructing firm lawyers not to use such information if told to them. The hiring law firm may have a duty to inquire as to conflict-of-interest information regarding current representations.).

N.Y.S. Bar Op. 762 (2003) (law firm must adequately supervise, as appropriate, the work of lawyers licensed in foreign countries who are "non lawyers for the purposes of former DR 1-104(c)" who work at the firm. The law firm is required to make reasonable efforts to ensure that observance of disciplinary rules of the foreign jurisdiction does not run afoul of the New York Code.).

N.Y.S. Bar Op. 789 (2003) (law firm may form attorney-client relationship with one or more of its own lawyers to receive ethics and professional responsibility advice).

N.Y.S. Bar Op. 751 (2002) (lawyer representing a governmental agency may not undertake more matters than the attorney can competently handle, but may accept their supervisors reasonable resolution of an arguable question of professional duty).

ABA: ABA Formal Op. 08-451 (2008) (outsourcing of legal or nonlegal support services by a lawyer is permissible as long as the lawyer remains ultimately responsible for competent legal services to the client pursuant to Model Rule 1.1 and complies with Rules 5.1 and 5.3. A lawyer should exercise reasonable direct supervisory authority over the foreign non-lawyer, including avoidance of the unauthorized practice of law by the non-lawyers. Disclosure, as appropriate, should be made to the client, and client consent should be obtained if the rendering of the outsourced services requires disclosure of confidential information. Outsourcing fees should be reasonable.).

ABA Formal Op. 08-453 (2008) (law firm may form attorney-client relationship with one or more of its own lawyers to receive ethics and professional responsibility advice).

ABA Formal Op. 03-431 and 03-429 (2003) (lawyer or partner with direct supervisory authority over a mentally impaired lawyer must take steps to ensure that the impairment does not affect client matters and may have to report the lawyer's impairment to the firm's management and the disciplinary authorities).

ABA Formal Op. 01-424 (2001) (former in-house lawyer may pursue a wrongful discharge claim against her former employer if such discharge was contrary to public policy).

ABA Formal Op. 96-399 (1996) (discusses a range of ethical obligations of Legal Services lawyers when funding is cut to their existing and future clients and when restrictions are placed on the available funding).

VII. ANNOTATIONS OF CASES

VII.1 Law Firm Discipline

In re Law Firm of Wilens & Baker, 9 A.D.3d 213 (1st Dept. 2004) (law firm and one of its partners were each censured for, inter alia, failing to promptly deliver client property; rude and uncivil treatment; and neglect of legal matters entrusted to them.)

VII.2 Individual Attorney Discipline

New York: Matter of Marshburn, 2009 NY Slip op. 8514; 2009 NY App. Div. LEXIS (1st Dept. 2009) (attorney suspended for six months because he was unaware that his partner, inter alia, converted client funds and failed to oversee the firm's escrow account.)

Matter of Garas, 65 A.D. 3d 164 (4th Dept. 2009) (attorney censured for forming a corporation to perform closing agent services on the sale of HUD foreclosure properties and permitting a non-lawyer employed by that corporation to engage in the unauthorized practice of law in performing functions usually performed by attorneys. The attorney was also guilty of failing to appropriately supervise that employee.).

Matter of Bodow, 54 A.D. 3d 76 (4th Dept. 2008) (attorney censured, inter alia, for failure to supervise non-lawyer employees, which failure caused neglect of a client matter).

Matter of Lenehan, 34 A.D. 3d 13 (4th Dept. 2006) (attorney disciplined for permitting debt collection agencies to pay her to use her law firm name for debt collection. The attorney knew that the agencies were engaging in illegal practices but failed to become meaningfully involved or supervise or control the activities.).

Matter of Iaquinta-Snigur, 30 A.D. 3d 67 (2d Dept. 2006) (attorney suspended for three years for, inter alia, failure to properly inspect and review the work of her law office staff members regarding her escrow account).

Matter of Duboff, 21 A.D.3d 206 (2d Dept. 2005) (attorney turned control of his law firm and trust accounts to a third-party non-attorney. Attorney had no involvement in employee hiring or firing, firm files or accounts, and was not privy to his law firm's corporate books. Attorney disciplined for failure to supervise.).

Matter of Allen, 308 A.D. 2d 143 (4th Dept. 2003) (attorney censured for failure to adequately review the activities of his law partner who improperly withdrew funds from the firm trust accounts).

Matter of Meltzer, 293 AD 2d 202 (1st Dept. 2002) (attorney censured for aiding a non-lawyer in the practice of law and for neglect of client matters because he failed to supervise his long-time paralegal/office manager who actually neglected matters she was permitted to handle).

Matter of Levy, 274 A.D. 2d 123 (4th Dept. 2000) (attorney censured for failing to adequately supervise an employee who intentionally filed a false expert disclosure statement, and who made false statements to the court and opposing counsel).

Matter of Ponzini, et al, 259 A.D.2d 142 (2d Dept. 1999) (motion to reargue granted 268 A.D.2d 478 (2d Dept. 2000) (attorneys initially disbarred for unintentional conversion, and failure to oversee the firm's escrow account, but upon reargument sanction was modified to a one-year suspension).

Matter of Orseck & Orseck 262 A.D. 2d 862 (3d Dept. 1999) (attorney censured because he was unaware that his partner (brother) committed improprieties with client funds, commingled his own funds with client funds, and permitted the balance in the escrow account to drop below the amount necessary to maintain client funds).

Matter of Flynn, 238 A.D. 2d 71 (4th Dept. 1997) (attorney censured for failing to adequately supervise a paralegal, and for the more serious misconduct of permitting

his escrow account balance to drop below that required to maintain client funds and commingling his funds with client funds).

Matter of Linn, 200 A.D.2d 4 (2d Dept. 1994) (attorney censured because he, inter alia, failed to supervise his law partner/brother in his firm, allowing his brother to disburse client funds for personal and business expenses. The Court concluded that respondent's lack of awareness, and his failure to inquire about the client assets, constituted a failure to supervise.).

Matter of Collins, 196 A.D. 2d 69 (4th Dept. 1994) (attorney censured because he failed to adequately supervise his employees concerning the receipt, deposit, and remittal of client funds. Although there was loss to the clients due to the employees' thefts, the respondent promptly reimbursed his clients.).

Matter of Pollack, 143 A.D. 2d 386 (1st Dept. 1989) (attorney censured because he failed to supervise his brother and associate in his firm, allowing his brother to disburse client funds for personal and business expenses. The Court concluded that respondent's lack of awareness, and his failure to inquire about the client assets, constituted a failure to supervise.).

Matter of Cardoso, 152 A.D. 2d 157 (2d Dept. 1989) (attorney censured because he failed to oversee his law partner's handling of the firm's escrow account allowing his partner to disburse client funds for personal expenses).

Matter of Sykes, 150 A.D. 2d 126 (2d Dept. 1989) (attorney was initially disbarred, but upon reargument censured because he failed to oversee his law partner's handling of the firm's escrow account, allowing his partner to convert client funds).

Federal: In re Jaffe, 585 F.3d 118 (2d Cir. 2009) (when a lawyer filed briefs drafted by unsupervised law students, she aided in the unauthorized practice of law in violation of former DR 3-101(a) and former DR 1-104(D)).

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Douglas R. Richmond, *Professional Responsibility of Law Firm Associates,* 45 BRANDEIS L.J. 199 (2007).

Rule 5.2: Responsibilities of a Subordinate Lawyer

I. TEXT OF RULE 5.2[1]

(a) A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

II. NYSBA COMMENTARY

[1] Although a lawyer is relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether the lawyer had the knowledge required to render conduct a violation of these Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter of professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise, a consistent course of action or position could not be taken. If the question can only be answered reasonably one way, the duty of both lawyers is clear, and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon a course of action. That authority ordinarily reposes in the supervisor and a subordinate may be guided accordingly. To evaluate the supervisor's conclusion that the question is arguable and the supervisor's resolution of it is reasonable in the light of applicable law, it is advisable that the subordinate lawyer undertake research, consult with a designated

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senior partner or special committee, if any (*see* Rule 5.1 Comment [3]), or use other appropriate means. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professional if the resolution is subsequently challenged.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 5.2 (a) and (b) are essentially similar to former DR 1-104(E) and (F).

III.2 ABA Model Rules

The New York Rule and the ABA Rule 5.2 are identical. Both the New York Rule and the Model Rule require a subordinate lawyer to follow the rules. In addition, if the supervisory lawyer directs the subordinate lawyer to follow "a reasonable course of action", then the subordinate lawyer may not be subject to charges for violations of the Rules.

IV. PRACTICE POINTERS

1. Subordinate lawyers cannot blindly go along with a supervisory lawyer's direction if there is "an arguable question" as to whether the course of action is ethical.
2. When an "arguable question" arises, subordinate lawyers are advised to "undertake research," confer with a senior partner, or any applicable special committee.
3. A subordinate attorney or associate must take action when the supervisory attorney's directions are neither reasonable nor ethical.

V. ANALYSIS

There is no question under either the NY Rule, the ABA Rule, or the former Disciplinary Rule that all lawyers, no matter what their status, including subordinates, are subject to this Rule and are "bound to" comply with the Rules of Conduct. The NYSBA commentary also indicates that a subordinate lawyer cannot just go along with the supervisory lawyer's course of action if there is "an arguable question" as to whether the course of action is ethical and is advised to "undertake research, consult with a designated senior partner or committee". From a literal reading of this Rule, it appears that subordinate lawyers cannot just "follow orders," look away or go along when the supervisory lawyer engages in a questionable course of conduct that they are working on.

We also note that due to New York case law as cited below, this Rule should also be reviewed in conjunction with Rule 8.3 Reporting Professional Misconduct (formerly

DR 1-103), which requires a lawyer to report another lawyer to a tribunal or other authority when he or she "possesses knowledge that raises a substantial question as to other lawyer's honesty, trustworthiness or fitness." Accordingly, a subordinate lawyer or associate is compelled to take some action when the supervisory lawyer's directions are neither reasonable nor ethical.

VI. ANNOTATIONS OF ETHICS OPINIONS

New York: N.Y.S. Bar Op. 762 (2003) (law firm is required to adequately supervise, as appropriate, the work of lawyers licensed in foreign countries who are "non lawyers for the purposes of [former]DR 1-104(c) " who work at the firm. The law firm is required to make reasonable efforts to ensure that observance of disciplinary rules of the foreign jurisdiction does not run afoul of the former New York Code.).

N.Y.S. Bar Op. 789 (2003) (law firm may form attorney-client relationship with one or more of its own lawyers to receive ethics and professional responsibility advice).

N.Y.S. Bar Op. 806 (2003) (law firm may participate with a foreign law firm in handling New York legal matters, as long as the foreign firm's lawyers have education, training, and ethical standards comparable to American lawyers.)

N.Y.S. Bar Op. 751 (2002) (lawyer representing a governmental agency may not undertake more matters than the attorney can competently handle, but may accept their supervisors reasonable resolution of an arguable question of professional duty).

ABA: ABA Formal Op. 01-424 (2001) (former in-house lawyer may pursue a wrongful discharge claim against her former employer if such discharge was contrary to public policy).

ABA Formal Op. 96-399 (1996) (discusses a range of ethical obligations of Legal Services lawyers when funding is cut to their existing and future clients and when restrictions are placed on the available funding).

VII. ANNOTATIONS OF CASES

Connolly v. Napoli, Kaiser & Bern, LLP et al. 12 Misc. 3d 530 (S. Ct. N.Y. Co. 2006) (associate allowed to sue his former law for wrongful termination, despite being an employee at will, for refusing to cover up wrongful acts of other lawyers in firm).

Matter of Jochnowitz, 89 A.D.2d 342 (1st Dept. 1993) (attorney disbarred for involvement in parking violations fraud scandal and failure to report other attorneys' involvement in an illegal kickback scheme).

Wieder v. Skala, 80 N.Y.2d 628 (1992) (attorney allowed to sue his former law firm after being fired for reporting another attorney pursuant to former DR 1-103 despite the fact that New York is an employment-at-will state).

Matter of Dowd and Pennisi, 160 A.D.2d 78 (2d Dept. 1990) (attorneys suspended for five years for involvement in parking violations fraud scandal and failure to report other attorneys' involvement in illegal kickback scheme).

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Rule 5.3: Lawyer's Responsibility for Conduct of Nonlawyers

I. TEXT OF RULE 5.3[1]

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

1 Rules Editor Deborah Scalise, Scalise & Hamilton.

II. NYSBA COMMENTARY

[1] This Rule requires a law firm to ensure that work of nonlawyers is appropriately supervised. In addition, a lawyer with direct supervisory authority over the work of nonlawyers must adequately supervise those nonlawyers. Comments [2] and [3] to Rule 5.1, which concern supervision of lawyers, provide guidance by analogy for the methods and extent of supervising nonlawyers.

[2] With regard to nonlawyers, who are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by or associated with the law firm is compatible with the professional obligations of the lawyers and firm. Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such assistants, whether they are employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A law firm must ensure that such assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. A law firm should make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with these Rules. A lawyer with direct supervisory authority over a nonlawyer has a parallel duty to provide appropriate supervision of the supervised nonlawyer.

[3] Paragraph (b) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of these Rules if engaged in by a lawyer. For guidance by analogy, see Rule 5.1, Comments [5]-[8].

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 5.3 is essentially similar to former DR 1-104(C) (D).

III.2 ABA Model Rules

Despite language differences, both the New York Rule and the Model Rule require reasonable supervision of nonlawyers under the circumstances. The New York rule provides factors which may be considered in assessing reasonableness. Both rules provide that a supervisory lawyer shall be responsible for the misconduct of a nonlawyer if the lawyer orders or ratifies the misconduct, or knows of the misconduct and fails to

take appropriate action. The New York Rule also states that a supervisory lawyer is responsible for the misconduct of a nonlawyer if the lawyer should have known of the misconduct at a time when remedying the misconduct was possible.

IV. PRACTICE POINTERS

1. Lawyers who ordered or ratified the misconduct of a nonlawyer, regardless of whether they are supervisory or managerial lawyers, are responsible for the nonlawyer's misconduct. The lawyers are also responsible for nonlawyer misconduct if they knew of the misconduct and did not prevent or mitigate it, or failed to take appropriate action.
2. A "nonlawyer" includes any person who is not admitted to practice in New York, including any foreign lawyers that a firm may employ.
3. A law firm must ensure that nonlawyers are given appropriate training concerning the ethical aspects of their jobs. Reasonable efforts should be made to establish internal policies and procedures designed to provide adequate assurances that nonlawyers will act in a way compatible with the Rules.
4. Proper supervisory procedures must be put in place to provide reasonable oversight for the nonlawyers under the circumstances considering the experience of the nonlawyer, the amount of work the nonlawyer is responsible for and the likelihood that ethical issues will arise. Lawyers must be "vigilant and creative" in discharging their duties to supervise nonlawyers.[2]
5. When hiring foreign nonlawyers, background and reference checks should be performed and some sort of interview conducted, even if by phone. There must be frequent and sufficient contact between the New York lawyer and foreign nonlawyer, with the nonlawyer's work product reviewed frequently.

V. ANALYSIS

V.1 Purpose of Rule 5.3

Rule 5.3 contains two distinct mandates. The first mandate is that law firms and lawyer supervisors put into place adequate supervisory procedures so that nonlawyer employees have sufficient oversight that they do not violate the rules by which law firms and lawyers must conduct themselves. Since nonlawyers are not subject to the Rules of Professional Conduct, the second mandate addresses the responsibility for what would be misconduct by nonlawyer employees by placing responsibility for nonlawyer misconduct firmly on the shoulders of lawyer supervisors and managers.

2 *See* N.Y.C. Bar Op. 2006-3 (2006).

V.2 Requirement to Supervise a Nonlawyer Employee

Subsection (a) sets forth the requirement that a law firm shall ensure that the work of nonlawyers "who work for" a firm is adequately supervised. This places responsibility on the firm, and requires that adequate supervisory procedures are in place and nonlawyers are not working without oversight. Subsection (a) also mandates that a lawyer with direct supervisory responsibility for a nonlawyer adequately supervise the nonlawyer. The standard of adequate supervision is reasonableness under the circumstances, and factors which should be considered in assessing the reasonableness of supervision include the experience of the nonlawyer employee, the amount of work for which the employee is responsible and the likelihood of whether ethical issues might arise.

V.3 Responsibility for Misconduct by a Nonlawyer Employee

Subsection (b) addresses the culpability of a lawyer for the actions of a nonlawyer which would violate the Rules if engaged in by a lawyer. The Rule specifies that if misconduct is committed by a nonlawyer, a lawyer, regardless of whether he or she is a supervisor, who ordered or ratified the misconduct is responsible for that misconduct. Managing or supervising lawyers are also responsible for the misconduct of a nonlawyer employee if they knew of the misconduct at a time when it could have been prevented or mitigated, and failed to take appropriate action. Additionally, managing or supervising lawyers are also responsible for nonlawyer misconduct if, in the exercise of reasonable supervisory oversight, they should have known of the misconduct at a time when remedial action could have been taken.

V.4 Nonlawyers

Subsection (b) also makes clear that a supervisory lawyer is responsible not only for the conduct of those nonlawyers actually employed by the lawyer, but also for nonlawyers who are "retained by or associated with" the lawyer. This would include, for example, per diem paralegals retained through a paralegal agency, or private investigators hired by the law firm. "Associated with" would also include professionals who are permitted to enter into a contractual relationship with an attorney pursuant to Rule 5.8.

The question of whether Subsection (a)'s language, which appears to limit supervisory responsibility for nonlawyers who "work for" the firm, encompasses nonlawyers who are "retained by or associated with" the law firm, was addressed by the New York City Bar Association in N.Y.C. Bar Op. 2006-3 (2006). The Committee issuing the opinion stated that it was their position that the two phrases, "work for" and "employed by, retained by or associated with" had equivalent meanings.

Although the term "nonlawyer" is not defined in the Rule, to us it means anyone who is not admitted to the practice of law in New York State. Very simply put, if a law

firm engages in the practice of foreign outsourcing of legal support services, any foreign lawyers doing work for the New York law firm are nonlawyers for the purposes of this rule. The mandate to adequately supervise the work of nonlawyers includes supervising the work of foreign attorneys.

Adequate supervision of foreign nonlawyers can be difficult to assess, bearing in mind that direct on-site supervision of those individuals will most likely not take place. N.Y.C. Bar Op. 2006-3 (2006), which discusses outsourcing of legal support services states that "Given… the hurdles imposed by the physical separation between the New York lawyer and the overseas nonlawyer, the New York lawyer must be both vigilant and creative in discharging the duty to supervise." First, lawyer supervisors of foreign nonlawyers should ensure that the foreign supplier of legal support services is advised, preferably in writing, that its employees' activities must conform to the New York Rules of Professional Conduct. N.Y.C. Bar Op. 2006-03 suggests that New York lawyers obtain information relating to the background of the foreign nonlawyers including reference checks, and in a suitable manner, conduct an advance interview with the foreign nonlawyer. New York supervisory attorneys should also make sure that there is frequent and sufficient contact with the foreign nonlawyers to ensure familiarity with the nonlawyers' methods of working. Work product should be reviewed by the supervising lawyer.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Requirement to Supervise a Nonlawyer Employee

N.Y.S. Bar Op. 828 (2009) (staff attorneys who work for a state agency are not obligated to supervise the work of investigators who also work for the agency, as staff attorneys are not a law firm and they do not have direct supervisory authority over the nonlawyer investigators).

N.Y.S. Bar Op. 774 (2004) (law firms must adequately supervise nonlawyers who have previously worked at another firm, including instructing them not to disclose confidential information acquired while at the previous firm, and instructing firm lawyers not to use such information if told to them. The hiring law firm may have a duty to inquire as to conflict information regarding current representations.).

VI.2 Nonlawyers

New York: NYCLA Bar Op. 737 (2007) (unethical for a non-government lawyer to employ or utilize an investigator who will use dissemblance if it is unlawful, rises to the level of fraud or perjury, violates the rights of third parties, or otherwise violates the Code of Professional Responsibility. Under certain narrow and exceptional conditions a lawyer may supervise an investigator who uses dissemblance.).

N.Y.C. Bar Op. 2006-3 (2006) (outsourcing of legal support services overseas to a nonlawyer by a New York lawyer is ethical as long as there is rigorous supervision of

the nonlawyer to ensure that the nonlawyer is not engaging in the unauthorized practice of law and that the New York lawyer is rendering competent representation while using the foreign legal support services. Client confidentiality must be observed, conflicts must be avoided, billing must be appropriate and if necessary, client consent to outsourcing must be obtained.).

N.Y.S. Bar Op. 762 (2003) (law firm must supervise, as appropriate, the work of lawyers licensed in foreign countries who are "non lawyers for the purposes of former DR 1-104(c)" who work at the firm. The law firm is required to make reasonable efforts to ensure that observance of disciplinary rules of the foreign jurisdiction does not run afoul of the New York Code.).

ABA: ABA Formal Op. 08-451 (outsourcing of legal or nonlegal support services by a lawyer is permissible as long as the lawyer remains ultimately responsible for competent legal services to the client pursuant to Model Rule 1.1 and complies with Rules 5.1 and 5.3. A lawyer should exercise reasonable direct supervisory authority over the foreign nonlawyer, including avoidance of the unauthorized practice of law by the nonlawyers. Disclosure, as appropriate, should be made to the client, and client consent should be obtained if the rendering of the outsourced services requires disclosure of confidential information. Outsourcing fees should be reasonable.).

VI.2 Responsibility for Misconduct by a Nonlawyer Employee

N.Y.C. Bar Op. 2010-2 (2010) (since informal discovery has long been favored, an attorney or agent may use his or her real name and profile to "friend" an unrepresented person's social network site without disclosing why the lawyer or agent is making the request. However, if a lawyer or agent "friends" an unrepresented person under false pretenses (such as when using a false name or a made up profile) to obtain information, the Rules will be violated.).

VII. ANNOTATIONS OF CASES

VII.1 Responsibility for Misconduct by a Nonlawyer Employee

Matter of Garas, 65 A.D. 3d 164 (4th Dept. 2009) (attorney censured for forming a corporation to perform closing agent services on the sale of HUD foreclosure properties and permitting a nonlawyer employed by that corporation to engage in the unauthorized practice of law in performing functions usually performed by attorneys. The attorney was also guilty of failing to appropriately supervise that employee.).

Matter of Bodow, 54 A.D. 3d 76 (4th Dept. 2008) (attorney censured, inter alia, for failure to supervise nonlawyer employees, which failure caused neglect of a client matter).

Matter of Lenehan, 34 A.D. 3d 13 (4th Dept. 2006) (attorney disciplined for permitting debt collection agencies to pay her to use her law firm name for debt

collection. The attorney knew that the agencies were engaging in illegal practices but failed to become meaningfully involved or supervise or control the activities.).

Matter of Iaquinta-Snigur, 30 A.D. 3d 67 (2d Dept. 2006) (attorney suspended for three years for, inter alia, failure to properly inspect and review the work of her law office staff members regarding her escrow account).

Matter of Duboff, 21 A.D.3d 206 (2d Dept. 2005) (attorney turned control of his law firm and trust accounts to a third-party non-attorney. Attorney had no involvement in employee hiring or firing, firm files or accounts, and was not privy to his law firm's corporate books. Attorney disciplined for failure to supervise.).

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Rule 5.4: Professional Independence of a Lawyer

I. TEXT OF RULE 5.4[1]

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or another lawyer associated in the firm may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6.

1 Rules Editor Deborah Scalise, Scalise & Hamilton. The editor would like to thank Ryan Gainor for his research assistance in the preparation of this chapter.

(d) A lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a member, corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

II. NYSBA COMMENTARY

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[1A] Paragraph (a)(2) governs the compensation of a lawyer who undertakes to complete one or more unfinished pieces of legal business of a deceased lawyer. Rule 1.17 governs the sale of an entire law practice upon retirement, which is defined as the cessation of the private practice of law in a given geographic area.

[1B] Paragraph (a)(3) permits limited fee sharing with a nonlawyer employee, where the employee's compensation or retirement plan is based in whole or in part on a profit-sharing arrangement. Such sharing of profits with a nonlawyer employee must be based on the total profitability of the law firm or a department within a law firm, and may not be based on the fee resulting from a single case.

[2] This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. *See also* Rule 1.8(f), providing that a lawyer may accept compensation from a third party as long as there is no interference with the lawyer's professional judgment and the client gives informed consent.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 5.4 combines rules relating to the professional independence of a lawyer when it comes to business dealings with nonlawyer third parties. It includes prohibitions on fee sharing with nonlawyers, partnership with nonlawyers and taking directions as to legal

matters from nonlawyers, all of which were found under various other sections of the New York Code of Professional Responsibility.

- Rule 5.4(a) is identical to DR 3-102 (A).
- Rule 5.4(b) is identical to DR 3-103.
- Rule 5.4(c) is identical to DR 5-107(B).
- Rule 5.4(d) is similar DR 5-107 (C). It substitutes "entity" for "a limited liability company, limited liability partnership or professional corporation." Rule 5.4(D)(1) is identical to DR 5-107 (C)(1). Rule 5.4(d)(2) is similar to DR 5-107 (C)(2) but adds the term "or occupies a position of similar responsibility in any form of association other than a corporation." Rule 5.4(d)(3) is identical to DR 5-107 (C)(3).

III.2 ABA Model Rules of Professional Conduct

The New York Rule 5.4 and the ABA Rule 5.4 are essentially similar.

NY Rule 5.4(a)(1) is identical to ABA Rule 5.4(A)(1). NY Rule 5.4(a) (2) provides "a lawyer who undertakes to complete unfinished legal business may pay" the estate of a deceased lawyer, while ABA Rule 5.4(A) (2) provides "a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to Rule 1.17, pay to the estate or other representative of that lawyer the agreed upon purchase price." Note that both NY Rule 1.17 and ABA 1.17 relate to the sale of a law practice. See discussion on N.Y. Rule 1.17. N.Y. Rule 5.4(a)(3) is similar to ABA Rule 5.4(A)(3) but adds the words "may compensate" to include employees in a retirement plan or profit sharing arrangement. There is no equivalent provision in N.Y. Rule 5.4(a) to ABA Rule 5.4(A) (4), which provides "a lawyer may share court awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter."

- NY Rule 5.4(b) is identical to ABA Rule 5.4(B).
- NY Rule 5.4(c) is essentially similar to ABA Rule 5.4(C) with the addition of the following phrases "Unless authorized by law" at the beginning of the sentence and "or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6." Note that both NY Rule 1.6, as well as ABA 1.6 relate to the confidentiality of information. See discussion on N.Y. Rule 1.6.
- NY Rule 5.4(d) is identical to ABA Rule 5.4(D).

IV. PRACTICE POINTERS

1. Lawyers must exercise independent judgment on behalf of their clients.
2. Lawyers may neither divide the profits from their practice with nonlawyers nor take direction from nonlawyers.
3. Lawyers are prohibited from forming partnerships with nonlawyers if the activities of the partnership include providing legal services.

V. ANALYSIS

V.1 Purpose of Rule 5.4

Rule 5.4 specifically provides that lawyers must exercise independent judgment on behalf of their clients and may neither divide the profits from their practice with nonlawyers, nor take direction from nonlawyers. Under the former New York Code of Professional Responsibility, a lawyer had to search in several sections for rules relating to the professional independence of a lawyer as to business dealings with nonlawyer third parties. This could cause some confusion because two of the rules pertaining to fee sharing and partnership with nonlawyers were found under Canon 3 entitled "A Lawyer Should Assist in Preventing the Unauthorized Practice of Law," at former DRs 3-102 and 3-103, while taking directions as to legal matters from nonlawyers was found under Canon 5 entitled "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client" at former DR 5-107 (which was grouped among the conflicts rules). Needless to say, such a dispersal diminished the import of the rule.

V.2 Limits on Fee Sharing

The exercise of independent judgment has been a hallmark of the legal profession. Thus Rule 5.4 expressly limits the sharing of fees between a lawyer and a nonlawyer. Limited fee sharing is permitted with nonlawyer-employees if the nonlawyer's compensation or retirement plan is based in whole or in part on a profit sharing agreement, as long as the amount is based on the total profitability of the firm[2] and not on a fee obtained from a particular case.[3] It has also been held that a lawyer could pay an auditor, hired by a client to monitor and administer its legal billing, a percentage of the law firm's gross billings to that client.[4] But, a law firm's agreement with an employee who worked as the firm's "administrator and claims manager" was held to be prohibited fee splitting where the employee was entitled to an equal share of the law firm's profits as a partner under the agreement.[5]

V.3 Completing Unfinished Business of Deceased Lawyer

Subsection (a)(2) permits a lawyer who completes the unfinished legal work of a deceased lawyer to pay the deceased lawyer's estate a portion of the total compensation that fairly represents the services provided to the client by the deceased lawyer.

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2 *See* NYSBA Commentary to Rule 5.4 [1B].
3 N.Y.S. Bar Op. 733 (2000).
4 N.Y.S. Bar Op. 827 (2008).
5 Matter of Ungar, 260 A.D. 2d 485, 688 N.Y.S.2d 588 (2d Dept. 1999).

V.4 Partnerships with Nonlawyers

The Rule prohibits lawyers from forming partnerships with nonlawyers, if any of the activities of the partnership consist of the practice of law. Lawyers are also prohibited from taking direction from nonlawyers, to protect the exercise of the lawyers' independent professional judgment. A lawyer may, however, share office space and other expenses with a nonlegal professional and share referrals, as long as no computers or phone lines are shared between them and no fees are shared. In addition, they may split a receptionist in the office only if there is a clear separation between the legal and nonlegal operations.[6]

Likewise, a lawyer may hire an accountant to help advise clients on tax planning, as long as the accountant does not have an ownership interest in the firm,[7] and lawyers may pay a nonlawyer to assist in advertising and interaction with clients, if the lawyer remains in a supervisory role.[8]

An interesting question arises in the case of law firms with offices in many different states and even foreign countries. Adopting the view that a "lawyer" is someone admitted to the bar in New York State, suddenly the firm may be in violation of the Rule. Under a broader definition of "lawyer," is seems that no violation has occurred. In N.Y.S. Bar Op. 806 (2007), the Ethics Committee found that where a foreign law firm's lawyers had professional education, training, and ethical standards comparable to those of American lawyers, a New York law firm could participate with the foreign law firm in handling legal matters in New York referred by the foreign firm, and could share legal fees in such matters, as long as the New York firm otherwise complied with former DR 2-107(A). See a further discussion of "Who is a "Lawyer" in Rule 5.5, *infra.*

V.5 Limits on Third-party Intervention

Rule 5.4 continues the traditional limits on allowing third parties to direct or regulate a lawyer's conduct and professional judgment in providing legal services to the client. While a third party may pay the lawyer's fee or recommend a lawyer, the lawyer's loyalty is to the client and the third party may not interfere with the lawyer's exercise of his or her professional judgment. For example, when a union staff attorney represented a union member in an arbitration, the lawyer was obligated to keep the union member's confidences, even if the union paid the lawyer's salary. Conversely, during collective bargaining, the lawyer was obligated to keep the union's confidences.[9]

6 NYCLA Bar Op. 733 (2004); N.Y.S. Bar Op. 765 (2003).
7 NYCLA Bar Op. 687 (1991).
8 NYCLA Bar Op. 720 (1997).
9 N.Y.S. Bar Op. 743 (2001).

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Limits on Fee Sharing

N.Y.C. Bar Op. 2009-4 (2009) (attorneys may pay pro bono organization for referral of pro bono assignments).

N.Y.S. Bar Op. 827 (2008) (it is not unethical for a law firm to pay to an auditor hired by the client to monitor and administer its legal bills a percentage of the law firm's gross billing to that client).

N.Y.S. Bar Op. 818 (2007) (underwriters' counsel may represent the underwriters in a securities offering even though the third-party issuer appointed and pays counsel. Underwriters must consent after disclosure of material facts.).

N.Y.S. Bar Op. 765 (2003) (reciprocal referral of clients by and between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm as well as sharing of costs, (former DR 1-107[D]), joint advertising (former DR 2-101[C][3]), and joint premises (EC 1-14) are permissible. However, the law firm and the service firm may not share fees.).

N.Y.C. Bar Op. 2003-6 (attorney or law firm may include in its legal fees to a client the cost of a nonlawyer performing legal support services overseas. The client should be charged no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service.).

N.Y.S. Bar Op. 733 (2000) (lawyer may compensate nonlawyer employees based on a profit sharing arrangement, but may not pay a percentage of profit or fees attributable to particular client matters referred by the nonlawyers).

N.Y.S. Bar Op. 727 (2000) (accounting firm charges contingency fee to refer cases to law firm. Although the accounting firm enters into own separate contract with client, since there is no necessary function for accounting firm to perform, arrangement looks like splitting fee for referral.)

N.Y.S. Bar Op. 698 (1998) (attorney may not accept medical malpractice referrals from a medical consultant if a condition of the referral is contingent payment).

N.Y.S. Bar Op. 678 (1996) (lawyer may not receive referrals from a divorce mediation service not approved by the bar association).

N.Y.C. Bar Op. 1994-6 (1994) (bank may charge a fixed fee for its employee attorney to perform legal services in connection with loan making. However, the fee charged to the debtor must be the actual cost of the legal fees.).

N.Y.S. Bar Op. 651 (1993) (lawyers may be required by legal referral service operated by a bar association to pay a percentage of the legal fees earned from referrals to the bar association referral service).

N.Y.S. Bar Op. 644 (1993) (lawyer may not form a corporation with a non lawyer where his legal services are offered to the corporation and where his legal fees are shared with nonlawyer shareholders).

N.Y.C. Bar Op. 1989-2 (employment agency providing temporary or per diem lawyers, as well as ancillary nonlegal services in connection with locating, recruiting, screening, and placing temporary lawyers, should be paid separately for the ancillary

services, and those fees for services are not legal fees, even if they are calculated as a proportion of the time worked by the temporary lawyer. The agreement between the agency and the law firm should separately state the fee paid to the agency and identify that fee as compensation for the agency's services in locating, recruiting, screening, and placing the temporary lawyer. The agency fee for ancillary services may not be included in the legal fee charged by the law firm to a client, and if that fee is to be paid by the client, the fee for ancillary services should be billed as an expense to the client.).

VI.2 Partnerships with Nonlawyers

NYCLA Bar Op. 733 (2004) (lawyer may share office space and other expenses with a nonlawyer. The two may refer clients to one another but may not accept a fee for doing so. Lawyer may not advertise that he has a continuous and systematic relationship with this other professional. A lawyer, however, may not share computers or phone lines with this other professional, and a receptionist may only be shared if there is a clear separation between the two ventures.).

NYCLA Bar Op. 720 (1997) (attorney may hire nonlawyer to assist in advertising and interaction with clients through that advertising as long as lawyer remains a supervisory role).

N.Y.S. Bar Op. 662 (1994) (lawyer may not affiliate with nonlawyer real estate broker in small claims actions to decrease real estate taxes even if the real estate broker does not hold himself out as an attorney).

N.Y.S. Bar Op. 658 (1994) (New York lawyer may affiliate with an attorney or firm from another country depending upon the educational requirements and ethical standards for the attorneys licensed in foreign countries).

N.Y.S. Bar Op. 646 (1993) (New York lawyer may be employed by a foreign legal consultant and may enter into a partnership with a foreign lawyer as long as the partnership will not adversely affect the New York lawyer's obligations under New York ethics rules).

NYCLA 687 (1991) (lawyer may employ accountant to help advise client on tax planning but the accountant may not have an ownership stake in the law firm).

N.Y.S. Bar Op. 557 (1984) (lawyer may not form a joint venture with accountant, nor share fees with the accountant. The two may not use joint letterhead).

VI.3 Limits on Third-party Intervention

N.Y.S. Bar Op. 825 (2008) (lawyer may render legal services to an individual client paid for by an Employee Assistance Program).

N.Y.S. Bar Op. 806 (2007) (where a foreign firm's lawyers have professional education, training, and ethical standards comparable to those of American lawyers, a New York law firm may participate with a foreign law firm in handling legal matters in New York referred by the foreign firm, and in sharing of legal fees in

such matters. The New York firm must otherwise comply with former DR 2-107(A).).

N.Y.S. Bar Op. 743 (2001) (when union staff attorney represents union member in arbitration he must keep the confidences of the union member, even if the union is paying his salary. During collective bargaining the lawyer must keep the confidences of the union.).

N.Y.S. Bar Op. 721 (1999) (lawyer may follow advice of insurance carrier and use a specific company for legal research, so long as he reviews the research and using the company does not diminish the defense).

VII. ANNOTATIONS OF CASES

VII.1 Limits on Fee Sharing

New York: Matter of Thomas E. Krug, 65 A.D. 3d 164 (4th Dept. 2008) (attorney censured for inter alia, sharing legal fees with a nonlawyer).

Matter of Rodkin, 21 A.D.3d 111 (1st Dept. 2005) (immigration attorney suspended from the practice of law for a period of six months for, inter alia, neglect of legal matters entrusted to him, aiding in the unauthorized practice of law, and accepting fees from referring agencies).

Matter of Meltzer, 293 AD 2d 202 (1st Dept. 2002) (attorney censured for aiding a nonlawyer in the practice of law, sharing legal fees with a nonlawyer, and for neglect of client matters because he failed to supervise his long-time paralegal/office manager who neglected matters she was permitted to handle).

Matter of Ungar, 260 A.D. 2d 485, 688 N.Y.S.2d 588 (1st Dept. 1999) (agreement with employee who worked as "administrator and claims manager" of law firm amounted to prohibited fee splitting. Employee was entitled to equal share of firm profits as partners under agreement.).

Matter of Friedman, 196 A.D.2d 280 (1st Dept.), *appeal dismissed, mot. dismissed*, 83 N.Y.2d 888, *cert. denied,* 513 U.S. 820 (1994) (attorney disbarred for, inter alia, pattern of misconduct constituting intentional acts of dishonesty over a ten-year period, including knowingly filing a false affidavit, giving false testimony at a hearing before a federal judge, soliciting false testimony from a witness, failing to supervise his investigator, sharing fees with a nonlawyer, failing to disclose information that he was required to reveal by law, and failing to disclose to the court that a witness gave false testimony).

Gorman v. Grodensky, et al., Defendants, 130 Misc. 2d 837; 498 N.Y.S.2d 249; 1985 N.Y. Misc. LEXIS 3278 (Sup. Ct, N.Y. Cty., Dec. 16, 1985) (plaintiff non-attorney's motion for summary judgment was denied because the contract with defendant attorneys was an agreement to split attorney's fees and was against public policy and unenforceable as plaintiff was not an attorney).

Federal: In re Friedman, 51 F.3d 20 (2d Cir, 1995) (federal court appropriate in reciprocal disbarment of attorney for behavior including acts of dishonesty, sharing

fees with a nonlawyer, and failing to disclose to the court that a witness gave false testimony).

VII.2 Partnerships with Nonlawyers

Matter of Garas, 65 A.D. 3d 164 (4th Dept. 2009) (attorney censured for forming a corporation to perform closing agent services on the sale of HUD foreclosure properties with a nonlawyer and permitting a nonlawyer employed by that corporation to engage in the unauthorized practice of law in performing functions usually performed by attorneys. The attorney was also guilty of failing to appropriately supervise that employee).

Matter of Takvorian, 240 A.D.2d 95, 670 N.Y.S.2d 211 (2d Dept. 1998) (lawyer suspended who formed partnership with nonlawyer.)

Matter of Andrews, 184 A.D.2d 195; (1st Dept. 1992) (attorney disbarred due to six-year scheme to misappropriate assets from a client with the assistance of client's former psychiatrist (a nonlawyer) with whom attorney entered into a business partnership and to whom he made numerous unauthorized and fraudulent payments).

VII.3 Limits on Third-party Intervention

Matter of Tavon, 66 A.D.3d 224, (2d Dept. 2009) (attorney disbarred for, inter alia, failure to cooperate with the Grievance Committee's investigation, multiple neglects, and multiple instances of permitting someone other than his client to improperly influence his independent professional judgment on behalf of his client).

Matter of Lefkowitz, 47 A.D.3d 326, 848 N.Y.S.2d 76 (1st Dept. 2007) (attorney suspended who aided in the unauthorized practice of law by representing the clients of an immigration service at interviews and hearing. The lawyer was paid by the immigration organization and not the clients, and the non-attorney immigration agents had the primary relationship with the clients.).

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Rule 5.5: Unauthorized Practice of Law

I. TEXT OF RULE 5.5[1]

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

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

II. NYSBA COMMENTARY

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law in another jurisdiction by a lawyer through the lawyer's direct action, and paragraph (b) prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law.

[2] The definition of the "practice of law" is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* Rule 5.3.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 5.5 as a whole replaces Disciplinary Rule 3- 101 (A) and (B) and is the same in substance. Rule 5.5 (a) has only editorial changes to DR 3-101 (B). The phrase "where

1 Contributing Editors John Horan, Fox Horan and Camerini and Wally Larson, Jr., Cleary Gottlieb Steen & Hamilton LLP.

to do so would be in violation of the regulations of the profession" is replaced with "in violation of the regulations of the legal profession." The change is without substantive effect; the prohibition is now more explicit and direct. Rule 5.5 (b) is identical to DR 3-101 (A).

New York Court Rules and Regulations: 22 NYCRR § 1200.16. Aiding Unauthorized Practice of Law.

III.2 ABA Model Rules

ABA Model Rules of Professional Conduct, Rules 5.5 (a) & (b).

IV. PRACTICE POINTERS

1. Whenever venturing into another jurisdiction, know the regulations of the legal profession in that jurisdiction. This Rule states the jurisdictional limitations on law practice in the broadest terms. As the NYSBA Commentary states: "a lawyer may practice only in a jurisdiction in which the lawyer is authorized to practice."
2. If the matter is one that will require litigation, either make arrangements to appear pro hac vice or to appear with local counsel.
3. If the matter concerns the law of another jurisdiction, even in the smallest part, associate with a lawyer of that jurisdiction. This precaution is in both the lawyer's self-interest and to guard against doing the client a disservice by not fully investigating local factors that may bear on what might on the surface appear straightforward.

V. ANALYSIS

V.1 Purpose of Rule 5.5

One of the benefits for New York lawyers of the April 2009 Rules' transition to the ABA Model Rules of Professional Conduct paradigm was that the change made it much easier for a lawyer crossing state borders to compare a given New York Rule with the comparative rule in other U.S. states. Even if there are variations (states tend to like to put their own spin on things), it is easier to find and compare, say, New York's Rule on confidentiality with New Jersey's or Arizona's (they are all found in the state's version of Rule 1.6). Such a comparison might be done, for example, to determine if the exceptions to the confidentiality obligation are different from one state to the other.

It pays to remember, however, that in electronics store vernacular, New York's Rules of Professional Conduct often retain the "guts" of the previous Model Code formulation (declining to follow partially, or in some cases, completely, the ABA Model Rule language). New York Rule 5.5 especially illustrates the importance of

comparing the substance of a rule with the version in other states and not assuming that same-numbered rules are substantially similar.

ABA Rule 5.5 is entitled "Unauthorized Practice of Law; Multijurisdictional Practice of Law" whereas New York Rule 5.5 is simply entitled "Unauthorized Practice of Law". The difference in titles signals a significant difference in scope.

New York Rule 5.5(b) is identical to predecessor DR 3-101(A), except that "nonlawyer" had a hyphen in the DR (its substance is similar to the last phrase of ABA Model Rule 5.5(a)). New York Rule 5.5(a) is the same concept as processor DR 3-101(B), but adopts the language of ABA Model Rule 5.5(a), leaving off the phrase "or assist another in doing so."

The similarities end there. Indeed, the language of New York's brief Rule 5.5 ends there with section (b), while the ABA Rule goes on to provide in its section (c) a safe harbor for out-of-state lawyers to provide legal services on a *temporary* basis if (1) undertaken in association with a local lawyer, (2) *pro hac vice* admission is obtained from the relevant tribunal, (3) reasonably related to an arbitration or mediation where pro hac vice admission is not required or (4) arise out of the lawyer's licensed practice. Section (d) of the ABA rule permits an out-of-state lawyer to provide services on a *regular* (as opposed to temporary basis) if (1) acting as in-house counsel for an organization or (2) the lawyer is authorized by law to provide the services.

According to the ABA[2], as of October 2009, 14 U.S. states had adopted a rule identical to ABA Model Rule 5.5 and 29 U.S. states had adopted a similar rule. This puts New York in the significant minority of U.S. states who have yet to recognize the reality of cross-border practice.

One can't help but look across "the pond" and note that there is a CCBE Code to European cross-border practice, a code of ethics rules specifically designed to address the reality of European lawyers crossing European borders in their practice. The Solicitors Regulation Authority's[3] Code of Conduct includes a rule on European cross-border practice that recognizes it is "necessary to provide a system of mutual professional understanding for professional relations between lawyers of different CCBE states." Rule 16, SRA Code, Introduction.[4]

On more than one occasion the New York State Bar Association has recommended that the New York courts adopt a rule similar to ABA Model Rule 5.5 but the Appellate Divisions have declined to do so. New York has also thus far declined to adopt a narrower rule permitting registration of out-of-state lawyers who act solely as in-house counsel for an organization, even though, as of 2007, forty U.S. states had done so.[5] Not surprisingly, the Association of Corporate Counsel's Web site has stated that "the idea that your client's representation needs must be limited, to retention or employment

2 *See* chart entitled "Statement Implementation of ABA Model Rule 5.5" at http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf.

3 The SRA regulates solicitors in England and Wales.

4 *Available at* http://www.sra.org.uk/solicitors/code-of-conduct/rule16.page.

5 *See* chart provided by Association of Corporate Counsel at http://www2.acc.com/public/reference/mjp/inhouserules.pdf. *See also* ABA Model Rule for Registration of In-House Counsel (adopted by the ABA House of Delegates in August 2008) (*available at* www.abanet.org/legaled/standards/noticeandcomment/ModelRule.DOC).

of lawyers who hold a plenary license in each of the relevant jurisdictions in which the client has a business, is an anachronism that demands reform."[6] We agree.

Not only does New York's rule lack the black-letter heft of the ABA version, but it also lacks the corresponding comments which are especially desirable in the murky areas of unauthorized practice of law and multi-jurisdictional practice.

All this to say that New York's Rule is substantially different than its ABA ancestor, and until the Appellate Divisions choose to follow the ABA formulation we and our out-of-state colleagues must deal with the hand we've been dealt. So let's examine the terse language of New York Rule 5.5(a) and (b).

V.2 What is a "lawyer"?

The question arises under every Rule of Professional Conduct, but in some contexts (such as this Rule) it is more interesting than others to consider: when Rule 5.5 regulates a lawyer's unauthorized practice of law, who is that "lawyer"? New York's Rules of Professional Conduct do not define what a lawyer is, and neither do the ABA Model Rules of Professional Conduct. Moreover, we are not aware of any U.S. jurisdiction that defines the term lawyer even while purporting to regulate lawyers (whoever they are). By extension, these jurisdictions do not define "nonlawyer" or "out-of-state lawyer"[7] either.

It has been noted that the New York Rules have been interpreted, in some instances, so that "lawyer" refers only to a New York-admitted lawyer subject to New York's rules. See discussion of nonlawyers in Rule 5.3, supra. As a general matter, this construction makes sense as a default interpretation for rules, because who else would New York be purporting to regulate?

However, there are New York Rules in which "lawyer" may refer not only to New York lawyers but also to lawyers admitted/licensed in other U.S. jurisdictions or non-U.S. lawyers with comparable credentials.[8] For example, Rule 5.4 prohibits a lawyer from forming a partnership with a nonlawyer. That may seem simple enough, until one considers the modern reality of law firms whose offices span U.S. states and even other countries. If one adopts the narrow definition of "lawyer" mentioned above, then suddenly the New York lawyers in such partnerships are in violation of a Rule of Professional Conduct. If, however, one adopts the broader definition of "lawyer" mentioned above, such law firms are ethically permitted to exist.

It may come as a relief to New York lawyers in national and international law firms that the ethics committee of the New York State Bar Association interpreted Rule 5.4

6 http://www.acc.com/advocacy/keyissues/mjp.cfm.

7 N.Y.S. Bar Op. 835 (2009) (in addressing the UPL question of a non-New York lawyer serving as general counsel for a New York corporation, that committee noted that the term out-of-state lawyer is not defined in the Rules but for purposes of the opinion defined it to mean a person who is not admitted to practice in New York but is admitted to practice and in good standing in another U.S. jurisdiction.)

8 Wally Larson, Jr. and Lewis Tesser, *Who is the "Lawyer" Governed by New York's Disciplinary Rules*, BLOOMBERG LAW REPORTS—NEW YORK LAW at 8-11 (June 2009).

using the broader definition of "lawyer." When it considered the question in 2007, the committee noted that while the rule might *appear* to prohibit affiliation between New York lawyers and non-New York lawyers, that Rule 5.4 should be read in the broader context of Rule 7.5(d). And Rule 7.5(d) permits partnerships between "lawyers" licensed in different jurisdictions if the firm's letterhead notes the jurisdictional limitations and if the non-New York lawyers have licensing and training requirements comparable to those of New York lawyers. N.Y.S. Bar Op. 806 (2007).

Rule 8.5 and Rule 7.3(i) are two examples of New York Rules in which the term "lawyer" is clearly, from context, referring to a broader definition. New York's choice of law rule, Rule 8.5, applies to "a lawyer admitted to practice in this state, regardless of where the lawyer's conduct occurs." If "lawyer" always meant "New York lawyer", it would not be necessary to clarify "admitted to practice in this state." And Rule 7.3(i), part of the 2007 advertising amendments to the then-Code, applies solicitation restrictions to a "lawyer or members of a law firm not admitted to practice in this State who solicit retention by residents of this State." If "lawyer" meant "New York lawyer" here, then it would be an oxymoron to refer to a lawyer not admitted to practice in New York.[9]

All this is to say that the term "lawyer" has been used loosely and apparently inconsistently in the New York Rules (following the ABA), so that it is often necessary to clarify who is the "lawyer" being regulated by any given Rule.

Rule 5.5 is one of those rules that, from context, we conclude uses the narrow definition of "lawyer." Under Rule 5.5(a), for example, there is no apparent reason for New York to purport to regulate a California lawyer violating the unauthorized practice of law (hereafter UPL) restrictions in, say, Nevada. Similarly under Rule 5.5(b), there is no apparent reason (or basis) for New York to purport to regulate a California lawyer who aids a nonlawyer in violation of California UPL.

One wonders why Rule 5.5(a) is even necessary. All Rule 5.5(a) says is that a lawyer should not violate another jurisdiction's UPL regulations. Do lawyers truly need an ethical rule that requires them to obey applicable rules or laws? It could be argued that it facilitates effective lawyer discipline to have rules such as this one, Rule 8.4(b) (lawyer shall not engage in illegal conduct that adversely reflects on the lawyer) or Rule 1.5(b) (requiring terms of engagement to be communicated in writing "when required by statute or court rule").

V.3 What Does it Mean to "practice law"?

It is impossible to divorce the question of what the "practice of law" means from a specific jurisdiction's legal regulations. The NYSBA Commentary to Rule 5.5, cmt.[2], notes that the definition is established by law and varies from one jurisdiction to another. It has proven difficult for U.S. states to pinpoint a comprehensive definition of "practice of law." The ABA's Task Force on the Model Definition of the Practice of Law maintains a list of states that have adopted a definition, and thus far only four

9 *Id.* at 8-9.

states are listed: Nebraska, Utah, Washington, and Connecticut.[10] Because Rule 5.5 regulates a lawyer's compliance with the regulations of *other* jurisdictions, it is educational to consider the available examples. Nebraska's definition is as follows:

> § 3-1001. General definition.
>
> The "practice of law," or "to practice law," is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge, judgment, and skill of a person trained as a lawyer. This includes, but is not limited to, the following:
>
> (A) Giving advice or counsel to another entity or person as to the legal rights of that entity or person or the legal rights of others for compensation, direct or indirect, where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to whom it is given.
>
> (B) Selection, drafting, or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person.
>
> (C) Representation of another entity or person in a court, in a formal administrative adjudicative proceeding or other formal dispute resolution process, or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
>
> (D) Negotiation of legal rights or responsibilities on behalf of another entity or person.
>
> (E) Holding oneself out to another as being entitled to practice law as defined herein.[11]

Nebraska also includes a section of exceptions and exclusions, so that whether or not specified conduct is the practice of law such exceptions "are not prohibited." § 3-1004 "Exceptions and exclusions" (exceptions including title insurance companies, certain real estate work, lobbying and sale of legal forms).

Washington State has a similar definition to Nebraska, and also provides for exceptions. Washington State Courts General Rule 24 "Definition of the Practice of Law." Connecticut's definition is similar (and its definition includes, but is not *limited* to, the specified conduct), although it adds specific reference to advising in any transaction in which an interest in property is transferred. CT Rules of the Superior Court, Sec. 2-44A "Definition of the Practice of Law."

Utah is more succinct, defining the practice of law as "the representation of the interests of another person by informing, counseling, advising, assisting, advocating for or drafting documents for that person through application of the law and associated legal principles that that person's facts and circumstances." Utah Supreme Court Rules of Professional Practice, Chapter 13A, Rule 1.0(b)(1) "Authorization to Practice Law."

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10 The Task Force Web site is at http://www.abanet.org/cpr/model-def/home.html, with links to each state's definition.

11 Nebraska Supreme Court Rules, Chapter 3, Art. 10 "Unauthorized Practice of Law" *available at* http://www.supremecourt.ne.gov/rules/pdf/Ch3Art10.pdf.

Utah also, helpfully, includes a safe harbor list for nonlawyers ("Whether or not it constitutes the practice of law, the following activity by a nonlawyer, who is not otherwise claiming to be a lawyer or to be able to practice law, is permitted… ."). Rule 1.0(c) (exceptions including sale of legal forms, general legal information, provision of clerical assistance, service as a third-party neutral and participation in labor negotiations).

We can observe from our survey that Utah is the only state, of the four who have adopted definitions, whose definition purports to define the outer boundary of the practice of law (the other three states say that their definition "includes but is not limited to" the specified conduct). We can also observe that none of the four states define the practice of law to mean only the practice of the *law of their state.* Accord, *In re Matter of New York County Lawyers Association v. Roel*, 3 N.Y.2d 224 (1957) (Mexican lawyer advising on Mexican law in New York City need not be advising on New York law to violate the UPL prohibitions of Judiciary Law.) From the regulatory client-protection perspective, it may make sense to define the practice of law more broadly on the theory that protection of the public is accomplished through geographic accountability (lawyers in New York subject to New York, lawyers in New Jersey subject to New Jersey, and so on) as opposed to subject-matter accountability.

Unlike those states, New York does not have a single rule defining the practice of law, but we can piece the following statutory guidance together:

- New York Judiciary Law §478 states, in summary, that it is unlawful for a non-attorney to "practice or appear" as an attorney for someone else, "or to hold himself out to the public" as being licensed, but it does not define "practice."
- New York Judiciary Law §484 adds that "No [unlicensed] natural person shall ask or receive, directly or indirectly, compensation for appearing for a person other than himself as attorney in any court or before any magistrate, or for preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate, wills, codicils, or any other instrument affecting the disposition of property after death, or decedents' estates, or pleadings of any kind in any action brought before any court of record in this state, or make it a business to practice for another as an attorney in any court or before any magistrate."

New York Judiciary Law §485 makes violation of the above sections, as well as other related UPL laws, a misdemeanor.

In January of 2002, the New York State Bar Association House of Delegates considered the following definition (as proposed by the Association's Special Committee on the Law Governing Firm Structure and Operation) and declined to adopt it because of concerns about whether the statute would criminalize conduct currently permissible under New York law:

> "Practice of Law" means the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person. The practice of law includes, but is not limited to:
>
> a. the provision of advice involving the application of legal principles to specific facts or purposes;

b. the preparation of legal instruments of any character, including but not limited to pleadings and other papers incident to actions or proceedings, deeds, mortgages, assignments, discharges, leases, or other instruments affecting real estate, wills, codicils, trusts, or other instruments affecting the disposition of property after death; and documents or agreements which affect the legal rights of an entity or person.
c. except as otherwise authorized by law, the representation of the interest of another before any judicial, executive, or administrative tribunal.[12]

Of course, even if such a definition were adopted, it would by its terms include but *not be limited* to the conduct described. So one could know that certain activities would require a license but would still operate under a cloud of ambiguity as to others. Taking a step back, is this the best way to regulate lawyering? On the one hand, "lawyering" is a constantly evolving core of skills and analysis, and so one might argue that an open-ended definition is the best approach. However, the downside for nonlawyers and out-of-state lawyers is that such ambiguity leaves them guessing as to how authorities will know the practice of law when they see it. Of course, it is not possible to define every term, but it is in some sense comical that New York regulates "lawyers" and "the practice of law" without defining either term.

When ethics committees are asked about issues involving UPL, they are obligated under their respective bar association mandates to decline to opine (their mandates are generally limited to interpreting the New York Rules of Professional Conduct). For example, the New York State Bar Association's ethics committee was asked whether an out-of-state lawyer might serve as in-house counsel for a New York corporation and maintain an office in New York. The Committee's opinion responds that the inquiry "is a question of law, and is not answered by the New York Rules of Professional Conduct. The question is therefore beyond our jurisdiction and we offer no opinion on the question." The Committee went on to urge the courts and New York legislature to provide further guidance regarding whether and to what extent out-of-state lawyers are authorized to practice law in New York. N.Y.S. Bar Op. 835 (2009).[13]

If, as we have concluded, "lawyer" under Rule 5.5 means a New York lawyer, will a New York lawyer ever have reason to be concerned about New York's UPL regulations for purposes of Rule 5.5(a)? The only instance we can imagine is the New York lawyer who has been temporarily suspended from practice.

As for non-New York lawyers, the Court of Appeals has had occasion to rule on UPL matters. *El Gemayel v. Seaman,* 72 N.Y.2d 701, 707 (1988) involved a Lebanese lawyer who advised a client in New York by telephone regarding the progress of legal proceedings in Lebanon. The Court of Appeals held that such conduct, without more, did not constitute the "practice of law" in New York State. *Spivak v Sachs,*

12 ABA Task Force on the Model Definition of the Practice of Law Survey on State Definitions of the Practice of Law at 19, available at http://www.abanet.org/cpr/model-def/model_def_statutes.pdf, details state-by-state efforts to adopt a definition of the practice of law.

13 For a discussion of admitted lawyer who is considering a change in status from active to inactive, *see* Wally Larson, Jr., *Question of the Week—Unauthorized Practice of Law*, BNA Corporate Counsel Weekly (Dec. 16, 2009) at 383.

16 N.Y.2d 163 (1965) involved a California attorney who assisted a client in New York with her divorce by spending 14 days in New York attending meetings, reviewing draft separation agreements, discussing the clients' financial/custody problems, recommending a change of counsel and, opining on what would be the proper jurisdiction for the divorce action and related issues. There, the Court of Appeals said that the California attorney had crossed the line into practicing law in New York without authorization. *In re Matter of New York County Lawyers Association v. Roel*, 3 N.Y.2d 224 (1957) involved a Mexican lawyer advising members of the public on Mexican law within the City of New York. The Court of Appeals observed that the prohibition on unauthorized practice of law, does not refer to advising on New York law alone.

V.4 How Out-of-state Lawyers Tend to Get in Trouble

Although it is impossible to draw a bright line for New York or other states, as a general matter the easiest way to attract the attention of UPL authorities is by advertising in that state and hanging out a shingle in the state. Such actions are the equivalent of waving a red flag in front of a bull. And, as a practical matter, lawyers leave themselves vulnerable to complaint by opposing lawyers in contested matters when they cross state lines. Similarly, decisions on UPL tend to result from fee disputes in which clients cite the lawyer's lack of a license in the key jurisdiction as a basis for nonpayment, arguing that the engagement letter or oral fee agreement is unenforceable as a matter of policy. See e.g., *Alco Collections Inc. v. Poirer*, 680 So. 2d 735 (La. 1996), *Birbower v. Superior Court*, 949 P.2d 1 (Cal. 1998), *Spivak v. Sachs*, 211 N.E.2d 329 (1965).

V.5 Foreign Legal Consultants

While New York still lags behind the majority of states in permitting multi-jurisdictional practice, the courts deserve credit for providing an alternative to admission for non-U.S. lawyers, namely licensing as a "legal consultant" (called a "foreign legal consultant" in some other states). Part 521 of the Rules of the Court of Appeals for the Licensing of Legal Consultants[14] provide the conditions for a successful applicant: member in good standing of a jurisdiction with comparable professional requirements, three years of practice, moral character and fitness, and over 26 years of age. Sec. 521.1.

Obtaining a legal consultant license enables the holder to render legal services in New York subject to limitations such as not appearing in court and not preparing real estate, marital or estate-planning documents. A license-holder must also avoid advising on U.S. state or federal law "except on the basis of advice from a person duly qualified and entitled." Sec. 521.3.

14 *Available at* http://www.courts.state.ny.us/CTAPPS/521rules.htm.

In considering an application for this license, the courts are permitted to take into account whether a New York lawyer would have a reasonable opportunity to establish an office in the applicant's home jurisdiction. Sec. 521.1(b). Translation: if the applicant's home jurisdiction is not friendly to New York lawyers, New York will be less likely to provide a license.

V.6 What Does It Mean for a Lawyer to "aid a nonlawyer in the unauthorized practice of law"?

We make the same interpretational assumptions for Rule 5.5(b) as we do for 5.5(a), namely, defining a lawyer as a New York lawyer subject to New York's rules (so that a nonlawyer is someone otherwise qualified) and the practice of law is the ambiguous cloud of conduct described above, depending on the rules of the applicable jurisdiction.

So the remaining issue to determine is, assuming that a nonlawyer is engaged in the unauthorized practice of law, what does it mean for a lawyer to "aid" in such conduct? N.Y. State 809, ¶5 (2007) concluded that "aid" requires an "intention to *substantially* assist or cause another to commit an act that constitutes the unauthorized practice of law, as opposed to doing something for one's own purposes that *incidentally* permits the other person to commit that act." But see Arizona Opinion 99-07 (lawyers may not negotiate with party's nonlawyer adjuster). It also noted that in its previous opinions in which a violation was found, "the common thread was that the lawyer was engaging in an affirmative act that substantially enabled the non-lawyer to practice law and was done with the purpose and intent of doing so." *Id.* at ¶6. This is its footnote citation of those opinions:

> N.Y.S. Bar Op. 801 (2006) (lawyer may not partner with out-of-state attorney where that attorney would be engaging in UPL); N.Y.S. Bar Op 705 (1998) (explaining when lawyer may accept referrals from non-attorney tax reduction company); N.Y.S. Bar Op. 662 (1994) (lawyer may not affiliate with non-lawyer to represent homeowners in small claims proceeding to reduce real estate taxes); N.Y.S. Bar Op. 644 (1993) (lawyer may not form corporation with non-lawyer to assist homeowners in obtaining real estate tax reductions); N.Y.S. Bar Op. 633 (1992) (lawyer may not enter into contractual arrangement with non-lawyer corporation to provide debt consolidation service to debtors); N.Y.S. Bar Op. 618 (1991) (salaried lawyer may not remit legal fees to corporate employer); N.Y.S. Bar Op. 557 (1984) (lawyer may not form firm with non-lawyer accountant for purpose of providing legal services); N.Y.S. Bar Op. 423 (1975) (lawyer may not merge with a non-lawyer collection agency corporation); N.Y.S. Bar Op. 343 (1974) (lawyer may not delegate supervision of execution of will to paralegal); N.Y.S. Bar Op. 334 (1974) (lawyer may not continue to use suspended lawyer's name in firm name); N.Y.S. Bar Op. 304 (1973) (lawyer may not delegate taking of deposition to non-lawyer employee.)[15]

15 *Id.*, n.2.

The NYSBA Comments to Rule 5.5, cmt. [2], notes helpfully that a lawyer is permitted to employ the service of paraprofessionals and delegate functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. One hopes that employment would imply the ability to delegate (otherwise, employment wouldn't happen) but it can't hurt to make delegation explicitly permitted. It also seems redundant to require the lawyer to "retain responsibility" given that Rule 5.3(b) makes the supervising lawyer responsible.

As overseas outsourcing of paraprofessional tasks becomes increasingly prevalent, a variety of issues present themselves for consideration. The Professional Responsibility Committee of the New York City Bar Association issued a helpful report in August of 2009 on outsourcing issues, ranging from supervision, confidentiality, conflicts, disclosure, and UPL.[16] On UPL, the report advises that the lawyer retain complete responsibility for the foreign professional and thus use judgment in setting the appropriate scope of delegation and then appropriately vet the work after completion to ensure its quality. See also N.Y.C. Bar Op. 2006-3 (2006) (describing the circumstances under which a New York lawyer may outsource legal support services overseas to a nonlawyer).

N.Y.S. Bar Op. 801 (2006) addressed the question of whether a lawyer may form a professional partnership with an attorney who is admitted in another state, but not in New York, where the out-of-state attorney would work exclusively on matters arising in New York from a New York office. Not surprisingly, the answer was no, because the out-of-state lawyer would be violating New York's UPL laws. Moreover, the committee noted that if the out-of-state lawyer limited activities to those permitted of a nonlawyer, such as a paralegal (in a sense, accepting nonlawyer status), then the New York lawyer would violate a different rule, Rule 5.4(a), by sharing fees with a nonlawyer.

N.Y.C. Bar Op.1998-1 (1998) addressed the question of under what circumstances, if any, a New York lawyer could employ a disbarred or suspended attorney to work in a law office. That ethics committee concluded that such employment is improper if the employment is "related to the practice of law" and then reminded lawyers that UPL is a question of law, not ethics. The opinion cites various cases to illustrate conduct that New York courts have found to be UPL when performed by disbarred or suspended "lawyers," including appearing as associate counsel, trying a case or drafting court complaints, permitting use of name as counsel in a litigation, serving as "house counsel", making determinations to initiate actions at law and settle collection claims, issuing subpoenas and disposing of applications for adjournments.

In summary, how does a New York lawyer get into trouble here? The main ways are:

1. over-delegation of tasks to nonlawyers that should only be performed directly by lawyers,
2. associating with out-of-state lawyers who in turn engage in UPL in New York, and
3. working with or hiring suspended or disbarred attorneys.

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16 Report on the Outsourcing of Legal Services Overseas, Association of the Bar of the City of New York, Committee on Professional Responsibility, *available at* http://www.nycbar.org/pdf/report/uploads/20071813-ReportontheOutsourcingofLegalServicesOverseas.pdf.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 What Does it Mean to "practice law?"

N.Y.S. Bar Op. 705 (1998) (provided that a tax reduction company is not engaged in the unauthorized practice of law, a lawyer may accept referrals from the company. Even if the company was engaged in prohibited conduct, the lawyer might be able to provide legal services to the property owner who retained the company without violating former DR 3-101.).

N.Y.C Bar Op. 1998-01 (1998) (analyzing the circumstances under which a lawyer may employ a disbarred or suspended lawyer and concluding that employment in any capacity related to the practice of law is clearly improper).

NYCLA Bar Op. 720 (1996) (provided that a lawyer supervises the work of a nonlawyer consultant a lawyer may employ the consultant to provide a range of services relating to advertising and the solicitation of clients). Accord NYCLA Bar Op. 713 (1996) (delegation to a nonlawyer pension plan expert).

N.Y.C. Bar Op. 1995-11 (1995) (analyzing the type of services a paralegal may perform subject to a lawyer's supervision).

N.Y.S. Bar Op. 677 (1995) (lawyer may delegate attendance at a real estate closing to a paralegal, but the lawyer must supervise the paralegal and continue the lawyer's direct relationship with the client).

N.Y.S. Bar Op. 633 (1992) (law firm may not enter into arrangement with staff leasing company to provide debt consolidation services to law firm's clients, if the law firm does not supervise work or maintain direct relationship with clients).

VI.2 How out-of-state lawyers Get into Trouble

Nassau County Bar Op. 98-8 (1998) (lawyer does not violate former DR 3-101 by giving legal advice and drafting a trust and will and selected documents in New York for a Florida resident in consultation with a Florida lawyer whose services are disclosed to, and paid by, the client. The Committee has no jurisdiction or competence to answer questions of Florida law relating to the "practice of law" within that state.).

VI.3 Aiding the Unauthorized Practice of Law

N.Y.S. Bar Op. 835 (2009) (in addressing the UPL question of a non-New York lawyer serving as general counsel for a New York corporation, it was noted that the term out-of-state lawyer is not defined in the Rules but for purposes of the opinion defined it to mean a person who is not admitted to practice in New York but is admitted to practice and in good standing in another U.S. jurisdiction).

N.Y.S. Bar Op. 832 (2009) (where a lawyer provides nonlegal services, but no legal services, to people, but the attorney's status as an attorney is visible to the general public, the recipients of the nonlegal services could reasonably believe that there is an attorney-client relationship. Thus absent a disclaimer or other steps, Rule 5.7 would apply.).

N.Y.S. Bar Op. 809 (2007) (lawyer who continues to represent a client in a transaction in which the counter-party is represented by a nonlawyer is not thereby aiding the unauthorized practice of law).

N.Y.S. Bar Op. 803 (2006) (describing the circumstances under which a law firm whose lawyers are admitted to practice in New York State may engage in debt collection activities outside the state that do not constitute the unauthorized practice of law).

N.Y.S. Bar Op. 801 (2006) (it is not proper for a New York attorney to partner with an out-of-state attorney if the services performed by such attorney are the unauthorized practice of law).

N.Y.S. Bar Op. 799 (2006) (under certain circumstances, a Web site that purports to analyze potential clients' legal problems may be engaged in the unauthorized practice of law.)

N.Y.C. Bar Op. 2006-03 (2006) (describing the circumstances under which a New York lawyer may outsource legal support services overseas to a nonlawyer).

N.Y.S. Bar Op. 721 (1999) (lawyer hired by an insurance carrier to represent an insured may, as directed by the insurance company, use the services of a legal research firm provided that the lawyer supervises the work of the legal research firm. In the absence of supervision, the lawyer would be assisting the legal research firm in the unauthorized practice of law.).

N.Y.S. Bar Op. 709 (1999) (if a lawyer licensed only in New York offers legal services over the Internet to out-of-state clients the lawyer's conduct may raise unauthorized practice of law issues).

Nassau County Bar Op. 97-6 (1997) (lawyer concentrating in elder law may not rent space from, nor engage in marketing with, a for-profit enterprise that would advertise a "multi-disciplinary approach to gerontology" and rent space to other professionals with a related expertise such as a psychologist, financial planner, and geriatric care manager. The lawyer's participation might facilitate the enterprises' holding itself out as "practicing law.").

Nassau County Bar Op. 92-26 (1992) (lawyer does not violate former DR 3-101 by accepting referrals directly from a nonlawyer property tax assessment and reduction firm provided that the client has authorized the firm to make the selection and the lawyer exercises independent professional judgment on the client's behalf).

Nassau County Bar Op. 92-15 (1992) (lawyer would likely violate former DR 3-101 by employing a disbarred lawyer as paralegal whose functions would include drafting, research, and the organization of files).

VII. ANNOTATIONS OF CASES

VII.1 Aiding the Unauthorized Practice of Law

New York: Matter of Tavon, 884 N.Y.S.2d 111 (App. Div., 2d Dept. 2009) (suspended lawyer who instituted legal action violated former DR 3-101).

Matter of Garas, 65 A.D.3d 164, 881 N.Y.S.2d 744 (4th Dept. 2009) (attorney forming professional corporation with nonlawyer violated former DR 3-101).

Matter of Jones, 60 A.D.3d 212, 872 N.Y.S.2d 44 (1st Dept. 2009) (reciprocal discipline to New York lawyer holding himself out as authorized to practice in New Jersey when he was unauthorized to practice there at the time).

Matter of Hancock, 55 A.D.3d 216, 863 N.Y.S.2d 804 (2d Dept. 2008) (aiding unauthorized practice of law by disbarred attorney).

Matter of LaMattina, 51 A.D.3d 371, 858 N.Y.S.2d 222 (2d Dept. 2008) (attorney forming professional corporation with nonlawyer violated former DR 3-101).

Matter of Rubenstein, 50 A.D.3d 74, 850 N.Y.S.2d 584 (2d Dept. 2008) (aiding unauthorized practice of law where attorney acted as employee of company owned by nonlawyer).

Matter of Lefkowitz, 47 A.D.3d 326, 848 N.Y.S.2d 76 (1st Dept. 2007) (aiding unauthorized practice of law in relation to immigration cases).

Matter of Goel, 46 A.D.3d 26, 844 N.Y.S.2d 537 (4th Dept. 2007) (aiding in the unauthorized practice of law where disbarred attorney assisted his wife in her practice).

Matter of Rodkin, 21 A.D.3d 111, 798 N.Y.S.2d 430 (1st Dept. 2005) (aiding in the unauthorized practice of law where attorney served as a "front" in immigration cases and had no direct relationship with clients).

Matter of Meltzer, 293 A.D.2d 202, 741 N.Y.S.2d 240 (1st Dept. 2002) (aiding in unauthorized practice of law where attorney formed professional corporation with nonlawyer and nonlawyer performed legal services).

Matter of Haas, 237 A.D.2d 729, 654 N.Y.S.2d 479 (3d Dept. 1997) (attorney performed unauthorized practice of law where he practiced law in New York without having an office there).

People v. Romero, 91 N.Y.2d 750, 675 N.Y.S.2d 588, 91 N.Y.2d 750, 675 N.Y.S.2d 588 (1998) (authority of the Attorney General to maintain an "action" to prohibit the unauthorized practice of law pursuant to Section 476-(a) of the Judiciary Law is limited to the maintenance of a civil action and does not encompass a criminal action).

In re Scheck, 171 A.D.2d 33, 574 N.Y.S.2d 372 (2d Dept. 1991) (court disciplined a lawyer for, inter alia, failing to supervise the employees of a collection agency who acted in the lawyer's name and for permitting the agency to use the lawyer's name, letterhead, and signature without the lawyer personally reviewing the correspondence).

El Gemayel v. Seaman, 72 N.Y.2d 701, 533 N.E.2d 245, 536 N.Y.S.2d 406 (1988) (Lebanese lawyer who advised a client in New York by telephone and did not visit the state did not violate Section 478 of the Judiciary Law and was therefore entitled to collect his legal fee).

NYCLA v. Dacey, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967) (nonlawyer did not engage in the unauthorized practice of law by publishing the book *How to Avoid Probate*).

Federal: In re Jaffe, 585 F.3d 118 (2d Cir. 2009) (where a lawyer filed briefs drafted by unsupervised law students, she aided in the unauthorized practice of law in violation of former DR 3-101(a) and former DR 1-104(D)).

Matter of Saghir, 632 F. Supp. 2d 328 (S.D.N.Y. 2009) (lawyer aided in unauthorized practice of law by paying inmate to prepare documents for other inmate clients).

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Rule 5.6: Restrictions on Right to Practice

I. TEXT OF RULE 5.6[1]

(a) A lawyer shall not participate in offering or making:

(1) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(2) an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy.

(b) This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

II. NYSBA COMMENTARY

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (a)(2) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17. [text to be supplied]

1 Rules Editor John Horan, Fox Horan and Camerini; and Executive Editor Wallace Larson, Jr., Cleary Gottlieb Steen & Hamilton LLP.

III. CROSS-REFERENCES

III.1 Former New York State Code of Professional Responsibility

Rule 5.6 is in substance the same as DR 2-108(A).

III.2 ABA Model Rules:

ABA Model Rules of Professional Conduct, Rule 5.6 (a).

IV. PRACTICE POINTERS

1. If an attorney is leaving a firm and the firm insists on drafting an agreement which will affect the way the lawyer continues to practice law, understand that Rule 5.6 and former DR 2-108 essentially make any restrictions to the right to practice law illegal.
2. If proposed restrictions are presented in an agreement which are tied to retirement, withdrawal, or fees previously earned, they may or may not pass muster under Rule 5.6(a)(1). Make a careful review of the Ethics Opinions and case law to determine the validity of the restrictions.[2]
3. Restrictions on the taking of clients when a partner departs are particularly suspect and will likely be unenforceable.[3]

V. ANALYSIS

V.1 Purpose of Rule 5.6

New York Rule 5.6 is substantially similar to its predecessor, DR 2-108 "Agreements Restricting the Practice of a Lawyer." New York Rule 5.6 section (a)(1) is almost identical to ABA Rule 5.6(a) and section (a)(2) is identical to ABA Rule 5.6(b). In moving from the Model Code to the Model Rule format in April 2009, New York added a new section (b) to Rule 5.6, thereby codifying cmt. [3], which is common and identical to both New York and ABA versions of the Rule. Cmts. [1] and [2] are

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2 *See* Cohen v. Lord, Day & Lord, 75 N.Y. 2d 95, 551 N.Y.S.2d 157 (1989) (the law firm's partnership agreement provided for a forfeiture of certain payments for competition and was found to violate former DR 2-108).

3 *See* Peroff v. Liddy, Sullivan, Galway, Begler & Peroff, P.C., 852 F. Supp. 239 (S.D.N.Y. 1994) (a provision in a partnership agreement financially penalized a withdrawing partner whose clients followed him to a new law firm was held to violate former DR 2-108 and was therefore unenforceable).

likewise common to both versions, and are identical except for New York's cmt.[2] reference to paragraph "(a)(2)" is paragraph "(b)" in the ABA version.

The report of the New York State Bar Association committee charged with proposing a complete batch of amended rules[4] summarized Rule 5.6 as follows: "Rule 5.6 prohibits non-compete agreements upon leaving a law firm, if made with associates or other lawyer-employees." It also noted that the Rule "continues the traditional limitation on entering into 'no-sue' agreements as part of the settlement of a lawsuit."[5] That committee had proposed only restricting operating agreements that "unreasonably" restrict a lawyer's right to practice, but the Association chose to recommend prohibiting *all* such agreements unless concerning benefits upon retirement,[6] a recommendation ultimately adopted by the Appellate Division of State Supreme Court.

To whom does this Rule 5.6 apply? Rather than repeating the discussion in Rule 5.5 about the alternative constructions of the term "lawyer" in the New York Rules of Professional Conduct, we will simply note that the term "lawyer" can mean different things for the purposes of different rules. And, as with Rule 5.5, we conclude from context that it only makes sense to apply Rule 5.6 solely to *New York* lawyers subject to the New York Rules of Professional Conduct.[7]

The title to the Rule is apt, but it is curious that both the title and substance refer to restrictions on "the right of a lawyer to practice" as opposed to restrictions on the lawyer's "ability" to practice. Curious because we don't normally speak of law practice using the language of rights. While most other references to "rights" in the Rules are references to clients' rights, Rule 7.1(r) refers to a lawyer's "right to accept employment" and Rule 3.5, cmt. [4] refers to an "advocate's right to speak on behalf of litigants." Paragraph 4 of the Preamble to the Rules notes that "abuse of legal authority is more readily challenged by a profession whose members are not dependent on the government for the *right* to practice law." (Emphasis added). While a lawyer's right to practice law is not a right specified in the U.S. Constitution, it is a power granted by the courts (as opposed to the executive or legislative branches, as noted by the Preamble) upon a lawyer's admission as an attorney at law.

Boiling Rule 5.6(a) down to its essence, a lawyer is prohibited from agreeing or offering to agree to a restriction on the lawyer's law practice in the context of partnership or employment, under section (a)(1), or client settlements under (a)(2).

Rule 5.6(b) codifies what the ABA included solely as a comment; the New York approach seems superior in light of the fact that the New York Appellate Division

4 The Committee on Standards of Attorney Conduct (COSAC).

5 Proposed New York Rules of Professional Conduct, v. 1, Report and Recommendations of Committee on Standards of Attorney Conduct, New York State Bar Association at 370 (Albany, New York Sept. 30, 2005).

6 Proposed Rules of Professional Conduct, New York State Bar Association at 185 (Albany, New York Feb. 1, 2008).

7 Rule 8.5(a) states that "A lawyer admitted to practice in this state is subject to the disciplinary authority of this state". If a lawyer is admitted in both New York and another jurisdiction, Rule 8.5(b) applies the rules of the jurisdiction in which the lawyer "principally practices" unless the conduct "clearly has its predominant effect" in the jurisdiction, the rules of that jurisdiction apply.

adopted the black letter of the Rules while the comments were adopted by the New York State Bar Association, which gives them persuasive authority but not disciplinary authority. New York's black-letter approach, of putting the exception in the text of the rule rather than relegating it to a comment, gives the idea of non-contradiction with Rule 1.17 greater power and clarity. Rule 1.17(a) states that in the sale of a law practice "the seller and the buyer may agree on reasonable restrictions on the seller's private practice of law, notwithstanding any other provision of these Rules." One can understand why a non-compete agreement might be integral in such contexts: if the selling lawyer moves next door and hangs out a shingle to compete, the old firm under new management might find its clients bolting. In order to induce the buyer to purchase, a lawyer selling his or her practice may find it necessary to be able to offer such a restriction (called "gardening leave" in the United Kingdom, we are told).

So the crux of Rule 5.6 resides in its section (a). What does it mean for a lawyer to "participate in offering or making" one of the prohibited type of agreements? The prohibition applies "to a lawyer who would propose or offer such an agreement and to a lawyer who would accept it." N.Y.S. Bar Op. 730 (2000) (analysis of predecessor to Rule 5.6(a)(2)); *see also* N.Y.C. Bar Op.1999-3 (1999) (the rule "is directed to lawyers on both sides of the restrictive agreement"). It has been noted that section (a)(1) is broader than (a)(2) in that the first applies to a restriction on *any* lawyer's practice, whereas (a)(2) only applies to a lawyer's self-imposed restriction. N.Y.C. Bar Op. 1999-3 (1999).

The predecessor to Rule 5.6(a)(1) was the subject of a brief 1970 advisory opinion of the New York State Bar Association ethics committee. The opinion addressed the question of whether a partnership agreement may restrict a lawyer who leaves the partnership from accepting employment by persons who were, until that departure, clients of the partnership and, under the plain reading of the rule (then DR 2-108(A)) concluded that the proposed term of the partnership agreement would violate the rule. N.Y.S. Bar Op. 129 (1970). Not all cases are so straightforward, as section (a)(1) can raise certain interpretational questions which we address below.

V.2 What is the Universe of Agreements Contemplated by "partnership, shareholder, operating, employment, or other similar type of agreement" in (a)(1)?

Practicing lawyers are generally either owners of a law practice or employees of a law practice or law department. Partnership, shareholder, and operating agreements are different types of governing documents of a law firm, so the universe encompasses law firm operating agreements whether in partnership form, corporate form,[8] or other forms permitted in New York State. Employment agreements are self-explanatory.

8 Although Judiciary Law §495 generally prohibits corporations from engaging in the practice of law, it does provide an exception for corporations organized under Articles 15 (Professional Service Corporations) and 15A (Foreign Professional Service Corporations). Judiciary Law §495(6).

"Other similar type of agreement" would presumably be an agreement that either (i) governs the law firm, if the lawyer is an owner or (ii) governs the lawyer's employment when the lawyer is an employee. A provision would thus not become valid, one imagines, simply because it was tucked inside an agreement regarding some other subject matter.

What about the parent who despises lawyers so much[9] that his will stipulates that off-spring will each receive an annual stipend provided the offspring *are not practicing law*! Would lawyer-offspring be prohibited from complying and then accepting the stipend? Because the provision is not related to firm governance or employment, it would appear not to implicate the rule.

V.3 What Does it Mean for an Agreement to Restrict the Lawyer's Right to Practice?

[a] in General The prohibition extends beyond non-competes to agreements that have the effect of *discouraging practice*. For example, in *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 96 (1989), the New York Court of Appeals considered a partnership provision that conditioned payment of earned but uncollected partnership revenues upon a partner's departure for a law firm in the same area. The departing partner argued that the restriction was unenforceable because it violated Rule 5.6(a)(1); the law firm argued that the Rule condemns "only blanket prohibitions on a lawyer's practice of law in a community," not economic disincentives. Id. at 99. Holding for the departing partner, the court noted that "if financial penalties were not 'restraints' within the meaning of the rule, there would be no need to exempt the specific category of financial arrangements dealing with retirement." Id. at 100.[10]

[b] Hackett v. Milbank In response to the ruling in *Cohen,* supra., a well-known law firm altered its partnership agreement (which previously stated that only withdrawing partners retiring from the practice of law were entitled to certain supplemental payments) to say that the payments were available to *all* withdrawing partners, whether retiring or entering new employment, although the payments would be reduced dollar-for-dollar to the extent the departing partners' annual earned income, from any source, exceeded $100,000. *Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146, 151 (1995).

A partner departed the firm and challenged the validity of the post-amendment partnership provision under Rule 5.6(a)(1). The challenge was heard in arbitration; we read about it because the arbitrator's decision was ultimately appealed to the Court of Appeals. That arbitrator noted that ""[t]he Partnership makes no bones about the fact that a primary motive for adopting the provisions of [the amendment] was to avoid payments to withdrawing partners who competed while at the same time

9 Unfortunately lawyers are not universally beloved.

10 It's not clear who the court was quoting for the term "restraints" (the term was not in the text of former DR 2-108(B) or its successor Rule 5.6(a)(1).

both (1) complying with [Rule 5.6(a)(1)] as interpreted in Cohen and (2) providing a 'safety net' for partners who left for lower-income pursuits." *Hackett* at 152. However, the arbitrator determined (i) that the payments were not intended to approximate the withdrawing partners' share of undistributed earned income and (ii) that the amendment was competition-neutral because the dollar-for-dollar reduction applied without regard for the withdrawing partner's earned income. The arbitrator read *Cohen* to require that a violation of Rule 5.6(a)(1) involves a "forfeiture of an interest already earned because of competition with the former firm" and concluded that the amended agreement was neither a forfeiture nor anti-competitive and thus remained enforceable against the departing partner. Id. at 154.

The New York Supreme Court disagreed with the arbitrator and vacated the award on the sole ground that it violated Rule 5.6(a) and was affirmed by the First Department. The Court of Appeals, however, reversed, saying that "an arbitrator's factual or legal determination is an evaluation of the competing labels and claims offered by the parties, and as such is not subject to judicial second-guessing, but only to a review to determine whether the award is on its face prohibited by public policy considerations… Accordingly, the only question before us is whether the courts below correctly concluded that the arbitrator's award violated public policy." The Court concluded that the arbitrator's award factually and legally answered the public policy challenge, saying "Whether or not we agree with [the arbitrator's] findings and conclusions, the award does not on its fact clearly violate public policy, and should not have been vacated on that basis." *Hackett* at 158.

It is instructive to note how the Court of Appeals in *Hackett* distinguished the Milbank partnership provision from the ones it held invalid in *Cohen* and *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375 (1993):

> Unlike the clauses disapproved in *Cohen* and in *Denburg*, the Milbank, Tweed supplemental payment provision is not inevitably anticompetitive on its face. Where the Parker Chapin clause clearly discriminated between partners departing for private practice and those, for example, entering academia or government service, [Milbank's provision] makes no such distinction: the reduction in supplemental payments applies to the withdrawing partner's earned income from any source. Where the Parker Chapin clause exempting lower-paid partners from the agreement was applicable only to those lower-paid partners who did not subsequently do work for former Parker Chapin clients, the Milbank, Tweed $ 100,000 cutoff applies to all withdrawing partners and no financial disincentive specifically devolves on partners withdrawing to compete with Milbank, Tweed in contrast to all other withdrawing partners.

Hackett at 156. The court also distinguished three New Jersey decisions and an Iowa decision cited by the departing partner in his unsuccessful argument against enforcement:

> In *Weiss v Carpenter, Bennett & Morrissey* (275 NJ Super 393, 646 A2d 473 [appeal pending]), the court ruled unenforceable a clause in a partnership agreement requiring a partner who withdraws for any reason other than death, disability or judicial appointment to forfeit shares of both capital equity and earnings; the

agreement thus discriminated against potentially competitive withdrawing partners. In *Katchen v Wolff & Samson* (258 NJ Super 474, 610 A2d 415, cert denied 130 NJ 599, 617 A2d 1222), the court ruled unenforceable a clause requiring forfeiture of a partner's equity interest on withdrawal, although it applied to all withdrawing partners; Katchen, however, involved a clear forfeiture of an equity interest already vested in the withdrawing partner. The arbitrator in fact specifically differentiated Katchen, and another New Jersey case (*Jacob v Norris, McLaughlin & Marcus*, 128 NJ 10, 607 A2d 142) on the basis that in those cases a withdrawing partner forfeited "an interest previously earned or acquired." Similarly, *Anderson v Aspelmeier, Fisch & Power* (461 NW2d 598 [Iowa]) involved the forfeiture of a withdrawing partner's equity interest.

Hackett at n.4.

The full spectrum of provisions that might be analyzed as a potential restriction on a lawyer's right to practice is limitless, but what we can draw from *Hackett* is that a provision will certainly violate Rule 5.6(a)(1) if it involves a forfeiture and is explicitly written to discriminate between lawyers who compete and those who do not, upon departure from ownership or employment.

V.4 What Does the Exception for "benefits upon retirement" Encompass?

The NYSBA Comments to Rule 5.6, cmt. [1] rephrases (a)(1)'s reference to benefits as follows: "restrictions incident to provisions concerning retirement benefits for service with the firm." In other words, it is permitted for a law firm to have a "retirement plan," and to condition payments from that plan on the lawyer's actual retirement from the practice of law. Although the term "retirement" has come to have a vague meaning in the world of professional sports (stars "retiring" and then "coming out of retirement"), it seems clear that retirement for these purposes means that the lawyer is no longer practicing law.[11] See *McDonough v. Bower & Gardner*, 226 A.D.2d 600 (2d Dept. 1996) (finding that an "earned but uncollected sum" owed to a departing lawyer during the lawyer's tenure with the firm "does not represent a future, anticipated distribution in contemplation of retirement" and thus is not a retirement benefit under Rule 5.6(a)(2)). As the Court of Appeals said in *Cohen*, "to treat departure compensation as a retirement benefit would invert the exception into the general rule, thus significantly undermining the prohibition against restraints on lawyers practicing law." *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 100 (1989).

The Restatement, Third, of the Law Governing Lawyers notes that the retirement exception "has been held to apply only to bona fide retirements at the end of a career

11 At the date of writing, the Office of Court Administration has changed the rules to add a new category of lawyer called "attorney emeritus" (previously lawyers were either active or retired), which will permit a "retired" lawyer to practice solely under the auspices of a qualified legal services provider in New York State. William Glaberson, *Courts Seek More Lawyers to Help the Poor*, N.Y. Times Jan. 7, 2010, at A26.

of practice, citing *Miller v. Foulston, Siefkin, Powers & Eberhardt*, 790 P.2d 404 (Kan. 1990). §13, rn. b. We agree with others that it "does not mean any and all payments upon retirement," but rather "refers to amounts separately owed the departing lawyer out of the firm's retirement plan, over and above any other money due" (not payment for the departing lawyer's interest in the firm's capital account or earnings not yet collected or distributed). Annotated Model Rules of Professional Conduct (5th Ed.), ABA Center for Professional Responsibility at 494-5.

V.5 What Does it Mean to "restrict a lawyer's practice" for Purposes of (a)(2)?

The ethics committee of the New York State Bar Association provided helpful guidance in a 2000 advisory opinion. The opinion addressed the question of whether an attorney for a plaintiff-employee in an employment discrimination case may agree, as part of the settlement, "not to disclose any information concerning" the settlement, the defendant corporation's business or the termination of the plaintiff's employment. The committee opined that the predecessor to Rule 5.6(a)(2) was intended to accomplish three goals: (1) to preserve public access to lawyers of their choice, (2) to prevent parties from "buying off" opposing lawyers and (3) to prevent a conflict between a lawyer's present client and future ones. It noted that the rule would, in the employment discrimination context, "prohibit an agreement by the employee's lawyer not to represent other employees in claims of discrimination against the defendant employer." N.Y.S. Bar Op. 730 (2000).

The Committee concluded that, to the extent information covered by the agreement would fall within the lawyer's duty of confidentiality to the client, there would be no violation. However, if a settlement were to require the lawyer to keep information confidential "for the opposing party's benefit" that the lawyer ordinarily would have no duty to protect, then the restriction would violate the rule's purposes. Applying those principles to the facts of the inquiry, the committee concluded that the proposed settlement terms would violate the rule because they seemed to apply to information that the lawyer would not ordinarily need to keep confidential, such as information about the defendant corporation that would be public information. It appears that the committee's main concern was *how* the lawyer came across the information, so that if the proposed settlement term had been limited to information *gained by the lawyer in the course of the litigation*, that there would have been no violation. N.Y.S. Bar Op. 730 (2000); see also Nassau County Bar Op. 92-36 (1992) (firm may use confidentiality agreements that restrict the use of confidential information by the firm's lawyers either during employment or in solicitation of clients once the lawyer has left the firm).

By footnote, the committee added a helpful clarification/reminder: that by its terms (a)(2) only applies to settlements, and therefore does not restrict a lawyer and client from entering into an engagement letter that addresses future conflicts of interest. N.Y.S. Bar Op. 730 (2000), n.1.

The ethics committee of the New York City Bar Association has noted in an advisory opinion that, under the predecessor to Rule 5.6(a)(2), a lawyer may not enter into a settlement agreement that would restrict the lawyer's ability to represent the same client or other clients in disputes against the same party. N.Y.C. Bar Op. 1993-3 (1993). The opinion began by discussing a 1997 decision of the Appellate Division, *Feldman v. Minars*, 230 A.D. 356, (1st Dept. 1997), in which the court disqualified plaintiff's counsel because their representation violated the settlement action in a prior action. Even though the court enforced the agreement,[12] it apparently noted that a strong case could be made that the agreement violated the ethical rule and left such decision to the "appropriate disciplinary authorities." Id. That court called into question the rule's public policy benefits, as did the court more recently in *Bassman v. Fleet Bank*, N.Y.L.J., Aug. 25, 2000 at 26, col. 6 (Sup. Ct. N.Y. Co.) (Ramos, J.).[13]

Section (a)(2) tends not to be embraced with open arms by judges, especially when it is viewed as interfering with the needs of the many plaintiffs in a large case, which may lead a judge to allow increased latitude or creativity in navigating the Rule.

Although the following was not a New York matter, it illustrates the reality of mass tort litigation. On November 9, 2007, Merck & Co., Inc., signed a settlement agreement between itself and negotiating plaintiffs' counsel for a private settlement program in the amount of $4.85 billion.[14] The settlement relates to various alleged complications stemming from the drug Vioxx. Counsel who signed the agreement agreed to submit enrollment forms for eligible client-claimants on a rolling basis.

However, the agreement has an intriguing wrinkle: it required that participating counsel obtain 100% participation by the Vioxx clients in their care and specified that if some of a lawyer's Vioxx clients refused to participate in the settlement, that such lawyer would be required to withdraw from those clients "*to the extent permitted by the equivalents of Rules 1.16 and 5.6 of the ABA Model Rules* of Professional Conduct in the relevant jurisdictions*."*.[15] The agreement was amended January 17, 2008 to add

12 As quoted in the City Bar opinion, the applicable language of the agreement read as follows: "[Neither the settling plaintiff's law] firm, nor any of its employees, agents, or representatives will assist or cooperate with any other parties or attorneys in any… action against the settling defendants arising out of, or related in any way to the investments at issue in the actions or any other offerings heretofore or hereafter made by the settling defendants… nor shall they encourage any other parties or attorneys to commence such action or proceeding." N.Y.C. Bar Op. 1999-3, quoting Feldman v. Minars, 230 A.D.2d 356, 357, 658 N.Y.S.2d 614, 615 (1st Dept. 1997).

13 Proposed New York Rules of Professional Conduct, v. 1, Report and Recommendations of Committee on Standards of Attorney Conduct, New York State Bar Association at 373 (Albany, New York Sept. 30, 2005).

14 Alex Berenson, *Merck Agrees to Settle Vioxx Suits for $4.85 Billion*, N.Y. Times Nov. 9, 2007.

15 Sections 1.2.8.1 and 1.2.8.2 of Settlement Agreement between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Thereto Dated as of November 9, 2007, *available at* http://www.merck.com/newsroom/vioxx/pdf/Settlement_Agreement.pdf (emphasis added).

that "Each Enrolling Counsel is expected to exercise his or her independent judgment in the best interest of each client individually before determining whether to recommend enrollment in the Program."[16] Judge Eldon E. Fallon of Federal District Court in new Orleans was quoted as saying that "I'm satisfied that nothing in the agreement imposes on a lawyer any impermissible restriction on the practice of law."[17]

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 What Does It Mean for an Agreement to Restrict the Lawyer's Right to Practice?

Nassau County Bar Op. 92-36 (1992) (an employment agreement in which a lawyer agrees to certain restrictions on the use of confidential information after the employment ends does not necessarily violate DR 2-108).

VI.2 What Does it Mean to "restrict a lawyer's practice" for Purposes of (a)(2)?

N.Y.C. Bar Op. 1999-03 (1999) (as a matter of ethics, a lawyer may not enter into a settlement agreement that restricts her own or another lawyer's ability to represent one or more clients, even if such an agreement may be enforceable as a matter of law).

VII. ANNOTATIONS OF CASES

VII.1 What is the Universe of Agreements Contemplated by "partnership, shareholder, operating, employment, or other similar type of agreement" in (a)(1)?

Nixon Peabody LLP v. De Senilhes, Valsamdidis, Amsallem, Jonath, Flaicher Associes, 20 Misc. 3d 1145(A), 873 N.Y.S.2d 235 (N.Y. Ct. 2008) (agreement between NY and French law firm not to solicit lawyers from each other's firm violated former DR 2-108).

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16 Section 1.22 to Amendment to Settlement Agreement, dated as of January 17, 2008 between Merck & Co., Inc. and the counsel listed in the signature pages thereto, available at http://www.merck.com/newsroom/vioxx/pdf/Amendment_to_Settlement_Agreement.pdf.

17 Adam Liptak, *Sidebar: In Vioxx Settlement, Testing a Legal Ideal: A Lawyer's Loyalty*, N.Y. Times Jan. 22, 2008.

VII.2 What Does It Mean for an Agreement to Restrict the Lawyer's Right to Practice?

New York: Gibbs v. Breed Abbott & Morgan, 271 A.D.2d 180, 710 N.Y.S.2d 578 (1st Dept. 2000) (law firm partner may not use confidential information to solicit firm employees to depart firm with him especially since he had not informed firm of his intent to leave).

Sage v, Polansky, 251 A.D.2d 567, 673 N.Y.S.2d 614 (2d Dept. 1998) (partnership provision restricted practice of law).

Rotenberg v. Chamberlain D'Amanda Oppenheimer & Greenfield, 248 A.D.2d 1021, 670 N.Y.S.2d 643 (4th Dept. 1998) (partnership agreement restricting compensation to capital contribution did not restrict withdrawing partner's ability to practice law. Provision was not a "financial disincentive" to competition, as it applied to all withdrawing partners whether they intended to continue practicing or not.).

Feldman v, Minars, 230 A.D.2d 356, 658 N.Y.S. 614 (1st Dept. 1997) (attorney disqualified pursuant to settlement agreement distinguishing case from *Cohen v. Lord, Day & Lord LLP).*

Hackett v. Milbank, Tweed, Hadley & McCloy, 86 N.Y.2d 146, 654 N.E.2d 95, 630 N.Y.S.2d 274 (1995) (influenced significantly by a public policy supportive of arbitration, the Court of Appeals reinstated an arbitrator's determination that a partnership agreement's "dollar-for-dollar reduction" provision relating to compensation for withdrawing partners who continued to practice did not violate former DR 2-108).

Judge v. Bartlett, Pontiff, Stewart & Rhodes, 197 A.D.2d 148, 610 N.Y.S.2d 412 (3d Dept. 1994) (termination pay provision of an employment agreement violated former DR 2-108 by placing a geographic limitation on a departing lawyer's right to practice and imposing a monetary penalty for violation of the provision).

Denburg v. Parker, Chapin Flattau & Klimpl, 82 N.Y.2d 375, 604 N.E.2d 900, 624 N.Y.S.2d 995 (1993) (partnership agreement requiring withdrawing partner to pay the greater of either 12.5% of the withdrawing partner's share of the law firm's profits over the last two years or 12.5% of the withdrawing partner's billings to the firm's former clients for the next two years violated former DR 2-108).

Cohen v. Lord, Day & Lord, 75 N.Y.2d 95, 550 N.E.2d 410, 551 N.Y.S.2d 157 (1989) (law firm's partnership agreement violated former DR 2-108 because its forfeiture for competition provision constituted an impermissible restriction on the practice of law).

Federal: Peroff v. Liddy, Sullivan, Galway, Begler & Peroff, P.C., 852 F. Supp. 239 (S.D.N.Y. 1994) (provision in a partnership agreement financially penalizing a withdrawing partner who took clients with him to a new law firm violated DR 2-108 and was therefore unenforceable).

VII.3 What does the Exception for "benefits upon retirement" Encompass?

McDonough v. Bower & Gardner, 226 A.D.2d 600, 641 N.Y.S.2d 391 (2d Dept. 1996) ("Special Departure Distribution" in a partnership agreement was not a valid retirement benefit and therefore violated former DR 2-108).

VII.4 What Does It Mean to "restrict a lawyer's practice" for Purposes of (a)(2)?

Tradewinds Airkines, Unc. V. Soros, 2009 WL 1321695 (S.D.N.Y. 2009) (confidentiality provision in settlement agreement would violate former DR 2-108 if it prevented lawyer from representing clients).

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Rule 5.7: Responsibilities Regarding Nonlegal Services

I. TEXT OF RULE 5.7[1]

(a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

(1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.

(2) A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is *de minimis*.

1 Rules Editor John Horan, Fox Horan and Camerini; and Executive Editor Wallace Larson, Jr., Cleary Gottlieb Steen & Hamilton LLP.

(b) Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under Rule 1.6(a) and (c) with respect to the confidential information of a client receiving legal services.

(c) For purposes of this Rule, "nonlegal services" shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.

II. NYSBA COMMENTARY

[1] For many years, lawyers have provided nonlegal services to their clients. By participating in the delivery of these services, lawyers can serve a broad range of economic and other interests of clients. Whenever a lawyer directly provides nonlegal services, the lawyer must avoid confusion on the part of the client as to the nature of the lawyer's role, so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that ordinarily accompany a client-lawyer relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services when that may not be the case. The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter. Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, the recipient is likely to be confused as to whether and when the relationship is protected as a client-lawyer relationship. Therefore, where the legal and nonlegal services are not distinct, paragraph (a)(1) requires that the lawyer providing nonlegal services adhere to all of the requirements of these Rules with respect to the nonlegal services. Paragraph (a)(1) applies to the provision of nonlegal services by a law firm if the person for whom the nonlegal services are being performed is also receiving legal services from the firm that are not distinct from the nonlegal services.

[2] Even when the lawyer believes that the provision of nonlegal services is distinct from any legal services being provided, there is still a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of a client-lawyer relationship. Therefore, paragraph (a)(2) requires that the lawyer providing the nonlegal services adhere to these Rules, unless the person understands that the nonlegal services are not the subject of a client-lawyer relationship. Nonlegal services also may be provided through an entity with which a lawyer is affiliated, for example, as owner, controlling party or agent. In this situation, there is still a risk that

the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of a client-lawyer relationship. Therefore, paragraph (a)(3) requires that the lawyer involved with the entity providing nonlegal services adhere to all of these Rules with respect to the nonlegal services, unless the person understands that the nonlegal services are not the subject of a client-lawyer relationship.

[3] These Rules will be presumed to apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services unless the lawyer complies with paragraph (a)(4) by communicating in writing to the person receiving the nonlegal services that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services. Such a communication should be made before entering into an agreement for the provision of nonlegal services in a manner sufficient to ensure that the person understands the significance of the communication. In certain circumstances, however, additional steps may be required to ensure that the person understands the distinction. For example, while the written disclaimer set forth in paragraph (a)(4) will be adequate for a sophisticated user of legal and nonlegal services, a more detailed explanation may be required for someone unaccustomed to making distinctions between legal services and nonlegal services. Where appropriate and especially where legal services are provided in the same transaction as nonlegal services, the lawyer should counsel the client about the possible effect of the proposed provision of services on the availability of the attorney-client privilege. The lawyer or law firm will not be required to comply with these requirements if its interest in the entity providing the nonlegal services is so small as to be de minimis.

[4] Although a lawyer may be exempt from the application of these Rules with respect to nonlegal services on the face of paragraph (a), the scope of the exemption is not absolute. A lawyer who provides or who is involved in the provision of nonlegal services may be excused from compliance with only those Rules that are dependent upon the existence of a representation or client-lawyer relationship. Other Rules, such as those prohibiting lawyers from misusing the confidences or secrets of a former client (see Rule 1.9), requiring lawyers to report certain lawyer misconduct (see Rule 8.3), and prohibiting lawyers from engaging in illegal, dishonest, fraudulent or deceptive conduct (see Rule 8.4), apply to a lawyer irrespective of the existence of a representation, and thus govern a lawyer not covered by paragraph (a). A lawyer or law firm rendering legal services is always subject to these Rules.

Provision of Legal and Nonlegal Services in the Same Transaction

[5] In some situations it may be beneficial to a client to purchase both legal and nonlegal services from a lawyer, law firm or affiliated entity in the same matter or in two or more substantially related matters. Examples include: (i) a law firm that represents corporations and also provides public lobbying, public relations, investment banking and business relocation services, (ii) a law firm that represents clients in environmental matters and also provides engineering consulting services to those clients, and (iii) a law

firm that represents clients in litigation and also provides consulting services relating to electronic document discovery. In these situations, the lawyer may have a financial interest in the nonlegal services that would constitute a conflict of interest under Rule 1.7(a)(2), which governs conflicts between a client and a lawyer's personal interests.

[5A] Under Rule 1.7(a)(2), a concurrent conflict of interest exists when a reasonable lawyer would perceive a significant risk that the representation will be materially limited or that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's responsibilities to another client, a former client or a third person or by the lawyer's own financial, business, property or personal interests. When a lawyer or law firm provides both legal and nonlegal services in the same matter (or in substantially related matters), a conflict with the lawyer's own interests will nearly always arise. For example, if the legal representation involves exercising judgment about whether to recommend nonlegal services and which provider to recommend, or if it involves overseeing the provision of the nonlegal services, then a conflict with the lawyer's own interests under Rule 1.7(a)(2) is likely to arise. However, when seeking the consent of a client to such a conflict, the lawyer should comply with both Rule 1.7(b) regarding the conflict affecting the legal representation of the client and Rule 1.8(a) regarding the business transaction with the client.

[5B] Thus, the client may consent if: (i) the lawyer complies with Rule 1.8(a) with respect to the transaction in which the lawyer agrees to provide the nonlegal services, including obtaining the client's informed consent in a writing signed by the client, (ii) the lawyer reasonably believes that the lawyer can provide competent and diligent legal representation despite the conflict within the meaning of Rule 1.7(b), and (iii) the client gives informed consent pursuant to Rule 1.7(b), confirmed in writing. In certain cases, it will not be possible to provide both legal and nonlegal services because the lawyer could not reasonably believe that he or she can represent the client competently and diligently while providing both legal and nonlegal services in the same or substantially related matters. Whether providing dual services gives rise to an impermissible conflict must be determined on a case-by-case basis, taking into account all of the facts and circumstances, including factors such as: (i) the experience and sophistication of the client in obtaining legal and nonlegal services of the kind being provided in the matter, (ii) the relative size of the anticipated fees for the legal and nonlegal services, (iii) the closeness of the relationship between the legal and nonlegal services, and (iv) the degree of discretion the lawyer has in providing the legal and nonlegal services.

[6] In the context of providing legal and nonlegal services in the same transaction, Rule 1.8(a) first requires that: (i) the nonlegal services be provided on terms that are fair and reasonable to the client, (ii) full disclosure of the terms on which the nonlegal services will be provided be made in writing to the client in a manner understandable by the client, (iii) the client is advised to seek the advice of independent counsel about the provision of the nonlegal services by the lawyer, and (iv) the client gives informed consent, as set forth in Rule 1.8(a)(3), in a writing signed by the client, to the terms of the transaction in which the nonlegal services are provided and to the lawyer's inherent conflict of interest.

[7] In addition, in the context providing legal and nonlegal services in the same transaction, Rule 1.8(a) requires a full disclosure of the nature and extent of the lawyer's financial interest or stake in the provision of the nonlegal services. By its terms, Rule 1.8(a) requires that the nonlegal services be provided on terms that are fair and reasonable to the client. (Where the nonlegal services are provided on terms generally available to the public in the marketplace, that requirement is ordinarily met.) Consequently, as a further safeguard against conflicts that may arise when the same lawyer provides both legal and nonlegal services in the same or substantially related matters, a lawyer may do so only if the lawyer not only complies with Rule 1.8(a) with respect to the nonlegal services, but also obtains the client's informed consent, pursuant to Rule 1.7(b), confirmed in writing, after fully disclosing the advantages and risks of obtaining legal and nonlegal services from the same or affiliated providers in a single matter (or in substantially related matters), including the lawyer's conflict of interest arising from the lawyer's financial interest in the provision of the nonlegal services.

[8] [Reserved.]

[9] [Reserved.]

[10] [Reserved.]

[11] [Reserved.]

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility:

Rule 5.7 is, word for word, identical to DR 1-106, including its rubric: "Responsibilities Regarding Nonlegal Services."
DRs 1-107 & 2-101 to 2-103, 22 N.Y.C.R.R. §§ 1200.5-c & 6.8
Ethical Considerations 1-9 through 1-12

III.2 ABA Model Rules:

ABA Model Rules of Professional Conduct, Rule 5.7
(The ABA Model Code of Professional Responsibility does not have an analogous provision).

IV. PRACTICE POINTERS

1. When providing nonlegal services be aware of the following obligations:
   - Avoid any assistance in the unauthorized practice of law.
   - Disclose to the client whatever arrangement is contemplated before it is made.

- Be sure there is no conflict of interest.
- Clarify whether the client information is confidential or non-confidential.

2. It is a best practice to provide to the client written disclosure about any or all arrangements of providing non-legal services. In many instances this leads to a better understanding by the client and in many cases is required by the Rules.

V. ANALYSIS

V.1 Purpose of Rule 5.7

Except for updated cross-references and replacing "confidences and secrets" in former DR 1-106(B) with "confidential information", Rule 5.7 is identical to former Disciplinary Rule 1-106. The Administrative Board[2] of the Appellate Division rejected the New York State Bar Association's recommendation that it adopt an additional provision as follows:

> A lawyer or law firm shall not, whether directly or through an affiliated entity, provide both legal and nonlegal services to a client in the same matter or in substantially related matters unless (i) the lawyer or law firm complies with Rule 1.8(a) regarding the provision of the nonlegal services, (ii) the lawyer or law firm reasonably believes it can provide competent and diligent representation to the client, and (iii) the client gives informed consent, confirmed in writing.[3]

The reporters' notes to the recommendation observed that this provision would give additional protections to clients in such situations, and was a "rejection by the NYSBA House of Delegates of contrary interpretations" of the rule by the Association's ethics committee in three 2002 advisory opinions: N.Y.S. Bar Ops. 752, 753 and 755.[4] The Administrative Board's rejection of the provision could be viewed as a victory for the Association's ethics committee over the Association's House of Delegates, but due to the lack of official legislative history we cannot know for certain what the Administrative Board was thinking.

In spite of the provision's rejection, the Association's Committee on Standards of Attorney Conduct chose to retain related comments in the Association's published version of the Rules. While Comments 1 through 4 of Rule 5.7 are based on previous Ethical Considerations 1-9 to 1-12 with a few minor editorial changes and internal

2 The Administrative Board is comprised of Presiding Justices from each Department of the Appellate Division, along with the Chief Judge and Administrative Judge (or in each case, such party's designated representative).

3 Proposed Rules of Professional Conduct approved by the New York State Bar Association's House of Delegates on November 3, 2007 at 186 (Albany, New York Feb. 1, 2008). The provision, as proposed, would have resided between what the sections that are now Rule 5.7 sections (b) and (c).

4 *Id.* at 190.

cross-reference adjustments,[5] Comments 5 through 7 are new and relate to the ill-fated provision.[6]

The ABA version of Rule 5.7 is shorter than the New York version, and while the New York version regulates "nonlegal" services, the ABA version regulates the provision of "law-related" services, namely services "that might reasonably be performed in conjunction with and in substance are related to the provision of legal services" and that are not prohibited as the unauthorized practice of law when provided by a nonlawyer. On its face, the scope of the ABA's rule would appear to be narrower than New York's, but we leave dissection of the ABA version to others. See *Annotated Model Rules of Professional Conduct (5th Ed.)*, ABA Center for Professional Responsibility at 499 *et. seq.*

V.2 A Big Picture Perspective on the Rule

In a nutshell, Rule 5.7 is intended to protect the public from confusion when they obtain nonlegal services from a lawyer.

Why is confusion a risk? When lawyers are representing a client (are operating within an attorney-client relationship), that representation and relationship are governed by various Rules of Professional Conduct. When persons qualified as New York lawyers are not wearing their "lawyer hats" in the provision of service, which is to say they are providing some "nonlegal" kind of service, whether it be lawn maintenance, math tutoring, or house-painting, we would not expect the recipients of such services to be entitled to the same protections. See NYSBA Comments to Rule 5.7cmt. [1], *Garas v. Grievance Comm. of the Eighth Judicial Dist.,* 65 A.D.3d 164 (4th Dept. 2009) (lawyer who formed an LLC for the purpose of bidding on HUD contracts disciplined for providing nonlegal services to a person without advising in writing that the nonlegal services would not be protected by an attorney-client relationship). For example, if a homeowner unknowingly uses a lawyer for lawn maintenance and in the process pours out her family woes, the lawyer does not necessarily owe that homeowner a duty of confidentiality. Or if the homeowner doesn't like her next-door neighbor, she cannot "conflict" the lawyer out of mowing that neighbor's lawn.

However, if the homeowner in our example *knows* the person mowing her lawn to be a lawyer, that homeowner may understandably be oblivious to the distinction between her service provider's separate capacities, focusing on the person's qualifications as a lawyer rather than the nature of their professional relationship. For example, she might lightly say "You're a lawyer, so I know this will be privileged…"[7]

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5 Proposed New York Rules of Professional Conduct, v. 1, Report and Recommendations of Committee on Standards of Attorney Conduct at 376 (Albany, N.Y., Sept 30, 2005).

6 *Id.* at 379.

7 *See* Ehrich v. Binghamton City Sch. Dist., 210 F.R.D. 17 (S.D.N.Y. 2002) (citing former DR 1-106 in upholding a client's privilege claim because the client reasonably believed that attorney's auditing services were subject to an attorney-client relationship.)

Or she may assume the person owes her a duty of loyalty even though she never actually asks the person to provide legal services.

Confusion is less of a risk when the services provided are clearly "nonlegal." However, Rule 5.7(c) defines nonlegal services to mean services that "lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law *when provided by a nonlawyer*." (Emphasis added). This tells that there are three categories of activities: services that are always nonlegal, services that are always the practice of law, and then a third category of activities that nonlawyers may legally perform but nevertheless become regulated as the practice of law when a lawyer chooses to perform them. See N.Y.S. Bar Op 832 (2009), N.Y.S. Bar Op. 557 (1984) at p.2.

The following is an interesting application of Rule 5.7 to the specific case of a lawyer who proposed to engage in the business of selling shelf corporations.

V.3 Ethics Opinion on a Lawyer Selling Shelf Corporations

The ethics committee of the New York State Bar Association issued an advisory opinion on the question of whether the New York Rules of Professional Conduct apply to the sale by a person qualified as a lawyer of shelf corporations.[8] N.Y.S. Bar Op. 832 (2009). To address the question, the committee posited three scenarios.

In scenario one, the lawyer provides legal services about the shelf corporations, such as giving legal advice about the pros and cons of shelf corporations. Applying Rule 5.7, the committee opined that the Rules would apply to both the advice and the sale of the shelf corporations because the disclaimer in (a)(4) would not be effective (presumably because the legal advice is not "distinct" from the sales).

In scenario two, the lawyer does not offer any legal advice (meaning that the lawyer does not answer the kinds of questions a prospective customer might ask about a shelf corporation). The committee seemed to say that if the lawyer could succeed in drawing this line in the sand, that services would not be subject to the Rules relating to representation, advertising or solicitation, although the lawyer would remain subject to the 24-7 Rules (our term for Rules that apply to a lawyer 24 hours a day, 7 days a week, regardless of whether he or she is providing legal services at the time), such as Rule 8.4(c), prohibiting dishonesty and misrepresentation generally.

In the third scenario, the lawyer does not provide legal advice in connection with the sales, but the lawyer's status as a lawyer is visible to the public because the lawyer uses the law office name or letterhead or advertises the sales on the lawyer's website or puts "Esq." or "J.D." after the lawyer's name. In this case, said the committee, the lawyer could, if desired, follow Rule 5.7(a)(4) to disclaim the application of the Rules.

In summary, the committee observed two reasons that the public might be confused about whether an attorney-client relationship is formed and analyzed the reasons differently. If the potential reason for confusion is knowledge of the lawyer's law license, that confusion is disclaimable. If, however, the potential reason for confusion

8 A shelf corporation is a company with no recent activity that may have been created to be "put on the shelf" to be used at a later date.

is that the nature of the nonlegal services is inextricably related to the legal services provided, such confusion is not disclaimable and the lawyer should proceed on the notion that all such services are governed by the Rules. See N.Y.S. Bar Op. 557 at p.2 ("While there are many services that may properly be undertaken by lawyers and non-lawyers alike, especially in the fields of taxation and tax planning" such services are regulated by the Rules when performed by a lawyer.)

V.4 Scope of the Rule

Returning to the definition of nonlegal services in section (c), what services are prohibited as an unauthorized practice of law when provided by a nonlawyer? We cannot give an exhaustive list because, as noted in our more extensive commentary (see our discussion of Rule 5.5) on the subject, New York has not fully defined the contours of what the "practice of law" is. As one might expect, certain activities are explicitly defined to require a law license, such as drafting wills or real estate instruments or appearing in court. However, other activities such as tax preparation, acting as a patent agent, providing insurance and investment services or lobbying a government body would fall into that "third category" above of activities that would only constitute the practice of law when provided by a lawyer.

In a sense, Rule 5.7 is a corollary to Rule 8.5 ("Disciplinary Authority and Choice of Law"), because both rules determine when certain Rules of Professional Conduct will apply to a lawyer's conduct. Whereas Rule 8.5 focuses on geographical jurisdiction/forum in which the services are provided by a lawyer, Rule 5.7 focuses on the *nature* of the services being provided by a lawyer.

NYSBA Comment [4] to Rule 5.7 notes that even if a lawyer is exempt from the application of the Rules of Professional Conduct with respect to nonlegal services, the exemption applies only to Rules "that are dependent upon the existence of a representation or client-lawyer relationship." It also notes that a lawyer or law firm rendering legal service is always subject to other rules such as Rule 1.9, Rule 8.3 and Rule 8.4 (prohibiting deceptive or dishonest conduct).

V.5 The Decision Tree

In some cases, a lawyer or law firm providing nonlegal services and legal services will determine that the services are clearly not distinct from one another. Under (a)(1), the Rules apply to all of the services, and the only remaining issue is compliance with (B) (prohibiting a nonlawyer from regulating the professional judgment of a lawyer).

In other cases, it may not be so clear what Rule 5.7 sections (a)(1) and (2) mean when they use the term "distinct." While we don't find any in-depth plumbing in New York ethics opinions as to what "distinct" means, there are ethics opinions that illustrate the types of situations in which it will be challenging for a single lawyer to provide dual services distinctly. Examples include a lawyer providing both talent management

services and legal representation to the same party,[9] debt collection services and legal advice,[10] mortgage brokerage or title abstract services along with legal advice,[11] and securities brokerage and legal services.[12]

Even if an authority were to agree that the legal services were distinct from the nonlegal ones under (a)(2), the Rules will still apply, however, "if the person receiving the services could reasonably believe" that the Rules apply to the nonlegal services. The question is raised: if the services are distinct, why would a person reasonably believe that the Rules apply? Above we noted the most common reason: because the recipient of the services knows the service provider is an attorney but cannot be expected to know whether the Rules apply. Other reasons a person "could reasonably believe": if the services are provided out of the same office, in the same general timeframe, using the same letterhead,[13] billing for the services in the same invoice or if the lawyer says or does anything to give the customer the impression that the Rules apply. It's ultimately a facts and circumstances analysis, and the Rule seems to have been drafted to favor the customer/client so, if a lawyer is in doubt, it is safer to proceed as if all the services are regulated by the Rules.

At first glance, (a)(4) would appear to be a safe harbor for lawyers providing both legal and nonlegal services, but look closer: it only says that there will be a presumption unless the lawyer provides a written disclaimer or the lawyer's interest in the nonlegal service is de minimis. As the State Bar ethics committee has observed "the specified writing only serves to reverse the presumption, not to provide conclusively that the services are not legal services." N.Y.S Bar Op. 832 (2009), ¶3. That committee observed in an earlier opinion that "It is possible that in certain circumstances, such as where the client is unsophisticated and has had a long relationship with the lawyer and where, despite the existence of a separate entity, the nonlegal services are not completely separated from the rendition of legal services, the writing would not be sufficient to disabuse the client of a reasonable believe that the lawyer would be acting to protect the client." N.Y.S. Bar Op. 755 (2002) at p. 5. See also Cmt. 3 to the Rule (noting that the writing should be tailored to the sophistication of the service recipient).

Section (b) is a reminder to lawyers who provide nonlegal services that no matter how entrepreneurial they become, their professional judgment must remain independent and the recipients of their legal services, namely clients, have a right to expect that their information will be held confidential. A lawyer engaged in a nonlegal business distinct from law practice will want to ensure that the law practice files are kept completely

9 *See* N.Y.S. Bar Op. 784 (2005).

10 *See* N.Y.S. Bar Op. 803 (2006).

11 *See* N.Y.S. Bar Op. 753 (2002).

12 *See* N.Y.S. Bar Op. 752 (2002).

13 N.Y.S. Bar Op. 803 (2006) noted that a firm performing debt collection activities should not mislead debtors with whom it communicates. For example, it should not use its law firm letterhead in such communications or otherwise suggest that the firm represents the customer as a client or might undertake legal action on the creditor-customer's behalf. The Committee's concern there seemed to be a combination of concerns relating to unauthorized practice of law (Rule 5.5) and general integrity (Rule 8.4(c)), rather than Rule 5.7, which was discussed there in a different context.

separate from the files of the nonlegal business, so that, for example, employees of the nonlegal business do not have access to the client files of the law practice.

V.6 Provision of Legal and Nonlegal Services in the Same Transaction

As noted above, the Appellate Division's Administrative Board considered and rejected the State Bar Association's recommendation that it include a new provision (i.e., one not included in predecessor DR 1-106) in Rule 5.7 regarding the provision of legal and nonlegal services by a lawyer or firm *in the same matter*. In optimistic expectation that the provision would be included in the final Rules, the Association had likewise prepared comments corresponding to the provision. Even though the provision was rejected, however, the Association chose to retain the corresponding comments in its published version: Comments 5, 5A, 5B, 6, and 7.

It may be that the Administrative Board chose not to adopt the provision because it would have created a new, independent basis for a conflict of interest requiring informed consent, confirmed in writing from the affected client. The orphaned comments seem to function as reminders and clarifiers as to the potential for conflicts, by pointing to Rules 1.7 and 1.8 (conflicts affecting current clients), so it may be that the rejected provision would have been redundant. For instance, as Cmt. 5 observes, if a lawyer provides both legal and nonlegal services, the lawyer must consider whether the lawyer has a financial interest in the nonlegal services that requires a conflict waiver under Rule 1.7.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Big Picture Perspective

N.Y.S. Bar Op. 832 (2009) (where a lawyer provides nonlegal services, but no legal services to people, but the attorney's status as an attorney is visible to the general public, the recipients of the nonlegal services could reasonably believe that there was an attorney-client relationship. Thus, absent a disclaimer or other steps, Rule 5.7 applied.).

N.Y.S. Bar Op. 803 (2006) (firm performing debt collection activities should not mislead debtors with whom it communicates).

N.Y.S. Bar Op. 752 (2002) (lawyer who participates in the operation of a nonlegal business offering professional services to a client remains subject to former DR 5-101 under certain circumstances and may not, for example, act as a broker and a lawyer in the same transaction).

VI.2 Lawyers Selling Shelf Corporations

N.Y.S. Bar Op. 832 (2009) (applying new Rule 5.7 to three scenarios involving a lawyer who sells shelf corporations).

VI.3 Scope of Rule

N.Y.C. Bar Op. 2006-3 (2006) (providing detailed ethical guidance to the outsourcing of legal services).

N.Y.S. Bar Op. 784 (2005) (under certain circumstances, a lawyer who is also a principal in an entertainment management company may also represent clients of that company in legal matters).

NYCLA Bar Op. 733 (2005) (analyzing the circumstances under which a lawyer may enter into non-exclusive referrals and share office space, computers, telephone lines, office expenses, and advertising with non-legal professionals).

Nassau County Bar Op. 2003-3 (2003) (lawyer who is representing a client in a real estate transaction may not refer the client to a title abstract company in which the lawyer has a financial interest without violating former DR 1-106).

N.Y.S. Bar Op. 769 (2003) (cautioning a lawyer who is representing a client in a personal injury matter against owning an interest in an entity that would be providing financial support to the client).

Nassau County Bar Op. 2004-1 (2004) (attorney may not form a corporate entity with a non-lawyer to represent clients in arbitrations conducted by the National Association of Securities Dealers, Inc. or similar organizations).

N.Y.S. Bar Op. 755 (2002) (analyzing the interplay among former DR 1-106, former DR 5-104(a) relating to business transactions between a lawyer and a client and former DR 1-106(A) relating to in-person or telephone solicitation).

N.Y.S. Bar Op. 753 (2002) (analyzing how former DR 1-106 and former DRs 5-101 and 5-105 relating to conflicts of interest apply to a lawyer's (1) offering legal, mortgage brokerage or title abstract services to the same client and (2) simultaneous representation in a real estate transaction of a buyer, seller, or lender).

VII. ANNOTATIONS OF CASES

VII.1 Big Picture Perspective

Matter of Channing, 66 A.D.3d 1110, 885 N.Y.S.2d 650 (3d Dept. 2009) (attorney entering into real estate broker relationship with client who did not explain conflict in the relationship violated former DR 1-106 and other Rules).

Ehrich v. Binghamton City Sch. Dist., 210 F.R.D. 17 (S.D.N.Y. 2002) (citing former DR 1-106 in upholding a client's privilege claim because the client reasonably believed that attorney's auditing services were subject to an attorney-client relationship).

Garas v. Grievance Comm. of the Eighth Judicial Dist., 65 A.D.3d 164 (4th Dept. 2009) (lawyer who formed an LLC for the purpose of bidding on HUD contracts was disciplined for providing nonlegal services to a person without advising in writing that the nonlegal services would not be protected by an attorney-client relationship).

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Rule 5.8: Contractual Relationship Between Lawyers and Nonlegal Professionals

I. TEXT OF RULE 5.8[1]

(a) The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it serves. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed "independent professional judgment and undivided loyalty uncompromised by conflicts of interest." Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent professional judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State. Multi-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values. However, a lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services, notwithstanding the provisions of Rule 1.7(a), provided that:

(1) the profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules;

(2) the lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice

1 Rules Editor John Horan, Fox Horan and Camerini; and Executive Editor Wallace Larson, Jr., Cleary Gottlieb Steen & Hamilton LLP.

of law by the lawyer or law firm, nor, as provided in Rule 7.2(a)(1), shares legal fees with a nonlawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral; and

(3) the fact that the contractual relationship exists is disclosed by the lawyer or law firm to any client of the lawyer or law firm before the client is referred to the nonlegal professional service firm, or to any client of the nonlegal professional service firm before that client receives legal services from the lawyer or law firm; and the client has given informed written consent and has been provided with a copy of the "Statement of Client's Rights In Cooperative Business Arrangements" pursuant to section 1205.4 of the Joint Appellate Divisions Rules.

(b) For purposes of paragraph (a):

(1) each profession on the list maintained pursuant to a Joint Rule of the Appellate Divisions shall have been designated sua sponte, or approved by the Appellate Divisions upon application of a member of a nonlegal profession or nonlegal professional service firm, upon a determination that the profession is composed of individuals who, with respect to their profession:

(i) have been awarded a bachelor's degree or its equivalent from an accredited college or university, or have attained an equivalent combination of educational credit from such a college or university and work experience;

(ii) are licensed to practice the profession by an agency of the State of New York or the United States Government; and

(iii) are required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession;

(2) the term "ownership or investment interest" shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.

(c) This Rule shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm.

II. NYSBA COMMENTARY

[1] Lawyers may enter into interprofessional contractual relationships for the systematic and continuing provision of legal and nonlegal professional services, provided the nonlegal professional or nonlegal professional service firm with which the lawyer or law firm is affiliated does not own, control, supervise or manage, directly or indirectly, in whole or in part, the lawyer's or law firm's practice of law. The nonlegal professional or nonlegal professional service firm may not play a role in, for example, (i) deciding whether to accept or terminate an engagement to provide legal services in a particular

matter or to a particular client, (ii) determining the manner in which lawyers are hired or trained, (iii) assigning lawyers to handle particular matters or to provide legal services to particular clients, (iv) deciding whether to undertake pro bono and other public-interest legal work, (v) making financial and budgetary decisions relating to the legal practice, and (vi) determining the compensation and advancement of lawyers and of persons assisting lawyers on legal matters.

[2] The contractual relationship permitted by this Rule may include the sharing of premises, general overhead, or administrative costs and services on an arm's length basis. Such financial arrangements, in the context of an agreement between lawyers and other professionals to provide legal and other professional services on a systematic and continuing basis, are permitted subject to the requirements of paragraph (a) and Rule 7.2(a). Similarly, lawyers participating in such arrangements remain subject to general ethical principles in addition to those set forth in this Rule including, at a minimum, Rule 1.7, Rule 1.8(f), Rule 1.9, Rule 5.7(b) and Rule 7.5(a). Thus, the lawyer or law firm may not, for example, include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional, enter into formal partnerships with nonlawyers, or practice in an organization authorized to practice law for a profit in which nonlawyers own any interest. Moreover, a lawyer or law firm may not enter into an agreement or arrangement for the use of a name in respect of which a nonlegal professional or nonlegal professional service firm has or exercises a proprietary interest if, under or pursuant to the agreement or arrangement, that nonlegal professional or firm acts or is entitled to act in a manner inconsistent with paragraph (a)(2) or Comment [1]. More generally, the existence of a contractual relationship permitted by this Rule does not by itself create a conflict of interest in violation of Rule 1.8(a). Whenever a law firm represents a client in a matter in which the nonlegal professional service firm's client is also involved, the law firm's interest in maintaining an advantageous relationship with a nonlegal professional service firm might, in certain circumstances, adversely affect the professional judgment of the law firm.

[3] Each lawyer and law firm having a contractual relationship under paragraph (a) has an ethical duty to observe these Rules with respect to the lawyer's or law firm's own conduct in the context of that relationship. For example, the lawyer or law firm cannot permit the obligation to maintain client confidences, as required by Rule 1.6, to be compromised by the contractual relationship or by its implementation by or on behalf of nonlawyers involved in the relationship. In addition, the prohibition in Rule 8.4(a) against circumventing a Rule through actions of another applies generally to the lawyer or law firm in the contractual relationship.

[4] The contractual relationship permitted by paragraph (a) may provide for the reciprocal referral of clients by and between the lawyer or law firm and the nonlegal professional or nonlegal professional service firm. When in the context of such a contractual relationship a lawyer or law firm refers a client to the nonlegal professional or nonlegal professional service firm, the lawyer or law firm shall observe the ethical standards of the legal profession in verifying the competence of the nonlegal professional or nonlegal professional services firm to handle the relevant affairs and interests of the client.

Referrals should be made only when requested by the client or deemed to be reasonably necessary to serve the client. Thus, even if otherwise permitted by paragraph (a), a contractual relationship may not require referrals on an exclusive basis. *See* Rule 7.2(a).

[5] To ensure that only appropriate professional services are involved, a contractual relationship for the provision of services is permitted under paragraph (a) only if the nonlegal party thereto is a professional or professional service firm meeting appropriate standards regarding ethics, education, training and licensing. The Appellate Divisions maintain a public list of eligible professions at 22 N.Y.C.R.R. § 1205.5. A member of the nonlegal profession or a professional service firm may apply for the inclusion of particular professions on the list or professions may be added to the list by the Appellate Divisions sua sponte. A lawyer or law firm not wishing to affiliate with a nonlawyer on a systematic and continuing basis, but only to engage a nonlawyer on an ad hoc basis to assist in a specific matter, is not governed by this Rule when so dealing with the nonlawyer. Thus, a lawyer advising a client in connection with a discharge of chemical wastes may engage the services of and consult with an environmental engineer on that matter without the need to comply with this Rule. Likewise, the requirements of this Rule need not be met when a lawyer retains an expert witness in a particular litigation.

[6] Depending upon the extent and nature of the relationship between the lawyer or law firm, on the one hand, and the nonlegal professional or nonlegal professional service firm, on the other hand, it may be appropriate to treat the parties to a contractual relationship permitted by paragraph (a) as a single law firm for purposes of these Rules, as would be the case if the nonlegal professional or nonlegal professional service firm were in an "of counsel" relationship with the lawyer or law firm. If the parties to the relationship are treated as a single law firm, the principal effects would be that conflicts of interest are imputed as between them pursuant to Rule 1.10(a) and that the law firm would be required to maintain systems for determining whether such conflicts exist pursuant to Rule 1.10(f). To the extent that the rules of ethics of the nonlegal profession conflict with these Rules, the rules of the legal profession will still govern the conduct of the lawyers and the law firm participants in the relationship. A lawyer or law firm may also be subject to legal obligations arising from a relationship with nonlawyer professionals, who are themselves subject to regulation.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility:

Rule 5.8 is identical to DR 1-107 A. through C. Part D is deleted.
Ethical Considerations 1-9 through 1-12.

III.2 ABA Model Rules:

The ABA Model Rules do not have an analogous provision.

IV. PRACTICE POINTERS

1. Fundamentally, the Appellate Divisions are not hospitable to multi-discipline practices and require an absolute line to be drawn between the services offered by such a firm. While a multi-discipline practice is allowed, such a practice is limited to the professions deemed eligible by the court, as published in the joint Appellate Division Rules, Sec. 1205.5.
2. In drawing a contract for the provision of legal services and one or more of the eligible nonlegal services, follow the restrictions of this Rule to the letter. Of paramount concern is maintaining the independence of legal judgment and maintaining a strict division of ownership and fees.
3. Make full disclosure of the relationship with the other service professional(s) to all client of the lawyers or law firm.
4. Obtain written consent of all clients and provide the clients with the "Statement of Client's Rights in Cooperative Business Arrangements" pursuant to Sec. 1205.4 of the Joint Appellate Division Rules.

V. ANALYSIS

V.1 Purpose of Rule 5.8

Although most New York Rules have a counterpart in the ABA Model Rules, there is no Rule 5.8 in the ABA Model Rules of Professional Conduct, so it's a New York original. New York Rule 5.8 was previously codified as DR 1-107 and the only changes in the new codification are updated cross-references and the mysterious removal of previous DR 1-107(D).[2]

Former DR 1-107(D) had provided that notwithstanding the rule against sharing legal fees with a nonlawyer (formerly DR 3-102(A), now Rule 5.4(a)), "a lawyer or law firm may allocate costs and expenses with a non-legal professional or non-legal professional service firm pursuant to a contractual relationship permitted by [Rule 5.8(a)], provided the allocation reasonably reflects the costs and expenses to be incurred by each." Section (D) appears to have only been cited in one ethics opinion of the New York State Bar Association (and there only in passing) so it's not clear what we should make of its disappearance on April 1, 2009.

V.2 What We Have Left

NYSBA Comment [2] to the Rule notes that the contractual relationship permitted by the Rule "may include the sharing of premises, general overhead or administrative

2 Roy Simon, *Comparing the New NY Rules of Professional Conduct to the NY Code of Professional Responsibility* at 16 (*reprinted and distributed with the consent of* New York Professional Responsibility Report).

costs and services on an arm's length basis." This Comment, like all other Comments to the Rules, was promulgated only by the State Bar and not by the Appellate Division (which promulgated only the black-letter Rules). Perhaps the Appellate Division's Administrative Board concluded that Section (D)'s requirement that allocation of expenses reasonably reflect each party's costs and expenses was too rigorous, so that *any* allocation of expenses is permissible so long as the remaining requirements are met.

V.3 The Rule Begins

The first paragraph and first sentence of second paragraph of Rule 5.8(a) include language that "does not state any requirements or prohibitions, and thus is better suited to a Comment than to a Rule."[3] The lofty language hearkens back to the old Canons and Ethical Considerations of yore. However, the Administrative Board decided to keep this language in the black letter of the Rule. The crux of the language is that multi-disciplinary practice "between lawyers and nonlawyers is incompatible with the core values of the legal profession" requiring a "strict division" of their services.

The practical aspect of section (a) is that a lawyer or law firm may not pursue "multidisciplinary practice" but may enter into contractual relationships with nonlegal professionals for the purpose of offering "legal services as well as other nonlegal professional services." We move on from the distinction between "practice" and "contractual relationships" to the conditions:

V.4 The Nonlegal Profession Must be on "the list"

The first condition is that the profession must be on the list maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules. By way of background, Section 1205.3 reads as follows:

SECTION 1205.3. LIST OF PROFESSIONS

(a) The Appellate Divisions jointly shall establish and maintain a list of professions, set forth in section 1205.5 of this Part designated by the Appellate Divisions sua sponte or approved by them upon application of a member of a nonlegal profession or nonlegal professional service firm, with whose members a lawyer may enter into a cooperative business arrangement to perform legal and nonlegal services as authorized by section 1200.5-c of this Title.

(b) A member of a nonlegal profession may apply to the Appellate Division to have that profession included in the list by submitting to the Appellate Division Clerk's Office in any Judicial Department a petition to establish that the profession is

3 New York State Bar Association Proposed Rules of Professional Conduct at 194 (Albany, NY 2008).

composed of individuals who, with respect to their profession, meet the requirements set forth in section 1200.5-c(b)(1) of this Title.

22 NYCRR 1205.3. Section 1205.5, the list itself, reads as follows:

SECTION 1205.5. NONLEGAL PROFESSIONS ELIGIBLE TO FORM COOPERATIVE BUSINESS ARRANGEMENTS WITH LAWYERS

Members of the following nonlegal professions are eligible to form contractual business relationships with lawyers:

Architecture
Certified Public Accountancy
Professional Engineering
Land Surveying
Certified Social Work

22 NYCRR 1205.5. So, the first condition is that the nonlegal professional must be a member of one of those five professions. Some tricky questions could arise with respect to whether someone qualifies as the "member" of these professions. The Educational Law, as implemented by the Education Department, regulates the licenses for the each of the professions listed by the Joint Appellate Division Rule.[4] These professionals, of course, have professional responsibilities of their own. *See* 1205.3b. One might need to consider the following:

> What is it that qualifies the person as a "member" of their nonlegal profession? Is it easy to distinguish between, say, that profession's equivalent of a paralegal and a lawyer? And must the professional be licensed in New York State as opposed to another state or federal licensing authority? A lawyer may need to do his or her homework in order to clarify that the person is indeed professionally qualified.

In addition, because the Rule functions as a safe harbor of sorts, it is implied that the continuing contractual relationship with the nonlegal professional will involve the nonlegal professional *only engaging* in activities that fall within that applicable profession's practice. For example, if a lawyer forms the contractual relationship with a CPA, and the CPA's office work includes, say, 50% accounting advice and 50% advice in art restoration, the contractual relationship must apparently be limited to the CPA's accounting work. In other words, lawyers are permitted to contract with CPAs doing CPA work, not with art restorers who happen to be CPAs. Given that New York, like most other states, has yet to definitively define what is, or is not, the practice of law, and given that some activities become the practice of law only when done by lawyers, it may be just as difficult for other professions to draw bright lines.[5]

4 *See* N.Y. Education Law Article 147 (Architecture), Article 149 (Public Accountancy), Article 145 (Engineering and Land Surveying), Article 154 (Social Work).

5 *See* our Analysis of Rule 5.5, *supra*, for a more detailed discussion of issues surrounding "unauthorized practice of law."

V.5 Independence and Legal Fees Not Shared

The second condition is that the nonlegal professional person or firm must not have any ownership or supervisory power over the lawyer or law firm and must not share legal fees or exchange tangible benefit for a referral. In essence, this is clarifying that the following restrictions in other Rules remain in effect: the Rule 7.2(a) prohibition against lawyers paying for referrals, the Rule 5.4(a) prohibition against sharing legal fees with nonlawyers and the Rule 5.4(b) prohibition against lawyers partnering with nonlawyers "if the activities of the partnership consist of the practice of law."[6]

The Rule covers legal forms in which lawyers and nonlawyers share ownership, such as partnerships and corporations. Given that New York does not currently permit even this small list of nonlegal professions to have ownership of a law firm, we are far from permitting the general public to own a law firm. However, on May 21, 2007, a day that shall live in infamy, the Australian personal injury law firm Slater & Gordon went public and listed on the Australian Stock Exchange, becoming the first publicly-traded law firm.[7] And the ABA Commission on Ethics 20/20, which is focusing on ethical and regulatory issues affecting the entire spectrum of legal work, has identified "alternative business structures" on its Preliminary Issues Outline.[8]

V.6 Relationship Disclosure

The third condition reasonably requires that the fact of the relationship between lawyer and nonlegal professional be disclosed by the lawyer to any client before referring that client to the nonlegal professional and vice versa. Moreover, the client must "give informed written consent" and be provided with a copy of the Statement of Client's Rights in Cooperative Business Arrangements pursuant to Section 1205.4 of the Joint Appellate Division Rules. That Section reads as follows:

SECTION 1205.4. STATEMENT OF CLIENT'S RIGHTS IN COOPERATIVE BUSINESS ARRANGEMENTS

In the furtherance of a cooperative business arrangement:

(a) prior to the commencement of legal representation of a client referred by a nonlegal service provider; or

6 *See* our Analysis of each of these Rules, *supra*, for more detail on what these prohibitions mean.

7 Larry E. Ribstein, *Want to Own a Law Firm*? THE AMERICAN (JOURNAL OF THE AMERICAN ENTERPRISE INSTITUTE) (May 30, 2007) *available at* http://www.american.com/archive/2007/may-0507/want-to-own-a-law-firm.

8 ABA Commission on Ethics 20/20 Preliminary Issues Outline at 6 (Nov. 19, 2009).

(b) prior to the referral of an existing client to a nonlegal service provider;

a lawyer shall provide the client with a statement of client's rights. That statement shall include a consent to the referral to be signed by the client and shall contain the following:

Statement of Client's Rights in Cooperative Business Arrangements

Your lawyer is providing you with this document to explain how your rights may be affected by the referral of your particular matter by your lawyer to a nonlegal service provider, or by the referral of your particular matter by your lawyer to a nonlegal service provider, or by the referral of your particular matter by a nonlegal service provider to your lawyer.

To help avoid any misunderstanding between your and your lawyer please read this document carefully. If you have any questions about these rights, do not hesitate to ask your lawyer.

Your lawyer has entered into a contractual relationship with a nonlegal professional or professional service firm, in the form of a cooperative business arrangement which may include sharing of costs and expenses, to provide legal and nonlegal services. Such an arrangement may substantially affect your rights in a number of respects. Specifically, you are advised:

1. A lawyer's clients are guaranteed the independent professional judgment and undivided loyalty of the lawyer, uncompromised by conflicts of interest. The lawyer's business arrangement with a provider of nonlegal services may not diminish these rights.

2. Confidences and secrets imparted by a client to a lawyer are protected by the attorney/client privilege and may not be disclosed by the lawyer as part of a referral to a nonlegal service provider without the separate written consent of the client.

3. The protections afforded to a client by the attorney/client privilege may not carry over to dealings between the client and a nonlegal service provider. Information that would be protected as a confidence or secret, if imparted by the client to a lawyer, may not be so protected when disclosed by the client to a nonlegal service provider. Under some circumstances, the nonlegal service provider may be required by statute or a code of ethics to make disclosure to a government agency.

4. Even where a lawyer refers a client to a nonlegal service provider for assistance in financial matters, the lawyer's obligation to preserve and safeguard client funds in his or her possession continues.

You have the right to consult with an independent lawyer or other third party before signing this agreement.

Client's Consent:

I have read the above statement of Client's Rights in Cooperative Business Arrangements and I consent to the referral of my particular matter in accordance with that Statement.

_____
Client's signature

_____
Date

V.7 How Professions Get Added to "the list"

Section (b) to the Rule provides that the Appellate Division may either (i) designate professions sua sponte (that is, unilaterally without request or application from others) or (ii) upon successful application by a member of the nonlegal profession in question. What applications will be successful? Successful applications will demonstrate that members of such profession meet three criteria, summarized as follows:

1. They have a B.A. degree or combined work experience and education that are the equivalent,
2. They are licensed to practice by New York or the federal government, and
3. They are required to adhere to a code of ethics "reasonably comparable" to the legal profession in order to maintain their license.

V.8 Non-exclusive Referral Arrangements are Okay

Section (c) states that the Rule "does not apply" to non-exclusive reciprocal referral understandings between lawyers and nonlegal professionals. What does this mean? Given that the purpose of Rule 1.7 is to provide a safe harbor for certain contractual MDP, does it mean that non-exclusive arrangements do not qualify for a safe harbor? Not in our view. Rather, we surmise, based on the analysis below, that the intent of (c) is to say that non-exclusive understandings neither require a safe harbor from Rule 1.7 nor compliance with section (a).

In short, (c) was badly drafted. On its face, the implication of (c) is that such arrangements are carved out of the Rule entirely "and are left to other rules."[9] Moreover, Rule 7.2(a)(1) only exempts contractual referral arrangements of the type "permitted by Rule 5.8." Rule 7.2(a)(1) does not exempt non-exclusive referral arrangements.

Fortunately, a State Bar ethics opinion provided some helpful clarity, saying that a prohibition against "nonexclusive reciprocal referral arrangements… would clearly not be consistent" with Rule 5.8, "at least with respect to the professions dealt with in that rule… ." Moreover, it found "no textual basis for restricting" such arrangements "to the listed professions." It therefore reasoned that a non-exclusive referral

9 N.Y.S. Bar Op. 765 (2003).

arrangement between a lawyer and insurance agent or securities broker is permitted by Rule 5.8(c) and Rule 7.2(a)(1).[10]

V.9 What Value Does the Rule Bring?

The Rule "exempts… arrangements from the conflicts of interest rule, which would otherwise apply, and places specific limitations on the nature of the contractual relationship, on the qualifications of professions that may be approved by the Appellate Divisions for such arrangements, and on disclosures to clients."[11] We don't know how many arrangements, if any, have emerged to take advantage of this exemption but we certainly don't hear much about them if they're out there.

It is generally understood that the predecessor to Rule 5.8, DR 1-107, along with former DR 1-106 (now Rule 5.7), was intended to open the door a bit in New York to multi-disciplinary practice (MDP). However, in light of the various Rules implicated by MDP, such as Rule 5.4(a) and (b) and Rule 7.2(a) it is not clear that a safe harbor from Rule 1.7(a) alone adds much value to the proposition of MDP. It's also not clear why a safe harbor from Rule 1.7(a) was required in the first place!

Based on the lack of recent postings or activity on the Web site[12] of the ABA's Center for Professional Responsibility for MDP, the topic of MDP is no longer "hot" nationwide. Based on the lack of State Bar ethics opinions on the Rule, New York has similarly cooled on the subject. Which raises the question: is anyone reading this?

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 What We Have Left

N.Y.S. Bar Op. 791 (2006) (concluding that a networking organization is not a "contractual relationship" within the meaning of former DR 1-107 and affirming the views expressed in Opinion 741 (2001)).

Nassau County Bar Op. 2004-1 (2004) (attorney may not form a corporate entity with a non-lawyer to represent clients in arbitrations conducted by the National Association of Securities Dealers, Inc. or similar organizations).

VI.2 Non-exclusive Referral Arrangements Are Okay

Nassau County Bar Op. 2005-02 (2005) (lawyer may not enter into a contractual relationship pursuant to former DR 1-107 with a stockbroker or similar investor

10 *Id.*

11 Proposed New York Rules of Professional Conduct, v1, Report and Recommendations of Committee on Standards of Attorney Conduct at 384 (Albany, New York Sept. 30 2005).

12 http://www.abanet.org/cpr/mdp/home.html

professional. Non-exclusive referral agreements may be allowable under certain circumstances.).

N.Y.S. Bar Op. 765 (2003) (analyzing the circumstances under which a lawyer or law firm may enter into a nonexclusive reciprocal referral arrangement with a nonlawyer).

VII. ANNOTATIONS OF CASES

VII.1 What we Have Left

Elacqua v. Physicians' Reciprocal Insurers, 52 A.D.3d 886, 860 N.Y.S.2d 229 (3d Dept. 2008) (deceptive business practice by insured's attorney who was being paid by insurer).

VII.2 Non-exclusive Referral Arrangements Are Okay

Rogers v. Ciprian, 26 A.D.3d 1, 805 N.Y.S.2d 36 (1st Dept. 2005) (breach of contract claim involving immigration consultant and attorney over whom she had no authority).

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Roy Simon, Conflicts of Interest Under the New MDP Rules, N.Y. Prof. Res. Rep., Oct. 2001, at 1.

Roy Simon, An Overview of New York's New "MDP" Rules, N.Y. Prof. Res. Rep., Sept. 2001, at 1.

Rule 6.1: Voluntary Pro Bono Service

I. TEXT OF RULE 6.1[1]

Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons.

(a) Every lawyer should aspire to:

(1) provide at least 20 hours of pro bono legal services each year to poor persons; and

(2) contribute financially to organizations that provide legal services to poor persons.

(b) Pro bono legal services that meet this goal are:

(1) professional services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation, to persons who are financially unable to compensate counsel;

(2) activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; and

(3) professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.

(c) Appropriate organizations for financial contributions are:

(1) organizations primarily engaged in the provision of legal services to the poor; and

(2) organizations substantially engaged in the provision of legal services to the poor, provided that the donated funds are to be used for the provision of such legal services.

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(d) This Rule is not intended to be enforced through the disciplinary process, and the failure to fulfill the aspirational goals contained herein should be without legal consequence.

II. NYSBA COMMENTARY

[1] Legal services organizations, courts, government agencies, bar associations, and various non-profit organizations have established programs through which lawyers provide free short-term limited legal services, such as advice or the completion of legal forms, to assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to utilize the conflict-checking system required by Rule 1.10(f) before providing the short-term limited legal services contemplated by this Rule. *See also* Rules 1.7, 1,8, 1.9, 1.10.

[2] To meet this professional obligation, paragraph (a) urges all lawyers to provide a minimum of 20 hours of pro bono legal service annually without fee or expectation of fee, either directly to poor persons or to organizations that serve the legal or other basic needs of persons of limited financial means. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of the lawyer's career, the lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2A] Paragraph (a)(2) provides that, in addition to providing the services described in paragraph (a), lawyers should provide financial support to organizations that provide legal services to the poor. This goal is separate from and not a substitute for the provision of legal services described in paragraph (a). To assist the funding of civil legal services for low income people, when selecting a bank for deposit of funds into an "IOLA" account pursuant to Judiciary Law § 497, a lawyer should take into consideration the interest rate offered by the bank on such funds.

[2B] Paragraphs (a)(1) and (a)(2) recognize the critical need for legal services that exists among poor persons. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rulemaking, and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest,

paragraph (a) requires compliance with Rules 1.7, 1.8, and 1.9 only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rule 1.7, 1.8, or 1.9 in the matter.

[4] To qualify as pro bono service within the meaning of paragraph (a)(1) the service must be provided without fee or expectation of fee, so the intent of the lawyer to render free legal services is essential. Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this Rule. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While a lawyer may fulfill the annual goal to perform pro bono service exclusively through activities described in paragraphs (a)(1) and (a)(2), all lawyers are urged to render public-interest and pro bono service in addition to assistance to the poor. This responsibility can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory, or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono service outlined in paragraph (a)(1). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by making financial contributions to organizations that help meet the legal and other basic needs of the poor, as described in paragraphs (a)(2), (c)(1) and (c)(2) or by performing some of the services outlined in paragraph (b)(2) or (b)(3).

[6] Paragraph (b)(1) includes the provision of legal services to those whose incomes and financial resources place them above limited means but are yet unable to meet the financial burdens of a given civil or criminal matter.

[7] Paragraphs (b)(2) and (b)(3) recognize the value of lawyers' engaging in activities that improve the law, the legal system or the legal profession. Examples of the many activities that fall within this paragraph include: (i) serving on bar association committees, (ii) serving on boards of pro bono or legal services programs, (iii) taking part in Law Day activities, (iv) acting as a continuing legal education instructor, a mediator, or an arbitrator, and (v) engaging in legislative lobbying to improve the law, the legal system, or the profession. In addition to rendering pro bono services directly to the poor and making financial contributions, lawyers may fulfill the goal of rendering pro bono services by serving on the boards or giving legal advice to organizations whose mission is helping the poor.

[8] Paragraphs (b)(1) and (b)(2) essentially reiterate the goal as set forth in (a)(2) with the further provision that the lawyer should seek to insure that the donated money be directed to providing legal assistance to the poor rather than the general charitable objectives of such organizations.

[9] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal service called for by this Rule.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 6.1 is new but is substantially similar in substance to Ethical Consideration 2-34 (formerly EC 2-25).

There are slight variations between Rule 6.1 and EC 2-34. Specifically:

- Rule 6.1 is similar to EC 2-34 except the EC 2-34 says that "A lawyer has an obligation to render public interest and pro bono legal service" while 6.1 provides that "Lawyers are strongly encouraged to provide pro bono legal services…"
- New Rule 6.1(d) differs from EC 2-34 in that it states plainly that the Rule "is not intended to be enforced through the disciplinary process and the failure to fulfill the aspirational goals of this Rule should be without legal consequence."

III.2 ABA Model Rules

- NY Rule 6.1 is similar to ABA Rule 6.1 except that the ABA Rule sets forth that "Every lawyer has a professional responsibility to provide legal services to those unable to pay," while the NY Rule is aspirational and provides that "Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons."
- NY Rule 6.1(a)(1) says that every lawyer should aspire to provide at least 20 hours of pro bono legal services annually while ABA Rule 6.1 sets the bar higher, stating that a lawyer "should aspire to render at least fifty (50) hours of pro bono publico legal services per year."
- NY Rule 6.1(a)(2) is similar to ABA Rule 6.1 except that the NY Rule once again provides that "each lawyer should aspire to… contribute financially to organizations that provide legal services to poor persons" while the ABA Rule mandates that a "a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means."
- The NY Rule refers to "poor persons" while the ABA Rule refers to "persons of limited financial means."
- The NY Rule differs from the ABA Rule in that the ABA Rule is sectioned differently. The ABA Rule lists the pro bono services that lawyers should contribute more annual hours towards first while the NY Rule lists in subsections (b)(1) through (b)(3) the pro bono services that allow a lawyer to meet the 20-hour annual goal.
- NY Rule 6.1(b)(1) is new and there is no similar section in the ABA Rule.
- NY Rule 6.1(b)(2) is similar in substance to ABA 6.1(b)(3) but NY lists "activities related to improving the administration of justice" instead of "activities for improving the law, the legal system or the legal profession." Additionally, the NY Rule adds "by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons."

- NY Rule 6.1(b)(3) is similar to ABA 6.1(a)(2) except the NY Rule lists pro bono services that meet the 20-hour annual goal while the ABA Rule sets forth the activities that lawyers should engage in so as to provide "a substantial majority of the 50 hours" of annual pro bono services. Additionally, the NY Rule does not include "community" or "governmental" organizations.
- Both the NY Rule and the ABA Rule generally establish that lawyers should make financial contributions to organizations that benefit poor persons but NY adds subsections (c)(1) and (2) detailing the appropriate organizations for financial contributions.
- New Rule 6.1(d) has no ABA equivalent.

IV. PRACTICE POINTERS

1. Before a lawyer decides to undertake a particular pro bono matter, the lawyer and/or firm should consider whether there is any publicly funded legal representation available to handle the matter.
2. When an attorney seeks to offer pro bono legal services, he or she should carefully determine whether he or she has sufficient training, experience, and skill to properly represent a pro bono client.
3. Lawyers providing pro bono legal services should be mindful that despite the lack of compensation, all such work should be performed with the same careful attention to detail that the lawyer would give a paying matter.
4. As with any legal representation, the terms on which pro bono legal work is undertaken, including the circumstances in which the relationship may be terminated, should be explained to the client at the outset.
5. Attorneys who undertake pro bono work should have appropriate malpractice insurance. A lawyer who does not have such insurance but nonetheless desires to offer pro bono services should seek out a pro bono organization that carries its own malpractice insurance for lawyers who volunteer to provide legal services.[2]

V. ANALYSIS

V.1 Purpose of Rule 6.1

Lawyers are motivated to undertake pro bono work for a variety of reasons including the individual lawyer's sense of professional responsibility, the lawyer's belief in assisting those who would not otherwise have access to the legal system, a commitment to public service, a desire to hone one's legal skills in an alternate field, a wish to

2 *See* American Bar Association Standing Committee on Pro Bono and Public Service and the Center for Pro Bono, Senior Lawyers, http://www.abanet.org/legalservices/probono/senior_lawyers.html#insurance (last visited January 23, 2010).

improve the image of the lawyer or law firm or a desire to enhance professional skills.[3] Whatever the reason a lawyer or law firm endeavors to provide pro bono legal services, the fact remains that the need for legal services for New York's poor is extensive and continuously increasing.

Rule 6.1 is aspirational only, meaning that lawyers will not face discipline if they do not render pro bono service. Nonetheless, New York's adoption of Rule 6.1 reflects an acknowledgement that the provision of legal services to those who cannot afford counsel is crucial to the fair administration of justice.[4] New York's laws and legal system are complex, making the assistance of a lawyer critical for obtaining civil justice."[5] Low-income individuals constitute roughly 38% of the overall population in New York City, and the lack of available and affordable legal services for the poor is of particular concern, considering that the legal issues poor New Yorkers encounter can be life-altering. These legal issues include eviction and foreclosure proceedings, the loss or diminution of Temporary Assistance or Unemployment Benefits, the inability to obtain citizenship or legal immigration status, health care issues, domestic violence, and criminal and family law matters.[6] If lawyers did not offer such services for little or no compensation, the number of poor persons foreclosed from the legal system would be even more dramatic than it is.

V.2 Mandatory Pro Bono Legal Services

Despite the well-documented lack of availability of affordable legal services for the poor, New York attorneys and some bar associations strongly opposed proposals that would have made the provision of pro bono legal services mandatory for most New York lawyers.[7] This has been the trend in other jurisdictions as well.[8] "In every instance

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3 National Pro Bono Resource Centre, *Submission to the Law Institute of Victoria Discussion Paper: Government Lawyers and Pro Bono* (2004), http://www.nationalprobono.org.au/ssl/CMS/files_cms/government_lawyers.pdf (last visited January 23, 2010).

4 *See* Testimony of Andrew Scherer, Executive Director and President of Legal Services NYC before the New York City Council Committee on Housing Preservation and Development, Re: "Anti-Eviction" Funding for Legal Assistance to the Poor" (N.Y. 2008), http://www.legalservicesnyc.org/index.php?option=com_content&task=view&id=109&Itemid=142. *See also* Press Release, *Judge Juanita Bing Newton Appointed Deputy Chief Administrative Judge for Justice Initiatives*, New York State Unified Court System (June 29, 1999) ("Access to the legal system is an inherent right of citizenship, yet far too many New Yorkers are currently denied this right because they lack economic resources.").

5 *Expanding Access to Justice in New York State*, A Ten Year Report, Office of the Deputy Chief Administrative Judge for Justice Initiatives (March 2009), http://www.abanet.org/legalservices/delivery/downloads/expanding_access_to_justice_in_new_york_state.pdf.

6 Legal Services. NYC, New Yorkers in Crisis (2008), *available at* http:// www.legalservicesnyc.org/storage/lsny/PDFs/new_yorkers_in_crisis.pdf.

7 Leslie C. Levin, *Pro Bono Publico in a Parallel Universe: The Meaning of Pro Bono in Solo and Small Firms*, 37 HOFSTRA L. REV. 699, 704–05 (2009).

8 Esther F. Lardent, *The Case Against: Just Say No… To Mandatory Pro Bono." From the* Pro Bono Guide issue of THE AMERICAN LAWYER, 1996.

in which a national, state or local bar association or a court has formulated a mandatory pro bono edict, that action has generated a firestorm of protest."[9] This has led commentators to conclude that initiatives to adopt mandatory pro bono rules have been counterproductive and divisive, making it more likely that attempts to implement a compulsory pro bono rule would be met with negative consequences.[10]

VI. ANNOTATIONS OF ETHICS OPINIONS

N.Y.C. Bar Op. 2009-4 (2009) ("the Rules strongly encourage lawyers both 'to provide pro bono legal services to benefit poor persons' and 'to contribute financially to organizations that provide legal services to poor persons.' Therefore, although payments to non-qualified legal assistance organizations in exchange for referrals are prohibited, donations generally to support such organizations are not.").

N.Y.C. Bar Op. 1996-4. (1996) (law firm may engage in the simultaneous participation on a pro bono basis in the volunteer counsel program to provide assistance in criminal appeals to a District Attorney (the D.A. Program) while also participating on a pro bono basis in the Volunteer Program of the Criminal Appeals Bureau of The Legal Aid Society (the Legal Aid Program). Although "simultaneous involvement in the prosecution and defense of criminal matters can give rise to ethical concerns in specific cases… simultaneous involvement in these two *pro bono* programs is not ethically improper.").

N.Y.C. Bar Op.1995-2 (1995) (where a legal services organization may have committed malpractice to the detriment of its client, the organization should withdraw from the representation, advise the client to obtain legal advice from an attorney not employed by the organization, and assist the client in locating new counsel. The Opinion notes that because "most clients who require pro bono legal assistance will find it substantially difficult to obtain a lawyer on their own to pursue a malpractice claim or to follow through on the original matter… [the legal services organization] should make special efforts to assist such clients in locating new counsel.").

VII. ANNOTATIONS OF CASES [RESERVED]

9 Esther F. Lardent, *The Case Against: "Just Say No… To Mandatory Pro Bono*," American Lawyer 1, 2 (1996), *available at* http:// www.probonoinst.org/pdfs/justsayno.pdf (last visited Jan. 24, 2010). *See also*, Richard F. Storrow & Patti Gearhart Turner, *Where Equal Justice Begins: Mandatory Pro Bono in American Legal Education*, 72 UMKC L. Rev. 493, 506–07 (2003)

10 Douglas W. Salvesen, *The Mandatory Pro Bono Service Dilemma: A Way Out of the Thicket,* 82 Mass. L. Rev. 197 (1997); Jennifer Murray, *Lawyers Do it For Free?: An Examination of Mandatory Pro Bono,* 29 Tex. Tech. L. Rev. (1998); John C. Scully, *Mandatory Pro Bono: An Attack on the Constitution,* 19 Hofstra L. Rev. 1229 (1991).

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Rule 6.2: [Reserved]

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Rule 6.3: Membership in a Legal Services Organization

I. TEXT OF RULE 6.3[1]

A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rules 1.7 through 1.13; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer's firm.

II. NYSBA COMMENTARY

[1] Lawyers should be encouraged to support and participate in legal services organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[1A] This Rule applies to legal services organizations organized and operating on a not-for-profit basis.

1 Rules Editor Janessa L. Bernstein, Tesser, Ryan & Rochman LLP; and Editor-in-Chief Lewis Tesser, Tesser, Ryan & Rochman LLP. The Editors would like to thank Charisma L. Miller and Patricia G. Birch for their research assistance.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 6.3 is the successor to former Disciplinary Rule 5-110. Specifically:

- 6.3 is identical to former DR 5-110 except that a period has been inserted to create the sentence "The lawyer shall not knowingly participate in a decision or action of the organization."
- 6.3(a) is identical to DR 5-110(1) except that "the lawyer's duty of loyalty to a client under DR 5-101 through DR 5-111" now reads "the lawyer's obligations to a client under Rules 1.7 through 1.13."
- 6.3(b) is identical to DR 5-110(2).

III.2 ABA Model Rules

NY Rule 6.3 is similar to ABA Rule 6.3 with minor variation. Specifically:

- Both NY and ABA Rule 6.3 each establish that a lawyer may serve as a director, officer, or member of a legal services organization except NY adds the words "not-for-profit" to describe the type of legal services organizations to which Rule 6.3 applies.
- NY Rule 6.3 says "interests that differ from those of a client" while ABA Rule 6.3 says "interests adverse to a client."
- NY Rule 6.3 adds "or the lawyer's firm" to the end of the first sentence of the Rule.
- NY 6.3(a) adds "through [Rule] 1.13."
- NY 6.3(b) uses the language "interests differ from those of a client" while ABA Rule 6.3 says "interests are adverse to a client."

IV. PRACTICE POINTERS

1. Lawyers who serve as directors, officers, or members of not-for-profit legal services organizations should be aware of their duties to private practice clients and should carefully consider whether participation will affect a client or will otherwise create a conflict.

2. Lawyers who serve as directors, officers, or members of not-for-profit legal services organizations should be aware of their own law firm's policies regarding attorney participation in such organizations and conflicts rules as well as the policies of the not-for-profit legal services organization.
3. Attorneys employed by firms should review client engagement letters prior to participating in a decision or action on behalf of a not-for-profit legal services organization in order to ensure that such participation is not prohibited by the agreement.

V. ANALYSIS

V.1 Purpose of Rule 6.3

Lawyers in private practice who offer their professional services to not-for-profit legal services organizations are granted some relief from New York's restrictive conflicts of interest rules by Rule 6.3. The Rule applies to a lawyer who "personally represents or practices with a law firm that represents clients whose interests may differ from those of the legal services organization that the lawyer serves."[2] The Rule permits a lawyer to serve as director, officer, or member of a not-for-profit legal services organization without fear that such involvement will necessarily create an attorney-client relationship with the persons served by such an organization and thereby create a possible conflict between the attorney's duties to private practice clients and the persons served by the organization. The public policy underlying this Rule, formerly DR 5-110, "is to encourage lawyers to contribute pro bono legal services and to assist in making legal counsel available to clients with limited means."[3]

V.2 Knowledge

Rule 6.3 prohibits a lawyer from "*knowingly* participat[ing] in a decision or action of the organization" if it "would be incompatible with the lawyer's obligations to a [private practice] client under Rules 1.7 through 1.13" pertaining to a lawyer's duty of loyalty to clients and the various conflicts of interest rules (*emphasis added*). To determine the extent of review required before a lawyer can participate in a decision or action that could implicate the lawyer's obligations to a private client pursuant to the cited disciplinary rules, it is first necessary to define "knowingly."

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2 The New York Code of Professional Responsibility: Opinions, Commentary, and Caselaw (1997 & 2008 Supp.)

3 N.Y.S. Bar Op. 794 (2006). *See also* Rule 6.1 (pro bono services that meet the 20-hour annual goal for New York lawyers include "activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons").

Rule 1.0 defines "knowingly" as denoting "actual knowledge of the fact in question," but the Rule further provides that a "person's knowledge may be inferred from the circumstances." Lawyers thus should be cautious when taking actions on behalf of a not-for-profit legal services organization and should carefully consider, prior to any such participation, whether a possible conflict of interest or violation of the lawyer's duty of loyalty to a private practice client will result from such participation. If this is the case, the lawyer is bound by the particular disciplinary rule at issue and must act in accordance with said Rule. This will not necessarily mean that a lawyer, in all instances, must refrain from participation in the action or decision at issue.[4] Instead, in some cases, such as those implicating Rules 1.7, 1.8, and 1.9, a lawyer may, after full disclosure to the private practice client, obtain the client's informed consent, confirmed in writing, and continue her participation in the decision or action on behalf of the not-for-profit legal services organization.[5]

Rule 6.3 is arguably more lenient as it relates to the question of an attorney's duties to a client of the not-for-profit legal services organization. Rule 6.3(b) establishes that a lawyer "shall not knowingly participate in a decision or action of the organization where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of the lawyer or the lawyer's firm." The Rule thus distinguishes between the duties of a lawyer to a current or former private practice client and the duties of the lawyer to a client of the legal services organization. The Rule, as it applies to a client of the organization, is lenient in that it only requires that a lawyer refrain from participation where there is a possibility that such participation will have a "material adverse effect." This is arguably a higher standard than is provided for in Rule 6.3(a) which mandates that the lawyer refrain from participation if the decision or action "would be incompatible" with the lawyer's other obligations to a client pursuant to Rules1.7 through 1.13.

VI. ANNOTATIONS OF ETHICS OPINIONS

N.Y.S. Bar Op. 643 (1993) (because former DR 5-110 permits a lawyer member of a legal services organization's governing board to represent a paying client whose interests are adverse to the organization's client, it follows that a lawyer-member of a legal services organization's governing board may represent an opponent of the organization's client on a paying or pro bono basis).

N.Y.S. Bar Op. 688 (1996) (supervising attorney at a law school legal clinic may properly represent a clinic client when opposing counsel is a member of the law school's Board of Trustees so long as the clinic attorney reasonably believes that his or her professional judgment will not be adversely affected by the relationship of the board member to the clinic, and the clinic attorney discloses to the client the relationship of the board member and the clinic as soon as practicable and obtains the client's consent to continue the representation).

4 *Supra* note 2.

5 *Supra* note 2.

VII. ANNOTATIONS OF CASES

Lovitch v. Lovitch 64 A.D.3d 710, 884 N.Y.S.2d 430 (2009) (alleged appearance of impropriety, due to fact that father's attorney was board member of organization for whom children's attorney worked, but disqualification of children's attorney in custody modification proceeding was not required, where children's attorney properly advocated the position of the children, and representation was not affected by the attorney's personal interests).

B.A. v. L.A., 196 Misc. 2d 86, 761 N.Y.S.2d 805 (Fam. Ct. Rockland Co. 2003) (holding that former DR 5-110 applied to a lawyer serving as a director of a legal services organization, not to an attorney employed by the organization).

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Rule 6.4: Law Reform Activities Affecting Client Interests

I. TEXT OF RULE 6.4[1]

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer actively participates, the lawyer shall disclose that fact to the organization, but need not identify the client. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7

II. NYSBA COMMENTARY

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. For example, a lawyer concentrating in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients. A lawyer's identification with the organization's aims and purposes, under some circumstances, may give rise to a personal-interest conflict with client interests implicating the lawyer's obligations under other Rules, particularly Rule 1.7. A lawyer is also professionally obligated to protect the integrity of the law reform program by making an appropriate disclosure

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within the organization when the lawyer knows a private client might be materially affected.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 6.4 is new but similar in some respects to the last two sentences of EC 8-4.[2]

III.2 ABA Model Rules

NY Rule 6.4 is substantially identical to ABA Rule 6.4 except New York adds an additional sentence that provides: "When the lawyer knows that the interests of a client may be adversely affected by a decision in which the lawyer actively participates, the lawyer shall disclose that fact to the client."

IV. PRACTICE POINTERS

1. Lawyers may be subject to stricter rules imposed by individual law firms governing the lawyer's ability to engage in decisions on behalf of law reform organizations that may affect client interests. A lawyer employed by a firm should carefully evaluate such situations in consultation with the firm's ethics counsel, conflicts committee, the managing lawyer or other ethics authorities.
2. Lawyers who participate in law reform organizations should be aware that such organizations may impose upon them different and more stringent disclosure obligations than those set forth in Rule 6.4.
3. Lawyers who serve on Bar Associations should be attentive to the activities they participate in which may affect the interests of private practice clients. If, in such a situation, the lawyer believes participating in an organizational decision will adversely affect a client, the lawyer should disclose the details of his or her participation to the private practice client and obtain the informed consent of the client confirmed in writing.
4. Lawyers who serve on Bar Associations should be mindful that their work on behalf of a Bar Association might allow for a private practice client to materially benefit. If the lawyer knows that a client will so benefit, the lawyer has an obligation to disclose the fact to the Association, though the lawyer need not disclose the identity of the client to the Bar Association.

2 This correlation was noted in a side-by-side comparison of pre- and post-April 1, 2009 New York Rules. Roy Simon, Comparing the New NY Rules of Professional Conduct to the NY Coe of Professional Responsibility, *available at* http://www.nyprr.com/.

V. ANALYSIS

V.1 Purpose of Rule 6.4

Rule 6.4 serves the important goal of encouraging lawyers to participate in activities that improve the legal system and the legal profession.[3] As with pro bono legal work, many attorneys feel an ethical obligation to use their skills to promote law reform.[4] Rule 6.4 thus allows lawyers to participate as members, directors, or officers of an organization seeking the reform of the law or its administration, notwithstanding the fact that the reform may affect the interests of the lawyer's client. The Rule provides guidance on how to avoid conflicts of interest with current clients.

V.2 Avoidance of Conflicts

[a] In General The authorization in Rule 6.4 of attorney participation in law reform activities is consistent with Rule 1.2(b), which establishes that a "lawyer's representation of a client… does not constitute an endorsement of the client's political, economic, social or moral views or activities."[5] Attorneys are therefore permitted to serve as directors, officers or members of an organization involved in reform of the law or its administration, even though that the reform may affect the interests of a client of the lawyer.

Rule 6.4 does impose some disclosure obligations on attorneys who know that the interests of a client may be either materially benefited or adversely affected by a decision in which the lawyer actively participates.

[b] Materially Benefitted Clients In the first situation, when a lawyer knows that a client will materially benefit from the lawyer's participation in a decision on behalf of an organization seeking law reform, the lawyer must disclose that fact to the organization. This obligation is consistent with Rule 3.9, which provides that a lawyer who makes a presentation to a legislature or administrative agency regarding a proposed change in the law would be engaging in impermissible deceit if he or she failed to disclose the fact that the appearance is on behalf of a client. The Rule, in apparent recognition of the importance of client confidentiality, allows a lawyer to disclose that her participation will materially benefit a current client while keeping the identity of the client confidential.

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3 *See* New York State Bar Association Committee on Standards of Attorney Conduct, Executive Summary: Proposed Rule 6.4, Law Reform Activities Affecting Client Interests, http://www.nysba.org/Content/ContentFolders30/CommitteeonStandardsofAttorneyConduct2/Rule6.4.pdf.

4 Daniel M. Kowalski, *Things to Do While Waiting for the Revolution*, 21 GEO. J. LEGAL ETHICS 37, 39 (2008); *See generally*, Nadine Strossen, *Pro Bono Legal Work: For the Good of Not Only the Public, But Also the Lawyer and the Legal Profession*, 91 MICH. L. REV. 2122 (1993).

5 *See also* Restatement of the Law Governing Lawyers, Third § 125 (2000) (noting that a lawyer's representation of a client implies nothing about the lawyer's personal beliefs).

[c] Disclosure to Adversely Affected Clients As originally adopted, Rule 6.4 contained a second disclosure requirement that if a lawyer knew that interests of a client may be adversely affected by a decision in which the lawyer actively participated, the lawyer had to disclose that fact to the client. In practical terms, this meant that such a client would have the opportunity to object to the participation as a "positional conflict" of interest.6[6] Concerns were raised about this requirement of client notification of a lawyer's participation in law-related activities that might have an adverse effect on the client, especially where the ultimate result of that provision in the rule might be to undermine the purpose of the rule itself, which is to encourage lawyers to use their expertise to promote progress in the law and legal policy. The requirement that a lawyer disclose to a client any involvement in an association decision that *may* adversely affect the client could not only have caused conflicts amongst clients and lawyers, and lawyers and their firms, but could also have caused an end to certain representations and dissuade lawyers from participating in law reform leadership activities.

Thus, on May 4, 2010, the Appellate Division amended Rule 6.4 to address those concerns by deleting the requirement and instead inserting the language:

> In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7.

VI. ANNOTATIONS OF ETHIC OPINIONS [RESERVED]

VII. ANNOTATIONS OF CASES [RESERVED]

VIII. BIBLIOGRAPHY

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6 *See* John Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 461 (1993); Norman Spaulding, *NOTE: The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395 (1998).

Rule 6.5: Participation in Limited Pro Bono Legal Service Programs

I. TEXT OF RULE 6.5[1]

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) shall comply with Rules 1.7, 1.8 and 1.9, concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in these Rules, only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest; and

(2) shall comply with Rule 1.10 only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by Rules 1.7, 1.8 and 1.9.

(b) Except as provided in paragraph (a)(2), Rule 1.7 and Rule 1.9 are inapplicable to a representation governed by this Rule.

(c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.

(d) The lawyer providing short-term limited legal services must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6.

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(e) This Rule shall not apply where the court before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation.

II. NYSBA COMMENTARY

[1] [Omitted.]

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. *See* Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client, but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, these Rules, including Rules 1.6 and Rule 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7, 1.8 and 1.9 only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rules 1.7 and 1.9 are inapplicable to a representation governed by this Rule, except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 only when the lawyer knows that the lawyer's firm is affected by Rules 1.7, 1.8 or 1.9. By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Because the lawyer is not precluded pursuant to this rule Rule 1.10 becomes inapplicable. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

- NY Rule 6.5 is identical to DR 5-101-a except that where Rule 6.5 references Rules 1.7, 1.8, and 1.9 respectively, DR 5-101-a(A)(1) references DR 5-101, DR 5-105, and DR 5-108. Additionally, Rule 6.5(a)(1) adds the word "and."

- NY Rule 6.5(a)(2) is identical to DR 5-101-a(A)(2) except the new Rule says "shall comply with Rule 1.10" while the Disciplinary Rule says "shall comply with DR 5-101 [1200.20], DR 5-105 [1200.24] and DR 5-108 [1200.27]." Additionally, the new Rule now says "in a law firm affected by Rules 1.7, Rule 1.8 and Rule 1.9" in place of the language "in a law firm is affected by those sections" found in the Disciplinary Rule.
- NY Rule 6.5(b) is identical to DR 5-101-a(B) except that where Rule 6.5 references Rules 1.7 and 1.9, the Disciplinary Rule references DR 5-105 [1200.24] and DR 5-108 [1200.27].
- NY Rule 6.5(c) now uses the word "paragraph" instead of the word "subdivision" as found in DR 5-101-a(C).
- NY Rule 6.5(d) is identical to DR 5-101-a(D) except that the new Rule refers to Rule 1.6 while the DR refers to DR 4-101.
- NY Rule 6.5(e) is identical to DR 5-101-a(E).

III.2 ABA Model Rules

NY Rule 6.5 is similar to ABA Rule 6.5. There are some variations:

- NY Rule 6.5(a) reads: "sponsored by a court, government agency, bar association or not-for-profit legal services organization" while ABA Rule 6.5(a) does not include in the list of programs within the rule a "government agency" or "bar association."
- NY Rule 6.5(a)(1) differs slightly from the ABA Rule 6.5(a)(1). The NY Rule is more expansive and it uses different language than does the ABA Rule. NY mandates that a lawyer "shall comply with Rules 1.7, 1.8 and 1.9" while the ABA Rule only provides that a lawyer "is subject to Rules 1.7 and 1.9(a)." The NY Rule adds the following language describing Rules 1.7, 1.8 and 1.9: "concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in these Rules." In addition, the ABA Rule says "only if the lawyer knows" while the NY Rule says "has actual knowledge at the time of commencement of representation."
- NY Rule 6.5(a)(2) is similar to ABA Rule 6.5(a)(2) except that NY says that a lawyer "shall comply" while the ABA Rule says "is subject to." In addition, the ABA Rule says "only if the lawyer knows" while the NY Rule says "has actual knowledge at the time of commencement of representation."
- NY Rule 6.5(b) differs from ABA Rule 6.5(b) in that the NY Rule says "Rule 1.7 and Rule 1.9 are inapplicable" while the ABA Rule instead says "Rule 1.10 is inapplicable."
- NY adds Rules 6.5(c), (d) and (e).

IV. PRACTICE POINTERS

1. Lawyers seeking to participate in limited pro bono legal services organizations should be mindful that traditional conflicts rules will apply if a lawyer participating

in such a program becomes aware of a conflict of interest with a private client during the course of a short-term representation of a pro bono client.

2. When selecting a program to work with, a lawyer should carefully consider the areas of pro bono law that will allow the lawyer to more easily avoid conflicts of interest. For example, a lawyer who represents realty companies may want to avoid participation in a program that offers pro bono services to clients facing landlord tenant disputes.
3. Many limited pro bono legal services organizations offer training to lawyers. Thus a lawyer need not seek out opportunities to provide legal services solely in the area of law in which the lawyer practices. Given the availability of such training, lawyers can more easily avoid conflicts of interest while still providing much needed pro bono services.

V. ANALYSIS

V.1 Purpose of Rule 6.5

Many attorneys who are unable to undertake extensive pro bono work choose instead to participate in limited pro bono legal service programs that offer legal services to a pro bono client. In programs of this type, "lawyers typically meet with clients only one time, for a relatively brief period…give rudimentary advice, help clients complete legal forms, and refer clients to other resources… all with the aim of assisting clients to address their legal problems without needing further legal assistance."[2] Legal hotlines, for example, are a common type of short-term pro bono program subject to the provisions of Rule 6.5.[3] Such programs allow many people who would otherwise go without the services of a lawyer to engage such services for a very limited amount of time. Attorneys who participate in these programs create a lawyer-client relationship with the people they serve,[4] albeit for a much more limited amount of time. Despite the limited nature of the legal services, the "lawyers who participate in these programs establish a lawyer-client relationship" with the persons they serve.[5] As with any lawyer-client relationship the duty to avoid conflicts of interest comes into play.

2 Roy Simon, *Conflicts of Interest & "Limited Service" Pro Bono Programs: New DR 5-101-a*, N.Y. Prof'l Resp. Rep., May 2008, at 1.

3 Lawrence J Fox and Susan R Martyn, American Law Institute-American Bar Association Committee on Continuing Professional Education.

4 See N.Y.C. Bar Op. 2005-01 (2005) at n. 1 (noting that "[a]lthough the [lawyer-client] relationship ordinarily comes about by express agreement, it may also be established implicitly").

5 Simon, *supra* note 2, at 1.

V.2 Former Disciplinary Rule 5-101-a

The current Rule 6.5 is identical to its predecessor, DR 5-101-a, which was adopted in November 2007. The Rule was modeled after ABA Model Rule 6.5 pertaining to attorneys' participation in short-term legal services programs.[6] New York was then considering adopting its own version of the Model Rules, which would have included Rule 6.5, but in view of its importance to numerous pro bono programs throughout the state, the Office of the Deputy Chief Administrative Judge for Justice Initiatives, along with Fern Fisher, administrative judge of the New York City Civil Court, urged the Administrative Board to amend the Code rather than await the consideration of the entire set of proposed rules.[7]

Prior to the enactment of DR 5-101-a, many pro bono attorneys were uncertain as to whether standard conflict of interest rules applied to short-term limited scope representation.[8] Given the lack of clarification in the Code, attorneys who participated in such programs were presumably expected to perform a standard conflicts check prior to undertaking *any* proposed new engagement, even ones of such limited nature.[9] The failure to have such a formal system in place could render both the law firm and the individual lawyer in violation of former DRs 5-101(D) and (E).[10]

The duty to check for conflicts of interest prior to the undertaking of even a very short term pro bono representation (such as that subsequently contemplated by former DR 5-101-a and current Rule 6.5) was a significant roadblock for lawyers seeking to offer limited pro bono services.[11] This was the case because lawyers offering such limited legal services were typically not able to effectively screen for conflicts of interest. *See generally*, NYSBA Commentary to Rule 6.5, Comment [3]. Given this inability to systematically screen for conflicts, and the possibility that a lawyer or firm could be required to withdraw from the representation of a firm client in the face of a conflict of interest resulting from the limited term pro bono representation, lawyers and firms were justifiably hesitant to offer limited pro bono legal services.

The enactment of former DR 5-101-a alleviated some of the burden on New York attorneys who sought to participate in limited pro bono legal service programs. The former Rule established that a lawyer participating in qualifying programs would only be subject to the conflict of interest rules if the lawyer had actual knowledge at the time of commencement of the representation of an underlying conflict or an imputed conflict. Former DR 5-101-a(A)(1), (2); Rule 6.5(A)(1), (2).

6 Juanita Bing Newton, Barbara Mulé and Susan. W. Kaufman, *New Rules Help Self Represented Litigants*, N.Y.L.J., June 26, 2008, at 2, col. 3.

7 *Id.*

8 *Id.*

9 *See generally* Simon, *supra* note 2, at 2.

10 *Supra* note 2, at 2.

11 *Supra* note 2, at 2.

V.3 Rule 6.5(e)

New Rule 6.5 is identical to former DR 1-105-a. It establishes that a relaxation of ordinary conflict of interest rules is appropriate for lawyers participating in certain short-term limited legal services programs.[12] Although Rule 6.5, like its predecessor DR 5-101-a, is likely to encourage participation in short-term pro bono programs, the Rule is not without its limits.

As set forth in subparagraph (e), the exemption from traditional conflict-of-interest rules will not apply in two circumstances: (1) if a court before which a matter is pending determines that a conflict of interest exists or, (2) if during the course of the representation, the lawyer providing such services becomes aware of a conflict of interest precluding continued representation. It is the second provision in subparagraph (e) that most noticeably limits the benefits of the Rule and makes a lawyer's decision to undertake limited pro bono representation more complicated[13]. A lawyer participating in short-term limited pro bono programs should be mindful that as soon as he or she becomes aware of a conflict of interest, traditional conflicts rules may come into play, overriding the leniency set forth in Rule 6.5(a). This is a problematic situation.

The triggering of traditional conflicts rules would impose a heavier burden on both the lawyer providing the short term pro bono services and on the lawyer's firm. In such a situation, if an attorney discovers a direct conflict with one of his or her firm's current clients, he or she would be subject to Rules 1.8 and 1.10(a) pertaining to the duties to clients in the face of conflicts and the imputation of conflicts.[14] A lawyer in such a situation would be prohibited from continuing a short-term representation adverse to a current client and, more significantly, would be precluded from representing a firm client against the short-term pro bono client. Further, the lawyer's firm would be disqualified by imputation from representing the firm client against the pro bono client. One commentator notes, "If that is what the Rule really means, then participating in a short-term limited legal services program carries almost as much risk as before DR 5-101-a was adopted."[15]

Attorneys and firms will unquestionably be hesitant to participate in short-term pro bono representations if such participation carries with it the attendant risk that a firm will be disqualified from representing a current client as a result of an attorney becoming aware of a conflict during the course of short-term representation. We do not believe that Rule 6.5(e) means that ordinary conflicts rules will apply as soon as a lawyer discovers a conflict during the course of a short-term pro bono representation. This would be an absurd result, forcing well-intentioned pro bono lawyers to disqualify

12 *See* New York State Bar Association Committee on Standards of Attorney Conduct, Executive Summary: Proposed Rule 6.5, Participation in Limited Legal Service Programs, http://www.nysba.org/Content/ContentFolders30/CommitteeonStandardsofAttorneyConduct2/Rule6.5.pdf.

13 *See generally* Simon, *supra* note 2.

14 Simon, *supra* note 2.

15 Simon, *supra* note 2.

themselves or their firms from the representation of paying clients. Instead, the Rule more likely means that a lawyer who discovers a conflict during the course of a short-term representation must not continue the short-term pro bono representation. This interpretation of the Rule is consistent with NYSBA Commentary to rule 6.5, Comment [5]. The Comment explains that "… after commencing a short-term limited representation in accordance with this Rule, a lawyer [who] undertakes to represent the [short-term] client in the matter on an ongoing basis" will be subject to traditional conflicts rules. Therefore, conflicts rules, such as the imputation rule, should only apply once the lawyer's representation of a pro bono client extends beyond the short-term one-time provision of pro bono services. Let us hope that courts will take into account the policy reasons behind the drafting of the Rule and interpret Rule 6.5(e) consistently with the Comment. The courts drafted Rule 6.5(e) and its predecessor DR 5-101-a in an effort to encourage attorneys to offer legal services to short-term pro bono clients, and the rule should be so applied.

An analysis of the language in subsections (a) and (e) further supports our view that traditional conflicts rules, including the imputation rule, will not become effective immediately upon a lawyer's discovery of a conflict during the course of a short-term representation. Rule 6.5(a) provides that a lawyer may undertake a short-term pro bono representation if a conflict is not evident "at the time of commencement of [the] representation." This language seemingly means that an attorney can provide limited advice to a pro bono client even if a conflict becomes evident later *during the course of the short-term representation, i.e., after the "time of commencement but before representation on an "ongoing basis."* Subsection (e) provides that Rule 6.5 will not apply if "during the course of the representation, the lawyer… becomes aware of the existence of a conflict of interest precluding continued representation." Subsection (e) does not modify subsection (a) but instead stands alone. While subsection (a) addresses the ability of a lawyer to undertake a short-term pro bono representation in the first instance, subsection (e) addresses the ability of a lawyer to represent the pro bono client on a continuing basis—one that is no longer short-term. Therefore, subsection (e) can be read to mean that once a pro bono representation extends beyond the short-term situation contemplated by subsection (a), traditional conflicts rules will once again apply.

We believe that the phrase "This Rule shall not apply… if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation," should read: "This Rule shall not apply… if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation of the short-term pro bono client and the lawyer does not cease the short-term representation." Nevertheless, a court might interpret the phrase to mean that "if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation of the short-term client, such a conflict will be imputed to the lawyer's firm and will preclude the continued representation of a private practice client." While this latter reading would be an unfortunate, and we believe, unintended result, attorneys must proceed with caution until there is clarification.

V.4 Choosing an Appropriate Pro Bono Opportunity

Given the unlikely situation that lawyers participating in short-term limited pro bono programs will be able to systematically screen for conflicts, lawyers should carefully choose the programs they work with. There are numerous pro bono opportunities available for lawyers, and by choosing a program carefully, lawyers may be able to avoid conflicts arising during the course of a short-term representation. For example, attorneys whose firms regularly represent creditors in consumer collection actions should be wary of undertaking the representation of pro bono clients seeking short-term assistance in filing for personal bankruptcy under Chapter 7.[16] Likewise, an attorney whose firm regularly represents realtors should hesitate undertaking the short-term limited pro bono representation of a person in a landlord-tenant dispute.[17] Instead, such attorneys could seek out one of the many pro bono programs that offer short-term services to pro bono clients in different practice areas.

Some short-term pro bono programs such as legal hotlines and "ask a lawyer" nights implement conflicts checks prior to assigning a lawyer to a short-term client. For example, many legal hotlines employ staff members to screen calls to ensure that no conflicts of interest will arise from matching a client with a particular lawyer. Given the availability of such opportunities, lawyers can avoid conflicts of interest and can offer their services to persons who otherwise would have no meaningful access to a legal counselor.

VI. ANNOTATIONS OF ETHICS OPINIONS

N.Y.C. Bar Op. 2009-3 (2009) (upon hiring a law school graduate, law firms generally may accept or continue representations adverse to clients of the clinic where the graduate worked. When the firm's representation involves a matter substantially related to the one previously handled by the graduate at the clinic, or the graduate acquired confidential information from her client that is material to the matter handled by the firm, the firm should implement adequate measures to screen the graduate upon commencement of employment to protect the confidences and secrets of her former client.).

N.Y.C. Bar Op.1991-1 (1991) (where a student had substantial responsibility for representing a client at a clinic and knew of the conflict at the time she sought or considered accepting future employment with a law firm, she could not continue her representation of the pro bono client absent receipt of the client's consent following full disclosure of the conflict).

16 *See* Boston Bar Ass'n Ethics Comm., Op. 2008-1 (2008), *available at* http://www.bostonbar.org/sc/ethics/op08_1.pdf.

17 *See generally* Simon, *supra* note 2.

VII. ANNOTATIONS OF CASES [RESERVED]

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Rule 7.1: Advertising

WARNING: A recent Second Circuit opinion affirmed that certain provisions of this Rule are unconstitutional. *Alexander v. Cahill*, 2010 WL 842711 (2d Cir. (NY) Mar. 12, 2010). It follows that certain original NYSBA Commentary, *infra*, are also superseded. Please see Analysis, *infra*.

I. TEXT OF RULE 7.1[1]

(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:

(1) contains statements or claims that are false, deceptive or misleading; or

(2) violates a Rule.

(b) Subject to the provisions of paragraph (a), an advertisement may include information as to:

(1) legal and nonlegal education, degrees and other scholastic distinctions, dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications of law related matters authored by the lawyer; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide professional ratings;

(2) names of clients regularly represented, provided that the client has given prior written consent;

(3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the lawyer or law firm participates; nonlegal services provided by the lawyer or law firm or by an entity owned and controlled by the lawyer or law

1 Rules Editor Janessa L. Bernstein, Tesser, Ryan & Rochman LLP; and Editor-in-Chief Lewis Tesser, Tesser, Ryan & Rochman LLP. The Editors would like to thank Charisma L. Miller for her research assistance.

firm; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by Rule 5.8, and the nature and extent of services available through those contractual relationships; and

(4) legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by paragraph (p); range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal and nonlegal services.

(c) An advertisement shall not:

(1) include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending[2];

(2) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;

(3) include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case[3];

(4) use actors to portray the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same;

(5) rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence[4];

(6) be made to resemble legal documents; or

(7) utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter[5].

(d) An advertisement that complies with paragraph (e) may contain the following:

(1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;

(2) statements that compare the lawyer's services with the services of other lawyers;

2 The viability of this provision is suspended indefinitely. *See Alexander v. Cahill*, 2010 WL 842711 (2d Cir. (NY) Mar. 12, 2010), and discussion, *infra*.

3 The viability of this provision has been materially modified. *See Alexander v. Cahill*, 2010 WL 842711 (2d Cir. (NY) Mar. 12, 2010), and discussion, *infra*.

4 The viability of this provision is suspended indefinitely. *See Alexander v. Cahill*, 2010 WL 842711 (2d Cir. (NY) Mar. 12, 2010), and discussion, *infra*.

5 The viability of this provision is suspended indefinitely. *See Alexander v. Cahill*, 2010 WL 842711 (2d Cir. (NY) Mar. 12, 2010),and discussion, *infra*.

(3) testimonials or endorsements of clients, where not prohibited by paragraph (c)(1), and of former clients; or

(4) statements describing or characterizing the quality of the lawyer's or law firm's services.

(e) It is permissible to provide the information set forth in paragraph (d) provided:

(1) its dissemination does not violate paragraph (a);

(2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; and

(3) it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome."

(f) Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words "Attorney Advertising" shall appear therein. In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING."

(g) A lawyer or law firm shall not utilize:

(1) a pop-up or pop-under advertisement in connection with computer accessed communications, other than on the lawyer or law firm's own web site or other internet presence[6]; or

(2) meta tags or other hidden computer codes that, if displayed, would violate these Rules.

(h) All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) Any words or statements required by this Rule to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of a web site, the required words or statements shall appear on the home page.

(j) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service. Such legal services shall include all those services that are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

6 The viability of this provision is suspended indefinitely. See *Alexander v. Cahill*, 2010 WL 842711 (2d Cir. (NY) Mar. 12, 2010).

(k) All advertisements shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial dissemination.

Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

(l) If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm shall not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm shall not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

(m) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Rule in a publication that is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this Rule in a publication that is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this Rule in a publication that has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

(n) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(o) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.

(p) All advertisements that contain information about the fees charged by the lawyer or law firm, including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law §488(3).

(q) A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

(r) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.

II. NYSBA COMMENTARY

WARNING: A recent Second Circuit opinion affirmed that certain provisions of this Rule are unconstitutional. *Alexander v. Cahill*, 2010 WL 842711 (2d Cir. (NY) Mar. 12, 2010). It follows that certain of the following original NYSBA Commentary, *infra*, are also superseded. Please see Analysis, *infra*.

Advertising

[1] The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of competent legal counsel. Hence, important functions of the legal profession are to educate people to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

[2] The public's need to know about legal services can be fulfilled in part through advertising. People of limited means who have not made extensive use of legal services in many instances rely on advertising to find appropriate counsel. While a lawyer's reputation may attract some clients, lawyers may also make the public aware of their services by advertising to obtain work.

[3] Advertising by lawyers serves two principal purposes: first, it educates potential clients regarding their need for legal advice and assists them in obtaining a lawyer appropriate for those needs. Second, it enables lawyers to attract clients. To carry out these two purposes and because of the critical importance of legal services, it is of the utmost importance that lawyer advertising not be false, deceptive, or misleading. Truthful statements that are misleading are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication, considered as a whole, not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services, or about the results a lawyer can achieve, for which there is no reasonable factual foundation. For example, a lawyer might truthfully state, "I have never lost a case," but that statement would be misleading if the lawyer settled virtually all cases that the lawyer handled. A communication to anyone that states or implies that the lawyer has the ability to influence improperly a court, court officer, governmental agency, or government official is improper under Rule 8.4(e).

[4] To be effective, advertising must attract the attention of viewers, readers, or recipients and convey its content in ways that will be understandable and helpful to them. Lawyers may therefore use advertising techniques intended to attract attention, such as music, sound effects, graphics, and the like, so long as those techniques do not render the advertisement false, deceptive, or misleading. Lawyer advertising may use actors or fictionalized events or scenes for this purpose, provided appropriate disclosure

of their use is made. Some images or techniques, however, are highly likely to be misleading. So, for instance, legal advertising should not be made to resemble legal documents.

[5] The "Attorney Advertising" label serves to dispel any confusion or concern that might be created when nonlawyers receive letters or e-mails from lawyers. The label is not necessary for advertising in newspapers or on television, or similar communications that are self-evidently advertisements, such as billboards or press releases transmitted to news outlets, and as to which there is no risk of such confusion or concern. An advertisement in a newspaper may nevertheless require the label if it is a paid article about a law firm adjacent to other articles written by the newspaper, where there is a reasonable risk that readers will confuse the two. The ultimate purpose of the label is to inform readers where they might otherwise be confused.

[6] Not all communications made by lawyers about the lawyer or the law firm's services are advertising. Advertising by lawyers consists of communications made in any form about the lawyer or the law firm's services, the primary purpose of which is retention of the lawyer or law firm for pecuniary gain as a result of the communication. However, non-commercial communications motivated by a not-for-profit organization's interest in political expression and association are generally not considered advertising. Of course, all communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, or knowingly make a material false statement of fact or law. By definition, communications to existing clients are excluded from the Rules governing advertising. A client who is a current client in any matter is an existing client for all purposes of these Rules. (Whether a client is a current client for purposes of conflicts of interest and other issues may depend on other considerations. Generally, the term "current client" for purposes of the advertising exemption should be interpreted more broadly than it is for determining whether a client is a "current client" for purposes of a conflict of interest analysis.)

[7] Communications to former clients that are germane to the earlier representation are not considered to be advertising. Likewise, communications to other lawyers, including those made in bar association publications and other publications targeted primarily at lawyers, are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm. Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising. However, a newsletter, client alert, or blog that provides information or news primarily about the lawyer or law firm (for example, the lawyer or law firm's cases, personnel, clients or achievements) generally would be considered advertising. Communications, such as proposed retainer agreements or ordinary correspondence with a prospective client who has expressed interest in, and requested information about, a lawyer's services, are not advertising. Accordingly, the special restrictions on advertising and solicitation would not apply to a lawyer's response to a prospective client who has asked the lawyer to outline the lawyer's qualifications to undertake a proposed retention or the terms of a potential retention.

[8] The circulation or distribution to prospective clients by a lawyer of an article or report published about the lawyer by a third party is advertising if the lawyer's primary purpose is to obtain retentions. In circulating or distributing such materials the lawyer should include information or disclaimers as necessary to dispel any misconceptions to which the article may give rise. For example, if a lawyer circulates an article discussing the lawyer's successes that is reasonably likely to create an expectation about the results the lawyer will achieve in future cases, a disclaimer is required by paragraph (e)(3). If the article contains misinformation about the lawyer's qualifications, any circulation of the article by the lawyer should make any necessary corrections or qualifications. This may be necessary even when the article included misinformation through no fault of the lawyer or because the article is out of date, so that material information that was true at the time is no longer true. Some communications by a law firm that may constitute marketing or branding are not necessarily advertisements. For example, pencils, legal pads, greeting cards, coffee mugs, T-shirts, or the like with the law firm name, logo, and contact information printed on them do not constitute "advertisements" within the definition of this Rule if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter.

Recognition of Legal Problems

[9] The legal professional should help the public to recognize legal problems because such problems may not be self-revealing and might not be timely noticed. Therefore, lawyers should encourage and participate in educational and public-relations programs concerning the legal system, with particular reference to legal problems that frequently arise. A lawyer's participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients. Such a program might be considered to be advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm. A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for nonlawyers should caution them not to attempt to solve individual problems on the basis of the information contained therein.

[10] As members of their communities, lawyers may choose to sponsor or contribute to cultural, sporting, charitable, or other events organized by not-for-profit organizations. If information about the lawyer or law firm disseminated in connection with such an event is limited to the identification of the lawyer or law firm, the lawyer's or law firm's contact information, a brief description of areas of practice, and the fact of sponsorship or contribution, the communication is not considered advertising.

Statements Creating Expectations, Characterizations of Quality, and Comparisons

[11] Lawyer advertising may include statements that are reasonably likely to create an expectation about results the lawyer can achieve, statements that compare the lawyer's services with the services of other lawyers, or statements describing or characterizing the quality of the lawyer's or law firm's services, only if they can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated and are accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome." Accordingly, if true and accompanied by the disclaimer, a lawyer or law firm could advertise "Our firm won 10 jury verdicts over $1,000,000 in the last five years," "We have more Patent Lawyers than any other firm in X County," or "I have been practicing in the area of divorce law for more than 10 years." Even true factual statements may be misleading if presented out of the context of additional information needed to properly understand and evaluate the statements. For example, a truthful statement by a lawyer that the lawyer's average jury verdict for a given year was $100,000 may be misleading if that average was based on a large number of very small verdicts and one $10,000,000 verdict. Likewise, advertising that truthfully recites judgment amounts would be misleading if the lawyer failed to disclose that the judgments described were overturned on appeal or were obtained by default.

[12] Descriptions of characteristics of the lawyer or law firm that are not comparative and do not involve results obtained are permissible even though they cannot be factually supported. Such statements are understood to be general descriptions and not claims about quality, and would not be likely to mislead potential clients. Accordingly, a law firm could advertise that it is "Hard-Working," "Dedicated," or "Compassionate" without the necessity to provide factual support for such subjective claims. On the other hand, descriptions of characteristics of the law firm that compare its services with those of other law firms and that are not susceptible of being factually supported could be misleading to potential clients. Accordingly, a lawyer may not advertise that the lawyer is the "Best," "Most Experienced," or "Hardest Working." Similarly, some claims that involve results obtained are not susceptible of being factually supported and could be misleading to potential clients. Accordingly, a law firm may not advertise that it will obtain "Big $$$," "Most Money," or "We Win Big."

Bona Fide Professional Ratings

[13] An advertisement may include information regarding bona fide professional ratings by referring to the rating service and how it has rated the lawyer, provided that the advertisement contains the "past results" disclaimer as required under paragraphs (d) and (e). However, a rating is not "bona fide" unless it is unbiased and nondiscriminatory. Thus, it must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service's economic interests

(such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated. Further, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered. For example, a rating service that purports to evaluate all lawyers practicing in a particular geographic area or in a particular area of practice or of a particular age must apply its criteria to all lawyers within that geographic area, practice area, or age group.

Meta-Tags

[14] Meta-tags are hidden computer software codes that direct certain Internet search engines to the web site of a lawyer or law firm. For example, if a lawyer places the meta-tag "NY personal injury specialist" on the lawyer's web site, then a person who enters the search term "personal injury specialist" into a search engine will be directed to that lawyer's web page. That particular meta-tag is prohibited because Rule 7.4(a) generally prohibits the use of the word "specialist." However, a lawyer may use an advertisement employing meta-tags or other hidden computer codes that, if displayed, would not violate a Rule.

Advertisements Referring to Fees and Advances

[15] All advertisements that contain information about the fees or expenses charged by the lawyer or law firm, including advertisements indicating that in the absence of a recovery no fee will be charged, must comply with the provisions of section 488(3) of the Judiciary Law. However, a lawyer or law firm that offers any of the fee and expense arrangements permitted by section 488(3) must not, either directly or in any advertisement, state or imply that the lawyer's or law firm's ability to advance or pay costs and expenses of litigation is unique or extraordinary when that is not the case. For example, if an advertisement promises that the lawyer or law firm will advance the costs and expenses of litigation contingent on the outcome of the matter, or promises that the lawyer or law firm will pay the costs and expenses of litigation for indigent clients, then the advertisement must not say that such arrangements are "unique in the area," "unlike other firms," available "only at our firm," "extraordinary," or words to that effect, unless that is actually the case. However, if the lawyer or law firm can objectively demonstrate that this arrangement is unique or extraordinary, then the lawyer or law firm may make such a claim in the advertisement.

Retention of Copies; Filing of Copies; Designation of Principal Office

[16] Where these Rules require that a lawyer retain a copy of an advertisement or file a copy of a solicitation or other information, that obligation may be satisfied by any of the following: original records, photocopies, microfilm, optical imaging, and any other

medium that preserves an image of the document that cannot be altered without detection.

[17] A law firm that has no office it considers its principal office may comply with paragraph (h) by listing one or more offices where a substantial amount of the law firm's work is performed.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

- Rules 7.1(a)(1)–(2) are identical to DR 2-101(A)(1)–(2).
- Rule 7.1(b)(1) is identical to DR 2-101(B)(1) except with the trivial change that "this Part" became "these Rules."
- Rule 7.1(b)(2) is identical to DR 2-101(B)(2).
- Rule 7.1(b)(3) is identical to DR 2-101(B)(3) except that the new Rule references Rule 5.8, while DR 2-101(B)(3) references DR1-107.
- Rule 7.1(b)(4) is identical to DR 2-101(B)(4).
- Rules 7.1(c)(1)–(7) are identical to DR 2-101(C)(1)–(7).
- Rules 7.1(d)(1)–(4) are identical to DR 2-101(D)(1)–(4).
- Rules 7.1(e)(1)–(3) are identical to DR 2-101(E)(1)–(3).
- Rule 7.1(f) is identical to DR 2-101(F) except 7.1(f) adds "billboard advertisement" and it references Rule 7.3(a)(1), while DR 2-101(F) referenced DR 2-103(A)(1).
- Rule 7.1(g)(1) is identical to DR 2-101(G)(1).
- Rule 7.1(g)(2) is identical to DR 2-101(G)(2) except that "a disciplinary rule" became "these Rules."
- Rule 7.1(h) is identical to DR 2-101(H).
- Rule 7.1(i) is identical to DR 2-101(I) except the word "rule" is now capitalized in 7.1(i). 7.1(i) adds "In the case of a web site, the required words or statements shall appear on the home page."
- Rule 7.1(j) is identical to DR 2-101(J).
- Rule 7.1(k) is identical to DR 2-101(K) except the word "Section" became "Rule."
- Rule 7.1(l) is identical to DR 2-101(L).
- Rule 7.1(m) is identical to DR 2-101(M) except the word "Disciplinary" has been deleted from the first sentence.
- Rules 7.1(n), (o) and (p) are identical to DRs 2-101(N), (O), and (P).
- Rule 7.1(q) is identical to DR 2-104(C).
- Rule 7.1(r) is identical to DR 2-104(E).

III.2 ABA Model Rules

ABA Model Rules 7.1 and 7.2 cover similar subjects.

IV. PRACTICE POINTERS

1. Notwithstanding the Court's ruling in *Alexander v. Cahill*, 2010 WL 842711 (2d Cir. (NY) Mar. 12, 2010), attorneys have a continuing obligation of honesty and candor, and attorneys' advertising should not be false, deceptive or misleading.
2. Individual attorneys should independently verify that information posted about the lawyer, such as a resume or practice discipline, on a law firm's Web site complies with the applicable provisions of Rule 7.1 as well as other applicable rules, such as Rule 7.4, and is accurate and not misleading. Firms or lawyers should preserve a copy of the contents of a firm Web site at least every ninety days and whenever a significant content change occurs.
3. Given the requirement that e-mail communications contain the label "Attorney Advertising" in the subject line heading, prudent lawyers should inform clients to check their spam filters for firm mail that may be improperly directed to the spam box as a result of this label.[7] Note that the "Attorney Advertising" legend does not have to be included in e-mails between the lawyer and a current client.
4. Firms should make a checklist of attorney obligations with respect to advertisements and communications to clients and prospective clients so as to ensure firm-wide compliance with this Rule by attorneys and firm marketing personnel. Centralized repositories should be maintained physically and electronically for the preservation of advertising for the required periods.
5. An attorney must be very careful about adhering to any fee information appearing in an advertisement and should consult sections (m) and (p) of the new Rule very carefully.

V. ANALYSIS

V.1 Alexander v. Cahill

Immediately following their enactment, the new advertising rules were challenged in federal court for violations of the constitutional right of New York lawyers to engage in commercial speech. The U.S. District Court for the Northern District of New York, in *Alexander v. Cahill,*[8] *determined that five of the rules adopted by the Courts were unconstitutional as protected free speech under the First Amendment. The Court granted a permanent injunction preventing the enforcement of the following advertising rules:*

- DR 2-101(C)(1)—pertaining to endorsements/testimonials from current clients. This provision is identical to Rule 7.1(c)(1).

7 Ass'n of the Bar of the City of New York Comm. On Prof. Resp. and Judicial Ethics, *Commentary on New York's Ethics Rules Governing Lawyer Solicitation*, March 2009, *available at* http://www.nycbar.org/pdf/report/Commentary_NY%20Ethics_RUles.pdf.

8 Alexander v. Cahill, 2007 WL 2120024 (N.D.N.Y. July 23, 2007).

- DR 2-101(C)(3)—pertaining to portrayals of judges, fictitious law firms, fictitious names, etc. This provision is identical to Rule 7.1(c)(3).
- DR 2-101(C)(5)—pertaining to techniques irrelevant to selection of counsel (e.g., a law firm appearing as baseball players). This provision is identical to Rule 7.1(c)(5).
- DR 2-101(C)(7)—pertaining to nicknames/monikers/mottos that imply an ability to achieve results. This provision is identical to Rule 7.1(c)(7).
- DR 2-102(G)(1)—pertaining to the use of pop-up/pop-under advertisements. This provision is identical to Rule 7.1(g)(1).

At the time of publication of this treatise, the Second Circuit affirmed in part and reversed in part the holding of the District Court regarding the above sections. The Court of Appeals affirmed the pertinent parts of the District Court's rulings, but reversed the invalidation of the portion of DR 2-101(C)(3) [Rule 7.1(c)(3)] that prohibits "the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case." The Court construed this language as applying "only to situations in which lawyers from different firms give the misleading impression that they are from the same firm (i.e., 'The Dream Team')." The court opined that the provision addresses "only attorney advertising techniques that are actually misleading (as to the existence or membership of a firm)" and as such is not entitled to First Amendment protection. Subject to that clarification, the court reversed the District Court's invalidation of that portion of DR 2-101(c)(3) that prohibited advertisements that include fictitious names.

Attorneys in New York should be mindful of the ruling given that the provisions deemed unconstitutional are identical to those in the new Rules of Professional Conduct. The remainder of this commentary will reserve comments on those rules for a subsequent edition pending a detailed review, and possible appeal of *Alexander v. Cahill*, 2010 WL 842711 (2d Cir. (NY) Mar. 12, 2010).

V.2 Purpose of Rule 7.1

Attorney advertising has been subject to scrutiny both in New York and across the United States. perhaps in recognition of the fact that "… there has been a proliferation of tasteless, and at times obnoxious, methods of attorney advertising in recent years."[9] As a result, in February 2007, New York significantly amended the provisions in the former Code of Professional Responsibility governing lawyer advertising and solicitation. Many of the changes that were made to former DR 2-101 have been preserved in new Rule 7.1.

9 Alexander v. Cahill, 2007 WL 2120024 (N.D.N.Y. July 23, 2007).

V.3 What is an Advertisement?

Rule 1.0(a) defines "Advertisement" to mean "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers." The definition is purposely broad, governing a wide array of attorney communications, although there is a significant exception when communication can be limited to other lawyers and existing clients. (Communications so limited do not have to be labeled "Attorney Advertising.") Communications aimed primarily at constituencies other than clients (such as recruiting material), however, are not "advertising" as defined by the Rules, and neither are alerts, commentaries, or an update about legal developments that are strictly issue-driven and do not list a lawyer's or firm's cases, clients, or achievements. *See* NYSBA Commentary to rule 7.1, Comment [7].

For a communication to be deemed an advertisement, the primary purpose of the communication must be the retention of the lawyer or the firm. This limits the definition slightly. As the rules exist, many different communications will still be considered advertisements under the new Rules.

V.4 Acceptable and Prohibited Forms of Attorney Advertising

Subsection (a) of the attorney advertising rule contains express requirements as to the content of advertisements. It is not surprising that the Rule establishes that advertisements may not contain false, deceptive, or misleading statements or claims. The Rule further provides that an attorney advertisement may not include a claim or statement that violates a rule of professional conduct. Thus, a lawyer cannot advertise a specialty when that would violate Rule 7.4.

Subsection (b) of the Rule sets forth information that may be properly included in an attorney advertisement. Most significantly, attorneys in New York may include the names of clients "regularly represented," but only with the client's prior written consent. This requirement will ensure that client confidentiality is protected. Even without consent, a lawyer may list experience in prior matters, where not misleading and where the client does not affirmatively object, provided there is no implication that the client is a regular client.

Subsection (c) provides a list of content prohibitions for attorney advertisements. Notably, four of the seven items listed have been deemed unenforceable or modified pursuant to the holding in *Alexander v. Cahill*. The remaining provisions, which have not been subject to a challenge in court, are self-explanatory.

Subsection (d) lists the types of statements that may properly be utilized in attorney advertisements, while subsection (e) provides that those statements must be supported by fact. Moreover, where an advertisement creates an expectation about the results a lawyer or firm may be able to achieve, it must be accompanied by a disclaimer stating "Prior results do not guarantee a similar outcome." Importantly, the disclaimer must be "clearly legible and capable of being read by the average person, if written, and

intelligible if spoken aloud," and it must be included in electronic formats and on websites where advertising appears.

Perhaps most significantly, Rule 7.1 sets forth a requirement that certain communications contain the label "Attorney Advertising." Notably, certain specified media types that are readily identifiable as advertising, such as newspaper, magazine, and journal ads or billboards need not include such label. In the case of Web sites, the label "Attorney Advertising" must appear on the home page. While this provision of the Rule is not problematic in theory, the inclusion of such language in an electronic communication will likely trigger spam blockers, making it difficult, or in some cases impossible, for the communication to reach the intended recipient.[10]

V.5 Retention of Advertisements

Rule 7.1 provides a list of directives pertaining to the retention of advertisements. The length of time that an attorney or firm must retain an advertisement will depend on the form of the advertisement. For example, a print advertisement must be retained for at least three years while an email advertisement must only be retained for a period of one year. In addition, lawyers or firms must retain a copy of the contents of any Web site upon the initial publication and any major redesign of the site at least every ninety days. It is also worth noting that when an advertisement also qualifies as a "solicitation," i.e., when it is distributed to recipients in New York who are not excluded by Rule 1.3, it needs to be filed with the appropriate disciplinary committee in a timely manner.

V.6 Compensation in Anticipation of Publicity

Lawyers should also be aware of the prohibition in subsection (o) against a lawyer's compensating or giving anything of value to print or media representatives "in anticipation of or in return for professional publicity in a news item." As noted by the late Mary Daly, "The reach of the prohibited conduct is not altogether clear. While a direct payment in exchange for publicity is clearly prohibited, the provision of a free lunch or dinner in the hope of winning a favorable comment in a newspaper article or a TV news story should not be."[11]

V.7 Non-Commercial Attorney Communications

In Alexander v. Cahill, 2007 WL 2120024 (N.D.N.Y. July 23, 2007), the District Court narrowly construed the provisions relating to advertisements as inapplicable to

10 THE NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY: OPINIONS, COMMENTARY, AND CASELAW (Oxford University Press, Inc. 1997 & 2008 Supp). One possibility for avoiding difficulty, where feasible and where the nature of a practice makes it sensible, is to restrict e-mailing the material to other lawyers and clients.

11 *Id.*

non-commercial attorney communications. That ruling was not at issue in the appeal. 2010 WL 842711, fn. 4, (2d Cir. (NY) Mar. 12, 2010).

V.8 Potentially Deceptive or Misleading Advertising

In Alexander v. Cahill, 2010 WL 842711, fn. 8, (2d Cir. (NY) Mar. 12, 2010), the Second Circuit questioned what harm advertising that is only "potentially misleading" creates, and, citing Florida Bar v. Went For It, Inc., 515 U.S. 618, 626 (1995), stated that the state bears the burden of proving "that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." The Alexander court did not need to resolve the issue in order to rule as it did, and left the issue "for a future case."

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Acceptable and Prohibited Forms of Attorney Advertising

N.Y.S. Bar Op. 830 (2009) (lawyer may ethically contact lay organizations to inform them that he or she is available as a public speaker on legal topics, but must adhere to advertising and solicitation requirements under the Rules where the communication is made expressly to encourage participants to retain the lawyer or law firm).

N.Y.S. Bar Op. 834 (2009) (advertisement that contains a client testimonial or advertisement must contain the disclaimer "Prior results do not guarantee a similar outcome").

N.Y.S. Bar Op. 792 (2006) (interpreting a prior version of DR 2-101 with respect to a lawyer's use of a radio or TV testimonial by a celebrity client).

VII. ANNOTATIONS OF CASES

VII.1 Alexander v. Cahill

Alexander v. Cahill, 2010 WL 842711 (2d Cir. (NY) Mar. 12, 2010) (certain of the content based advertising provisions unconstitutionally restrict First Amendment freedom of speech).

VII.2 Acceptable and Prohibited Forms of Attorney Advertising

In re King, 36 A.D.3d 173, 829 N.Y.S.2d 291 (4th Dept. 2006) (attorney suspended in violation of DR 2-101 (k) for failure to include an office address in his firm letterhead and in advertisements for his firm's legal services and for violations of other provisions of the former Code of Professional Responsibility).

In re Lenahan, 34 A.D.3d 13, 824 N.Y.S.2d 826 (4th Dept, 2006) (suspension of lawyer for violations of Code of Professional Responsibility and for failure to include law firm address on law firm letterhead).

In re Onuaguluchi, 36 A.D.3d 4, 823 N.Y.S.2d 207(2d Dept. 2006) (attorney who listed unlicensed family members on his professional letterhead violated former DR 2-101(a)'s prohibition against the use of false, deceptive, and/or misleading information).

Matter of Shapiro, 225 A.D.2d 215, 656 N.Y.S.2d 80 (4th Dept. 1996) (advertisement that is "extremely offensive and degrading to the legal profession,"… "is nonetheless constitutionally protected hyperbole" (225 A.D.2d at 216, 656 N.Y.S.2d at 81) and is therefore not false or misleading for the purposes of the former Code of Professional Responsibility DR 2-101 (a); however, respondent's listing in various telephone directories as "Accident Legal Clinic of Shapiro and Shapiro" [was] "misleading because it implie[d] that the respondent [was] operating a legal clinic separate from his law firm").

Anonymous v. Grievance Committee for Second and Eleventh Judicial Districts of State, 136 A.D.2d 344, 527 N.Y.S.2d 248 (2d Dept. 1988) ("While attorney advertisements are a form of commercial speech protected by the First Amendment, this does not preclude states from requiring that such advertisements do not contain false, deceptive, or misleading information").

Zimmerman v. Office of Grievance Committees, 79 A.D.2d 263, 438 N.Y.S.2d 400 (4th Dept. 1981) (advertisement in Yellow Pages stating that attorney practiced in numerous areas of law each of the 25 areas of law warranted censure of attorney because the ad "may leave the public with the erroneous impression that some lawyers, including those listed in the advertisement, are certified as specialists or that certification is available").

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Rule 7.2: Payment for Referrals

I. TEXT OF RULE 7.2[1]

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

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

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

(b) A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations that promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school;

(ii) operated or sponsored by a bona fide, non-profit community organization;

1 Rules Editor Janessa L. Bernstein, Tesser, Ryan & Rochman LLP; and Editor-in-Chief Lewis Tesser, Tesser, Ryan & Rochman LLP. The Editors would like to thank Charisma L. Miller for her research assistance.

(iii) operated or sponsored by a governmental agency; or

(iv) operated, sponsored, or approved by a bar association;

(2) a military legal assistance office;

(3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule; or

(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer;

(ii) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization;

(iii) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter;

(iv) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief;

(v) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations; and

(vi) Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

II. NYSBA COMMENTARY

Paying Others to Recommend a Lawyer

[1] Lawyers are not permitted to pay others for channeling professional work. Paragraph (a)(3), however, allows a lawyer to pay for advertising and communications permitted by these Rules, including the costs of print directory listings, online directory listings, newspaper ads, television and radio airtime, domain name registrations, sponsorship

fees, banner ads and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, marketing personnel, and web site designers. *See* Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[2] A lawyer may pay the usual charges of a qualified legal assistance organization. A lawyer so participating should make certain that the relationship with a qualified legal assistance organization in no way interferes with independent professional representation of the interests of the individual client. A lawyer should avoid situations in which officials of the organization who are not lawyers attempt to direct lawyers concerning the manner in which legal services are performed for individual members and should also avoid situations in which considerations of economy are given undue weight in determining the lawyers employed by an organization or the legal services to be performed for the member or beneficiary, rather than competence and quality of service.

[3] A lawyer who accepts assignments or referrals from a qualified legal assistance organization must act reasonably to ensure that the activities of the plan or service are compatible with the lawyer's professional obligations. *See* Rule 5.3. The lawyer must ensure that the organization's communications with prospective clients are in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a qualified legal assistance organization would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time interactive electronic contacts that would violate Rule 7.3.

[4] A lawyer also may agree to refer clients to another lawyer or a nonlawyer in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. *See* Rules 2.1, 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer must not pay anything solely for the referral, but the lawyer does not violate paragraph (a) by agreeing to refer clients to the other lawyer or nonlawyer so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. A lawyer may enter into such an arrangement only if it is nonexclusive on both sides, so that both the lawyer and the nonlawyer are free to refer clients to others if that is in the best interest of those clients. Conflicts of interest created by such arrangements are governed by Rule 1.7. A lawyer's interest in receiving a steady stream of referrals from a particular source must not undermine the lawyer's professional judgment on behalf of clients. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprising multiple entities.

[5] Campaign contributions by lawyers to government officials or candidates for public office who are, or may be, in a position to influence the award of a legal engagement

may threaten governmental integrity by subjecting the recipient to a conflict of interest. Correspondingly, when a lawyer makes a significant contribution to a public official or an election campaign for a candidate for public office and is later engaged by the official to perform legal services for the official's agency, it may appear that the official has been improperly influenced in selecting the lawyer, whether or not this is so. This appearance of influence reflects poorly on the integrity of the legal profession and government as a whole. For these reasons, just as the Code prohibits a lawyer from compensating or giving anything of value to a person or organization to recommend or obtain employment by a client, the Code prohibits a lawyer from making or soliciting a political contribution to any candidate for government office, government official, political campaign committee or political party, if a disinterested person would conclude that the contribution is being made or solicited for the purpose of obtaining or being considered eligible to obtain a government legal engagement. This would be true even in the absence of an understanding between the lawyer and any government official or candidate that special consideration will be given in return for the political contribution or solicitation.

[6] In determining whether a disinterested person would conclude that a contribution to a candidate for government office, government official, political campaign committee, or political party is or has been made for the purpose of obtaining or being considered eligible to obtain a government legal engagement, the factors to be considered include (a) whether legal work awarded to the contributor or solicitor, if any, was awarded pursuant to a process that was insulated from political influence, such as a "Request for Proposal" process, (b) the amount of the contribution or the contributions resulting from a solicitation, (c) whether the contributor or any law firm with which the lawyer is associated has sought or plans to seek government legal work from the official or candidate, (d) whether the contribution or solicitation was made because of an existing personal, family or non-client professional relationship with the government official or candidate, (e) whether prior to the contribution or solicitation in question, the contributor or solicitor had made comparable contributions or had engaged in comparable solicitations on behalf of governmental officials or candidates for public office for which the lawyer or any law firm with which the lawyer is associated did not perform or seek to perform legal work, (f) whether the contributor has made a contribution to the government official's or candidate's opponent(s) during the same campaign period and, if so, the amounts thereof, and (g) whether the contributor is eligible to vote in the jurisdiction of the governmental official or candidate, and if not, whether other factors indicate that the contribution or solicitation was nonetheless made to further a genuinely held political, social or economic belief or interest rather than to obtain a legal engagement.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

The rule is identical to DRs 2-103(D) and (F).

III.2 ABA Model Rules

Model Rule 7.2(b) contains similar provisions as Rule 7.2

IV. PRACTICE POINTERS

1. Although lawyers are generally prohibited from compensating or giving anything of value in exchange for referrals, lawyers and firms are permitted to pay for advertisements and communications permitted under the Rules. A lawyer or firm that employs others to prepare marketing materials should consult Rule 5.3 prior to doing so.
2. Lawyers are permitted to make payments for referrals to other lawyers subject to certain conditions. Prior to doing so, lawyers should carefully consult Rule 1.5(g).
3. A lawyer may enter into reciprocal referral arrangements with another lawyer or nonlawyer, though lawyers are generally not permitted to make payments solely for the referral. While such arrangements are permitted under the Rules, lawyers should be mindful of the obligation to maintain professional judgment when making referrals. Lawyers should consult Rules 2.1 and 5.4(c) prior to entering into such an arrangement.

V. ANALYSIS

V.1 Purpose of Rule 7.2

The legal profession has consistently regulated the involvement of nonlawyers in the practice of law.[2] Such limitations exist in "to protect the lawyer's professional independence of judgment." See NYSBA Comment [1] to Rule 5.4. One area of concern has been that of referral fees—that is, paying a fee or giving "anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client." Under Rule 7.2(a) New York attorneys are prohibited from engaging in such conduct. For example, while a lawyer or firm may make payments to qualified legal service organizations and certain referral fees to other lawyers as permitted by Rule 1.5(g), a lawyer may not accept client referrals from a for-profit referral service that does not fall within any of the categories listed in Rule 7.2 that advertises and solicits clients in exchange for referral fees from lawyers.[3]

2 John S. Dzienkowski and Robert J. Peroni, *Conflicts of Interest in Lawyer Referral Arrangements with Nonlawyer Professionals*, Geo. J. Legal Ethics 197, 198 (2008).

3 *See* N.Y.C. Bar Op. 1994-3 (1994).

V.2 Referral Fees to Nonlawyers

Referral fees, as discussed in the context of Rule 7.2, can be described as payments made by a lawyer or law firm to another person or entity in exchange for that person or entity channeling professional work to the lawyer or law firm. Rule 7.2(a) establishes a blanket prohibition against referral fees unless "usual and reasonable fees or dues" are made to a qualified legal assistance organization as will be described in detail below. Additionally, even where such referral fees are permitted, there must be no interference with the exercise of professional judgment on behalf of a client.

V.3 Qualified Legal Assistance Organizations

"Qualified legal assistance organizations" are exempted from the prohibition against referral fees. Rule 7.2(b) specifies which organizations fall under this category including legal aid offices or public defender offices, military legal assistance offices, lawyer referral services "operated, sponsored or approved by a bar association," or a "bona fide organization which recommends, furnishes or pays for legal services to its members or beneficiaries" provided specific conditions are satisfied. Despite these clear mandates as to the types of acceptable organizations to which such payments may be made, the Rule provides some limitations as to the actual amount that may properly be paid as a referral fee.

V.4 Usual and Reasonable Fees Paid to Qualified Legal Assistance Organizations

Rule 7.2(a)(2) sets forth an exception to the broad prohibition against referral fees, providing that a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization."

Although the Rules do not provide a definition of "usual and reasonable," the New York City Bar Association Committee on Professional and Judicial Ethics has given some guidance. In Formal Opinion 2009-4, the Committee explains that, "[a]s with the assessment of attorneys' fees under Rule 1.5(a), which prohibits fees that are "excessive or illegal," the question of whether pro bono fees or dues are "usual and reasonable" will be a fact-specific inquiry."[4] Consequently, lawyers should carefully evaluate all facts to ensure that the fees meet this undefined standard. While smaller fees will probably go unquestioned, especially where such fees fund the "reasonable operating expenses of the service," a fee would probably not be deemed to be "usual" if it were

4 S*ee* N.Y.C. Bar Op., 2009-04 (2009).

imposed on an ad hoc basis (for "special" cases) or in response to a sudden budget shortfall."[5]

V.5 Web Site Referrals to Lawyers

Advances in technology and the widespread use of the Internet for both professional advertising and networking have given rise to various new and interesting questions regarding the ethical propriety of certain forms of communications. In September 2006, the New York State Bar Association Committee on Professional Ethics (the Committee) addressed the question of whether a lawyer may utilize an Internet service or a Web Site that charges the lawyer a fee to provide information about potential clients who the lawyer will then contact. The Committee further analyzed the question of whether it is acceptable if a Web site purports to analyze a prospective client's legal problem and then selects which of its subscribing lawyers should respond.

The Committee's decision, though based on several other sections of the former Code of Professional Responsibility, is relevant to the instant discussion of referral fees. The Committee explains that a lawyer's participation in such Web site would subject the attorney to discipline because it is impermissible for a Web site to "purport to recommend a particular lawyer… for the prospective client's problem, based on an analysis of that problem." The Opinion provides an example of such an impermissible scenario, describing a situation where a Web site matches a slip-and-fall client with a personal injury lawyer. Such a referral is prohibited under new Rule 7.2 and former DR 2-103(D) because referrals under these provisions may only be made by qualified legal assistance organizations such as bar association.

V.6 Lawyers' Continuing Obligations Under Other Rules of Professional Conduct

Rule 7.2 does not exist in a vacuum. Even if a lawyer may properly accept referrals under Rule 7.2, the lawyer still is obliged to comply with other provisions of the Rules of Professional Conduct. For example, under Rule 1.1 (former DR 6-101), attorneys must provide competent representation to a client and under Rule 5.4(c) (former DR 5-107(b)), a lawyer cannot "permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6." These provisions highlight the necessity that the attorney undertaking a pro bono matter and any attorney working on behalf of a qualified legal assistance

5 Michael Franck, Percentage Fees Available and Ethical, *available at* http://www.abanet.org/legalservices/lris/clearinghouse/introduction.pdf (last visited Jan. 27, 2010).

organization ensure the underlying pro bono client receives competent, independent representation.[6]

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Usual and Reasonable Fees Paid to Qualified Legal Assistance Organizations

N.Y.C. Bar Op. 2009-4 (2009) (payments to a pro bono organization to obtain pro bono assignments may be made without violating the Rules provided that (a) the fees or dues paid by the law firm or lawyer to the pro bono organization are "usual and reasonable"; and (b) the pro bono organization charging such fees or dues is a "qualified legal assistance organization" as defined by Rule 7.2(b) (1)-(4)).

NYCLA Bar Op. 733 (2004) ("Absolutely no payment, tangible benefits or compensation of any kind, direct or indirect, can be paid or received in consideration for any referral.").

N.Y.S. Bar Op. 671 (1994) (lawyer may not, even with the consent of a client accept a referral fee from an insurance company, even where the client could elect to claim the referral fee and the attorney purports to exercise independent judgment in framing his or her initial recommendation to purchase life insurance).

N.Y.C. Bar Op. 1994-3 (1994) (attorney may not participate in a for-profit private legal referral service unless authorized under former DR 2-103(D)).

N.Y.S. Bar Op. 194 (1971) (attorney may accept retainer from a client who received the attorney's contact information from a motor club listing of attorneys that had been certified by the American Bar Association).

VI.2 Web site Referrals to Lawyers

N.Y.S. Bar Op. 799 (2004) (lawyer may not use the services of a Web site that forwards inquiries from potential clients to subscribing lawyers, where the subscribing lawyers pay a fee to participate in the service and the service purports to analyze the prospective client's problem and select an appropriate lawyer for the matter).

VII. ANNOTATIONS OF CASES

VII.1 Referral Fees to Nonlawyers

In re Krug, 51 A.D.3d 102 (4th Dept. 2008) (respondent attorney found to have violated the Code where he agreed to and did compensate a nonlawyer for a referral that resulted in employment).

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6 *See* N.Y.C. Bar Op. 2009-4 (2009).

In re Kronegold, 29 A.D.3d 236 (2d Dept. 2006) (respondent attorney violated former DR 2-103 where Respondent employed or paid a non-lawyer to solicit retainers to perform legal services).

In re Klafter, 11 A.D.3d 1 (2d Dept. 2004) (attorney who paid a man, whom he knew to be a non-attorney for the referral of the personal injury case of an alleged accident victim, engaged in an act of solicitation of professional employment, in violation of the former Code).

In re Quintana, 304 A.D.2d 197 (2d Dept. 2003) (public censure was appropriate disciplinary sanction for attorney's conduct in paying referral fee to non-attorney).

People v. Hankin, 175 Misc. 2d 83, 667 N.Y.S.2d 890 (1997) (attorney's actions in allegedly accepting unsolicited offer by undercover informant, who was posing as private investigator, to refer client with personal injury case, signing retainer with undercover officer posing as client, and later promising to pay informant posing as investigator for referring matter to him, did not support criminal charge of employing person to solicit legal business; payment could not be said to constitute employment for purpose of solicitation, since business and retainer had already been secured).

Matter of Alessi, 60 N.Y,2d 229, 469 N.Y.S.2d 577 (1983), *cert. denied*, 465 U.S. 1102 (1984) (lawyers' mailings to third parties, such as real estate brokers, for the purpose of obtaining referrals to potential clients, have been held by the New York Court of Appeals to be specifically prohibited by Judiciary Law Sec. 479).

VII.2 Usual and Reasonable Fees Paid to Qualified Legal Assistance Organizations

Matter of Brownstein, 189 A.D.2d 244 (2d Dept. 1993) (attorney violated former DR 2-103(D) where attorney was employed/paid by a legal services organization which did not entitle beneficiaries to select counsel other than that furnished by the organization).

In re Santalone, 301 A.D.2d 265 (1st Dept. 2002) (suspension for three months was appropriate sanction for attorney's willful and serious violation of disciplinary rules by paying a fee to a third party for referring personal injury client).

In re Setareh, 264 A.D.2d 146 (1st Dept. 2000) (attorney's misconduct in compensating a third party on two occasions for referring personal injury clients to him warranted public censure).

VIII. BIBLIOGRAPHY

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Rule 7.3: Solicitation and Recommendation of Employment

I. TEXT OF RULE 7.3[1]

Solicitation and Recommendation of Employment

(a) A lawyer shall not engage in solicitation:

(1) By in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or

(2) By any form of communication if:

(i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule;

(ii) the recipient has made known to the lawyer a desire not to be solicited by the lawyer;

(iii) the solicitation involves coercion, duress or harassment;

(iv) the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or

(v) the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

(b) For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for

1 Rules Editor Sarah Jo Hamilton, Scalise & Hamilton LLP.

which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions:

(1) A copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial district or judicial department wherein the lawyer or law firm maintains its principal office. Where no such office is maintained, the filing shall be made in the judicial department where the solicitation is targeted. A filing shall consist of:

(i) a copy of the solicitation;

(ii) a transcript of the audio portion of any radio or television solicitation; and

(iii) if the solicitation is in a language other than English, an accurate English-language translation.

(2) Such solicitation shall contain no reference to the fact of filing.

(3) If a solicitation is directed to a predetermined recipient, a list containing the names and addresses of all recipients shall be retained by the lawyer or law firm for a period of not less than three years following the last date of its dissemination.

(4) Solicitations filed pursuant to this subdivision shall be open to public inspection.

(5) The provisions of this paragraph shall not apply to:

(i) a solicitation directed or disseminated to a close friend, relative, or former or existing client;

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at a prospective client affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

(iii) professional cards or other announcements the distribution of which is authorized by Rule 7.5(a).

(d) A written solicitation shall not be sent by a method that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail or that requires a signature on the part of the recipient.

(e) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(f) Any solicitation made in writing or by computer-accessed communication and directed to a pre-determined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal need.

(g) If a retainer agreement is provided with any solicitation, the top of each page shall be marked "SAMPLE" in red ink in a type size equal to the largest type size used in the agreement and the words "DO NOT SIGN" shall appear on the client signature line.

(h) Any solicitation covered by this section shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

II. NYSBA COMMENTARY

Solicitation

[1] In addition to seeking clients through general advertising (either by public communications in the media or by private communications to potential clients who are neither current clients nor other lawyers), many lawyers attempt to attract clients through a specialized category of advertising called "solicitation." Not all advertisements are solicitations within the meaning of this Rule. All solicitations, however, are advertisements with certain additional characteristics. By definition, a communication that is not an advertisement is not a solicitation. Solicitations are subject to all of the Rules governing advertising and are also subject to additional Rules, including filing a copy of the solicitation with the appropriate attorney disciplinary authority (including a transcript of the audio portion of any radio or television solicitation and, if the solicitation is in a language other than English, an accurate English language translation). These and other additional requirements will facilitate oversight by disciplinary authorities.

[2] A "solicitation" means any advertisement: (i) that is initiated by a lawyer or law firm (as opposed to a communication made in response to an inquiry initiated by a potential client), (ii) with a primary purpose of persuading recipients to retain the lawyer or law firm (as opposed to providing educational information about the law, *see* Rule 7.1, Comment [7]), (iii) that has as a significant motive for the lawyer to make money (as opposed to a public-interest lawyer offering pro bono services), and (iv) that is directed to or targeted at a specific recipient or group of recipients, or their family members or legal representatives. Any advertisement that meets all four of these criteria is a solicitation, and is governed not only by the Rules that govern all advertisements but also by special Rules governing solicitation.

Directed or Targeted

[3] An advertisement may be considered to be directed to or targeted at a specific recipient or recipients in two different ways. First, an advertisement is considered "directed to or targeted at" a specific recipient or recipients if it is made by in-person or telephone contact or by real-time or interactive computer-accessed communication

or if it is addressed so that it will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages). Advertisements made by in-person or telephone contact or by real-time or interactive computer-accessed communication are prohibited unless the recipient is a close friend, relative, former client or current client. Advertisements addressed so that they will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages) are subject to various additional rules governing solicitation (including filing and public inspection) because otherwise they would not be readily subject to disciplinary oversight and review. Second, an advertisement in public media such as newspapers, television, billboards, web sites or the like is a solicitation if it makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers. The term "specific incident" is explained in Comment [5].

[4] Unless it falls within Comment [3], an advertisement in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or recipients. For example, an advertisement in a public medium is not directed to or targeted at "a specific recipient or group of recipients" simply because it is intended to attract potential clients with needs in a specified area of law. Thus, a lawyer could advertise in the local newspaper that the lawyer is available to assist homeowners in reducing property tax assessments. Likewise, an advertisement by a patent lawyer is not directed or targeted within the meaning of the definition solely because the magazine is geared toward inventors. Similarly, a lawyer could advertise on television or in a newspaper or web site to the general public that the lawyer practices in the area of personal injury or Workers' Compensation law. The fact that some recipients of such advertisements might actually be in need of specific legal services at the time of the communication does not transform such advertisements into solicitations.

Solicitations Relating To a Specific Incident Involving Potential Claims for Personal Injury or Wrongful Death

[5] Solicitations relating to a specific incident involving potential claims for personal injury or wrongful death are subject to a further restriction, in that they may not be disseminated until 30 days (or in some cases 15 days) after the date of the incident. This restriction applies even where the recipient is a close friend, relative, or former client, but not where the recipient is a current client. A "specific incident" is a particular identifiable event (or a sequence of related events occurring at approximately the same time and place) that causes harm to one or more people. Specific incidents include such events as traffic accidents, plane or train crashes, explosions, building collapses, and the like.

[6] A solicitation that is intended to attract potential claims for personal injury or wrongful death arising from a common cause but at disparate times and places, does not relate to a specific incident and is not subject to the special 30-day (or 15-day) rule,

even though it is addressed so that it will be delivered to specific recipients or their families or agents (as with letters, emails, express packages), or is made in a public medium such as newspapers, television, billboards, web sites or the like and makes reference to a specific person or group of people, *see* Comments [3]-[4]. For example, solicitations intended to be of interest only to potential claimants injured over a period of years by a defective medical device or medication do not relate to a specific incident and are not subject to the special 30-day (or 15-day) rule.

[7] An advertisement in the public media that makes no express reference to a specific incident does not become a solicitation subject to the 30-day (or 15-day) rule solely because a specific incident has occurred within the last 30 (or 15) days. Thus, a law firm that advertises on television or in newspapers that it can "help injured people explore their legal rights" is not violating the 30-day (or 15-day) rule by running or continuing to run its advertisements even though a mass disaster injured many people within hours or days before the advertisement appeared. Unless an advertisement in the public media explicitly refers to a specific incident, it is not a solicitation subject to the 30-day (or 15-day) blackout period. However, if a lawyer causes an advertisement to be delivered (whether by mail, email, express service, courier, or any other form of direct delivery) to a specific recipient (i) with knowledge that the addressee is either a person killed or injured in a specific incident or that person's family member or agent, and (ii) with the intent to communicate with that person because of that knowledge, then the advertisement is a solicitation subject to the 30-day (or 15-day) rule even if it makes no reference to a specific incident and even if it is part of a mass mailing.

Extraterritorial Application of Solicitation Rules

[8] All of the special solicitation rules, including the special 30-day (or 15-day) rule, apply to solicitations directed to recipients in New York State, whether made by a lawyer admitted in New York State or a lawyer admitted in any another jurisdiction. Solicitations by a lawyer admitted in New York State directed to or targeted at a recipient or recipients outside of New York State are not subject to the filing and related requirements set out in Rule 7.3(c).

Whether such solicitations are subject to the special 30-day (or 15-day) rule depends on the application of Rule 8.5.

In-Person, Telephone and Real-Time or Interactive Computer-Accessed Communication

[9] Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, inperson solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration.

These same risks are present in telephone contact or by real-time or interactive computeraccessed communication and are regulated in the same manner. The prohibitions on in-person or telephone contact and by real-time or interactive computer-accessed communication do not apply if the recipient is a close friend, relative, former or current client. Communications with these individuals do not pose the same dangers as solicitations to others. However, when the special 30-day (or 15-day) rule applies, it does so even where the recipient is a close friend, relative, or former client. Ordinary email and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a web site that are not a live response are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 7.3 is the direct successor to most provisions of former Disciplinary Rule DR 2-103. Specifically:

- Rule 7.3 (a)–(c) is identical to former DR 2-103 (a)–(c)
- Rule 7.3 (d) is identical to former DR 2-103 (e)
- Rule 7.3 (e) is identical to former DR 2-103 (g), and is essentially similar to former DR 7-111.
- Rule 7.3 (f) is identical to former DR 2-103 (h)
- Rule 7.3 (g) is identical to former DR2-103 (i)
- Rule 7.3 (h) is identical to former DR 2-103 (j)
- Rule 7.3 (i) is identical to former DR 2-103 (k)

III.2 ABA Model Rules of Professional Conduct (2009)

NY Rule 7.3 is much more extensive and detailed than is its Model Rule 7.3 counterpart entitled "Direct Contact with Prospective Clients." Similarities are:

- Model Rule 7.3(a), which prohibits direct telephone and real time electronic solicitation of professional employment for pecuniary gain unless the recipient is another lawyer or is a family member, friend, or prior client of the soliciting lawyer, is essentially the same as NY Rule 7.3(a)(1).
- Model Rule 7.3(b) is essentially similar to NY Rule 7.3(a)(2) in that it prohibits *any* direct solicitation of persons who have made known their desire not to be solicited, and solicitation for the purposes of coercion, duress, or harassment.

Here the similarities between the Model Rule and the NY Rule end.

IV. PRACTICE POINTERS

1. In deciding whether to conduct a direct solicitation, remember that in-person contact is almost always prohibited.
2. Make certain that all statements in the solicitation are true and accurate.
3. Make certain that the solicitation complies with the advertising rules (Rule 7.1).
4. Determine who the target audience is, and whether each person in that audience has the requisite mental or physical capacity to exercise reasonable judgment with respect to retaining an attorney.
5. Make certain that any solicitation relating to a specific incident involving potential claims for personal injury or wrongful death complies with the requirements of subsection (e) of this rule.
6. File all copies of solicitations with the appropriate grievance committee.

V. ANALYSIS

V.1 Purpose of Rule 7.3

Solicitation is defined in Rule 7.3(b) as any advertisement directed to a specific recipient or group of recipients, the primary purpose of which is the retention of the law firm and for which a significant motive is pecuniary gain. Therefore, solicitations are lawyer advertising directed at a specific recipient or recipients. But not all direct communication to targeted recipients constitutes solicitation. Should an attorney directly solicit a prospective client in order to perform strictly pro bono work, this communication would not fall within the New York definition of solicitation.[2]

The Rules governing solicitation contemplate that while lawyers may directly solicit business to a targeted prospective client, such solicitation is fraught with the potential for overreaching. Thus, the basic thrust of the rules regarding solicitation is protection of prospective clients, especially those who, for reason of their circumstances, might not be able to judge whether retention of the lawyer was appropriate. For this reason New York has included in Rule 7.3(a) (2) a prohibition of solicitation of persons the lawyer knows, or reasonably should know, would likely be unable to exercise reasonable judgment in retaining a lawyer by reason of physical, emotional or mental state. This prohibition is aimed directly at hospital solicitations, or ambulance chasers, but also includes other forms of the prohibited conduct. Also, a lawyer may not directly solicit in person or by telephone or real time electronic communications, unless the recipient is a close friend, relative, or former or existing client. According to the NYSBA Commentary to Rule 7.3, Comment [9], this prohibition protects clients from yielding to attorneys' superior oratorical skills and overreaching.

2 *See* Alexander v. Cahill, 634 F. Supp. 2d 239 (N.D.N.Y. 2007); In Re Primus 436 U.S. 412, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978) and NAACP v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).

V.2 Subsection 7.3(a)(1) In Person Solicitation

All in-person solicitation is banned except for communications to former or existing clients, as defined for purposes of conflicts, family members, and close friends. This includes telephonic and real-time electronic communications. While real-time electronic communications are not defined; all electronic communications are not necessarily real-time. The provision is meant to be analogous to telephone contact, and contemplates situations described in NYSBA Commentary to the Rule, Comment [1], where prospective clients already overwhelmed by circumstances may be unable to appropriately evaluate the need for the lawyer's services during a real-time direct electronic communication. In *Ohralik v. Ohio State Bar Association*. 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978), the U.S. Supreme Court held that a state could ban all in-person solicitation for pecuniary gain. Also, in-person solicitation is prohibited by NY State Judiciary Law Section 479, which, despite language banning any kind of solicitation, is interpreted to prohibit in-person solicitation that is not constitutionally protected.

Attorneys are specifically permitted by the Rule to solicit former and current clients. However, solicitation of these clients by an attorney leaving one firm to join another must also accord with the attorney's fiduciary duty to the firm she is leaving. See *Gibbs v. Breed, Abbott & Morgan*, 271 A.D. 2d 180 (1st Dept. 2000); *Graubard Mollen Dannet & Horowitz v. Moskovitz*, 86 N.Y. 2d 112 (1995); *In re Silverberg*, 81 A.D. 2d 640 (2d Dept. 1981). These cases stand for the proposition that a lawyer owes a fiduciary duty to partners, and cannot ethically, without notice that she is leaving the firm, solicit current clients of the firm unless certain conditions are met.

Certain sections of the New York State Judiciary Law also address solicitation of clients by attorneys. Section 480 bans entering a hospital within 15 days of a patient's injury in order to obtain a statement, release, or settlement. Section 481 prohibits certain types of employees from communicating with attorneys or their agents in order to assist an attorney in solicitation of legal business, and Section 482 prohibits a lawyer from employing anyone for purpose of solicitation. These sections are also relevant to the discussion of Rule 7.2 dealing with payment for referrals, or payment for solicitation.

V.3 Subsection 7.3(a)(2) Other Direct Solicitation

All other forms of direct solicitation are permitted, unless they fall within the exceptions enumerated in 7.3(a)(2). Of special note in these exceptions is the requirement that if a lawyer intends or expects to refer the matter to another attorney, the lawyer must disclose that fact in the solicitation.

The most usual form of direct solicitation, up until the electronic age, was targeted mailing, which according to *Shapero v. Kentucky Bar Association,* 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988) is entitled to First Amendment protection. The Supreme Court in *Shapero* distinguished *Ohralik,* stating that face-to-face solicitation is different from mailing.

Electronic solicitation, directed to a specific group or recipient, is also governed by NY Rule 7.3.

V.4 Subsection 7.3(b) Definition of Solicitation

See discussion under Purpose of Rule 7.3, supra.

V.5 Subsection 7.3(c) Filing Requirements

Subsection 7.3(c) sets forth certain requirements for solicitations in addition to the requirements imposed by Rule 7.1 (Advertising). Solicitations must be filed with the attorney disciplinary committee of the judicial district or departments where the attorney maintains a principal office. Requirements of the filing are set forth in the rule. Subsection 7.3(c)(5) specifically exempts from the rule:

- Solicitations directed to current or former clients, family, and close friends;
- A Web site, unless it is specifically targeted prospective clients affected by an identifiable event or prospective defendant, and
- Professional cards or announcements which are otherwise in conformity with the Rules.

V.6 Subsection 7.3(d) Method of Sending

This subsection protects clients from having to go to a location other than the recipient's home or business to receive the communication, or from having to sign a receipt for it.

V.7 Subsection 7.3(e) Specific Incidents

New York Rule 7.3(e) prohibits solicitation of clients involving potential claims resulting from injury or death as a result of a specific incident before the thirtieth day after the date of the incident, unless a filing is made within thirty days, in which case solicitation may not be made until the fifteenth day after the incident. This rule was adopted originally in 2007 as former DR 2-103(G), and former DR 7-111. (Former DR 7-111 specifically prohibited communications from *defendants'* attorneys, including insurance company attorneys. This prohibition appears to have been omitted from the NY Rules.)

In 1985, the New York Court of Appeals ruled that a blanket prohibition of direct mail solicitation of accident victims violated an attorney's rights under the First and Fourteenth Amendments to the U.S. Constitution. Such a blanket prohibition did not simply constitute a restriction on the time, place and manner of speech, but was

addressed to its content. *Matter of von Wiegen,* 63 N.Y. 2d 164 (1984). The U.S. Supreme Court agreed. See *Shapero,* supra. Thereafter the New York Disciplinary Rules were amended to include a ban on solicitation of those who by virtue of their circumstances might be unable to make appropriate decisions about retaining a lawyer. The Supreme Court weighed in on the issue again, modifying its position in *Shapero,* in *The Florida Bar v. Went for It, Inc*., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995), when it upheld a thirty-day blackout period on targeted mail solicitations of accident victims. In 2007, former DR 2-103(G), now Rule 7.3(e), was added to the Disciplinary Rules, imposing the current thirty-day blackout on targeted solicitations of victims of specific events.

A challenge to Rule 7.3(e) was rejected by the United States District Court for the Northern District of New York in *Alexander v. Cahill*, 634 F. Supp. 2d 239 (N.D.N.Y. 2007). The Second Circuit Court of Appeals upheld the constitutionality of the rule, finding that the state interest in protecting vulnerable victims, especially in their homes, and in protecting the reputation of the profession justified the 30-day (or 15-day) moratorium. *Alexander v. Catalano*, U.S. Ct. App. 2d Cir. (Docket Nos. 07-3677-cv (L), 07-3900-cv (XAP) March 12, 2010).[3]

V.8 Subsection 7.3(f) Disclosure in Specific Event

Written or computer accessed communications (e.g., e-mail), which are triggered by a specific event, not just personal injury, must disclose how the attorney obtained information as to the identity of the prospective client and the potential need for legal services. It is clear that this requirement was adopted in order to address potential client fears regarding privacy, and to ensure that attorneys did not use unauthorized means of obtaining identities.

V.9 Subsection 7.3(g) Sample Retainers

The requirement that a retainer agreement sent with a solicitation be marked "SAMPLE", and "DO NOT SIGN" is designed to ensure that prospective clients cannot simply sign and send in a retainer agreement in response to the solicitation without having an appropriate discussion with the attorney regarding the representation. Again this is a provision designed to protect the client.

V.10 Subsection 7.3(h) Solicitation to Include Attorney Information

Another provision to protect the client, Subsection 7.3(h), mandates that the name, office location, and telephone number be included in the solicitation. This mandate

3 The Court of Appeals did not consider whether the use of meta-tags, by which a person seeking information on the Internet regarding a specific incident would be directed to a general law firm advertisement.

ensures that a prospective client will know the location of the soliciting attorney. The requirement repeats the mandate under the advertising rules that all advertisements (including solicitations) contain such indentifying information.

V.11 Subsection 7.3(k) Application to Out-of-state Attorneys

This provision is designed to ensure that out-of-state attorneys are subject to the disciplinary rules regarding solicitation of clients in New York. While out-of-state attorneys are not subject to professional discipline in New York State, other civil remedies may be invoked to enforce compliance.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Subsection 7.3(a)(1) In Person Solicitation

ABA Formal Op. 99-414 (1999) (departing lawyer in a law firm is prohibited by ethical rules, and may be prohibited by other law, from making in-person contact prior to her departure with clients with whom she has no family or client-lawyer relationship. After she has left the firm she may contact any firm client by letter.).

VI.2 Subsection 7.3(a)(2) Other Direct Solicitation

New York: N.Y.S. Bar Op. 830 (2009) (lawyer may ethically contact lay organizations to inform them that he or she is available as a public speaker on legal topics, but must adhere to advertising and solicitation requirements under the Rules where the communication is made expressly to encourage participants to retain the lawyer or law firm).

N.Y.C. Bar Op. 2000-1 (2000) (it is well established that a lawyer or law firm may advertise and/or solicit legal business through traditional means, such as newspapers or radio, subject to the rules regulating lawyer advertising and solicitation. Use of the Internet does not alter this basic conclusion).

N.Y.C. Bar Op. 1998-2 (1998) (law firm that establishes a discussion area on its Web site should exercise caution and vigilance to avoid the establishment of an attorney-client relationship and impermissible advertising or solicitation).

N.Y.S. Bar Op. 676 (1995) (attorney may advertise for, or solicit by mail, additional participants in class action litigation).

ABA: ABA Formal Op. 07-445 (2007) (before a class action has been certified, counsel for plaintiff and defense have interests in contacting putative members of the class. Model Rules of Profession Conduct 4.2 and 7.3 do not generally prohibit counsel for either plaintiff or defendant from communicating with persons who may in the future become members of the class. Both plaintiffs' and defense counsel must nevertheless comply with Model Rule 4.3).

Other Jurisdictions: Ariz. Ethics Op. 02-08 (2002) (lawyer is permitted to conduct an information booth at trade show if lawyer does not initiate contact with other attendees).

Fla. Ethics Op. A-00-1(2000) (lawyer may not use chat room to solicit clients).

R.I. Ethics Op. 98-03 (1998) (lawyer may not solicit clients for free legal work if "significant motive for the solicitation is the personal gain of the inquiring attorney in qualifying for future employment and the eventual pecuniary benefit to be derived there from").

VI.3 Subsection 7.3(b) Definition of Solicitation

N.Y.S. Bar Op. 841 (2010) (an e-mail sent by a lawyer to other lawyers advising them that he is handling personal injury cases involving certain pharmaceutical products and asking the lawyers to refer cases to him, is neither an advertisement under Rule 1.0(a) nor a solicitation under rule 7.3(b). Such a communication is not subject to the filing requirement of Rule 7.3. The e-mail must still comply with Rule 8.4's requirement concerning honesty, fraud and deceit and Rule 7.4 regarding statements that a lawyer or firm is a "specialist" or "specializes." If fee sharing with the referring attorney is also contemplated, the provisions of Rule 1.5(g) have to be complied with as well.).

N.Y.S. Bar Op. 810 (2006) (attorney who provides legal services to clients on behalf of a county agency and maintains a private practice may not represent clients in the private practice in a matter in which the attorney participated as a government lawyer so long as the client is entitled to representation by the public agency. The lawyer may, however, represent the client in the private practice with respect to a different matter so long as the lawyer did not solicit the client to engage the lawyer.).

N.Y.S. Bar Op. 755 (2002) (rules on solicitation do not prevent a lawyer-owned ancillary business from referring existing customers to the lawyer for legal services, including by in-person or telephone contact, but no referral fee may be paid therefore).

VI.4 Subsection 7.3(c) Filing Requirement

N.Y.S. Bar Op. 841 (2010) (an e-mail sent by a lawyer to other lawyers advising them that he is handling personal injury cases involving certain pharmaceutical products and asking the lawyers to refer cases to him, is neither an advertisement under Rule 1.0(a) nor a solicitation under rule 7.3(b). Such a communication is not subject to the filing requirement of Rule 7.3. The e-mail must still comply with Rule 8.4's requirement concerning honesty, fraud and deceit and Rule 7.4 regarding statements that a lawyer or firm is a "specialist" or "specializes." If fee sharing with the referring attorney is also contemplated, the provisions of Rule 1.5(g) have to be complied with as well.).

VII. ANNOTATIONS OF CASES

VII.1 Subsection 7.3(a)(1) In-person Solicitation

Rivera v. Lutheran Medical Center, 73 A.D.3d 891, 899 N.Y.S.2d 859 (A.D., 2d Dept. 2010) (court granted plaintiff's motion to disqualify the nonparty appellant from representing certain witnesses due to the finding of soliciting professional employment).

U.S. v. Occidental Chemical Corp., 606 F. Supp 1470 (W.D.N.Y. 1985) (during a deposition of Defendant corporation's former employee, the corporation's attorney offered the employee free representation, and informed Plaintiff's attorneys that they were offering such representation to all former employees. Plaintiffs moved to enjoin the representation and solicitation of the former employees. The court determined that since the former employee had believed he was being represented by the corporation's counsel while he was still employed, the representation was not prohibited. However, although there was no violation of the former N.Y. Code Prof. Resp. DR 2-103(A), DR 2-104 or N.Y. Jud. Law § 479, solicitation of all former employees created an appearance of impropriety and was prohibited. Representation of former employees was permissible if they initiated the communication.).

VII.2 Subsection 7.3(a)(2) Other Direct Solicitation

Rivera v. Lutheran Medical Center, 22 Misc. 3d 178 (Sup. Ct. Kings. Co. 2008) (the court found that it was improper for defendant hospital's law firm to represent witnesses who worked for the employer since the law firm improperly solicited them to gain a tactical advantage to the litigation by insulating them for any informal contact with plaintiff's counsel).

In re Weinstein, 4 A.D. 3d 29 (1st Dept. 2004) (attorney disciplined for, inter alia, placing a call to the home of prospective client urging that he be retained to represent the prospective client).

In re von Wiegen, 63 N.Y.2d 163 (1984) (attorney discipline matter in which the Court determined that blanket prohibition of mail solicitation of accident victims violates the First and Fourteenth Amendments to the U.S. Constitution).

In re Alessi, 60 N.Y.2d 229 (1983) (on remand from the U.S. Supreme Court, Court determined that prohibition pursuant to Judiciary Law Section 479 of attorney's direct mail advertisement to real estate brokers was permissible since there was a substantial government interest in preventing conflicts of interest).

In re Koffler, 51 N.Y.2d 140 (1980) (court determined that the state cannot proscribe direct mail solicitation of property owners to use attorney's legal services in connection with the sale of their property).

VII.3 Subsection 7.3(e) Specific Incidents

In re Shapiro, 7 A.D.3d (4th Dept. 2007) (attorney improperly sent solicitation letter to comatose hospitalized accident victim three days after the accident, at a time when the

attorney knew or reasonably should have known that the recipient would be unlikely to be able to exercise reasonable judgment in retaining the attorney).

Matter of Kressner & Schulman, 108 A.D.2d 334 (1st Dept. 1985) (respondents disciplined for purchasing information about hospitalized patients from hospital attorney in order to solicit patients in malpractice claims in violation of Judiciary Law Section 479).

Alexander v. Catalano, U.S. Ct. App. 2d Cir. (March 12, 2010). The Court upheld the constitutionality of the New York rule providing a moratorium on solicitation of victims of specific incidents.

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Rule 7.4: Identification of Practice and Specialty

I. TEXT OF RULE 7.4[1]

(a) A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

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

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

(2) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "Certification granted by the [identify state or territory] is not recognized by any governmental authority within the State of New York. Certification is not a requirement

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for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law."

II. NYSBA COMMENTARY

[1] Paragraph (a) permits a lawyer to indicate areas of practice in which the lawyer practices, or that his or her practice is limited to those areas.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office.

[3] Paragraph (c) permits a lawyer to state that the lawyer specializes or is certified as a specialist in a field of law if such certification is granted by an organization approved or accredited by the American Bar Association or by the authority having jurisdiction over specialization under the laws of another jurisdiction provided that the name of the certifying organization or authority must be included in any communication regarding the certification together with the disclaimer required by paragraph (c).

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 7.4 is identical to former Disciplinary Rule DR 2-105.

III.2 ABA Model Rules

Rule 7.4 is essentially similar to Model Rule 7.4. Specifically:

- Both rules permit an attorney to state that her practice is limited to a certain area of law, but subsection (a) of NY Rule 7.4 specifically forbids an attorney from stating that she is a specialist in any field of law, except as permitted by Rule 7.4(c). This prohibition of the use of the term "specialist" is contained in Model Rule 7.4(d).
- Subsection (b) is identical to the Model Rule and permits the designation of "Patent Attorney" for those admitted to practice before the United States Patent and Trade Office.
- Subsection (c) of the NY Rule differs significantly from subsection (c) of the Model Rule, which permits an attorney to use the designation "Admiralty" or "Proctor in Admiralty." The New York rule does not contain this provision. Rather, subsection (c) of the New York rule is essentially similar to Subsection (d) of the Model Rule, and sets forth the conditions pursuant to which an attorney in New York may use the designation "specialist." Both subsections require that the use of the term "specialist" be limited to those who have been so certified by an organization that has been approved by the American Bar Association, or a state authority. However, in New York a specialist must include a prominent disclaimer, as set forth above in the rule.

IV. PRACTICE POINTERS

1. If a lawyer states a specialization in a certain area of law or that he or she is certified in a specialty, the statement must be accompanied by required information and a disclaimer.
2. If an attorney is certified by an organization recognized by the ABA or another state, the appropriate disclaimer must be prominent.
3. Lawyers may state that their practice is "limited" to a certain area of the law, or that they "concentrate" in an area without providing any disclaimers. Such statements must not imply an expertise where non exists.

V. ANALYSIS

Rule 7.4 covers all public statements made by lawyers, including on letterhead, notices or signs, as well as in advertisements. If a lawyer states that he or she specializes in a certain area of law, or that he or she is certified in a specialty, the lawyer must accompany the statement with the information required by the Rule and must include the disclaimers set forth in the Rule. New York has no state certifying agency. If an attorney is certified by an organization recognized by the ABA, or by another state, the appropriate disclaimer must be prominent.

Lawyers may state that their practice is limited to a certain area of law, or that they concentrate their practice in a certain area of law. The limitation does not require any accompanying disclaimer as it does not constitute a statement that the lawyer actually "specializes" or is "certified," both of which claims are often associated with expertise. When a lawyer makes a statement with respect to limiting or concentrating the practice, however, the statement should be truthful, and should not imply an expertise where none exists.

VI. ANNOTATIONS OF ETHICS OPINIONS

New York: N.Y.S. Bar Op. 841 (2010) (an e-mail sent by a lawyer to other lawyers advising them that he is handling personal injury cases involving certain pharmaceutical products and asking the lawyers to refer cases to him, is neither an advertisement under Rule 1.0(a) nor a solicitation under rule 7.3(b). Such a communication is not subject to the filing requirement of Rule 7.3. The e-mail must still comply with Rule 8.4's requirement concerning honesty, fraud and deceit and Rule 7.4 regarding statements that a lawyer or firm is a "specialist" or "specializes." If fee sharing with the referring attorney is also contemplated, the provisions of Rule 1.5(g) have to be complied with as well.).

N.Y.S. Bar Op. 757 (2002) (announcements of certification as a specialist sent to other attorneys and clients are public statements and must include the disclaimer required by DR 2-105).

N.Y.S. Bar Op. 722 (1999) (attorney may include reference to professional organization on letterhead, but if membership implies certification in a legal field, the disclaimer required by DR 2-105 must be included).

NYCLA Bar Op. 726 (1998) (attorney may send letter to prospective corporate clients saying that the attorney's firm "has significant expertise in the area of law which is the subject of the complaint").

N.Y.S. Bar Op. 695 (1997) (attorney may include on letterhead and other materials the identification of a non-legal employee as a "Certified Legal Assistant" provided that term is accompanied by the statement that the certification is afforded by the National Association of Legal Assistants (NALA), and provided further that the attorney has satisfied himself or herself that NALA is a bona fide organization that provides such certification to all who meet objective and consistently applied standards relevant to the work of legal assistants).

Other Jurisdictions: Ariz. Ethics Op. 2000-1 (2000) (law firm may not advertise that it specializes in an area of law unless a member of the firm is certified in that area).

Ohio Sup. Ct. Ethics Op. 99-4 (1999) (Internet domain name may not use term "specialized" because it would violate state's rule regarding specialization).

III. Ethics Op. 96-8 (1997) (law firm may use term "concentrating" in intellectual property law but may not use "specializes" unless a member is admitted to practice in Patent and Trademark Office).

VII. ANNOTATIONS OF CASES

New York: Matter of Moran, 42 A.D.3d 272 (4th Dept. 2007) (respondent violated former DR 2-105 (c) by referring to himself as a certified trial specialist without including the disclaimer required by that disciplinary rule).

Federal: Hayes v. Zakia, 327 F. Supp. 2d 224 (W.D.N.Y. 2004) (former DR 2-105, requiring disclaimer with use of "certified as a specialist," did not violate the First Amendment as the state has an interest in protecting consumers from potentially misleading advertisements).

Peel v. Atty. Reg. & Disciplinary Comm., 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990) (attorney's letterhead indicating that he was certified as a civil trial specialist by the National Board of Trial Advocacy was protected by the First Amendment of the U.S. Constitution because the potential for being misleading was not significant).

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Rule 7.5: Professional Notices, Letterheads and Signs

I. TEXT OF RULE 7.5[1]

(a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following:

(1) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4. A professional card of a law firm may also give the names of members and associates;

(2) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4;

(3) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; or

(4) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or Rule 7.4. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of

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Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(b) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "PC" or such symbols permitted by law, the name of a limited liability company or partnership shall contain "LLC," "LLP" or such symbols permitted by law and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. A lawyer or law firm may not include the name of a nonlawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to Rule 5.8 to provide legal and other professional services on a systematic and continuing basis include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith. A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;

(2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;

(3) the domain name does not imply an ability to obtain results in a matter; and

(4) the domain name does not otherwise violate these Rules.

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

II. NYSBA COMMENTARY

Professional Status

[1] In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status. Lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact, and thus lawyers should not hold themselves out as being a partners or associates if they only share offices.

Trade Names and Domain Names

[2] A lawyer may not practice under a trade name. Many law firms have created Internet web sites to provide information about their firms. A web site is reached through an Internet address, commonly called a "domain name." As long as a law firm's name complies with other Rules, it is always proper for a law firm to use its own name or its initials or some abbreviation or variation of its own name as its domain name. For example, the law firm of Able and Baker may use the domain name www.ableandbaker.com, or www.ab.com, or www.able.com, or www.ablelaw.com. However, to make domain names easier for clients and potential clients to remember and to locate, some law firms may prefer to use terms other than the law firm's name. If Able and Baker practices real estate law, for instance, it may prefer a descriptive domain name such as www.realestatelaw.com or www.ablerealestatelaw.com or a colloquial domain name such as www.dirtlawyers.com. Accordingly, a law firm may utilize a domain name for an Internet web site that does not include the name of the law firm, provided the domain name meets four conditions: First, all pages of the web site created by the law firm must clearly and conspicuously include the actual name of the law firm. Second, the law firm must in no way attempt to engage in the practice of law using the domain name. This restriction is parallel to the general prohibition against the use of trade names. For example, if Able and Baker uses the domain name www.realestatelaw.com, the firm may not advertise that people buying or selling homes should "contact www.realestatelaw.com" unless the firm also clearly and conspicuously includes the name of the law firm in the advertisement. Third, the domain name must not imply an ability to obtain results in a matter. For example, a personal injury firm could not use the domain name www.win-your-case.com or www.settle-for-more.com because such names imply that the law firm can obtain favorable results in every matter regardless of the particular facts and circumstances. Fourth, the domain name must not

otherwise violate a Rule. If a domain name meets the three criteria listed here but violates another Rule, then the domain name is improper under this Rule as well. For example, if Able and Baker are each solo practitioners who are not partners, they may not jointly establish a web site with the domain name www.ableandbaker.com because the lawyers would be holding themselves out as having a partnership when they are in fact not partners.

Telephone Numbers

[3] Many lawyers and law firms use telephone numbers that spell words, because such telephone numbers are generally easier to remember than strings of numbers. As with domain names, lawyers and law firms may always properly use their own names, initials, or combinations of names, initials, numbers, and legal words as telephone numbers. For example, the law firm of Red & Blue may properly use phone numbers such as RED-BLUE, 4-REDLAW, or RB-LEGAL.

[4] Some lawyers and firms may instead (or in addition) wish to use telephone numbers that contain a domain name, nickname, moniker, or motto. A lawyer or law firm may use such telephone numbers as long as they do not violate any Rules, including those governing domain names. For example, a personal injury law firm may use the numbers 1-800-183 ACCIDENT, 1-800-HURT-BAD, or 1-800-INJURY-LAW, but may not use the numbers 1-800-WINNERS, 1-800-2WIN-BIG, or 1-800-GET-CASH. (Phone numbers with more letters than the number of digits in a phone number are acceptable as long as the words do not violate a Rule.) *See* Rule 7.1, Comment [12].

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

New York Rule 7.5 is essentially the same as former Disciplinary Rule DR 2-102, which was amended in 2007.

III.2 ABA Model Rules

Although New York Rule 75 and the Model Rule regulate firm names and letterheads, the New York rule departs considerably from the Model Rule, including many more details and regulations. Similarities are:

- The prohibition of names, letterheads, and other professional designations that violate Rule 7.1;
- The requirement that a law firm with offices in more than one jurisdiction indicate the jurisdictional limitations of firm lawyers on letterheads;

- The prohibition of the use of the name of a lawyer holding public office; and
- The prohibition of the use of the term "partner" unless the lawyers are in fact partners.

IV. PRACTICE POINTERS

1. If the firm has offices in more than one jurisdiction double-check letterheads, Web sites and similar notices to make sure that they contain the appropriate jurisdictional limitations on the practice of each attorney.
2. When establishing a Web site, make certain to double-check requirements under advertising Rule 7.1.
3. When using a domain name that does not include the name of the lawyer or law firm, make certain that the name of the firm or law firm is prominently displayed on all pages of the website.
4. Use only a domain name that does not imply an ability to obtain results.

V. ANALYSIS

V.1 Purpose of Rule 7.5

Rule 7.5 is the direct descendant of the Code provisions, and unlike the simple, general approach of the Model Rule, provides a great deal of regulation with respect to what information is required, and what statements are prohibited in cards, announcements, and letterheads.

V.2 Announcements, Letterheads, and Signs

Professional cards and announcements may be sent to anyone. The rule specifically states that the designation "of counsel" may be used when there is a continuing relationship between law firms and/or lawyers. The designation "General Counsel" may be used only when a lawyer or law firm devotes a "substantial amount" of time in the representation of the client. The use of deceased or retired partners' names is permitted. Announcement cards and office signs may contain reference to any non-legal business conducted by the lawyer.

V.3 Trade Names

Rule 7.5(b) prohibits the use of trade names by lawyers and law firms in private practice. The firm name must contain the name of at least one lawyer who practices in the firm, but cannot contain any other language which might be misleading as to the nature of the practice. In *Matter of Shephard*, 92 A.D.2d 978 (3d Dept. 1983), the

Court held that the name "The People's Law Firm of Jan L. Shephard, Attorney, P.C." was improper because it suggested that the firm was controlled by the public. The use of "the Country Lawyer" immediately below the attorney's name, however, was ruled permissible because "the lawyer's name was inserted apart from the motto." *Matter of von Wiegen,* 63 N.Y.2d 164 (1984). In *Alexander v. Cahill*, 634 F. Supp. 2d 239 (N.D.N.Y. 2007) the District Court, in considering a challenge to former DR 2-101(c)(7) [now NY Rule 7.1(c)(7)], determined that the state has an interest in regulating advertising using a trade name "that implies an ability to obtain results in a matter" as "trade names are far too likely to be false, deceptive and misleading" when used for the provision of legal services. The Court also determined, however, that the Rule prohibiting advertising using a trade name was drafted too broadly, and ruled it unconstitutional. The prohibition in Rule 7.5 (formerly DR 2-102) against practicing under a trade name was not challenged, and presumably remains valid.

Nor may a law firm use the designation "legal clinic," "legal aid," or "legal service office" and the like unless the firm is a qualified legal assistance organization, or a law firm providing low cost legal services.

V.4 Deceased and Retired Partners

While the New York Rule forbids the use of the names of lawyers no longer associated with the firm, the rule expressly permits the use, by a law firm or a predecessor law firm in unbroken line of succession, of deceased and retired law firm members' names. In New York, retirement means that a lawyer may not practice in the geographic area of the former practice. (See Rule 1.17 Sale of a Law Practice, supra.)

V.5 Nonlawyers

Although New York Rule 5.8 permits contractual relationships between authorized nonlegal professionals and lawyers, Rule 7.5 expressly prohibits the use of the nonlawyer's name by the lawyer or law firm in its firm name. The Rule resulted from the formation in Washington D.C. of a law firm which was affiliated with the accounting firm Ernst & Young, and the adoption of the firm name, McKee Nelson Ernst & Young. When the McKee firm sought to expand to New York, the New York Rules prohibited the use of the Ernst & Young name in the firm's title. When the Code was amended in 2001 to permit affiliation with nonlawyer professionals, however, the Administrative Board of the New York Courts responsible for adopting the Code made certain that a nonlawyer name would not be included in a law firm name. The prohibition against including the name of a nonlawyer extends of course to paralegals or any other nonlawyer affiliated with the law firm.

V.6 Partnerships

In New York, pursuant to Rule 7.5 (c), only partners in fact may hold themselves out as partners. Thus, attorneys sharing space must make it clear to the public that they are

not engaged in practice as a partnership. The designation of a "contract" partners or non-equity partner as a "partner" is problematic under the Rule. These individuals are generally no more than highly salaried associates, do not share in the profits (or losses) and do not participate in the management of the firm. Designating these individuals as "partners" is likely violative of the Rule, which in New York, appears to be often honored in the breach.

V.7 Domain Names

Rule 7.5(c) permits a law firm to use a name other than the name of the firm as a domain name. This provision allows a law firm to create a domain name that can easily be captured in an Internet search by topic, and which does not imply an ability to obtain results, such as "WEWINCASES.com." Of course, the domain name cannot violate any other disciplinary rules, and the Web site must *conspicuously* display the law firm name on every page. Although conspicuously is not defined, the Rule clearly contemplates printing that is immediately obvious to the viewer.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Announcements, Letterheads, and Signs

New York:

N.Y.S. Bar Op. 793 (2006) (New York State Bar Association Committee on Professional Ethics interpreted "Of Counsel" relationship "to mean that the of counsel lawyer is 'available to the firm for consultation and advice on a regular and continuing basis'").

N.Y.C. Bar Op. 2000-4 (2000) (firm may be designated as "affiliated" with another law firm on the second firm's letterhead as long as the relationship between the firms is close, regular, continuing, and semi-permanent. Such an affiliation is regarded as one firm for conflicts purposes).

N.Y.S. Bar Op. 757 (2002) (professional announcements of certification as a specialist that mailed to present or former clients are "public" communications and the disclaimer regarding certification in the rule must be included).

N.Y.S. Bar Op. 722 (1999) (lawyer's letterhead may include mention of membership in a professional organization. However, if such membership implies certification in a legal field, the reference must comply with the requirements regarding such certification, including the necessary disclaimer.).

N.Y.S. Bar Op. 704 (1998) (out-of-state law firm opening an office in New York may use a general letterhead without individual names, and an individual attorney may use an individual letterhead without indicating status as partner, associate or of counsel).

N.Y. C. Bar Op. 1996-2 (1996) (law firm may issue an announcement of its hiring of a law student or other nonlawyer. However the announcement must clearly state that the employee is not a lawyer, and is working in a nonlawyer capacity.).

N.Y.C. Bar Op. 1995-8 (1995) (lawyers who are not affiliated may not advertise themselves as "the Law Offices at X Square." A law firm may be "of counsel" to another law firm or to individual lawyers. Lawyers or law firms may advertise that they are "associated" or "affiliated" with each other, provided that their relationship is similar to an "of Counsel" relationship and that potential clients are fully informed of the nature of the relationship.).

N.Y.C. Bar Op. 1995-14 (1995) (lawyer may list honorary degrees in advertisements and on letterhead, but must take care to ensure that the listing will not be misleading).

ABA: ABA Formal Op. 90-357 (1990) (the use of the title "of counsel," is permissible as long as the relationship between the two law firms is a "close, regular, personal relationship and the use of the title is not otherwise false or misleading").

VI.2 Trade Names

N.Y.S. Bar Op. 740 (2001) (use of "A" before the firm name in a Yellow Pages advertisement constitutes the impermissible use of a trade name as it is not the actual name of the firm).

N.Y.S. Bar Op. 732 (2000) (lawyer, X, who employs a number of associates may practice under the firm name "The X Group").

VI.3 Deceased and Retired Partners

N.Y. C. Bar Op. 2005-06 (retired attorney may use professional letterhead but is not required to disclose on that letterhead that he or she is retired).

VI.4 Partnerships

New York: N.Y.C. Bar Op. 1995-9 (partners of one law firm may use the same firm name when forming a second law firm in another jurisdiction. An active name partner in one law firm may be "of counsel" to another law firm. A law firm may continue to use the name of a "retired" law partner who is "of counsel" to the law firm while practicing with a firm having the same partners in another jurisdiction.).

N.Y.S. Bar Op. 622 (1991) (upon dissolution of a law firm, only one of the two resulting law partnerships may use in its firm name the name of a deceased founding partner. There must be sufficient continuity of membership, clientele, and professional practice between the new firm and the original firm so that a continuing line of succession may be demonstrated. Use of the deceased partner's name must be authorized by law or contract and must not be misleading to the public.).

ABA: ABA Formal Op. 84-351 (1984) (law firms may state that they are affiliated or associated with one another, as long as the communication is not misleading,

confidentiality requirements are observed, and conflicts on interest are evaluated as though the firms were a single firm).

VI.5 Domain Names

N.Y. C. Bar Op. 2003-01 (lawyer or law firm may use a domain name that does not include or embody the firm's name, but may not be false, deceptive, or misleading, or imply any special expertise or competence. The Web site must conspicuously show the actual name of the law firm.).

VII. ANNOTATION OF CASES

VII.1 Announcements, Letterheads and Signs

US v. Morales, 2010 WL 2400120 (E.D.N.Y. 2010) (two attorneys representing a client indicted and subsequently convicted on four narcotics- related charges failed to appear on his behalf numerous times, failed to obey court orders to file notices of appearance and to file status reports, failed to submit timely motions, delayed the required presentencing interview by misleading the Probation Department as to who was representing the client, all of which resulted in a delay between conviction and sentencing of more than one year. The Court found that both attorneys violated Rule 1.3 in that neither attorney's representation of the client was diligent; that one attorney violated Rule 1.16 by unilaterally terminating his representation of the client; and that the other attorney violated Rule 7.5 in using the other's letterhead after his separation from the firm in a manner that caused confusion to the Court and both violated the Rules by repeatedly ignoring the Court's orders.).

In Re R.M.J., 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982) (Supreme Court struck down a provision restricting the sending of professional announcements to clients, former clients, relatives, and close friends).

VII.2 Trade Names

Matter of Shephard, 92 A.D.2d 978 (3d Dept. 1983) (court held that the name "The People's Law Firm of Jan L. Shephard, Attorney, P.C." was improper because it suggested that the firm was controlled by the public).

Matter of Shapiro, 90 A.D.2d 22 (1st Dept. 1982) (lawyer was found to have violated former DR 2-102(B) by using the name "The People's Legal Clinic, Inc.").

Matter of von Wiegen 63 N.Y.2d 164 (1984) (use of "the Country Lawyer" immediately below the attorney's name in a flyer was ruled permissible because "the lawyer's name was inserted apart from the motto").

VII.3 Deceased and Retired partners

Phillips v. Cahill Gordon & Reindel, 100 Misc. 2d 656 (N.Y Co. 1981) (plaintiff claimed that the appearance by attorneys of the Cahill Gordon firm was improper as the name partners were all deceased. The Court determined that the use of the names of deceased partners was permissible since the use of deceased partners' names had the sanction of custom and did not offend any statutory provision or legislative policy.).

VII.4 Partnerships

N.Y. Criminal and Civil Courts Bar Associations v. Jacoby & Meyers, 61 N.Y.2d 130 (1984) (Bar Associations sued Jacoby & Meyers law firm claiming that the name of the law firm, bearing names of partners who were not admitted to practice in New York, was misleading. The Court determined that the law firm could practice in New York under the firm name since an unnamed partner admitted to practice in New York was actively residing and supervising the firm offices in this state.).

Rosenberg v. Johns-Manville Sales Corp., 99 Misc. 2d 554 (N.Y. Co. 1979) (law firm practicing in several states must have at least one partner admitted to practice in New York. An associate is not "capable of setting policy for the firm, or of holding himself out to the public as the firm, or of accepting the legal responsibility for all of its acts and those of its other employees.").

VII.5 Domain Names

Alexander v. Cahill, 634 F. Supp. 2d 239 (N.D.N.Y. 2007), *aff'd* No. 07-3677 (2d. Cir. 12, 2010) (U.S. District Court ruled that several provisions of New York's revised rules regulating attorney advertising, former DR 2-101 (now Rule 7.1), were unconstitutional. However, Court upheld former DR 2-102(E), now 7.5(e), governing domain names.).

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Rule 8.1: Candor in the Bar Admission Process

I. TEXT OF RULE 8.1[1]

(a) A lawyer shall be subject to discipline if, in connection with the lawyer's own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:

(1) has made or failed to correct a false statement of material fact; or

(2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

II. NYSBA COMMENTARY

[1] If a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission as well as that of another.

[2] This Rule is subject to the provisions of the Fifth Amendment to the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

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1 Rules Editor Gordon Eng. The commentary expresses the personal views of Mr. Eng and does not in any way reflect the positions of Debevoise and Plimpton LLP. Any errors or omissions are the result of Mr. Eng's work product and not of Debevoise and Plimpton LLP. Mr. Eng would like to acknowledge Danielle Miklos for her research assistance in the preparation of this Chapter.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

New York Rule of Professional Conduct 8.1 is the successor to former New York Disciplinary Rule (DR) 1-101, "Maintaining Integrity and Competence of the Legal Profession."

- Rule 8.1 is substantively similar to DR 1-101 but combines DR1-101(A) and (B) into a single paragraph.
- Rule 8.1 clarifies the scope of the rule to include a lawyer's own application to the bar previously filed in New York or in any other jurisdiction.
- Rule 8.1 simplifies the phrase "A lawyer shall not further the application for admission to the bar of another person that the lawyer knows to be unqualified in respect to character, education, or other relevant attribute" with the phrase "in connection with the application of another person for admission to the bar."

III.2 ABA Model Rules

Although Rule 8.1 is similar to Rule 8.1 of the American Bar Association Model Rules of Professional Conduct (ABA Rule) with respect to application for admission to the bar, NY Rule 8.1 is much narrower than ABA Rule 8.1 in the following respects:

- The scope of ABA Rule 8.1 goes beyond bar admission applications and imposes a duty of candor not only to a lawyer's own bar admission application but also to any disciplinary matter involving the lawyer's own conduct as well as that of others.
- Comment [1] of ABA Rule 8.1 provides, among other things, that "it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct."
- Unlike NY Rule 8.1, ABA Rule 8.1 also imposes a duty to correct any prior misstatement in the matter that the lawyer may have made and affirmatively clarify any misunderstanding on the part of the admissions or disciplinary authority of which the lawyer involved becomes aware. *See* Comment [1] ABA Rule 8.1.
- ABA Rule 8.1 further provides that a lawyer representing an applicant for admission to the bar or representing another lawyer before a disciplinary proceeding is governed by the rules of confidentiality under ABA Rule 1.6 and, in some cases, ABA Rule 3.3. NY Rule 8.1 is silent with respect to these concerns.

IV. PRACTICE POINTERS

1. Applicants to the New York State Bar must provide a complete, truthful, and accurate disclosure of all incidents in their lives that might reflect on the applicant's fitness to practice law.
2. Applicants must disclose all prior legal employment, whether paid or unpaid, no matter how significant or insignificant it may seem. It is much easier to explain an unfavorable past employment situation at the time of admission to the bar than to explain the failure to disclose that information at a later time before a disciplinary tribunal.
3. It may be tempting to rationalize non-disclosure of some incidents in an applicant's past as not significant enough or "truly" reflective of an applicant's fitness to practice law, but an applicant should err on the side of a full disclosure. In those instances in which there might be an issue, addressing it early in the process, perhaps with the assistance of counsel, is far preferable to later discovery by a disciplinary board. As set forth here, later discovery of an undisclosed incident or misrepresentation during the application process might lead to disciplinary action.

V. ANALYSIS

V.1 Purpose of Rule 8.1

A unique feature of the legal profession is the degree of autonomy that it possesses in terms of self-regulation. The legal profession in turn views this autonomy as a privilege that must be protected and preserved by establishing, maintaining, and enforcing standards of competency and integrity. Although competence is addressed in other sections of the New York Rules of Professional Conduct (the NY Rules), Section 8 of the NY Rules deals with the integrity and moral fitness component. Section 8 is accordingly entitled "Maintaining the Integrity of the Profession." The first rule in this section is Rule 8.1, which reflects the notion that high ethical standards begin at the entrance door to the profession.

V.2 Complete, Truthful, and Accurate Information

Rule 8.1 provides for the discipline of attorneys who do not provide complete, truthful, and accurate information to the character and fitness committee concerning any questionable incidents in their past. The presumption is that any applicant unwilling to provide honest and open disclosure, no matter how painful or embarrassing, at the outset of practice, will be less likely to be hospitable to honest and open disclosure at some point in the practice of law when the stakes to clients, the courts, and the legal profession will be that much greater. For applicants with a regrettable past, candor to the character and fitness committee is the first trial by fire.

Integrity may be a quality more difficult to measure than competence. But failure to comply with Rule 8.1 is viewed as direct evidence of a lawyer's material ethical deficiency. Precisely because integrity is a more difficult quality to measure than competence, candor in the admission process finds its place at the forefront of this section of the ethical rules.

The ethical rules are not the only source that demands candor in the bar admission process. New York as in "[e]very state in the United States as a prerequisite for admission to the practice of law, requires that applicants possess 'good moral character.' Although the requirement is of judicial origin, it is now embodied in legislation in most states."[2] In New York, the prerequisite that an applicant possess "the character and general fitness requisite for an attorney and counselor-at-law" is embodied in Article 4, § 90(1)(a) of the Judiciary Law. Section 90(2) further provides that "the appellate division of the supreme courts is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice."

V.3 Recommending or Supporting Another Lawyer's Application for Admission

Rule 8.1 is not limited to a lawyer's own application for admission to the bar. Rule 8.1 applies equally in connection with the application of another person for admission to the bar. This provision applies when a lawyer is recommending or supporting an applicant for admission to the bar. In recommending an applicant for admission, a lawyer should have a good-faith belief based on a reasonable acquaintance or relationship that the applicant is of good moral character. The lawyer in these circumstances, however, should "not become a self-appointed investigator or judge of applicants for admission."[3]

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Recommending or Supporting Another Lawyer's Application for Admission

Nassau County Bar Op. 94-23 (1994) (lawyer must honestly complete an affidavit of good character for an applicant to the bar who worked in the lawyer's employ as a law student. If the applicant's behavior was irresponsible and unprofessional, the lawyer must so state. If the lawyer believes that the applicant violated the Appellate Division's rules governing admission by failing to identify the lawyer as a former legal employer, the lawyer may be obligated to report this knowledge.).

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2 Comment, *Procedural Due Process and Character Hearings for Bar Applicants*, 15 Stan. L. Rev. 500 (1963).

3 *See* EC 1-3.

Nassau County Bar Op. 90-21 (1990) (lawyer has no ethical duty to report the misconduct of a non-lawyer. The decision to report is a matter of the lawyer's personal judgment.).

VII. ANNOTATIONS OF CASES

VII.1 Complete, Truthful and Accurate Information

In re Osredkar, 25 A.D.3d 199, 805 N.Y.S.2d 760 (4th Dept. 2005) (more than five years after attorney's admission to the bar the Court revoked the admission after finding attorney before and after his admission made false and misleading statements in his resumés and also made materially false statements in his application for admission to the bar by failing to disclose certain legal employment, a material fact requested in the bar application).

In re Spinner, 19 A.D.3d 803, 796 N.Y.S.2d 716 (3d Dept. 2005) (two years after attorney's admission to the bar the Court revoked the attorney's admission after finding the attorney failed to fully disclose on his admission to the bar: (i) his arrest for possession of marijuana in 1993 in New Jersey and his guilty plea to disorderly conduct; (ii) his arrest in New York in 1996 even though the charges were dismissed; and (iii) his arrest and plea of guilty to disorderly conduct in New York in 2000).

In re Canino, 10 A.D.3d 194, 781 N.Y.S.2d 686 (2d Dept. 2004) (seven years after the attorney's admission to the bar and having an unblemished disciplinary record, the court, nevertheless, revoked the admission of an attorney who admitted that at the time of admission to the bar, he failed to disclose his summer internship with the Richmond County District Attorney's office because he had reason to believe that the required employment affidavit would have been unfavorable to his application).

In re Bamisile, 3 A.D.3d 10, 770 N.Y.S.2d 77 (2d Dept. 2003) (five years after being admitted to the bar and having sustained no disciplinary history during that period, the court revoked attorney's admission upon finding that attorney made materially false statements arising from his complex immigration status and failed to disclose, on his application for admission to the bar, that he used other names, had more than one social security number, and had prior employment as a teacher and fraud investigator).

In re Benn, 282 A.D.2d 187, 724 N.Y.S.2d 466 (2d Dept. 2001) (court disbarred a lawyer for a single incident in which he accepted a $500 payment to represent a client in an uncontested matrimonial action prior to his admission to the bar and subsequently falsely denied on his application for admission to the bar that he had engaged in the unauthorized practice of law or had given legal advice in his admission application).

In re Nurse, 276 A.D.2d 24, 714 N.Y.S.2d 73 (1st Dept. 2000) (court suspended a lawyer for three months for, inter alia, her deliberate failure to disclose an instance of a prior legal employment on her bar application).

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Rule 8.2: Judicial Officers and Candidates

I. TEXT OF RULE 8.2[1]

(a) A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Part 100 of the Rules of the Chief Administrator of the Courts.

II. NYSBA COMMENTARY

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. False statements of fact by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer may engage in constitutionally protected speech, but is bound by valid limitations on speech and political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

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III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 8.2 of the NY Rules is the successor to former New York Disciplinary Rules 8-102, "Statements Concerning Judges and Other Adjudicatory Officers," and 8-103, "Lawyer Candidate for Judicial Officer."

- Rule 8.2(a) is substantively similar to DR 8-102, but Rule 8.2(a) replaces the single word "qualifications" with the phrase "qualifications, conduct or integrity."
- Rather than separate paragraphs, one for sitting judges and another for candidates, Rule 8.2(a) combines DR 8-102(A) (concerning candidates) and DR 8-102(B) (concerning judges or adjudicatory officer) into a single paragraph.
- Rule 8.2(b) is the successor the DR 8-103 and is similar to the predecessor DR except that Rule 8.2(b) expands the applicable provisions of the New York Rule of Judicial Conduct. DR 8-103 provided that a lawyer candidate for judicial office shall comply with Section 100.5 of the Chief Administrator's Rules Governing Judicial Conduct (22 NYCRR 100.5) and Canon 5 of the Code of Judicial Conduct. Rule 8.2(b) provides that the lawyer candidate shall comply with the applicable provisions of Part 100 of the Rules of the Chief Administrator of the Courts. Part 100 includes 22 NYCRR sections 100.0 through 100.6.

III.2 ABA Model Rules

Rule 8.2 is similar to ABA Rule 8.2, but Rule 8.2 differs slightly in the following respects:

- Rule 8.2 uses the phrase "A lawyer shall not knowingly make a false statement of fact concerning the qualifications…," while ABA Rule 8.2(a) expresses the rule as "A lawyer shall not make a statement that the lawyer knows to be false for with reckless disregard as to its truth or falsity concerning the qualifications… ."
- Although Rule 8.2 deals with judges, adjudicatory officers, or candidates for election or appointment to judicial office, ABA Rule 8.2 offers a slightly more broad formulation and includes "judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."
- Comment [1] to ABA Rule 8.2 provides as examples of candidates for public legal offices such positions as attorney general, prosecuting attorney, and public defender. A plain reading of Rule 8.2 and Part 100 of the Rules of the Chief Administrator of the Courts suggests a narrower definition.

III.3 ABA Model Code of Professional Responsibility Ethical Considerations ("EC")

EC 8-6 encourages lawyers who by training, experience, and judgment are uniquely qualified to evaluate candidates for judicial office and thus have a special responsibility

to assist in the selection process. In doing so, however, lawyers should strive not to allow purely political considerations from outweighing judicial fitness. EC 8-6 recognizes a lawyer's right as a citizen to criticize public officials and judges publicly, but only in those instances where a lawyer is "certain of the merit of his complaint" and, even in those circumstances, EC 8-6 exhorts lawyers to use appropriate restraint.

IV. PRACTICE POINTERS

1. Rule 8.2 prohibits a lawyer from knowingly making a false statement of fact, but on its face it does not appear to apply to opinions. Because the distinction between fact and strongly worded opinions can become blurred, lawyers are well advised to exercise restraint in making statements, whether of fact or opinion, concerning the subject matter of this rule.
2. A significant amount of the substantive rule embodied in Rule 8.2 is incorporated by reference to Part 100 of the Rules of the Chief Administrator of the Courts. Part 100 (22 NYCRR) contains seven sections ranging from 100.0 to 100.6. Although candidates for judicial office and sitting judges should be familiar with all seven sections, particular attention should be devoted to section 100.5, "A judge or candidate for elective judicial office shall refrain from inappropriate political activity." As set forth in more detail in the Analysis below, section 100.5 contains the "pledges or promises" clause. 22 NYCRR 100.5(A)(4)(d)(i).
3. Additional guidance contained in relevant parts of former EC 8-6 may also be helpful to practitioners. "While a lawyer as a citizen has a right to criticize [judges and administrative officials] publicly, [a lawyer] should be certain of the merit of [the lawyer's] complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system."

V. ANALYSIS

V.1 Purpose of Rule 8.2

The brevity of Rule 8.2, which consists of two short paragraphs and three equally concise comments, belies the complexity as well as the volume of case law and secondary source material concerning this ethics rule. Perhaps nowhere else in the Rules is the intersection of legal and ethical analysis so well-manifested than in this terse rule that implicates the First Amendment of the United States Constitution, state interests in protecting the dignity, impartiality, independence of New York State's judiciary, and preserving public confidence in the court system. Rule 8.2 is most relevant in circumstances, as in New York State, where many judges are elected to the bench by popular vote. The rule specifically sets forth the ethical guidelines and restrictions on what sitting judges and candidates for judicial office can say or do.

Rule 8.2, like its predecessor DRs, attempts to reconcile the tension between two broad interests: (i) a lawyer's right to free speech under the First Amendment, and (ii) the state's interest in preserving the impartiality and the appearance of impartiality in the judicial branch.

V.2 Restrictions on Statements

The degree to which a state's judicial disciplinary structure may permissibly restrict statements made by a sitting judge or a lawyer candidate for judicial office was brought into sharp relief recently by the United States Supreme Court decision in *Republican Party of Minnesota v. White,* 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).

In *White* the United States Supreme Court examined whether a Minnesota legal restriction (known as the "announce clause") that prohibited a judicial candidate from announcing "his or her views on disputed legal or political issues" during a campaign for judicial office violated the First Amendment of the United States Constitution. 536 U.S. at 768. The parties in that case had agreed that strict scrutiny was the appropriate standard of review, and that is the standard the Court used in examining whether the announce clause was narrowly tailored to serve a compelling state interest.

Minnesota contended that the announce clause was intended to further the state's compelling interest in judicial impartiality and the appearance of judicial impartiality. Because Minnesota's announce clause did not define impartiality, id. at 775, the Court examined three different possible meanings of impartiality (lack of bias for or against either party in a dispute, lack of a preconceived legal viewpoint, or the quality of open-mindedness) and concluded that those interpretations of impartiality were either not compelling state interests and that even if those interests were compelling state interests the announce clause was under inclusive and not sufficiently narrow to serve those interests. Accordingly, the Court found that Minnesota's announce clause prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violated the First Amendment. Id. at 788.

The Minnesota Code in *White* also contained a so-called "pledges or promises" clause that separately prohibited judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." The Court made clear that the Minnesota pledges or promises clause was not at issue in *White*, and the Court accordingly expressed no view on it. Id. at 770.

Like Minnesota, New York also has a pledges or promises clause. It is incorporated by reference in Rule 8.2(b) by way of Part 100 of the Rules of the Chief Administrator of the Courts. Specifically, section 100.5(4)(d)(i), provides that "A judge or a non-judge who is a candidate for public election to judicial office shall not make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office." 22 NYCRR 100.5(4)(d)(i).

V.3 Preserving the Impartiality and Independence of the Judiciary

Section 100.5 is entitled "A judge or candidate for elective judicial office shall refrain from inappropriate political activity." Among the prohibitions, including the pledges or promises clause, are additional restrictions on certain political activities and speeches or statements that a sitting judge or candidate for a judicial office may engage in.

Not surprisingly, a number of constitutional challenges to New York's ethical rules embodied in Part 100 followed shortly after the United States Supreme Court ruled in *White*, two of which are particularly noteworthy. Both actions relied on the United States Supreme Court's holding in *White.* Both challenged 22 NYCRR § 100.5. The New York Court of Appeals made short shrift of these challenges in dual per curium decisions issued on the same day in *In the Matter of Raab*, 100 N.Y.2d 305, 793 N.E.2d 1287, 763 N.Y.S.2d 213 (2003) and *In the Matter of Watson*, 100 N.Y.2d 290, 794 N.E.2d 1, 763 N.Y.S.2d 219 (2003). *Raab* addressed the extent to which New York may impose restrictions on the ability of sitting judges and candidates for judicial office to engage in political conduct, including speech-making (with some narrow exceptions), while *Watson* considered New York's pledges or promises clause.

In both *Raab* and *Watson* the New York Court of Appeals distinguished New York's restrictions on judges and judicial candidates from the Minnesota provisions in *White* and concluded that New York's rules embodied in 22 NYCRR 100.5, "even applying strict scrutiny review… are constitutionally permissible because they are narrowly tailored to further a number of compelling state interests, including preserving the impartiality and independence of our state judiciary and maintaining public confidence in New York State's court system." *Raab*, 100 N.Y.2d at 312. The New York Court of Appeals further concluded that the New York rules do not contain provisions analogous to Minnesota's announce clause "in that it does not prohibit judicial candidates from articulating their views on legal issues." *Watson*, 100 N.Y.2d at 301.

At the time of this writing New York's rules governing judicial conduct appear to have withstood constitutional challenge and have been cited in a number of subsequent disciplinary proceedings by the state Commission on Judicial Conduct. *See e.g.*, Joel Stashenko, *Judge Admonished for Soliciting Political Support of Attorney in Her Court*, N.Y.L.J., January 9, 2009 (reporting on the Commission's finding of a violation of § 100.5(A)(5)).

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Restrictions on Statements

N.Y.C. Bar Op. 1996-1 (1996) (lawyer may write an article for a professional journal criticizing a judge for abusive and intemperate judicial conduct during a trial, provided that the lawyer is not knowingly making false accusations).

VI.2 Preserving the Impartiality and Independence of the Judiciary

N.Y.S. Bar Op. 491 (1978) (judge-elect may not campaign on behalf of candidates for political office).

N.Y.S. Bar Op. 289 (1973) (discusses general guidelines applicable to campaigns of candidates for judicial office).

VII. ANNOTATIONS OF CASES

VII.1 Restrictions on statements

New York: In re Watson, 100 N.Y.2d 290, 794 N.E.2d 1, 763 N.Y.S.2d 219 (2003) (statements made by a judge in the course of his campaign violated the pledges or promises clause embodied in the New York rules of Judicial Conduct).

In re Shanley, 98 N.Y.2d 310, 774 N.E.2d 735, 746 N.Y.S.2d 670 (2002) (campaign literature describing a judicial candidate as a "law and order candidate" did not violate the pledges and promises prohibition in the New York Rules governing Judicial Conduct).

In re Ligammari, 290 A.D.2d 175, 737 N.Y.S.2d 761 (4th Dept. 2002) (publicly censuring a lawyer for violating former DR 8-102B by making false accusations of criminal and unethical conduct against his opponent during a campaign for a County Court judgeship).

In re Ferlicca, 280 A.D.2d 246, 723 N.Y.S.2d 296 (4th Dept. 2001) (censuring a lawyer who, as a candidate in a primary election for a judicial position, approved the dissemination of a political mailer containing false and misleading statements about his opponent).

In re Holtzman, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (1991) (sustaining a Grievance Committee letter of reprimand against a district attorney for releasing to the media false allegations of misconduct against a named judge in violation of former DR 8-102(B) and former DR 1-102(A)(6) and declining to extend the "constitutional malice" standard enunciated by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) to lawyer disciplinary proceedings).

Federal: Spargo v. New York State Commission on Judicial Conduct, 351 F.3d 65 (2d Cir. 2003) (younger abstention doctrine required the district court to abstain from exercising jurisdiction over the plaintiff's constitutional challenges to certain rules of the New York Code of Judicial Conduct embodied in 22 NYCRR 100.5).

Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002) (holding that the "Announce Clause" in the Minnesota Code of Judicial Conduct violated the First Amendment by prohibiting candidates for election to judicial office from announcing their views on disputed legal or political issues).

VII.2 Preserving the Impartiality and Independence of the Judiciary

In re Raab, 100 N.Y.2d 305, 793 N.E.2d 1287, 763 N.Y.S.2d 213 (2003) (finding New York's rules of Judicial Conduct narrowly tailored to further compelling state interests, including preserving the impartiality and independence of the judiciary and maintaining public confidence in New York State's court system and censuring a sitting judge for engaging in improper political activity in the course of a judicial campaign).

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Rule 8.3: Reporting Professional Misconduct

I. TEXT OF RULE 8.3[1]

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(c) This Rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6; or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

II. NYSBA COMMENTARY

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation to cooperate with authorities empowered to investigate judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

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1 Rules Editor Gordon Eng. The commentary expresses the personal views of Mr. Eng and does not in any way reflect the positions of Debevoise and Plimpton LLP. Any errors or omissions are the result of Mr. Eng's work product and not of Debevoise and Plimpton LLP. Mr. Eng would like to acknowledge Danielle Miklos for her research assistance in the preparation of this Chapter.

[2] A report about misconduct is not required where it would result in violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to a tribunal or other authority empowered to investigate or act upon the violation.

[3A] Paragraph (b) requires a lawyer in certain situations to respond to a lawful demand for information concerning another lawyer or a judge. This Rule is subject to the provisions of the Fifth Amendment to the United States Constitution and corresponding provisions of state law. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in a bona fide assistance program for lawyers or judges. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) encourages lawyers and judges to seek assistance and treatment through such a program. Without such an exception, lawyers and judges may hesitate to seek assistance and treatment from these programs, and this may result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 8.3 is substantively similar to its predecessor rule DR 1-103 with some minor differences:

- Rule 8.3 reflects that the new Rules no longer use the terms "confidence or secret" and instead provides in a separate paragraph under Rule 8.3(c) that the Rule does not require disclosure protected by Rule 1.6, "Confidentiality of Information."
- DR 1-103(A) provides that a "lawyer possessing knowledge… of a violation of Section 1200.3 (DR 1-102) [Misconduct] that raises a substantial question as to

another lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." Rule 8.3(a) replaces the "possessing knowledge" phrase with the phrase "a lawyer who knows." Rule 8.3(a) also dispenses with a specific reference to Misconduct rule and simply refers to a violation of the Rules of Professional Conduct generally.

III.2 ABA Model Rules of Professional Conduct

- ABA Rule 8.3 differs from NY Rule 8.3 in that ABA Rule 8.3(b) provides for a specific ethical duty for a lawyer to inform the appropriate authority if a lawyer "knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office."
- ABA Rule 8.3 does not contain language similar to NY Rule 8.3(b), which provides that a lawyer shall not fail to respond to demands for information from appropriate authorities if the lawyer possesses knowledge that a judge or other lawyer has committed professional misconduct.

III.3 Ethical Considerations EC 1-4, 8-5

EC 1-4 calls upon a lawyer to affirmatively report to the proper officials "all unprivileged knowledge of conduct" of another lawyer who violates the Disciplinary Rules. Similarly, Canon 8 embodies Ethical Considerations intended to encourage lawyers to assist in improving the legal system. EC 8-5 provides that "a lawyer should reveal to appropriate authorities" any knowledge of improper conduct by a participant in a proceeding before a tribunal or legislative body that entails "fraudulent, deceptive or otherwise illegal conduct."

III.4 Judiciary Law § 499

Rule 8.3(c)(2) provides a safe harbor from the duty to disclose knowledge of another lawyer's violation of the Disciplinary Rules where the knowledge of the violation is gained by a lawyer or judge while participating in a bona fide lawyer assistance program. This exception finds additional statutory support in the form of New York Judiciary Law, Article 15, Section 499, which provides that "The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client." Thus, by statute, any confidential information about another lawyer or judge obtained in the context of a bona fide lawyer assistance committee enjoys the same protection afforded to attorney-client communications. In this regard,

§ 499 also provides that "Such privilege may be waived only by the person, firm or corporation which has furnished information to the committee."

IV. PRACTICE POINTERS

1. As written, Rule 8.3 imposes a mandatory duty to report another lawyer's misconduct. In keeping with that heavy burden, Rule 8.3 embodies a knowledge requirement. Absent of actual knowledge, a lawyer is not required to but, nevertheless, may report a belief or suspicion of another lawyer's violation of the Rules of Professional Conduct.
2. Rule 1.0 provides that "knowingly," "known," "know," or "knows" denotes actual knowledge of the fact in question." At the same time Rule 1.0 suggests that actual knowledge need not be carried to a scientific certainty. Accordingly, the definition further provides that a "person's knowledge may be inferred from circumstances."
3. Under Rule 8.3(c)(1), the duty to protect client confidential information under Rule 1.6 supersedes the duty to report professional misconduct of another lawyer. Accordingly, whether reporting professional misconduct by attorneys who are colleagues in the same firm or by adversary counsel, it is critically important to consider whether client consent may be necessary before reporting the misconduct.
4. NYSBA Comment [3] to Rule 8.3 attempts to put some perspective on the duty and reminds lawyers that the term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence which the lawyer has knowledge of. It is impractical and not desirable to require lawyers to report minor transgressions of the Rules of Professional Conduct.
5. Rule 8.3 concerns conduct about another lawyer's fitness as a lawyer and does not require reporting conduct concerning another lawyer's fitness to be a business partner, spouse, parent, committee chair, or any other non-lawyer role.

V. ANALYSIS[2]

V.1 Purpose of Rule 8.3

Self-regulation is one of the defining characteristics of the legal profession. And Rule 8.3 lies at the heart of the bar's claim to self-regulation. Compared to other licensed professionals in New York, lawyers enjoy a remarkable degree of professional freedom. For the most part, their conduct is regulated by the judicial branch, not the legislative or executive. Although the courts play an activist role in regulating the profession, they also show considerable deference to lawyer-driven initiatives in such areas as amending the disciplinary rules and reforming the procedures for the admission and discipline of

2 The following Analysis on Rule 8.3 partly draws from commentary written by the late Prof. Mary C. Daly in connection with former DR 1-103.

lawyers. If lawyers do not adequately police the conduct of their colleagues at the bar, society will reject the current scheme of self-regulation, replacing it with executive agency supervision similar to that now in place for other professions. The disclosure of information mandated by Rule 8.3 must be understood as part of the bargain that the legal profession has struck with society.

V.2 Reporting Ethical Misconduct

If lawyers do not bring their colleagues' serious ethical misconduct to the attention of the authorities, that conduct may go undetected. Clients and the courts are often not in a position to learn of serious wrongdoing without the assistance of other members of the bar. The disciplinary bodies are notoriously underfunded and lack the resources of prosecutors' offices. Furthermore, what might appear to be a single and isolated incident of misconduct may often be part of a continuing pattern of behavior. Consciously avoiding or ignoring a lawyer's reporting responsibility in this regard risks inadvertently allowing the miscreant lawyer additional opportunities to injure other clients or to obstruct the administration of justice.

Although a lawyer having actual knowledge must report, a lawyer armed only with mere belief or suspicions may report. Depending on the facts and circumstances, reporting may be the wiser course of action particularly when a lawyer cannot classify the information in the lawyer's possession as either knowledge or suspicion. On the other hand, it is unethical to use irresponsible or unsupported charges reported under the authority of Rule 8.3(a) as a tool to gain an advantage in a litigation or transaction. A lawyer who engages in such tactics may and should be severely disciplined since such conduct undermines self-regulation.

V.3 When Must Lawyers Report Misconduct?

There is no clear guidance on precisely when a lawyer must report another lawyer's misconduct under Rule 8.3(a). It is not very helpful to respond "within reasonable time," as "reasonableness" is a function of context. In some situations, a week's delay would be too long; in others, a month's would be acceptable. In most circumstances, reporting is not a pleasant undertaking, and a lawyer either consciously or subconsciously will postpone it as long as possible. Nothing can be gained by delay, however. It only makes reporting more difficult and conceivably opens the lawyer to disciplinary charges for failing to act within a reasonable time.

V.4 To Whom Must the Misconduct be Reported?

Rule 8.3(a) requires a lawyer to report to either "a tribunal or other authority empowered to investigate or act upon such violation." The "other authority" is almost always the

disciplinary authority in one of the four Appellate Divisions. In most instances, wrongful conduct arising during litigation will be reported to the court before which the matter is pending. A lawyer's decision to report to the court rather than to the "other authority empowered to investigate" is eminently sensible and practical, too often the appropriate disciplinary authority never learns of the opposing lawyer's misconduct because the court neglects to transmit a copy of its decision sanctioning the lawyer to the disciplinary authority. Lacking this information, a disciplinary authority may fail to detect a pattern of serious misconduct or may detect it only after the lawyer's conduct has injured other clients or disrupted the administration of justice in other cases. Although not expressly required by Rule 8.3(a), the lawyer who initiated the report to the tribunal should advise the appropriate disciplinary authority if the tribunal faults the other lawyer's conduct. Taking this additional step is an important contribution to the legal profession's self-regulation.

The reporting obligation embodied in Rule 8.3(a) would be toothless if a lawyer possessing knowledge or evidence of misconduct withheld it from investigators. Accordingly, Rule 8.3(b) affirmatively recognizes an obligation of full disclosure by requiring a lawyer to "respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct." It is likely that "evidence" was included to insure the disclosure of all information regardless of whether it rises to the level of "knowledge."

Notably, the duty to respond to a demand for information from a proper authority under Rule 8.3(b) concerning knowledge or evidence of misconduct applies equally where the miscreant is another lawyer or where the miscreant is a judge. This distinction is important in light of the number of non-lawyer judges presiding throughout New York State.

V.5 Reporting Judicial Misconduct

Somewhat intriguing is the absence of the word "judge" in Rule 8.3(a). A plain reading of Rule 8.3(a) suggests that a lawyer is not compelled to report a judge (especially a non-lawyer judge) even if the reporting lawyer knows that a judge has committed a violation of the Rules of Professional Conduct as provided in Rule 8.3(a). The absence of the word "judge" in Rule 8.3(a) and inclusion of the word judge in Rule 8.3(b) and 8.3(c)(2) suggests that the drafters of Rule 8.3 purposefully left out the word judge in paragraph 8.3(a). While, perhaps it can be argued that Rule 8.3(a) is concerned with the miscreant's fitness as a lawyer (and a non-lawyer judge is by definition not a lawyer), the absence of the word judge in Rule 8.3(a) appears at odds with the ethos of self-regulation. Taken together, Rule 8.3(a) and 8.3(b) appear to be a version of "don't ask, don't tell" for judges. That is, Rule 8.3 suggests that a lawyer who knows of a judge's transgressions (whether or not the judge is a lawyer) is not required to affirmatively report the miscreant judge to the proper authorities unless first asked for information in the form of a lawful demand for information from a tribunal or other proper authority.

V.6 Confidential Information and Information Gained While Participating in a Lawyers' Assistance Program

Rule 8.3(c)(1) and (2) does not require disclosure if the knowledge or evidence is protected by Rule 1.6 or if the information is gained by a lawyer or judge while participating in a bona fide lawyer assistance program. In the latter instance, through the operation of Judiciary Law § 499, information obtained in the context of a bona fide lawyer assistance program is constructively attorney-client privileged. *See* Judiciary Law § 499, above. As expressed in NYSBA Comment [4], moreover, Rule 8.3 "does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question."

V.7 "Snitch Rule"

As laudable as Rule 8.3 is in its intent and purpose, it has drawn its share of criticism from lawyers for a number of reasons. Sometimes referred to somewhat pejoratively as the "Snitch Rule," Rule 8.3 may be "one of the most underenforced, and possibly unenforceable, mandates in legal ethics."[3] Enforcement by the judiciary, while increasing, has also been infrequent and underenforced over the years.[4] And not all states have adopted the rule; California and Kentucky do not have mandatory misconduct reporting in their respective rules of professional conduct.[5]

For a number a reasons lawyers are generally reluctant to turn in fellow lawyers, especially colleagues in the same firm, even when faced with evidence of serious misconduct. This is even more so when junior associates are involved and the issue involves the duty to report misconduct of senior attorneys or even partners in the same firm.[6] The fear of retaliation and the reluctance to "snitch" on fellow attorneys are only a few of the reasons why instances of reporting misconduct under Rule 8.3 is relatively rare and underenforced.

While a detailed analysis of the ambiguities and difficulties of implementing and enforcing Rule 8.3 is beyond the scope of this comment, it is probably safe to say that further review and revision to Rule 8.3 will be forthcoming in the future. The ABA and most states have been struggling with the formulation of this rule for more than 30 years as commentators continue to call attention to the difficulties of mandatory reporting of misconduct.[7]

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3 Nikki A. Ott, Heather F. Newton, *A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?,* 16 Geo. J. Legal Ethics 747, Summer 2003, Student Note.

4 *Id.* at 749.

5 *Id.* at 755.

6 Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 Brandeis L.J. 199, Winter 2007.

7 Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 Geo. J. Legal Ethics 259, Winter, 2003.

Finally, despite the difficulties mentioned above, Rule 8.3 is likely to remain in the New York Rules for the foreseeable future, further revisions notwithstanding. Of course, attorneys must report misconduct when it is mandated by the Rules. When reporting is optional, attorneys may want to consider the following factors[8]:

- First consider the seriousness of the ethical breach. Is it knowing and intentional?
- Does the breach reflect adversely on an attorney's fitness, character, or honesty?
- What is the weight of the evidence? Is it actually knowledge or mere suspicion?
- And finally, will the reporting of the misconduct involve disclosure or lead to the disclosure of client confidential information? And if so, did the client give informed consent?

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Reporting Ethical Misconduct

Nassau County Bar Op. 98-12 (1998) (lawyer has an independent duty as an officer of the court to report wrongdoing by opposing counsel that the lawyer learned of from an independent private investigator, but the lawyer may also use that information for the client's benefit).

N.Y.C. Bar Op. 1995-5 (1995) (lawyer possessing "first-hand knowledge" of a former partner's neglect and mishandling of client matters, including missed court appearances and accounting irregularities, must report the misconduct).

VI.2 Confidential Information and Information Gained While Participating in a Lawyers' Assistance Program

N.Y.S. Bar Op. 742 (2001) (lawyer may not report the wrongdoing of a non-lawyer, third party who engaged in a business transaction with the lawyer's client if that information is protected as a confidence or secret).

Nassau County Bar Op. 98-6 (1998) (lawyer may not report the embezzlement of his client's funds by another lawyer because the client has requested that the information be kept "confidential and privileged." The lawyer must respect the client's wishes even though the dishonest lawyer admitted the embezzlement in a deposition.).

Nassau County Bar Op. 96-1 (1996) (if a lawyer learns of another lawyer's filing of a false and fraudulent retainer agreement with the Office of Court Administration in the course of the lawyer's representation of a client and that client instructs the lawyer not disclose the misconduct, the lawyer must comply with the client's instructions because the information is either a confidence or secret within the meaning of former DR 4-101). Accord: Nassau County Bar Op. 95-15 (1995) (unless the information is a confidence or secret within the meaning of former DR 4-101, a lawyer must report

8 John K. Villa, *Mandatory and Discretionary Snitching on Opposing Counsel's Misconduct*, 24 No. 7 ACC Docket 82, July/August 2006.

another lawyer's employment of a suspended lawyer because since the suspended lawyer is practicing law in violation of the order of suspension).

VI.3 "Snitch Rule"

N.Y.S. Bar Op. 635 (1992) (in determining whether a lawyer is obligated to report another lawyer's misconduct, the lawyer should conduct a four-step analysis and determine: (1) whether the lawyer possess sufficient "knowledge;" (2) whether the knowledge is protected as a confidence or secret; (3) whether the other lawyer's conduct violated a disciplinary rule; and (4) whether the conduct raises a substantial question about to the other lawyer's "honesty, trustworthiness, or fitness in other respects as a lawyer").

VII. ANNOTATIONS OF CASES

VII.1 Reporting Ethical Misconduct

Connolly v. Napoli, Kaiser & Bern*, LLP*, 12 Misc. 3d 530, 817 N.Y.S.872 (Sup. Ct. N.Y. Co. 2006) (terminating an associate for refusing to violate former DR 1-102 can constitute a breach of an implied-in-law contract of employment; extends the holding in Wieder v. Skala).

Lichtman v. Estrin, 282 A.D.2d 326, 723 N.Y.S.2d 185 (1st Dept. 2001) (allegations of the complaint were sufficient to meet the standards set forth in *Wieder v. Skala*).

Kelly v. Hunton & Williams, 1999 WL 408416 (E.D.N.Y. No. 97-CV-5631 (JG) June 17, 1999) (rejecting law firm's contention that an unadmitted associate cannot be faced with the dilemma of having to choose between continued employment at the firm or a punctilious compliance with self-reporting requirements under former DR 1-103(A) and extending protection of *Wieder v. Skala* to law graduates working as associates at law firm).

Wieder v. Skala, 80 N.Y.2d 628, 609 N.E.2d 105, 593 N.Y.S.2d 752 (1992) (creating a narrow exception to New York's employment-at-will doctrine between a law firm associate and a law firm and finding for public policy reasons that an associate who was terminated by his law firm for insisting that the firm comply with the self-reporting provisions of former DR 1-103(A) concerning serious misconduct of another associate constituted a valid claim for breach of contract while noting that compliance with former DR1-103 "is critical to the unique function of self-regulation belonging to the legal profession").

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Rule 8.4: Misconduct

I. TEXT OF RULE 8.4[1]

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a

1 Rules Editor Gordon Eng. The commentary expresses the personal views of Mr. Eng and does not in any way reflect the positions of Debevoise and Plimpton LLP. Any errors or omissions are the result of Mr. Eng's work product and not of Debevoise and Plimpton LLP. Mr. Eng would like to acknowledge Danielle Miklos for her research assistance in the preparation of this Chapter.

determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

II. NYSBA COMMENTARY

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on their behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for illegal conduct that indicates lack of those characteristics relevant to law practice. Violations involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice are illustrative of illegal conduct that reflects adversely on fitness to practice law. Other types of illegal conduct may or may not fall into that category, depending upon the particular circumstances. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding. The assertion of the lawyer's constitutional rights consistent with Rule 8.1, Comment [2] does not constitute failure to cooperate. The conduct must be seriously inconsistent with a lawyer's responsibility as an officer of the court.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good-faith belief that no valid obligation exists. [4A] A lawyer harms the integrity of the law and the legal profession when the lawyer states or implies an ability to influence improperly any officer or agency of the executive, legislative or judicial branches of government.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[5A] Unlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (g).

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 8.4(a) is substantively similar to and combines predecessor DR 1-102(1) and (2). Rule 8.4(a) adds that a lawyer shall not "knowingly assist or induce another to" violate or attempt to violate the Rules of Professional Conduct. Rule 8.4(a) also includes the phrase "or do so through the acts of another" in place of the prior phrase "[c]ircumvent a Disciplinary Rule through the actions of another."

- Rule 8.4(b), (c), and (d) are identical to predecessor rules DR 1-102(A)(3), (4), and (5).
- Rule 8.4(e)(1) is similar to predecessor DR 9-101(C).
- Rule 8.4(e)(2) and 8.4(f) are new and do not have predecessor rules from the New York Code of Professional Responsibility.
- Rule 8.4(g) and (h) are identical to predecessor rules DR 1-102(A)(6) and (7) respectively.

III.2 ABA Model Rules of Professional Conduct

Rule 8.4 is substantively similar to ABA Rule 8.4 except that the ABA version does not contain a similar provision to Rule 8.4(g) and the catch-all paragraph Rule 8.4(h).

- ABA Rule 8.4(a), (c), (d), and (f) are identical to Rule 8.4 (a), (c), (d), and (f) respectively and except for minor variations ABA Rule 8.4(b) and (e) are substantively similar to the corresponding Rule 8.4 (b) and (e).

III.3 Ethical Considerations

EC 1-5 sets the goal for lawyers to maintain high standards of professional conduct both in the lawyer's personal and public life. Because of the lawyer's position in society, even minor violations of the law may tend to lesson public confidence and respect for the profession.

III.4 New York Judiciary Law § 90

Section 90(2) of the Judicial Law of New York empowers the Appellate Division in each department of the Supreme Court to "censure, suspend from practice or remove

from office any attorney and counselor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice." Each of the four judicial departments in turn have incorporated by reference the Rules of Professional Conduct in the definition of "professional misconduct." For example, the First Judicial Department defines professional misconduct as having been committed by:

> "Any attorney who fails to conduct himself both professionally and personally, in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law and any attorney who violates any provision of the rules of this court governing the conduct of attorneys, or with respect to conduct on or after April 1, 2009, the Rules of Professional Conduct (Part 1200 of this Title), or with respect to conduct on or before March 31, 2009, any disciplinary rules of the former Code of Professional Responsibility, as adopted by the New York State Bar Association, effective January 1, 1970, as amended, or any of the special rules concerning court decorum shall be guilty of professional misconduct within the meaning of subdivision 2 of section 90 of the Judiciary Law."

22 NYCRR 603.2.

The other three judicial departments have similarly defined professional misconduct by incorporating the ethics rules by reference.[2]

III.5 22 NYCRR §§ 603 and 605

Parts 603 and 605 embody the Rules of Practice for Attorneys practicing in the Appellate Division First Judicial Department, which encompasses Manhattan and the Bronx. The First Department has incorporated by reference the New York Rules of Professional Conduct. Accordingly, attorneys practicing or admitted within the jurisdiction of the First Department should be familiar with these sections, particularly sections 603.1, 603.4, and 605.5.

IV. PRACTICE POINTERS

1. Rule 8.4 expressly applies to law firms as entities. Managing partners and other lawyers with supervisory authority over others should carefully review Rule 1.0(h) (defining "law firm"), Rule 5.1 (Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers), Rule 5.3 (Lawyer's Responsibility for Conduct of Nonlawyers), and 7.1 (Advertising). Other provisions of the Rules pertinent to law firms as entities include but are not limited to: Rule 1.5 (Fees and Division of Fees), 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: Current Clients), 1.8, Comment 17B (failure of a law firm to educate lawyers or enforce restrictions

2 Similar definitions of "professional misconduct" can be found at 22 NYCRR 691.2 (2d Dept.); 22 NYCRR 806.2 (3d Dept.); and 22 NYCRR 1022.17 (4th Dept.).

concerning client-lawyer sexual relations may constitute a violation of Rule 5.1, 1.10(e), (f) & (g) (Imputation of Conflicts of Interest) and Comment 4A & 9 (Lawyers Moving Between Firms, and Conflict-Checking Procedures, respectively), 1.11 Comment 6 (Former Government Lawyers: Using Screening to Avoid Imputed Disqualification), 1.12 (Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals) and Comment 3, 1.15 (Preserving Identity of Funds and Property of Others: Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping; Examination of Records), 1.17 (Sale of Law Practice), 1.18 (Duties to Prospective Clients), 4.5 (Communication After Incidents Involving Personal Injury or Wrongful Death), 5.4 (Professional Independence of a Lawyer), 5.7 (Responsibilities Regarding Nonlegal Services), 5.8 (Contractual Relationships Between Lawyers and Nonlegal Professionals), 7.1 (Payment for Referrals), 7.3 (Solicitation and Recommendation of Professional Employment), 7.4 (Identification of Practice and Specialty), and 7.5 (Professional Notices, Letterheads, and Signs).

2. Because the Appellate Division, First Department has incorporated the provision of the Rules of Professional Conduct pertaining to law firms (not just individual lawyers), lawyers who practice in Manhattan and the Bronx should consult 22 NYCRR Parts 603 and 605, which set forth the First Department's approach to discipline imposed on both lawyers as individuals and on law firms as entities in accordance with New York's ethics rules.

V. ANALYSIS

V.1 Purpose of Rule 8.4

To say that the scope of Rule 8.4 is broad and far-reaching is arguably an understatement. Rule 8.4 casts such a wide net that in some ways it can be viewed as the ethical version of New York's long-arm statute and Martin Act rolled into one.

Rule 8.4's long arm reach stems from the impressive scope of its eight sub-paragraphs coupled with the notion of reciprocal discipline. See e.g., *In the Matter of Boxer*, 246 A.D.2d 66, 676 N.Y.S.2d 98 (1st Dept. 1998) (applying reciprocal discipline and disbarring New York attorney also admitted in Massachusetts for conduct in Massachusetts for which he was disciplined in Massachusetts for intentionally converting client funds and thereby violating former DR 1-102(A)(4) and former DR 9-102 [Rule 8.4(c) and 1.15, respectively]).

Except for sub-section (g), which concerns unlawful discrimination in the practice of law, each of the other seven sub-paragraphs are fairly general. As the late Prof. Mary C. Daly observed in her comments on the predecessor DR 1-102, many of the prohibitions in the Misconduct section "are deliberately framed in vague language, thereby allowing disciplinary bodies and the courts a significant interpretive leeway in evaluating a lawyer's [or law firm's] conduct." Moreover, the Rule is not limited

simply to a lawyer's fitness to practice law but touches virtually all other aspects of a lawyer's life, whether or not directly involved with the practice of law.

V.2 The Violative Conduct in Not Limited to the Practice of Law

Rule 8.4's reach extends to a lawyer's social, business, and private life—virtually any conduct that reflects on a lawyer's fitness to be a lawyer. *See, e.g., In the Matter of Kahn*, 16 A.D.3d 7, 791 N.Y.S.2d 36 (1st Dept. 2005) (suspending New York attorney from the practice of law for six months for violating former DR 1-102(a)(7) [Rule 8.4(h)] for making offensive, vulgar, and sexually oriented comments directed at female attorneys and persisting in his course of conduct despite being warned by a friend that his remarks were inappropriate and having been asked by adversarial colleagues to refrain from vulgarity); *Matter of Muller*, 231 A.D.2d 296, 659 N.Y.S.2d 255 (1st Dept. 1997) (suspending New York attorney from the practice of law for six months for violating former DR 1-102(A)(4) by subjecting a former girlfriend to numerous harassing phone calls over a period of time and by posing as a Federal Court law clerk to harass his victim at the law school she was attending; and by obtaining information about the victim from her school and attempting to discredit her by making misrepresentations); *In the Matter of Whelan*, 169 A.D.2d 71, 571 N.Y.S.2d 774 (2d Dept. 1991) (censuring an attorney for driving while intoxicated).

V.3 Intent is Not Necessarily Required

Both actual violations as well as attempts to violate the Rules of Professional Conduct fall under Rule 8.4's purview. Notably absent in the Rule is the intent word *knowing or knowingly*. In this respect, the rule resembles New York's anti-fraud statute, the Martin Act, which famously does not require prosecutors to prove scienter or mens rea in bringing certain criminal actions against defendants charged with fraud in the purchase or sale of securities.[3] In this sense Rule 8.4 is analogous to a strict liability tort statute. Negligent as well as intentional violations of the disciplinary rules will expose a lawyer or law firm to potential disciplinary action. See, e.g., *In the Matter of Steven L. Holley*, 285 A.D.2d 216, 729 N.Y.S.2d 128 (1st Dept. 2001) (publicly censuring attorney for disclosure of a sealed court document to a journalist and holding that a rule specifically prohibiting intentional disclosure of client secrets did not preclude censure for negligent disclosure based on rule proscribing conduct that reflects adversely on a lawyer's fitness to practice law). The one exception where the

3 Michael Campion Miller and Sandra Cavazos, *Limitations in Sentencing Under State Criminal Securities Fraud Statutes*, N.Y.L.J., Oct. 29, 2009, *available at* www.law.com (subs. req). ("The Martin Act (N.Y. Gen. Bus. Law §§ 352 *et seq*. (McKinney 1996)) regulates the purchase and sale of securities in New York, and gives New York prosecutors broad enforcement authority to bring criminal actions, including misdemeanor cases without a showing of scienter or intent to defraud.")

requirement of knowing conduct is not absent is Rule 8.4(f), which restricts a lawyer or law firm from *knowingly* assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

V.4 RULE 8.4 Applies to Law Firms

New York's Rule 8.4 is also unique in being only one of two states in the country where this misconduct rule expressly applies to law firms as entities.[4] Law firms practicing in Manhattan and the Bronx should additionally be aware that the First Department has incorporated this provision of the Rule with respect to discipline of law firms.[5] Under 22 NYCRR § 605, lawyers and law firms who have violated the disciplinary rules shall be subject to disbarment, suspension, censure, reprimand or admonition.

V.5 Treble Damages Possible?

A recent judicial opinion concerning New York attorneys engaging in misconduct outside New York highlights the long-arm nature of New York's disciplinary approach and adds a significant new dimension to the analysis of the consequences of attorney misconduct. On January 15, 2010 the Supreme Court, Kings County, in *Cinao v. Reers*, 2010 N.Y. Slip Op. 20006, 12274/04 (2010), held that treble damages as well as punitive damages under New York Judiciary Law § 487 may apply to attorney conduct no matter where the action is pending. In *Cinao* the plaintiff, (presumably a New York resident) sued for legal malpractice alleging defendant attorney had engaged in intentional misconduct and deception in a matter with respect to the management of a trust created by the plaintiff's deceased mother and the court proceedings in Hawaii.

The Court noted that Judiciary Law § 487 "descends from the first Statute of Westminster, which was adopted by the Parliament summoned by King Edward I of England in 1275" (internal citations omitted) *Cinao* at ∗2. The statute reads in its entirety:

§487. Misconduct by Attorneys

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

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4 New York was the first jurisdiction in the United States to subject law firms as entities to professional discipline. *See* Prof. Roy Simon, *Simon's New York Code of Professional Responsibility Annotated*, 34, (2008 ed).

5 22 NYCRR § 603.1(b) provides: "This Part shall apply to any law firm, as that term is used in the Rules of Professional Conduct (Part 1200 of this Title) that has a member, employs, or otherwise retains an attorney or legal consultant described in subdivision (a) of this section."

2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Id.

The Court also noted that, "[a] violation of Judiciary Law §487 may be established either by the defendant's alleged deceit or by an alleged chronic, extreme pattern of legal delinquency by the defendant" (internal citations and quotations omitted). *Id.* In permitting the plaintiff to claim treble damages, the court concluded that there was "no basis for limiting the applicability of Judiciary Law § 487 to judicial proceedings pending in New York courts. A New York court has sufficient interest in supervising the conduct of attorneys admitted before its bar, and protecting resident clients who have been harmed by the deceit of an admitted attorney, to apply Judiciary Law § 487 to the attorney's conduct no matter where the action is pending." Id. at *∗7–∗8.*

The *Cinao* opinion did not cite to any rule in the new Rules of Professional Conduct, but the implication to Rule 8.4 appears clear enough. An attorney found guilty of violating § 487 would likely also be found in violation of Rule 8.4(b), (c), (d) and (h).

The implication of the *Cinao* opinion underscores the potential of parallel proceedings for New York attorneys engaged in the kind of misconduct described in Rule 8.4.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Misconduct involving dishonesty, trustworthiness and fitness as a lawyer

N.Y.S. Bar Op. 843 (2010) (lawyer may access and review the public social network pages of a party to a litigation (other than the layer's client) as long as those pages are available to all members of the network, such as Facebook or My Space, and the lawyer does not "friend" the other party or direct someone else to. Rule 8.4 would not be violated by such conduct since the lawyer is not "engaging in deception." Those pages are available to anyone in the network and the information obtained is similar to information retrieved through other online or print media or subscription services.).

N.Y.S. Bar Op. 841 (2010) (an e-mail sent by a lawyer to other lawyers advising them that he is handling personal injury cases involving certain pharmaceutical products and asking the lawyers to refer cases to him, is neither an advertisement under Rule 1.0(a) nor a solicitation under rule 7.3(b). Such a communication is not subject to the filing requirement of Rule 7.3. The e-mail must still comply with Rule 8.4's requirement concerning honesty, fraud and deceit and Rule 7.4 regarding statements that a lawyer or firm is a "specialist" or "specializes." If fee sharing with the referring attorney is also contemplated, the provisions of Rule 1.5(g) have to be complied with as well.).

N.Y.C. Bar Op. 2010-2 (2010) (since informal discovery has long been favored, an attorney or agent may use his or her real name and profile to "friend" an unrepresented person's social network site without disclosing why the lawyer or agent is making the request. However, if a lawyer or agent "friends" an unrepresented person under false pretenses (such as when using a false name or a made up profile) to obtain information, the Rules will be violated.).

Nassau County Bar Op. 95-8 (1995) (mere act of filing for bankruptcy does not violate DR 1-102). Accord: N.Y.S. Bar Op. 269 (1972); Nassau County Bar Ass'n Op. 88-47 (1988).

N.Y.C. Bar Op. 1994-7 (1994) (lawyer who is a candidate for the elected position of Attorney-General should set up a committee to solicit funds from other lawyers, not personally solicit them. Furthermore, the lawyer should not endeavor to learn the identity of the contributing lawyers.).

VI.2 Responsibility for the Actions of Others

N.Y.C. Bar Op. 2010-2 (2010) (lawyers can avail themselves of information on social networking sites through informal discovery techniques but may not use deception or cause an agent to use trickery to obtain on-line information).

NYCLA Bar Op. 737 (2007) (discussing circumstances where it is ethically permissible for a non-government lawyer to use the services of and supervise an investigator where the lawyer knows that "dissemblance" will be employed by the investigator and concluding that in very limited circumstances, using of dissemblance does not constitute conduct involving dishonesty, fraud, deceit, or misrepresentation).

N.Y.C. Bar Op. 1995-4 (1995) (lawyer who represents a client in connection with debt collection would violate former DR 1-102(A)(4), (5), & (8) by permitting the client to send out pre-signed form letters on matters that the lawyer had not personally reviewed).

N.Y.C. Bar Op. 1994-6 (1994) (if a bank in connection with a loan elects to have a borrower pay the bank's attorney's fees, those fees may not exceed the "actual costs" of the lawyer's services. The bank's lawyer would violate former DR 1-102(A)(4), if a greater sum were designated as "attorney's fees.").

N.Y.C. Bar Op. 1993-2 (1993) (Section 84(1) of the General Business Law bars a private investigator from accepting compensation on a contingent fee basis, therefore, a lawyer may not ethically enter into such a fee arrangement with a private investigator).

VI.3 Deceitful or Unlawful Conduct or Conduct Prejudicial to the Administration of Justice

NYCLA Bar Op. 735 (2006) (discussing the circumstances in which a foreign lawyer's employee status or compensation agreement with a law firm might constitute deceit or unlawful conduct, respectively).

N.Y.S. Bar Op. 749 (2001) (lawyers may not ethically use available technology to surreptitiously examine and trace e-mail and other electronic documents).

N.Y.C. Bar Op. 1995-10 (1995) (lawyer's secretly taping a telephone conversation is generally misleading). But see, NYCLA Bar Op. 696 (1993).

N.Y.S. Bar Op. 702 (1998) (lawyer-legislator may not avoid the ethical proscription against practicing criminal law by abstaining from all votes affecting the district attorney's budget and publicly disclosing the intention to abstain). See also N.Y.S. Bar Op. 692 (1996).

Nassau County Bar Op. 97-9 (1997) (lawyer engages in conduct prejudicial to the administration of justice if the lawyer accepts a payment from a client for "the entire agreed amount due" after a court has determined a lesser sum to be a "fair and reasonable fee.").

VI.4 Conduct Involving Communication or Conduct Involving the Courts

NYCLA Bar Op. 742(2010) (under the new Rules, it is allowable for an attorney, with the informed consent of the client, to play a limited role and prepare pleadings and other submissions for a pro se litigant, without disclosing the lawyer's participation to the tribunal or opposing counsel. Disclosure of how the pleading or other submission was prepared need only be made "where necessary," such as when mandated by a procedural rule, court rule, judge's rule judge's order or any other situation where failure to disclose the attorney's assistance in "ghostwriting" would be considered a misrepresentation or otherwise violate a law or the attorney's ethical obligation. Unless required otherwise, in cases where disclosure is necessary, generally the lawyer need not reveal his or her identity and may indicate on the document that it was "Prepared with the assistance of counsel admitted in New York.').

N.Y.S. Op. 739 (2001) (lawyer must disclose in an application for counsel fees that the lawyer has agreed to represent the client for a reduced fee even if the client has signed a retainer agreement contemplating that the lawyer would make an application to the court for counsel fees from the client's spouse at the lawyer's customary rate).

N.Y.S. Bar Op. 689 (1997) (under some circumstances, the failure to disclose a private fee arrangement to a court may violate former DR 1-102(A)(4)).

Nassau County Bar Op. 97-5 (1997) (lawyer who has served as trial counsel for an insured may not permit the lawyer's name to be listed as "of counsel" on an appellate brief, if the lawyer does not participate in the preparation or prosecution of the appeal).

NYCLA Bar Op. 711 (1996) (lawyer for a criminal defendant may not urge a complaining witness to surprise the prosecutor by failing to show for a hearing. But the lawyer may speak to the complaining witness without the prosecutor's permission to discuss withdrawing the charges.).

N.Y.S. Bar Op. 662 (1994) (lawyer who assists a layperson in connection with a litigation violates former DR 1-102 unless the fact of his assistance is revealed). Accord: N.Y.C. Bar Op. 1987-2 (1987); N.Y.S. Bar Op. 613 (1990). Ed. Note: Rule 1.2(c),

which was added to the new Rules of Professional Conduct, provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel." While readers should refer to the applicable section of this treatise for further details on Rule1.2(c), suffice it to note here that the new rule, which has no counterpart in the old New York Code of Professional Responsibility, will likely have an impact on the continued viability of this ethics opinion. It is likely that revised ethical opinions dealing with the scope of the new Rule 1.2(c) will be forthcoming that will amend, revise or even possibly retract this bar opinion.

VI.5 Conduct Involving Communication or Conduct Involving Clients and the General Public

N.Y.S. Bar Op. 726 (2000) (staff counsel of an insurance company may hold themselves out as a law firm only if they act consistently with the professional responsibilities of a law firm and provide a clear explanation in public communications that they are employees of the insurance company).

N.Y.S. Bar Op. 696 (1997) (government lawyer who is "an active participant in the incipient but critical stages" of a criminal prosecution violates DR 1-102 by engaging in partisan political activity. Therefore, a municipal attorney charged with investigating public corruption may not engage in such activity). Accord: N.Y.S. Bar Op. 683 (1996) (Assistant District Attorneys may not participate in campaign activities on behalf of the incumbent District Attorney).

N.Y.C. Bar Op. 1996-8 (1996) (referring to a per diem attorney as an associate would violate former DR 1-102(A)(4). Under certain circumstances, it might be appropriate to use an "of counsel" designation.).

N.Y.C. Bar Op. 1995-12 (1995) (since the issue whether the failure to obtain an professional interpreter is a matter of law, the Committee will not opine on it. However, a lawyer should consider Ethical Consideration 1-7's admonition to avoid biased or condescending conduct toward a client and whether the client is being disadvantaged in the absence of such assistance.).

N.Y.C. Bar Op. 1994-5 (1994) (not misconduct for a lawyer to employ the designation "Esq." in connection with non-legal activities).

VII. ANNOTATIONS OF CASES

VII.1 Misconduct involving dishonesty, trustworthiness or fitness to be a lawyer

New York: In re Green, 72 A.D.3d 142, 143, 893 N.Y.S.2d 773 (A.D., 2010) (lawyer disbarred where his criminal convictions adversely affected his fitness as a lawyer).

In re Ehrlich, 72 A.D.3d 1391, 899 N.Y.S.2d 674 (A.D., 3d Dept. 2010) (attorney found to engage in "misleading and deceiving conduct that is prejudicial to the administration of justice which adversely reflected on his fitness as an attorney by attempting to mislead and deceive his clients about the status of their cases" as he falsified court documents and failed to respond to client communications).

In re Iromuanya, 905 N.Y.S.2d 527 (2010) (attorney filed an attorney registration statement accompanied by the required $350 check which was returned for insufficient funds. Attorney failed to correct the deficiency in violation of Rule 8.4(d). In his registration statement, Attorney also falsely certified that he was exempt from continuing legal education requirements in violation of Rule 8.4 (c), (d), and (h). Attorney failed to cooperate with the Office of Court Administration by failing to correct the delinquency and by failing to respond to the Chief Attorney Inquiry regarding the false certifications in violation of Rule 8.4 (d) and (h).).

Cinao v. Reers, 2010 N.Y. Slip Op. 20006, Index No. 12274/04, Supreme Court, Kings County (Jan. 15, 2010) (finding N.Y. Judiciary Law §
487, which provides for treble and punitive damages, applies to attorney misconduct in a legal malpractice action concerning New York attorney's alleged misconduct in proceedings in Hawaii).

Matter of Tzeuton, 66 A.D.3d 1082, 885 N.Y.S.2d 649 (2009) (attorney's criminal conviction "strikes at the core principles of the Rules of Professional Conduct… Rule 8.4 reflecting badly on the profession).

In re Howley, 2009 N.Y. Slip Op. 09410 (1st Dept. Dec. 17, 2009) (suspending attorney from practice of law for one year for failing to file a New York State tax return for the taxable year 2003 in violation of New York State Tax Law § 180(a), a class A misdemeanor).

In re Caliguiri, 50 A.D.3d 90, 851 N.Y.S.2d 148 (1st Dept. 2008) (suspending an attorney from practice of law for one year for conduct reflecting adversely on his fitness to practice law by reviewing without authorization confidential documents belonging to his client, a medical malpractice insurer, while providing non-paid advice to a neighbor who was a lawyer representing a plaintiff in an action against a doctor insured by client insurance company).

In re Law Firm of Wilens and Baker, 9 A.D.3d 213, 777 N.Y.S.2d 116 (1st Dept. 2004) (publicly censuring the law firm and one of the name partners for conduct in violation of the Code of Professional Responsibility by acting in a rude and demeaning manner to clients).

In re Hawthorne, 309 A.D.2d 285, 765 N.Y.S.2d 607 (1st Dept 2003) (publicly censuring a lawyer for failing to comply with a court order to pay child support payments).

In re Holley, 285 A.D.2d 216, 729 N.Y.S.2d 128 (1st Dept. 2001) (publicly censuring a lawyer's negligent disclosure of a client's confidential information in a sealed court document to a journalist and thereby reflecting adversely on his fitness to practice law).

In re Wong, 275 A.D.2d 1, 710 N.Y.S.2d 57 (1st Dept. 2000) (publicly censuring lawyer in reciprocal disciplinary proceeding arising in New Jersey and holding that lawyer's pre-admission misconduct although unrelated to law school admission process constituted misconduct in violation of former DR 1-102(A)(3)).

Sherman v. Eisenberg, 267 A.D.2d 29, 699 N.Y.S.2d 371 (1st Dept. 1999) (unsworn, as well as sworn, falsehoods violate DR 1-102. A lawyer may be sanctioned for making false statements to his adversary in a letter pursuant to 22 NYCRR § 130-1.1.).

In re Dinhofer, 257 A.D.2d 326, 690 N.Y.S.2d 245 (1st Dept. 1999) (suspending lawyer for three months for making "derogatory, undignified, and inexcusable" comments).

Meachum v. Outdoor World Corp., 171 Misc. 2d 354, 654 N.Y.S.2d 240 (Sup. Ct. Queens Co. 1996) (lawyer who assists a client in taping a telephone conversation violates former R 1-102(A)(2) even if the client's conduct is not illegal).

In re Higgins, 105 A.D.2d 462, 480 N.Y.S.2d 257 (3d Dept. 1984) (publicly censuring a lawyer for criminal possession of a small amount of marijuana even though crime was not an act of moral turpitude, the incident reflects adversely on the legal profession and on the lawyer's fitness to practice law).

Federal: Matter of Saghir, 2009 WL 1953017 (S.D.N.Y. 2009) (dishonest dealings with Grievance Committee).

VII.2 Misconduct Prejudicial to the Administration of Justice or Misconduct Involving Communication or Conduct with the Court

Jackson v. Mills, 269 A.D.2d 200, 703 N.Y.S.2d 95 (1st Dept. 2000) (failure to disclose to the Supreme Court an order of the Surrogate Court may violate former DR 1-102 and such failure may constitute the basis for a claim for malpractice, breach of fiduciary duty, fraud, and misrepresentation).

MacDraw, Inc. v. CIT Group Equipment Financing, Inc., 994 F. Supp. 447 (S.D.N.Y. 1997), aff'd, 138 F.3d 33 (2d Cir. 1998) (lawyers' pro hac vice status revoked for violating former DR 1-102(A)(5) by engaging in "undignified and discourteous" conduct that was "prejudicial to the administration of justice" and "degrading to a tribunal" by commenting that "we hope in the future this court functions better because frankly it has not functioned well," and by asking whether the judge (who was Asian-American) knew certain Asian-American individuals involved in recent campaign finance controversy, and whether judge had any business, political, or personal dealings with them or any other persons related in any way to the Clinton Administration).

Matter of Hildebrand, 221 A. D.2d 85, 643 N.Y.S.2d 105 (1st Dept. 1996) (censuring a lawyer for violating former DR 1-102(A)(3)-(4), (6), & (8) by the criminal possession of cocaine and failing to report the lawyer's conviction to the Departmental Disciplinary Committee and one other state's bar).

VII.3 Conduct Adversely Reflecting on Lawyer's Fitness as a Lawyer

In re Burkard, 2010 WL 2342551 (2010) (attorney admitted that he neglected the matters of numerous clients, failed to refund unearned fees in a timely manner, failed

to enter into written retainer agreements in domestic relations matters, failed to participate in the fee arbitration process, failed promptly to deliver the property of one client despite numerous requests for such property by that client, and failed to comply with attorney registration requirements. Finally, attorney respondent admitted that he did not satisfy arbitration awards rendered in favor of two clients. While the attorney violated Rule 8.4(h), because he expressed remorse, took steps to ensure the violations did not recur, alleged health problems and family difficulties during the time period in which the violations occurred and because of his previously unblemished record, the Committee recommended censure.).

In the Matter of Rosenberg, 907 N.Y.S.2d 713 (2010) (attorney admitted that he improperly used his escrow account to pay personal bills after his attorney operating account was closed by the bank. He also failed to maintain required escrow account records and books, which may have contributed to the issuance of checks against insufficient funds from his escrow account, his inaccurate testimony concerning the escrow account at an examination under oath before petitioner, and his failure to promptly and completely cooperate with petitioner's investigation. Attorney also improperly issued two checks payable to cash from his escrow account, has not paid the stenographic bills for his examinations under oath pursuant to subpoena and has failed to comply with the attorney registration requirements. These actions violate Rules 1.15[a], [b][1]; [c], [d], [e]; rule 8.4[c], [d], [h] .).

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Rule 8.5: Disciplinary Authority and Choice of Law

I. TEXT OF RULE 8.5[1]

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

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

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

(2) For any other conduct:

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

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

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1 Rules Editor Gordon Eng. The commentary expresses the personal views of Mr. Eng and does not in any way reflect the positions of Debevoise and Plimpton LLP. Any errors or omissions are the result of Mr. Eng's work product and not of Debevoise and Plimpton LLP. Mr. Eng would like to acknowledge Danielle Miklos for her research assistance in the preparation of this Chapter.

II. NYSBA COMMENTARY

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this state is subject to the disciplinary authority of this state. Extension of the disciplinary authority of this state to other lawyers who provide or offer to provide legal services in this state is for the protection of the citizens of this state. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. *See* ABA Model Rules for Lawyer Disciplinary Enforcement, Rules 6 and 22. A lawyer who is subject to the disciplinary authority of this state under Rule 8.5(a) appoints an official to be designated by the Appellate Division to receive service of process in New York State. The fact that the lawyer is subject to the disciplinary authority of this state may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct, imposing different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions. Paragraph (b) is not intended to subject lawyers to discipline if they act reasonably in the face of uncertainty about where the predominant effect of their conduct will occur.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice-of-law rules, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the admitting jurisdiction in which the lawyer's conduct occurred, principally practices or, if the predominant effect of the conduct is in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction

shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the lawyer principally practices, where the conduct occurred, where the tribunal in which the proceeding is ultimately brought sits, or in another jurisdiction.

[5] When a lawyer is licensed to practice in this state and another jurisdiction and the lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in an admitting jurisdiction other than the one in which the lawyer principally practices. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer is licensed and reasonably believes the predominant effect will occur, the lawyer should not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this Rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice-of-law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between or among competent regulatory authorities in the affected jurisdictions provide otherwise.

III. CROSS-REFERENCES

III.1 Former New York Code of Professional Responsibility

Rule 8.5 is identical to predecessor rule DR 1-105.

III.2 ABA Model Rules of Professional Conduct

ABA Rule of Professional Conduct 8.5 is similar to Rule 8.5 but differs in the following respects:

- ABA Rule 8.5(a) is substantively similar to Rule 8.5(a), but the ABA version includes an additional sentence: "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offer to provide any legal services in this jurisdiction."
- ABA Rule 8.5(b) is similar to Rule 8.5(b) but ABA Rule 8.5(b)(1) use the term "tribunal" rather than "court."

Tribunal is a defined term in both the ABA Rules and in the New York Rules and includes a "court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity." Notably, this definition does not include mediations.

- ABA Rule 8.5(b)(2) differs from the New York version with respect to "other conduct."

If a lawyer is licensed to practice only in New York, Rule 8.5(b)(2)(i) provides that the New York disciplinary rules apply. ABA Rule 8.5(b)(2) provides that the "rules of the jurisdiction in which the lawyer's conduct occurred" applies in the first instance.

In the case where a lawyer is admitted in more than one jurisdiction, the New York Rule 8.5(b)(2)(ii) provides that the disciplinary rules where the admitted lawyer "principally practices" unless the "particular conduct has its predominant effect in another jurisdiction in which the lawyer is licensed to practice." In that case, "the rules of that jurisdiction shall be applied to that conduct."

The ABA Rule 8.5(b)(2) differs from Rule 8.5(b)(2)(ii) in that the ABA rule provides that for other conduct, "the rules of the jurisdiction in which the lawyer's conduct occurred" applies rather than where the admitted lawyer principally practices. Similar to New York's Rule 8.5(b)(2)(ii), the ABA Rule 8.5(b)(2) also provides for a predominant effect alternative for other conduct "if the predominant effect of the conduct is in a different jurisdiction, [then] the rules of that jurisdiction shall be applied to the conduct."

ABA Rule 8.5(b)(2) adds the sentence: "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur."

IV. PRACTICE POINTERS

1. Rule 8.5 applies to more than state jurisdictions. Practitioners in federal court should research the federal district court's local rules to determine whether there are significant differences in ethics rules. Practitioners in transnational settings must also be familiar with the local rules governing attorney conduct in those jurisdictions.
2. The phrase "in connection with a proceeding in a court" embodied in Rule 8.5(b)(1) should be interpreted broadly and includes all aspects of factual investigation and legal research, pleadings, communications with the court and adversary counsel, interviews, court appearances, and any related work billed to the matter.
3. Admitted to practice in the jurisdiction should be read to include both formal admission as well as admission pro hac vice. In some instances, the meaning may be even broader and not require any formal recognition to render an attorney's practice as being admitted or licensed to practice in a particular jurisdiction. See N.Y.S. Bar Op. 815 (2007) supra.
4. Do not assume that neighboring jurisdictions will have similar ethics rules even if the rules adhere to the ABA Model Rules format. Important local differences particularly in the treatment of confidential information may result in inconsistent and conflicting results.
5. Because the choice of law provision in Rule 8.5(b) applies to transnational practice unless superseded by international law, treaties, or other agreements between or

among regulatory authorities abroad (NYSBA Commentary to Rule 8.5, Comment [7]) transnational practitioners need to thoroughly research the ethical rules that may be applicable in those jurisdictions outside the United States in the event those rules apply.

V. ANALYSIS

V.1 Purpose of Rule 8.5

The main purpose behind Rule 8.5 and the ABA Model Rule on which it is based is to address multijurisdictional practice. Although Rule 8.5 was originally conceived of in the context of attorneys practicing in differing states within the United States, the rapid growth in transnational legal practice in recent years has added an additional layer of complexity in understanding, interpreting and applying this rule. For example, before World War II, only four U.S. law firms had an overseas office.[2] By 2004, the number had grown to 381 law offices abroad located in 76 cities spread among 48 countries.[3] And the growth is not limited to just the very large firms. Increasingly, smaller and medium-size firms are also entering the global market for legal services.[4] Rule 8.5 attempts to simplify the choice of law with respect to which a jurisdiction's ethics rules should apply in varying circumstances.

V.2 Reciprocal Enforcement

The first part of Rule 8.5(a) makes it clear that New York's disciplinary rules apply to attorneys admitted in New York regardless of where the New York attorney's conduct occurs. New York attorneys are subject to the notion of reciprocal enforcement. Lawyers who are admitted in other jurisdictions may be contemporaneously subject to discipline in that other jurisdiction for the same conduct. Lawyers admitted to multiple jurisdictions are subject to multiple long-arm reaches for the same conduct at the same time. "Admitted" means not only formally licensed to practice but also admitted pro hac *vice*.

V.3 Choice of Law

[a] In General The second part of Rule 8.5 provides guidance about the choice of law where an attorney is potentially subject to multiple jurisdictions. In this regard, Rule 8.5(b) divides the rule into two broad categories: (1) conduct relating to a

2 Catherine A. Rogers, *Lawyers Without Borders*, 30 U. Pa. J. Int'l L. 1035, 1036 (Summer 2009).

3 *Id.*

4 *Id.*

proceeding pending before a court and (2) "other conduct" which includes pre-litigation conduct as well as transactional work (contract negotiations, deal-making, general research, and office work).

[b] Conduct Relating to a Pending Proceeding For conduct relating to a proceeding pending before a court, Rule 8.5(b)(1) provides guidance that appears relatively straightforward. Once an attorney is admitted to practice before a court, either formally or pro hac vice, that attorney is subject to the rules of the jurisdiction where that court "sits," unless otherwise provided in the rules of that court. Rule 8.5(b)(1) uses the word "court" rather than "tribunal," whereas ABA Rule 8.5(b)(1) uses "tribunal." Presumably, the drafters of Rule 8.5(b)(1) were well aware of the distinction. "Tribunal" is a defined term under Rule 1.0 and includes a broader array of adjudicative bodies, notably arbitral entities, legislative bodies, administrative agencies, and other bodies "acting in an adjudicative capacity." Although the drafters of Rule 8.5(b)(1) might have purposefully replaced "tribunal" for "court" in the actual rule, they apparently did not make the same effort in conforming the NYSBA comments to Rule 8.5(b)(1). Comment [4] inaccurately reads: "Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a *tribunal*, the lawyer shall be subject only to the rules of the jurisdiction in which the *tribunal* sits unless the rules of the *tribunal*, including its choice-of-law rules, provide otherwise."

The distinction between *court* and *tribunal* can be important, particularly in the context of arbitral bodies and in transnational proceedings.[5] In some ways, a court's jurisdiction is simpler to understand and interpret, even if the term "court" is not defined in Rule 1.0. Attempting to understand, interpret, and apply the ethics rules of multiple arbitral or adjudicative bodies might be exactly the kind of exercise the drafters of Rule 8.5(b)(1) wanted to avoid. The possibility of inconsistent or contrary rules increases where the definition invokes the larger universe embodied in the definition of tribunal. This is particularly true with respect to what is deemed mandatory, permissive, or outright prohibited between and among tribunals operating outside the borders of the United States. Having only become effective on April 1, 2009, it remains to be seen whether this distinction between *court* and *tribunal* will provide clarity or confusion to Rule 8.5(b)(1).

[c] Other Conduct For matters that have not yet proceeded to court and for all "other conduct" such pre-litigation activities in anticipation of a proceeding not yet pending before a court, as well as for transactional legal services, Rule 8.5(b)(2)(ii) provides a two-step rule: (i) for New York attorneys "licensed to practice" only in New York, only New York's disciplinary rules apply; but (ii) where the attorney is also licensed to practice in another jurisdiction there is a further bifurcated decision guide. The disciplinary rules where that attorney "principally practices" apply unless there is a "predominant effect" in the other jurisdiction where the attorney is also licensed to practice. In the case of a predominant effect the disciplinary rules of that other jurisdiction then

5 *Id.* at 1050 ("International tribunals may 'sit' in one place, but have their 'seat' in another.")

apply. "Predominant effect" is not a defined term and accordingly is subject to the facts and circumstances of each case.

The "predominant effect" analysis is an unavoidably subjective exercise. Moreover, with the advancement in technology and communications, coupled with multi-party litigation, the difficulty is to determine what jurisdiction the predominant effect occurred can be enormously difficult.[6] NYSBA Commentary to Rule 8.5, Comment [5] recognizes that "it may not be clear whether the predominant effect of the lawyer's conduct will occur in an admitting jurisdiction other than the one in which the lawyer principally practices." The ABA Rule 8.5(b)(2) provides a safe harbor, which is absent in the language of Rule 8.5(b)(2)(ii). In the ABA version, the final sentence of the rule reads: "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." While Rule 8.5(b)(2)(ii) does not contain the ABA safe harbor language, Comment [5] to Rule 8.5, nevertheless, suggests a similar safe harbor should apply: "So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer is licensed and reasonably believes the predominant effect will occur, the lawyer should not be subject to discipline under this Rule." While the NYSBA Comments do not have the same authority as the actual rule, courts look to the NYSBA Comments for interpretive guidance and as persuasive authority.

VI. ANNOTATIONS OF ETHICS OPINIONS

VI.1 Reciprocal Enforcement

N.Y.S. Bar Op. 768 (2003) (analyzing the application of former DR 1-105 to the conduct of a lawyer representing a government agency).

VI.2 Choice of Law

N.Y.S. Bar Op. 815 (2007) (New York lawyer permitted by the law of a foreign jurisdiction to engage in conduct in that foreign jurisdiction that would constitute the practice of law if undertaken in New York, even though the lawyer is not required by the law of the foreign jurisdiction to be formally admitted to practice law, is "licensed to practice" in that jurisdiction within the meaning of former DR 1-105(B)(2)(b) [now Rule 8.5(b)(2)(ii)]. If the lawyer principally practices in that foreign jurisdiction and the conduct does not have its predominant effect in New York, the rules of foreign jurisdiction apply.).

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6 *See* Nancy J. Moore, *Choice of Law for Professional Responsibility Issues in Aggregate Litigation*, 14 ROGER WILLIAMS U.L. REV. 73 (Winter 2009) (analyzing difficult choice of law issues in applying ABA Model Rule 8.5 in the context of complex litigation, class actions, multi-party and multi-jurisdictional settings).

N.Y.S. Bar Op. 750 (2001) (the conduct of a lawyer licensed in New York and in another jurisdiction clearly has its predominant effect in the other jurisdiction, that jurisdiction's ethics rules apply to the lawyer's conduct).

N.Y.C. Bar Op. 1999-7 (1999) (New York Lawyer's Code of Professional Responsibility applies to a lawyer's conduct even though the representation required the lawyer to submit filings to the INS office in New Jersey).

Nassau County Bar Op. 2002-01 (2001) (analyzing the circumstances under which two attorneys admitted to practice in both New York and Florida may form a partnership in Florida and simultaneously and separately represent parties in New York who are adverse to one another).

VII. ANNOTATIONS OF CASES

EDITOR'S NOTE: The contributing editor found no reported cases dealing directly with Rule 8.5 or its predecessor DR 1-105. But cases dealing with reciprocal enforcement of disciplinary rules, while perhaps not citing Rule 8.5 or former DR 1-105 directly, are relevant to this topic. *See, e.g.*,:

In re Wong, 275 A.D.2d 1, 710 N.Y.S.2d 57 (1st Dept. 2000) (publicly censuring lawyer in reciprocal disciplinary proceeding arising in New Jersey and holding that lawyer's pre-admission misconduct unrelated to law school admission process constituted misconduct in violation of former DR 1-102(A)(3) and (7) and lawyer's pre-admission criminal sexual misconduct with a minor warranted public censure).

In re Boxer, 246 A.D.2d 66, 676 N.Y.S.2d 98 (1st Dept. 1998) (applying reciprocal discipline and disbarring New York attorney also admitted in Massachusetts for conduct in Massachusetts for which he was disciplined in Massachusetts for intentionally converting client funds).

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Carla C. Ward, *The Law of Choice: Implementation of ABA Model Rule 8.5*, 30 J. Legal Prof. 173 (2005–2006), (student commentary).

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THE NEW YORK RULES OF PROFESSIONAL CONDUCT

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NEW YORK RULES OF PROFESSIONAL CONDUCT
(EFFECTIVE APRIL 1, 2009)

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with special responsibility for the quality of justice. As a representative of clients, a lawyer assumes many roles, including advisor, advocate, negotiator, and evaluator. As an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system and the administration of justice. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority.

[2] The touchstone of the client-lawyer relationship is the lawyer's obligation to assert the client's position under the rules of the adversary system, to maintain the client's confidential information except in limited circumstances, and to act with loyalty during the period of the representation.

[3] A lawyer's responsibilities in fulfilling these many roles and obligations are usually harmonious. In the course of law practice, however, conflicts may arise among the lawyer's responsibilities to clients, to the legal system and to the lawyer's own interests. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Nevertheless, within the framework of the Rules, many difficult issues of professional discretion can arise. The lawyer must resolve such issues through the exercise of sensitive professional and moral judgment, guided by the basic principles underlying the Rules.

[4] The legal profession is largely self-governing. An independent legal profession is an important force in preserving government under law, because abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice law. To the extent that lawyers meet these professional obligations, the occasion for government regulation is obviated.

[5] The relative autonomy of the legal profession carries with it special responsibilities of self-governance. Every lawyer is responsible for observance of the Rules of Professional Conduct and also should aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves. Compliance with the Rules depends primarily upon the lawyer's understanding of the Rules and desire to comply with the professional norms they embody for the benefit of clients and the legal system, and, secondarily, upon reinforcement by peer and public opinion. So long as its practitioners are guided by these principles, the law will continue to be a noble profession.

SCOPE

[6] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These Rules define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules. The Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

[7] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[8] The Rules provide a framework for the ethical practice of law. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.

[9] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[10] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide whether to agree to a settlement or to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and in their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the

supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[11] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[12] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, because the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[13] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

RULE 1.0: TERMINOLOGY

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

(b) "Belief" or "believes" denotes that the person involved actually believes the fact in question to be true. A person's belief may be inferred from circumstances.

(c) "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search

engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

(d) "Confidential information" is defined in Rule 1.6.

(e) "Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(f) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(g) "Domestic relations matter" denotes representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support or alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.

(h) "Firm" or "law firm" includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

(i) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

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

(k) "Knowingly," "known," "know," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(l) "Matter" includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

(m) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional legal corporation or a member of an association authorized to practice law.

(n) "Person" includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity.

(o) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(p) "Qualified legal assistance organization" means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof.

(q) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.

(r) "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(s) "Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(t) "Screened" or "screening" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.

(u) "Sexual relations" denotes sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse.

(v) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

(w) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording and email. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing [1] Some Rules require that a person's oral consent be "confirmed in writing." E.g., Rules 1.5(g)(2) (client's consent to division of fees with lawyer in another firm must be confirmed in writing), 1.7(b)(4) (client's informed consent to conflict of interest must be confirmed in writing) and 1.9(a) (former client's informed consent to conflict of interest must be confirmed in writing). The definition of "confirmed in writing" provides three distinct methods of confirming a person's consent: (i) a writing from the person to the lawyer, (ii) a writing from the lawyer to the person, or (iii) consent by the person on the record in any proceeding before a tribunal. The confirming writing need not recite the information that the lawyer communicated to the person in order to obtain the person's consent. For the definition of "informed consent" see Rule 1.0(j). If it is not feasible for the lawyer to obtain or transmit a written confirmation at the time the client gives oral consent, then the lawyer must obtain or transmit the confirming writing within a reasonable time thereafter. If a lawyer has obtained a client's informed oral consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm [2] Whether two or more lawyers constitute a firm within paragraph (h) will depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. For example, a group of lawyers could be regarded as a firm for purposes of determining whether a conflict of interest exists but not for application of the advertising rules.

[3] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates. Whether lawyers in a government agency or department constitute a firm may depend upon the issue involved or be governed by other law.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or components of it may constitute a firm or firms for purposes of these Rules.

Fraud [5] When used in these Rules, the terms "fraud" and "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform, so long as the necessary scienter is present and the conduct in question could be reasonably expected to induce detrimental reliance.

Informed Consent [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. E.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent. Other considerations may apply in representing impaired clients. See Rule 1.14.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. E.g., Rules 1.7(b) and 1.9(a). For definitions of "writing" and "confirmed in writing" see paragraphs (x) and (e), respectively. Other Rules require that a client's consent be obtained in a writing signed by the client. E.g., Rules 1.8(a) and (g). For the meaning of "signed," see paragraph (x).

Screened or Screening [8] The definition of "screened" or "screening" applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rule 1.11, 1.12 or 1.18. See those Rules for the particular requirements of establishing effective screening.

[9] The purpose of screening is to ensure that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should promptly be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. In any event, procedures should be adequate to protect confidential information.

[10] In order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening.

RULE 1.1: COMPETENCE

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Comment

Legal Knowledge and Skill [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may

be required in some circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kinds of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] [Omitted.]

[4] A lawyer may accept representation where the requisite level of competence can be achieved by adequate preparation before handling the legal matter. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Thoroughness and Preparation [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client may limit the scope of the representation if the agreement complies with Rule 1.2(c).

Maintaining Competence [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject. See 22 N.Y.C.R.R. Part 1500.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate this Rule by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

Comment

Allocation of Authority Between Client and Lawyer [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. The lawyer shall consult with the client with respect to the means by which the client's objectives are to be pursued. See Rule 1.4(a)(2).

[2] Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. On the other hand, lawyers usually defer to their clients regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Because of the varied nature of the matters about which a lawyer and client might disagree, and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental

disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(c)(4). Likewise, the client may resolve the disagreement by discharging the lawyer, in which case the lawyer must withdraw from the representation. See Rule 1.16(b)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client, however, may revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities [5] Legal representation should not be denied to any person who is unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to issues related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[6A] In obtaining consent from the client, the lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded. In addition, the lawyer must disclose the reasonably foreseeable consequences of the limitation. In making such disclosure, the lawyer should explain that if the lawyer or the client determines during the representation that additional services outside the limited scope specified in the engagement are necessary or advisable to represent the client adequately, then the client may need to retain separate counsel, which could result in delay, additional expense, and complications.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted were not sufficient to yield advice upon which the client could rely.

Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See Rules 1.1, 1.8 and 5.6.

Illegal and Fraudulent Transactions [9] Paragraph (d) prohibits a lawyer from counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is illegal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. When the representation will result in violation of the Rules of Professional Conduct or other law, the lawyer must advise the client of any relevant limitation on the lawyer's conduct and remonstrate with the client. See Rules 1.4(a)(5) and 1.16(b)(1). Persuading a client to take necessary preventive or corrective action that will bring the client's conduct within the bounds of the law is a challenging but appropriate endeavor. If the client fails to take necessary corrective action and the lawyer's continued representation would assist client conduct that is illegal or fraudulent, the lawyer is required to withdraw. See Rule 1.16(b)(1). In some circumstances, withdrawal alone might be insufficient. In those cases the lawyer may be required to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 1.6(b)(3); Rule 4.1, Comment [3].

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) prohibits a lawyer from assisting a client's illegal or fraudulent activity against a third person, whether or not the defrauded party is a party to the transaction. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise, but does preclude such a retainer for an enterprise known to be engaged in illegal or fraudulent activity.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law, or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

RULE 1.3: DILIGENCE

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

(c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

Comment [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. Notwithstanding the foregoing, the lawyer should not use offensive tactics or fail to treat all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled diligently and promptly. Lawyers are encouraged to adopt and follow effective office procedures and systems; neglect may occur when such arrangements are not in place or are ineffective.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated, as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. If a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, Rule 1.16(e) may require the lawyer to consult with the client about the possibility of

appeal before relinquishing responsibility for the matter. Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To avoid possible prejudice to client interests, a sole practitioner is well advised to prepare a plan that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation.

Communicating with Client

[2] In instances where these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with the client and secure the client's consent prior to taking action, unless prior discussions with the client have resolved what action the client wants the lawyer

to take. For example, paragraph (a)(1)(iii) requires that a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously made clear that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires that the lawyer reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases, the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Likewise, for routine matters such as scheduling decisions not materially affecting the interests of the client, the lawyer need not consult in advance, but should keep the client reasonably informed thereafter. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer or a member of the lawyer's staff acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(j).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to those who the lawyer reasonably believes to be appropriate persons within the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

RULE 1.5: FEES AND DIVISION OF FEES

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

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

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

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

(1) a contingent fee for representing a defendant in a criminal matter;

(2) a fee prohibited by law or rule of court;

(3) a fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or

(5) any fee in a domestic relations matter if:

(i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or

(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to

the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a Statement of Client's Rights and Responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

Comment

[1] Paragraph (a) requires that lawyers not charge fees that are excessive or illegal under the circumstances. The factors specified in paragraphs (a)(1) through (a)(8) are not exclusive, nor will each factor be relevant in each instance. The time and labor required for a matter may be affected by the actions of the lawyer's own client or by those of the opposing party and counsel. Paragraph (a) also requires that expenses for which the client will be charged must not be excessive or illegal. A lawyer may seek payment for services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging an amount to which the client has agreed in advance or by charging an amount that reflects the cost incurred by the lawyer, provided in either case that the amount charged is not excessive.

[1A] A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information. Thus, under an hourly billing arrangement, it would be fraudulent to knowingly and intentionally charge a client for more than the actual number of hours spent by the lawyer on the client's matter; similarly, where the client has agreed to pay the lawyer's cost of in-house services, such as for photocopying or telephone calls, it would be fraudulent knowingly and intentionally to charge a client more than the actual costs incurred. Fraudulent billing requires an element of scienter and does not include inaccurate billing due to an innocent mistake.

[1B] A supervising lawyer who submits a fraudulent bill for fees or expenses to a client based on submissions by a subordinate lawyer has not automatically violated this Rule. Whether the lawyer is responsible for a violation must be determined by reference to Rule 5.1, 5.2 and 5.3.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Court rules regarding engagement letters require that such an understanding be memorialized in writing in certain cases. See 22 N.Y.C.R.R. Part 1215. Even where not required, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the excessiveness standard of paragraph (a). In determining whether a particular contingent fee is excessive, or whether it is excessive to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may regulate the type or amount of the fee that may be charged.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(e). A lawyer may charge a minimum fee, if that fee is not excessive, and if the wording of the minimum fee clause of the retainer agreement meets the requirements of paragraph (d)(4). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). A fee paid in property instead of money may, however, be subject to the requirements of Rule 1.8(a), because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made if its terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client.

Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. In matters in litigation, the court's approval for the lawyer's withdrawal may be required. See Rule 1.16(d). It is proper, however, to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[5A] The New York Court Rules require every lawyer with an office located in New York to post in that office, in a manner visible to clients of the lawyer, a "Statement of Client's Rights." See 22 N.Y.C.R.R. § 1210.1. Paragraph (e) requires a lawyer in a domestic relations matter, as defined in Rule 1.0(g), to provide a prospective client with the "Statement of Client's Rights and Responsibilities," as further set forth in 22 N.Y.C.R.R. § 1400.2, at the initial conference and, in any event, prior to the signing of a written retainer agreement.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained or upon obtaining child custody or visitation. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not affiliated in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. Paragraph (g) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole in a writing given to the client. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the client's agreement must be confirmed in writing. Contingent fee arrangements must comply with paragraph (c). Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. See Rule 5.1. A lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (g) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm. Paragraph (h) recognizes that this Rule does not prohibit payment to a previously associated lawyer pursuant to a separation or retirement agreement.

Disputes over Fees

[9] A lawyer should seek to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. The New York courts have established a procedure for resolution of fee disputes through arbitration and the lawyer must comply with the procedure when it is mandatory. Even when it is voluntary, the lawyer should conscientiously consider submitting to it.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

Comment

Scope of the Professional Duty of Confidentiality [1] This Rule governs the disclosure of information protected by the professional duty of confidentiality. Such information is described in these Rules as "confidential information" as defined in this Rule. Other rules also deal with confidential information. See Rule 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients; Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client; Rule 1.14(c) for information relating to representation of a client with diminished capacity; Rule 1.18(b) for the lawyer's duties with respect to information provided to the lawyer by a prospective client; Rule 3.3 for the lawyer's duty of candor to a tribunal; and Rule 8.3(c) for information gained by a lawyer or judge while participating in an approved lawyer assistance program.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source. See Rule 1.0(j) for the definition of informed consent. The lawyer's duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer, even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Typically, clients come to lawyers to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is thereby upheld.

[3] The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or

required by these Rules or to comply with other law or court order. The confidentiality duty applies not only to matters communicated in confidence by the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to the representation, whatever its source. The confidentiality duty, for example, prohibits a lawyer from volunteering confidential information to a friend or to any other person except in compliance with the provisions of this Rule, including the Rule's reference to other law that may compel disclosure. See Comments [12]-[13]; see also Scope.

[4] Paragraph (a) prohibits a lawyer from knowingly revealing confidential information as defined by this Rule. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal confidential information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation with persons not connected to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client.

[4A] Paragraph (a) protects all factual information "gained during or relating to the representation of a client," but not information obtained before a representation begins or after it ends. See Rule 1.18, dealing with duties to prospective clients. Information relates to the representation if it has any possible relevance to the representation or is received because of the representation. The accumulation of legal knowledge or legal research that a lawyer acquires through practice ordinarily is not client information protected by this Rule. However, in some circumstances, including where the client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer's research. Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information that is in the public domain is not protected unless the information is difficult or expensive to discover. For example, a public record is confidential information when it may be obtained only through great effort or by means of a Freedom of Information request or other process.

Use of Information Related to Representation [4B] The duty of confidentiality also prohibits a lawyer from using confidential information to the advantage of the lawyer or a third person or to the disadvantage of a client or former client unless the client or former client has given informed consent. See Rule 1.0(j) for the definition of "informed consent." This part of paragraph (a) applies when information is used to benefit either the lawyer or a third person, such as another client, a former client or a business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not (absent the client's informed consent) use that information to buy a nearby parcel that is expected to appreciate in value due to the client's purchase, or to recommend that another client buy the nearby land, even if the lawyer does not reveal any confidential information. The duty also prohibits disadvantageous use of confidential information unless the client gives informed consent, except as permitted or required by these Rules. For example,

a lawyer assisting a client in purchasing a parcel of land may not make a competing bid on the same land. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client, even to the disadvantage of the former client, after the client-lawyer relationship has terminated. See Rule 1.9(c)(1).

Authorized Disclosure [5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Implied disclosures are permissible when they (i) advance the best interest of the client and (ii) are either reasonable under the circumstances or customary in the professional community. In addition, lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers. Lawyers are also impliedly authorized to reveal information about a client with diminished capacity when necessary to take protective action to safeguard the client's interests. See Rules 1.14(b) and (c).

Disclosure Adverse to Client [6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions that prevent substantial harm to important interests, deter wrongdoing by clients, prevent violations of the law, and maintain the impartiality and integrity of judicial proceedings. Paragraph (b) permits, but does not require, a lawyer to disclose information relating to the representation to accomplish these specified purposes.

[6A] The lawyer's exercise of discretion conferred by paragraphs (b)(1) through (b)(3) requires consideration of a wide range of factors and should therefore be given great weight. In exercising such discretion under these paragraphs, the lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure under paragraphs (b)(1), (b)(2) or (b)(3), the lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client. When the lawyer reasonably believes that the client will carry out the threatened harm

or crime, the lawyer may disclose confidential information when permitted by paragraphs (b)(1), (b)(2) or (b)(3). A lawyer's permissible disclosure under paragraph (b) does not waive the client's attorney-client privilege; neither the lawyer nor the client may be forced to testify about communications protected by the privilege, unless a tribunal or body with authority to compel testimony makes a determination that the crime-fraud exception to the privilege, or some other exception, has been satisfied by a party to the proceeding. For a lawyer's duties when representing an organizational client engaged in wrongdoing, see Rule 1.13(b).

[6B] Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. Wrongful execution of a person is a life-threatening and imminent harm under paragraph (b)(1) once the person has been convicted and sentenced to death. On the other hand, an event that will cause property damage but is unlikely to cause substantial bodily harm is not a present and substantial risk under paragraph (b)(1); similarly, a statistical likelihood that a mass-distributed product is expected to cause some injuries to unspecified persons over a period of years is not a present and substantial risk under this paragraph.

[6C] Paragraph (b)(2) recognizes that society has important interests in preventing a client's crime. Disclosure of the client's intention is permitted to the extent reasonably necessary to prevent the crime. In exercising discretion under this paragraph, the lawyer should consider such factors as those stated in Comment [6A].

[6D] Some crimes, such as criminal fraud, may be ongoing in the sense that the client's past material false representations are still deceiving new victims. The law treats such crimes as continuing crimes in which new violations are constantly occurring. The lawyer whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts, because refusal to end a continuing crime is equivalent to an intention to commit a new crime. Disclosure is not permitted under paragraph (b)(2), however, when a person who may have committed a crime employs a new lawyer for investigation or defense. Such a lawyer does not have discretion under paragraph (b)(2) to use or disclose the client's past acts that may have continuing criminal consequences. Disclosure is permitted, however, if the client uses the new lawyer's services to commit a further crime, such as obstruction of justice or perjury.

[6E] Paragraph (b)(3) permits a lawyer to withdraw a legal opinion or to disaffirm a prior representation made to third parties when the lawyer reasonably believes that

third persons are still relying on the lawyer's work and the work was based on "materially inaccurate information or is being used to further a crime or fraud." See Rule 1.16(b)(1), requiring the lawyer to withdraw when the lawyer knows or reasonably should know that the representation will result in a violation of law. Paragraph (b)(3) permits the lawyer to give only the limited notice that is implicit in withdrawing an opinion or representation, which may have the collateral effect of inferentially revealing confidential information. The lawyer's withdrawal of the tainted opinion or representation allows the lawyer to prevent further harm to third persons and to protect the lawyer's own interest when the client has abused the professional relationship, but paragraph (b)(3) does not permit explicit disclosure of the client's past acts unless such disclosure is permitted under paragraph (b)(2).

[7] [Omitted.]

[8] [Omitted.]

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about compliance with these Rules and other law by the lawyer, another lawyer in the lawyer's firm, or the law firm. In many situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with these Rules, court orders and other law.

[10] Where a claim or charge of any kind alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. Such a claim can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone. However, the lawyer's right to respond under paragraph (b)(5) does not arise until a client, former client or third person makes an accusation of such wrongdoing and the lawyer reasonably believes that an action or proceeding making such a claim will be brought. Paragraph (b)(5) does not permit a lawyer to disclose confidential information to counter adverse public criticism of the lawyer when a proceeding is unlikely to be brought. The lawyer may respond directly to the person who has made an accusation that permits disclosure, provided that (i) the lawyer reasonably believes an action or proceeding will be brought and (ii) the lawyer's response complies with Rule 4.2 and Rule 4.3, and other Rules or applicable law. A lawyer may make the disclosures authorized by paragraph (b)(5) through counsel. The right to respond also applies to accusations of wrongful conduct concerning the lawyer's law firm, employees or associates.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Paragraph (b) does not mandate any disclosures. However, other law may require that a lawyer disclose confidential information. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of confidential information appears to be required by other law, the lawyer must consult with the client to the extent required by Rule 1.4 before making the disclosure, unless such consultation would be prohibited by other law. If the lawyer concludes that other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

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

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified in paragraphs (b)(1) through (b)(6). Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose, particularly when accusations of wrongdoing in the representation of a client have been made by a third party rather than by the client. If the disclosure will be made in connection with an adjudicative proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may, however, be required by other Rules or by other law. See Comments [12]-[13]. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). E.g., Rule 8.3(c)(1). Rule 3.3(c), on the other hand, requires disclosure in some circumstances whether or not disclosure is permitted or prohibited by this Rule.

Withdrawal [15A] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw pursuant to Rule 1.16(b)(1). Withdrawal may also be required or permitted for other reasons under Rule 1.16. After withdrawal, the lawyer is required to refrain from

disclosing or using information protected by Rule 1.6, except as this Rule permits such disclosure. Neither this Rule, nor Rule 1.9(c), nor Rule 1.16(e) prevents the lawyer from giving notice of the fact of withdrawal. For withdrawal or disaffirmance of an opinion or representation, see paragraph (b)(3) and Comment [6E]. Where the client is an organization, the lawyer may be in doubt whether the organization will actually carry out the contemplated conduct. Where necessary to guide conduct in connection with this Rule, the lawyer may, and sometimes must, make inquiry within the organization. See Rules 1.13(b) and (c).

Duty to Preserve Confidentiality [16] Paragraph (c) requires a lawyer to exercise reasonable care to prevent disclosure of information related to the representation by employees, associates and others whose services are utilized in connection with the representation. See also Rules 1.1, 5.1 and 5.3. However, a lawyer may reveal the information permitted to be disclosed by this Rule through an employee.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to use a means of communication or security measures not required by this Rule, or may give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.

[18] [Omitted.]

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment

General Principles [1] Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the lawyer's ability to exercise professional judgment on behalf of each client. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "differing interests," "informed consent" and "confirmed in writing," see Rules 1.0(f), (j) and (e), respectively.

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer, acting reasonably, to: (i) identify clearly the client or clients, (ii) determine whether a conflict of interest exists, i.e., whether the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation, (iii) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable under paragraph (b); and if so (iv) consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include all of the clients who may have differing interests under paragraph (a)(1) and any clients whose representation might be adversely affected under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). See Rule 1.10(e), which requires every law firm to create, implement and maintain a conflict-checking system.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16(b)(1). Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9; see also Comments [5], [29A].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts

in the midst of a representation, as when a company sued by the lawyer on behalf of one client is acquired by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rules 1.16(d) and (e). The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest [6] The duty to avoid the representation of differing interest prohibits, among other things, undertaking representation directly adverse to a current client without that client's informed consent. For example, absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken may reasonably fear that the lawyer will pursue that client's case less effectively out of deference to the other client, that is, that the lawyer's exercise of professional judgment on behalf of that client will be adversely affected by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client appearing as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Differing interests can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

[8] Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. For example, the professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions that each client might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons [9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be adversely affected by responsibilities to former clients under Rule 1.9, or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal-Interest Conflicts [10] The lawyer's own financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 5.7 on responsibilities regarding nonlegal services and Rule 1.8 pertaining to a number of personal-interest conflicts, including business transactions with clients.

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

[12] A lawyer is prohibited from engaging in sexual relations with a client in domestic relations matters. In all other matters a lawyer's sexual relations with a client are circumscribed by the provisions of Rule 1.8(j).

Interest of Person Paying for Lawyer's Services [13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's exercise of professional judgment on behalf of a client will be adversely affected by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations [14] Ordinarily, clients may consent to representation notwithstanding a conflict. As paragraph (b) indicates, however, some conflicts

are nonconsentable. If a lawyer does not reasonably believe that the conditions set forth in paragraph (b) can be met, the lawyer should neither ask for the client's consent nor provide representation on the basis of the client's consent. A client's consent to a nonconsentable conflict is ineffective. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), notwithstanding client consent, a representation is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 regarding competence and Rule 1.3 regarding diligence.

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, federal criminal statutes prohibit certain representations by a former government lawyer despite the informed consent of the former governmental client. In addition, there are some instances where conflicts are nonconsentable under decisional law.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to mediation (because mediation is not a proceeding before a "tribunal" as defined in Rule 1.0(w)), such representation may be precluded by paragraph (b)(1).

Informed Consent [18] Informed consent requires that each affected client be aware of the relevant circumstances, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires. See Rule 1.0(j). The information that a lawyer is required to communicate to a client depends on the nature of the conflict and the nature of the risks involved, and a lawyer should take into account the sophistication of the client in explaining the potential adverse consequences of the conflict. There are circumstances in which it is appropriate for a lawyer to advise a client to seek the advice of a disinterested lawyer in reaching a decision as to whether to consent to the conflict. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved. See Comments [30] and [31] concerning the effect of common representation on confidentiality.

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one client refuses to consent to the disclosure necessary to permit the other

client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation is that each party obtains separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests. Where the fact, validity or propriety of client consent is called into question, the lawyer has the burden of establishing that the client's consent was properly obtained in accordance with the Rule.

Client Consent Confirmed in Writing [20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of (i) a document from the client, (ii) a document that the lawyer promptly transmits to the client confirming an oral informed consent, or (iii) a statement by the client made on the record of any proceeding before a tribunal, whether before, during or after a trial or hearing. See Rule 1.0(e) for the definition of "confirmed in writing." See also Rule 1.0(x) ("writing" includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. The Rule does not require that the information communicated to the client by the lawyer necessary to make the consent "informed" be in writing or in any particular form in all cases. See Rules 1.0(e) and (j). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing. See Comment [18].

Revoking Consent [21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients, and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict [22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the conditions set forth in paragraph (b). The effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. At a minimum, the client should be advised generally of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts. The more comprehensive the explanation and disclosure of the types of future representations that might arise and the actual and

reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the understanding necessary to make the consent "informed" and the waiver effective. See Rule 1.0(j). The lawyer should also disclose the measures that will be taken to protect the client should a conflict arise, including procedures such as screening that would be put in place. See Rule 1.0(t) for the definition of "screening." The adequacy of the disclosure necessary to obtain valid advance consent to conflicts may also depend on the sophistication and experience of the client. For example, if the client is unsophisticated about legal matters generally or about the particular type of matter at hand, the lawyer should provide more detailed information about both the nature of the anticipated conflict and the adverse consequences to the client that may ensue should the potential conflict become an actual one. In other instances, such as where the client is a child or an incapacitated or impaired person, it may be impossible to inform the client sufficiently, and the lawyer should not seek an advance waiver. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, an advance waiver is more likely to be effective, particularly if, for example, the client is independently represented or advised by in-house or other counsel in giving consent. Thus, in some circumstances, even general and open-ended waivers by experienced users of legal services may be effective.

[22A] Even if a client has validly consented to waive future conflicts, however, the lawyer must reassess the propriety of the adverse concurrent representation under paragraph (b) when an actual conflict arises. If the actual conflict is materially different from the conflict that has been waived, the lawyer may not rely on the advance consent previously obtained. Even if the actual conflict is not materially different from the conflict the client has previously waived, the client's advance consent cannot be effective if the particular circumstances that have created an actual conflict during the course of the representation would make the conflict nonconsentable under paragraph (b). See Comments [14]-[17] and [28] addressing nonconsentable conflicts.

Conflicts in Litigation [23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or codefendants, is governed by paragraph (a)(1). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal as well as civil cases. Some examples are those in which a lawyer is asked to represent codefendants in a criminal case, co-plaintiffs or codefendants in a personal injury case, an insured and insurer, or beneficiaries of the estate of a decedent. In a criminal case, the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, multiple representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's representation of another client in a different case; for example, when a decision favoring one client will create a precedent likely to weaken seriously the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of this risk include: (i) where the cases are pending, (ii) whether the issue is substantive or procedural, (iii) the temporal relationship between the matters, (iv) the significance of the issue to the immediate and long-term interests of the clients involved, and (v) the clients' reasonable expectations in retaining the lawyer. Similar concerns may be present when lawyers advocate on behalf of clients before other entities, such as regulatory authorities whose regulations or rulings may significantly implicate clients' interests. If there is significant risk of an adverse effect on the lawyer's professional judgment, then absent informed consent of the affected clients, the lawyer must decline the representation.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1). Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts [26] Conflicts of interest under paragraph (a)(1) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is a significant risk that the lawyer's professional judgment will be adversely affected include: (i) the importance of the matter to each client, (ii) the duration and intimacy of the lawyer's relationship with the client or clients involved, (iii) the functions being performed by the lawyer, (iv) the likelihood that significant disagreements will arise, (v) the likelihood that negotiations will be contentious, (vi) the likelihood that the matter will result in litigation, and (vii) the likelihood that the client will suffer prejudice from the conflict. The issue is often one of proximity (how close the situation is to open conflict) and degree (how serious the conflict will be if it does erupt). See Comments [8], [29] and [29A].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present at the outset or may arise during the representation. In order to avoid the development of a disqualifying conflict, the lawyer should, at the outset of the common representation and as part of the process of obtaining each client's

informed consent, advise each client that information will be shared (and regardless of whether it is shared, may not be privileged in a subsequent dispute between the parties) and that the lawyer will have to withdraw from one or both representations if one client decides that some matter material to the representation should be kept secret from the other. See Comment [31].

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to one another, but common representation is permissible where the clients are generally aligned in interest, even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. Examples include helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, and arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation [29] In civil matters, two or more clients may wish to be represented by a single lawyer in seeking to establish or adjust a relationship between them on an amicable and mutually advantageous basis. For example, clients may wish to be represented by a single lawyer in helping to organize a business, working out a financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution of an estate or resolving a dispute between clients. The alternative to common representation can be that each party may have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation that might otherwise be avoided, or that some parties will have no lawyer at all. Given these and other relevant factors, clients may prefer common representation to separate representation or no representation. A lawyer should consult with each client concerning the implications of the common representation, including the advantages and the risks involved, and the effect on the attorney-client privilege, and obtain each client's informed consent, confirmed in writing, to the common representation.

[29A] Factors may be present that militate against a common representation. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, absent the informed consent of all clients, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. See Rule 1.9(a). In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial

between or among commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, it is unlikely that the clients' interests can be adequately served by common representation. For example, a lawyer who has represented one of the clients for a long period or in multiple matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. It must therefore be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. At the outset of the common representation and as part of the process of obtaining each client's informed consent, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential even as among the commonly represented clients. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the two clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitation on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients [34] A lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent

any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should always seek informed consent of the client organization before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer will avoid representation adverse to the client's affiliates, (ii) the lawyer's obligations to either the organizational client or the new client are likely to adversely affect the lawyer's exercise of professional judgment on behalf of the other client, or (iii) the circumstances are such that the affiliate should also be considered a client of the lawyer. Whether the affiliate should be considered a client will depend on the nature of the lawyer's relationship with the affiliate or on the nature of the relationship between the client and its affiliate. For example, the lawyer's work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, and the client's overall mode of doing business, may be so extensive that the entities would be viewed as "alter egos." Under such circumstances, the lawyer may conclude that the affiliate is the lawyer's client despite the lack of any formal agreement to represent the affiliate.

[34A] Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate. Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer's client.

[34B] Finally, before accepting a representation adverse to an affiliate of a corporate client, a lawyer should consider whether the extent of the possible adverse economic impact of the representation on the entire corporate family might be of such a magnitude that it would materially limit the lawyer's ability to represent the client opposing the affiliate. In those circumstances, Rule 1.7 will ordinarily require the lawyer to decline representation adverse to a member of the same corporate family, absent the informed consent of the client opposing the affiliate of the lawyer's corporate client.

Lawyer as Corporate Director [35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the

other members of the board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

RULE 1.8: CURRENT CLIENTS: SPECIFIC CONFLICT OF INTEREST RULES

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not:

(1) solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or

(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.

For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative, or an individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to conclusion of all aspects of the matter giving rise to the representation or proposed representation of the client or prospective client, a lawyer shall not negotiate or enter into any arrangement or understanding with:

(1) a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the representation or proposed representation; or

(2) any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of the representation of a client or prospective client.

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

(f) A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and

(3) the client's confidential information is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil matter subject to Rule 1.5(d) or other law or court rule.

(j) (1) A lawyer shall not:

(i) as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person;

(ii) employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer's firm; or

(iii) in domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.

(2) Rule 1.8(j)(1) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.

(k) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.

Comment

Business Transactions Between Client and Lawyer [1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer's investment on behalf of a client. For these reasons business transactions between a lawyer and client are not advisable. If a lawyer nevertheless elects to enter into a business transaction with a current client, the requirements of paragraph (a) must be met if the client and lawyer have differing interests in the transaction and the client expects the lawyer to exercise professional judgment therein for the benefit of the client. This will ordinarily be the case even when the transaction is not related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, such as the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent.

[2] Paragraphs (a)(1), (a)(2) and (a)(3) set out the conditions that a lawyer must satisfy under this Rule. Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated in writing to the client in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised in writing of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the

lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement and the existence of reasonably available alternatives, and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(j) for the definition of "informed consent."

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially adversely affected by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the client's expense. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction. A lawyer has a continuing duty to monitor the inherent conflicts of interest that arise out of the lawyer's business transaction with a client or because the lawyer has an ownership interest in property in which the client also has an interest. A lawyer is also required to make such additional disclosures to the client as are necessary to obtain the client's informed consent to the continuation of the representation.

[3A] The self-interest of a lawyer resulting from a business transaction with a client may interfere with the lawyer's exercise of independent judgment on behalf of the client. If such interference will occur should a lawyer agree to represent a prospective client, the lawyer should decline the proffered employment. After accepting employment, a lawyer should not acquire property rights that would adversely affect the lawyer's professional judgment in representing the client. Even if the property interests of a lawyer do not presently interfere with the exercise of independent judgment, but the likelihood of interference can be reasonably foreseen by the lawyer, the lawyer should explain the situation to the client and should decline employment or withdraw unless the client gives informed consent to the continued representation, confirmed in writing. A lawyer should not seek to persuade a client to permit the lawyer to invest in an undertaking of the client nor make improper use of a professional relationship to influence the client to invest in an enterprise in which the lawyer is interested.

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

[4A] Rule 1.8(a) does not apply to business transactions with former clients, but the line between current and former clients is not always clear. A lawyer entering into a business transaction with a former client may not use information relating to the

representation to the disadvantage of the former client unless the information has become generally known. See Rule.

[4B] The Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[4C] This Rule also does not apply to ordinary fee arrangements between client and lawyer reached at the inception of the client-lawyer relationship, which are governed by Rule 1.5. The requirements of the Rule ordinarily must be met, however, when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee. For example, the requirements of paragraph (a) must ordinarily be met if a lawyer agrees to take stock (or stock options) in the client in lieu of cash fees. Such an exchange creates a risk that the lawyer's judgment will be skewed in favor of closing a transaction to such an extent that the lawyer may fail to exercise professional judgment as to whether it is in the client's best interest for the transaction to close. This may occur where the client expects the lawyer to provide professional advice in structuring a securities-for-services exchange. If the lawyer is expected to play any role in advising the client regarding the securities-for-services exchange, especially if the client lacks sophistication, the requirements of fairness, full disclosure and written consent set forth in paragraph (a) must be met. When a lawyer represents a client in a transaction concerning literary property, Rule 1.8(d) does not prohibit the lawyer from agreeing that the lawyer's fee shall consist of a share of the ownership of the literary property or a share of the royalties or license fees from the property, but the lawyer must ordinarily comply with Rule

[4D] An exchange of securities for legal services will also trigger the requirements of Rule 1.7 if the lawyer's ownership interest in the client would, or reasonably may, affect the lawyer's exercise of professional judgment on behalf of the client. For example, where a lawyer has agreed to accept securities in a client corporation as a fee for negotiating and documenting an equity investment, or for representing a client in connection with an initial public offering, there is a risk that the lawyer's judgment will be skewed in favor of closing the transaction to such an extent that that the lawyer may fail to exercise professional judgment. (The lawyer's judgment may be skewed because unless the transaction closes, the securities will be worthless.) Unless a lawyer reasonably concludes that he or she will be able to provide competent, diligent and loyal representation to the client, the lawyer may not undertake or continue the representation, even with the client's consent. To determine whether a reasonable possibility of such an adverse effect on the representation exists, the lawyer should analyze the nature and relationship of the particular interest and the specific legal services to be rendered. Some salient factors may be (i) the size of the lawyer's investment in proportion to the holdings of other investors, (ii) the potential value of the investment in relation to the lawyer's or law firm's earnings or other assets, and (iii) whether the investment is active or passive.

[4E] If the lawyer reasonably concludes that the lawyer's representation of the client will not be adversely affected by the agreement to accept client securities as a legal fee, the Rules permit the representation, but only if full disclosure is made to the client and the client's informed consent is obtained and confirmed in writing. See Rules 1.0(e) (defining "confirmed in writing"), 1.0(j) (defining "informed consent"), and 1.7.

[4F] A lawyer must also consider whether accepting securities in a client as payment for legal services constitutes charging or collecting an unreasonable or excessive fee in violation of Rule 1.5. Determining whether a fee accepted in the form of securities is unreasonable or excessive requires a determination of the value of the securities at the time the agreement is reached and may require the lawyer to engage the services of an investment professional to appraise the value of the securities to be given. The lawyer and client can then make their own advised decisions as to whether the securities-for-fees exchange results in a reasonable fee.

[5] [Omitted.]

Gifts to Lawyers [6] A lawyer may accept a gift from a client if the transaction meets general standards of fairness. If a client offers the lawyer a gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client. Before accepting a gift offered by a client, a lawyer should urge the client to secure disinterested advice from an independent, competent person who is cognizant of all of the circumstances. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a gift be made to the lawyer or for the lawyer's benefit.

[6A] This Rule does not apply to success fees, bonuses and the like from clients for legal services. These are governed by Rule 1.5.

[7] If effectuation of a gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is related to the done and a reasonable lawyer would conclude that the transaction is fair and reasonable, as set forth in paragraph (c).

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or named to another fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will adversely affect the lawyer's professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary or Media Rights [9] An agreement by which a lawyer acquires literary or media rights concerning the subject matter of the representation creates a conflict

between the interest of the client and the personal interests of the lawyer. The lawyer may be tempted to subordinate the interests of the client to the lawyer's own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from the client television, radio, motion picture, newspaper, magazine, book, or other literary or media rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of the literary or media rights to the prejudice of the client. To prevent this adverse impact on the representation, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the representation, even though the representation has previously ended. Likewise, arrangements with third parties, such as book, newspaper or magazine publishers or television, radio or motion picture producers, pursuant to which the lawyer conveys whatever literary or media rights the lawyer may have, should not be entered into prior to the conclusion of all aspects of the matter giving rise to the representation.

[9A] Rule 1.8(d) does not prohibit a lawyer representing a client in a transaction concerning intellectual property from agreeing that the lawyer's fee shall consist of an ownership share in the property, if the arrangement conforms to paragraph (a) and Rule 1.5.

Financial Assistance [9B] Paragraph (e) eliminates the former requirement that the client remain "ultimately liable" to repay any costs and expenses of litigation that were advanced by the lawyer regardless of whether the client obtained a recovery. Accordingly, a lawyer may make repayment from the client contingent on the outcome of the litigation, and may forgo repayment if the client obtains no recovery or a recovery less than the amount of the advanced costs and expenses. A lawyer may also, in an action in which the lawyer's fee is payable in whole or in part as a percentage of the recovery, pay court costs and litigation expenses on the lawyer's own account. However, like the former New York rule, paragraph (e) limits permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above.

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

Person Paying for a Lawyer's Services [11] Lawyers are frequently asked to represent clients under circumstances in which a third person will compensate them, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Third-party payers frequently have interests that may differ from those of the client. A lawyer is therefore prohibited from accepting or continuing such a representation unless the lawyer determines that there will be no interference with the lawyer's professional judgment and there is informed consent from the client. See also Rule 5.4(c), prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another.

[12] Sometimes it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest may exist if the lawyer will be involved in representing differing interests or if there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing. See Rules 1.0(e) (definition of "confirmed in writing"), 1.0(j) (definition of "informed consent"), and 1.0(x) (definition of "writing" or "written").

Aggregate Settlements [13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consents. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement. Paragraph (g) is a corollary of both these Rules and provides that, before any settlement offer is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement is accepted. See also Rule 1.0(j) (definition of "informed consent"). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims [14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited because they are likely to

undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are currently represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for the lawyer's own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation [16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil matters are governed by Rule 1.5.

Client-Lawyer Sexual Relationships [17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is often unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that if the sexual relationship leads to the lawyer's emotional involvement, the lawyer will

be unable to represent the client without impairing the lawyer's exercise of professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict the extent to which client confidences will be protected by the attorney-client evidentiary privilege. A client's sexual involvement with the client's lawyer, especially if the sexual relations create emotional involvement, will often render it unlikely that the client could rationally determine whether to consent to the conflict created by the sexual relations. If a client were to consent to the conflict created by the sexual relations without fully appreciating the nature and implications of that conflict, there is a significant risk of harm to client interests. Therefore, sexual relations between lawyers and their clients are dangerous and inadvisable. Out of respect for the desires of consenting adults, however, paragraph (j) does not flatly prohibit client-lawyer sexual relations in matters other than domestic relations matters. Even when sexual relations between a lawyer and client are permitted under paragraph (j), however, they may lead to incompetent representation in violation of Rule 1.1. Because domestic relations clients are often emotionally vulnerable, domestic relations matters entail a heightened risk of exploitation of the client. Accordingly, lawyers are flatly prohibited from entering into sexual relations with domestic relations clients during the course of the representation even if the sexual relationship is consensual and even if prejudice to the client is not immediately apparent. For a definition of "sexual relations" for the purposes of this Rule, see Rule 1.0(u).

[17A] The prohibitions in paragraph (j)(1) apply to all lawyers in a firm who know of the representation, whether or not they are personally representing the client. The Rule prohibits any lawyer in the firm from exploiting the client-lawyer relationship by directly or indirectly requiring or demanding sexual relations as a condition of representation by the lawyer or the lawyer's firm. Paragraph (j)(1)(i) thus seeks to prevent a situation where a client may fear that a willingness or unwillingness to have sexual relations with a lawyer in the firm may have an impact on the representation, or even on the firm's willingness to represent or continue representing the client. The Rule also prohibits the use of coercion, undue influence or intimidation to obtain sexual relations with a person known to that lawyer to be a client or a prospective client of the firm. Paragraph (j)(1)(ii) thus seeks to prevent a lawyer from exploiting the professional relationship between the client and the lawyer's firm. Even if a lawyer does not know that the firm represents a person, the lawyer's use of coercion or intimidation to obtain sexual relations with that person might well violate other Rules or substantive law. Where the representation of the client involves a domestic relations matter, the restrictions stated in paragraphs (j)(1)(i) and (j)(1)(ii), and not the per se prohibition imposed by paragraph (j)(1)(iii), apply to lawyers in a firm who know of the representation but who are not personally representing the client. Nevertheless, because domestic relations matters may be volatile and may entail a heightened risk of exploitation of the client, the risk that a sexual relationship with a client of the firm may result in a violation of other Rules is likewise heightened, even if the sexual relations are not per se prohibited by paragraph (j).

[17B] A law firm's failure to educate lawyers about the restrictions on sexual relations -or a firm's failure to enforce those restrictions against lawyers who violate them—may

constitute a violation of Rule 5.1, which obligates a law firm to make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

[18] Sexual relationships between spouses or those that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the sexual relationship and therefore constitute an impermissible conflict of interest. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) applies to sexual relations between a lawyer for the organization (whether inside counsel or outside counsel) and a constituent of the organization who supervises, directs or regularly consults with that lawyer or a lawyer in that lawyer's firm concerning the organization's legal matters.

Imputation of Prohibitions [20] Where a lawyer who is not personally representing a client has sexual relations with a client of the firm in violation of paragraph (j), the other lawyers in the firm are not subject to discipline solely because those improper sexual relations occurred. There may be circumstances, however, where a violation of paragraph (j) by one lawyer in a firm gives rise to violations of other Rules by the other lawyers in the firm through imputation. For example, sexual relations between a lawyer and a client may give rise to a violation of Rule 1.7(a), and such a conflict under Rule 1.7 may be imputed to all other lawyers in the firm under Rule 1.10(a).

RULE 1.9: DUTIES TO FORMER CLIENTS

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

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require

with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with these Rules. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of a former client. So also, a lawyer who has prosecuted an accused person could not properly represent that person in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type, even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in

resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation. On the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

[4] [Moved to Comment to Rule 1.10.]

[5] [Moved to Comment to Rule 1.10.]

[6] [Moved to Comment to Rule 1.10.]

[7] Independent of the prohibition against subsequent representation, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6, 1.9(c).

[8] Paragraph (c) generally extends the confidentiality protections of Rule 1.6 to a lawyer's former clients. Paragraph (c)(1) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Paragraph (c)(2) provides that a lawyer may not reveal information acquired in the course of representing a client except as these Rules would permit or require with respect to a current client. *See* Rules 1.6, 3.3.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraph (a). See also Rule 1.0(j) for the definition of "informed consent." With regard to the effectiveness of an advance waiver, see Rule 1.7, Comments [22]-[22A]. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.

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

(e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

(1) the firm agrees to represent a new client;

(2) the firm agrees to represent an existing client in a new matter;

(3) the firm hires or associates with another lawyer; or

(4) an additional party is named or appears in a pending matter.

(f) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless of whether there is another violation of these Rules.

(g) Where a violation of paragraph (e) by a law firm is a substantial factor in causing a violation of paragraph (a) by a lawyer, the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a).

(h) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

Comment

Definition of "Firm" [1] For purposes of these Rules, the term "firm" includes, but is not limited to, (i) a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law, and (ii) lawyers employed in a legal services organization, a government law office or the legal department of a corporation or other organization. See Rule 1.0(h). Whether two or more

lawyers constitute a "firm" within this definition will depend on the specific facts. See Rule 1.0, Comments [2]-[4].

Principles of Imputed Disqualification [2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).

[3] Paragraph (a) does not prohibit representation where neither questions of client loyalty nor questions of protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm or adversely affect the ability of the others in the firm to exercise professional judgment on behalf of the client, the firm should not be disqualified. On the other hand, if an opposing party in a case is owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events that took place before admission to the bar, such as work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(t), 5.3.

Lawyers Moving Between Firms [4A] The principles of imputed disqualification are modified when lawyers have been associated in a firm and then end their association. The nature of contemporary law practice and the organization of law firms have made the fiction that the law firm is the same as a single lawyer unrealistic in certain situations. In crafting a rule to govern imputed conflicts, there are several competing considerations. First, the former client must be reasonably assured that the client's confidentiality interests are not compromised. Second, the principles of imputed disqualification should not be so broadly cast as to preclude others from having reasonable choice of counsel. Third, the principles of imputed disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after leaving a firm. In this connection, it should be recognized that today most lawyers practice in firms, that many limit their practice to, or otherwise concentrate in, one area of law, and that many move from one association to another multiple times in

their careers. If the principles of imputed disqualification were defined too strictly, the result would be undue curtailment of the opportunity of lawyers to move from one practice setting to another, of the opportunity of clients to choose counsel, and of the opportunity of firms to retain qualified lawyers. For these reasons, a functional analysis that focuses on preserving the former client's reasonable confidentiality interests is appropriate in balancing the competing interests.

[5] Paragraph (b) permits a law firm, under certain circumstances, to represent a client with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, under Rule 1.7 the law firm may not represent a client with interests adverse to those of a current client of the firm. Moreover, the firm may not represent the client where the matter is the same or substantially related to a matter in which (i) the formerly associated lawyer represented the client, and (ii) the firm or any lawyer currently in the firm has material information protected by Rule 1.6 and Rule 1.9(c) that is likely to be significant to the matter.

[5A] In addition to information that may be in the possession of one or more of the lawyers remaining in the firm, information in documents or files retained by the firm itself may preclude the firm from opposing the former client in the same or substantially related matter if (i) the information is protected by Rule 1.6 and Rule 1.9(c) and likely to be significant and material to the current matter, and (ii) the documents or files containing confidential client information are retained in a place or in a form that is accessible to lawyers participating in the current adverse matter. A law firm seeking to avoid disqualification under this Rule should therefore take reasonable steps to ensure that any confidential information relating to the prior representation that is maintained in the firm's hard copy or electronic files is not accessible to any lawyer who is participating in the current adverse representation.

[5B] Rule 1.10(c) permits a law firm to represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or the firm with which the lawyer was previously associated, represented a client whose interests are materially adverse to that client, provided the newly associated lawyer did not acquire any confidential information of the previously represented client that is material to the current matter.

[5C] The bookkeeping and accounting problems that may arise from prohibiting a personally disqualified lawyer from being apportioned a share of the fees from a matter make it inadvisable to impose an unqualified rule prohibiting this practice. Although this Rule does not prohibit a personally disqualified lawyer from being apportioned a share of the fees in the matter, if the disqualified lawyer's share of the fee would represent a significant increase in that lawyer's compensation over what the lawyer would otherwise earn, permitting the lawyer to be apportioned a share in the fee may create incentives that would call into question the effectiveness of the screening procedures. In such situations, a firm seeking to avoid imputed disqualification under this Rule would be well-advised to prohibit the personally disqualified lawyer from sharing in the fees in the matter.

Client Consent [6] Rule 1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict cannot be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comments [22]-[22A]. For a definition of "informed consent," see Rule 1.0(j).

Former and Current Government Lawyers [7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11 (b), not this Rule. The imputation of conflicts among current government lawyers employed by the same office, agency or department is governed by Rule 1.1 1(b), not this Rule.

Relationship Between this Rule and Rule 1.8(k) [8] Subject to paragraph (a), where a lawyer is prohibited from engaging in certain transactions under Rule 1.8(a) through (i), that Rule determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Conflict-Checking Procedures [9] Under paragraph (f), every law firm, no matter how large or small (including sole practitioners), is responsible for creating, implementing and maintaining a system to check proposed engagements against current and previous engagements and against new parties in pending matters. The system must be adequate to detect conflicts that will or reasonably may arise if: (i) the firm agrees to represent a new client, (ii) the firm agrees to represent an existing client in a new matter, (iii) the firm hires or associates with another lawyer, or (iv) an additional party is named or appears in a pending matter. The system will thus render effective assistance to lawyers in the firm in avoiding conflicts of interest. See also Rule 5.1.

[9A] Failure to create, implement and maintain a conflict-checking system adequate for this purpose is a violation of this Rule by the firm. In cases in which a lawyer, despite reasonably diligent efforts to do so, could not acquire the information that would have revealed a conflict because of the firm's failure to maintain an adequate conflict-checking system, the firm shall be responsible for the violation. However, a lawyer who knows or should know of a conflict in a matter that the lawyer is handling remains individually responsible for the violation of these Rules, whether or not the firm's conflict-checking system has identified the conflict. In cases in which a violation of paragraph (f) by the firm is a substantial factor in causing a violation of these Rules by a lawyer, the firm, as well as the individual lawyer, is responsible for the violation. As to whether a client-lawyer relationship exists or is continuing, see Scope [9]-[10]; Rule 1.3, Comment [4].

[9B] The records required to be maintained under paragraph (f) must be in written form. See Rule 1.0(x) for the definition of "written," which includes tangible or

electronic records. To be effective, a conflict-checking system may also need to supplement written information with recourse to the memory of the firm's lawyers through in-person, telephonic, or electronic communications. An effective conflict-checking system as required by this Rule may not, however, depend solely on recourse to lawyers' memories or other such informal sources of information.

[9C] The nature of the records needed to render effective assistance to lawyers will vary depending on the size, structure, history, and nature of the firm's practice. At a minimum, however, a firm must record information that will enable the firm to identify (i) each client that the firm represents, (ii) each party in a litigated, transactional or other matter whose interests are materially adverse to the firm's clients, and (iii) the general nature of each matter.

[9D] To the extent that the records made and maintained for the purpose of complying with this Rule contain confidential information, a firm must exercise reasonable care to protect the confidentiality of these records. See Rule 1.6(c).

[9E] The nature of a firm's conflict-checking system may vary depending on a number of factors, including the size and structure of the firm, the nature of the firm's practice, the number and location of the firm offices, and the relationship among the firm's separate offices. In all cases, however, an effective conflict-checking system should record and maintain information in a way that permits the information to be checked systematically and accurately when the firm is considering a proposed engagement. A small firm or a firm with a small number of engagements may be able to create and maintain an effective conflict-checking system through the use of hard-copy rather than electronic records. But larger firms, or firms with a large number of engagements, may need to create and maintain records in electronic form so that the information can be accessed quickly and efficiently.

Organizational Clients [9F] Representation of corporate or other organizational clients makes it prudent for a firm to maintain additional information in its conflict-checking system. For example, absent an agreement with the client to the contrary, a conflict may arise when a firm desires to oppose an entity that is part of a current or former client's corporate family (e.g., an affiliate, subsidiary, parent or sister organization). See Rule 1.7, Comments [34]-[34A]. Although a law firm is not required to maintain records showing every corporate affiliate of every corporate client, if a law firm frequently represents corporations that belong to large corporate families, the law firm should make reasonable efforts to institute and maintain a system for alerting the firm to potential conflicts with the members of the corporate client's family.

[9G] Under certain circumstances, a law firm may also need to include information about the constituents of a corporate client. Although Rule 1.13 provides that a firm is the lawyer for the entity and not for any of its constituents, confusion may arise when a law firm represents small or closely held corporations with few shareholders, or when a firm represents both the corporation and individual officers or employees but bills the corporate client for the legal services. In other situations, a client-lawyer relationship may develop unintentionally between the law firm and one or more

individual constituents of the entity. Accordingly, a firm that represents corporate clients may need a system for determining whether or not the law firm has a client-lawyer relationship with individual constituents of an organizational client. If so, the law firm should add the names of those constituents to the data base of its conflict-checking system.

RULE 1.11: SPECIFIC CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:

(1) shall comply with Rule 1.9(c); and

(2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government

is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

(e) As used in this Rule, the term "matter" as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions.

(f) A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflicts of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(j) for the definition of "informed consent."

[2] Paragraphs (a)(1), (a)(2), (d) and (f) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth special imputation rules for former government lawyers, with screening and notice provisions.

See Comments [6]-[7B] concerning imputation of the conflicts of former government lawyers; see Comments [9A]-[9B] concerning imputation of the conflicts of current government lawyers.

[3] Paragraphs (a)(2), (d) and (f) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so. As with paragraph (a)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by paragraphs (a)(2), (d)(1), (d)(2) and (f).

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. A former government lawyer is therefore disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent to entering public service. The limitation on disqualification in paragraphs (a)(2), (d)(1) and (d)(2) to matters involving a specific party or specific parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[4A] By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. Accordingly, unless the information acquired during government service is "generally known" or these Rules would otherwise permit or require its use or disclosure, the information may not be used or revealed to the government's disadvantage. This provision applies regardless of whether the lawyer was working in a "legal" capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by Rule 1.11(a)(1). Paragraph (c) of Rule 1.11 adds further protections against exploitation of confidential information. Paragraph (c) prohibits a lawyer who has information about a person acquired when the lawyer was a public officer or employee, that the lawyer knows is confidential government information, from

representing a private client whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage. A firm with which the lawyer is associated may undertake or continue representation in the matter only if the lawyer who possesses the confidential government information is timely and effectively screened. Thus, the purpose and effect of the prohibitions contained in Rule 1.11 (c) are to prevent the lawyer's subsequent private client from obtaining an unfair advantage because the lawyer has confidential government information about the client's adversary.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a municipality and subsequently is employed by a federal agency. The question whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13, Comment [9].

Former Government Lawyers: Using Screening to Avoid Imputed Disqualification

[6] Paragraphs (b) and (c) contemplate the use of screening procedures that permit the law firm of a personally disqualified former government lawyer to avoid imputed disqualification. There may be circumstances where representation by the personally disqualified lawyer's firm may undermine the public's confidence in the integrity of the legal system. Such a circumstance may arise, for example, where the personally disqualified lawyer occupied a highly visible government position prior to entering private practice, or where the facts and circumstances of the representation itself create a risk that the representation will appear to be improper. Where the particular circumstances create such a risk, a law firm may find it prudent to decline the representation, but Rule 1.11 does not require it to do so. See Rule 1.0(t) for the definition of "screened" and "screening."

[6A] The bookkeeping and accounting problems that may arise from prohibiting a personally disqualified lawyer from being apportioned a share of the fees from a matter make it inadvisable to impose an unqualified rule prohibiting this practice. Although this Rule does not prohibit a personally disqualified lawyer from being apportioned a share of the fees in the matter, if the disqualified lawyer's share of the fee would represent a significant increase in that lawyer's compensation over what the lawyer would otherwise earn, permitting the lawyer to be apportioned a share in the fee may create incentives that would call into question the effectiveness of the screening procedures. In such situations, a firm seeking to avoid imputed disqualification under this Rule would be well-advised to prohibit the personally disqualified lawyer from sharing in the fees in the matter.

[7] A firm seeking to avoid disqualification under this Rule should also consider its ability to implement, maintain, and monitor the screening procedures permitted by

paragraphs (b) and (c) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraphs (b) and (c).

[7A] In order to prevent any lawyer in the firm from acquiring confidential information about the matter from the newly associated lawyer, it is essential that notification be given and screening procedures implemented promptly. If the matter requiring screening is already pending before the personally disqualified lawyer joins the firm, the procedures required by this Rule should be implemented before the lawyer joins the firm. If a newly associated lawyer joins a firm before a conflict requiring screening arises, the requirements of this Rule should be satisfied as soon as practicable after the conflict arises. If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the personally disqualified lawyer and other lawyers in the firm in a given matter.

[7B] Notice to the appropriate government agency, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information. It does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraph (a) does not prohibit a lawyer from representing a private party and a government agency jointly when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Current Government Lawyers: Using Screening to Avoid Imputed Disqualification

[9A] Where the conflict arises from the government lawyer's prior representation of a client, the office, agency or department is required to notify the former client of the circumstances warranting the use of screening and the actions that have been taken to comply with the requirements of this Rule, unless providing notice would be in violation of law or Rule 1.6. The requirement that the government lawyer's former client be notified is suspended under circumstances where notice would make information public that the agency is required to keep secret. For example, a prosecutor's office would not be required to notify a personally disqualified lawyer's former client if that former client is now the subject of a pending grand jury investigation.

[9B] Whether a lawyer's belief that the lawyer can provide competent and diligent representation is reasonable may depend on various factors including, for example, the nature of the conflict or the role of the personally disqualified lawyer in the office, agency or department in which the lawyer also serves. Thus, all other things being equal, it may be reasonable for a lawyer to conclude that the lawyer can act competently and diligently in the matter where the personally disqualified lawyer does not occupy a supervisory position; it may be unreasonable for a lawyer to reach this conclusion where the personally disqualified lawyer is the head of the office, agency or department.

[10] For purposes of paragraph (e), a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which (i) the matters involve the same basic facts, (ii) the matters involve the same or related parties, and (iii) time has elapsed between the matters.

RULE 1.12: SPECIFIC CONFLICTS OF INTEREST FOR FORMER JUDGES, ARBITRATORS, MEDIATORS OR OTHER THIRD-PARTY NEUTRALS

(a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.

(b) Except as stated in paragraph (e), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

(1) an arbitrator, mediator or other third-party neutral; or

(2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral.

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.

(d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also, the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. See Rule 1.11, Comment [4]. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Canons have the same meaning.

[2] Like a former judge, a lawyer who has served as an arbitrator, mediator or other third-party neutral may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consents, confirmed in writing.

See Rules 1.0(j), (e). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not obtain information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Paragraph (d) therefore provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in paragraph (d). "Screened" and "screening" are defined in Rule 1.0(t).

[4A] The bookkeeping and accounting problems that may arise from prohibiting a personally disqualified lawyer from being apportioned a share of the fees from a matter make it inadvisable to impose an unqualified rule prohibiting this practice. Although this Rule does not prohibit a personally disqualified lawyer from being apportioned a share of the fees in the matter, if the disqualified lawyer's share of the fee would represent a significant increase in that lawyer's compensation over what the lawyer would otherwise earn, permitting the lawyer to be apportioned a share in the fee may create incentives that would call into question the effectiveness of the screening procedures. In such situations, a firm seeking to avoid imputed disqualification under this Rule would be well-advised to prohibit the personally disqualified lawyer from sharing in the fees in the matter.

[4B] A firm seeking to avoid disqualification under this Rule should also consider its ability to implement, maintain, and monitor the screening procedures permitted by paragraph (d) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (d).

[4C] In order to prevent any lawyer in the firm from acquiring confidential information about the matter from the newly associated lawyer, it is essential that notification be given and screening procedures implemented promptly. If the matter requiring screening is already pending before the personally disqualified lawyer joins the firm, the procedures required by this Rule should be implemented before the lawyer joins the firm. If a newly associated lawyer joins a firm before a conflict requiring screening arises, the requirements of this Rule should be satisfied as soon as practicable after the conflict arises. If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the personally disqualified lawyer and others in the firm in a given matter.

[5] Notice to the parties and any appropriate tribunal, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

RULE 1.13: ORGANIZATION AS CLIENT

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client [1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, members, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Rule apply equally to unincorporated associations. "Other constituents" as used in this Rule means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, for example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews between the lawyer and the client's employees or other constituents made in the course of that investigation are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[2A] There are times when the organization's interests may differ from those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent whose interest differs from that of the organization: (i) that a conflict or potential conflict of interest exists, (ii) that the lawyer does not represent the constituent in connection with the matter, unless the representation has been approved in accordance with Rule 1.13(d), (iii) that the constituent may wish to obtain independent representation, and (iv) that any attorney-client privilege that applies to discussions between the lawyer and the constituent belongs to the organization and may be waived by the organization. Care must be taken to ensure that the constituent understands that,

when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent, and that discussions between the lawyer for the organization and the constituent may not be privileged.

[2B] Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

Acting in the Best Interest of the Organization [3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer, even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. Under Rule 1.0(k), a lawyer's knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. The terms "reasonable" and "reasonably" connote a range of conduct that will satisfy the requirements of Rule 1.13. In determining what is reasonable in the best interest of the organization, the circumstances at the time of determination are relevant. Such circumstances may include, among others, the lawyer's area of expertise, the time constraints under which the lawyer is acting, and the lawyer's previous experience and familiarity with the client.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility within the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Measures to be taken may include, among others, asking the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it may be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. See Rule 1.4.

[5] The organization's highest authority to which a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may

prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules [6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, Rule 1.8, Rule 1.16, Rule 3.3 or Rule 4.1. Rules 1.6(b)(2) and (b)(3) may permit the lawyer in some circumstances to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event withdrawal from the representation under Rule 1.16(b)(1) may be required.

[7] The authority of a lawyer to disclose information relating to a representation under Rule 1.6 does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged past violation of law. Having a lawyer who cannot disclose confidential information concerning past acts relevant to the representation for which the lawyer was retained enables an organizational client to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer for an organization who reasonably believes that the lawyer's discharge was because of actions taken pursuant to paragraph (b), or who withdraws in circumstances that require or permit the lawyer to take action under paragraph (b), must proceed as "reasonably necessary in the best interest of the organization." Under some circumstances, the duty of communication under Rule 1.4 and the duty under Rule 1.16(e) to protect a client's interest upon termination of the representation, in conjunction with this Rule, may require the lawyer to inform the organization's highest authority of the lawyer's discharge or withdrawal, and of what the lawyer reasonably believes to be the basis for the discharge or withdrawal.

Government Agency [9] The duties defined in this Rule apply to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules. See Scope [9]. Moreover, in a matter involving the conduct of government officials, a government lawyer may have greater authority under applicable law to question such conduct than would a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified. In addition, duties of

lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope [10].

[10] See Comment [2A].

[11] See Comment [2B].

Concurrent Representation [12] Paragraph (d) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder, subject to the provisions of Rule 1.7. If the corporation's informed consent to such a concurrent representation is needed, the lawyer should advise the principal officer or major shareholder that any consent given on behalf of the corporation by the conflicted officer or shareholder may not be valid, and the lawyer should explain the potential consequences of an invalid consent.

Derivative Actions [13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are normal incidents of an organization's affairs, to be defended by the organization's lawyer like any other suits. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the

lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. The conventional client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities upon the lawyer. When the client is a minor or suffers from a diminished mental capacity, maintaining the conventional client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client attentively and with respect.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. The lawyer should consider whether the presence of such persons will affect the attorney-client privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, with or without a disability, the question whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and reasonably believes that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a conventional client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take

reasonably necessary protective measures. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interest, and the goals of minimizing intrusion into the client's decision-making autonomy and maximizing respect for the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: (i) the client's ability to articulate reasoning leading to a decision, (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and (iii) the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that a minor or a person with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be unnecessarily expensive or traumatic for the client. Seeking a guardian or conservator without the client's consent (including doing so over the client's objection) is appropriate only in the limited circumstances where a client's diminished capacity is such that the lawyer reasonably believes that no other practical method of protecting the client's interests is readily available. The lawyer should always consider less restrictive protective actions before seeking the appointment of a guardian or conservator. The lawyer should act as petitioner in such a proceeding only when no other person is available to do so.

[7A] Prior to withdrawing from the representation of a client whose capacity is in question, the lawyer should consider taking reasonable protective action. See Rule 1.16(e).

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant

to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client.

RULE 1.15: PRESERVING IDENTITY OF FUNDS AND PROPERTY OF OTHERS; FIDUCIARY RESPONSIBILITY; COMMINGLING AND MISAPPROPRIATION OF CLIENT FUNDS OR PROPERTY; MAINTENANCE OF BANK ACCOUNTS; RECORD KEEPING; EXAMINATION OF RECORDS

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

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

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," or "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit

slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

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

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

(vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust,

escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

Comment

[1] A lawyer should hold the funds and property of others using the care required of a professional fiduciary. Securities and other property should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts, including an account established pursuant to the "Interest on Lawyer Accounts" law where appropriate. See State Finance Law § 97-v(4)(a); Judiciary Law § 497(2); 21 N.Y.C.R.R. § 7000.10. Separate trust accounts may be warranted or required when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b)(3) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which portion of the funds belongs to the lawyer.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold undisputed funds to coerce a client into accepting the lawyer's contention. Furthermore, the disputed portion of the funds must be kept in or transferred into a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. Notice to the client of the right to arbitrate fee disputes is required in some circumstances. The undisputed portion of the funds is to be distributed promptly.

[4] When in the course of representation a lawyer is in possession of funds in which two or more persons (other than the lawyer) claim interests, the funds should be kept separate by the lawyer until the dispute is resolved, by agreement of the parties or court order or commencement by the lawyer of an interpleader action and deposit of the property into court. The lawyer should distribute promptly all portions of the funds as to which the interests are not in dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

(1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

(1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged; or

(4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action with which the lawyer has a fundamental disagreement;

(5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;

(8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

(9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(10) the client knowingly and freely assents to termination of the employment;

(11) withdrawal is permitted under Rule 1.13(c) or other law;

(12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or

(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid

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

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c), 6.5; see also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation under paragraph (a), (b)(1) or (b)(4), as the case may be, if the client demands that the lawyer engage in conduct that is illegal or that violates these Rules or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] Court approval or notice to the court is often required by applicable law, and when so required by applicable law is also required by paragraph (d), before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rule 1.6 and Rule 3.3.

Discharge

[4] As provided in paragraph (b)(3), a client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14(b).

Optional Withdrawal

[7] Under paragraph (c), a lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if withdrawal can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past, even if withdrawal would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action with which the lawyer has a fundamental disagreement.

[7A] In accordance with paragraph (c)(4), a lawyer should use reasonable foresight in determining whether a proposed representation will involve client objectives or instructions with which the lawyer has a fundamental disagreement. A client's intended action does not create a fundamental disagreement simply because the lawyer disagrees with it. See Rule 1.2 regarding the allocation of responsibility between client and lawyer. The client has the right, for example, to accept or reject a settlement proposal; a client's decision on settlement involves a fundamental disagreement only when no reasonable person in the client's position, having regard for the hazards of litigation, would have declined the settlement. In addition, the client should be given notice of intent to withdraw and an opportunity to reconsider.

[8] Under paragraph (c)(5), a lawyer may withdraw if the client refuses to abide by the terms of an agreement concerning fees or court costs (or other expenses or disbursements).

[8A] Continuing to represent a client may impose an unreasonable burden unexpected by the client and lawyer at the outset of the representation. However, lawyers are ordinarily better suited than clients to foresee and provide for the burdens of representation. The burdens of uncertainty should therefore ordinarily fall on lawyers rather than clients unless they are attributable to client misconduct. That a representation will require more work or significantly larger advances of expenses than the lawyer contemplated when the fee was fixed is not grounds for withdrawal under paragraph (c)(5).

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, under paragraph (c) a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

RULE 1.17: SALE OF LAW PRACTICE

(a) A lawyer retiring from a private practice of law; a law firm, one or more members of which are retiring from the private practice of law with the firm; or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice. The seller and the buyer may agree on reasonable restrictions on the seller's private practice of law, notwithstanding any other provision of these Rules. Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted.

(b) Confidential information.

(1) With respect to each matter subject to the contemplated sale, the seller may provide prospective buyers with any information not protected as confidential information under Rule 1.6.

(2) Notwithstanding Rule 1.6, the seller may provide the prospective buyer with information as to individual clients:

(i) concerning the identity of the client, except as provided in paragraph (b)(6);

(ii) concerning the status and general nature of the matter;

(iii) available in public court files; and

(iv) concerning the financial terms of the client-lawyer relationship and the payment status of the client's account.

(3) Prior to making any disclosure of confidential information that may be permitted under paragraph (b)(2), the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidential information, the seller may make the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists, subject to paragraph (b)(6). If the prospective buyer determines that conflicts of interest exist prior to reviewing the information, or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review the information unless the seller shall have obtained the consent of the client in accordance with Rule 1.6(a)(1).

(4) Prospective buyers shall maintain the confidentiality of and shall not use any client information received in connection with the proposed sale in the same manner and to the same extent as if the prospective buyers represented the client.

(5) Absent the consent of the client after full disclosure, a seller shall not provide a prospective buyer with information if doing so would cause a violation of the attorney-client privilege.

(6) If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes confidential information in the circumstances, the seller may not provide such information to a prospective buyer without first advising the client of the identity of the prospective buyer and obtaining the client's consent to the proposed disclosure.

(c) Written notice of the sale shall be given jointly by the seller and the buyer to each of the seller's clients and shall include information regarding:

(1) the client's right to retain other counsel or to take possession of the file;

(2) the fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;

(3) the fact that agreements between the seller and the seller's clients as to fees will be honored by the buyer;

(4) proposed fee increases, if any, permitted under paragraph (e); and

(5) the identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in New York State, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to resell the practice.

(d) When the buyer's representation of a client of the seller would give rise to a waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.

(e) The fee charged a client by the buyer shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice, as may withdrawing partners of law firms.

Termination of Practice by Seller

[2] The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the buyers. The fact that a number of the seller's clients decide not to be represented by the buyers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice

as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position. Although the requirements of this Rule may not be violated in these situations, contractual provisions in the agreement governing the sale of the practice may contain reasonable restrictions on a lawyer's resuming private practice. See Rule 5.6, Comment [1], regarding restrictions on right to practice.

[3] The private practice of law refers to a private law firm or lawyer, not to a public agency, legal services entity, or in-house counsel to a business. The requirement that the seller cease to engage in the private practice of law therefore does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within a geographic area, defined as the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted. Its provisions therefore accommodate the lawyer who sells the practice on the occasion of moving to another city and county that does not border on the city or county within New York State.

[5] [Omitted.]

Sale of Entire Practice

[6] The Rule requires that the seller's entire practice be sold. The prohibition against sale of less than an entire practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The buyers are required to undertake all client matters in the practice, subject to client consent. This requirement is not violated even if a buyer is unable to undertake a particular client matter because of a conflict of interest and the seller therefore remains as attorney of record for the matter in question.

Client Confidences, Consent and Notice

[7] Giving the buyer access to client-specific information relating to the representation and to the file requires client consent. Rule 1.17 provides that before such information can be disclosed by the seller to the buyer, the client must be given actual written notice of the contemplated sale, including the identity of the buyer, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed under paragraph (c)(2).

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. The selling lawyer must make a good-faith effort to notify all of the lawyer's current clients. Where clients cannot be given actual notice and therefore cannot themselves consent to the purchase or direct any other disposition of their files, they are nevertheless protected by the fact that the buyer has the duty to maintain their confidences under paragraph (b)(4).

[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Buyer

[10] The sale may not be financed by increases in fees charged to the clients of the purchased practice except to the extent permitted by subparagraph (e) of this Rule. Under subparagraph (e), the buyer must honor existing arrangements between the seller and the client as to fees unless the seller's retainer agreement with the client permits a fee increase or the buyer obtains a client's specific agreement to a fee increase in compliance with the strict standards of Rule 1.8(a) (governing business transactions between lawyers and clients).

Other Applicable Ethical Standards

[11] Lawyers participating in the sale or purchase of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. Examples include (i) the seller's obligation to exercise competence in identifying a buyer qualified to assume the practice and the buyer's obligation to undertake the representation competently under Rule 1.1, (ii) the obligation of the seller and the buyer to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to under Rule 1.7, and (iii) the obligation of the seller and the buyer to protect information relating to the representation under Rule 1.6 and Rule 1.9. See also Rule 1.0(j) for the definition of "informed consent."

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale. See Rule 1.16. If a tribunal refuses to give its permission for the substitution and the seller therefore must continue in the matter, the seller does not thereby violate the portion of this Rule requiring the seller to cease practice in the described geographic area.

Applicability of the Rule

[13] [Omitted.]

[14] This Rule does not apply to: (i) admission to or retirement from a law partnership or professional association, (ii) retirement plans and similar arrangements, (iii) a sale of tangible assets of a law practice, or (iv) the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice. This Rule governs the sale of an entire law practice upon retirement, which is defined in paragraph (a) as the cessation of the private practice of law in a given geographic area. Rule 5.4(a)(2) provides for the compensation of a lawyer who undertakes to complete one or more unfinished pieces of legal business of a deceased lawyer.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENTS

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client."

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;

(iii) the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) written notice is promptly given to the prospective client; and

(3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.

(e) A person who:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client with the meaning of paragraph (a).

Comment

[1] Prospective clients, like current clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Prospective clients should therefore receive some, but not all, of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. As provided in paragraph (e), a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a). Similarly, a person who communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter is not entitled to the protection of this Rule. A lawyer may not encourage or induce a person to communicate with a lawyer or lawyers for that improper purpose. See Rules 3.1(b)(2), 4.4, 8.4(a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for nonrepresentation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7 or Rule 1.9, then consent from all affected current or former clients must be obtained before accepting the representation. The representation must be declined if

the lawyer will be unable to provide competent, diligent and adequate representation to the affected current and former clients and the prospective client.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(j) for the definition of "informed consent." If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Under paragraph (c), even in the absence of an agreement the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in that matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened, and written notice is promptly given to the prospective client. See Rule 1.10. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[7A] Paragraph (d)(2) sets out the basic procedural requirements that a law firm must satisfy to ensure that a personally disqualified lawyer is effectively screened from participation in the matter. This Rule requires that the firm promptly: (i) notify, as appropriate, lawyers and relevant nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client, and (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and others in the firm.

[7B] A firm seeking to avoid disqualification under this Rule should also consider its ability to implement, maintain, and monitor the screening procedures permitted by paragraph (d)(2) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining,

the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, but it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (d)(2).

[7C] In order to prevent any other lawyer in the firm from acquiring confidential information about the matter from the disqualified lawyer, it is essential that notification be given and screening procedures implemented promptly. If any lawyer in the firm acquires confidential information about the matter from the disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the disqualified lawyer and other lawyers in the firm in a given matter.

[8] Notice under paragraph (d)(2), including a general description of the subject matter about which the lawyer was consulted and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

Comment

Scope of Advice [1] This Rule is not intended to be enforced through the disciplinary process. However, it is important to remind lawyers that a client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. Nevertheless, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibilities as advisor may include the responsibility to indicate that more may be involved than strictly legal considerations. For the allocation of responsibility in decision making between lawyer and client, see Rule 1.2.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial or public relations specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

RULE 2.2: [RESERVED]

RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the

evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Unless disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is protected by Rule 1.6.

Comment

Definition [1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties: for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency: for example, an opinion concerning the legality of securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business, or of intellectual property or a similar asset.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer or by special counsel employed by the government is not an "evaluation" as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to a client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client [3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, because such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken on behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent,

however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information [4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of the search may be limited by time constraints or the non-cooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If, after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted knowingly to make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1. A knowing omission of material information that must be disclosed to make material statements in the evaluation not false or misleading may violate this Rule.

Obtaining Client's Informed Consent [5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a)(2). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the lawyer has consulted with the client and the client has been adequately informed concerning the conditions of the evaluation, the nature of the information to be disclosed and important possible effects on the client's interests. See Rules 1.0(j), 1.6(a).

Financial Auditors' Requests for Information [6] When a question is raised by the client's financial auditor concerning the legal situation of a client, and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

RULE 2.4: LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. In addition to representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A "third-party neutral" is a person such as a mediator, arbitrator, conciliator or evaluator or a person serving in another capacity that assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers although, in some court-connected contexts, only lawyers are permitted to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that applies either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as a third-party neutral and as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral may be asked subsequently to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(w)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

RULE 3.1: NON-MERITORIOUS CLAIMS AND CONTENTIONS

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of a claim or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Lawyers are required, however, to inform themselves about the facts of their clients' cases and the applicable law, and determine that they can make good-faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the action has no substantial purpose other than to harass or maliciously injure a person, or if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification or reversal of existing law (which includes the establishment of new judge-made law).

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

RULE 3.2: DELAY OF LITIGATION

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Such tactics are prohibited if their only substantial purpose is to frustrate an opposing party's attempt to obtain rightful redress or repose. It is not a justification that such tactics are often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay or needless expense. Seeking or realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

RULE 3.3: CONDUCT BEFORE A TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(w) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein because litigation documents ordinarily present assertions by the client or by someone on the client's behalf and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be based on the lawyer's own knowledge, as in an

affidavit or declaration by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. See also Rule 8.4(b), Comments [2]-[3].

Legal Argument

[4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Paragraph (a)(2) requires an advocate to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.

Offering or Using False Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer or use evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce or use false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false.

[6A] The prohibition against offering and using false evidence ordinarily requires a prosecutor to correct any false evidence that has been offered by the government, inform the tribunal when the prosecutor reasonably believes that a prosecution witness has testified falsely, and correct any material errors in a presentence report that are detrimental to a defendant.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If the criminal defendant insists on testifying and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form. The lawyer's ethical duty may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

[8] The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's actual knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) prohibits a lawyer from offering or using evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes to be false. Offering such proof may impair the integrity of an adjudicatory proceeding. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of a criminal defense client where the lawyer reasonably believes, but does not know, that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the criminal defendant's decision to testify.

Remedial Measures

[10] A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as making a statement about the matter to the trier of fact, ordering a mistrial, taking other appropriate steps or doing nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that

the lawyer keep silent. The client could therefore in effect coerce the lawyer into being a party to a fraud on the court.

Preserving Integrity of the Adjudicative Process

[12] Lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. Accordingly, paragraph (b) requires a lawyer who represents a client in an adjudicative proceeding to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding. Such conduct includes, among other things, bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding; unlawfully destroying or concealing documents or other evidence related to the proceeding; and failing to disclose information to the tribunal when required by law to do so. For example, under some circumstances a person's omission of a material fact may constitute a crime or fraud on the tribunal.

[12A] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered or used the evidence in question. A lawyer's duty to take reasonable remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

[13] [Omitted.]

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the opposing position is expected to be presented by the adverse party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there may be no presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the opposing party, if absent, just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] A lawyer's compliance with the duty of candor imposed by this Rule does not automatically require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure.

The lawyer, however, may be required by Rule 1.16(d) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. See also Rule 1.16(c) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructionist tactics in discovery procedure, and the like. The Rule applies to any conduct that falls within its general terms (for example, "obstruct another party's access to evidence") that is a crime, an intentional tort or prohibited by rules or a ruling of a tribunal. An example is "advis[ing] or caus[ing] a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein."

[2] Documents and other evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Paragraph (a) protects that right. Evidence that has been properly requested must be produced unless there is a good-faith basis for not doing so. Applicable state and federal law may make it an offense to destroy material for the purpose of impairing its availability in a pending or reasonably foreseeable proceeding, even though no specific request to reveal or produce evidence has been made. Paragraph (a) applies to evidentiary material generally, including computerized information.

[2A] Falsifying evidence, dealt with in paragraph (a), is also generally a criminal offense. Of additional relevance is Rule 3.3(a)(3), dealing with use of false evidence in a proceeding before a tribunal. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] Paragraph (b) applies generally to any inducement to a witness that is prohibited by law. It is not improper to pay a witness's reasonable expenses or to compensate an expert witness on terms permitted by law. However, any fee contingent upon the content of a witness' testimony or the outcome of the case is prohibited.

[3A] Paragraph (d) deals with improper statements relating to the merits of a case when representing a client before a tribunal: alluding to irrelevant matters, asserting personal knowledge of facts in issue, and asserting a personal opinion on issues to be decided by the trier of fact. See also Rule 4.4, prohibiting the use of any means that have no substantial purpose other than to embarrass or harm a third person. However, a lawyer may argue, upon analysis of the evidence, for any position or conclusion supported by the record. The term "admissible evidence" refers to evidence considered admissible in the particular context. For example, admission of evidence in an administrative adjudication or an arbitration proceeding may be governed by different standards than those applied in a jury trial.

[4] In general, a lawyer is prohibited from giving legal advice to an unrepresented person, other than the advice to secure counsel, when the interests of that person are or may have a reasonable possibility of being in conflict with the interests of the lawyer's client. See Rule 4.3.

[5] The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).

RULE 3.5: MAINTAINING AND PRESERVING THE IMPARTIALITY OF TRIBUNALS AND JURORS

(a) A lawyer shall not:

(1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Part 100 of the Rules of the Chief Administrator of the Courts;

(2) in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except:

(i) in the course of official proceedings in the matter;

(ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer;

(iii) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or

(iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts;

(3) seek to or cause another person to influence a juror or prospective juror by means prohibited by law;

(4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order;

(5) communicate with a juror or prospective juror after discharge of the jury if:

(i) the communication is prohibited by law or court order;

(ii) the juror has made known to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress or harassment; or

(iv) the communication is an attempt to influence the juror's actions in future jury service; or

(6) conduct a vexatious or harassing investigation of either a member of the venire or a juror or, by financial support or otherwise, cause another to do so.

(b) During the trial of a case a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(c) All restrictions imposed by this Rule also apply to communications with or investigations of members of a family of a member of the venire or a juror.

(d) A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. In addition, gifts and loans to judges and judicial employees, as well as contributions to candidates for judicial election, are regulated by the New York Code of Judicial Conduct, with which an advocate should be familiar. See New York Code of Judicial Conduct, Canon 4(D)(5), 22 N.Y.C.R.R. § 100.4(D)(5) (prohibition of a judge's receipt of a gift, loan, etc., and exceptions) and Canon 5(A)(5), 22 N.Y.C.R.R. § 100.5(A)(5) (concerning lawyer contributions to the campaign committee of a candidate for judicial office). A lawyer is prohibited from aiding a violation of such provisions. Limitations on contributions in the Election Law may also be relevant.

[2] Unless authorized to do so by law or court order, a lawyer is prohibited from communicating ex parte with persons serving in a judicial capacity in an adjudicative proceeding, such as judges, masters or jurors, or to employees who assist them, such

as law clerks. See New York Code of Judicial Conduct, Canon 3(B)(6), 22 N.Y.C.R.R. § 100.3(B)(6).

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. Paragraph (a)(5) permits a lawyer to do so unless the communication is prohibited by law or a court order, but the lawyer must respect the desire of a juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's misbehavior is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

RULE 3.6: TRIAL PUBLICITY

(a) A lawyer who is participating in or has participated in a criminal or civil matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness or the expected testimony of a party or witness;

(2) in a criminal matter that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal matter that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Provided that the statement complies with paragraph (a), a lawyer may state the following without elaboration:

(1) the claim, offense or defense and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal matter:

(i) the identity, age, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the identity of investigating and arresting officers or agencies and the length of the investigation; and

(iv) the fact, time and place of arrest, resistance, pursuit and use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission or statement.

(d) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits,

the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer making statements that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. It recognizes that the public value of informed commentary is great and that the likelihood of prejudice to a proceeding because of the commentary of a lawyer who is not involved in the proceeding is small. Thus, the Rule applies only to lawyers who are participating or have participated in the investigation or litigation of a matter and their associates.

[4] There are certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration. Paragraph (b) specifies certain statements that ordinarily will have prejudicial effect.

[5] Paragraph (c) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice. Nevertheless, some statements in criminal cases are also required to meet the fundamental requirements of paragraph (a), for example, those identified in paragraph (c)(7)(iv). Paragraph (c) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement; statements on other matters may be permissible under paragraph (a).

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Paragraph (d) permits such responsive statements, provided they contain

only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8 Comment [5] for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

RULE 3.7: LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and also can create a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal may properly object when the trier of fact may be confused or misled by a lawyer's serving as both advocate and witness. The opposing party may properly object where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof. The requirement that the testimony of the advocate-witness be on a significant issue of fact provides a materiality limitation.

[3] To protect the tribunal, the Rule prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraph (a). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Testimony relating solely to a formality is uncontested when the lawyer reasonably believes that no substantial evidence will be offered in opposition to the testimony. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyer to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required among the interests of the client, of the tribunal, and of the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rule 1.7, 1.9 and 1.10, which may separately require disqualification of the lawyer-advocate, have no application to the tribunal's determination of the balancing of judicial and party interests required by paragraph (a)(3).

[5] Because the tribunal is may be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness on a significant issue other than on behalf of the client where it is apparent that the testimony may be prejudicial to the client, paragraph (b) prohibits the non-testifying lawyer to act as advocate.

Conflict of Interest

[6] In determining whether it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rule 1.7 or Rule 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to serve simultaneously as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether such a conflict exists

is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(e) for the definition of "confirmed in writing" and Rule 1.0(j) for the definition of "informed consent."

RULE 3.8: SPECIAL RESPONSIBILITIES OF PROSECUTORS AND OTHER GOVERNMENT LAWYERS

(a) A prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.

(b) A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Applicable state or federal law may require other measures by the prosecutor, and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4. A government lawyer in a criminal case is considered a "prosecutor" for purposes of this Rule.

[2] A defendant who has no counsel may waive a preliminary hearing or other important pretrial rights and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. This would not be applicable, however, to an accused appearing pro se with the approval of the tribunal, or to the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (b) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] [Omitted.]

[5] Rule 3.6 prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a

prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium against the accused. A prosecutor in a criminal case should make reasonable efforts to prevent persons under the prosecutor's supervisory authority, which may include investigators, law enforcement personnel, employees and other persons assisting or associated with the prosecutor, from making extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.6. See Rule 5.3. Nothing in this Comment is intended to restrict the statements that a prosecutor may make that comply with Rule 3.6(c) or Rule 3.6(d).

[6] Like other lawyers, prosecutors are subject to Rule 5.1 and Rule 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Prosecutors should bear in mind the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case, and should exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[6A] Reference to a "prosecutor" in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function. Like other lawyers, prosecutors are subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when the lawyer comes to know of its falsity. See Rule 3.3, Comment [6A].

[6B] The prosecutor's duty to seek justice has traditionally been understood not only to require the prosecutor to take precautions to avoid convicting innocent individuals, but also to require the prosecutor to take reasonable remedial measures when it appears likely that an innocent person was wrongly convicted. Accordingly, when a prosecutor comes to know of new and material evidence creating a reasonable likelihood that a person was wrongly convicted, the prosecutor should examine the evidence and undertake such further inquiry or investigation as may be necessary to determine whether the conviction was wrongful. The scope of the inquiry will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of the inquiry or investigation should be such as to provide a "reasonable belief," as defined in Rule 1.0(r), that the conviction should or should not be set aside.

[6C] When a prosecutor comes to know of clear and convincing evidence establishing that a conviction was wrongful, the prosecutor should disclose the new evidence to the defendant so that defense counsel may conduct any necessary investigation and make any appropriate motions directed at setting aside the verdict, and should disclose the

new evidence to the court or other appropriate authority so that the court can determine whether to initiate its own inquiry. The evidence should be disclosed in a timely manner, depending on the particular circumstances. For example, disclosure of the evidence might be deferred where it could prejudice the prosecutor's investigation into the matter. If the convicted defendant is unrepresented and cannot afford to retain counsel, the prosecutor should request that the court appoint counsel for purposes of these post-conviction proceedings. The post-conviction disclosure duty raised by this Comment applies to new and material evidence of innocence, regardless of whether it could previously have been discovered by the defense.

[6D] If the prosecutor comes to know of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor should seek to remedy the injustice by taking appropriate steps to remedy the wrongful conviction. These steps may include, depending on the particular circumstances, disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor believes that the defendant was wrongfully convicted.

[6E] The duties in Comments [6B], [6C] and [6D] apply whether the new evidence comes to the attention of the prosecutor who obtained the defendant's conviction or to a different prosecutor. If the evidence comes to the attention of a prosecutor in a different prosecutor's office, the prosecutor should notify the office of the prosecutor who obtained the conviction.

RULE 3.9: ADVOCATE IN NON-ADJUDICATIVE MATTERS

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

Comment

[1] In representation before bodies such as legislatures, municipal councils and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument regarding the matters under consideration. The legislative body or administrative agency is entitled to know that the lawyer is appearing in a representative capacity. Ordinarily the client will consent to being identified, but if not, such as when the lawyer is appearing on behalf of an undisclosed principal, the governmental body at least knows that the lawyer is acting in a representative capacity as opposed to advancing the lawyer's personal opinion as a citizen. Representation in such matters is governed by Rule 4.1 through 4.4, and 8.4.

[1A] Rule 3.9 does not apply to adjudicative proceedings before a tribunal. Court rules and other law require a lawyer, in making an appearance before a tribunal in a

representative capacity, to identify the client or clients and provide other information required for communication with the tribunal or other parties.

[2] [Omitted.]

[3] [Omitted.]

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Comment

Misrepresentation [1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. As to dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact [2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category; so is the existence of an undisclosed principal, except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Illegal or Fraudulent Conduct by Client [3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client as to conduct that the lawyer knows is illegal or fraudulent. Ordinarily, a lawyer can avoid assisting a client's illegality or fraud by withdrawing from the representation. See Rule 1.16(c)(2). Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. See Rules 1.2(d), 1.6(b)(3).

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to

be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and un-counseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] Paragraph (a) applies even though the represented party initiates or consents to the communication. A lawyer must immediately terminate communication with a party if after commencing communication, the lawyer learns that the party is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented party or person or an employee or agent of such a party or person concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person or between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented party or person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer having independent justification or legal authorization for communicating with a represented party or person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement (as defined by law) of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the state or federal rights of the accused. The fact that a communication does not violate a state or federal right is insufficient to establish that the communication is permissible under this Rule. This Rule is not intended to effect any change in the scope of the anti-contact rule in criminal cases.

[6] [Omitted.]

[7] In the case of a represented organization, paragraph (a) ordinarily prohibits communications with a constituent of the organization who: (i) supervises, directs or regularly consults with the organization's lawyer concerning the matter, (ii) has authority to obligate the organization with respect to the matter, or (iii) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former unrepresented constituent. If an individual constituent of the organization is represented in the matter by the person's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rules 1.13, 4.4.

[8] The prohibition on communications with a represented person applies only in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(k) for the definition of "knowledge." Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious.

[9] In the event the party with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[10] A lawyer may not make a communication prohibited by paragraph (a) through the acts of another. See Rule 8.4(a).

Client-to-Client Communications

[11] Persons represented in a matter may communicate directly with each other. A lawyer may properly advise a client to communicate directly with a represented person, and may counsel the client with respect to those communications, provided the lawyer complies with paragraph (b). Agents for lawyers, such as investigators, are not considered clients within the meaning of this Rule even where the represented entity is an agency, department or other organization of the government, and therefore a lawyer may not cause such an agent to communicate with a represented person, unless the lawyer would be authorized by law or a court order to do so. A lawyer may also counsel a client with respect to communications with a represented person, including by drafting papers for the client to present to the represented person. In advising a client in connection with such communications, a lawyer may not advise the client to seek privileged information or other information that the represented person is not personally authorized to disclose or is prohibited from disclosing, such as a trade secret or other information protected by law, or to encourage or invite the represented person to take actions without the advice of counsel.

[12] A lawyer who advises a client with respect to communications with a represented person should be mindful of the obligation to avoid abusive, harassing, or unfair conduct with regard to the represented person. The lawyer should advise the client against such conduct. A lawyer shall not advise a client to communicate with a represented person if the lawyer knows that the represented person is legally incompetent. See Rule 4.4.

RULE 4.3: COMMUNICATING WITH UNREPRESENTED PERSONS

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. As to misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(a), Comment [2A].

[2] The Rule distinguishes between situations involving unrepresented parties whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented party, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent, produced, or otherwise inadvertently made available by opposing parties or their lawyers. One way to resolve this situation is for lawyers to enter into agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents. In the absence of such an agreement, however, if a lawyer knows or reasonably should know that such a document was sent inadvertently, this Rule requires only that the lawyer promptly notify the sender in order to permit that person to take protective measures. Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes email and other electronically stored information subject to being read or put into readable form.

[3] Refraining from reading or continuing to read a document once a lawyer realizes that it was inadvertently sent to the wrong address and returning the document to the sender honors the policy of these Rules to protect the principles of client confidentiality. Because there are circumstances where a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document, however, this Rule does not subject a lawyer to professional discipline for reading and using that information. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document, or to return the document to the

sender, or both. Accordingly, in deciding whether to retain or use an inadvertently received document, some lawyers may take into account whether the attorney-client privilege would attach. But if applicable law or rules do not address the situation, decisions to refrain from reading such documents or to return them, or both, are matters of professional judgment reserved to the lawyer. See Rules 1.2, 1.4.

RULE 4.5: COMMUNICATION AFTER INCIDENTS INVOLVING PERSONAL INJURY OR WRONGFUL DEATH

(a) In the event of a specific incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants, before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(b) An unsolicited communication by a lawyer or law firm, seeking to represent an injured individual or the legal representative thereof under the circumstance described in paragraph (a) shall comply with Rule 7.3(e).

Comment

[1] Paragraph (a) imposes a 30-day (or 15-day) restriction on solicitations directed to potential claimants relating to a specific incident involving potential claims for personal injury or wrongful death, by lawyers or law firms who represent actual or potential defendants or entities that may defend or indemnify those defendants. However, if potential claimants are represented by counsel, it is proper for defense counsel to communicate with potential plaintiffs' counsel even during the 30-day (or 15-day) period. See also Rule 7.3(e).

RULE 5.1: RESPONSIBILITIES OF LAW FIRMS, PARTNERS, MANAGERS AND SUPERVISORY LAWYERS

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b) (1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

Comment

[1] Paragraph (a) applies to law firms; paragraph (b) applies to lawyers with management responsibility in a law firm or a lawyer with direct supervisory authority over another lawyer.

[2] Paragraph (b) requires lawyers with management authority within a firm or those having direct supervisory authority over other lawyers to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to these Rules. Such policies and procedures include those designed (i) to detect and resolve conflicts of interest (see Rule 1.10(f)), (ii) to identify dates by which actions must be taken in pending matters, (iii) to account for client funds and property, and (iv) to ensure that inexperienced lawyers are appropriately supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (b) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated

senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and lawyers with management authority may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (d) expresses a general principle of personal responsibility for acts of other lawyers in the law firm. See also Rule 8.4(a).

[5] Paragraph (d) imposes such responsibility on a lawyer who orders, directs or ratifies wrongful conduct and on lawyers who are partners or who have comparable managerial authority in a law firm who know or reasonably should know of the conduct. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Partners and lawyers with comparable authority, as well as those who supervise other lawyers, are indirectly responsible for improper conduct of which they know or should have known in the exercise of reasonable managerial or supervisory authority. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent misconduct or to prevent or mitigate avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (a), (b) or (c) on the part of a law firm, partner or supervisory lawyer even though it does not entail a violation of paragraph (d) because there was no direction, ratification or knowledge of the violation or no violation occurred.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of another lawyer. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by these Rules. See Rule 5.2(a).

RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of these Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise, a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear, and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. To evaluate the supervisor's conclusion that the question is arguable and the supervisor's resolution of it is reasonable in light of applicable law, it is advisable that the subordinate lawyer undertake research, consult with a designated senior partner or special committee, if any (see Rule 5.1, Comment [3]), or use other appropriate means. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

RULE 5.3: LAWYER'S RESPONSIBILITY FOR CONDUCT OF NONLAWYERS

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

Comment

[1] This Rule requires a law firm to ensure that work of nonlawyers is appropriately supervised. In addition, a lawyer with direct supervisory authority over the work of nonlawyers must adequately supervise those nonlawyers. Comments [2] and [3] to Rule 5.1, which concern supervision of lawyers, provide guidance by analogy for the methods and extent of supervising nonlawyers.

[2] With regard to nonlawyers, who are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by or associated with the law firm is compatible with the professional obligations of the lawyers and firm. Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such assistants, whether they are employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A law firm must ensure that such assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. A law firm should make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with these Rules. A lawyer with direct supervisory authority over a nonlawyer has a parallel duty to provide appropriate supervision of the supervised nonlawyer.

[3] Paragraph (b) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of these Rules if engaged in by a lawyer. For guidance by analogy, see Rule 5.1, Comments [5]-[8].

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or another lawyer associated in the firm may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6.

(d) A lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a member, corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[1A] Paragraph (a)(2) governs the compensation of a lawyer who undertakes to complete one or more unfinished pieces of legal business of a deceased lawyer. Rule 1.17 governs the sale of an entire law practice upon retirement, which is defined as the cessation of the private practice of law in a given geographic area.

[1B] Paragraph (a)(3) permits limited fee sharing with a nonlawyer employee, where the employee's compensation or retirement plan is based in whole or in part on a profit-sharing arrangement. Such sharing of profits with a nonlawyer employee must

be based on the total profitability of the law firm or a department within a law firm and may not be based on the fee resulting from a single case.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f), providing that a lawyer may accept compensation from a third party as long as there is no interference with the lawyer's professional judgment and the client gives informed consent.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW

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

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

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law in another jurisdiction by a lawyer through the lawyer's direct action, and paragraph (b) prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law.

[2] The definition of the "practice of law" is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE

(a) A lawyer shall not participate in offering or making:

(1) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(2) an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy.

(b) This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (a)(2) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

RULE 5.7: RESPONSIBILITIES REGARDING NONLEGAL SERVICES

(a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

(1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.

(2) A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

(b) Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any

person, or to cause the lawyer or law firm to compromise its duty under Rule 1.6(a) and Rule 1.6(c) with respect to the confidential information of a client receiving legal services.

(c) For purposes of this Rule, "nonlegal services" shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.

Comment

[1] For many years, lawyers have provided nonlegal services to their clients. By participating in the delivery of these services, lawyers can serve a broad range of economic and other interests of clients. Whenever a lawyer directly provides nonlegal services, the lawyer must avoid confusion on the part of the client as to the nature of the lawyer's role, so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that ordinarily accompany a client-lawyer relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services when that may not be the case. The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter. Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, the recipient is likely to be confused as to whether and when the relationship is protected as a client-lawyer relationship. Therefore, where the legal and nonlegal services are not distinct, paragraph (a)(1) requires that the lawyer providing nonlegal services adhere to all of the requirements of these Rules with respect to the nonlegal services. Paragraph (a)(1) applies to the provision of nonlegal services by a law firm if the person for whom the nonlegal services are being performed is also receiving legal services from the firm that are not distinct from the nonlegal services.

[2] Even when the lawyer believes that the provision of nonlegal services is distinct from any legal services being provided, there is still a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of a client-lawyer relationship. Therefore, paragraph (a)(2) requires that the lawyer providing the nonlegal services adhere to these Rules, unless the person understands that the nonlegal services are not the subject of a client-lawyer relationship. Nonlegal services also may be provided through an entity with which a lawyer is affiliated, for example, as owner, controlling party or agent. In this situation, there is still a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of a client-lawyer relationship. Therefore, paragraph (a)(3) requires that the lawyer involved with the entity providing nonlegal services adhere to all of these Rules with respect to the nonlegal services, unless the person understands that the nonlegal services are not the subject of a client-lawyer relationship.

[3] These Rules will be presumed to apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services unless the lawyer complies with paragraph (a)(4) by communicating in writing to the person receiving the nonlegal services that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services. Such a communication should be made before entering into an agreement for the provision of nonlegal services in a manner sufficient to ensure that the person understands the significance of the communication. In certain circumstances, however, additional steps may be required to ensure that the person understands the distinction. For example, while the written disclaimer set forth in paragraph (a)(4) will be adequate for a sophisticated user of legal and nonlegal services, a more detailed explanation may be required for someone unaccustomed to making distinctions between legal services and nonlegal services. Where appropriate and especially where legal services are provided in the same transaction as nonlegal services, the lawyer should counsel the client about the possible effect of the proposed provision of services on the availability of the attorney-client privilege. The lawyer or law firm will not be required to comply with these requirements if its interest in the entity providing the nonlegal services is so small as to be de minimis.

[4] Although a lawyer may be exempt from the application of these Rules with respect to nonlegal services on the face of paragraph (a), the scope of the exemption is not absolute. A lawyer who provides or who is involved in the provision of nonlegal services may be excused from compliance with only those Rules that are dependent upon the existence of a representation or client-lawyer relationship. Other Rules, such as those prohibiting lawyers from misusing the confidences or secrets of a former client (see Rule 1.9), requiring lawyers to report certain lawyer misconduct (see Rule 8.3), and prohibiting lawyers from engaging in illegal, dishonest, fraudulent or deceptive conduct (see Rule 8.4), apply to a lawyer irrespective of the existence of a representation, and thus govern a lawyer not covered by paragraph (a). A lawyer or law firm rendering legal services is always subject to these Rules.

Provision of Legal and Nonlegal Services in the Same Transaction

[5] In some situations it may be beneficial to a client to purchase both legal and nonlegal services from a lawyer, law firm or affiliated entity in the same matter or in two or more substantially related matters. Examples include: (i) a law firm that represents corporations and also provides public lobbying, public relations, investment banking and business relocation services, (ii) a law firm that represents clients in environmental matters and also provides engineering consulting services to those clients, and (iii) a law firm that represents clients in litigation and also provides consulting services relating to electronic document discovery. In these situations, the lawyer may have a financial interest in the nonlegal services that would constitute a conflict of interest under Rule 1.7(a)(2), which governs conflicts between a client and a lawyer's personal interests.

[5A] Under Rule 1.7(a)(2), a concurrent conflict of interest exists when a reasonable lawyer would perceive a significant risk that the representation will be materially limited or that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's responsibilities to another client, a former client or a third person or by the lawyer's own financial, business, property or personal interests. When a lawyer or law firm provides both legal and nonlegal services in the same matter (or in substantially related matters), a conflict with the lawyer's own interests will nearly always arise. For example, if the legal representation involves exercising judgment about whether to recommend nonlegal services and which provider to recommend, or if it involves overseeing the provision of the nonlegal services, then a conflict with the lawyer's own interests under Rule 1.7(a)(2) is likely to arise. However, when seeking the consent of a client to such a conflict, the lawyer should comply with both Rule 1.7(b) regarding the conflict affecting the legal representation of the client and Rule 1.8(a) regarding the business transaction with the client.

[5B] Thus, the client may consent if: (i) the lawyer complies with Rule 1.8(a) with respect to the transaction in which the lawyer agrees to provide the nonlegal services, including obtaining the client's informed consent in a writing signed by the client, (ii) the lawyer reasonably believes that the lawyer can provide competent and diligent legal representation despite the conflict within the meaning of Rule 1.7(b), and (iii) the client gives informed consent pursuant to Rule 1.7(b), confirmed in writing. In certain cases, it will not be possible to provide both legal and nonlegal services because the lawyer could not reasonably believe that he or she can represent the client competently and diligently while providing both legal and nonlegal services in the same or substantially related matters. Whether providing dual services gives rise to an impermissible conflict must be determined on a case-by-case basis, taking into account all of the facts and circumstances, including factors such as: (i) the experience and sophistication of the client in obtaining legal and nonlegal services of the kind being provided in the matter, (ii) the relative size of the anticipated fees for the legal and nonlegal services, (iii) the closeness of the relationship between the legal and nonlegal services, and (iv) the degree of discretion the lawyer has in providing the legal and nonlegal services.

[6] In the context of providing legal and nonlegal services in the same transaction, Rule 1.8(a) first requires that: (i) the nonlegal services be provided on terms that are fair and reasonable to the client, (ii) full disclosure of the terms on which the nonlegal services will be provided be made in writing to the client in a manner understandable by the client, (iii) the client is advised to seek the advice of independent counsel about the provision of the nonlegal services by the lawyer, and (iv) the client gives informed consent, as set forth in Rule 1.8(a)(3), in a writing signed by the client, to the terms of the transaction in which the nonlegal services are provided and to the lawyer's inherent conflict of interest.

[7] In addition, in the context providing legal and nonlegal services in the same transaction, Rule 1.8(a) requires a full disclosure of the nature and extent of the lawyer's financial interest or stake in the provision of the nonlegal services. By its

terms, Rule 1.8(a) requires that the nonlegal services be provided on terms that are fair and reasonable to the client. (Where the nonlegal services are provided on terms generally available to the public in the marketplace, that requirement is ordinarily met.) Consequently, as a further safeguard against conflicts that may arise when the same lawyer provides both legal and nonlegal services in the same or substantially related matters, a lawyer may do so only if the lawyer not only complies with Rule 1.8(a) with respect to the nonlegal services, but also obtains the client's informed consent, pursuant to Rule 1.7(b), confirmed in writing, after fully disclosing the advantages and risks of obtaining legal and nonlegal services from the same or affiliated providers in a single matter (or in substantially related matters), including the lawyer's conflict of interest arising from the lawyer's financial interest in the provision of the nonlegal services.

[8] [Omitted.]

[9] [Omitted.]

[10] [Omitted.]

[11] [Omitted.]

RULE 5.8: CONTRACTUAL RELATIONSHIPS BETWEEN LAWYERS AND NONLEGAL PROFESSIONALS

(a) The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it serves. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed "independent professional judgment and undivided loyalty uncompromised by conflicts of interest." Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent professional judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State.

Multi-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values. However, a lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services, notwithstanding the provisions of Rule 1.7(a), provided that:

(1) the profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules;

(2) the lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm, nor, as provided in Rule 7.2(a)(1), shares legal fees with a nonlawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral; and

(3) the fact that the contractual relationship exists is disclosed by the lawyer or law firm to any client of the lawyer or law firm before the client is referred to the nonlegal professional service firm, or to any client of the nonlegal professional service firm before that client receives legal services from the lawyer or law firm; and the client has given informed written consent and has been provided with a copy of the "Statement of Client's Rights In Cooperative Business Arrangements" pursuant to section 1205.4 of the Joint Appellate Divisions Rules.

(b) For purposes of paragraph (a):

(1) each profession on the list maintained pursuant to a Joint Rule of the Appellate Divisions shall have been designated sua sponte, or approved by the Appellate Divisions upon application of a member of a nonlegal profession or nonlegal professional service firm, upon a determination that the profession is composed of individuals who, with respect to their profession:

(i) have been awarded a bachelor's degree or its equivalent from an accredited college or university, or have attained an equivalent combination of educational credit from such a college or university and work experience;

(ii) are licensed to practice the profession by an agency of the State of New York or the United States Government; and

(iii) are required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession;

(2) the term "ownership or investment interest" shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.

(c) This Rule shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm.

Comment

Contractual Relationships Between Lawyers and Nonlegal Professionals [1] Lawyers may enter into interprofessional contractual relationships for the systematic and continuing provision of legal and nonlegal professional services, provided the nonlegal professional or nonlegal professional service firm with which the lawyer or

law firm is affiliated does not own, control, supervise or manage, directly or indirectly, in whole or in part, the lawyer's or law firm's practice of law. The nonlegal professional or nonlegal professional service firm may not play a role in, for example, (i) deciding whether to accept or terminate an engagement to provide legal services in a particular matter or to a particular client, (ii) determining the manner in which lawyers are hired or trained, (iii) assigning lawyers to handle particular matters or to provide legal services to particular clients, (iv) deciding whether to undertake pro bono and other public-interest legal work, (v) making financial and budgetary decisions relating to the legal practice, and (vi) determining the compensation and advancement of lawyers and of persons assisting lawyers on legal matters.

[2] The contractual relationship permitted by this Rule may include the sharing of premises, general overhead or administrative costs and services on an arm's length basis. Such financial arrangements, in the context of an agreement between lawyers and other professionals to provide legal and other professional services on a systematic and continuing basis, are permitted subject to the requirements of paragraph (a) and Rule 7.2(a). Similarly, lawyers participating in such arrangements remain subject to general ethical principles in addition to those set forth in this Rule including, at a minimum, Rule 1.7, Rule 1.8(f), Rule 1.9, Rule 5.7(b) and Rule 7.5(a). Thus, the lawyer or law firm may not, for example, include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional, enter into formal partnerships with nonlawyers, or practice in an organization authorized to practice law for a profit in which nonlawyers own any interest. Moreover, a lawyer or law firm may not enter into an agreement or arrangement for the use of a name in respect of which a nonlegal professional or nonlegal professional service firm has or exercises a proprietary interest if, under or pursuant to the agreement or arrangement, that nonlegal professional or firm acts or is entitled to act in a manner inconsistent with paragraph (a)(2) or Comment [1]. More generally, the existence of a contractual relationship permitted by this Rule does not by itself create a conflict of interest in violation of Rule 1.8(a). Whenever a law firm represents a client in a matter in which the nonlegal professional service firm's client is also involved, the law firm's interest in maintaining an advantageous relationship with a nonlegal professional service firm might, in certain circumstances, adversely affect the professional judgment of the law firm.

[3] Each lawyer and law firm having a contractual relationship under paragraph (a) has an ethical duty to observe these Rules with respect to the lawyer's or law firm's own conduct in the context of that relationship. For example, the lawyer or law firm cannot permit the obligation to maintain client confidences, as required by Rule 1.6, to be compromised by the contractual relationship or by its implementation by or on behalf of nonlawyers involved in the relationship. In addition, the prohibition in Rule 8.4(a) against circumventing a Rule through actions of another applies generally to the lawyer or law firm in the contractual relationship.

[4] The contractual relationship permitted by paragraph (a) may provide for the reciprocal referral of clients by and between the lawyer or law firm and the nonlegal professional or nonlegal professional service firm. When in the context of such a

contractual relationship a lawyer or law firm refers a client to the nonlegal professional or nonlegal professional service firm, the lawyer or law firm shall observe the ethical standards of the legal profession in verifying the competence of the nonlegal professional or nonlegal professional services firm to handle the relevant affairs and interests of the client. Referrals should be made only when requested by the client or deemed to be reasonably necessary to serve the client. Thus, even if otherwise permitted by paragraph (a), a contractual relationship may not require referrals on an exclusive basis. See Rule 7.2(a).

[5] To ensure that only appropriate professional services are involved, a contractual relationship for the provision of services is permitted under paragraph (a) only if the nonlegal party thereto is a professional or professional service firm meeting appropriate standards regarding ethics, education, training and licensing. The Appellate Divisions maintain a public list of eligible professions at 22 N.Y.C.R.R. § 1205.5. A member of the nonlegal profession or a professional service firm may apply for the inclusion of particular professions on the list or professions may be added to the list by the Appellate Divisions sua sponte. A lawyer or law firm not wishing to affiliate with a nonlawyer on a systematic and continuing basis, but only to engage a nonlawyer on an ad hoc basis to assist in a specific matter, is not governed by this Rule when so dealing with the nonlawyer. Thus, a lawyer advising a client in connection with a discharge of chemical wastes may engage the services of and consult with an environmental engineer on that matter without the need to comply with this Rule. Likewise, the requirements of this Rule need not be met when a lawyer retains an expert witness in a particular litigation.

[6] Depending upon the extent and nature of the relationship between the lawyer or law firm, on the one hand, and the nonlegal professional or nonlegal professional service firm, on the other hand, it may be appropriate to treat the parties to a contractual relationship permitted by paragraph (a) as a single law firm for purposes of these Rules, as would be the case if the nonlegal professional or nonlegal professional service firm were in an "of counsel" relationship with the lawyer or law firm. If the parties to the relationship are treated as a single law firm, the principal effects would be that conflicts of interest are imputed as between them pursuant to Rule 1.10(a) and that the law firm would be required to maintain systems for determining whether such conflicts exist pursuant to Rule 1.10(f). To the extent that the rules of ethics of the nonlegal profession conflict with these Rules, the rules of the legal profession will still govern the conduct of the lawyers and the law firm participants in the relationship. A lawyer or law firm may also be subject to legal obligations arising from a relationship with nonlawyer professionals, who are themselves subject to regulation.

RULE 6.1: VOLUNTARY PRO BONO SERVICE

Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons.

(a) Every lawyer should aspire to:

(1) provide at least 20 hours of pro bono legal services each year to poor persons; and

(2) contribute financially to organizations that provide legal services to poor persons.

(b) Pro bono legal services that meet this goal are:

(1) professional services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation, to persons who are financially unable to compensate counsel;

(2) activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; and

(3) professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.

(c) Appropriate organizations for financial contributions are:

(1) organizations primarily engaged in the provision of legal services to the poor; and

(2) organizations substantially engaged in the provision of legal services to the poor, provided that the donated funds are to be used for the provision of such legal services.

(d) This Rule is not intended to be enforced through the disciplinary process, and the failure to fulfill the aspirational goals contained herein should be without legal consequence.

Comment

[1] Legal services organizations, courts, government agencies, bar associations and various non-profit organizations have established programs through which lawyers provide free short-term limited legal services, such as advice or the completion of legal forms, to assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to utilize the conflict-checking system required by Rule 1.10(f) before providing the short-term limited legal services contemplated by this Rule. See also Rules 1.7, 1,8, 1.9, 1.10.

[2] To meet this professional obligation, paragraph (a) urges all lawyers to provide a minimum of 20 hours of pro bono legal service annually without fee or expectation of fee, either directly to poor persons or to organizations that serve the legal or other basic needs of persons of limited financial means. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of the lawyer's career, the lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in

criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2A] Paragraph (a)(2) provides that, in addition to providing the services described in paragraph (a), lawyers should provide financial support to organizations that provide legal services to the poor. This goal is separate from and not a substitute for the provision of legal services described in paragraph (a). To assist the funding of civil legal services for low income people, when selecting a bank for deposit of funds into an "IOLA" account pursuant to Judiciary Law § 497, a lawyer should take into consideration the interest rate offered by the bank on such funds.

[2B] Paragraphs (a)(1) and (a)(2) recognize the critical need for legal services that exists among poor persons. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rulemaking and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7, 1.8 and 1.9 only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rule 1.7, 1.8 or 1.9 in the matter.

[4] To qualify as pro bono service within the meaning of paragraph (a)(1) the service must be provided without fee or expectation of fee, so the intent of the lawyer to render free legal services is essential. Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this Rule. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While a lawyer may fulfill the annual goal to perform pro bono service exclusively through activities described in paragraphs (a)(1) and (a)(2), all lawyers are urged to render public-interest and pro bono service in addition to assistance to the poor. This responsibility can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono service outlined in paragraph (a)(1). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by making financial contributions to organizations that help meet the legal and other basic needs of the poor, as described in paragraphs (a)(2), (c)(1) and (c)(2) or by performing some of the services outlined in paragraph (b)(2) or (b)(3).

[6] Paragraph (b)(1) includes the provision of legal services to those whose incomes and financial resources place them above limited means but are yet unable to meet the financial burdens of a given civil or criminal matter.

[7] Paragraphs (b)(2) and (b)(3) recognize the value of lawyers' engaging in activities that improve the law, the legal system or the legal profession. Examples of the many activities that fall within this paragraph include: (i) serving on bar association committees, (ii) serving on boards of pro bono or legal services programs, (iii) taking part in Law Day activities, (iv) acting as a continuing legal education instructor, a mediator or an arbitrator, and (v) engaging in legislative lobbying to improve the law, the legal system or the profession. In addition to rendering pro bono services directly to the poor and making financial contributions, lawyers may fulfill the goal of rendering pro bono services by serving on the boards or giving legal advice to organizations whose mission is helping the poor.

[8] Paragraphs (b)(1) and (b)(2) essentially reiterate the goal as set forth in (a)(2) with the further provision that the lawyer should seek to insure that the donated money be directed to providing legal assistance to the poor rather than the general charitable objectives of such organizations.

[9] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal service called for by this Rule.

RULE 6.2: [RESERVED]

RULE 6.3: MEMBERSHIP IN A LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rules 1.7 through 1.13; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer's firm.

Comment

[1] Lawyers should be encouraged to support and participate in legal services organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization.

However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[1A] This Rule applies to legal services organizations organized and operating on a not-for-profit basis.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer actively participates, the lawyer shall disclose that fact to the organization, but need not identify the client. When the lawyer knows that the interests of a client may be adversely affected by a decision in which the lawyer actively participates, the lawyer shall disclose that fact to the client.[1]

Comment

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. For example, a lawyer concentrating in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients. A lawyer's identification with the organization's aims and purposes, under some circumstances, may give rise to a personal-interest conflict with client interests implicating the lawyer's obligations under other Rules, particularly Rule 1.7. A lawyer is also professionally obligated to protect the integrity of the law reform program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially affected.

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1 Effective May 4, 2010, the last sentence of Rule 6.4 has been deleted and replaced with: "In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7."

RULE 6.5: PARTICIPATION IN LIMITED PRO BONO LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) shall comply with Rules 1.7, 1.8 and 1.9, concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in these Rules, only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest; and

(2) shall comply with Rule 1.10 only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by Rules 1.7, 1.8 and 1.9.

(b) Except as provided in paragraph (a)(2), Rule 1.7 and Rule 1.9 are inapplicable to a representation governed by this Rule.

(c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.

(d) The lawyer providing short-term limited legal services must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6.

(e) This Rule shall not apply where the court before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation.

Comment

[1] [Omitted.]

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client, but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, these Rules, including Rules 1.6 and Rule 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a)

requires compliance with Rules 1.7, 1.8 and 1.9 only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rules 1.7 and 1.9 are inapplicable to a representation governed by this Rule, except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 only when the lawyer knows that the lawyer's firm is affected by Rules 1.7, 1.8 or 1.9. By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Because the lawyer is not precluded pursuant to this rule Rule 1.10 becomes inapplicable. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

RULE 7.1: ADVERTISING

(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:

(1) contains statements or claims that are false, deceptive or misleading; or

(2) violates a Rule.

(b) Subject to the provisions of paragraph (a), an advertisement may include information as to:

(1) legal and nonlegal education; degrees and other scholastic distinctions; dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications of law-related matters authored by the lawyer; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide professional ratings;

(2) names of clients regularly represented, provided that the client has given prior written consent;

(3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the lawyer or law firm participates; nonlegal services provided by the lawyer or law firm or by an entity owned and controlled by the lawyer or law firm; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted

by Rule 5.8, and the nature and extent of services available through those contractual relationships; and

(4) legal fees for initial consultation; contingent fee rates in civil matters, when accompanied by a statement disclosing the information required by paragraph (p); range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service, hourly rates, and fixed fees for specified legal and nonlegal services.

(c) An advertisement shall not:

(1) include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter that is still pending;

(2) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;

(3) include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;

(4) use actors to portray the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same;

(5) rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence;

(6) be made to resemble legal documents; or

(7) utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.

(d) An advertisement that complies with paragraph (e) may contain the following:

(1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;

(2) statements that compare the lawyer's services with the services of other lawyers;

(3) testimonials or endorsements of clients, where not prohibited by paragraph (c)(1), and of former clients; or

(4) statements describing or characterizing the quality of the lawyer's or law firm's services.

(e) It is permissible to provide the information set forth in paragraph (d) provided:

(1) its dissemination does not violate paragraph (a);

(2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; and

(3) it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome."

(f) Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words "Attorney Advertising" shall appear therein. In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING."

(g) A lawyer or law firm shall not utilize:

(1) a pop-up or pop-under advertisement in connection with computer-accessed communications, other than on the lawyer's or law firm's own web site or other Internet presence; or

(2) meta-tags or other hidden computer codes that, if displayed, would violate these Rules.

(h) All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) Any words or statements required by this Rule to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of a web site, the required words or statements shall appear on the home page.

(j) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service. Such legal services shall include all those services that are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

(k) All advertisements shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial dissemination. Any advertisement contained in a computer-accessed communication shall be retained by the lawyer for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

(l) If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm shall not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm shall not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in

the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

(m) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Rule in a publication that is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this Rule in a publication that is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this Rule in a publication that has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

(n) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(o) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.

(p) All advertisements that contain information about the fees charged by the lawyer or law firm, including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law § 488(3).

(q) A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

(r) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.

Comment

Advertising [1] The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of competent legal counsel. Hence, important functions of the legal profession are to educate people to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

[2] The public's need to know about legal services can be fulfilled in part through advertising. People of limited means who have not made extensive use of legal services in many instances rely on advertising to find appropriate counsel. While a lawyer's reputation may attract some clients, lawyers may also make the public aware of their services by advertising to obtain work.

[3] Advertising by lawyers serves two principal purposes: first, it educates potential clients regarding their need for legal advice and assists them in obtaining a lawyer appropriate for those needs. Second, it enables lawyers to attract clients. To carry out these two purposes and because of the critical importance of legal services, it is of the utmost importance that lawyer advertising not be false, deceptive or misleading. Truthful statements that are misleading are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication, considered as a whole, not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services, or about the results a lawyer can achieve, for which there is no reasonable factual foundation. For example, a lawyer might truthfully state, "I have never lost a case," but that statement would be misleading if the lawyer settled virtually all cases that the lawyer handled. A communication to anyone that states or implies that the lawyer has the ability to influence improperly a court, court officer, governmental agency or government official is improper under Rule 8.4(e).

[4] To be effective, advertising must attract the attention of viewers, readers or recipients and convey its content in ways that will be understandable and helpful to them. Lawyers may therefore use advertising techniques intended to attract attention, such as music, sound effects, graphics and the like, so long as those techniques do not render the advertisement false, deceptive or misleading. Lawyer advertising may use actors or fictionalized events or scenes for this purpose, provided appropriate disclosure of their use is made. Some images or techniques, however, are highly likely to be misleading. So, for instance, legal advertising should not be made to resemble legal documents.

[5] The "Attorney Advertising" label serves to dispel any confusion or concern that might be created when nonlawyers receive letters or emails from lawyers. The label is not necessary for advertising in newspapers or on television, or similar communications that are self-evidently advertisements, such as billboards or press releases transmitted to news outlets, and as to which there is no risk of such confusion or concern. An advertisement in a newspaper may nevertheless require the label if it is a paid article about a law firm adjacent to other articles written by the newspaper, where there is a reasonable risk that readers will confuse the two. The ultimate purpose of the label is to inform readers where they might otherwise be confused.

[6] Not all communications made by lawyers about the lawyer or the law firm's services are advertising. Advertising by lawyers consists of communications made in any form about the lawyer or the law firm's services, the primary purpose of which is retention of the lawyer or law firm for pecuniary gain as a result of the communication. However, noncommercial communications motivated by a not-for-profit organization's interest in political expression and association are generally not considered advertising. Of course, all communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law. By definition, communications

to existing clients are excluded from the Rules governing advertising. A client who is a current client in any matter is an existing client for all purposes of these Rules. (Whether a client is a current client for purposes of conflicts of interest and other issues may depend on other considerations. Generally, the term "current client" for purposes of the advertising exemption should be interpreted more broadly than it is for determining whether a client is a "current client" for purposes of a conflict of interest analysis.)

[7] Communications to former clients that are germane to the earlier representation are not considered to be advertising. Likewise, communications to other lawyers, including those made in bar association publications and other publications targeted primarily at lawyers, are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm. Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising. However, a newsletter, client alert, or blog that provides information or news primarily about the lawyer or law firm (for example, the lawyer or law firm's cases, personnel, clients or achievements) generally would be considered advertising. Communications, such as proposed retainer agreements or ordinary correspondence with a prospective client who has expressed interest in, and requested information about, a lawyer's services, are not advertising. Accordingly, the special restrictions on advertising and solicitation would not apply to a lawyer's response to a prospective client who has asked the lawyer to outline the lawyer's qualifications to undertake a proposed retention or the terms of a potential retention.

[8] The circulation or distribution to prospective clients by a lawyer of an article or report published about the lawyer by a third party is advertising if the lawyer's primary purpose is to obtain retentions. In circulating or distributing such materials the lawyer should include information or disclaimers as necessary to dispel any misconceptions to which the article may give rise. For example, if a lawyer circulates an article discussing the lawyer's successes that is reasonably likely to create an expectation about the results the lawyer will achieve in future cases, a disclaimer is required by paragraph (e)(3). If the article contains misinformation about the lawyer's qualifications, any circulation of the article by the lawyer should make any necessary corrections or qualifications. This may be necessary even when the article included misinformation through no fault of the lawyer or because the article is out of date, so that material information that was true at the time is no longer true. Some communications by a law firm that may constitute marketing or branding are not necessarily advertisements. For example, pencils, legal pads, greeting cards, coffee mugs, T-shirts or the like with the law firm name, logo, and contact information printed on them do not constitute "advertisements" within the definition of this Rule if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter.

Recognition of Legal Problems [9] The legal professional should help the public to recognize legal problems because such problems may not be self-revealing and might not be timely noticed. Therefore, lawyers should encourage and participate in

educational and public-relations programs concerning the legal system, with particular reference to legal problems that frequently arise. A lawyer's participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients. Such a program might be considered to be advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm. A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for nonlawyers should caution them not to attempt to solve individual problems on the basis of the information contained therein.

[10] As members of their communities, lawyers may choose to sponsor or contribute to cultural, sporting, charitable or other events organized by not-for-profit organizations. If information about the lawyer or law firm disseminated in connection with such an event is limited to the identification of the lawyer or law firm, the lawyer's or law firm's contact information, a brief description of areas of practice, and the fact of sponsorship or contribution, the communication is not considered advertising.

Statements Creating Expectations, Characterizations of Quality, and Comparisons [11] Lawyer advertising may include statements that are reasonably likely to create an expectation about results the lawyer can achieve, statements that compare the lawyer's services with the services of other lawyers, or statements describing or characterizing the quality of the lawyer's or law firm's services, only if they can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated and are accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome." Accordingly, if true and accompanied by the disclaimer, a lawyer or law firm could advertise "Our firm won 10 jury verdicts over $1,000,000 in the last five years," "We have more Patent Lawyers than any other firm in X County," or "I have been practicing in the area of divorce law for more than 10 years." Even true factual statements may be misleading if presented out of the context of additional information needed to properly understand and evaluate the statements. For example, a truthful statement by a lawyer that the lawyer's average jury verdict for a given year was $100,000 may be misleading if that average was based on a large number of very small verdicts and one $10,000,000 verdict. Likewise, advertising that truthfully recites judgment amounts would be misleading if the lawyer failed to disclose that the judgments described were overturned on appeal or were obtained by default.

[12] Descriptions of characteristics of the lawyer or law firm that are not comparative and do not involve results obtained are permissible even though they cannot be factually supported. Such statements are understood to be general descriptions and not claims about quality, and would not be likely to mislead potential clients. Accordingly, a law firm could advertise that it is "Hard-Working," "Dedicated," or "Compassionate" without the necessity to provide factual support for such subjective claims. On the

other hand, descriptions of characteristics of the law firm that compare its services with those of other law firms and that are not susceptible of being factually supported could be misleading to potential clients. Accordingly, a lawyer may not advertise that the lawyer is the "Best," "Most Experienced," or "Hardest Working." Similarly, some claims that involve results obtained are not susceptible of being factually supported and could be misleading to potential clients. Accordingly, a law firm may not advertise that it will obtain "Big $$$," "Most Money," or "We Win Big."

Bona Fide Professional Ratings [13] An advertisement may include information regarding bona fide professional ratings by referring to the rating service and how it has rated the lawyer, provided that the advertisement contains the "past results" disclaimer as required under paragraphs (d) and (e). However, a rating is not "bona fide" unless it is unbiased and nondiscriminatory. Thus, it must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service's economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated. Further, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered. For example, a rating service that purports to evaluate all lawyers practicing in a particular geographic area or in a particular area of practice or of a particular age must apply its criteria to all lawyers within that geographic area, practice area, or age group.

Meta-Tags [14] Meta-tags are hidden computer software codes that direct certain Internet search engines to the web site of a lawyer or law firm. For example, if a lawyer places the meta-tag "NY personal injury specialist" on the lawyer's web site, then a person who enters the search term "personal injury specialist" into a search engine will be directed to that lawyer's web page. That particular meta-tag is prohibited because Rule 7.4(a) generally prohibits the use of the word "specialist." However, a lawyer may use an advertisement employing meta-tags or other hidden computer codes that, if displayed, would not violate a Rule.

Advertisements Referring to Fees and Advances [15] All advertisements that contain information about the fees or expenses charged by the lawyer or law firm, including advertisements indicating that in the absence of a recovery no fee will be charged, must comply with the provisions of section 488(3) of the Judiciary Law. However, a lawyer or law firm that offers any of the fee and expense arrangements permitted by section 488(3) must not, either directly or in any advertisement, state or imply that the lawyer's or law firm's ability to advance or pay costs and expenses of litigation is unique or extraordinary when that is not the case. For example, if an advertisement promises that the lawyer or law firm will advance the costs and expenses of litigation contingent on the outcome of the matter, or promises that the lawyer or law firm will pay the costs and expenses of litigation for indigent clients, then the advertisement must not say that such arrangements are "unique in the area," "unlike other firms," available "only at our firm," "extraordinary," or words to that effect, unless that is actually the case. However, if the lawyer or law firm can objectively

demonstrate that this arrangement is unique or extraordinary, then the lawyer or law firm may make such a claim in the advertisement.

Retention of Copies; Filing of Copies; Designation of Principal Office [16] Where these Rules require that a lawyer retain a copy of an advertisement or file a copy of a solicitation or other information, that obligation may be satisfied by any of the following: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

[17] A law firm that has no office it considers its principal office may comply with paragraph (h) by listing one or more offices where a substantial amount of the law firm's work is performed.

RULE 7.2: PAYMENT FOR REFERRALS

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

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

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

(b) A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations that promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school;

(ii) operated or sponsored by a bona fide, non-profit community organization;

(iii) operated or sponsored by a governmental agency; or (iv) operated, sponsored, or approved by a bar association;

(2) a military legal assistance office;

(3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule; or

(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer;

(ii) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization;

(iii) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter;

(iv) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief;

(v) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations; and

(vi) Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

Comment

Paying Others to Recommend a Lawyer [1] Lawyers are not permitted to pay others for channeling professional work. Paragraph (a)(3), however, allows a lawyer to pay for advertising and communications permitted by these Rules, including the costs of print directory listings, online directory listings, newspaper ads, television and radio airtime, domain name registrations, sponsorship fees, banner ads and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, marketing personnel and web site designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[2] A lawyer may pay the usual charges of a qualified legal assistance organization. A lawyer so participating should make certain that the relationship with a qualified legal assistance organization in no way interferes with independent professional representation of the interests of the individual client. A lawyer should avoid situations in which officials of the organization who are not lawyers attempt to direct lawyers concerning the manner in which legal services are performed for individual members and should also avoid situations in which considerations of economy are given undue weight in determining the lawyers employed by an organization or the legal services to be performed for the member or beneficiary, rather than competence and quality of service.

[3] A lawyer who accepts assignments or referrals from a qualified legal assistance organization must act reasonably to ensure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. The lawyer must ensure that the organization's communications with prospective clients are in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a qualified legal assistance organization would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic or real-time interactive electronic contacts that would violate Rule 7.3.

[4] A lawyer also may agree to refer clients to another lawyer or a nonlawyer in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1, 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer must not pay anything solely for the referral, but the lawyer does not violate paragraph (a) by agreeing to refer clients to the other lawyer or nonlawyer so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. A lawyer may enter into such an arrangement only if it is nonexclusive on both sides, so that both the lawyer and the nonlawyer are free to refer clients to others if that is in the best interest of those clients. Conflicts of interest created by such arrangements are governed by Rule 1.7. A lawyer's interest in receiving a steady stream of referrals from a particular source must not undermine the lawyer's professional judgment on behalf of clients. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprising multiple entities.

[5] Campaign contributions by lawyers to government officials or candidates for public office who are, or may be, in a position to influence the award of a legal engagement may threaten governmental integrity by subjecting the recipient to a conflict of interest. Correspondingly, when a lawyer makes a significant contribution to a public official or an election campaign for a candidate for public office and is later engaged by the official to perform legal services for the official's agency, it may appear that the official has been improperly influenced in selecting the lawyer, whether or not this is so. This appearance of influence reflects poorly on the integrity of the legal profession and government as a whole. For these reasons, just as the Code prohibits a lawyer from

compensating or giving anything of value to a person or organization to recommend or obtain employment by a client, the Code prohibits a lawyer from making or soliciting a political contribution to any candidate for government office, government official, political campaign committee or political party, if a disinterested person would conclude that the contribution is being made or solicited for the purpose of obtaining or being considered eligible to obtain a government legal engagement. This would be true even in the absence of an understanding between the lawyer and any government official or candidate that special consideration will be given in return for the political contribution or solicitation.

[6] In determining whether a disinterested person would conclude that a contribution to a candidate for government office, government official, political campaign committee or political party is or has been made for the purpose of obtaining or being considered eligible to obtain a government legal engagement, the factors to be considered include (a) whether legal work awarded to the contributor or solicitor, if any, was awarded pursuant to a process that was insulated from political influence, such as a "Request for Proposal" process, (b) the amount of the contribution or the contributions resulting from a solicitation, (c) whether the contributor or any law firm with which the lawyer is associated has sought or plans to seek government legal work from the official or candidate, (d) whether the contribution or solicitation was made because of an existing personal, family or non-client professional relationship with the government official or candidate, (e) whether prior to the contribution or solicitation in question, the contributor or solicitor had made comparable contributions or had engaged in comparable solicitations on behalf of governmental officials or candidates for public office for which the lawyer or any law firm with which the lawyer is associated did not perform or seek to perform legal work, (f) whether the contributor has made a contribution to the government official's or candidate's opponent(s) during the same campaign period and, if so, the amounts thereof, and (g) whether the contributor is eligible to vote in the jurisdiction of the governmental official or candidate, and if not, whether other factors indicate that the contribution or solicitation was nonetheless made to further a genuinely held political, social or economic belief or interest rather than to obtain a legal engagement.

RULE 7.3: SOLICITATION AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

(a) A lawyer shall not engage in solicitation:

(1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or

(2) by any form of communication if:

(i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule;

(ii) the recipient has made known to the lawyer a desire not to be solicited by the lawyer;

(iii) the solicitation involves coercion, duress or harassment;

(iv) the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or

(v) the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

(b) For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions:

(1) A copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial district or judicial department wherein the lawyer or law firm maintains its principal office. Where no such office is maintained, the filing shall be made in the judicial department where the solicitation is targeted. A filing shall consist of:

(i) a copy of the solicitation;

(ii) a transcript of the audio portion of any radio or television solicitation; and

(iii) if the solicitation is in a language other than English, an accurate English-language translation.

(2) Such solicitation shall contain no reference to the fact of filing.

(3) If a solicitation is directed to a predetermined recipient, a list containing the names and addresses of all recipients shall be retained by the lawyer or law firm for a period of not less than three years following the last date of its dissemination.

(4) Solicitations filed pursuant to this subdivision shall be open to public inspection.

(5) The provisions of this paragraph shall not apply to:

(i) a solicitation directed or disseminated to a close friend, relative, or former or existing client;

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at a prospective client affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

(iii) professional cards or other announcements the distribution of which is authorized by Rule 7.5(a).

(d) A written solicitation shall not be sent by a method that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail or that requires a signature on the part of the recipient.

(e) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(f) Any solicitation made in writing or by computer-accessed communication and directed to a pre-determined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal need.

(g) If a retainer agreement is provided with any solicitation, the top of each page shall be marked "SAMPLE" in red ink in a type size equal to the largest type size used in the agreement and the words "DO NOT SIGN" shall appear on the client signature line.

(h) Any solicitation covered by this section shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

Comment

Solicitation [1] In addition to seeking clients through general advertising (either by public communications in the media or by private communications to potential clients who are neither current clients nor other lawyers), many lawyers attempt to attract clients through a specialized category of advertising called "solicitation." Not all advertisements are solicitations within the meaning of this Rule. All solicitations, however, are advertisements with certain additional characteristics. By definition, a communication that is not an advertisement is not a solicitation. Solicitations are subject to all of the Rules governing advertising and are also subject to additional Rules, including filing a copy of the solicitation with the appropriate attorney disciplinary authority (including a transcript of the audio portion of any radio or television solicitation and, if the solicitation is in a language other than English, an accurate English language translation). These and other additional requirements will facilitate oversight by disciplinary authorities.

[2] A "solicitation" means any advertisement: (i) that is initiated by a lawyer or law firm (as opposed to a communication made in response to an inquiry initiated by a

potential client), (ii) with a primary purpose of persuading recipients to retain the lawyer or law firm (as opposed to providing educational information about the law, see Rule 7.1, Comment [7]), (iii) that has as a significant motive for the lawyer to make money (as opposed to a public-interest lawyer offering pro bono services), and (iv) that is directed to or targeted at a specific recipient or group of recipients, or their family members or legal representatives. Any advertisement that meets all four of these criteria is a solicitation, and is governed not only by the Rules that govern all advertisements but also by special Rules governing solicitation.

Directed or Targeted [3] An advertisement may be considered to be directed to or targeted at a specific recipient or recipients in two different ways. First, an advertisement is considered "directed to or targeted at" a specific recipient or recipients if it is made by in-person or telephone contact or by real-time or interactive computer-accessed communication or if it is addressed so that it will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages). Advertisements made by in-person or telephone contact or by real-time or interactive computer-accessed communication are prohibited unless the recipient is a close friend, relative, former client or current client. Advertisements addressed so that they will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages) are subject to various additional rules governing solicitation (including filing and public inspection) because otherwise they would not be readily subject to disciplinary oversight and review. Second, an advertisement in public media such as newspapers, television, billboards, web sites or the like is a solicitation if it makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers. The term "specific incident" is explained in Comment [5].

[4] Unless it falls within Comment [3], an advertisement in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or recipients. For example, an advertisement in a public medium is not directed to or targeted at "a specific recipient or group of recipients" simply because it is intended to attract potential clients with needs in a specified area of law. Thus, a lawyer could advertise in the local newspaper that the lawyer is available to assist homeowners in reducing property tax assessments. Likewise, an advertisement by a patent lawyer is not directed or targeted within the meaning of the definition solely because the magazine is geared toward inventors. Similarly, a lawyer could advertise on television or in a newspaper or web site to the general public that the lawyer practices in the area of personal injury or Workers' Compensation law. The fact that some recipients of such advertisements might actually be in need of specific legal services at the time of the communication does not transform such advertisements into solicitations.

Solicitations Relating To a Specific Incident Involving Potential Claims for Personal Injury or Wrongful Death [5] Solicitations relating to a specific incident involving potential claims for personal injury or wrongful death are subject to a further restriction,

in that they may not be disseminated until 30 days (or in some cases 15 days) after the date of the incident. This restriction applies even where the recipient is a close friend, relative, or former client, but not where the recipient is an current client. A "specific incident" is a particular identifiable event (or a sequence of related events occurring at approximately the same time and place) that causes harm to one or more people. Specific incidents include such events as traffic accidents, plane or train crashes, explosions, building collapses, and the like.

[6] A solicitation that is intended to attract potential claims for personal injury or wrongful death arising from a common cause but at disparate times and places, does not relate to a specific incident and is not subject to the special 30-day (or 15-day) rule, even though it is addressed so that it will be delivered to specific recipients or their families or agents (as with letters, emails, express packages), or is made in a public medium such as newspapers, television, billboards, web sites or the like and makes reference to a specific person or group of people, see Comments [3]-[4]. For example, solicitations intended to be of interest only to potential claimants injured over a period of years by a defective medical device or medication do not relate to a specific incident and are not subject to the special 30-day (or 15-day) rule.

[7] An advertisement in the public media that makes no express reference to a specific incident does not become a solicitation subject to the 30-day (or 15-day) rule solely because a specific incident has occurred within the last 30 (or 15) days. Thus, a law firm that advertises on television or in newspapers that it can "help injured people explore their legal rights" is not violating the 30-day (or 15-day) rule by running or continuing to run its advertisements even though a mass disaster injured many people within hours or days before the advertisement appeared. Unless an advertisement in the public media explicitly refers to a specific incident, it is not a solicitation subject to the 30-day (or 15-day) blackout period. However, if a lawyer causes an advertisement to be delivered (whether by mail, email, express service, courier, or any other form of direct delivery) to a specific recipient (i) with knowledge that the addressee is either a person killed or injured in a specific incident or that person's family member or agent, and (ii) with the intent to communicate with that person because of that knowledge, then the advertisement is a solicitation subject to the 30-day (or 15-day) rule even if it makes no reference to a specific incident and even if it is part of a mass mailing.

Extraterritorial Application of Solicitation Rules [8] All of the special solicitation rules, including the special 30-day (or 15-day) rule, apply to solicitations directed to recipients in New York State, whether made by a lawyer admitted in New York State or a lawyer admitted in any another jurisdiction. Solicitations by a lawyer admitted in New York State directed to or targeted at a recipient or recipients outside of New York State are not subject to the filing and related requirements set out in Rule 7.3(c). Whether such solicitations are subject to the special 30-day (or 15-day) rule depends on the application of Rule 8.5.

In-Person, Telephone and Real-Time or Interactive Computer-Accessed Communication [9] Paragraph (a) generally prohibits in-person solicitation, which

has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and are regulated in the same manner. The prohibitions on in-person or telephone contact and by real-time or interactive computer-accessed communication do not apply if the recipient is a close friend, relative, former or current client. Communications with these individuals do not pose the same dangers as solicitations to others. However, when the special 30-day (or 15-day) rule applies, it does so even where the recipient is a close friend, relative, or former client. Ordinary email and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a web site that are not a live response are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication.

RULE 7.4: IDENTIFICATION OF PRACTICE AND SPECIALTY

(a) A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

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

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

(2) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "Certification granted by the [identify state or territory] is not recognized by

any governmental authority within the State of New York. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law."

Comment

[1] Paragraph (a) permits a lawyer to indicate areas of practice in which the lawyer practices, or that his or her practice is limited to those areas.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office.

[3] Paragraph (c) permits a lawyer to state that the lawyer specializes or is certified as a specialist in a field of law if such certification is granted by an organization approved or accredited by the American Bar Association or by the authority having jurisdiction over specialization under the laws of another jurisdiction provided that the name of the certifying organization or authority must be included in any communication regarding the certification together with the disclaimer required by paragraph (c).

RULE 7.5: PROFESSIONAL NOTICES, LETTERHEADS AND SIGNS

(a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following:

(1) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4. A professional card of a law firm may also give the names of members and associates;

(2) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4;

(3) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; or

(4) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or Rule 7.4. A letterhead of a law firm

may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(b) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "PC" or such symbols permitted by law, the name of a limited liability company or partnership shall contain "LLC," "LLP" or such symbols permitted by law and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. A lawyer or law firm may not include the name of a nonlawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to Rule 5.8 to provide legal and other professional services on a systematic and continuing basis include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith. A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;

(2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;

(3) the domain name does not imply an ability to obtain results in a matter; and

(4) the domain name does not otherwise violate these Rules.

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

Comment

Professional Status [1] In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status. Lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact, and thus lawyers should not hold themselves out as being a partners or associates if they only share offices.

Trade Names and Domain Names [2] A lawyer may not practice under a trade name. Many law firms have created Internet web sites to provide information about their firms. A web site is reached through an Internet address, commonly called a "domain name." As long as a law firm's name complies with other Rules, it is always proper for a law firm to use its own name or its initials or some abbreviation or variation of its own name as its domain name. For example, the law firm of Able and Baker may use the domain name www.ableandbaker.com, or www.ab.com, or www.able.com, or www.ablelaw.com. However, to make domain names easier for clients and potential clients to remember and to locate, some law firms may prefer to use terms other than the law firm's name. If Able and Baker practices real estate law, for instance, it may prefer a descriptive domain name such as www.realestatelaw.com or www.ablerealestatelaw.com or a colloquial domain name such as www.dirtlawyers.com. Accordingly, a law firm may utilize a domain name for an Internet web site that does not include the name of the law firm, provided the domain name meets four conditions: First, all pages of the web site created by the law firm must clearly and conspicuously include the actual name of the law firm. Second, the law firm must in no way attempt to engage in the practice of law using the domain name. This restriction is parallel to the general prohibition against the use of trade names. For example, if Able and Baker uses the domain name www.realestatelaw.com, the firm may not advertise that people buying or selling homes should "contact www.realestatelaw.com" unless the firm also clearly and conspicuously includes the name of the law firm in the advertisement. Third, the domain name must not imply an ability to obtain results in a matter. For example, a personal injury firm could not use the domain name www.win-your-case.com or www.settle-for-more.com because such names imply that the law firm can obtain favorable results in every matter regardless of the particular facts and circumstances. Fourth, the domain name must not otherwise violate a Rule. If a domain name meets the three criteria listed here but violates another Rule, then the domain name is improper under this Rule as well. For example, if Able and Baker are each solo

practitioners who are not partners, they may not jointly establish a web site with the domain name www.ableandbaker.com because the lawyers would be holding themselves out as having a partnership when they are in fact not partners.

Telephone Numbers [3] Many lawyers and law firms use telephone numbers that spell words, because such telephone numbers are generally easier to remember than strings of numbers. As with domain names, lawyers and law firms may always properly use their own names, initials, or combinations of names, initials, numbers, and legal words as telephone numbers. For example, the law firm of Red & Blue may properly use phone numbers such as RED-BLUE, 4-RED-LAW, or RB-LEGAL.

[4] Some lawyers and firms may instead (or in addition) wish to use telephone numbers that contain a domain name, nickname, moniker, or motto. A lawyer or law firm may use such telephone numbers as long as they do not violate any Rules, including those governing domain names. For example, a personal injury law firm may use the numbers 1–800-ACCIDENT, 1–800-HURT-BAD, or 1–800-INJURY-LAW, but may not use the numbers 1–800-WINNERS, 1–800–2WIN-BIG, or 1–800-GET-CASH. (Phone numbers with more letters than the number of digits in a phone number are acceptable as long as the words do not violate a Rule.) See Rule 7.1, Comment [12].

RULE 8.1: CANDOR IN THE BAR ADMISSION PROCESS

(a) A lawyer shall be subject to discipline if, in connection with the lawyer's own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:

(1) has made or failed to correct a false statement of material fact; or

(2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

Comment

[1] If a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission as well as that of another.

[2] This Rule is subject to the provisions of the Fifth Amendment to the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

RULE 8.2: JUDICIAL OFFICERS AND CANDIDATES

(a) A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Part 100 of the Rules of the Chief Administrator of the Courts.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. False statements of fact by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer may engage in constitutionally protected speech, but is bound by valid limitations on speech and political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(c) This Rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6; or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation to cooperate with authorities

empowered to investigate judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would result in violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to a tribunal or other authority empowered to investigate or act upon the violation.

[3A] Paragraph (b) requires a lawyer in certain situations to respond to a lawful demand for information concerning another lawyer or a judge. This Rule is subject to the provisions of the Fifth Amendment to the United States Constitution and corresponding provisions of state law. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in a bona fide assistance program for lawyers or judges. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) encourages lawyers and judges to seek assistance and treatment through such a program. Without such an exception, lawyers and judges may hesitate to seek assistance and treatment from these programs, and this may result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

RULE 8.4: MISCONDUCT

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on their behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for illegal conduct that indicates lack of those characteristics relevant to law practice. Violations involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice are illustrative of illegal conduct that reflects adversely on fitness to practice law. Other types of illegal conduct may or may not fall into that category, depending upon the particular circumstances. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice,

such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding. The assertion of the lawyer's constitutional rights consistent with Rule 8.1, Comment [2] does not constitute failure to cooperate. The conduct must be seriously inconsistent with a lawyer's responsibility as an officer of the court.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good-faith belief that no valid obligation exists.

[4A] A lawyer harms the integrity of the law and the legal profession when the lawyer states or implies an ability to influence improperly any officer or agency of the executive, legislative or judicial branches of government.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[5A] Unlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (g).

RULE 8.5: DISCIPLINARY AUTHORITY AND CHOICE OF LAW

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

(b) In any exercise of the disciplinary authority of this state, the Rules of Professional Conduct to be applied shall be as follows:

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

(2) For any other conduct:

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

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

Comment

Disciplinary Authority [1] It is longstanding law that the conduct of a lawyer admitted to practice in this state is subject to the disciplinary authority of this state. Extension of the disciplinary authority of this state to other lawyers who provide or offer to provide legal services in this state is for the protection of the citizens of this state. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See ABA Model Rules for Lawyer Disciplinary Enforcement, Rules 6 and 22. A lawyer who is subject to the disciplinary authority of this state under Rule 8.5(a) appoints an official to be designated by the Appellate Division to receive service of process in New York State. The fact that the lawyer is subject to the disciplinary authority of this state may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law [2] A lawyer may be potentially subject to more than one set of rules of professional conduct, imposing different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforwardly as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice-of-law rules, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long

as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this Rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice-of-law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between or among competent regulatory authorities in the affected jurisdictions provide otherwise.

Survey of Attorney Disciplinary Rules in the State and Federal Courts of New York with Comments

by
NYCLA's Committee on Professional Discipline∗[1]
November 12, 2005

INTRODUCTION

This report surveys the attorney disciplinary rules applicable to lawyers admitted to practice in the state and federal courts of New York who are charged with misconduct. The report summaries and compares the disciplinary rules of the four New York State Supreme Court Appellate Departments, the federal District Courts in New York and the United States Court of Appeals for the Second Circuit. Comprised of four principal sections, the report outlines the statutory and case law origins of the rules and presents in some detail the rules' components: the behavior that constitutes attorney misconduct, the sanctions imposed for misconduct and the procedures for determining whether it has occurred. Intended to help the Association's membership, the bar and the public to better understand the disciplinary process, the survey points out major procedural differences and, according to some commentators, legally significant variations in substantive rights the rules. Earlier this year, the Committee sponsored a Symposium on the question of whether the differences should be resolved through unified statewide attorney disciplinary rules. The Symposium was attended representatives of each of the four Appellate Department Presiding Justices, grievance committee prosecuting counsel, respondents' defense counsel, academics specializing in legal ethics and New York State and NYCLA bar association ethics committee representatives. The Committee's report on the Symposium and its comments on and recommendations regarding the rules and the question of unification will be issued in the future.

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1 ∗This report is solely that of the Committee on Professional Responsibility, has not been approved by the Board of Directors of the New York County Lawyers' Association and does not necessarily represent the views of the Board.

BACKGROUND

Although The New York Law Journal regularly reports the outcomes of proceedings disciplining attorneys, many practitioners are not familiar with the rules governing the disciplinary processes involved. Yet some attorneys must counsel or represent colleagues in disciplinary matters, and other attorneys find themselves personally facing such proceedings. Even those attorneys not directly involved in the process should be familiar with the rules concerning attorney misconduct, if only to have an informed framework for guiding their own behavior. This report seeks to provide some basic information regarding the salient features of state and federal disciplinary processes. The rules examined include those of the New YorkState Supreme Court Appellate Division's four Departments, the four federal District Courts in New York State, and the United States Court of Appeals for the Second Circuit, which has appellate jurisdiction of New York cases. The report also offers some recommendations concerning issues of procedure and substance to which the rules give rise.

1. THE SCOPE OF THE REPORT

a. Survey of State and Federal Court Local Rules for Disciplining Attorneys for Violations of Ethical Standards

The focus of this survey is on court disciplinary rules imposed on attorneys for ethical violations. These rules have been promulgated pursuant to what has been identified as 1) a state's natural authority to control who will be admitted to practice law in that state and 2) the federal government's constitutional authority to determine who will practice in its courts.

b. Ethical Conduct Rules Distinguished from Statutes and Rules Sanctioning Attorney Litigation Misconduct

These rules are different from the rules, statutes, and common law obligations directly imposed by the courts that control acts committed during litigation. Although violation of such rules or obligations may form the substantive basis for misconduct charges and can result in referrals to state or federal disciplinary bodies, consideration of them is beyond the scope of this report. Not addressed here, for example, are provisions under Rule 11 of the Federal Rules of Civil Procedure (sanctions available against attorney for factual or legal misrepresentations to the court) or Rule 37 thereof (sanctions for failure to make disclosure or cooperate in discovery), or 28 U.S.C. § 1927 (2004) (counsel liability for multiplying legal proceedings in a case due to unreasonable, vexatious conduct); or under Federal Rule of Appellate Procedure 38 (sanctions for filing a frivolous appeal); or under 22 NYCRR § 130-1 (awards of costs and imposition of financial sanctions for frivolous conduct in civil litigation), New York Civil Practice Law and Rules §8110 (fiduciary to pay costs personally for mismanagement or bad

faith in the prosecution or defense of an action), or various other contempt or legal malpractice proceedings under state or federal law.

2. WHAT CONDUCT IS SUBJECT TO DISCIPLINE?

a. Division of the Report into Three Parts:Types of Sanctionable Conduct, Range of Sanctions, and Procedures to Determine Sanctionability and Relief from Sanctions

This examination of attorney disciplinary processes is, for greater ease of comprehension, divided into three parts. The first part reviews the types of conduct that are sanctionable. The second covers the range of sanctions available, and the third covers the procedures used to determine whether specific conduct was sanctionable. Before proceeding, however, the basis of the courts' authority to make disciplinary rules ought to be considered.

b. Background Sources of the Courts' Misconduct Rule Making Authority

(1) "Inherent, [Self]-contained" Authority to Protect the Public from Attorneys Who No Longer "[A]dvance the Ends of [J]ustice" The United States Supreme Court has given both state and federal courts the power to determine who may practice before them and has permitted them to promulgate rules controlling practitioner conduct inside and outside the courthouse. Such power is said to arise from an "inherent, self contained" authority a court has to protect the public by removing an attorney who no longer fulfills the duty imposed on an attorney as an officer of the court—the duty to serve as an agent advancing the ends of justice. Theard v. United States, 354 U.S. 278, 281 (1957) (Frankfurter, J.), citing People ex rel. Karlin v. Culkin, 248 N. Y. 465, 470-71, 162 N. E. 487, 489 (1928) (Cardozo, C. J.) ("Membership in the bar is a privilege burdened with conditions . . . The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.").

A disciplinary proceeding does not function as a civil action. A private person or attorney has no right to bring or participate in one. Its purpose is not to litigate a civil cause of action seeking damages or other relief against an attorney.[2] Nor is it a criminal prosecution, since its goal is not to "punish" the attorney but to prevent harm to the legal system by determining whether the attorney (who as an officer of the court bears

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2 Cf. infra note 7. However, the Lawyers' Fund for Client Protection, pursuant to Judiciary Law § 468-b, provides reimbursement of losses caused by the dishonest conduct of attorneys admitted to practice in New York. The Fund, represented by the New York State Attorney General's Office in collaboration with its own legal staff, seeks to collect restitution from offending lawyers.

responsibility for upholding and protecting the system) should be sanctioned for conduct that breaches the rules. Jawa v. Rome Developmental Disability Services, 1999 WL 288661, at *4 (N.D.N.Y.). Accord In re Singer, 290 A.D.2d 197, 738 N.Y.S. 2d 38, 40 (1st Dep't 2002)(In determining appropriate sanction for attorney, court must bear in mind purpose of disciplinary procedure is not to punish but to determine fitness of an officer of the court to serve protect the courts and the public from unfit attorneys.).

(2) General Rules Applicable to Both State and Federal Courts and Variations Among Them The general terms and conditions pursuant to which attorneys may be sanctioned have been stated in the decisions of the United States Supreme Court and those of other courts.[3] In New York, the rules that state and federal courts have adopted to govern the conduct of attorneys vary from one another sufficiently to benefit from an explanation of their differences.

The rules differ in several respects both between the state and federal courts and among the four state court appellate division departments authorized to discipline attorneys[4] as well as among the four federal district courts in the state[5] and the Court of Appeals for the Second Circuit. These variations will be explored in this report.

c. Misconduct Under State Law And Rules

(1) The Primary Rules In addition to the New York State courts' inherent authority to control attorney conduct, see footnote 2, the authority is set out in statute. Jud. L. § 90 (granting the Supreme Court the power to discipline attorneys); see also Jud. L. § 487 (Misconduct by attorneys). New York Judicial Law Section 90 grants the State Supreme

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3 In re Ruffalo, 390 U.S. 544, 551 (1968) (attorney in disciplinary proceeding entitled to procedural due process including fair notice of charges and an opportunity for a hearing of the attorney's explanation and defense); Theard v. United States, 354 U.S. 278, 282(1957) (same); Bradley v. Fisher, 80 U.S. 335, 354-55 (1872) (attorney faced with disbarment entitled as a rule of "natural justice" to notice of the grounds for complaint and ample opportunity to explain and defend), cited in Committee on the Federal Courts, Procedural Rights of Attorneys Facing Sanctions, 40 The Record of the Association of the Bar of the City of New York 313, 316-17 (1985); In re Gouiran, 58 F. 3d 54, 57(2d Cir. 1995) (the state and federal judiciary have autonomous control over the conduct of their officers); In re Wong, 275 A. D. 1, 710 N.Y.S. 2d 57, 60 (1st Dep't 2000) (the Appellate Division, as a separate branch of government, retains inherent authority to discipline attorneys practicing before it for misconduct independent of any authority granted by statute).

4 New York, atypically among the states, places authority to discipline attorneys in its intermediate appellate courts, rather than its highest court. Gary L. Casella, The Esoteric World of Attorney Discipline, 16 Westchester B. J. 177, Summer 1989, cited in David M. Appell, Note, Attorney Disbarment Proceedings and the Standard of Proof, 24 HofstraL. Rev. 275, 279 n. 36 (1995).

5 The District Courts for the Southern and Eastern Districts of New York, however, have promulgated joint substantive and procedural disciplinary rules, which have eliminated such differences. Differences have been partially eliminated among the appellate division departments by statute and the joint Disciplinary Code of Professional Responsibility. See discussion in Section 1(c)(1) below.

Court the power to discipline attorneys, authorizing whichever of the Appellate Division's four departments admitted the attorney to sanction him or her for misconduct.[6] The Appellate Departments have promulgated joint Disciplinary Rules of the Code of Professional Responsibility, effective September 1, 1990, codified at 22 NYCRR Part 1200.[7] In 1996, the departments approved amendments to the joint rules to permit the disciplining of law firms for misconduct;[8] New York was the first state to allow disciplining of firms.[9] There is no agreement among the departments, however, regarding the manner in which firms should be sanctioned for violations.[10] Additional revisions to Part 1200 were promulgated in 1999 and 2001.

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6 Jud. L. § 90 provides in relevant part that an appellate division department is "authorized to censure, suspend from practice or remove from office any attorney [admitted to practice in the department] guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice." Id. § 90(2); see In re Race, 296 A.D.2d 162, 169, 744 N.Y.S. 2d 29, 31(1st Dep't 2002) (mere utterance by attorney of fabricated story to police twenty-four years ago was conduct prejudicial to the administration of justice, even if it did not hinder the police investigation). An attorney may also be sanctioned for failure to participate in paternity or child support proceedings or failure to meet child support obligations. Id. § 90(2-a). Under § 487, an attorney who 1) commits deceit or collusion, or consents to the same, with intent to deceived the court or a party, or 2) willfully delays her client's suit for personal gain or willfully receives any money or other payment for or on account of any funds he or she has not laid out, commits a misdemeanor. In addition to punishment for the misdemeanor, the attorney is subject to forfeiture of treble damages to the injured party in a civil suit. New York City Transit Authority v. Morris J. Eisen, P.C., 276 A.D.2d 78, 715 N.Y.S. 2d 232, 237-38 (1st Dep't 2000) (attorneys in state civil action for treble damages collaterally estopped from relitigating federal jury findings in a racketeering suit against them that they committed deceit and collusion when they presented false evidence in personal injury suits).

7 "The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Id., Preliminary Statement.

8 22 NYCRR §§ 1200.3(a) [DR 1-102] and 1200.5 [DR 1-105]. The amended 22 NYCRR § 1200.3(a) provides that a lawyer or law firm shall not 1) violate a disciplinary rule, 2) circumvent a disciplinary rule through actions of another, 3) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness to practice, 4) engage in conduct involving dishonesty, fraud or misrepresentation, 5) engage in conduct that is prejudicial to the administration of justice, 6) unlawfully discriminate in one's practice of law, 7) engage in any other conduct that adversely reflects on the fitness as a lawyer. Section 1200.5 requires a law firm and its attorneys with management and supervisory authority to make reasonable efforts to ensure that all attorneys in the firm conform to the disciplinary rules; the firm must adequately supervise the work of partners, associates and non-lawyers who work at the firm, taking into account such factors as the level of experience and the extent to which ethical problems are likely to arise in a matter. In addition, under § 1200.5, a lawyer is responsible for a rule violation by another lawyer whom she retained or employed. The lawyer is also responsible for the conduct of retained or employed non-lawyers that would be a violation if committed by a lawyer. A lawyer must comply with the disciplinary rules not withstanding that she acted at the direction of another person. A subordinate lawyer does not violate the rules if she acts in accordance with a supervisory attorney's reasonable resolution of an arguable question of professional duty. Id.

9 Connors, Professional Responsibility, 47 Syracuse L. Rev. 655, 676-78 (1997).

10 See Connors, supra note 7, at 676-77, citing Edward A. Adams, New Rule Authorizes Discipline of Firms, N. Y. L. J., June 4, 1996, at 1, speculating that, among the issues that prevented

(2) Misconduct Sanctions for Culpable Acts Committed Outside the Practice of Law Misconduct may be found even if the culpable acts occurred outside the practice of law, e.g., in In re Race, 296 A.D.2d at 169, 744 N.Y.S. 2d at 31(fabricated story told to police); Matter of Burns, 242 A.D.2d 49, 672 N.Y.S. 2d 321 (1st Dep't 1998)(failure to file income tax returns); Matter of Wong, 241 A.D.2d 297, 672 N.Y.S. 2d 323 (1st Dep't 1998)(filing false insurance claims); Matter of Whelan, 169 A.D.2d 71, 571 N.Y.S. 2d 774 (2d Dep't 1991)(drunk driving), all cited in Patrick M. Connors, Practice Commentaries, McKinney's Judiciary Law § 90 (2003).

(3) Rules in the First Department of the Supreme Court, Appellate Division In the First Department, New York Supreme Court, Appellate Division, the disciplinary rules apply to attorneys who are admitted to, practice in, reside in, commit acts in or who have offices in the department, whether the attorney practices as an individual, with a firm, with the government, or as in-house counsel to a corporation or other entity. 1st Dep't R. § 603.1(a).

The Department's detailed rules provide that misconduct subject to disciplinary action occurs when there is a violation of any of the following: 1) Judiciary Law §90(2); 2) the Department's own rules governing the conduct of attorneys; 3) the requirement that one conduct oneself, both professionally and personally, in conformity with the standards of conduct imposed upon members of the bar; 4) any Disciplinary Rule of the Code of Professional Responsibility as adopted by the New York State Bar Association, effective January 1, 1970, as amended; 5) with respect to conduct occurring on or before December 31, 1969, any Canon of the Canons of Professional Ethics as adopted by the New York State Bar Association; 6) with respect to conduct occurring on or after September 1, 1990, any of the disciplinary rules adopted by the Appellate Divisions, effective September 1, 1990; 7) decisional law; or 8) special rules regarding decorum. 1st Dep't R. §§ 603.2, 605.2(10), 605.4.

Section 1200.3(a) [DR 1-102] of the Disciplinary Rules applies to firms, including but not limited to professional legal corporations, limited liability companies, law partnerships and qualified legal assistance corporations. 22 NYCRR §§ 1200.1(b), 1200.3(a). However, in the First Department, the term "firm" more specifically applies to any law firm "that has a member, employs, or otherwise retains a lawyer or legal consultant[,]" where the "firm is the object of an investigation or prosecution of alleged violation of the Code of Professional Responsibility." 1st Dep't R. §§ 603.1(b), 605.1(c).

(4) Rules in the Second Department The Second Department's misconduct rules apply to "all" attorneys who are admitted to practice in, reside in, commit acts in, or who have offices in the Second Department, or who are admitted by another court and regularly practice in the Department or who have been admitted by another court and participate in Second Department court proceedings whether admitted pro hac vice or

promulgation of rules for misconduct sanctions against firms, the departments were unable to resolve disagreements over whether they had authority to impose monetary penalties.

not. 2d Dep't R. § 691.1(a). Unlike the First Department, there is no reference to or special definition of firms.

The Second Department's definition of misconduct is more general than the First Department's. An attorney is deemed guilty of professional misconduct in the department, within the meaning of Jud. L. § 90(2), for failure to conduct him or her self "either professionally or personally, in conformity with the standards of conduct imposed on members of the bar as conditions for the privilege to practice law." Attorneys may also be disciplined for violation of 1) any disciplinary rule of the Code of Professional Responsibility adopted by the Appellate Divisions, effective September 1, 1990, 2) any canon of the Canons of Professional Ethics adopted by the New York State Bar Association, and 3) any other standard of attorney conduct announced by the Second Department. 2d Dep't R. § 691.2. Unlike the First Department, the Ethical Canon's applicability is not restricted to the period before January 1, 1970.

(5) Rules in the Third Department The Third Department's more general grounds for discipline, contained in its "Professional Misconduct Defined" section, 3d Dep't R. § 806.2, apply to attorneys who are admitted to practice by the department, reside in, or have an office in, are employed in, or transact business in the Third Department. Like the Second Department, the rules contain no provisions expressly applicable to firms. Id. § 806.1. An attorney is deemed to commit professional misconduct in violation of Jud. L. § 90(2) by 1) failing to conduct him or herself according to "the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law," 2) violating the 1990 joint Appellate Division disciplinary rules, or 3) violating "any other rule or announced standard of the court." 3d Dep'tR. § 806.2. The department rules do not expressly make violation of a provision of the Canon of Professional Ethics a misconduct predicate.

(6) Rules in the Fourth Department The Fourth Department's rules of professional misconduct apply to all attorneys who are admitted to practice in, have offices in, or practice in the department. 4th Dep't R. § 1022.1. The Department's misconduct rules are the most general of all. Under them, a violation of any disciplinary rule of 22 NYCRR Part 1200 or any other rule or announced standard of the Appellate Division constitutes professional misconduct within the meaning of Judiciary Law § 90(2). 4th Dep't R. § 1022.17. The rules make no reference to firms, or to the State Bar Association's Canon of Professional Ethics.

(7) Appellate Department Misconduct Definition Differences Discussed Compared to the First Department's detailed provisions requiring the application of the version of the rules in effect at the time the conduct in question occurred, the Second, Third, and Fourth Departments grounds for discipline are largely chronologically un-nuanced. This lack of chronological specificity suggests that extra care is needed in notices of charges from these departments to avoid due process problems.

It is noteworthy that unlike the other departments', the Second Department's grounds for discipline can be based on the New York State Bar's Canon of Professional Ethics for periods on or after September 1, 1990, the date the Appellate Division

adopted the joint Disciplinary Rule. The rules do not include the Canon. Authoritative commentators have described the Canon as "aspirational" and "not mandatory."[11]

(8) Applying Misconduct Rules in a Complex Case A review of the case of In re Wong, 275 A.D.2d 1, 710 N.Y.S. 2d 57(1st Dep't 2000) is useful in seeing how the range of rules may be applied in a difficult case. Wong involved an attorney whom the First Department disciplined for conduct that occurred in New Jersey in 1986 (sexually touching a 10 year old girl) prior to his New York admission in 1988 (and prior to his New Jersey admission in 1989). The attorney pleaded guilty in New Jersey to a felony in 1994. The misconduct only came to the attention of New York disciplinary authorities in 1999 after the attorney was disciplined by New Jersey. Although the court noted that the behavior took place before the attorney's admission in New York, it held that it was not barred from applying its rule permitting discipline of an attorney for misconduct in a foreign jurisdiction whenever it occurred. This was so, the court held, because it retained inherent authority pursuant to 1) its rule allowing it to impose any other sanction authorized by law, including the power to discipline for misconduct independent of violations of New York's Code of Professional Responsibility, and 2) the court's inherent duty to protect the public and maintain its own integrity by insuring that an attorney is fit to practice in its jurisdiction. Id. at 4-7, 710 N.Y.S. 2d at 60-61.

d. Misconduct Under Federal Law And Rules

(1) Sources of Authority

The federal trial and appellate courts have, as do the state courts, an "inherent, self contained power" to sanction attorneys, a power derived from "the attorney's role as an officer of the court which granted admission." In re Snyder, 472 U.S. 634, 643 (1985). Based on this inherent power and powers granted by statute pursuant to 28 U.S.C. § 2071 and the Federal Rules of Civil and Appellate Procedure (that provide the courts with authority to make local rules for the control of their business), the federal district courts and circuit courts of appeal have promulgated disciplinary rules controlling the conduct of attorneys practicing in them. Id. § 2071(a); Fed. R. Civ. P. 83;

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11 Roy D. Simon. The 1999 Amendments to the Ethical Considerations in New York's Code of Professional Responsibility, 29 Hofstra L. Rev. 265, 266 (2000); Stephen Krane, Regulating Attorney Conduct, Past, Present and Future, 29 Hofstra L. Rev. 247, 248 (2000). Mr. Krane, a former President of the New York State Bar Association,has remarked that the American Bar Association's ("ABA's") Model Canon, its Model Code, and subsequent Model Rules show a movement from a mere "aspirational guide" in the 1908 Canon, to a combination of aspiration and discipline in the 1969 Code (adopted with amendments by the New York State Bar Association) and finally to a more rigid ethical framework in the 1983 ABA Rules (some of which was incorporated into the New York State Code of Professional Responsibility that was eventually adopted by the Appellate Departments in 1990 and codified at 22 NYCRR Part 1200). In Krane's view, the Canons are so vague that their use as a basis for imposing discipline would violate due process and they may be safely ignored. Id. at 252-53. Professor Simon argues that nonetheless the courts look to the Canons to help them interpret the Disciplinary Rules.

Fed. R. App. P. 47 (Authorizing each Circuit Court of Appeals to make and amended local rules governing its practice).

(2) Federal Appellate Disciplinary Rules Pursuant to Fed. R. App. P. 46(b), a member of a circuit court's bar may be suspended or disbarred if 1) the member has been suspended or disbarred from practice by another federal or state court or 2) the member is "guilty of conduct unbecoming a member of the court's bar." Id. 46(b)(1). In addition, an attorney who is not a member of the court's bar but practices in the court may be disciplined for conduct unbecoming a member of the bar or for failure to comply with a court rule. Id. 46(c); Snyder, 472 U.S. at 644. The phrase "conduct unbecoming a member of the bar" is interpreted in the light the "'complex code of behavior"' to which attorneys are subject, i.e., "'conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and "the lore of the profession," as embodied in codes of professional conduct."' 472 U.S. at 644-45 (citations omitted).

(3) Court of Appeals for the Second Circuit Rules Under 2d Cir. R. 46, promulgated pursuant to Fed. R. App. P. 46 and 47, an attorney suspended or disbarred from practice by any other federal or state court of record will be automatically suspended or disbarred on comparable terms by the circuit court, unless the sanction is modified or reversed by the court. 2d Cir. R. 46(f). An attorney may also be suspended if convicted of a serious crime, regardless of the pendency of an appeal. A serious crime is defined as any federal or state felony and any lesser crime an element of which constitutes a) interference with the administration of justice, b) false swearing, c) misrepresentation, d) fraud, e) willful failure to file income tax returns, f) deceit, g) bribery, h) extortion, i) misappropriation, j) theft, or k) an attempt to, conspiracy to, or solicitation of another to commit a serious crime. Id. 46(g)(2). Pursuant to 2d Cir. R. 46(h)(2), the court may refer to the court-appointed Committee on Admissions and Grievances[12] accusations and evidence of conduct that violates professional disciplinary rules of the State or jurisdiction where the attorney has his or her principal office. The committee may investigate, hear, and report on the charges as directed by the court. Id.

(4) Local Rules in New York's Federal District Courts The federal district courts in New York have promulgated local rules pursuant to Fed. R. Civ. P. 83(a)(1).

(5) Joint Local Rules of the Southern and Eastern Districts of New York The district courts for the Southern and Eastern Districts of New York, which divide jurisdiction of New York City and the New York counties north and east of the city within commuting distance,[13] have found that joint court rules best serve the interests of counsel,

12 The committee is composed of seven members of the bar and a non-voting bar member who is the committee's Secretary, all of whom are appointed by the court. 2d Cir. R. 46(h)(1).

13 The Southern District comprises the counties of Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, and Westchester and concurrently with the Eastern District, the waters

many of whom practice in both districts.[14] Over the years these courts have successfully coordinated rule making, rule revisions and amendments, while taking into account any of the courts' differing needs and perspectives on particular issues. An extensive recasting of the joint rules took place in April 1997. L. Civ. R. 1.5 provides for attorney discipline.[15] Id.

Pursuant to L. Civ. R. 1.5, each district has a Committee on Grievance, composed of judges from the district, that determines by clear and convincing evidence whether an attorney has violated the rule. Grounds for discipline or other relief occur when the attorney 1) has been convicted of a felony or misdemeanor by any federal, state, or territorial court, 2) has been disciplined by any federal, state, or territorial court, 3) has resigned from any federal, state, or territorial court while under investigation into allegations of misconduct, 4) is under an infirmity which prevents the practice of law, 5) in connection with activities in district court, has violated the New York State Lawyer's Code of Professional Responsibility as adopted by the New York Appellate Divisions, as interpreted by the United States Supreme Court, the United States Court of Appeals for the Second Circuit and the district court,[16] or 6) has appeared in district court without permission when not a member of the court's bar. Id.

(6) Northern District of New York Rules Under the Northern District of New York's L. P. R. 83.4, Discipline of Attorneys, the Chief Judge is in charge of disciplining members of the bar of the court. Id. 83.4(a). A member convicted of a felony in any state, territorial, or district court must be suspended from practice in the district court, and she is disbarred when the conviction becomes final.[17] Id. 83.4(b). A member who resigns from the bar of the court while an investigation into allegations of misconduct is pending in any state, territorial, or district court is barred from practicing in the court. Id. 83.4(c). A member of the Northern District bar disciplined by any state, territory, or district court will be disciplined by the district court to the same extent, except if a) the record shows that the other proceeding so lacked notice or opportunity to be heard as to violate due process, b) there was a clear lack of proof establishing misconduct, c) imposition of the same discipline would result in a grave injustice,

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within the Eastern District. The Eastern District comprises the counties of Kings, Nassau, Queens, Richmond, and Suffolk and concurrently with the Southern District, the waters within the counties of Bronx and New York.

14 See infra note 4 for a discussion of the joint Southern/Eastern District of New York rules.

15 NYCLA Professional Responsibility Committee member Igou M. Allbray, as a member of the Joint Southern District Eastern District Rules Committee, participated in that committee's drafting of the revised joint local rules adopted by those courts.

16 The adoption by the two district courts of the Appellate Division's New York State Lawyer's Code of Professional Responsibility has tended to regularize and minimize the number of rules to which attorneys practicing in these courts are expected to conform their conduct. The rule makes clear that federal law as applied by the two courts, the Second Circuit and the Supreme Court control the interpretation of the New York code. Conflicts between the state rules and the federal rules are resolved pursuant to the U.S. Constitution's Supremacy Clause, art. VI, cl. 2.

17 The term "final" typically means that either the time to appeal has lapsed or that the conviction has been affirmed on appeal. See, e.g., W.D.N.Y. Local Rule of Civil Procedure 83.3(b)(2), discussed below.

or d) the misconduct has been held by the Northern District to warrant substantially different discipline. Id. 83.4(d).

A member of the Northern District bar convicted of a misdemeanor by any state, territory, or district court may be disbarred, suspended, or censured. Id. 83.4(e). An attorney disbarred or suspended for a period by the state that admitted him or her will be similarly disbarred or suspended from practice in the Northern District. Id. 83.4(f). An attorney admitted to the court's bar may also be disciplined "for cause" after a hearing. Id. 83.4(g). A visiting attorney permitted to practice in a particular case found guilty of misconduct shall be barred from appearing again, and the court clerk will notify the court to which the attorney was admitted. Id. 83.4(h). In a recent amendment, the court has replaced its L. P. R. 83.4 (j) (which called for enforcement of the ABA Code of Professional Responsibility) with a version similar to Southern/Eastern District L. Civ. R. 1.5(b). Pursuant to the revision, the court enforces the New York Code of Professional Responsibilities as adopted from time to time by the Appellate Division as interpreted by the Second Circuit.[18]

(7) Western District of New York Rules Under the Western District of New York's Discipline of Attorneys local rule, L. R. Civ. P. 83.3, an attorney admitted to practice in the district may be disbarred or otherwise disciplined "for cause" after a hearing. Id. 83.3(a). An attorney convicted of a felony will be suspended from practice.[19] When the felony conviction becomes final, the attorney will be disbarred. Id. 83.3(b). An attorney admitted to practice in the district that has been suspended, disbarred or disciplined in any district, state or territory, or who has resigned from the bar of any such court while an investigation into misconduct allegations is pending, shall be similarly disciplined in the Western District. Id. 83.3(c). The court has eliminated the former L. R. Civ. P. 83.3(c) (2002), which provided for the enforcement of the American Bar Association's Code of Professional Responsibility as adopted by the New York Bar Association. No other disciplinary code or provision replaced this one.

(8) New York Federal District Courts' Cross-Adoption of Their Local Disciplinary Rules Considered The Joint Southern and Eastern Joint Rules are the result of long-standing coordination between the benches and bars of both courts. Reported district and circuit court cases arising under the local joint disciplinary rules show no divergences of results or differences in interpretation or application of the joint rules. Elements of the joint rules have been adopted by the two other New York district courts. Compare N.D.N.Y. District L. P. R. 83.4(j) (2002) and L. P. R. 83.4(j) (2003) with S.D.N.Y./E.D.N.Y.L. Civ. R. 1.5(b)(5), and W.D.N.Y.L. Civ. P. R. 83.3(b)

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18 The Southern/Eastern District rule is broader. It provides for the interpretation of the Appellate Division's disciplinary rules under federal law as pronounced by the Supreme Court, the Second Circuit Court of Appeals and the district court itself.

19 A felony is defined as any criminal offense classified as a felony under federal or New York law, or a criminal offense committed in any other state, commonwealth or territory classified as a felony there, which if committed in New York would constitute a felony in New York. L. R. Civ. P. 83.3(b)(3).

(2002). Compare also W.D.N.Y.L. Civ. P. R. 83.3(b)-(c) with S.D.N.Y./E.D.N.Y.L. Civ. R. 1.5(d)(1). However, the Western District has dropped its former adoption of the New York State Bar Association Code, L. Civ. P. R. 83.3(c) (2002), without any replacement.

(9) New York Federal District Courts' Adoption of State Court Disciplinary Rules Considered The practice of "wholesale" adoption of state bar rules of conduct by the federal courts has been severely criticized on grounds that the bar rules are often "extremely imprecise," vague, and ambiguous and simply defer rulemaking to the court on a case-by-case basis. According to this view, because disciplinary cases arise only sporadically, such rules, derived from specific cases, are not likely to gain the respect of attorneys. Further, according to this view, systematic authoritative standards of conduct may never be developed based on them.[20] However, provisions like those of New York's Judiciary Law §§ 90 and 487 and the Appellate Division disciplinary rules (adopted by three of the New York federal district courts) appear to meet much of this criticism in that they more precisely describe and provide clearer notice of prohibited conduct.[21]

3. KINDS OF PENALTIES IMPOSED FOR MISCONDUCT

a. Variations in the Range of Penalties Among the State and Federal Courts

The different Appellate Division departments show some variation in the range of punishments meted out for misconduct, although all start necessarily (although sometimes not expressly) from the three basic types provided by § 90 of the Judiciary Act—censure, suspension, and disbarment. The First, Second, and Third Departments' rules also provide a range of lesser penalties. In the federal system, the Southern/Eastern District Courts' local rules provide a wider range of sanctions than do those of the Northern and Western District Courts or the Court of Appeals for the Second Circuit (which has the fewest).

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20 Green, Whose Rules Of Professional Conduct Should Govern Attorneys And How Should They Be Created, 64 Geo. Wash. L. Rev. 460, 467-68 (1996). Professor Green attacks adoption in the federal courts of the ABA's most recent version of the rules, the Rules of Professional Conduct, or adoption of the disciplinary rules of the state in which a federal district court is located on vagueness grounds. He proposes a single set of detailed national rules.

21 The Northern District L. P. R. 83.4(g) and the Western District L. R. Civ. P. 83.3(a) define much misconduct broadly through "for cause" provisions. See discussion of the United States Supreme Court's effort to give content to like provisions at section 2(c) above.

b. State Court Penalties For Misconduct:Generally

(1) Authority Accorded Each Appellate Division Department to Censure, Suspend, or Disbar An Attorney Admitted to Practice in New Jud. L. § 90 grants each Appellate Division Department the authority to censure, suspend from practice for a period of time, or remove from office any attorney admitted to practice in New York who is guilty of "professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice . . ." Id. § 90(2).[22] Suspension or disbarment by the Appellate Division operates as a suspension or removal from practice from every court of the state. Id. § 90(3). Violation of a sanctions order is punishable as contempt of court. An admitted attorney will be disbarred on presentation of a certified copy of the record of conviction for a felony by a New York court or if convicted of a felony by a federal court or any state court where the crime would constitute a felony in New York. Id. §§ 90(4)-(b), (e). The burden is on the convicted attorney to file the certificate. Failure of the attorney to do so is deemed a separate act of misconduct by the attorney. Id.

An attorney convicted in another jurisdiction of a "serious crime,"[23] not a felony under New York law, will be suspended from practice until the conviction becomes final. On notice that the conviction by the other court has become final, the Appellate Division will order the attorney to show cause why an order of suspension, censure, or removal from office should not be made. Id. §§ 90(4)(f)-(g). The attorney may request a hearing pursuant to the show cause order, which, if granted, will be conducted by a justice, judge, or referee who will issue a report and recommendation. For good cause shown on the attorney's or on the Appellate Division's own motion, the court may set aside a suspension if it appears consistent with maintenance the "integrity and honor of the profession, the protection of the public and the interest of justice." Id. After the § 90(4) hearing, the Appellate Division may impose such discipline it deems warranted by the facts and circumstances of the case. Id. § 90(4)(h).

If the conviction upon which the § 90(4) removal or disbarment was based is reversed or pardoned by the President of the United States or any state governor, the Appellate Division Department has the power to modify or vacate its sanction, subject to certain conditions. Id. § 90(5)(a). Pursuant to an application for reinstatement and a hearing, the § 90(4) removal or disbarment may also be vacated or modified after seven years have elapsed if the person sanctioned has not been convicted of a crime during that period. Id. § 90(5)(b). Where an attorney has been found by a preponderance of the evidence to have misappropriated funds, the Appellate Division sanction order may require monetary restitution, as well as reimbursement of any sum paid by the

22 See footnote 5 for a summary of the contents ofJud. L. § 90(2).

23 A serious crime is defined as any criminal offense denominated a felony under the laws of any state or federal jurisdiction which does not constitute a felony under New York law, and any other crime a necessary element of which includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime. Jud. L. § 90(4)(d).

Lawyers' Fund For Client Protection to the person whose funds were misappropriated. Id. §§ 90(6-a)(a)-(b). A restitution or reimbursement order is enforceable as a civil money judgment. Id. § 90(6-a)(d). Where an attorney is permitted to resign from the bar, the court may order restitution. Id. § 90(6-a)(e). Pursuant to § 90(7), when directed by the justices of a department or a majority of them, court designated attorneys from the counties within a department or appointed counsel investigate and prosecute proceedings for suspension or removal.

(2) Judiciary Law § 487:Misconduct by Attorneys Under Jud. L. § 487, an attorney is guilty a misdemeanor if he 1) acts deceitfully or collusively, or consents to deceit or collusion, with intent to deceive the court or any party, or 2) willfully delays his client's suit with a view to his gain, or 3) receives money for or on account of any money he or she has not laid out. In addition to punishment under the penal law, the attorney forfeits treble damages to the injured party, recoverable in a civil action.

(3) First Department Rule § 605.5 Types of Discipline: Disbarment, Suspension, Censure, Reprimand, Admonition The types of discipline specified in the First Department Rules are:1) disbarment, 2) suspension, and 3) censure, all to be levied by the court; as well as 4) reprimand, levied by the Departmental Disciplinary Committee,[24] with or without referral to the court for further action and 5) admonition, levied by the committee without hearing. In re Harley, 298 A.D.2d 49, 744 N.Y.S. 2d 171 (1st Dep't 2002) (disbarment appropriate where attorney made false and misleading statements to clients and the trial court to induce signing of back-dated retainer agreement allowing attorney's law firm to receive $382,000 in unearned fees). Previous discipline may be considered when determining whether to impose discipline and the extent of any discipline to be imposed when an attorney is subject to new misconduct charges. 1st Dept R. § 605.5. Department Disciplinary Committee staff counsel may refer minor complaints involving attorneys with no significant disciplinary history to court-appointed volunteer mediators, who attempt to mediate and resolve matters raised in complaints. Unsuccessful mediations that need further consideration are referred back to staff counsel. Id. § 605.20(d)(2).

(4) Second Department Rule § 691.6(a): Reprimand, Admonition, Letter of Caution, Confidentiality; See 2d Dep't R. § 691.10 Conduct of Disbarred, Suspended or Resigned Attorney; Abandonment of Practice by Attorney In the Second Department, besides suspension and disbarment pursuant to Jud. L. § 90(2), see 2d Dep't R. § 691.10, in cases of professional misconduct not warranting proceedings in court, a Grievance Committee,[25] after an investigation and by majority vote, may issue a reprimand, an admonition, or a letter of caution. The reprimand can issue after a hearing before the committee. An admonition may be imposed without a hearing. A letter of caution may issue when the committee believes that the attorney acted in

24 See footnote 34 for a description of the composition the committee.

25 See discussion of the Second Department Grievance Committee structure in Section 4 of this report.

a manner, which, while not constituting clear misconduct, involved behavior that requires comment. Id. § 691.6(a).

(5) Third Department Rule § 806.5: As Directed By Court—Suspension, Disbarment; 3d Dep't R. § 806.4(c): Determined By Professional Standards Committee—Admonition, Letter of Caution, Letter of Education In the Third Department, suspensions and disbarments are determined in disciplinary proceedings as directed by the court. Factual issues are referred to a judge or referee who conducts a hearing and makes a report. The court may issue the final determination or direct the judge or referee to make the decision. 3d Dep't R. § 806.5; Matter of Wheatley, 297A.D.2d 872, 873, 747 N.Y.S. 2d 853, 854 (3d Dep't 2002) (attorney disbarred for dishonesty, fraud, deceit and misrepresentation), modified by 304 A.D.2d, ___, 758 N.Y.S. 2d ___, ___ (2003) (sanction reduced to two year suspension based on mitigating evidence). Other penalties for misconduct include: 1) admonishment by the Professional Standards Committee,[26] where acts of misconduct have been established by clear and convincing evidence but the misconduct is not serious enough to warrant prosecution in a disciplinary proceeding; 2) letter of caution issued by the committee, where misconduct has been established by clear and convincing evidence but is not serious enough to warrant either prosecution in a disciplinary proceeding or a imposition of an admonishment; and 3) letter of education issued by the committee, in cases where the attorney's conduct warrants comment. 3d Dep't R. § 806.4(c). A county bar association may mediate complaints not constituting misconduct it receives or that are referred to it by the Committee on Professional Standards or the committee's professional staff. Id. § 806.6.

(6) Fourth Department Rule §§ 1022.19–1022.22 and 1022.27: Referral to a Mediation or Monitoring Program, Letter of Caution, Letter of Admonition, Reciprocal Discipline, Suspension and Disbarment In the Fourth Department, responsibilities for determining whether attorney misconduct has occurred are handled by the Attorney Grievance Committee, the committee's legal staff, and the County and Local Bar Associations in a complex arrangement, discussed infra at Section 4 (Procedure). Under this arrangement, a misconduct complaint may be 1) dismissed as unfounded; 2) referred to the attorney-client dispute mediation program pursuant to 22 NYCRR § 1220.2; 3) result in a Letter of Caution, where the attorney appears to have engaged in inappropriate behavior that does not constitute professional misconduct; or 4) result in a Letter of Admonition, where the conduct is found to be inappropriate. 4th Dep't R. § 1022.19. Formal misconduct charges filed in the Appellate Division can lead to suspension or disbarment. See id. §§ 1022.20 and 1022.27.

26 See discussion of the composition and scope of authority of the Third Department's Committee on Professional Standards below in Section 4(d)(6).

c. Federal Court Penalties For Misconduct

(1) Federal Rules of Appellate Procedure §§ 46(b)-(c):Suspension, Disbarment, "Discipline" for "conduct unbecoming" a Bar Member or for "failure to comply with any court rule" The kinds of sanctions for disciplinary breaches authorized by the Federal Rules of Appellate Procedure are, except for suspensions and disbarments by other courts, stated in general terms. Fed. R. App. P. 46(b) provides for suspension or disbarment of a member of the court's bar, if the attorney has been suspended or disbarred from practice by any other court, or is guilty of "conduct unbecoming a member of the court's bar." The rule does not define"conduct unbecoming." It does not expressly provide for lesser sanctions. Under Fed. R. App. P. 46(c), any attorney who practices in the appeals court may be "disciplined" for conduct unbecoming a member of the bar or for failure to comply with any court rule. The kinds of discipline that may be levied are not stated.

(2) Local Rule of the Court of Appeals for the Second Circuit 46(f): Suspension, Disbarment Pursuant to the 2d Cir. R. 46(f), attorneys are subject to reciprocal suspension or disbarment as a result of being suspended or disbarred by another court. These sanctions apply as well to attorneys who resign from the bars of other courts while under investigation into allegations of misconduct. Id. 46(f)(5). Under 2d Cir. R. 46(g)(1) an attorney convicted of a "serious" crime[27] will be immediately suspended from practice in the Second Circuit, regardless of the pendency of an appeal. The suspension remains in effect pending the disposition of a disciplinary proceeding authorized to be commenced on the filing of the certificate of conviction, unless the court orders otherwise. Id.[28] Convictions for crimes not constituting serious crimes are referred to the court's Committee of Admissions and Grievances, which is composed of attorneys, for whatever action the committee deems warranted.[29]

(3) Joint Southern and Eastern District of New York Local Civil Rule 1.5(c): Letter of Reprimand, Letter of Admonition, Censure, Suspension, Disbarment from the District Court Although the Federal Rules of Civil Procedure do not provide specific authorization for the promulgation of disciplinary rules, Fed. R. Civ. P. 83(a)(1) permits

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27 See Section 1(d)(2) for the definition of a serious crime under 2d Cir. R. 46(g)(2).

28 In addition to suspension of an attorney for conviction of a serious crime, the court may direct commencement of a disciplinary proceeding against the attorney to determine what discipline will finally be imposed. A hearing to determine the final sanction is not commenced until all appeals of the conviction have been concluded. The proceeding will be terminated if a suspension or disbarment order is entered under 2d Cir. R. 46(f). Id. 46(g)(4). An attorney suspended by the Second Circuit because of a conviction for a serious crime (but who has not been suspended or disbarred by another court under 2d Cir. R. 46(f)) will be reinstated if the conviction is reversed, although the reinstatement will not terminate a disciplinary proceeding against the attorney pending in the circuit, which will proceed to disposition on the basis of available evidence. Id. 46(g)(6).

29 See discussion of the composition of the committee infra in Section 4. c. and note 34.

the district courts to make and amend rules governing practice before them.[30] There is a wider range of stated misconduct sanctions available in most of the New York federal district courts than there is in the circuit court.

In the Eastern and Southern District Courts, the sanctions include a letter of reprimand or admonition, censure, suspension, and disbarment from practice. L. Civ. R. 1.5(c)(1). They may arise from the following: felony or misdemeanor conviction (id. 1.5(b)(1)); discipline by another court (id. 1.5 (b)(2)); resignation from the bar of any court while a misconduct investigation is pending there (id. 1.5(b)(3)); and in connection with activities in the Southern or Eastern District Courts, violation of the New York Lawyer's Code of Professional Conduct as adopted by the Appellate Division (id. 1.5(b)(5)).

An attorney who has not been admitted to one of these courts who violates the Code of Professional Responsibility in court-connected activities or who appears in court without permission may be sanctioned with a letter of reprimand or admonition, censure, or an order precluding the attorney from appearing again in the court which issued the order. Id. 1.5(c)(2). In addition, an attorney under an infirmity that prevents the practice of law will be suspended. Id. 1.5(c)(3).

(4) Northern District of New York Local Practice Rule 83.4: Disbarment, Suspension, Censure, Preclusion, or "Otherwise Disciplined" In the Northern District of New York, the local rules structure provides for a specific penalty for each ground for discipline. L. P. R. 83.4. Thus, a member of the Northern District bar convicted of a felony will be suspended from practice in the district. When the conviction becomes final, the attorney is barred from practice in the district. Id. 83.4(b). A Northern District bar member who resigns from another court while a misconduct investigation is pending there against him or her will be disbarred in the district. Id. 83.4(c). A district bar member disciplined by another court will be disciplined to the same extent by the district court, unless the original disciplinary record shows that there was a due process deficiency in the notice or the attorney's opportunity to be heard; that there was such an infirmity of proof that the district court had a "clear conviction" that it should not accept the other court's result; that imposition of the same discipline would result in a grave injustice; or that the conduct would warrant a substantially different discipline in the district. Id. 83.4(d).

A Northern District bar member convicted of a misdemeanor by another court may be disbarred, suspended, or censured. Id. 83.4(e). A district bar member disbarred or suspended by the state court that admitted him will be disbarred or automatically suspended for a like period by the district court. Id. 83.4(f). A district court bar member may also be disbarred or otherwise disciplined, after a hearing, "for cause." Id. 83.4(g). A visiting attorney admitted to argue or try a case who has been found guilty of misconduct by the court will be precluded from again appearing in the district, with notice of the order provided to the court that admitted the attorney to practice.

30 Fed. R. Civ. P. 83(a)(1) permits a district court, acting though a majority of its judges, to make and amend rules governing its practice consistent with federal law and the practices and procedures of the United States Supreme Court promulgated pursuant to 28 U.S.C. § 2072.

Id. 83.4(h). Unless otherwise ordered by the court, no action may be taken pursuant to L. P. R. 83.4(e) or 83.4(f) where the state has brought disciplinary proceedings against the attorney. Id. 83.4(i).

(5) Western District of New York Local Rule of Civil Procedure 83.3(a), (c): Disbarment, Suspension, Censure, "Sanction" and other "Discipline" As indicated in Section 1(c)(7) regarding the Western District's grounds for discipline, its rules provide that an attorney admitted to the district may, after a hearing, be censured, suspended, disbarred, or "otherwise disciplined" (including revocation of a pro hac vice admission) for cause. L. Civ. P. R. 83.3(e). An attorney who has been admitted to the court's bar who has been convicted of a felony, as defined by federal or New York law, or convicted of a felony under the law of another state, commonwealth, or territory, if it would constitute a felony in New York (Id. 83.3(b)(3)), will be suspended. Id. 83.3(b)(1). When the conviction becomes final,[31] the attorney will be disbarred. Id. 83.3(b)(2). A Western District bar member who has been suspended, disbarred or disciplined in any way by any court, or has resigned from the bar of a court while an investigation into allegations of misconduct are pending there against the attorney, will be disciplined to the same extent in the Western District, except the discipline may be set aside by a majority of active and senior judges when the evidence in the original record "clearly and convincingly" discloses that 1) the attorney so lacked notice or an opportunity to be heard as to violate due process, 2) the proof establishing the misconduct was so infirmed that there was a clear belief that the conclusion could not be accepted as final, or 3) imposition of the same discipline would result in a grave injustice. Id. 83.3(c).

d. Other Penalties Considerations: Reciprocity, Variations in Sanctions among the Courts

In the federal courts, three circumstances justify a decision not to impose reciprocal discipline: 1) the originating state court's proceeding's notice or opportunity to be heard lacked due process; 2) an infirmity in the proof of facts clearly leads to a failure of the evidence to support the conclusion; and 3) there is some other serious reason in the interest of justice to preclude imposing reciprocal disciplinary sanctions. In re Edelstein, 214 F. 3d 127, 131 (2d Cir. 2000), citing Selling v. Radford, 243 U.S. 46, 50-51 (1917). Moreover, some of the Supreme Court's Justices would require that a court considering reciprocal discipline give plenary consideration to the facts regarding the attorney's conduct. See 214 F. 3d at 131 n. 2 (citing cases).

The range of penalties provided by the Appellate Division Department and Southern/Eastern District rules allow for standardized schemes that mesh penalties with kinds and levels of the infraction.

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31 "Final" means that either the time to appeal has lapsed or that the conviction has been affirmed on appeal. Id. 83.3(b)(2).

4. PROCEDURES

a. Due Process Requirements

Procedures for determining whether conduct should be sanctioned must comport with minimum due process requirements, including duly served notice of specific charges and an opportunity to be heard in opposition to them. New York state and federal rules appear to have met these basic requirements.

b. Standards of Proof Issues: Preponderance of the Evidence v. Clear and Convincing Evidence

While the general standard of proof of misconduct in the state and federal courts is by a preponderance of the evidence, some exceptions exist. The Southern/Eastern District of New York opts to impose a higher standard of proof of misconduct—clear and convincing evidence—which affects the finding of misconduct and the level of penalty applied. Southern/Eastern District of New York Local Civil Rule (L. Civ. R.) 1.5(b). In the Third Department under § 806.4(c)(1)(ii), conduct warranting admonishment must be established by clear and convincing evidence, and pursuant to Southern/ Eastern District L. Civ. R. 1.5(b), proof of misconduct must be established by clear and convincing evidence.

The New York State Court of Appeals has announced the state standard. In re Capoccia, 59 N. Y. 2d 549, 551, 453 N. E. 2d 497, 498, 466 N.Y.S. 2d 268, 269 (1983) ("fair preponderance of the evidence" and not the higher standard of clear and convincing evidence applies in determining whether an attorney has committed professional misconduct); see also In re Friedman, 196 A.D.2d 280, 296, 609 N.Y.S. 2d 578, 587 (1st Dep't 1994) (disbarment of attorney under fair preponderance standard for thirteen counts of misconduct arising from his representation of personal injury claims in three cases did not violate due process under the federal or state constitutions; referee's recommendation for suspension rejected as inadequate), appeal dismissed, 83 N. Y. 2d 888, 635 N. E. 2d 295, 613 N.Y.S. 2d 126, cert. denied, 513 U.S. 820, 115 S. Ct. 81 (1994). In Capoccia, the court held that the privilege of practicing law by an individual was more akin to a property interest than a right and thus did not require the higher standard. The court found that the protection of society, the public interest, and the court itself "as an instrument of justice" far outweighed the interests of the attorney subject to discipline. Mitchell v. Association of the Bar of New York City, 40 N. Y. 2d 153, 156, 351 N. E. 2d 743, 746, 386 N.Y.S. 2d 95, 97 (1976) (quoting In re Isserman, 345 U.S. 286, 289 (1953)), quoted in Appell, cited in the paragraph below at 282 n. 62.

One student commentator has vigorously contested this result. David M. Appell, Note, Attorney Disbarment Proceedings and the Standard of Proof, 24 Hofstra L. Rev. 275 (1995). Appell argues that the severity of the disbarment disciplinary sanction, which damages the attorney's ability to earn a living and her reputation, does affect a liberty interest implicating Fourteenth Amendment due process rights. On the other hand, it can be argued that although statute or the courts may provide otherwise, neither

common nor statutory law, or the federal or New York State constitution impose a higher standard of proof on the courts' exercise of their power to allocate property interests, including the power to control licensing of the practice of law.

c. State Procedures

(1) General Procedures Under Judiciary Law § 90 Under Jud. L. § 90, before being sanctioned, an attorney must be served with a written notice of charges and given an opportunity to be heard in defense. Id. § 90(6). Moreover, in any disciplinary proceeding, the petitioner and the respondent, including a bar association, corporation, or other association, have the right to appeal an Appellate Division final order concerning questions of law to the Court of Appeals (subject to limitations prescribed in N. Y. Constitution, Article 6, Section 3). Id. § 90(8).[32] In addition, records of the disciplinary complaint, inquiry, investigation, and other proceedings are sealed and are deemed to be private and confidential. However, for good cause shown, the appellate division department having jurisdiction over the disciplinary proceeding may within its discretion, with or without notice, divulge any part of a record. But if the charges are sustained the records are deemed public records and are available.Id. § 90(10).[33]

Pursuant to authority granted by Jud. L. § 90(2), each Appellate Division department has established its own set of procedures for determining whether the challenged conduct is sanctionable.

(2) First Department Disciplinary Committee and Office of Chief Counsel: Structure and Duties The First Department's procedural rules are the most elaborate of the Departments.[34] They provide for a Departmental Disciplinary Committee,

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32 Article 6, Section 3 of the New York State constitution grants the legislature the power to regulate proceedings in the courts, and to delegate to the courts, including the Appellate Division, its legislative authority to adopt regulations consistent with practice and procedures "provided by statute or general rules."

33 The Association of the Bar of the City of New York has twice recommended that once the appropriate body makes a determination to bring a formal misconduct proceeding against an attorney, the proceeding should be open to the public. Procedural rights of attorneys facing discipline, 40 The Record of the ABCNY 323 (1985); Committee on Professional Discipline, Confidentiality of disciplinary proceedings, 47 The Record of the ABCNY 48 (1992). The rationale was that opening up the process to public scrutiny is likely to alleviate suspicion and resentment of what the public sometimes perceives to be a mutual "back-scratching" process without external checks. The report also argues, on the other hand, that publication at too early a stage of the process might jeopardize client interests as the result of premature exposure, with the possibility of breaching the attorney-client privilege, or might undermine resolution of claims through mediation or the use of lesser sanctions, such as letters of caution or admonishment, which might be all the case warrants. The report argues, as well, that limitations on opening the process would protect attorneys from frivolous or vindictive complaints, since the large majority of complaints are without merit. Id. at 62.

34 Because the Department's extensive procedures are not easily summarized, the rules themselves ought to be consulted, Rules and Procedures of the Departmental Disciplinary Committee, Parts 603 and 605.

appointed by the court,[35] which investigates and prosecutes complaints against attorneys who are admitted to practice in, work in or live in the department. 1st Dep't R. § 603.4(a)(1). The committee is assisted by the Office of Chief Counsel, which investigates complaints or grievances referred to it by the court, the committee or other sources. The office may also initiate investigations of matters coming to its attention that are within the jurisdiction of the committee. Id. § 605.6(a). Should the office consider that allegations warrant a response, the attorney is given an opportunity to answer them.

(3) First Department Procedures Following the conclusion of an investigation, in cases where there is no jurisdiction, the office refers the case to the authorities in the appropriate jurisdiction; otherwise the office refers it to the Disciplinary Committee, with a recommendation for dismissal, admonishment or a formal hearing. 1st Dep't R. § 605.6(e). Depending on the type of recommendation, one or more attorney members of the committee selected by the chair reviews the office's recommendation and approves or modifies it and returns it to the office. 1st Dep't R. §§ 605.6(f), 605.7(a)-(b). On approval of the office's recommendation or its acceptance of the reviewing attorney(s)' modification, or after determination of the appropriate discipline by the committee chair, except where formal proceedings are to be instituted, the respondent is notified of the determination to dismiss or to admonish. If an admonishment is determined to be the appropriate disposition, the respondent may not appeal, but may seek reconsideration or demand a formal hearing before a referee. Id., § 605.8(a)-(b). If the reviewing attorney(s) of the Disciplinary Committee approve(s) the Office of Chief Counsel's recommendation to institute formal proceedings, the office will prosecute the case at a hearing before a court-appointed referee. Id., §§ 605.12–13. After taking evidence, the referee makes a report to the court stating findings of fact and conclusions of law and recommendations for sanctions, if any. Id. § 605.13(q).

A hearing panel composed of Disciplinary Committee members reviews the referee's report and recommendation. After taking written and oral argument from office counsel and the respondent, the panel determines whether to affirm, dismiss, or modify the referee's report and recommendation. Panel determinations are submitted to the court for final decision where they may be disputed by the respondent or the office or when the referee and hearing panel find it appropriate to do so. Id. §§ 605.14 and 605.15; see In re Brooks, 271 A.D.2d 127, 708 N.Y.S.2d22 (1st Dep't 2002) (referee conducts hearing on charges and issues a report and recommendation; a panel of the court, after hearing argument and reviewing the record may confirm or reject the report and recommendation and submit them to the court for final decision), lv. to appeal denied, 95 N.Y.2d955, 745 N.E.2d388, 722 N.Y.S.2d468 (2000). An attorney who has been

35 The First Department Departmental Disciplinary Committee is structured as follows. Attorneys, who are members of the New York State bar in good standing with offices or residences in New York City, must make up at least two thirds of the committee. Appointments to the committee may be made from lists of nominees of the Association of the Bar of the City of New York, the Bronx County Bar Association or the New York County Lawyers' Association or by other means deemed by the court to be in the public interest. Up to one third of the members need not be members of the bar. 1st Dep't R. § 603.4(a)(2).

disbarred or suspended for more than six months may apply to the court for reinstatement. If the chief counsel opposes reinstatement, she requests that the court either deny the application or appoint a referee and refer the matter to the Disciplinary Committee. 1st Dep't R. § 605.10(b).

(4) Second Department Grievance Committees and Their Staffs: Structure and Duties Second Department rules provide for the court to appoint three twenty-person grievance committees for the different judicial districts within the department, and sixteen of each twenty must be attorneys. The grievance committees are responsible for investigating and prosecuting matters concerning attorneys who practice in or reside in their district or, at the time of admission to the bar, resided there. One committee is responsible for attorneys from the Second and Eleventh Judicial Districts. Another is responsible for attorneys from the Ninth Judicial District. The third is responsible for attorneys in the Tenth District. The court may draw committee members from lists of attorneys submitted by the bar associations in the counties that make up the department. The court, in consultation with the bar associations, appoints for each committee a chief counsel and such assistant chief counsel and support staff as the court deems necessary. 2d Dep't R. §§ 691.4(a)-(b).

(5) Second Department Grievance Committee Procedures and Court Review Second Department misconduct investigations may be commenced pursuant to written complaints made to the court or to one of the grievance committees, or by the court or a committee sua sponte. A three-member subcommittee of a grievance committee may be appointed to conduct hearings on complaints and report its findings of fact to the full committee for further disposition. A full committee may, after preliminary investigation, dismiss the complaint, conclude the matter by issuing a letter of caution to the attorney or by privately admonishing the attorney, or serve the attorney with written charges and hold a hearing if the matter is deemed to be of sufficient importance. Where the public interest demands prompt action and the available evidence show probable cause for such action, the committee will recommend that the court institute a disciplinary proceeding. 2d Dep't R. §§ 691.4(a)-(f), 691.4(h). The grievance committees' proceedings are sealed and deemed private and confidential, unless otherwise provided by the court. Id. § 691.4(j).

If during the course of a misconduct investigation or proceeding it appears that the attorney suffers from substance abuse, the attorney or the committee may seek from the court or the court on its own motion may grant a stay of the investigation, charges or proceedings and direct the attorney to complete a court approved monitoring program. In making the determination the court will consider whether the alleged misconduct occurred while the attorney suffered from substance abuse dependency, whether the conduct related to substance abuse dependency, the seriousness of the alleged misconduct and whether diversion into the program is in the best interests of the public, the legal profession and the attorney. On successful program completion the court may direct discontinuance or resumption of proceedings or take other action. The attorney must pay for any costs associated with participation in the program. Id. § 691.4(m). An attorney subject to a grievance committee hearing or is subject to a

pending disciplinary proceeding before the court may offer medical or psychological evidence in mitigation of charges on notice to grievance committee counsel. Id. § 691.4(n).

In event of a formal disciplinary proceeding, petitioner and respondent attorney may subpoena attendance of witnesses or production of documents. Depositions may be taken of witnesses likely to be unavailable at the hearing. Id. § 691.5-a.

An attorney under investigation for misconduct may resign if he or she 1) acknowledges that the resignation was freely and voluntarily made and not coerced, 2) was aware that there is a pending misconduct investigation and knows the nature of the allegations, and 3) acknowledges that if charges were predicated on the conduct under investigation, the attorney could not defend him or herself on the merits. Id. § 691.9. An attorney disbarred after a hearing, or on consent, or whose name has been stricken from the roll of attorneys, or who resigned while under investigation for misconduct may not apply for reinstatement prior to at least seven years from the date of disbarment or removal. Id. § 691.11(a); see also In re Wachtler, Panel Denies Wachtler's Bid of Reinstatement, N.Y.L.J. at 1 (Apr. 18, 2003)(Second Department denies application for reinstatement of former Chief Judge who resigned from the bench and plead guilty to federal felony of threatening in 1993 to kidnap teenaged daughter of former lover). A suspended attorney may apply after such interval as the court may direct in the suspension order or any modification of the order. Id. § 691.11(a). An application for reinstatement may be granted on a showing, by clear and convincing evidence, that the applicant has complied with the order of disbarment or suspension, and possesses the character and general fitness to practice law. Id. § 691.11(c)(1). If the applicant has been disbarred or suspended for more than one year, that subsequent to the controlling order, the applicant must show that he or she has passed the Multistate Professional Responsibility Examination and has completed one hour of CLE credit for each month of disbarment or suspension up to a maximum of 24 credits, to be completed during the period of disbarment or suspension and within two years preceding reinstatement. On request the court may conditionally grant reinstatement, subject to completion of the CLE requirement. Id. § 691.11(c)(2). If the applicant was suspended for one year, he or she must complete during that period 18 CLE credit hours, six of which must be in legal ethics and professionalism, or must complete 12 CLE credit hours and pass the Multistate Professional Responsibility Examination. Id. § 691.11(c)(3). If an applicant is suspended for less than one year, during the period of suspension he or she must complete one CLE credit hour for each month of suspension. Id. § 691.11(c)(4). The court shall refer an application for reinstatement after a suspension of more than one year or disbarment to a Character and Fitness Committee, referee, justice or judge for a character and fitness review and report before granting reinstatement. The court may, in its discretion, make such a referral regarding an application for reinstatement after a suspension of one year or less. Id. § 691.11(d).

An application for reinstatement after voluntary resignation may be made on notice to the grievance committee in the judicial district here the attorney last maintained an office, or if none, to the committee where the attorney resided when admitted. The applicant must show the circumstances of the resignation, the reason for seeking

reinstatement, whether he or she is or has been subject to disciplinary proceedings in any jurisdiction and any results, that he or she is in good standing in every bar admitted to, and that one hour of CLE credit has been received for each month since the effective date of resignation up to a maximum of 24 credits. The court may refer an application for a character and fitness review and report by a character and fitness committee, referee, justice or judge. Id. § 691.11-a.

Third Department Committee on Professional Standards and Staff:Structure and Duties.

Third Department disciplinary rules provide for a court-appointed twenty-one member Committee on Professional Standards, three members of which are to be non-attorneys. The court, in consultation with the committee, appoints a professional and support staff headed by a chief attorney. The committee investigates all matters concerning attorney misconduct brought to its attention. 3d Dep't R. § 806.3. The chief attorney determines whether a complaint made against an attorney, if true, is sufficient to warrant an investigation. An attorney who is the subject of a complaint is expected to cooperate in the investigation and may be required to submit to an examination by a staff attorney. Failure to do so may result in suspension from practice. 3d Dep't R. §§ 806.4(a)-(b).

If, after investigation, the committee determines that no further action is warranted, the complaint is dismissed. Otherwise the committee may 1) direct that a disciplinary proceeding be commenced against the attorney, or 2) admonish the attorney orally or in writing, if the misconduct has been established by clear and convincing evidence and the committee determines in its discretion in the light of all the circumstances that the misconduct is not serious enough to warrant prosecution in a disciplinary proceeding, or 3) issue a letter of caution, if the misconduct has been established by clear and convincing evidence and the committee determines in the light of all the circumstances that the misconduct is not serious enough to warrant disciplinary prosecution or an admonishment, or 4) issue a letter of education, if the committee determines in its discretion that the attorney's actions warrant comment. Prior to imposition of the admonishment, the attorney may challenge the proposed action at a disciplinary proceeding before the court, which is not bound by the committee's determination. The attorney may ask the committee to reconsider a letter of caution. Id. § 806.4(c). If a disciplinary proceeding before the Court is instituted, the Court refers issues of fact to a judge or referee to hear and report. If no factual issue is raised, on request, the Court may hear arguments for and against the merits or mitigation. Id. § 806.5.

(6) Third Department County Bar Associations: Addressing Complaints Not Constituting Misconduct County bar associations have special roles in the Third Department misconduct process. A bar association that receives a complaint about an attorney refers it to the Committee on Professional Standards' chief attorney for review. If the chief attorney determines that the complaint is a minor matter not constituting misconduct—for example, a fee dispute or a claim of inadequate representation not constituting professional misconduct, or a claim that legal services have been delayed not constituting neglect—the matter is referred back to the bar association for resolution. If the association is unable to resolve the complaint within ninety days, at the

chief attorney's request, it refers the case again to the chief attorney for further consideration. 3d Dep't R. § 806.6(a). Upon receipt of a complaint from any source, the committee or the Chief Attorney may refer it, if appropriate, to a county bar association for mediation. Id. § 806.6(b).

(7) Third Department: Resignations by Attorneys Subject to Disciplinary Proceedings; Reinstatement; Discipline by Non-New York Jurisdictions An attorney who is subject to disciplinary proceedings or a misconduct investigation may resign upon stating that he or she 1) does so freely with knowledge of the specific charges of misconduct and the consequences of resignation and 2) does not contest the allegations and recognizes that the failure to do so precludes claiming innocence of the misconduct charged. 3d Dep't R. § 806.8. An attorney disbarred for a felony or a serious crime may seek reinstatement after seven years. A suspended attorney may seek reinstatement upon expiration of the period of suspension. Reinstatement may be granted on a showing by clear and convincing evidence that the disbarment or suspension order has been complied with, that the attorney possesses the character and fitness to resume the practice of law, and that the attorney has attained a passing grade on the Multistate Professional Responsibility Examination. Id. § 806.12. An attorney disciplined by a non-New York State jurisdiction may be disciplined by the 3rd Department for conduct that gave rise to the discipline imposed by the jurisdiction. The attorney must file a copy of the jurisdiction's order within 30 days of its issuance. Failure to do so may be deemed misconduct. On filing theother jurisdiction's order or on receipt of its record of proceedings, the attorney may submit any defense or opposition to discipline being imposed by the 3rd department. The department will examine the papers before it and such other evidence it admits and may impose discipline unless it finds 1) that procedures in the other jurisdiction denied the attorney due process, or 2) there was such an infirmity in the proof in the other proceeding that the result can not accepted, or 3) that imposition of discipline would be unjust. If the attorney raises either 1) or 2) or both the attorney must file the record or relevant portions of the record of proceedings in the other jurisdiction deemed necessary to determine the issues. Id. § 806.19.

(8) Fourth Department Attorney Grievance Committee and Staff: Structure and Duties; Responsibilities of County or Local Bar Associations for Minor Complaints In the Fourth Department, each judicial district has its own Attorney Grievance Committee. The members of a district's committee are recommended by the presidents of the bar associations in the district; each grievance committee must have one member from each county in the judicial district. 4th Dep't R. § 1022.19(a)(1). The committees investigate misconduct complaints regarding attorneys practicing in their respective districts, supervise the committee legal staffs, and refer cases directly to the Appellate Division requiring prompt action, where the attorney has committed a felony or a crime that adversely affects the attorney's honesty, trustworthiness, or fitness to practice. Id. § 1022.19(b).

The judicial district's chief attorney initiates investigations of all complaints. If the complaint involves a minor matter such as a personality dispute between attorney and

client, a fee dispute, or a delay that did not harm the client, the matter is referred to the county or local bar association for investigation and determination. Where the bar association can not resolve the matter within sixty days of receipt of the complaint or after a sixty-day extension, the judicial district grievance committee assumes jurisdiction of the matter. Id. §§ 1022.19(c)-(e).

A Fourth Department judicial district chief attorney may recommend to the district committee that an attorney be formally charged when there is probable cause to believe that the attorney has committed misconduct or has been convicted of a crime that adversely reflects upon the attorney's honesty, trustworthiness, or fitness to practice. The attorney can challenge the charge before the committee, which votes to decide whether charges should be filed with the court for a hearing. The court refers any factual issues raised to a justice or referee to hear and report on them. On a finding by the court that the misconduct of the attorney under investigation immediately threatens the public interest, the attorney is suspended from practice pending resolution of the case. Id. § 1022.20(d).

(9) Fourth Department Procedure On receipt of proof of conviction of a felony, as defined in Jud. L. § 90(4)(e),[36] the attorney will be disbarred. 4th Dep't R. § 1022.21(a). On receipt of conviction of a serious crime, as defined in Jud. L. § 90(4)(d),[37] the attorney will be suspended pending entry of a final order of disposition. Id. § 1022.21(b)(1). If the court determines that the crime of which the attorney was convicted was not serious, the court may refer the matter to a district grievance committee for investigation and appropriate disciplinary action. Id. § 1022.21(c).

The attorney under misconduct investigation may resign during its pendency pursuant to his or her statement that the resignation was voluntary, was not coerced and was made with full knowledge of the consequences, that the charges are true, that the attorney has no defense to them, and that if the charges relate to misappropriation or misapplication of client funds or property the attorney consents to an order of restitution. Id. § 1022.26(a). A disbarred attorney or one who has resigned as a result of misconduct may seek reinstatement after seven years. The court may require that the person disbarred pass the New York State Bar Examination and will require passage of the Multistate Professional Responsibility Examination. A suspended attorney may apply for reinstatement at the end of the suspension period. If the suspension has been for more than one year, the court may require passage of the bar examination and will require passage of the Multi-state Professional Responsibility Examination. Id. §§ 1022.28(a)-(b).[38]

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36 See Section 3(b)(1) for a discussion of the felony definition under Jud. L. § 90(4)(e).

37 See footnote 21 for the definition of a serious crime under Jud. L. § 90(4)(d).

38 Currently, there appears to be no movement toward a unified New York State misconduct procedural system comparable to the Appellate Division's Joint Disciplinary Rules of the Code of Professional Responsibility.

d. Federal Procedures

(1) Federal Rules of Appellate Procedure 46 and 47: No Specific Procedural Rules; Local Circuit Rules Authorized The Federal Rules of Appellate Procedure do not provide specific procedural rules governing the disciplining of members of the circuit court bars. Fed. R. App. P. 46(b)(2). However, Fed. R. App. P. 47(a) permits each circuit court to promulgate its own local practice rules.

(2) Second Circuit Committee on Admissions and Grievances: Structure, Duties and Procedures In the Second Circuit, procedural rules concerning attorney discipline are found at Second Circuit Rule 46(f)-(h). Pursuant to 2d Cir. R. 46(h)(1)-(2), a court-appointed Committee on Admissions and Grievances, composed of seven members of the bar, initially addresses accusations and evidence of attorney misconduct involved in any matter before the court. The committee investigates, hears, and reports on allegations referred by the court regarding violation of professional responsibility rules in effect in the state or other jurisdiction where the attorney maintains his principal office. The matters referred may include not only acts of affirmative misconduct but also negligent acts.

The committee provides a written statement of charges regarding the matter to the attorney, who is entitled to a plenary hearing at which witnesses and other evidence in support of and in opposition to the charges may be presented. Unless otherwise ordered by the court, the committee has discretion to make its own rules of procedure. Id. 46(h)(3). The committee provides the court with a record of the proceedings and its recommendations with a statement of supporting reasons. The respondent attorney may present a statement in opposition to or in mitigation of the recommendation. The court, consisting of its active members, must act within a reasonable time on the recommendation by a majority vote. Id. 46(h)(4).

(3) Second Circuit: Effect of Disbarment By One Court on Other Courts Although an attorney must be admitted to a state bar to be admitted to one of the federal district courts in New York, subsequent revocation of state bar membership does not automatically disqualify the attorney from continued practice in the district court. In re Gouiran, 58 F.3d 54, 57 (2d Cir. 1995). This is so, the Court held, because the state and federal judicial systems each have autonomous control of their officers, and none of the local federal courts' rules provides for automatic disbarment of an attorney who has lost his or her bar membership. Id. at 58.

(4) Southern and Eastern District of New York Committees on Grievances: Structure and Duties Under the Southern/Eastern District Courts' detailed disciplinary rules, each district has its own Committee on Grievances, a committee of the board of judges appointed by and under the direction of the district's chief judge, which is in charge of attorney discipline. Each chief judge also appoints a panel of attorneys admitted to the district's bar to advise and assist the committee. At the direction of the committee or its chair, members of the attorney panel may investigate complaints, prepare and support charges, or serve as members of hearing panels. Local Civil Rule 1.5(a).

(5) Southern and Eastern Districts of New York: Procedures Related to Local Civil Rules 1.5(1)-(3) If it appears that there exists a ground for discipline set forth in L. Civ. R. 1.5(b)(1) by being convicted of a felony or misdemeanor, or L. Civ. R. 1.5(b)(2) by being disciplined by another court, or L. Civ. R. 1.5(b)(3) by resigning from the bar of another court while under a misconduct investigation by that court, the district's Committee on Grievances will serve notice on the attorney to show cause in writing why discipline should not be imposed. In all such cases in which a federal or state court has disbarred or suspended the attorney or he or she has resigned while under investigation for misconduct, the committee will serve the notice on the attorney with an order of the district court, effective 24 days after service, on comparable terms disbarring or suspending the attorney, or deeming the attorney to have resigned. The attorney may move within 20 days of service of the notice to modify or revoke the order. Timely filing of the motion will stay the order until further order of the court. If good cause is shown for holding an evidentiary hearing, the committee may proceed to "impose discipline or take such other action as justice and this rule may require." In all other cases, notice shall be served with an order of the Committee on Grievances directing the attorney to show cause in writing why discipline should not be imposed. Id. 1.5(d)(1).

(6) Due Process Rights to an Evidentiary Hearing The contours and extent of the due process right to an evidentiary hearing are examined in In re Jacobs v. Grievance Committee of the E. D. N. Y., 44 F.3d 84, 86, 90-1 (2d Cir. 1994) (under the predecessor of L. Civ. R. 1.5(d)(1), the risk of erroneous deprivation of evidentiary hearing extremely low, because attorney already had opportunity in the Appellate Division to present the evidence he sought to present to the district court advisory hearing panel), citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (when deciding whether to grant or deny an evidentiary hearing, private interests must be balanced against public interests), cert. denied 516 U.S. 817 (1995).

In Jacobs, the state court sanctioned an attorney for over billing a client he was representing in a divorce proceeding, for unlawfully obtaining and filing confessions of judgment from her, and for improperly attempting to limit his malpractice liability. Jacobs claimed that the Eastern District attorney advisory panel appointed to his case pursuant to the then-local disciplinary rule, Rule 4 violated due process by failing to accord him a full evidentiary hearing and merely taking oral argument. The district court attorney advisory panel (composed of three retired judges) found the Appellate Division decision proper and recommended suspension; the Grievance Committee affirmed.

Relying on Mathews to determine whether Jacobs had been deprived of due process as a result of being denied an evidentiary hearing, the circuit court balanced his private interest in practicing law in the district court against the court's interest in forgoing an evidentiary hearing. The risk of an erroneous deprivation was found to be extremely low because the attorney had availed himself of the opportunity to present evidence to the Appellate Division referee and to appeal the referee's alleged error to the court. In addition, the district court advisory panel had carefully reviewed the attorney's summary of evidence and properly determined that the evidence had either been

already introduced in the state proceeding, could have been introduced there, or was of no significance, and therefore would have resulted in a replication of the state proceeding, resulting in a waste of valuable time and effort. 44 F.3d 90-1.

(7) Southern and Eastern Districts of New York Local Civil Rules 1.5(d)(2)-(3): Procedures Related to Discipline By Other Courts and Resignation from the Bar of Another Court If an attorney has been disciplined by another court or has resigned from the bar of another court while under investigation, discipline will not be imposed if the attorney establishes by "clear and convincing evidence" that there was such an infirmity of proof of misconduct that the district court could not accept as final the other court's conclusion, that the procedures used in the other court's investigation or discipline so lacked notice or an opportunity to be heard as to constitute a deprivation of due process, or that the imposition of the same discipline would result in a grave injustice. Id. 1.5(d)(2). Complaints and any files are treated as confidential, unless otherwise ordered by the chief judge for good cause. Id. 1.5(d)(3).

(8) Southern and Eastern Districts of New York Local Civil Rule 1.5(d)(4): Procedures Related to L. Civ. R. 1.5 (b)(4)-(6) Disciplinary Grounds With respect to disciplinary or other grounds stated in L. Civ. R. 1.5(b)(4)-(6) (i.e., (a) an infirmity preventing the practice of law, (b) a violation of the New York Code of Professional Conduct, as adopted by the Appellate Division, or (c) appearing in the district court without being a member of the court without permission) the subject attorney will be served with an order to show cause why discipline should not be imposed. On receipt of the attorney's response, an evidentiary hearing will be held before a magistrate judge or a sub-panel of three attorneys selected from the panel of attorneys who assist the Committee on Grievances. The findings and recommendations of the magistrate judge or sub-panel are reported in writing to the committee. After affording the respondent attorney an opportunity to respond to the report in writing, the committee proceeds "to impose discipline or to take such action as justice or this rule may require." L. Civ. R.1.5(d)(4).

(9) Southern and Eastern District of New York Local Civil Rules 1.5(e) and (g): Procedures Related to Reinstatement and Providing Notice of Discipline to Other Courts An attorney disbarred, suspended, or precluded from appearing in court may seek reinstatement for good cause. The application is referred to the Committee on Grievances, which may refer it to a magistrate judge or a panel of attorneys for findings and a recommendation. The committee may also act on the application without making a referral. L. Civ. R. 1.5(e). When an attorney is known to be a member of the bar of another state, territory, or federal court, the district court will send the other court a certified copy of the judgment and opinion, if any, of the conviction, disbarment, preclusion, suspension, or censure. Id. 1.5(g).

(10) Northern District of New York Local Practice Rule 83.4: Procedures The Northern District local rules provide that the chief judge has charge of all matters relating to the discipline of members of its bar. L.P.R.83.4(a). A Northern District bar

member will be suspended from practice when convicted of a felony. The attorney will be disbarred when the conviction becomes final. Id. 83.4(b). An attorney disciplined by another jurisdiction for misconduct will be disciplined to the same extent in the Northern District. The attorney may apply for an order to show cause why the reciprocal discipline should not be imposed on grounds of lack of a) notice or an opportunity to be heard sufficient to constitute a deprivation of due process, b) that there was such an infirmity of proof as to give rise to the clear conviction that the discipline should not be accepted as final, c) that imposition of the same discipline would constitute a grave injustice, or d) that the misconduct warrants a substantially different discipline. Id. 83.4(d).

A Northern District bar member convicted of a misdemeanor in any jurisdiction may be disbarred, suspended, or censured. Id. 83.4(e). The chief judge may designate a bar association to prosecute a disciplinary proceeding against an attorney and may temporarily suspend the attorney for good cause during the proceeding's pendency. The chief judge may have the matter heard by a court of one or more judges or by a master to hear, report, and make a recommendation, after which the court takes such action "as justice requires." Id. 83.4(e)(1). An attorney disbarred or suspended by the court which admitted the attorney shall be disbarred or suspended for a like period. Id. 83.4(f).

In addition to any other disciplinary sanction imposed under the Northern District rules, an attorney admitted to the district's bar may also be disbarred or otherwise disciplined "for cause" after a hearing and as the court may direct. The chief judge may appoint a magistrate judge or attorney(s) to investigate, advise, or assist regarding any grievance or complaint or request by an attorney for relief from discipline. Except after a felony conviction (or for a pro hac vice admission, which may be revoked for cause by the judge who granted the admission), no censure, suspension, or disbarment may be imposed unless approved by a majority of the district's active judges. Id. 83.4(g). Complaints, grievances, and related files are treated as confidential. Discipline imposed may be made public within the court's discretion. Id. A visiting attorney found guilty of misconduct will be precluded from appearing in the district, and other courts that have admitted the attorney will be notified. Id. 83.4(h). Unless otherwise ordered by the court, no proceedings shall be commenced pursuant to L. P. R. 83.4(e) or L. P. R. 83.4(f) where disciplinary proceedings have been brought against the attorney in the New York State. Id. 83.4(i). The court enforces the Appellate Division's Code of Professional Responsibility, as interpreted by the United States Court of Appeals for the Second Circuit. Id. 83.4(j).

(11) Western District of New York Local Rule of Civil Procedure 83.3: Procedures Under the Western District local rule, the chief judge may appoint a magistrate judge or attorney(s) to investigate, advise, or assist on grievances, complaints, and attorney applications for relief from sanctions. In addition to any other sanction, an attorney admitted to the court's bar may be censored, sanctioned, suspended, disbarred, or otherwise disciplined "for cause" on notice, an opportunity for a hearing, and the approval of a majority of the active and senior judges of the court, except for pro hac vice admissions, felony convictions, or situations where the attorney has been

disciplined by another court or has resigned while under investigation for misconduct. L. R. Civ. P. 83.3(a)-(c). A district judge may revoke for cause a pro hac vice admission granted by that judge. Id. 83.3(a).

When the court is notified of a felony conviction,[39] the chief judge suspends the attorney. The suspension may be set aside for good cause by a majority of the active and senior judges, in their discretion, and after oral argument or evidentiary hearing, if desired by the court. Id. 83.3(b)(1). When the conviction becomes final, the court will order the attorney disbarred. The court may consider an application to set aside the disbarment on the papers submitted, schedule oral argument, or hold an evidentiary hearing. For good cause shown, a majority of the active and senior judges may set aside the disbarment when it is in the interests of justice to do so. Id. 83.3(b)(2).

Upon notice that an attorney admitted to the Western District bar has been suspended, disbarred, or disciplined in any way in any district, state, commonwealth, or territory or has resigned from such jurisdiction while under investigation for misconduct, the court will discipline the attorney to the same extent. A majority of the active and senior judges may set the discipline aside when the record shows by clear and convincing evidence that 1) notice and opportunity to be heard was so lacking as to violate due process rights, 2) there was such an infirmity of proof as to give rise to the clear conviction that the other court's conclusion should not be accepted as final, or 3) the imposition of the same discipline would result in grave injustice. The court in its discretion may consider the application for relief on the papers submitted, schedule oral argument, or hold an evidentiary hearing. Id. 83.3(c). Complaints, grievances, and related files are confidential. Any discipline imposed shall or shall not be made public, within the discretion of the court. Id. 83.3(a).

(12) Western District of New York Local Rule of Civil Procedure 83.3(b): Procedural Issues Regarding the Felony Conviction Disciplinary Rule Procedural issues arose with the Western District's felony disciplinary local civil rule, L. R. Civ. P. 83.3(b), in In the Matter of Tidwell, 139 F. Supp. 2d 343 (W.D.N.Y. 2000), aff'd 295 F. 3d 331 (2d Cir. 2002), before the rule was revised in 2003. In Tidwell, the district court had reciprocally disbarred an attorney who pleaded guilty to a state felony on a charge of leaving the scene of an accident at which the victim bicyclist died. At the state court sentencing, the attorney accepted a one-year prison term and did not contest losing his license to practice pursuant to Judiciary Law § 90(4), which provides for automatic disbarment when convicted of a New York felony. When the Western District received notice of the state conviction and disbarment from the Fourth Department, the chief judge, pursuant to former L. R. Civ. P. Rule 83.3(b), issued an order without notice or a hearing, automatically disbarring the attorney.

On his release from prison, the attorney moved under F. R. Civ. P. 60(b) to set aside the order on grounds, among other things, that the district court's automatic disbarment process and the Fourth Department disbarment order lacked due process for want of

39 "Felony" means any criminal offense classified as a felony under federal or New York law, or under the law of any other state, commonwealth or territory, which, if committed in New York, would constitute a felony. L. R. Civ. P. 83.3(b)(3).

notice and an opportunity to be heard. On appeal to the Second Circuit from the denial of the motion, the attorney also alleged that while incarcerated he had unsuccessfully attempted, through his wife and son, to appeal the district court disbarment order.

The Second Circuit held that because there was no dispute that New York was entitled to disbar him because of the uncontested felony conviction, there was no factual issue for the district court to resolve, and the attorney had no valid complaint that he did not receive prior notice and a hearing from that court. The circuit court found that, in any event, any procedural defect in the district court was overcome by the full hearing it provided on the Rule 60(b) motion. Moreover, the circuit held, whether the district's automatic reciprocal-discipline rule would present due process issues in other circumstances did not have to be addressed because the district court chief judge, referring to Southern/Eastern District Local Civil Rule 1.5(d) (providing for notice and an opportunity to be heard in reciprocal discipline cases) and District of Connecticut Local Civil Rule 3(f)(same), informed the circuit that the Western District felony rule would be changed. The new rule, promulgated in 2003, is described above.

e. Appellate Review

(1) Authority to Review Lower Court Misconduct Decisions On Grounds of "Fundamental Notions of Fairness" Because of a court's inherent power to sanction attorneys for misconduct, the authority of an appellate court to review a lower court's decision to sanction is not self-evident. Matter of Jacobs, 44 F. 3d at 87-88. In Jacobs, discussed in Section 4(a) above, the court held that the Supreme Court and circuit courts have always assumed jurisdiction to review lower court decisions to discipline attorneys practicing in their courts, probably on grounds that to preclude review would be contrary to "fundamental notions of fairness." Although courts, including lower courts, have independent discretion to sanction misconduct, recourse must be available to prevent abuse of discretion. Id. at 88. In the Second Circuit, the standard of review of a misconduct sanctions order is clear abuse of discretion. Id.; In re Edelstein, 214 F. 3d 127, 130-31 (2d Cir. 2000); In re Gouiran, 58 F. 3d 54, 56 (2d Cir. 1995). In New York State, "discipline imposed by a unanimous order of the Appellate Division is not subject to an appeal as of right in the absence of a substantial constitutional question." Edelstein, 214 F. 3d at 131 n. 1.

5. CONCLUSIONS

This review points out the variety of disciplinary rules and practices among the state and federal courts in New York. There has doubtlessly been great value in the experience acquired by the bench and bar with the different approaches to the disciplinary rules. But in our increasingly large and complex society, the federal district courts and the Appellate Division Departments may want to consider the advantages of a further codification and unification of the rules. Anecdotal evidence suggests that uniform procedural and substantive disciplinary rules for the state and federal courts

save time and expense for the litigants, the courts, and the public, and may be needed to address problems of substantive law arising from the differences. The Appellate Division's joint Disciplinary Rules of the Code of Professional Responsibility and the Southern/Eastern District Court joint rules demonstrate the feasibility and utility of joint rules in that they have eased attorney disciplinary case law and practice across the state. The efficacy of the Appellate Division's codification of the disciplinary rules is demonstrated by its adoption as part of the misconduct rules of three of the four federal district courts in New York.[40] The Eastern and Southern Districts have had long and fruitful experience with their own joint local rules. Their coordinated joint local rule making allows for the promulgation of effective, efficient, more comprehensive rules and suggests the value and feasibility of further efforts of this kind.

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Paul Green	David M. Wirtz

*Chair of Survey Subcommittee and Author of Report
**Member of Survey Subcommittee

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40 The Southern, Eastern and Northern District Courts have adopted the joint Appellate Division Code of Disciplinary Rules. See discussion in Section 1(c).

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Task Force Report on Professionalism

New York County Lawyers' Association
January 11, 2010

INTRODUCTION

NYCLA's Professionalism Task Force was formed in 2005 in the wake of the Enron scandals and against a backdrop of surveys and anecdotal reports of growing dissatisfaction with attorneys both from outside the profession and from within it. Reports of lack of civility, cutting corners and even outright knavery were rampant. Some lawyers were said to be struggling with marginal practices or a desire to do public interest law against a mountain of law school and college debt, and public esteem for lawyers was declining.

The goal of the Task Force was first to take a hard look at the attitudes and practices of lawyers, judges and law schools in New York City. We wished to gauge the extent of the perceived problem and to identify tangible, realizable steps that an organization such as NYCLA might take to reduce its dimensions and ameliorate the professional lives of some lawyers—and by extension, their adversaries, clients and other participants in the legal system. Our goal was always narrow and local in scope, taking into account the work of others and NYCLA's primary role as an organization of attorneys practicing in New York.

The Task Force was established to complement, not duplicate, the ongoing work of major projects, such as Chief Judge Kaye's Committee on Professionalism and the Courts and work done by the ABA, other bar organizations and professionalism commissions around the country.[1] Indeed, we consulted with, received valuable

1 *See generally,* Committee on the Profession and the Courts: *Final Report to the Chief Judge* (1995); ABA, Center for Professional Responsibility, *Survey on Lawyer Discipline Systems* (Annual); ABA, Section of Legal Education and Admission to the Bar, *Report of the Professionalism Committee: "Teaching and Learning Professionalism"* (1996); ABA Standing Committee on Professionalism, *Report on a Survey of Law School Professionalism Programs* (2006); ABA Standing Committee on Professionalism, *A Guide to Professionalism Commissions* (2d ed. 2008).

suggestions from, and drew freely on the work and insights of many of those bodies, for which we are extremely grateful. We have focused on understanding and defining the issue as it may exist in New York City and crafting suggestions that seemed practical, realizable and tailored to the realities of the various types of practices in the City. The work of others enriched and helped refine our study. We felt that we could eschew broader societal and economic themes that NYCLA could only address in a hortatory way in favor of recommendations that we hoped might be concrete and functional.

The members of the Task Force are listed in Appendix A, and NYCLA is grateful to all of them for their thoughtfulness and commitment of time. In keeping with the demographics of NYCLA and the nature of our effort, the Task Force was drawn from all segments of the profession in the City: partners and associates from large firms, members of small firms and solo practitioners, judges and court personnel, in-house counsel, lawyers with long experience at public agencies or with public interest groups, law professors, lawyers with decades of experience and lawyers in the first few years of their practice.

We proceeded in the first instance by engaging in frank and far-ranging discussion, sometimes with academics or others involved in similar studies, to identify what we meant by professionalism and to refine our mission and course of study. The resulting, working definition of professionalism is set forth in Part I of this Report (see also Appendix B), along with some background and commentary.

We created a questionnaire that most of the law schools in or around New York City answered so that we had a clearer picture of what schools felt they could do—and also what they could not do—to instill an appreciation of and commitment to professionalism among future lawyers. We also developed a questionnaire (see Appendix C) that over 150 NYCLA members answered either in hard copy or (in a few cases) electronic form. Never intended as a survey, the questionnaire was designed to obtain comments and insights about whether, and if so why, lawyers practicing in New York thought professionalism had declined over time. (Most respondents did, but a number did not, and a few noted some improvement through more attention at law schools and ethics CLE programs.) These efforts were supplemented with a questionnaire to New York State Court judges and disciplinary authorities and a roundtable focus group and discussion with a number of judges and magistrates from the United States District Court for the Southern District of New York.

Building on a suggestion from John H. Gross of the Judicial Institute on Professionalism in the Law,[2] the Task Force then organized a series of focus groups among various segments of the profession. These included one focus group of associates at large firms and others among practitioners at small firms or solo practitioners and at the New York City Corporation Counsel.

From all this work, a few consistent themes emerged, and they are distilled in Part III of this Report. But the one predominant theme was an expressed need and desire for mentoring. This need appeared to exist not only among those in small or individual

2 Also referred to as the "Craco Commission," which was the commission convened by Judge Kaye that has held focus groups and convocations around the State of New York on the topic of professionalism.

practices but also among those in larger law firms or institutions, whose formal mentoring programs were sometimes felt to be lacking or potentially compromised by the employer/employee relationship. Other studies have noted the sometimes critical, if elusive, role played by mentoring.[3] Many experienced lawyers also expressed a willingness to serve as mentors, particularly in a bar association setting with the added incentive of possible programmatic resources and CLE credit.

In this way, the most tangible outcome of the Task Force's work—NYCLA's pilot mentoring program—was born. It is described in more detail in Part VIII. This program will supplement other programs at NYCLA that often beget informal mentoring relationships, such as the Inn of Court that NYCLA founded over 15 years ago, the Minority Judicial Internship Program, and the opportunities afforded by participation in the work of NYCLA's committees and *pro bono* programs. We realize that there are many challenges to such a program, and that it will take persistence and effort on behalf of mentors, mentees and NYCLA's leadership for it to succeed and to grow. At the same time, we believe that such a program will fill a real need among the bar of New York. We hope that, with experience over time, it will not only lead to success for NYCLA and its members but also serve as a model for other organizations.

I. DEFINITION OF PROFESSIONALISM

The first job of the Task Force was to define "professionalism." There was relatively little difficulty in reaching consensus as to whether or not a particular behavior was considered by us to be "professional"; nevertheless, as we were to discover, professionalism is easier to recognize than to define. Lawyers in all states are governed by ethical rules. In New York, the Rules of Professional Conduct ("the Conduct Rules") specify impermissible attorney behavior, but we all believed that the definition of professionalism should extend beyond minimal adherence to those rules. Certain conduct that might be in compliance with the Conduct Rules may still be unprofessional. For example, shameless self-promotion or the failure to return phone calls would seldom constitute disciplinary infractions, yet they epitomize unprofessional behaviors.

To arrive at consensus, the Task Force read writings of numerous scholars, judges and practitioners, from Edmund Burke to Dean Roscoe Pound to Justice Sandra Day O'Connor. We reviewed definitions of professionalism, including the 1986 Report of the American Bar Association Commission on Professionalism (the "Stanley Report"), the 1995 Committee on the Profession and the Courts' Final Report to the Chief Judge, and the New York State Bar Association's Committee on Attorney Professionalism.[4]

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3 *See, e.g.,* Ronit Dinovitzer et al., *After the JD: First Results of a National Study of Legal Careers* 80 (2004).

4 The New York State Bar Association (NYSBA) Committee on Attorney Professionalism defines attorney professionalism as "dedication to service to clients and commitment to promoting respect of the legal system in pursuit of justice and the public good, characterized by ethical conduct, competence, good judgment, integrity and civility." NYSBA Journal, "Attorney Professionalism Forum" 48 (Oct. 2009) (definition also available at www.nvsba.org').

We analyzed the role of law in America, and the role of lawyers in our system of law. We discussed commercialism in law practices, large and small, and we reviewed the staggering amount of time that many lawyers voluntarily devote to service *pro bono publico.* We considered the difference between the practice of law as a profession and the practice of law as a business or trade. We took note of the trends in our society that have resulted in the growth of the number of attorneys, the increasing size of law firms and a possible divide between the large, predominantly corporate practice and other segments of the bar. We examined the historic role of lawyers at the forefront of social movements here in the United States, as well as abroad, such as the thousands of lawyers who protested in the streets of Lahore, Pakistan, and were subsequently jailed, in response to General Pervez Musharref's controversial declaration of emergency rule, which suspended the Constitution, dissolved the Supreme Court and took control of private television news channels.[5]

Our discussions ranged from practical to philosophical. For example, if *pro bono* work and bar association involvement are likely to enhance professionalism traits, should such service be mandatory? We concluded that there are myriad ways for a lawyer to serve and that the decision to do so should be an individual matter.

Should an attorney's fee be secondary to service? We concurred with Roscoe Pound's definition of professionalism as "the pursuit of a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood."[6]

Should civility be the benchmark of professionalism? We felt that civility was a key component but that an approach emphasizing civility to the exclusion of other factors might obscure the important issue of the profession's obligations to client service and society and decided against the proposition.

Should our law schools be required to make professionalism a more pervasive part of the law school curriculum? We agreed that emphasis should be placed upon teaching the profession's role in society, as indeed our work showed it has been in various ways at a number of local schools. At the same time, we came to understand that there are limits to what students may absorb at this stage of their careers and what law schools can effectively teach without slighting substantive content. Thus we believe that, while the law school experience should include a meaningful professionalism component, the manner for doing so is best planned by the individual law schools.

Prior to defining professionalism, it was necessary to consider its characteristics. We have summarized some of the traits that were instrumental in helping us arrive at a definition.

The Law Is a Higher Calling

Law is a learned art involving research, analysis and judgment. We are committed to promoting respect for legal scholarship. We pursue justice and the public good.

5 Jane Perlez and David Rohde, *Pakistan Attempts to Crush Protests by Lawyers,* N.Y. Times, Nov. 5, 2007.

6 Roscoe Pound, *The Lawyer from Antiquity to Modern Times,* 5 (1953).

Louis A. Craco, Chair of the New York State Judicial Institute on Professionalism in the Law, aptly stated that "[t]he key notion is that we help clients one by one by putting at their service our special knowledge and craft and judgment."[7] We are dedicated to the historic and evolving substantive rules and ethical values that elevate the law to a learned profession as opposed to a trade or business. We acknowledge lawyers' historic role in society, to their clients and to the profession as a whole. Professionalism involves a commitment to competence and the understanding and development of the law and integrity in our practice. We should exhibit soundness of character, fidelity and honesty, as well as soundness of research and analysis.

Lawyers must serve their clients fairly and skillfully. Our service to clients preempts our desire to accumulate wealth personally. Professionalism involves dedication and service to clients, even at the risk of personal discomfort or inconvenience to the attorney. Public service in the broadest sense is a critical part of professionalism.

Professionalism thus requires a willingness to subordinate narrow self-interest in pursuit of the more fundamental goal of public service. There are numerous occasions in practice, particularly in litigation, where a lawyer's self-interest may conflict with a client's interest. One of the key marks of a professional is recognizing the potential for conflict and always trying to resolve it in the client's favor.

Lawyers must strive to develop the law and improve the legal system. We understand the value of mentoring less experienced attorneys, and giving due respect to courts and more senior practitioners. The essence of professionalism is a commitment to develop one's skills to the fullest and to apply them responsibly to the problem at hand. We look beyond short-term results and consider the consequences of our actions and advice.

Professionalism Implies Maturity and a Reasoned Temperament

Lawyers should use common sense and wisdom in the exercise of judgment. We should infuse our subjective higher, personal values into our daily practice. Attorneys and clients comprise just one aspect of the legal system. Adversary attorneys, fellow practitioners, judges, clerks and assistants, partners and associates, government agencies and legislatures are among the many faces of the legal system. Our commitment to promoting respect not only for each other but for all involved in the legal system should be a hallmark of our behavior. Professionalism implies an understanding of the importance of collegiality and civility though the concept is broader than a code of good manners. Chief Justice Warren Burger of the United States Supreme Court said that "lawyers who know how to think but have not learned how to behave are a menace and a liability . . . to the administration of justice."[8]

Perspective is an indispensable attribute of a professional. While the societal role of doctors, teachers and social workers is fairly clear, the role of lawyers is considerably less obvious and is often not well articulated. As lawyers develop understanding of

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7 Journal of the New York State Judicial Institute on Professionalism in the Law, *Convocation on the Face of the Profession II: The First Seven Years of Practice,* 6 (2003).

8 Warren E. Burger, *The Necessity for Civility,* 52 F.R.D. 211,215 (1971).

their profession's societal role, they are likely to develop a better understanding of their own role as professionals and to enhance the public's understanding.

A lawyer should recognize that there are limits on the ability to help a client and strive to be detached and provide disinterested, considered and sound advice. There is frequently tension between the so-called duty of zealous advocacy[9] and the professional's duty to society. Too often conflicts between the two are resolved by reflexively claiming that the adversary system will somehow take care of them. Lawyers who act professionally understand this tension and strive to resolve it maturely in practice.

Professionalism: The Definition

The definition of professionalism ought to implicate a sense of duty, respect and selflessness that transcends the mandatory character of the ethical rules. This includes both good intent and responsible action. Professionalism addresses both the interests of the clients, and broader concerns. As attorneys, we have a higher calling, not merely a job. We have a duty to behave maturely. With all of the above parameters in minds, the Task Force arrived at the following definition:

> By professionalism we mean a group pursuing a learned art as a higher calling in a spirit that it is performing a public service, a service that is indispensable in a democratic nation founded on the rule of law. This calling is no less a public service because it may also be a means of livelihood. Pursuit of a learned art in the spirit of a public service is the essence of being a lawyer. It implies obligations of dignity, integrity, self-respect and respect for others.
>
> The essence of professionalism is a commitment to develop one's skills to the fullest and to apply them responsibly and with the utmost diligence to the problem at hand. Professionalism requires adherence to the highest standards of integrity and a willingness to subordinate narrow self-interest in pursuit of the more fundamental goal of client service. Because of the tremendous power they wield in our system, lawyers must never forget that their duty to serve their clients fairly and skillfully takes priority over the personal accumulation of wealth. Lawyers must be willing and prepared to put their clients' interests before their own while retaining enough perspective to provide those clients with considered, well-informed and objective advice.
>
> Although duties to their clients in particular matters are paramount, throughout their careers lawyers must remain conscious of and committed to the goal of improving the profession and the system of justice. This commitment includes taking personal and professional measures to increase the availability of legal services and abet even-handed and efficient application and administration of the legal system for all segments of society.

9 The words "zealous advocacy" no longer appear in the New York Rules of Professional Conduct.

II. SUMMARY OF TASK FORCE ACTIVITIES

After surveying existing literature and drafting its working definition of professionalism, the Task Force formulated and circulated questionnaires to NYCLA members, law schools in and around New York City, and New York state judges, seeking their comments on the state of professionalism. The law school questionnaire was drafted with the understanding that even though law schools are not the only agents of influence in the development of lawyers, they have a singular influence on future lawyers as the "influence of first impression" in their careers. The purpose of the law school questionnaire was to understand some of the current practices used by New York law schools for communicating both the ethics rules and broader notions of professionalism to law students. The questionnaire for the judiciary was drafted with the belief that the judiciary plays a prominent role in shaping the ethical and professional values of lawyers and that judges may have unique insights into how well those values are observed in practice and whether the integrity and professionalism of those appearing before them have improved or declined over time.

In addition to the responses received from the law schools, the Task Force received responses from some 150 NYCLA members and nearly a score of State Court judges. The Task Force further engaged in roundtable discussions with roughly the same number of judges and magistrate judges in the United States District Court for the Southern District, and met with representatives from the Craco Commission and the New York State Bar's Professionalism Committee, as well as law school professors and others, to discuss the state of professionalism in New York. Based on the model suggested to the Task Force by the Craco Commission, the Task Force planned a series of focus groups at which a group of six to 12 practitioners could consider the issues identified in the questionnaire responses and other discussions.

The focus group discussions were divided into two rounds. Some informal first-round discussion groups served to develop questions and themes for the final groups. The second-round panels then met for discussion of those themes. The focus groups were divided into three main categories, namely, associates at large law firms ("Large Firm Group"), solo and small firm practitioners ("Small Firm Groups"), and lawyers from institutions such as the New York City Corporation Counsel ("Public Service Groups"). One or two leaders with a prepared outline of three or four topics led the group discussion. Participants in all the groups were promised confidentiality, and notes were taken but no transcript was made.

In addition to providing comments on the working definition of professionalism, other important issues arose in the focus groups. For example, issues that were discussed in the Large Firm Group and Small Firm Groups included particular instances of professional or unprofessional behavior that participants had encountered with other lawyers, the role bar associations, law schools, the courts and CLE play in teaching professionalism to lawyers, and steps that could be taken to improve professionalism among lawyers. In the Public Service Groups, the impact of an increasing workload and limited resources on the ability to advocate effectively on behalf of their clients was an issue that was discussed in depth. A summary of key points of discussion in the focus groups appears in Part III.

Finally, in early 2008, the Task Force realized that through the NYCLA website, it had the capacity to post to and manage a blog as a way to generate and monitor further discussion on the topic of professionalism. The inaugural post was made on March 15, 2008. Task Force member Madeleine Giansanti Cag serves as the chief blogger and manages the blog. Although not yet as widely used as it might be, the blog has been a source of ongoing dialogue regarding topics of interest to the Task Force, and the Task Force hopes that it will attract more visitors and comments in the future. It can be easily accessed by clicking an icon titled "Task Force on Professionalism Blog" on NYCLA's home page (www.nycla.org).

III. LAWYERS' PERCEPTIONS: THE FOCUS GROUPS

Small Law Firm Groups

Certain themes emerged from the two Small Firm Groups. The concept of professionalism is understood by many of these lawyers to boil down to the manner in which a lawyer deals with fellow professionals, the courts and other persons involved in legal matters. It cannot be defined solely with regard to "client service" because the concept of client service (from the client's perspective) may be in tension with economic and other realities, as well as ethical obligations (e.g., a lawyer must consider constraints other than the client's desire to hire a "shark in a suit").

In the view of many in these groups, professionalism may be valued more outside New York City than in it, particularly in smaller communities or specialized practices where there are more frequent interactions with the same adversaries and judges. Some participants expressed agreement with press reports asserting that attorney self-interest too often was prejudicial to client interests in New York.

Churning of the client's file was said by some participants to be a common practice because of economic pressure or the tactics of adversaries such as some larger firms. Bills are not always sent promptly, and phone calls are not always returned promptly. The time required for a matter may depend on the experience of the lawyer on the other side. For example, there is a perception that some adversaries wage wars of attrition, and some government lawyers do not have the incentive to handle a matter efficiently and may sometimes use their position to satisfy idle curiosity or for other collateral objectives.[10]

Defensive lawyering seems more prevalent than ever in the view of several of the small firm attorneys. For example, in the litigation area one now needs letters confirming every adjournment, and practices such as serving subpoenas on the eve of trial or trying to force an adversary to prepare papers at the last minute are commonplace and accepted. Some lawyers seem to be gaming the court system by not following court rules and delaying proceedings by being late or absent or sending papers late.

10 These comments were in stark contrast to that of the government lawyers in the Public Service Groups who felt that their caseload forced them to do too little on the matters rather than too much.

These tactics sometimes work in state courts, but federal courts do not tolerate them, illustrating the unfortunate truth that when attorneys are permitted to get away with unprofessional behavior, the behavior becomes contagious in a race to the bottom.

Though one might assume that transactional work would seem to be more conducive to professionalism—due to the incentive to reach an agreement—participants still saw a need to "read every word" of revised drafts because they could not trust the other side to point out revisions. Participants also felt that some attorneys put "strawmen" into contracts knowing they are not serious points but simply included as a negotiation tactic. The participants expressed concern that an "anything-goes" mentality could prevail during negotiations because there is no judge or other arbiter to whom one is accountable.

Participants in the Small Firm Groups noted that lawyers have historically been trained in law school to be accurate, especially in representations to the court, but not necessarily professional. Some current CLE is ineffective and does not reach those who approach it with a non-professional attitude. (Too many lawyers are listening to recordings that may or may not be relevant to practice simply in order to obtain necessary credits). To encourage professional behavior, CLE credit might be given for attending bar committee meetings, mentoring and *pro bono* service. Participants noted that bar association membership and activity are excellent ways to improve professionalism, in part because they create peer pressure to adhere to professional norms of conduct.

Many participants felt that courts could and should do more to curb incivility: to paraphrase one participant, judges should explain that raising your voice does not mean that you will be heard. The feedback system should be better (perhaps a "rate-your-lawyer" website). And, of course, lawyers have to be responsible for their clients as well as themselves. They need to attend to client expectations by clearly communicating the scope of work, reasonable chance of success and how much the work will cost.

In summary, two ideas emerged:

1. For the long term, the various stakeholders of the legal profession need a more integrated approach to professionalism, which will require a generally agreed-upon definition to implement.
2. For the short term, mentoring should be promoted by bar associations as a way to ensure that positive role models influence less-experienced lawyers.

Public Service Groups

The Task Force conducted two focus groups involving over 20 attorneys at the Office of the Corporation Counsel, the first consisting of the corporation counsel and executive staff, and the second for assistants with three to five years of experience in the office. The executives noted the complexities of having a governmental body, such as a city, as a client. This type of client is multi-faceted, often identified with the public interest and the public treasury, but with commercial and other interests to protect. Its policies

or actions cannot correspond to the perceived interests of all members of the public or the personal preferences of all its lawyers, sometimes placing those who represent it in an awkward or difficult position. Some members of the group felt that government lawyers have a higher ethical standard than private practice lawyers because they serve the public and are ultimately committed to civil justice. The executives felt that the ethics training at the office emphasized obligations to the public and to the courts, and urged attorneys to conduct themselves with the highest integrity in furtherance of the achievement of justice.

In connection with maintaining high professional standards, the executive focus group noted an increased emphasis on maintaining communication and transparency by various means, including formal presentations on topics of general agency interest, monthly reports describing the major cases pending in various divisions, and reports indicating how many hours were spent on particular matters. Executives also noted that, unlike many attorneys in the private sector, government attorneys are not free to turn down a case if a client's budget makes it impossible to provide adequate representation. Even during periods of budget surpluses, the management of voluminous litigation requires a realistic policy through which attorneys weigh the costs of litigation against settlement.

The assistants' group expressed similar concern regarding pressure to settle cases due to financial constraints, and at times, felt settlements were negotiated that might not have been in the City's best interest. However, assistants generally rated professionalism in the office as high due to a strong general commitment to working to improve service to the public. Most of the assistant attorneys reported having left law school with a basic concept of professionalism, but with little understanding as to how it would arise in government practice, in particular the low level of professionalism exhibited in certain instances by some adversaries. Several assistant attorneys felt that their efforts to be as professional as they would like were hindered at times by slowness of agency clients in providing necessary information and materials, as well as heavy caseloads. Neither group felt there was a strong need for more job training on professionalism because of the considerable efforts already in place.

Large Law Firm Group

The Task Force also conducted a focus group for associates at over a dozen large law firms in New York City. Large law firms have grown in number, size and influence, particularly in urban centers where lawyers at such firms work predominantly for business clients.[11]

The focus group participants differentiated between professional conduct and professional purpose. Participants reviewed the working definition of professionalism and responded to a series of questions regarding their work experiences and personal views.

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11 *See* John P. Heinz et al., *Urban Lawyers: The New Social Structure of the* Bar, 98-139 (2005); see *also* Robert Macerate, *"The Lost Lawyer " Regained: The Abiding Values of the Legal Profession,* 100 Dick. L. Rev. 587, 602-03 (1996).

Several themes emerged from this session as well, with some similarities and some differences from the other groups.

Large-firm associates tended to differentiate between professional conduct and professional purpose. Professional conduct encompasses day-to-day behavior and interactions with others, while professional purpose relates to the ultimate aim or outcome of the work being performed. For example, several associates noted that a lawyer could act in a professional manner yet without regard for the outcome or ethnical implications of the work being performed. The frequency of this response suggests that associates at large firms at times—at least privately—struggle to balance their ethical duties to serve their clients with other moral or personal considerations. This dilemma mirrors a tension that lawyers in governmental service also expressed.

Associates who focused on professional purpose felt that *pro bono* work is central to maintaining a sense of professionalism at a law firm. Associates who focused on conduct, on the other hand, saw little connection between *pro bono* work and professionalism. While *pro bono* work offers an opportunity to embrace "the higher calling in a spirit that is performing a public service," one associate noted, it does not mitigate a lawyer's duty to adhere to the highest standards of professional conduct in all matters.

Perhaps as expected, large law firm associates were nearly unanimous in noting that the biggest motivator for unprofessional behavior was connected to profit motives and billable hour requirements. Some associates reported being given work that they felt was not necessary in order to increase their billable hours, while others suggested that the billable requirement was generally susceptible to manipulation and unprofessional activity.[12] One lawyer noted that associate bonus structures, commonly tied to hours billed in a year, further contributed to unprofessional behavior. One associate felt that firms sought to maintain a level of ethics and professionalism to the extent that it does not interfere with maximizing profit. Another associate thought high attrition rates at large firms lead to apathy towards professionalism. A third complained that there was little chance to display professionalism when performing years of document review without any contact with clients or other counsel. Collectively, these responses suggest that large-firm associates see professionalism more as a response to workplace demands than as interactions with clients, opposing counsel and the courts.

Views on the efficacy of mentoring as a means of developing professionalism varied. Some felt that in-house mentoring programs amount to "speeches from partners to associates" and that informal mentoring worked fine. However, most responders indicated that mentoring, both formal and informal, could influence an associate for the better by identifying "qualities of professionalism you wish to emulate, as well as

12 Harvard Law Professor David B. Wilkins referred to the business model of the large law firm as employing "sweatshop capitalism," noting the tendency for many firms to "take people in, grind the excess value out of them by working them as hard as humanly possible, and then after eight-to-ten years throw ninety percent of them away." *NYS Judicial Institute on Professionalism in the Law,* Vol. I, 10 (2001). This theme was also observed in an ABA study of Chicago lawyers. That study, however, also noted that the toll taken by billable hours, while real, tended to be somewhat exaggerated and was not necessarily greater than that in other demanding or engaging jobs and profession. Heinz at 130-131.

those qualities of unprofessionalism you hope to avoid." Some expressed possible reservations about discussing some issues with an intramural mentor appointed by the employer for fear of adverse career consequences or futility if the underlying grievance reflects the culture of the firm itself.

IV. PUBLIC PERCEPTIONS OF LAWYERS

Whether the medium is television, movies or one of the many lawyer jokes told among friends, expressed dissatisfaction with lawyers seems to be pervasive in discourse and our public consciousness.[13] Well over 1,000,000 lawyers are now practicing in the United States and stereotypes often substitute for the varied traits and characteristics of such a large sample size. The growth in the number of lawyers coupled with recognition of First Amendment rights to advertise has led to increased and often highly visible competition. Many of these million-plus lawyers are perceived as hungry for clients.

Likewise, it is difficult neatly to summarize the perceptions of lawyers by the American public though there are some general identifiable trends. One is a nostalgia for lawyers of our real and fabled past. Whether it be the brilliance of Clarence Darrow in his defense of Leopold and Loeb or Atticus Finch offering lessons in morality and virtue before a jury of his peers in *To Kill a Mockingbird,* we like to remember lawyers as learned and unwavering pillars of their communities, and courtrooms as hallowed grounds from which truth and justice emerge.

A second trend is the growing sense that the modern lawyer does not share the same qualities as these iconic lawyers of the past, that the profession has spiraled downward to a much crasser, "bottom-line" approach, with each lawyer looking out for his or her own monetary well-being at the expense of clients, colleagues and the public at large.[14] This is a common observation with other professions, such as medicine and banking, and may be a reflection of our ambivalence toward living in an increasingly capitalistic society and our sense that what was a "profession" has been replaced by a business model. It has also been noted that some concerns over declining standards and increasing commercialism have been voiced driving the supposed golden ages themselves. Over 100 years ago, John Dos Passos of this Association wrote that "[t]he

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13 There is extensive literature concerning public dissatisfaction with lawyers. *See e.g.,* Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession,* 68 St. John's L. Rev. 85 (1994).

14 This view has been reinforced by anecdotal observations and reminiscences of those within the legal community as much, if not more, than the public at large. For example, then Chief Justice William H. Rehnquist, in an speech before the North Carolina Bar Association in 1994, lamented an earlier time in his life when "there was a public aspect to the profession, and most lawyers did not regard themselves as totally discharging their obligation by simply putting in a given number of hours that could be billed to clients. Whether it was pro bono work of some sort, or a more generalized discharge of community obligation by serving on zoning boards, charity boards, and the like, lawyers felt that they could contribute something to the community in which they lived . . . As law firms focus on the proverbial bottom line, with predictable pressure on associates to increase billable hours, little time remains for public service." Heinz at 203.

lawyer stands before the community shorn of his prestige, clothed in the unattractive garb of a mere commercial agent—a flexible and convenient go-between, often cultivating every kind of equivocal quality as the means of success."[15]

In 2002, the American Bar Association Section of Litigation released a report titled *Public Perceptions of Lawyers: Consumer Research Findings* (the "ABA Report"), examining the public's positive and negative perceptions of lawyers and offering suggestions for how lawyers, law firms and bar associations might improve the reputation of the profession.[16] The ABA Report shows that the American public is ambivalent about its lawyers. On one hand, the public perceives lawyers as knowledgeable, hardworking and able to offer expertise that helps clients resolve problems and navigate through difficult situations. On the negative side, many regard lawyers as greedy and corrupt, hired guns who are driven by profits and self-interest rather than client interest or a concern for justice. As noted above, this perception was even voiced by some participants in the Small Firm Groups. The ABA Report also indicated that the public believes lawyers do a poor job of policing themselves, and that bar associations are viewed more often as clubs for lawyers than as protectors of professional values.

The ABA Report offers some useful suggestions for combating these perceptions, including improving client communications, explaining fees up front, alerting clients to unexpected charges, advertising responsibly, providing legal education programs and engaging in *pro bono* work. It also recommends that law firms and bar associations educate lawyers about good attorney-client relationships.

It is useful to note that the public's primary negative perceptions of lawyers are not that they lack requisite expertise or ability, but rather that they are greedy, corrupt and do a poor job of policing one another. These are essentially criticisms of character rather than ability. These criticisms are in part due to the public attention given to the small subset of lawyers who make mistakes or act inappropriately. Stories of successful *pro bono* representation or mediating delicate situations are often overshadowed by the occasional malfeasances that garner media attention.

Additionally, the Task Force has noticed increasing public criticism of judges, whose vital independence from other branches of government is frequently misconstrued as out of touch or even undemocratic. Supreme Court decisions relating to substantive and procedural due process rights, including the right to privacy, have become lightning rods for political groups who disagree with the outcomes. Local media often sensationalize decisions without placing them in context, and judges are in no position, and lack the resources, to defend themselves. Contentious judicial confirmation battles have also contributed to public mistrust for the courts. These unfortunate developments

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15 Dos Passos, John R. *The American Lawyer: As He Was, As He Is, As He Can Be.* (1907). Another illustrative example, told by American Bar Association President Martha W. Barnett in her keynote address, 52 S.C. L. Rev. 453 (2001), is the commencement address of Timothy Dwight at Yale University on July 25, 1776, in which he accused the legal profession of meanness, deception and bill padding and urged graduates to avoid the law like "death or infamy." Timothy Dwight, *A Valedictory Address to the Young Gentlemen, Who Commenced Bachelors of Arts at Yale College,* July 25, 1776, Am. Mag. 101 (Jan. 1788).

16 The ABA Report is available at http://www.abanet.org/litigation/lawvers/publicperceptions.pdf.

are detrimental to our system of justice and lead to the erosion of public trust in our shared institutions and system of governance.

Negative public perceptions are attributable in part to a lack of understanding about what a lawyer does and the nature of his or her ethical obligations and duties. For example, a lawyer's duty to safeguard privileged and confidential communications and information can often frustrate the public's desire for information. A lawyer's willingness to represent an unpopular client or supporter of a particular cause, undoubtedly essential to our legal system's administration of justice and sometimes a means for social change, is often misunderstood as identifying with all the characteristics of that client. A lawyer must consider a variety of contingencies and risks when providing legal advice and often counsel caution and deliberation. This approach may sometimes frustrate a client or appear dilatory or obstructionist to an adversary. As these examples show, improving the public's understanding of our judicial system and the role that lawyers play could improve public perceptions of lawyers and therefore lawyers' perceptions of themselves. This educational role continues to be an important one for NYCLA and other bar associations to play.

V. LAW SCHOOLS

Law schools confront the issue of promoting professionalism in two separate but related ways: supporting and encouraging civil and appropriate conduct and integrity among law students, and exploring and teaching the concept of attorney professionalism. The public understandably expects that law schools will not graduate students (and certify them to become members of the bar) if they have shown themselves incapable of honest and appropriate professional behavior. The practicing bar expects that newly admitted attorneys will understand basic ethical standards and will be prepared to practice law ethically and professionally. And because law schools are institutions of higher learning, law schools are best positioned to explore the meaning of professionalism and its implications from a broader perspective.

Law schools begin to tend to these obligations with their earliest interactions with their students. In recent years, a number of law schools have expanded orientation programs for this purpose. Professors may conduct role-playing exercises involving simulated ethical dilemmas and discussions, with related readings. Judges and practicing attorneys (assisted by bar associations such as NYCLA and the New York State Bar Association) may present programs on professionalism. Orientation programs may also include talks by academic and student life administrators about the pressures of law student life, and appropriate and inappropriate ways of coping with those pressures; these programs sometimes include information from Lawyers Assistance Programs and bar admission authorities. Some schools (perhaps fewer in New York than elsewhere in the country) conduct ceremonies at which students make pledges of their commitment to ethics and professionalism. The message of all of these programs is that students enter the profession of law on the first day of law school, and should conduct themselves accordingly. Of course, all law schools, like post-secondary institutions generally, have codes of conduct or honor codes, violations of which may result in

disciplinary sanctions. The law school codes may incorporate broader expectations of professional behavior than other graduate programs or undergraduate institutions.

In fact, chronologically speaking, the first point at which law schools must address these issues is upon a student's application to law school. Application forms routinely ask students to provide information about prior disciplinary sanctions and arrests or criminal sanctions, primarily to inform admission decisions. Bar admissions authorities ask similar questions of applicants to the bar. Bar applicants who have failed to disclose incidents to their law schools that are subsequently reported to bar admission authorities have found their bar admissions delayed or sometimes denied. In response, many law schools have changed their application questions to track the language of bar applications. Even with a tightening of the language, some schools have reported anecdotally an increase in the number of students who omit these incidents (frequently juvenile arrests, dismissals or alcohol-related violations) from their applications, reporting them only after they matriculate and, in some cases, as late as their final year when they are beginning to prepare their bar applications. In some cases, law schools offer limited amnesty periods for reporting incidents that would not have affected the admissions decisions; many times, however, these cases are adjudicated through the school's disciplinary process. This experience highlights the gate-keeping role that law schools play, but also underscores that law schools, like other institutions, are subject to broad shifts in societal mores.

Law school curricula have long incorporated the teaching of ethics and professionalism. Of course, since the Watergate scandal of the 1970s, law schools have required students to complete a course in the rules of ethical conduct, and New York, like most states, requires that students pass the Multistate Professional Responsibility Examination (MPRE) to be admitted to the bar. The required course in most schools is not limited to preparation for the MPRE, however, and explores issues such as what it means to be a fiduciary, the tensions that can arise between an attorney's obligations as an officer of the court and as zealous advocate for a client, and the dictates of civility. The effectiveness of this curriculum can be hindered by the format of the course; students are unlikely to absorb and fully understand the intense stresses facing practicing attorneys if they encounter them only in readings and lecture-hall discussions. Professors whose law practice experience may be limited or remote in time sometimes encounter resistance or skepticism from students who believe that the "real world" produces different resolutions to ethical dilemmas than does the classroom.

Clinical and skills courses offer at least a partial response to the issues described above. Most schools offer simulation courses on skills, such as trial advocacy, pretrial practice, negotiating, counseling and interviewing. Although ethics may not be the substantive focus of these courses, they frequently incorporate ethical issues in the case descriptions and exercises. This exposes the students to the issues "in role" and thus forces them to grapple with them in a more realistic, less academic way. Even more realistically, law school clinics offer students the opportunity to represent actual clients under the supervision of professors. In these courses, students learn the fundamental aspects of law practice management, with their attendant ethical implications, such as the obligations to practice competently and to protect client confidentiality. Real clients in real settings almost inevitably also generate particular ethical dilemmas, and clinics

provide a place for students to consider the issues with the guidance of their professors. Most schools also offer externships, in which students receive academic credit for placement in law offices and judges' chambers. These courses typically require students to reflect on their observations of the attorneys with whom they work and interact, including the effectiveness and professionalism of the practices they see. The guiding principle of all of these courses is to teach students to notice ethical issues in everyday practice, to reflect on their implications, and to have the opportunity to explore them in writing or in the context of discussions with faculty and classmates. Many clinical faculty believe that a key to the effectiveness of these courses is the mentoring that students receive from members of the practicing bar, as well as experienced practitioner-professors.

Some schools also offer upper-level courses in ethics, including such topics as theories of legal ethics, the history and current state of the profession, and attorney rogues and heroes. Although these courses are not typically required, they do allow interested students the opportunity to read, discuss, research and write about the subjects in some depth.

A number of New York-area law schools have academic centers that focus on issues of legal ethics and attorney professionalism. Some of these centers emphasize ethical theory and practice, such as Fordham's Stein Center for Legal Ethics, Hofstra's Institute for the Study of Legal Ethics and Cardozo's Jacob Burns Center for Ethics in the Practice of Law. Others focus on the role of lawyers and law in society, such as NYU's Institute for Law and Society and New York Law School's Center for Professional Values and Practice. Still others highlight the importance of an attorney's obligation to promote justice and serve the public interest, such as New York Law School's Justice Action Center and Columbia's Center for Public Interest Law. These centers sponsor programs for the public and colloquia for the academic community exploring these topics, and many have specialized publications as well.

Law schools and all of the courses, programs and projects they sponsor operate in the context of the pressures that confront the legal profession generally. Law school tuition and living expenses while in law school are high, and the vast majority of students take on significant debt in order to finance their legal education. Law students, like lawyers, experience higher rates of substance abuse and emotional disorders, such as depression and anxiety, than the general population. Law students face an extremely competitive job market upon graduation, which has only intensified in the recent recession. And the economics of law practice, in most sectors, is less promising than it has been in generations. When they are admitted to the profession and become practicing lawyers, law graduates confront the issues discussed elsewhere in this Report. These conditions make it vital to strengthen and expand partnerships between law schools and the practicing bar.

VI. COURTS

Judges expressed concern over the lack of civility, respect for decorum and even truthfulness of some of the lawyers appearing before them. Most felt that these qualities,

in general, had declined over time. Some attributed the perceived decline to the growth in the number of lawyers chasing too few clients, often in a small-firm setting without an experienced role model. Others pointed to the limited amount of time in court actually accumulated by most lawyers and to the emphasis on commercialism. Whatever the causes, the most telling comment that the Task Force encountered in its deliberations was the remark of one long-time federal district court judge who said that, whereas he once accepted at face value and relied on representations of all but a handful of attorneys appearing before him, he now felt there were only a handful of lawyers well known to him whose word he could trust.

One issue of concern to the Task Force, noted in the focus groups as well as among Task Force members, was the failure or inability of courts to become more involved and take action to curb improper behavior. As Chief Justice Warren Burger noted, if "even a few" judges tolerate misconduct, "the administration of justice suffers and it leads to repetition of that conduct by other lawyers."[17] There are, of course, impediments to doing more. First and foremost are the crowded dockets of the courts themselves, leaving little time to become embroiled in discovery disputes and other pretrial activity. This problem is exacerbated by the complexity and sheer mass of electronic discovery. This background makes it difficult for judges to spend the time to decide fairly who-shot-john satellite disputes often having marginal relevance to the principal issues in a case.

Another factor that may affect some judges is concern for their own reputation with the bar and beyond if they mistakenly reprimand an attorney or discipline a prominent or well-connected attorney or firm. This may be a special concern of New York State judges as they near re-election when any controversy could compromise a re-election campaign. Judges may, however, take some comfort in the virtually unanimous and often earnestly expressed view of survey respondents and focus group participants that strong and more frequent reactions by the judiciary would be welcomed and could stem particularly egregious or unnecessarily obstructive behavior.

VII. LAW FIRMS AND BAR ASSOCIATIONS

As the focus groups' discussion showed, interaction with role models plays a pivotal role in influencing behavior.[18] This phenomenon of "social learning" is not unique to the legal profession. The armed services are unapologetic and explicit in their emphasis on the exhibition of role models. New recruits, fresh off the bus, are greeted by a drill instructor, with spit-polished shoes, Smokey-the-Bear hat, aviator sunglasses and a uniform in perfect order. Drill sergeants train new recruits to be cognizant of the fact that part of their job is to be a walking, breathing embodiment of military discipline.

Although not always as overtly hierarchical as the military, society is full of spheres in which someone is looking to someone else for cues as to behavior and one generation

17 Warren E. Burger, *The Decline of Professionalism,* 61 Tenn. L. Rev. 1 (1993).

18 *See* Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock,* 22 Geo. J. Legal Ethics 1549, 1556-57 (2009).

sets standards for the next. School-age athletes watch the professionals; the professionals watch their all stars, coaches and managers. Small investors watch the experienced big investors, small business owners watch the leaders of the Fortune 500.

So long as lawyers are human beings, modeling will influence our professional behavior for better and for worse. Law firms, bar associations and other institutions therefore inescapably become vehicles for such professional role modeling in the legal profession and need to examine themselves critically in this regard.

Law Firms

Some law students graduate and end up at private law firms. On their first day on the job, and in any initial orientations, those lawyers-in-training are forming first impressions of surface elements, like dress and office organization, as well as watching to see how senior lawyers treat them and interact with clients, judges, opposing counsel or other parties. In every interaction observed, the new lawyer has the opportunity to see how senior lawyers conduct themselves. For example, new lawyers are observing whether honesty and integrity are lauded, expected and assumed, or maligned. They observe whether after a negotiation of an agreement, the senior lawyer decides to leave out a point that was conceded and, if caught red-handed, simply to claim it was a mistake. They observe whether the senior lawyer acts disingenuously in discussing contrary authorities or facts in briefs and oral arguments.

New lawyers also note whether common-sense customer service is eschewed: for example, if the senior lawyer waits a week to reply to the client's phone calls or e-mails; if the senior lawyer uses dated law books to do legal research; or if the senior lawyer has too many clients to serve any of them competently. Such negative examples teach new lawyers to un-learn what might otherwise be assumed as expected of a lawyer.

Over time, firm culture is driven by what types of people succeed at the firm. Junior lawyers watch carefully to see who is made partner, and who is shown the door. They absorb a lesson if unethical or illegal conduct is overlooked when the perpetrator is a rainmaker. If yellers and screamers and corner-cutters make partner, junior lawyers get the message. If courteous, competent and careful lawyers make partner, junior lawyers also get that message.

Many firms have formal mentoring and training courses and firm policies that can reinforce the good lessons learned from behavior and symbolize in a concrete way their importance to the firm. These programs, however, require a commitment from management and senior lawyers who have many other demands on their time and may feel that business and client imperatives take priority. As a result, as the Large Firm Group's discussion showed, their effectiveness is varied. These programs are sometimes regarded as meaningful but can also appear to be window dressing if not actively supported and if belied by actual behavior. Moreover, not every senior lawyer is by temperament a good mentor or necessarily a good match for the mentee to which he or she may be assigned. Some of these programs might therefore benefit from participation and advice from outside the firm. But they will be successful only if the lessons they teach, reflect and reinforce the realities of the firm's practice.

Bar Associations

While law firms are groups of lawyers associated for the purpose of providing legal services, bar associations are groups of lawyers associated for the purpose of serving the legal profession, as well as improving its interaction with the world. They serve a modeling function as well, but in a collegial rather than hierarchical setting.

Because of their ever-evolving portfolios, bar associations offer new lawyers the unique opportunity to step away from their desks and become more thoughtful lawyers. Members are afforded opportunities to engage in *pro bono* and related public service work, write reports, serve on committees and interact with fellow lawyers. Simply walking through the door of a bar association is a reminder that even when away from his or her firm, a lawyer remains a member of a profession and, indeed, that the profession and its concerns are broader than those of an individual lawyer or firm. Active participation challenges a lawyer to think about what that means. Joining a bar association committee provides the opportunity to step away from the day-to-day practice of law and consider it in a less parochial, more nuanced context.

A securities lawyer has the opportunity to consider the various reasons securities laws exist and in the process become more skilled at interpreting them. Or that same lawyer has the opportunity to consider and shape and improve law in a completely different area—human rights law or international law. A litigator has the opportunity to learn, from a judge's perspective, the challenges of rendering a decision within the constraints of our system. A trusts and estates lawyer can sit next to a personal injury lawyer, a criminal defense lawyer and an M&A lawyer and debate the merits of a new disciplinary rule. Large-firm lawyers mingle with sole practitioners, government lawyers with private lawyers, rookie lawyers with veteran lawyers.

In the process, new lawyers rub shoulders with experienced lawyers outside the confines of a boss-subordinate relationship. Voluntary associations offer something of a self-selection advantage in that lawyers who think they already know it all are not likely to join. The process of serving on a committee requires patience and the ability to listen to different points of view. It also requires a willingness to do work for no pay, which tends to attract lawyers who have some level of enjoyment in what they do.

The senior lawyers who participate, whether they realize it or not, serve as role models. They can become natural mentors to those junior lawyers smart enough to make themselves useful. A less-experienced lawyer may be asked to draft minutes or help coordinate a meeting, research or draft part of a report, or organize committee programs or activities. These are tasks that can expand a new lawyer's horizon and network of professional colleagues, build professional confidence and also give access to someone else's wisdom and experience. And that exposure can also provide positive modeling of professionalism, when a senior lawyer is cool under fire, firm but polite, informed when necessary, competent and well prepared, and open about limitations on knowledge.

VIII. NYCLA'S PILOT MENTORING PROGRAM

In addition to informal mentoring relationships that develop through committee work, bar associations can play an active role in formal mentoring partnerships. Seth Rosner,

member of the New York State Judicial Institute on Professionalism in the Law, noted that "organized mentoring programs in county and local bar associations specifically aimed at encouraging participation by young lawyers and by seniors who will come regularly . . . is important."[19]

While the Task Force's research and analysis show differences of opinion on the extent of the professionalism problem or how to cure it, the one key theme that emerged is the feeling that having a mentoring program in New York would be an excellent way to increase professionalism among lawyers and increase their professional satisfaction.

To that end, a sub-committee of the Task Force and the NYCLA CLE Institute has developed a Pilot Mentoring Program that would pair seasoned attorneys with one or two mentees and involve opportunities for CLE credit.[20] The idea is to provide formal training through individual access to mentors for questions, consultations, guidance and the ability to share experiences. The pilot will be a one-year program beginning in early 2010. Mentors will be encouraged to meet with their mentees in person, via phone and by e-mail on an as-needed basis.[21] In addition, some suggested mentor/mentee activities include: lunch meetings; inviting the mentee to the mentor's workplace; and inviting the mentee to seminars, conferences, bar association and other networking events. The Program Oversight Board comprises Hon. Laura Ward, Lewis Tesser, Nancy Morisseau, Madeleine Giansanti Cag and Bari Chase. Ms. Chase will administer the program from the NYCLA side.

Mentors will receive special training and a Mentor's Notebook designed to facilitate the training. Mentors will receive CLE credit for their roles and for engaging in these sessions. In addition to the informal mentor/mentee sessions, the Program Oversight Board will have 75-minute formal group sessions for all the mentees that will focus on skill building and professionalism. Written source materials will be provided, and CLE credit will be awarded to mentees for attending these sessions. Some of the suggested topics include: Ethics and Professionalism, Management Practices and Practice Development, and at least one open-ended session to be determined by the mentor and mentee. We expect that there will be exercises in team building and working with people with different traits.

The cost for a mentee enrolling in the program will be $75 for the year, which includes six MCLE transitional and non-transitional credits (including ethics). Tuition assistance will be available so that cost should not stop someone from becoming a mentee.

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19 Journal of the New York State Judicial Institute on Professionalism in the Law: *Convocation on the Face of the Profession II: The First Seven Years of Practice* 124 (2003).

20 The concept of issuing CLE credit to practicing attorneys who are willing to become involved in organized and structured mentoring programs has been raised by others in recent years. *See e.g.*, comments of John R. Dunne, Journal of the New York State Judicial Institute on Professionalism in the Law: *Convocation on the Face of the Profession* 134 (2001).

21 Though not addressed here, on-line and partially on-line mentoring programs have had some success at law schools, as noted by the associate dean of student affairs at Buffalo Law School. Journal of the New York State Judicial Institute on Professionalism in the Law: *Convocation on the Face of the Profession* 150 (2001). For a compilation of suggestions related to lawyer mentoring, *see Id,* at 173, Appendix A: Compilation of Proposals Made At the Breakout Sessions (2001).

IX. STEPS FOR THE FUTURE

The mentoring program that we have advocated, and which NYCLA will soon initiate, is an important step that the Task Force and NYCLA should nurture and monitor closely. If the program works successfully, NYCLA and the Task Force should judiciously expand and improve upon it. Assuming that NYCLA develops an effective model, we should share it with other bar associations and institutions. With the lessons of experience and a cadre of mentors and mentees, NYCLA may be in a strong position to partner with law schools on programs for their alumni and with law firms or other institutions on programs for their associates or employees.

The mentoring program we advocate is only part of the mentoring opportunities NYCLA has fostered and should continue to foster to increase the understanding and realization of professionalism in the practice of law in New York City. NYCLA already provides a degree of informal mentoring through committee work and forums, as well as its Summer Minority Judicial Internship Program and its Denis Mclnerney Inn of Court. All these activities should be continued and expanded, with a focus on instilling ethical values and professional norms. The NYCLA Ethics Institute was formed in 2008, in part, to emphasize and coordinate such activities at NYCLA, and we recommend that the Task Force be continued under the auspices of that Institute. To date, the Task Force has been operating as part of the NYCLA Justice Center, but the Ethics Institute (which had not been formed when the Task Force was created) seems a logical permanent home.

The work of the Task Force—and NYCLA—should not stop at mentoring, however. We believe that NYCLA should remain in active dialogue with law schools to encourage them to develop innovative programs for effectively inculcating ethical values in students and playing a role in graduates' transition to practice. While this is a decision for the law school to make, NYCLA is uniquely situated to provide information on what graduates feel works and what is missing in their law school programs, and it could assist in programs bringing together students and practicing lawyers of varying types and levels of experience.

The Ethics Institute and NYCLA should explore partnering with law firms and other legal employers as well. Even those at firms with strong cultures and developed mentoring programs report a need for outside perspectives, and not all firms and employers have developed effective programs. In a time of economic stress and potentially broad changes in the structure of the profession, outside perspectives and resources may be especially valued. NYCLA is well suited to this role because of the makeup of its Ethics Institute, the diverse nature of its membership, and the concentration of so many large legal employers in New York City. The Ethics Institute may be able to create training programs and lead discussion groups on some topics more effectively and efficiently than many employers could do on their own.

The Ethics Institute should continue to look for opportunities for NYCLA to stress professionalism and ethics in its programming, both through forums and lectures and as a component of CLE programs. Ethics and professionalism columns or articles should appear as regular features in NYCLA's print and electronic communications. The Task Force maintains a professionalism blog that appears under-utilized at present,

but dynamic use of new forms of communication should be emphasized. Informal surveys or questions submitted to members through such media could also be useful tools for monitoring changes or reaction to new models of professional organization in the future.

As recounted in *Brethren and Sisters of the Bar: A Centennial History of the New York County Lawyers' Association,* authored by Past President Edwin David Robertson, NYCLA has a long and distinguished history of leadership in ethics and the transmission of professional values. This tradition began at a time when the nature and demographics of the profession were changing. NYCLA should remind its members of that role and its continuing importance during another time of change and uncertainty. And it should use all available means of communication to do so.

NYCLA has taken steps to address these criticisms and to improve relations between legal practitioners and the public. It has often gone to the press to point out distortions and unfairness in *adhominem* or poorly informed attacks on judicial decisions. NYCLA supports active and successful legal education programs in the New York public schools, including courses and conferences based on its *NYC Youth Law Manual* and a city-wide high school essay contest. A goal of these programs is to improve public understanding of our judicial system and government and, in some sense, fill the vacuum caused by the shift away from civics courses at the grade school and high school level. NYCLA has also been systematically studying and suggesting ways to improve the local courts in New York City that most often and immediately affect the lives of the public. All these efforts should be continued and strengthened where possible.

Finally, NYCLA has a major role to play in educating the public about the role lawyers and the courts play in our system of government. Misperceptions of what lawyers do and why they do it contribute to lawyers' dissatisfaction with the profession. Representations gone awry or the venal or bombastic lawyer are what make news and attract criticism. But it is only news because it is not in fact the norm. Most lawyers obey the ethics of the profession, respect the law and are dedicated above all to their clients. Many contribute substantial volunteer hours and resources to the public good. Few areas of human endeavor can match this record.

NYCLA should play a major role as a public voice for the profession, as well as a defender of the judiciary when it is unfairly attacked. Independence of lawyers and the judiciary are bulwarks of our freedoms; this principle must be kept continually before the public. NYCLA cannot do all this by itself, but it can certainly contribute.

Long-standing and fundamental aspects of NYCLA's mission include "elevating the standards of integrity, honor and courtesy in the legal profession and fostering the spirit of collegiality among members of the Association and throughout the bar" and "maintaining high ethical standards for the bench and the bar." These abiding aspirations provided much of the impetus for creation of the Ethics Institute. A permanent Professionalism Task Force within the Institute would further contribute to those goals. This Task Force should continue to study professionalism issues and developments within NYCLA and beyond, monitor perceptions among NYCLA members, and suggest future steps and help NYCLA implement them.

APPENDIX A

LIST OF TASK FORCE MEMBERS

James B. Kobak Jr., Chair
James Altman
Stephen J. Blauner
Carol Buckler
Hon. John T. Buckley
Madeleine Giansanti Cag
Ramsey Chamie
Louis Crespo
Paul F. Doyle
John D. Feerick
Bruce A. Green
John Gross
Unekuojo Idachaba
David Kelly
Mark Ladov
Wallace L. Larson
George Marlow
Jason A. Masimore
Martin Minkowitz
Nancy Morisseau
Mahendra M. Ramgopal
Stacy J. Rappaport
Norman L. Reimer
Gerard E. Reinhardt
Edwin David Robertson
Barry R. Temkin
Lewis F. Tesser
Hon. Laura Ward
Kristin B. Whiting
Linda Willett

APPENDIX B

NYCLA DEFINITION OF PROFESSIONALISM

By professionalism we mean a group pursuing a learned art as a higher calling in a spirit that it is performing a public service, a service that is indispensable in a democratic nation founded on the rule of law. This calling is no less a public service because it may also be a means of livelihood. Pursuit of a learned art in the spirit of a public service is the essence of being a lawyer. It implies an obligation of dignity, integrity, self-respect and respect for others.

The essence of professionalism is a commitment to develop one's skills to the fullest and to apply them responsibly and with the utmost diligence to the issue at hand. Professionalism requires adherence to the highest standards of integrity and a willingness to subordinate narrow self-interest in pursuit of the fundamental goal of client service. Because of the tremendous power they wield in our system, lawyers must never forget that their duty to serve their clients fairly and skillfully takes priority over the personal accumulation of wealth. Lawyers must be willing and prepared to put their clients' interests before their own while retaining enough perspective to provide those clients with considered, well-informed and objective advice.

Although duties to their clients in particular matters are paramount, throughout their careers lawyers must remain conscious of and committed to the goal of improving the profession and the system of justice. This commitment includes taking personal and professional measures to increase the availability of legal services and abet even-handed and efficient application and administration of the legal system for all segments of society.

APPENDIX C

NYCLA/JUSTICE CENTER
TASK FORCE TO STUDY THE TEACHING AND TRANSMISSION OF ETHICAL AND PROFESSIONAL VALUES

PROFESSIONALISM SURVEY

Year of Admission to Practice_____

Gender_____

Practice Setting

Solo or Small Firm	_____	Legal Services or Not-For-Profit Employer	_____
Medium-Size Firm	_____	Law Professor	_____
Large Firm	_____	Judiciary	_____
In House	_____	Legislative	_____
Government Attorney	_____	Other	_____

List the area(s) in which you principally practice: (e.g., general practice, matrimonial, real estate, bankruptcy, civil defense, criminal defense, etc.)

_____
_____
_____

What do you think of the state of professionalism (as defined above) in the profession today? Has it improved or declined over time?

_____
_____
_____

What do you believe the profession is getting right? In other words, are there examples of highly professional conduct and behavior?

_____
_____
_____

What motivates you to act professionally? Conversely, what are the prime motivators of unprofessional conduct?

_____
_____
_____

Do law schools do enough to promote and teach professionalism? If no, what more could they do? What are they doing that you think is helpful?

_____

_____

_____

Do other institutions (NYCLA and other bar associations, the courts, law firms) do enough to promote and teach professionalism? If not, what more could they do? What are they doing that you think is helpful?

_____

_____

_____

_____

CLE ethics credits became mandatory a number of years ago. Has mandatory CLE of ethics improved professionalism? __Yes ___No Why or why not?

_____

_____

_____

_____

What are the most significant issues of professionalism facing you or the profession? How well equipped do you feel you and other lawyers are to deal with those issues? What can you or other lawyers do to maintain professionalism in dealing with other lawyers, including colleagues and subordinates?

_____

How do you think attorneys or the organized bar can combat the negative impression the public is reported to have of attorneys?

_____

_____

_____

APPENDIX D

SELECTED BIBLIOGRALIST OF TASK FORCE MEMBPHY

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Attorney Discipline in New York

Lewis Tesser

Every lawyer is required to observe the Rules of Professional Conduct. A violation of a Rule does not itself give rise to a cause of action and is not necessarily a basis for civil liability. Nonetheless, the failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules provide a framework for the ethical practice of law, but they do not prescribe the extent of discipline to be imposed upon attorneys who commit acts of professional misconduct. As noted in the Preamble to the Rules:

> The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question. . . .[and] . . . that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

As many lawyers will face disciplinary complaints at some point in their legal careers,[1] it is imperative attorneys understand the disciplinary process.

1. THE JUDICIAL DEPARTMENTS

In New York State, authority over the conduct of attorneys rests with the Appellate Divisions of the Supreme Court.[2] There are four regional Appellate Divisions of the

1 Sarah Diane McShea, *Practical Advice for Practicing Lawyers, Avoiding Ethical Violations, Professional Misconduct, Legal Malpractice and Criminal Prosecution: A Lawyer's Handbook*, New York City Bar Association, New York County Lawyers Association Legal Referral Service handout (Feb. 23, 2009).

2 Jud. L. § 90; *see also* New York State Bar Association, *A Guide to Attorney Disciplinary Procedures in New York* State, http://www.nysba.org/Content/NavigationMenu/PublicResources/UnhappywithaNYAttorney/Unhappy_with_a_NY_At.htm.

Supreme Court, each of which has one or more attorney disciplinary committees authorized to investigate and prosecute complaints of professional misconduct made against lawyers.[3] The Rules governing attorney disciplinary proceedings vary in each of the four Departments.[4] Lawyers should be familiar with the Rules Governing Attorney Conduct in their particular Department, and should also be familiar with the Judiciary Law provisions governing attorney conduct, as well as the Rules of the Chief Administrator[5] and the disciplinary law and precedents governing attorney conduct.[6] Lawyers who practice in federal court should also be familiar with the applicable ethics rules and disciplinary procedures in the federal district and circuit appellate courts in which they appear.

2. RULES APPLICABLE TO ATTORNEYS ADMITTED BY THE FIRST DEPARTMENT

All attorneys who are admitted to practice by, reside in, commit acts in, or have offices in the First Department (whether practicing as an individual, with a firm, with the government, or as in-house counsel) are subject to the Rules of the Appellate Division, First Department.[7] Discipline may be imposed upon such attorneys for a violation of the Rules of Professional Conduct (for conduct on or after April 1, 2009), the Code of Professional Responsibility (for conduct on or before March 31, 2009), the rules of the Appellate Division governing the conduct of attorneys, or the special rules regarding decorum.[8]

The rules governing attorney misconduct apply to individual lawyers as well as to law firms. The First Department's Rules specifically state the Rules apply to any law

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3 In New York State, there are a total of eight disciplinary or grievance committees. In the First Department, there is the Departmental Disciplinary Committee; in the Second Department, there are three Grievance Committees, divided up geographically; in the Third Department, there is one agency, the Committee on Professional Standards; and, in the Fourth Department, there are three Grievance Committees, divided up geographically.

4 *See* 22 NYCRR Part 603 (First Department Rules), 22 NYCRR Part 691 (Second Department Rules), 22 NYCRR Part 806 (Third Department Rules), and 22 NYCRR Part 1022 (Fourth Department Rules).

5 *See* 22 NYCRR Part 118 (Registration of Attorneys), Part 139 (Costs and Sanctions), and Part 137 (Fee Dispute Resolution Program).

6 Richard M. Maltz, *Handout on Ethical Issues for Solo and Small Firm Practitioners* (provided by author).

7 New York County Lawyers Association, *Survey of the Attorney Discipline Rules in the State and Federal Courts of New York with Comments by the Committee on Professional Discipline*, Nov. 12, 2005, http://www.nycla.org/siteFiles/Publications/Publications203_0.pdf (last visited Jan 29, 2010) (citing 1st Dept. R. § 603.1(a)). The First Department's Rules also govern the conduct of foreign legal consultants licensed to practice in New York, as well the conduct of lawyers admitted pro hac vice in any matter in any court within the First Department and lawyers who "participate" in any action or proceeding within the First Department. 22 NYCRR § 603.1(a).

8 New York County Lawyers Association, *supra* note 7 (citing 1st Dept. R. §§ 603.2, 605.2(10), 605.4).

firm that "has a member, employs, or otherwise retains a lawyer or legal consultant" who is subject to the First Department's Rules. Although *law firm* is also defined in Rule of Professional Conduct 1.0(h), the First Department's Rules set forth the Court's asserted jurisdiction over individuals and entities for disciplinary and regulatory purposes.[9]

3. RULES APPLICABLE TO ATTORNEYS ADMITTED BY THE SECOND DEPARTMENT

The Second Department's Rules Governing the Conduct of Attorneys apply to all attorneys who are admitted to practice, reside, commit acts, or have offices in the Second Department, as well as attorneys who are admitted in another jurisdiction and regularly practice in the Second Department (e.g., government attorneys, in-house counsel) or who have been admitted pro hac vice or participate in an action or proceeding in any court in the Second Department.[10]

Discipline may be imposed upon attorneys in the Second Department who violate the Rules of Professional Conduct, the rules of the Second Department governing the conduct of attorneys, or any other "rule or announced standard of this Court governing the conduct of attorneys."[11] The Second Department's Rules do not specifically refer to the Court's jurisdiction over law firms, but state that they apply to individual lawyers.[12]

4. RULES APPLICABLE TO ATTORNEYS ADMITTED BY THE THIRD DEPARTMENT

The Third Department's Rules apply to all attorneys who are admitted to practice by, reside in, have an office in, or are employed or transact business in the Third Department.[13]

Discipline may be imposed by the Third Department upon any attorney who violates the Rules of Professional Conduct, the Code of Professional Responsibility, or "any other rule or announced standard of the court."[14] The Third Department's Rules do not specifically refer to the Court's jurisdiction over law firms, but state that they apply to "all attorneys."[15]

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9 1st Dept. R. §§ 603.1(b), 605.1(c); 22 NYCRR § 1200.0(h).
10 New York County Lawyers Association, *supra* note 7 (citing 2d Dept. R. § 691.1(a)).
11 *Id.* (citing 2d Dept. R. § 691.2).
12 *Id.*
13 *Id.*
14 *Id.* (citing 3d Dept. R. § 806.2).
15 *Id.*

5. RULES APPLICABLE TO ATTORNEYS ADMITTED BY THE FOURTH DEPARTMENT

The Fourth Department's Rules apply to all attorneys who are admitted to practice, have offices, or practice in the Department.[16]

Discipline may be imposed on attorneys who violate the Rules of Professional Conduct or "any other rule or announced standard of the Appellate Division governing the conduct of attorneys."[17] The Fourth Department's Rules do not specifically refer to the Court's jurisdiction over law firms, but state that they apply to "all attorneys."[18]

A. Grievance Committees

The eight disciplinary and grievance committees are appointed by the Appellate Divisions of the four judicial Departments. The committees have the authority to investigate complaints and prosecute charges against attorneys and law firms who commit acts of professional misconduct. The committees are comprised of both lawyers and nonlawyers, who serve on a volunteer, pro bono basis, and a full-time, State-funded professional staff of lawyers, investigators, forensic accountants, legal assistants, and support staff.[19] The full-time staff of the committees evaluates and investigates complaints received against attorneys. They may, in appropriate instances, refer lower-level matters to a county bar association for resolution. They may also refer fee disputes to an appropriate fee dispute committee for arbitration or to a mediation panel if all parties are willing. The staff may also conduct informal preliminary inquiries and assist complainants and attorneys with informal resolutions in matters not involving allegations of any serious impropriety.[20] At the conclusion of the inquiry or investigation, if the complaint is not dismissed, it will result in either formal action by the committee or the Appellate Division.

B. Imposing Public Discipline on a Lawyer

Only the Appellate Divisions may impose public discipline on a lawyer (or law firm). Such public discipline includes censure, suspension from practice for a specific period of time (ranging typically from three months to five years), or disbarment. In addition, the Appellate Divisions may accept resignations from attorneys under investigation, with such resignations being tantamount to disbarment on consent. The disciplinary committees are uthorized to impose private discipline and to issue warnings or formal advice to lawyers in appropriate cases. Such "non-public" disciplinary sanctions

16 *Id.* (citing 4th Dept. R. § 1022.1).
17 *Id*. (citing 4th Dept. R. § 1022.17).
18 *Id*.
19 *Id*.
20 *Id*.

include Letters of Admonition and Letters of Reprimand (issued after a hearing). In addition, depending on which Department is involved, the committees may issue dismissals with advice, letters of education, and Letters of Caution.

The following examination of the attorney disciplinary process is based upon the current practice in the First Department. As there are significant procedural variations in the process from Department to Department, attorneys should consult the appropriate rules in each Department to ensure they have a full understanding of how grievances are handled. See NYCLA Report, *Survey of Attorney Disciplinary Rules in the State and Federal Courts of New York, With Comments*, by the Committee on Professional Discipline in Volume II of this treatise, infra, for a summary and comparison of the rules in the four New York State Supreme Court Appellate Departments, the federal District Courts in New York, and the U.S. Court of Appeals for the Second Circuit.

6. INVESTIGATION OF ATTORNEY MISCONDUCT BY A GRIEVANCE COMMITTEE

An investigation may be initiated as the result of a complaint made by a client, adversary party, judge, fellow member of the bar, employee or employer, witness, government agency or total stranger. The disciplinary committee may commence a sua sponte investigation based upon media accounts, court decisions, review of law firm Web sites, or other advertising or referral by the Appellate Division. Complaints must be in writing.

The First Department's Disciplinary Committee is assisted by the Office of Chief Counsel (OCC), which has broad investigative powers through the Appellate Division. It may issue subpoenas to obtain files and documents from the attorney subject to the complaint and any third parties, and to obtain testimony from the lawyer or third parties.

The OCC conducts an investigation of the complaints it receives or initiates, provided an allegation of professional misconduct is involved. Because the eight committees in New York have overlapping jurisdiction over lawyers, typically where the lawyer maintains his or her primary law office (and where registered) will determine which committee will handle any particular matter. The OCC may "reject" a complaint if it fails to allege any professional misconduct—"the lawyer refused to take my case" or "the lawyer is a terrible person and should be disbarred." In these and similar instances, the OCC most likely will not even notify the attorney that such a complaint was filed and rejected.

Pursuant to Judiciary Law § 90(10), all of the files and records and proceedings before the Disciplinary Committee are private and confidential.

When a complaint alleges prima facie attorney conduct prohibited under the applicable rules, the attorney against whom the complaint is made ("the respondent") will be required to respond in writing.[21] In some instances, the OCC will defer consideration of a matter and not require the attorney to respond immediately to

21 *Id*.

the complaint. For example, complaints alleging fee disputes or misconduct occurring in pending litigation may be dismissed or action delayed pending the outcome of the fee arbitration or litigation. Similarly, the investigation of complaints based on criminal conduct, or following an arrest or indictment, is likely to await the resolution of the criminal case. The committees are not anxious to interfere with other court proceedings or to be exploited as debt collectors or leverage in litigation. It is generally advisable for attorneys who receive a complaint to consult counsel concerning the issues raised in the complaint, as well as issues likely to arise in an investigation.

If a complaint has been accepted by the OCC, an investigation will be conducted by the staff. That investigation will include obtaining the lawyer's written response, which will generally be forwarded to the complainant for a reply. It may also include requests for further information or documents, appearance at a deposition, interviews of witnesses, and if escrow violations are alleged, analysis of bank records. Lawyers are obliged to cooperate with the OCC's investigation—and failures to cooperate may result in the imposition of interim suspensions by the Appellate Division. At the conclusion of its investigation, the OCC will recommend dismissal of the complaint, issuance of a Letter of Admonition, or the filing of formal charges and commencement of a formal hearing. The OCC's recommendation is made to the Disciplinary Committee, which may accept or reject it. The respondent attorney has no opportunity to be heard at this stage of the process.[22]

The overwhelming majority of disciplinary complaints are ultimately dismissed after the investigation is completed. However, if the attorney has violated a disciplinary rule not requiring public discipline, the Committee may issue a Letter of Admonition. As an Admonition is a formal finding of professional misconduct, it is a disciplinary sanction. The Admonition is private and confidential, but an attorney may be required to disclose it in a variety of circumstances, including when applying for admission in another jurisdiction, when applying for pro hac vice admission, when seeking government employment or appointment to the bench, or in connection with an application for malpractice insurance, among others. An Admonition will be used as "prior discipline" if the lawyer is later found guilty of professional misconduct. Because of the serious consequences attaching to an Admonition, lawyers take them seriously. In addition, a lawyer has only limited appeal rights: the lawyer may request reconsideration of the Admonition by the Chairman of the Disciplinary Committee or may demand a hearing, in which case the Admonition is vacated and the OCC brings charges, which must then be litigated before a referee and a hearing panel.[23]

In serious matters, the OCC recommends the filing of formal charges. If the Disciplinary Committee approves the recommendation, the Appellate Division will appoint a referee, and the OCC will serve the lawyer with formal written charges and prosecute the case at a sworn, transcribed hearing[24] that is the equivalent of a bench trial. After written charges are served, the respondent attorney files a formal written answer to the charges, admitting or denying each factual allegation and alleged

22 *Id*. (citing 1st Dept. R. § 605.6(e)).

23 *Id*. (citing 1st Dept. R. §§ 605.8(a)–(b)).

24 *Id*. (citing 1st Dept. R. §§ 605.12–13.

violation of the Rules. The issues are litigated before the court-appointed Referee, who conducts the hearing in a formal fashion, entertaining motions, ruling on evidentiary points, and determining disputed issues of fact and law. The OCC has the burden of proof (a fair preponderance of the evidence under New York law), and the respondent attorney is entitled to notice of the charges and an opportunity to be heard. There is only limited discovery permitted in the proceedings, although the Court's rules provide the respondent-attorney may obtain court-ordered subpoenas compelling the appearance of witnesses and the production of documents at the hearing.[25]

At the conclusion of the hearing, which is bifurcated into a liability phase and, if any charges are sustained, a sanction phase, the Referee will issue a decision, sustaining or dismissing the charges in whole or in part, and if any charge is sustained, recommending an appropriate sanction, including private reprimand, public censure, suspension, or disbarment. In appropriate cases, alternative sanctions (such as monitoring of the lawyer) may be recommended.

The Referee's determination is then reviewed by a Hearing Panel.[26] The Panel receives written submissions from the parties and hears oral argument, then reviews the entire record of the proceeding before the Referee, including the hearing transcripts, evidence, and motions and submissions made by the parties during and after the hearing. The Hearing Panel issues its own written decision affirming, modifying, or rejecting the findings and conclusions, and any sanction recommendation made by the Referee.

If the Referee and the Hearing Panel have sustained the charges of professional misconduct and recommended public discipline, the matter will be presented to the Appellate Division by the OCC, which will file a formal petition seeking public discipline. In the First Department, this will commence a special proceeding before the Court. (The practice varies considerably from Department to Department.)[27]

As mentioned above, only the Appellate Division may impose public discipline. Although the Court may impose a private reprimand, that is a relatively rare disposition. More typically, the Court will publicly censure the attorney, impose a suspension for a period of time ranging from three months to five years, or disbar the attorney. Except in the case of private discipline, the Court's decisions are public and appear in the *New York Law Journal* and the official Appellate Division Reports.

7. SANCTIONS AND DISCIPLINE

Attorneys who practice in a particular forum must carefully review customs and practices in that forum. Attorneys found in violation of particular rules (including Federal Rule of Civil Procedure 11 or Part 130[28]) may face severe sanctions in those

25 *Id*.

26 *Id.* This is in contrast to the Second Department where the Referee's Report is submitted directly to the Appellate Division. *Id.*

27 *Id.*

28 N.Y. Comp. Codes R. & Regs. tit. 22, §§ 1215.1, 1215.2 (2002).

jurisdictions, and may also subsequently face disciplinary investigation and prosecution. In such circumstances, the disciplinary agency investigating the conduct at issue may argue a collateral estoppel effect should be given to the sanction decision. If collateral estoppel is granted, the attorney will be entitled only to a hearing on the appropriate disciplinary sanction to be imposed by the Committee or the Appellate Division.

Notably, where attorneys are charged with either civil or criminal contempt, disciplinary investigations commonly follow. If criminal contempt is ordered, a disciplinary proceeding is mandatory under 22 N.Y.C.R.R. §§603.12 & 691.7. If civil contempt is ordered, the disciplinary committee has discretion as to whether to commence an investigation.

Avoiding Complaints and Violations

Lewis Tesser

Armed with this treatise, the rules and nuances at their fingertips, avoiding disciplinary infractions should be easy. Nevertheless, bad things happen to good lawyers. Each year, some well-intentioned lawyers cross over the misconduct threshold, and many, many more are the subject of disciplinary complaints even though they have not committed an ethical violation. Therefore, it is worth discussing the factors triggering disciplinary complaints and the circumstances frequently attending disciplinary violations. Whether or not misconduct has been committed, no lawyer wants to receive a Complaint in an envelope from the disciplinary committee marked "Personal and Confidential."

AVOIDING DISCIPLINARY COMPLAINTS

Probably over 90% of disciplinary complaints emanate from unsatisfied clients. The remedy is apparent: keep the customer satisfied. Every completed litigation matter has a loser, and most deals leave a party feeling disappointed at one point or another. Clients can be very forgiving about these let-downs—or not.

The key to avoiding disciplinary complaints is good communication. Open, timely, and honest communication with clients is the single easiest and greatest step any lawyer can take to reduce the likelihood of receiving complaints. What is involved?

PROMPTLY RETURN PHONE CALLS. When attorneys do not respond to client inquiries, clients believe they and their matters are not important to the attorney. Disciplinary Complaint to follow! Of course, attorneys do not have to immediately respond to the client who calls ten times a day. Again the solution lies in communication. An attorney need not drop everything and immediately respond to every client whistle, but attorneys should have in place a policy regarding response time, such as returning every client call within 4 hours. Even if attorneys are unable to respond, they should

be able to have someone call the client to explain the reason for the unavailability and to make a realistic promise as to when the call will be returned.

If you are in a small firm or a solo, these comments apply doubly to you. The reality is that you are more likely to receive a complaint than a lawyer in a large firm. Maybe it is because larger businesses (who employ larger firms) are less likely to file a complaint. Maybe it is because larger firms have more personnel to provide guidance or to run interference and help with communication. Maybe it is just unfair.

All work should be documented, with contemporaneous notes kept of conversations, material events, time devoted, and expenses incurred. Records should be maintained in a way they can be easily retrieved.

Clients should not be surprised. The most common example is billing. An attorney may feel awkward having spent more time than expected. That is the time to communicate with the client. Frequently and regularly convey bills to clients. Clients should be informed of material developments and interim and ultimate outcomes and receive copies of materials. The attorney who is going to be away or busy on a deal, and cannot work on a matter when the client has reason to think it was to be worked on, should give the client a heads-up.

AVOIDING DISCIPLINARY VIOLATIONS

It is not difficult to commit a disciplinary violation. Despite an attorney's earnest intent, it happens. The most serious violations are often escrow transgressions.

1. Escrow

In his Analysis accompanying Rule 1.5 in Volume 1 of this Treatise, supra., Wally Larson describes the Rule, which is captioned, "Preserving Identity of Funds and Property of Others; Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping; Examination of Records." The rule's caption is the longest caption in the Rules by a factor of three, perhaps to signal its importance.

If an attorney borrows money from your escrow account, how much time does the attorney have to pay it back and at what interest rate? Trick question! Escrow accounts do not contain the attorney's money—these funds belong to clients. Borrowing from the account is conversion and may well result in disbarment. Correcting the conversion *may but will not always* mitigate the ultimate sanction, but it does not rectify the misconduct.

A principal of a firm is responsible for the firm's escrow account even if someone else has invaded it. In *In re Wallman,* 260 A.D.2d 148, 149 (1st Dept. 1999), an attorney practicing for thirty-five years was immediately suspended from the practice of law because his partner converted escrow funds. The court explained, "As one of two partners, respondent should have been aware of how the firm escrow account was being handled and is fully responsible for its misuse."

Clients should be promptly paid all funds to which they are entitled. Control should be maintained over who (attorneys only) has access to and signs escrow checks. Never write checks payable to "cash" and do not use credit cards. Fees should be immediately withdrawn upon earning and upon payment to the client. Checks should not be drawn for personal or business expenses. All deposits should clear before they are drawn upon.

The escrow funds of one client cannot be used for another client's purposes (i.e., an attorney should maintain all client funds as if they were in separate accounts). There are recordkeeping requirements (see discussion in the Analysis section accompanying Rule 1.15, in Volume 1, supra.).

2. Practice Pointers

A principal in a law firm should open the envelope containing the escrow bank statement from the bank to forestall the possibility of fraud. The statement should be immediately reconciled vis-à-vis what clients should have in their respective accounts. Attorneys should also be aware of possible third-party claims against client money.

Lawyers can call ethics hotlines for almost immediate guidance on ethical quagmires:

- NYCLA: (212) 267-6646
- The Association of the Bar of the City of New York. (212) 382-6624
- NYSBA: (518) 463-3200

In addition to good communication, other good management practices directly correlate to the maintenance of a violation-free practice. For example, good time management, attentiveness to appointments and work, and case selection boundaries practically forestall the possibility of disciplinary neglect.

Neglect will adversely affect a law license. It is often the lesser case that gets lawyers into trouble. This is the work that gets put aside for work that generates more fees, enthusiasm, or whatever. The most trouble-creating case is frequently a no-fee favor for a relative. It will not matter to the disciplinary committee: once any matter is accepted by a lawyer, it must be handled competently and diligently.

A problem with a case gets worse with inattention. See *In re Straney*, 186 A.D.2d 315 (3d Dept. 1992): "Respondent states that he is a very busy sole practitioner. Neglect is an unacceptable response to such a pressure."

Failure to observe good office management practices can be the canary in the coal mine. It can be a tip-off that you or a colleague is undergoing stress—which induces bad judgment.

Law is a collegial practice. We can reach out to help and be helped.

It is easy to get nudged into a conflict of interest. We frequently know or have represented more than one party to a transaction, and we want to help as many of them as we can. Sometimes it is possible, but sometimes not. In New York, attorneys must have a conflict-checking system, and must check for conflicts before and during the representation.

Candor and Independence: we all want to do a great job for our clients, but it is the client's matter. Professor Thurman Arnold taught his law students, "There may come a time in your practice when, despite your very best efforts, someone has got to go to jail. When that time comes, make sure it's the client."

It is usually necessary and always a good idea to have a written engagement letter specifying the client, fees, and scope of representation.

VIOLATIONS HAPPEN

Anyone reading this far into the article is not likely to have woken up on a particular day, stopped at Starbucks for a triple grande latte, and thought, "Today's the day I want to have a conflict of interest." Yet we do convert, commingle, get conflicted, keep bad records, delay, confuse, and get confused.

I think that lawyers become lawyers for good reasons and that lawyers are good people. We believe in a society based on the rule of law and fair principles. We employ logic, creativity, savvy, and psychology. We help people and institutions. We join bar associations, do pro bono work, and zealously argue on behalf of our clients' interests.

How do good people commit disciplinary infractions? Lawyers are good people, but we are people. We have stress, financial problems, health crises, alcohol and substance abuse, family situations, depression, employee and partner conflicts, and tendencies toward procrastination. These situations affect our judgment. It is often easier to recognize stress when it is happening to someone else than when it is happening to ourselves. If we see a colleague's judgment is being affected, we can remember we are a community serving a higher calling—and we have resources available to all of us.

Bar association involvement creates a near ineluctable self-fulfilling prophecy of professional success and satisfaction.

Even if you are busy, do not neglect to take care of yourself. There is yoga, counseling, exercise, or some other form of game changer that can get you back to where you need to be. If you or a colleague is having a serious personal problem, run, do not walk to the **New York State Lawyer's Assistance Program**. Telephone: 1 (800) 255-0569. E-mail: LAP@NYSBA.ORG.

The New NY Rules of Professional Conduct

Sarah Jo Hamilton and Lewis Tesser

Effective April 1, 2009, the New York Code of Professional Responsibility (the Code), which has governed attorney conduct for forty years in New York, was replaced by the New York Rules of Professional Conduct (the Rules). These new Rules were adopted by the Administrative Board of the Appellate Division in December 2008 after the New York State Bar Association forwarded a recommendation to adopt proposed Rules of Professional Conduct based on the ABA Model Rules. The format of the new Rules, as adopted, follows that of the ABA Model Rules, and although some of its provisions are similar to the Model Rules, much of the content is identical to the former Code. This article will set forth some of the major changes from the Code in the Rules.

The adoption of the new Rules comes somewhat late in the national ethics rules game. The ABA, aware of dissatisfaction with the Code of Professional Responsibility (which was inadequate in many respects and not logically organized), first adopted the Model Rules in 1983. Subsequently most other states in the union adopted a version of the Rules, but lately New York has been the lone holdout for the Code. New York's adoption of the Rules means New York lawyers now have a more coherent set of disciplinary rules and a national body of professional conduct law to which they can refer.

The first important change is in the organization of the Rules. Following the Model Rules format, the New York Rules are divided into sections essentially organized by function, viz.

Section One	Rules 1.0 to 1.18	Client-Lawyer Relationship
Section Two	Rules 2.1 to 2.4	Attorney as Advisor
Section Three	Rules 3.1 to 3.9	Attorney as Litigator
Section Four	Rules 4.1 to 4.5	Attorney as Professional
Section Five	Rules 5.1 to 5.8	Attorney as Supervisor and Practitioner
Section Six	Rules 6.1 to 6.5	Pro Bono and Legal Services
Section Seven	Rules 7.1 to 7.5	Advertising, Recommendation, Solicitation

Section Eight Rules 8.1 to 8.5 Misconduct, Reporting Misconduct, Bar Admission, Judicial Officers, Discipline

Most of the rules are logically set forth in the most appropriate section. We do not attempt to comment on all the rules in this article, but have selected major changes to discuss in the following sections.

DEFINITIONS

Rule 1.0 contains terminology. Definitions set forth in new Rule 1.0 greatly expand the number specifically set forth in the definition section of the Code. Some definitions are taken directly from substantive sections of the Code while some are new and taken from the Model Rules. Some terms of particular interest are:

1.0(e) "Confirmed in writing," which means a writing from a person to a lawyer, or a lawyer to a person confirming the person has given consent (see sections (i) and (ii) of Rule 1.0(e)). The definition of the term "confirmed in writing" can also include a statement on the record of a proceeding before a tribunal. The writing must be transmitted or obtained within a reasonable time after oral consent is given.

1.0(x) "Writing" includes handwritten, printed, and photocopied material, photographs, audio or video recordings, and e-mail. A "signed writing" includes electronic signatures.

1.0(k) "Knowingly," "known," "know," and "knows" mean actual knowledge, which may be inferred from circumstances.

1.0(q–s) "Reasonable", "reasonable belief," and "reasonably should know" relate to the conduct of a reasonably prudent and competent lawyer. These definitions establish the reasonable person standard for belief or knowledge.

1.0(d) The definition of "Confidential Information" is found in Rule 1.6.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

The definition of confidential information, referred to in 1.0(d), is actually contained in the substantive Rule 1.6 dealing with confidentiality of information. Whereas in DR 4-101 the Code drew a distinction between "confidences" and "secrets," Rule 1.6(a) makes no such distinction, stating that confidential information consists of information gained during, or relating to, the representation of a client, whatever the source; it includes matters protected by attorney-client privilege, matters likely to be embarrassing or detrimental to the client, and information that the client has requested be kept confidential.

Confidential information may not be knowingly revealed or used to the disadvantage of a client, or for the advantage of the lawyer or a third person, unless the client gives informed consent. ("Informed consent," defined in Rule 1.0 (j), is the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has

adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.) Confidential information also may be disclosed if disclosure is impliedly authorized to advance the best interests of the client and is reasonable or customary. Other exceptions permitting disclosure of confidential information are similar to those in the Code, with some important differences.

First, the new Rule permits disclosure to prevent reasonably certain death or substantial bodily harm, and to permit attorneys to obtain legal advice about compliance with the Rules or other law. But, most importantly, Rule 3.3 dealing with Conduct Before a Tribunal authorizes disclosure of confidential information to prevent or rectify a fraud upon a tribunal.

RULE 3.3 CONDUCT BEFORE A TRIBUNAL

Under the Code sections dealing with conduct before a tribunal, DR 7-102(B), an attorney who received information clearly establishing that that a client had perpetrated a fraud upon a tribunal was mandated to call upon the client to rectify the fraud. If the client refused, or was unable to do so, the attorney was mandated to reveal the fraud *unless the information was protected as a confidence or secret.* As expressed many times, by many authors, there are very few, (if any), instances where client fraud upon a tribunal would not be protected as a confidence or secret. For the most part, the exception negated the rule.

Rule 3.3 represents a 180-degree swing. It provides that an attorney must take reasonable remedial measures to correct false evidence including, if necessary, disclosure to the tribunal. The obligation also extends to future, current, and past criminal or fraudulent conduct. The exception for confidential information in the Code has been explicitly eliminated. Although the Rule applies to material evidence, materiality has been held to extend to matters related solely to credibility. See *In re Friedman*, 196 A.D. 2d 280 (1st Dept. 1994).

RULE 1.5 FEES AND DIVISION OF FEES

The Fee provisions contained in Rule 1.5 are similar to the rules regarding fees in the Code. The new rule is more expansive, though, and includes other rules and case law. For example, the court rule regarding written letters of engagement (22 NYCRR §1215) has been incorporated by reference into the Rules of Professional Conduct so that failure to comply with the rule could be the basis for discipline under this Rule. Further, the rule specifically prohibits excessive expenses, mandates that in contingent fee cases that clients be notified of expenses for which they will be responsible, codifies the prohibition against nonrefundable retainers (*In re Cooperman*, 83 N.Y.2d 645, 611 N.Y.S. 2d 465 (1994)), and notably, requires that clients be informed *in writing* of the amount of the fee each attorney will receive in cases referred to other attorneys.

RULE 1.14 CLIENTS WITH DIMINISHED CAPACITY

This new and welcome rule provides authority for attorneys confronted with clients with diminished capacity to obtain the help the attorneys need to keep the client from harm. It authorizes the attorney to maintain, as far as reasonably possible, a conventional relationship with the client. However, the lawyer may take reasonably necessary protective action, including consulting with others who may help the client, and may, in the appropriate case, seek the appointment of a guardian or conservator. The rule specifies that the attorney may reveal confidential information, but only to the extent necessary to protect the client's interests. As the language of the section is permissive, it is still unclear whether failure to take protective measures under this rule would subject an attorney to discipline.

RULE 1.18 DUTIES TO PROSPECTIVE CLIENTS

There is no Code equivalent to Rule 1.18, which is new to New York. The rule defines a prospective client as one who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter, and places the prospective client in the same position relative to conflicts of interest as a former client. A lawyer may not represent a client adverse to a prospective client in the same or substantially related matter without written consent from both the affected and prospective clients.

However, in the case of a prospective client, the imputation of disqualification to the attorney's firm can be overcome under certain circumstances. The lawyer must have taken reasonable measures to avoid exposure to more information than was necessary to determine whether to represent the prospective client. Additionally, the firm must promptly and appropriately screen the disqualified lawyer from the matter, must not apportion any part of the fees to the disqualified attorney, and must promptly provide written notice of the representation to the prospective client.

Of special note are the exceptions to the prospective client status. A person who unilaterally communicates information to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship does not come under the prospective client protective umbrella. Neither does the person who seeks a consultation in order to disqualify the attorney from handling a materially adverse representation on the same or a substantially related matter. Thus, the cocktail-party guest who starts relaying confidential information to an attorney attending the social gathering is not protected, and neither is the man seeking to disqualify an attorney from representing his wife in a matrimonial matter.

RULE 4.4(B) INADVERTENTLY PRODUCED MATERIAL

For too long New York has suffered from contradictions and confusion in legal authorities regarding inadvertently transmitted documents. Ethics opinions and case law suggested contradictory obligations, ranging from stating that examining inadvertently

sent material was unethical to permitting full examination and use of the material. Under Rule 4.4, an attorney's obligations are clear: the attorney must notify the sender. There is no disciplinary violation in examining, or indeed in the absence of an order prohibiting use, using the inadvertently sent material. The rule does not, however, attempt to establish what use, if any, may be made of such material, and leaves those decisions to the courts.

CONCLUSION

This article sets forth some significant differences between the Code and the new Rules. There are many other differences, some small, some not so small, with which all New York attorneys should become familiar.

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Who is the "Lawyer" Governed by New York's Disciplinary Rules?

Wally Larson, Jr. and Lewis Tesser

INTRODUCTION

New York's new Rules of Professional Conduct do not define the term *lawyer* nor do they clarify the definition of *law firm*. In some instances, the Rules have been interpreted so that a *lawyer* is only a New York-admitted lawyer subject to New York's rules, while in other instances, in addition to New York-admitted attorneys, *lawyer* may include U.S. lawyers from states other than New York and/or non-U.S. lawyers with comparable credentials. This ambiguity affects conflicts imputation analyses at firms with offices in New York and one or more jurisdictions. For example: does a New York law firm and/or its New York lawyers violate Rule 1.10 by representing a client in contract negotiations in New York when the Texas office and Texas lawyers of the same firm represent a different client in a dispute with the first client? Or is a lawyer who is admitted in both Texas and New York in violation of Rule 1.10 or any other New York Rules of Professional Conduct for working on the Texas matter? After using a hypothetical law firm to illustrate the complexities, we suggest alternative interpretational approaches a law firm can follow as well as a regulatory approach that would provide needed clarity. This approach recognizes the importance of a client having a choice of counsel while also ensuring *lawyers* and *firms*, whoever they may be, remain loyal to their other clients.

DISCUSSION

On April 1, 2009, significant amendments to the New York Rules of Professional Conduct moved New York from the old ABA Model Code format to the more modern ABA Model Rules format while retaining many of the former provisions. These rules have teeth because they are promulgated by joint order of the Appellate Division of the

Supreme Court and enforced by the various disciplinary committees of the Judicial Departments.

But despite all the time and attention paid to these rule changes, a nagging question lives on: exactly to whom do these rules apply? The rules generally purport to regulate "lawyers": Lawyers Shall Do This, Lawyers Shall Not Do That. But the rules do not define who or what is a lawyer.

Given the lack of definition, we might be tempted to adopt a hermeneutic principle that any references to a "lawyer" in the New York disciplinary rules denote a New York-admitted lawyer subject to the New York rules. For example, it seems reasonable to interpret Rule 8.4's prohibition against illegal or dishonest conduct as applying to New York lawyers only (leaving the conduct of, say, California lawyers or UK solicitors to the regulation of such jurisdictions). But the exceptions to our hermeneutic principle are daunting. For example, Rule 5.4 prohibits a "lawyer" from sharing legal fees with a nonlawyer or forming a partnership with a nonlawyer. The New York State Bar ethics committee has concluded that although that rule might appear to prohibit affiliation with non-New York lawyers (and under our hermeneutic principle, a non-New York lawyer is a nonlawyer), Rule 7.5(d) nevertheless permits partnerships between lawyers licensed in different jurisdictions so long as the firm's letterhead notes such jurisdictional limitations, and such other lawyers have licensing and training requirements comparable to those of American lawyers. N.Y. State 806 (2007). Although after analysis of such jurisdictions' licensing requirements, the committee had previously accorded "comparable" status to lawyers in Great Britain, Japan, and Sweden, the committee determined it was "not necessary or appropriate" for the committee to continue to analyze individual jurisdictions for such a purpose. Id. In other words, it is now up to New York lawyers to make their own determination of comparability before sharing fees or partnering with non-U.S. lawyers.

Another exception to our hermeneutic principle is Rule 8.5, New York's choice-of-law rule, which states that the New York rules apply to a "lawyer admitted to practice in this state, regardless of where the lawyer's conduct occurs." The Rule implies the obvious: there are lawyers who are not licensed to practice in New York. Nevertheless, by using the term *lawyer* to include those who are not licensed in New York, the definitional intent of the Rule is further muddied. Similarly, Rule 7.3(i), applies solicitation restrictions to a "lawyer or members of a law firm not admitted to practice in this State who solicit retention by residents of this State." These two rules, therefore, refer to non-New York lawyers as "lawyers" and call into question our hermeneutical principle.

Although "lawyer" is not defined in the Rules, "law firm" is defined in Rule 1.0(h) to include lawyers in a law partnership. Unfortunately, this brings us back to our initial inquiry into what a "lawyer" is and presents a different question: does a "law firm" include only the New York-admitted lawyers who are subject to the New York rules for the purpose of conflict analysis, or all lawyers (New York, U.S., non-U.S.) associated together in a firm?

The answer to this question is not simply academic, as it can impact a firm's bottom line at a time when bottom lines are being watched carefully. Rule 1.10, New York's conflict imputation rule, states that while "lawyers are associated in a firm, none of

them shall knowingly represent a client when any one of them would be prohibited from doing so. . . .” Most U.S. states, including New York, follow ABA Model Rule 1.7 and state that it is a conflict of interest for a lawyer to represent Client A in a matter directly adverse to Client B, whom the lawyer represents on unrelated matters. This Rule indicates when a firm must either obtain clients’ consent or reject business because a conflict exists. However, certain jurisdictions use different standards in determining what a conflict is and when business must be rejected. For example, Texas Rule 1.6(b) finds a representational conflict only if Client B is or was represented by the lawyer in a substantially related matter, and Rule 3.2 of The Code of Conduct for European Lawyers[1] takes a similar approach. Given the differing definitions of concurrent representational conflicts in various jurisdictions, the definitions of “lawyer” and “law firm” will impact whether a firm must reject business as a result of a conflict.

CONCURRENT REPRESENTATIONAL CONFLICTS AND THE FIRM-WITHIN-A-FIRM APPROACH

To understand the implications of the above discussion and the need to clarify the terms “lawyer” and “firm,” let us consider a hypothetical law firm with offices in Texas and New York. Lawyers of the Texas office represent Client A in negotiating an intellectual property contract governed by Texas law while the same office is asked to advise Client B in a Texas law personal injury dispute with Client A. The matters are not substantially related, so this is not a conflict of interest under Texas disciplinary rule 1.6(b). But would the lawyers of the New York office have a conflict simply by being associated with the Texas office, even if they were not personally involved in either matter? Remember, New York’s Rule 1.10 says that none of the *lawyers* associated in a *firm* should take on a matter if any one of them would be prohibited from doing so. Although such a conflict, if extant, would be consentable under Rule 1.7(b), Client A is not likely to give its consent, so the prospective matter would have to be declined based on New York’s Rules.

The inquiry does not end there, however, as we also need to analyze this question in light of a 2003 New York State Bar ethics committee opinion advising to what extent a New York attorney’s law firm must supervise “associates, partners and non-lawyers who are admitted to practice in foreign jurisdictions but not in New York.” It observed that under Rule 5.1, a firm must ensure “all lawyers in the firm” conform to the New York Rules of Professional Conduct. The committee noted that, read literally, this rule could require non-New York lawyers in the firm to conform to the New York Rules, but “[w]e believe that this broad reading is unintended.” N.Y. State 762 (2003).

Instead, the committee said the firm should make reasonable efforts to “ensure that lawyers subject to the New York Code” comply. Additionally, it concluded that such supervision should ensure that a foreign lawyer’s adherence to the foreign jurisdiction’s disciplinary rules does not “expose the New York firm or its New York lawyers” to a violation of the New York disciplinary rules. Id. In essence, the committee interpreted

1 This code applies to cross-border activities of European lawyers.

"firm" to mean only the New York-admitted lawyers practicing New York law. We refer to this as the firm-within-a-firm approach to conflicts analysis.

Applying the committee's concept of "firm to our hypothetical conflict imputation question, the Texas office is clearly not regulated by the New York rules. However, is the Texas office exposing the New York office to a violation of the New York disciplinary rules? The answer depends on whether the New York office is subject to the New York disciplinary rules for purposes of the Texas matters. We think not.

We take this position because New York Rule 8.5(a), addressing disciplinary authority and choice of law, refers only to the conduct of individual lawyers admitted to practice in New York, but in our example, the New York lawyers are not engaging in "conduct." Their Texas colleagues are taking on work that is ethically permissible in the jurisdiction in which they practice. Moreover, as a policy matter, Client B gets its preferred counsel (although Client A is denied the opportunity to object, this is precisely the sort of trade-off that jurisdictions are entitled to make for themselves). Of course, the firm would still have to make a determination under Rule 1.7(a)(2) whether there is a risk that either client representation will affect the lawyers' professional judgment, and if so, obtain the informed consent of the affected client(s).

However, we might ask whether the analysis changes if some of the lawyers in the Texas office are admitted in both Texas *and* New York. Rule 8.5(b) applies New York's disciplinary rules to lawyers with multiple admissions as follows: (1) for conduct in connection with court proceedings, it applies the rules of the jurisdiction in which the court sits, and (2) for any other conduct, it applies the rules of the admitting jurisdiction in which the lawyer principally practices. So the New York rules would not be applied to the conduct of multi-admission lawyers principally practicing in Texas.

But let us tweak the hypothetical a bit: what if the New York office is representing Client A in New York negotiations as to intellectual property licensing under New York law, and the Texas office is representing Client B in its Texas dispute with Client A? Initially, we should note that the choice-of-law rule is now implicated to the extent the New York lawyers now have "conduct" in the New York matter. But the Texas matter remains untouched by the choice-of-law rule because it does not involve conduct by the lawyers of the New York office.

As stated above, Rule 1.10 says that none of the *lawyers* associated in a *firm* should take on a matter if any *one* of them would be prohibited from doing so. Implicit in Rule 1.10 is that the "one" lawyer prohibited from taking on the matter is prohibited by his or her applicable jurisdiction's disciplinary rules. So, to analyze the hypothetical, we will apply the firm-within-a-firm approach and interpret "lawyers" and "firm" to mean associated New York-admitted lawyers subject to the New York disciplinary rules for the purposes of the IP-licensing negotiations. Then, because none of the lawyers in this firm-within-a-firm are involved in the Client B representation adverse to Client A, the choice-of-law rule does not subject the firm-within-a-firm to the New York rules. Therefore, none of the lawyers in the New York office would be prohibited from continuing to represent Client A in the New York matter.

Now, let us say our hypothetical law firm expands to include a Florida office comprised of Florida-licensed lawyers. If one of them wants to work on the New York

matter, that lawyer must ensure only that any lawyer in the Florida office would be free to do so (Florida has the same concurrent representational conflict definition as New York).

In short, for the purposes of analyzing conflict imputation, we are employing a "siloed office" approach to illustrate the impact of consistently applying our hermeneutic principle. Of course, for firms with offices in multiple U.S. and foreign jurisdictions, it is still not practical or advisable to conduct conflict searching on a siloed-office basis. There are plenty of business reasons to avoid, when possible, any firm lawyer being adverse to a client represented by any other firm lawyer (at least without giving such client a courtesy "heads-up"). However, when it is time for a firm to decide whether a current client's consent is *ethically required* for the firm to take on a prospective matter, we believe that a "one firm" approach would frustrate the decision made by jurisdictions such as Texas and Europe to define conflicts differently.

HOW COULD WE REGULATE CONFLICT IMPUTATION DIFFERENTLY?

If we were drafting a regulatory approach from whole cloth, the most prudent approach might be to divide a "law firm" into a "broad conflicts" firm-within-a-firm (comprised of offices in jurisdictions with the broad approach) and other offices. The "broad conflicts" offices would analyze unrelated-matter conflicts collectively so that no lawyer in any of these offices could be adverse to a client represented on an unrelated matter by any lawyer in this group of offices.

For purposes of related-matter conflicts, all of the firm's offices would analyze conflicts collectively. This would ensure that no lawyer in any office could be adverse to a client represented by a lawyer in any office in a substantially related matter. The benefit of this approach is that it caters to the tendency of clients (reasonably stemming from law firm engagement letters and marketing efforts) to view the "firm" as their lawyer, while also recognizing that client expectations as to counsel's availability will be locally based.

The obstacle to this approach, however, is that there is no obvious interpretational means under New York's current rules to reach that result. Moreover, it is unlikely that such a result could be achieved under a paradigm of state-based regulation. Many lawyers cross state borders and national borders, but a rule purporting to regulate conflicts and lawyers associated in a firm raises vexing definitional and conflict-of-law questions. Barring a coordinated effort at reciprocity among jurisdictions, perhaps only a multi-jurisdictional authority could accomplish the promulgation of something like our whole-cloth approach.

So we are stuck deciding whether "lawyer" means (1) a New York lawyer subject to New York rules, or (2) U.S. and comparable lawyers. Adopting the latter approach for purposes of Rule 1.10 would, in the words of Opinion 762, apply an unintended broad reading by forcing the New York way on other jurisdictions that opt to give prospective clients greater leeway in their selection of counsel. Adopting the former more narrow approach seems to be the lesser of two evils because it turns each office

of a multi-jurisdictional firm into a silo for purposes of conflict analysis. This ensures that a client of the New York office will not be opposed by another client of the New York office—which is as broad a regulatory net as New York could reasonably expect to cast. *See* ABA 91-360 (lawyer licensed in State A, which permits partnerships with nonlawyers, and State B, which prohibits them, should practice through separate firms to comply with State B's more restrictive rule).

Opinion 762 did not, unfortunately, address conflicts of interest, perhaps because of the interpretational challenges we discussed above. However, it did address confidentiality, and noted that if New York prohibits disclosure of certain information while Country X requires disclosure of the same information, the solution would be to shield the firm lawyer(s) in Country X from that information. If a lawyer in Country X disclosed information gained in a Country X representation, such disclosure would not constitute a disciplinary violation by New York lawyers. In sum, the Country X office would become a firm-within-a-firm for purposes of ethical analysis.

This brings us back to our original hermeneutic principle whereby we interpret "lawyer" under Rule 1.10 to mean a New York lawyer subject to New York Rules for purposes of the conduct in question.

We are not aware of any authorities, in New York or elsewhere, who have specifically addressed these interpretational issues regarding conflict imputation. When courts rule on disqualification motions, our sense is that they tend to assume (without considering the interpretational issues we have raised) that the firm should be treated as unitary for purposes of conflict analysis and imputation. For example, in *McKesson Information Solutions Inc. v. Duane Morris LLP,* Fulton Cnty. (Ga.) Super. Ct., Civ. No. 2006CV121110, 11/8/06, the firm Duane Morris was enjoined from opposing a company-client's subsidiary in a Georgia arbitration because the firm represented two other company subsidiaries in an unrelated bankruptcy proceeding in Pennsylvania. Once the Pennsylvania matter was settled, the Georgia judge lifted the injunction against Duane Morris. In so doing (and perhaps implicitly recognizing that the initial decision was flawed), the court emphasized the importance of a client having counsel of choice. The judge also noted that "to bar an attorney from representing a client who may have some distant interest in conflict with another current or former client, especially in an era of flourishing companies and multi-office law firms, is inherently unreasonable." *McKesson Information Solutions Inc. v. Duane Morris LLP*, Fulton Cnty. (Ga.) Super. Ct., Civ. No. 2006CV121110, 3/6/07.

So what is an international law firm to do with New York's conflict imputation rule? We offer three alternatives:

1. The most conservative approach is to prevent any firm lawyer from opposing any firm client, even in a completely unrelated matter, without such client's informed consent (in New York, such consent must now be confirmed in writing).
2. The moderate approach is our "whole cloth" regulatory proposal whereby we treat all offices in jurisdictions with the New York conflict definition as one firm-within-a-firm for analyzing unrelated matter adversity while analyzing substantially related matter conflicts on a firm-wide basis (because confidentiality is implicated). Although this approach lacks textual support, it seems to be a reasonable and sound

resolution a judge could adopt to navigate between overly restrictive and permissive alternatives, and also to make allowances for a client's reasonable expectations.

3. The most aggressive, and risky approach, is to proceed as if each office is its own "law firm" silo (as we did above for illustrative purpose in our hypotheticals).

This was a rather substantial bit of analysis in an effort to define "lawyer" under one rule. What about all the other disciplinary rules? Alas, "lawyers", whoever they may be, are left to do what lawyers do best: research authority, analyze policy, and compare rules in order to reach a conclusion. Then, all that is left to do is hope that should their conclusion ever be questioned, the adjudicator will come out the same way—or will at least have mercy on the lawyer for reasonably coming out differently.

Perhaps one day New York will see fit to adopt this language from ABA Model Rule 8.5(b)(2): "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur."

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Attorney Ethics and Real Estate Issues

Carol Sigmond and Lewis Tesser

Recent news stories describing Ponzi schemes and large-scale fraud have impacted the legal community and left prominent attorneys disgraced, disbarred, and/or jailed. One such story is that of Marc Dreier, once a high-profile attorney and managing partner of the now-defunct Drier, LLP, who is now a convicted felon. As Mr. Drier has pled guilty to felonies, his disbarment will follow as a matter of course. Assuming for the moment that we are bar counsel charging this matter under New York's new Code of Professional Conduct, how would we proceed?

In some respects, Mr. Dreier's scheme was an example of garden-variety wrongdoing: he sold that which he did not own. In this case, Mr. Dreier was selling notes purportedly issued by a Dreier LLP client, a real estate developer. On the other hand, the details of Mr. Drier's scheme are unique. In order to sell the bogus notes, Mr. Drier and his accomplice: (1) forged the signature of the principal of the developer-client on notes that appeared genuine; (2) created false financial statements for the developer-client alleged to have been issued by an accounting firm to support the repayment representations in the falsified prospectus; (3) invented a partner in the accounting firm to sign off on the false financial statements; (4) arranged to have the accomplice impersonate a principal of the developer-client who then appeared at a "closing"; (5) conducted activities associated with the scheme in the developer-client's offices; and (6) converted the proceeds of the sale of the bogus notes for their personal financial gain.

Common sense tells us that an attorney who purports to sell the forged notes of a client for personal gain will likely be disbarred. Indeed, the First Department suspended Mr. Dreier's license to practice law on December 23, 2008 "on the basis of uncontroverted evidence of serious professional misconduct." The question is: what provisions of the new Code did Mr. Dreier violate as part of his "serious professional misconduct"? We suggest that at least five rules are implicated: Rule 1.1 Competence, Rule 1.4 Communications, Rule 1.7 Conflict of Interest: Current Clients, Rule 1.15 Preserving the Identity of Funds and Property of Others, and Rule 4.2 Truthfulness in Statements to Others.

Rule 1.1 sets forth the general requirement that an attorney provide "competent representation." Subpart (c)(2) states that an attorney "shall not intentionally" . . . prejudice or damage the client during the course of representation except as permitted or required by these Rules." Obviously, when Mr. Drier used his position as counsel for the developer to issue bogus notes in the developer's name, thereby placing the developer at risk of claims for repayment on the bogus notes, Mr. Drier caused "prejudice or damage" or both to the developer-client in a manner not permitted by law or rule.

Rule 1.4 sets forth the requirement that attorneys keep clients informed of material developments in client matters. Certainly, a sale of notes for a client that purported to cause the client to become indebted is a fact or event as to which the client should be informed. Mr. Dreier's failure to disclose the sale of the client developer's notes, albeit bogus, was material to the client-developer.

Rule 1.7 sets forth the rules governing conflicts of interest with current clients. Subpart 1.7 (a)(2) provides that a lawyer should not represent a client if there is a "significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the law's own financial . . . or other personal interests." Mr. Dreier's entire scheme (the bogus notes, the falsified financial statements, the invented partner in the accounting firm, the impersonation of the developer-client's principal, and the conversion of the proceeds from the sales of the bogus notes) demonstrate a conflict of interest. From a macro perspective, Mr. Dreier's scheme was designed to enrich himself and allow him to maintain a luxurious lifestyle. Also, Mr. Dreier had an interest in not having the scheme exposed. Therefore, Mr. Dreier's personal liberty and financial interests were directly contrary to the financial and reputational interests of his client. From a micro perspective, the sale of the bogus notes purporting to indebt his client was adverse to the client's financial interests. The falsification of the financial statement with the invented accounting partner was contrary to the interests of the client's reputational interests. Having an accomplice impersonate a principal of the developer-client also adversely impacted the developer-client's reputational interests. Finally, the conversion of the funds generated by the sales of the bogus notes to Mr. Dreier's personal use conflicted with the developer-client's financial interests.

Rule1.15 provides that attorneys take funds or property for clients as fiduciaries and sets forth the requirement that client funds and property not be commingled with attorney funds and property. Having sold the bogus notes that purported to create indebtedness on the part of the developer-client, Mr. Dreier took the proceeds for himself. Therefore, to enrich himself, Mr. Dreier failed to keep the developer-client's property free from a bogus debt. Similarly, to the extent that he sold bogus notes and purported to create indebtedness of the developer-client, and then converted the money to his own interests, Mr. Dreier failed to act as a fiduciary for the developer-client.

Rule 4.1 provides that attorneys should be truthful in their communications with others. Mr. Dreier committed multiple violations of this rule. Every offer of the bogus notes, every discussion about the bogus notes, every discussion of the falsified financial statements—indeed the very the existence of the falsified financial statements—constitute violations of Rule 4.1. Mr. Dreier violated Rule 4.1 just by telling a receptionist

at the developer-client's office that he had an appointment with the developer-client's principal, as this was not true. Mr. Dreier had brought an accomplice and a legitimate buyer of the bogus notes to the developer-client's office as part of his scheme to sell the notes. Mr. Dreier arranged to have his accomplice impersonate one of the principals of the developer-client to persuade the legitimate buyer that the bogus notes were actually validly issued. In the context of Mr. Dreier's scheme, even the false introduction of the accomplice violated Rule 4.1.

In all likelihood, we will never know if the foregoing analysis is correct. It is even possible that Mr. Dreier will resign from the bar as he prepares to be sentenced. However, the foregoing makes clear his scheme was not only a violation of the criminal law but also highly unethical.

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When a Client Wants to Give Something of Value to the Attorney

Thomas G. Draper, Jr. and Lewis Tesser

Lawyers are charged with the duty to promote and protect their clients' interests; accordingly, many protections exist to prevent conflicts of interest. When a client seeks to make a gift to her lawyer, ethical questions arise as to the propriety of a lawyer's acceptance of such a gift. Because of the fiduciary relationship that exists between lawyer and client, a prudent lawyer should limit the circumstances under which she will accept such a gift. This article will review the New York State rules, both ethical and substantive, that govern such gifts.

LIFETIME GIFTS TO LAWYERS

New York case law has been seemingly inconsistent with regard to whether a client's gift to a lawyer is ethically acceptable. For example, in *In re Sherbunt*,[1] a Third Department case in which an attorney was the respondent in a disciplinary proceeding, a client had gifted $45,000 to his attorney. Although the lawyer drafted a writing that memorialized the gift and the client signed the writing, the gift was not revealed to any other party. In his defense, the lawyer claimed that he had urged the client to seek disinterested advice. Finding this to be inadequate, the court said, "at a minimum he should have *insisted* that another attorney prepare the writing which memorialized the gift and should have sought the involvement of a third party who could attest to the voluntary nature of the transaction. His failure to do so constituted a violation of DR 1-102 (A)(6)."[2] (emphasis added). This conduct along with other circumstances reflected adversely on the lawyer's fitness to practice law. The Supreme Court,

1 *In re* Sherbunt, 134 A.D.2d. 723 (App. Div. 3rd Dept. 1987).

2 *Id.* at 724.

Appellate Division suspended the lawyer from the practice of law for one year.[3] Thus, in *Sherbunt*, the mere urging of a client to seek independent counsel was insufficient.

However, in another case that arose in a civil (not disciplinary) context,[4] the Second Department upheld an even more generous gift than the one deemed invalid in *Sherbunt.* The court in *Hall v. Clyne* considered a challenge by a disgruntled heir to a lifetime gift made by the decedent to her lawyer. The client, who was 80 years old, had placed $105,000 into joint accounts with her attorney and the attorney's wife and children. The client died within one year of the date of the gift. By her will, the client left her entire estate to another person, the sole legatee, who brought a proceeding to recover the gift from the lawyer and his family. The surrogate denied the application, and the Appellate Division affirmed. The record showed that the lawyer and his wife had been close friends of the decedent for some forty years during which time the lawyer had assisted the client with her financial affairs. The lawyer and his wife had visited the client frequently and helped her clean her home. Although the client lived a rather secluded life for the nine years prior to her death, she possessed all of her faculties and was capable of making personal and business decisions. However, there is no indication that the lawyer ever urged the client to seek the disinterested advice of counsel prior to making the gift, and the court said:

> It is well settled that when a confidential relationship exists between parties, a valid gift must be established by evidence which is clear and convincing. When parties do not deal on terms of equality, it requires but slight evidence to shift to the donee the burden of proving by clear and convincing evidence that any transfer of property in question was free and voluntary on the part of the donor.[5]

The court concluded that the testimony offered by the lawyer and his wife, taken together with the testimony of disinterested witnesses, established by clear and convincing evidence that the decedent intended to make the gifts in question.

In *Radin v. Opperman,*[6] a case with facts similar to those of *Hall*, the Fourth Department voided a gift made by a client to his lawyer where the lawyer was unable to produce independent witnesses to testify as to whether the decedent intended to make the gift in question. The lawyer in *Radin* had known an 80-year-old man for many years, had been his attorney for eight years, and had helped the client gain admission to a veteran's facility. The lawyer visited the client monthly at the facility (and was in fact the man's only visitor). Around the time the client was admitted to the facility, the lawyer had assisted the client in recovering $17,000 from the client's sister-in-law who had withdrawn funds from accounts she had held jointly with the client. After recovering the money, the client opened joint accounts with the lawyer and accounts in the client's own name in trust for the lawyer. Four years after making the gift and creating the accounts, the client died.

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3 Despite the case being decided under the old Code, the result would likely be identical under the new Rules.

4 Hall v. Clyne, 206 A.D.2d. 428 (2d Dept. 1994).

5 *Id*. at 429.

6 64 A.D. 2d 820 (4th Dept. 1978).

The lawyer initiated a proceeding against the administratrix of the client's estate to recover the accounts held in trust for the lawyer. The administratrix cross-petitioned for the return of $29,000, which she said the lawyer had improperly removed from the joint accounts. In his defense, the lawyer argued that the lawyer-client relationship had ceased and he was acting only as the decedent's friend. Nonetheless, the Surrogate's Court found that the lawyer had a fiduciary relationship with the client and had failed to present clear and satisfactory evidence that the transactions were fully understood by the client and were made by the client voluntarily. The lawyer produced no independent witnesses and he did not have the client seek independent advice with respect to the transactions. The Surrogate's Court held for the administratrix, and the Appellate Division affirmed.

In each of the above-mentioned cases, a client's gift to a lawyer was alleged to be a voluntary, unsolicited act of the client. Although the outcome in *Hall* is seemingly inconsistent with that of *Sherbunt* and *Radin*, arguably the case would have been resolved differently had it been raised in the context of a disciplinary proceeding.

TESTAMENTARY BEQUESTS TO A LAWYER

The question of the efficacy of a gift made by a client to a lawyer becomes even more thorny where a client who is unrelated to her lawyer tells the lawyer that she would like to leave a legacy for him in her will. In *Matter of Putnam*,[7] the New York Court of Appeals said:

> [T]he law . . . requires that the lawyer who drafts himself a bequest to explain the circumstances and to show in the first instance that the gift was freely and willingly made. Such wills, when made to the exclusion of the natural objects of the testator's bounty, are viewed with great suspicion by the law, and some proof should be required beside the factum of the will before the will can be sustained. In the absence of any explanation a jury may be justified in drawing the inference of undue influence, although the burden of proving it never shifts from the contestant.

As a practical matter, courts will hold a "Putnam Hearing" before admitting a will to probate whenever the lawyer/drafter is a beneficiary. Even if the lawyer seemingly follows all ethical obligations, a will that benefits a lawyer with whom the testator had a lawyer-client relationship is still subject to scrutiny. For example, in *In re Henderson*,[8] a client told her long-time attorney that she wanted him to draft a will that left a substantial part of her estate to the lawyer and his family. The lawyer sent the client a four-page memo confirming his inability ethically to prepare the will and suggesting the client contact the county bar association for a referral. The memo discussed the client's assets and the likely tax and administration expenses, then listed the potential beneficiaries including the lawyer and his family. The lawyer also advised that the client leave a legacy to her sister with whom she was having a dispute. The lawyer

7 257 N.Y. 140 (1931).

8 *In re* Henderson, 80 N.Y.2d 388 (1992).

suggested that the client give the memo to a new attorney, and the client followed the advice set forth in the memo.

The bar association referred the client to another attorney who ultimately prepared the will in accordance with the guidelines in the memo. The new lawyer did not question the client concerning why she was disinheriting her sister or giving a legacy to the lawyer. The sister objected to the will alleging undue influence, and the proponent of the will moved for summary judgment. The Surrogate's Court denied the motion for summary judgment, concluding the facts warranted a hearing on the sister's claim of fraud and undue influence. When the proponent appealed, the Appellate Division reversed the denial of the motion and dismissed the remaining objection. On appeal by the sister, the Court of Appeals wrote:[9]

> A testator's freedom to bequeath property in accordance with his or her wishes should not be diminished merely because the object of the testator's generosity happens to be a lawyer with whom the testator enjoyed a beneficial professional relationship.[10] Attorneys often extend themselves on behalf of their long-time clients, and such "acts of kindness and consideration" do not by themselves "constitute undue influence" when they "evoke reciprocal sentiments of gratitude and affection" by the client.[11] Accordingly, as the Appellate Division correctly concluded, the Putnam inference of undue influence should not automatically be applied where a lawyer-legatee has had a professional relationship with the testator but was not the attorney who drafted the testamentary instrument.
>
> However, contrary to the Appellate Division's holding, the inapplicability of the Putnam inference does not end the inquiry here. The issue before the Surrogate's Court on the proponent's motion was whether the allegations in the objectant's motion papers were sufficient to raise a triable question of fact on her claim of fraud and undue influence. . . . [O]ther facts and circumstances in this case justified the Surrogate's decision to grant the objectant a hearing.

Perhaps the objectant's challenge in the above-referenced case would not have made it to the jury if the draftsman of the will had carefully questioned the testator as to her reasons for giving her lawyer a gift and for disinheriting her sister and if the draftsman had documented the testator's answers. In any case, a bequest made to a lawyer by his or her client will be subject to such scrutiny that the prudent lawyer is best served by advising the client to independently discuss the bequest with disinterested counsel.

THE NEW NEW YORK RULES OF PROFESSIONAL CONDUCT

As discussed, a lawyer may accept a gift from a client provided it is clear that the gift was knowingly made and free of undue influence. The newly adopted New York Rules

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9 *Id*. at 564.

10 See generally, Annotation, *Wills: Undue Influence in Gift to Testator's Attorney*, 19 A.L.R.3RD 575, §3.

11 *In re* Guidi, 259 App.Div. 652, 656, *aff'd* 284 N.Y. 680 (1940).

of Professional Conduct[12] (the Rules), which repeal the Code of Professional Responsibility (the Code) that had governed lawyer conduct for some forty years in New York, squarely address the question of when a gift to a lawyer is ethically appropriate. New Rule 1.8 (c) provides:

> (c) A lawyer shall not:
>
> (1) solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or
>
> (2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.
>
> For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

Based on the plain language of Rule 1.8(c), a lawyer may neither solicit gifts from a client nor draft an instrument that gives any gift to either the lawyer or a person related to the lawyer unless certain requirements are met. Comment 6 to Rule 1.8 provides: "[D]ue to concerns about overreaching and imposition of clients, a lawyer may not suggest that a gift be made to the lawyer of for the lawyer's benefit."[13] However, under certain circumstances, a lawyer may accept a gift from a client without such acceptance constituting professional misconduct. The comment to the Rule states: "A lawyer may accept a gift from a client if the transaction meets general standards of fairness. If a client offers the lawyer a gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client." As discussed above, however, the validity of a gift may be questioned even if the attorney did not commit misconduct.

CONCLUSION

Although it is probably not uncommon for clients to offer simple holiday gifts or token gifts of appreciation to their lawyers, what should the prudent lawyer do if a client offers more than a simple gift? The Rules in conjunction with case law plainly establish that New York attorneys may only accept gifts from clients where the transaction is unquestionably fair. It is in precisely such situations that lawyers should take great precautions to avoid any appearance of impropriety. The Comment to Rule 1.8 gives the following guidance: "Before accepting a gift offered by a client, a lawyer should urge the client to secure disinterested advice from an independent, competent person

12 NY Judiciary Law, Appendix.

13 The Comments to the Rules of Professional Conduct may be found by the public without charge on the Web site of the New York State Bar Association (available at http://www.nysba.org).

who is cognizant of all the circumstances." Although merely advising a client to seek advice may be sufficient, *Sherbunt* suggests something more is warranted.

Taking together the Rules, the Comments to the Rules, and case law, a prudent lawyer would be well-advised to advise her client, in writing, that the client seek the advice of disinterested counsel regarding any prospective gift. If the client is unwilling to do so, the lawyer must decide whether disinterested witnesses have knowledge of such gift and would find it appropriate and whether the gift meets general standards of fairness. Where a lawyer is unsure as to the propriety of a gift and the client is unwilling to seek the advice of disinterested counsel, a prudent lawyer may find herself in a position where she must reject the gift.

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Is Law Firm Discrimination Unethical?[1]

Barry R. Temkin

On April 6, 2010, the New York Law Journal reported on a lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC) against Kelley Drye & Warren contending that the venerable firm had violated the Federal Age Discrimination in Employment Act by stripping a 79-year-old partner of his equity share and reducing his bonus.[2] The EEOC contended that Eugene D'Ablemont and other septuagenarian partners had been improperly demoted upon reaching the age of 70. Like all good stories, this one has two sides, and Kelley Drye fired back, contending that Mr. D'Ablemont's demotion had nothing to do with age and everything to do with productivity, citing annual billings of 200 to 300 hours.[3] Nonetheless, Kelley Drye dropped its mandatory retirement age for partners and re-equitized Mr. D'Ablemont.

The Kelley Drye story recalls the EEOC's recent suit against Chicago's Sidley Austin Brown & Wood.[4] Sidley Austin had demoted 32 equity partners to positions as "Senior Counsel," and opposed an EEOC enforcement proceeding on the ground that the demoted partners had been management, not employees, a position that was rejected by the U.S. Court of Appeals for the Seventh Circuit. Following this judicial rejection of the firm's first line of defense, Sidley Austin settled for $27 million.[5]

Many large law firms have structures which require partners to retire upon reaching a certain age, often 65 years old. These rules are defended by law firms as promoting orderly transition of client matters to junior partners, permitting the younger lawyers to grow their practices, and maintaining the health and productivity of the firm. On the

1 Article first appeared in the *New York Law Journal*, August 26, 2010. Reprinted with permission of the *New York Law Journal*.

2 Nate Raymond, "'Life Partner' Not Subject to Federal Age Bias Law, Kelley Drye Argues" NYLJ, April 6, 2010.

3 Id.

4 EEOC v. Sidley Austin Brown and Wood, 315 F.3d 696 (7th Cir. 2002).

5 Nate Raymond, "Firms Cling to Retirement Policies Despite Continuing Criticism," NYLJ, April 8, 2010.

other hand, senior lawyers contend that they are unfairly being forced out when they have many years of abundant productivity ahead of them.

Much has been written about the graying of the baby boomers, the post-war generation born between 1946 and 1964. In large part due to advances in medical technology and nutrition, the boomers are healthier than their parents' generation, often enjoying good health and productivity well into their 70s and beyond. A recent series in The New York Times chronicled the career paths of several senior partners at major law firms who were forced to find new jobs at a time when they were professionally productive in many different ways.[6] The New York State Bar Association Special Committee on Age Discrimination in the Profession has gone on record in opposition to the mandatory retirement of law firm partners.[7]

RULES OF PROFESSIONAL CONDUCT

Against this backdrop, it is interesting to consider a new perspective as the legal profession continues graying and struggling with mandatory retirement issues. Unbeknownst to many lawyers, the 2009 New York Rules of Professional Conduct specifically address unlawful discrimination as a potential ethics violation, subject to professional discipline. New York's Rules of Professional Conduct provide that a lawyer or law firm shall not "unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation."[8] New York RPC 8.4(g) is, by definition, a disciplinary rule. Thus, the New York rule places additional pressure upon law firms to avoid unlawful discrimination. Now a law firm has to worry about more than just writing a check to resolve a claim of unlawful discrimination; the respondent may also have to contend with professional discipline.

A few comments about RPC 8.4(g) are in order. In the first instance, New York's rule is not universal. Although some other states have similar provisions, the American Bar Association (ABA) Model Rules of Professional Conduct contain no analogous rule. Second, the New York Rule is not new. Rather, it is similar to the anti-discrimination provisions in the predecessor Code of Professional Responsibility, which date back to 1990.[9]

RPC 8.4(g) is the only ethics rule in New York which at least sometimes requires a complainant to exhaust administrative remedies, so to speak, before filing a complaint

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6 See Julie Cresell and Karen Donovan, "Happy Birthday. Vacate Your Office." N.Y. TIMES, Dec. 8, 2006.

7 See "Report and Recommendations on Mandatory Retirement Practices in the Profession," New York State Bar Association, Special Committee on Age Discrimination in the Profession, January, 2007 (NYSBA Report).

8 22 N.Y.C.R.R § 1200 (2009), New York Rules of Professional Conduct 8.4(g).

9 See Roy Simon, Simon's New York Code of Professional Responsibility Annotated 59-60 (2007).

with the appropriate attorney grievance or disciplinary committee. New York RPC 8.4(g) provides:

Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such a tribunal in the first instance. A certified copy of a determination by such a tribunal, which has been final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding . . ..[10]

Thus, a finding of unlawful discrimination by the EEOC or New York State Division of Human Rights can support a disciplinary prosecution of a lawyer or law firm. The Rule does not indicate whether a finding of discrimination in a private suit would have preclusive effect.

A charge of unlawful discrimination by a lawyer or law firm may be brought, in the first instance, by a civil rights law enforcement agency. A finding of discrimination is prima facie evidence of discrimination. But the text of the rule does not explicitly state that a complainant must necessarily wait until final adjudication of the EEOC (or other agency) investigation in order to bring a disciplinary claim.

Rather the rule, by its terms, specifically states that "a complaint based on unlawful discrimination shall be brought before such a tribunal in the first instance." While a judicial finding of unlawful discrimination is prima facie evidence of unethical conduct, does this mean that the complainant must await final adjudication of the discrimination and grievance claim and exhaustion of all appeals, or does this mean, rather, that the aggrieved complainant may file with the EEOC on Monday and file with the department disciplinary committee on Tuesday?

This question is more theoretical than practical. As a practical matter, the departmental disciplinary and grievance committees, given their limited resources, are unlikely to commence a prosecution for unlawful discrimination under RPC 8.4(g) until court adjudication of the underlying complaint concludes. This is true for a number of reasons. In the first instance, RPC 8.4(g), by its terms, does not proscribe all discrimination, but only states that it is unethical for a law firm or a lawyer to "*unlawfully* discriminate in the practice of law…."[11]

Thus, the rule's structure seems to anticipate, in most circumstances, an investigation and interpretation of the respondent's conduct by an agency endowed with expertise and resources for investigating and prosecuting fact specific allegations of discrimination. The departmental disciplinary committees, and the Appellate Divisions of which they are an arm, are not looking to substitute their own judgment and interpretation of the federal antidiscrimination laws or their state counterparts, particularly while an EEOC investigation is underway. Attorney grievance committees lack the institutional expertise or resources to evaluate, investigate, and adjudicate claims of unlawful discrimination.

10 N.Y.R.P.C. 8.4(g), supra note 5.

11 Id. (emphasis added).

DISCIPLINARY PROSECUTIONS

There are some interstices in the rule. The EEOC does not have jurisdiction over every claim of discrimination, and not all discrimination takes place in the context of employment, housing, or other areas reached by civil rights laws. Rule 8.4(g) broadly proscribes discrimination "in the practice of law," and is not limited to workplace bias. Lawyer disciplinary authorities have prosecuted unlawful discrimination under the rubric of other disciplinary rules, in many instances without waiting for a formal judicial adjudication of unlawful discrimination.[12]

Geoffrey Peters, Dean of William Mitchell College of Law in Minnesota, was prosecuted for repeated unwanted touching of female law students.[13] Dean Peters, who was referred to by his own lawyer as "the Tactile Dean," repeatedly groped young female law students.

At the time, Minnesota lacked an ethics rule specifically proscribing unlawful discrimination and there had been no adverse finding by a civil rights agency or court. Nonetheless,the Minnesota court concluded that the respondent had engaged in "conduct that adversely reflects on a lawyer's fitness to practice law" in violation of Minnesota Disciplinary Rule 1-102, a general, catch-all provision which did not specifically reference discrimination:

A formal adjudication that conduct is illegal is not prerequisite for a determination that conduct adversely reflects any lawyer's fitness to practice law. DR 1-102 (A)(3) expressly proscribes certain kinds of illegal conduct—illegal conduct involving moral turpitude. DR 1-102 (A)(6) prohibits any other conduct that adversely reflects on [a lawyer's] fitness to practice law.[14]

Another sexual harassment prosecution without a prior adjudication of unlawful discrimination was *In Re Kahn*.[15] The respondent engaged in a pattern of sexual harassment of females, none of whom were his employees. The respondent handed hard candies to female adversary counsel while sarcastically asking, "Do you want to suck one of my balls?"[16] Further, the respondent "invited a female adversary to guess the bra size of a fourteen-year-old client."[17] For these and other acts of jarringly unprofessional conduct, the 67-year-old respondent was suspended for three months.[18]

At the time of Mr. Robert Kahn's prosecution, the New York Code of Professional Responsibility contained an explicit provision that proscribed unlawful discrimination in the practice of law and required that a complaint must be "brought before [a civil

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12 See NYSBA Report at 13 ("There does not appear to be any case law treatment of the discrimination prohibitions of DR 1-102(a)(6)…").

13 *In re Peters*, 428 N.W.2d 375 (Minn. 1988).

14 Lisa G. Lerman and Philip G. Schrag, Ethical Problems in The Practice of Law 89 (Aspen 2008).

15 *In re Kahn*, 16 A.D.3d 7 (1st Dept. 2005).

16 791 N.Y.S.2d at 37.

17 Id. at 38.

18 Id.

rights] tribunal in the first instance."[19] Nonetheless, the departmental disciplinary committee prosecuted Mr. Kahn under that section, but instead invoked its catch-all provision, which more generally proscribed "conduct that adversely reflects on the respondent's fitness as a lawyer."20[20]19

It appeared that Mr. Kahn's harassment was not directed at employees within the meaning of the federal antidiscrimination law such that the EEOC would have had jurisdiction in the first instance. To the contrary, Mr. Kahn's discrimination was directed at fellow attorneys whom he encountered in the court room. Thus, the DDC could have prosecuted Mr. Kahn under the predecessor to current RPC 8.4(g) without awaiting the outcome of an administrative investigation by civil rights agency.

CONCLUSION

New York's Rules of Professional Conduct proscribe unlawful discrimination in the practice of law, adding an additional weapon in the hands of disciplinary authorities. This increases the stakes involved in civil rights investigations and prosecutions of law firms, which now face more than mere money damages and professional disgrace as a result of a finding of unlawful discrimination. Now, lawyers and law firms found guilty of unlawful discrimination may also face professional discipline.

19 Disciplinary Rule 1-102(a)(6), 22 N.Y.C.R.R. § 1200.3(a)(6).

20 791 N.Y.S.2d at 37 (referring to DR 1-102(a)(7).

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Sample Forms

Sample Form

STATEMENT OF CLIENT'S RIGHTS IN COOPERATIVE BUSINESS ARRANGEMENTS

Your lawyer is providing you with this document to explain how your rights may be affected by the referral of your particular matter by your lawyer to a nonlegal service provider, or by the referral of your particular matter by your lawyer to a nonlegal service provider, or by the referral of your particular matter by a nonlegal service provider to your lawyer.

To help avoid any misunderstanding between your and your lawyer please read this document carefully. If you have any questions about these rights, do not hesitate to ask your lawyer.

Your lawyer has entered into a contractual relationship with a nonlegal professional or professional service firm, in the form of a cooperative business arrangement which may include sharing of costs and expenses, to provide legal and nonlegal services. Such an arrangement may substantially affect your rights in a number of respects. Specifically, you are advised:

1. A lawyer's clients are guaranteed the independent professional judgment and undivided loyalty of the lawyer, uncompromised by conflicts of interest. The lawyer's business arrangement with a provider of nonlegal services may not diminish these rights.

2. Confidences and secrets imparted by a client to a lawyer are protected by the attorney/client privilege and may not be disclosed by the lawyer as part of a referral to a nonlegal service provider without the separate written consent of the client.

3. The protections afforded to a client by the attorney/client privilege may not carry over to dealings between the client and a nonlegal service provider. Information that would be protected as a confidence or secret, if imparted by the client to a lawyer, may not be so protected when disclosed by the client to a nonlegal service provider. Under some circumstances, the nonlegal service provider may be required by statute or a code of ethics to make disclosure to a government agency.

4. Even where a lawyer refers a client to a nonlegal service provider for assistance in financial matters, the lawyer's obligation to preserve and safeguard client funds in his or her possession continues.

You have the right to consult with an independent lawyer or other third party before signing this agreement.

Client's Consent:

I have read the above statement of Client's Rights in Cooperative Business Arrangements and I consent to the referral of my particular matter in accordance with that Statement.

_____Client's signature

_____

Date

Sample Upjohn Warning

We represent the company only, and do not represent anyone but the company. Our conversations are privileged, but the privilege belongs to the company and the company decides whether to waive the priviledge. If there is a conflict, the attorney-client privilege belongs to the company. You are free, however, to consult with your own lawyer at any time.[1]

Sample Form

Request for Certificate of Good Standing[2]

Please be advised that requests for additional Certificates of Good Standing should be directed to the following address:

Regular Mail:

Admissions Office
State of New York
Supreme Court, Appellate Division
_____Judicial Department
_____ (*address*)
_____, NY _____
Federal Express/UPS:
Admissions Office
State of New York
Supreme Court, Appellate Division
_____Judicial Department
_____Building
Room _____, ____ Floor
_____, New York _____

Please include a letter request on law office stationery, a check payable to the "State of New York" for $5.00 per certificate, and a self-addressed stamped envelope.

The written request should be prepared on the attorney's stationery and bear the attorney's original signature. Acceptable methods of payment are:

- A bank draft drawn on a U.S. bank payable in U.S. dollars
- A personal check drawn on a U.S. bank payable in U.S. dollars

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1 Apapted from the Upjohn warning discussed in Ivonee Mena King & Nicholas A. Fromherz, *Getting the Upjohn Warning Right in Internal Investigations*, The Practical Litigator, v17, no. 2 (March 2006).

2 Adapted from the Third Judicial Department's form.

- A travelers' check payable in U.S. dollars
- An international money order payable in U.S. dollars

Please note that these certificates are **not** the "Certificates Under Seal" or the "Certificates of Existence" (sometimes referred to as "Certificates of Good Standing") which pertain to corporations and are issued by the New York Secretary of State. For information regarding such corporate certificates, please visit the website of the NYS Department of State at http://www.dos.state.ny.us/corp/corpwww.html

Sample Form

Application to Resign from the New York State Bar[3]

_____, Clerk of the Court

State of New York Supreme Court, Appellate Division
Third Judicial Department
Admissions Office
P.O. Box 7350, Capitol Station
Albany, NY 12224-0350

(518) 471-4778
fax (518) 471-4749
http://www.nycourts.gov/ad3/Admissions/
_____,Principal Attorney

Application to Resign from the New York State Bar

Please be advised that, in order to process an application to voluntarily resign from the New York State Bar for non-disciplinary reasons, it will be necessary for you to provide the following information in affidavit form:

1. Whether you have ever been known by any other name or names;

2. The jurisdictions in which you are admitted to practice and the dates of your admission in those jurisdictions;

3. Whether, to your knowledge, you are presently the subject of any disciplinary proceeding or whether there is now pending against you any proceeding or investigation concerning any accusation of professional misconduct; if the answer to this question is "yes" please provide details;

4. Whether you presently have clients in the State of New York;

3 Adapted from the Third Judicial Department Form.

5. A statement of the reasons for your application to resign from the Bar of the State of New York;

6. Your statement that you are aware, if you later seek to again be admitted to the New York State Bar, that you may be required at that time to demonstrate that you possess the qualifications and character and fitness for admission; and that you may be required to pay any attorney registration fee arrears owed at the time of your voluntary resignation; and

7. Whether you have a Secure Pass issued by the New York State Courts (if you have a Secure Pass, it must be returned to this office with your application to resign).

Upon receipt of your affidavit, your application for resignation from the Bar will be submitted to the Court and you will be advised in due course.

Please be further advised that if the Court grants your application and you later seek to be again admitted to the New York State Bar by this Court, you may be required at that time to demonstrate that you possess the qualifications and character and fitness for admission. In addition, payment of attorney registration fee arrears owed at the time of your voluntary resignation may be required. You may also have to take the attorney's oath of office again. To demonstrate the required qualifications, and depending on your individual situation, you may need to (1) show passage of the New York State Bar exam within three years preceding your readmission application; or (2) submit proof that you qualify for admission on motion (i.e., admission in a reciprocal jurisdiction and practice for five of the seven years preceding your readmission application in one or more jurisdictions in which you have been admitted to practice); or (3) obtain an order from the Court of Appeals stating that you are qualified for readmission. To demonstrate character and fitness, you may, at a minimum, have to submit an update of your application questionnaire and be interviewed here in Albany by a member of this Court's Committee on Character and Fitness.

If we can be of any further assistance, please do not hesitate to contact us. Thank you.

Sample Form

Order to Show Cause to Withdraw as Counsel[4]

[1. *The Order to Show Cause must contain the following decretal clause*:]

"ORDERED, that Plaintiff/Defendant (name)_____ must appear in court, in person on the date and at the place above indicated."

[2. *Please incorporate the following text into the body of the Order to Show Cause*.]

NOTICE TO THE PLAINTIFF_____:

4 Adapted from Supreme Court, Bronx County, form.

YOUR ATTORNEY DOES NOT WANT TO REPRESENT YOU, OR IS PRECLUDED FROM REPRESENTING YOU.

THE COURT WANTS TO PROTECT YOUR RIGHTS, AND TO GIVE YOU AN OPPORTUNITY TO RESPOND TO THE STATEMENT MADE BY YOUR ATTORNEY IN HIS/HER AFFIDAVIT WHICH IS ATTACHED TO THE ORDER TO SHOW CAUSE.

IN ORDER TO FULLY PROTECT YOUR RIGHTS YOU MUST APPEAR IN COURT ON _____. AT THAT TIME YOU MAY OBJECT OR CONSENT TO THE APPLICATION, AND YOU MAY PROVIDE ANY AND ALL INFORMATION WHICH YOU BELIEVE IS IMPORTANT REGARDING THIS APPLICATION.

IF YOUR ATTORNEY IS PERMITTED AND/OR OBLIGATED TO WITHDRAW FROM YOUR CASE, YOU WILL BE REQUIRED TO FIND A NEW ATTORNEY OR REPRESENT YOURSELF.

YOU MUST COMMUNICATE WITH THE COURT IN ORDER TO PROTECT YOUR RIGHTS. IF YOU CAN NOT APPEAR ON THE ABOVE DATE, YOU MAY WRITE TO THE COURT AND ADVISE THE COURT AS TO YOUR WISHES REGARDING THIS CASE, BEING CERTAIN THAT ANY MAIL ADDRESSED TO THE COURT IS RECEIVED ON OR BEFORE THE ABOVE DATE. IN THAT LETTER, PLEASE PROVIDE YOUR TELEPHONE CONTACT INFORMATION IN CASE IT IS NECESSARY FOR THE COURT TO CALL YOU. IF YOU DECIDE TO WRITE TO THE COURT, YOU SHOULD ADDRESS

YOUR LETTER AS FOLLOWS:

Hon. Larry S. Schachner
Supreme Court of the State of New York
851 Grand Concourse
Bronx, New York 10451

Sufficient cause appearing therefore, let service of a copy of the within Order, and all the papers upon which it is based, upon the plaintiff and upon defense counsel by regular and certified mail, return receipt requested, on or before the _____ day of, 2007, be deemed properly and timely served.

ENTER:

_____

Larry S. Schachner, **JSC**

Sample Form

STATEMENT OF CLIENT'S RIGHTS AND RESPONSIBILITIES[5]

1. You are entitled to be treated with courtesy and consideration at all times by your lawyer and the other lawyers and personnel in your lawyer's office.
2. You are entitled to an attorney capable of handling your legal matter competently and diligently, in accordance with the highest standards of the profession. If you are not satisfied with how your matter is being handled, you have the right to withdraw from the attorney-client relationship at any time (court approval may be required in some matters and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge).
3. You are entitled to your lawyer's independent professional judgment and undivided loyalty uncompromised by conflicts of interest.
4. You are entitled to be charged a reasonable fee and to have your lawyer explain at the outset how the fee will be computed and the manner and frequency of billing. You are entitled to request and receive a written itemized bill from your attorney at reasonable intervals. You may refuse to enter into any fee arrangement that you find unsatisfactory. In the event of a fee dispute, you may have the right to seek arbitration; your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.
5. You are entitled to have your questions and concerns addressed in a prompt manner and to have your telephone calls returned promptly.
6. You are entitled to be kept informed as to the status of your matter and to request and receive copies of papers. You are entitled to sufficient information to allow you to participate meaningfully in the development of your matter.
7. You are entitled to have your legitimate objectives respected by your attorney, including whether or not to settle your matter (court approval of a settlement is required in some matters).
8. You have the right to privacy in your dealings with your lawyer and to have your secrets and confidences preserved to the extent permitted by law.
9. You are entitled to have your attorney conduct himself or herself ethically in accordance with the Code of Professional Responsibility.
10. You may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, age, national origin or disability.

5 Available on the NY Courts website at http://www.nycourts.gov/litigants/clientsrights.shtml

Sample Form

Statement of Client's Responsibilities[6]

Reciprocal trust, courtesy and respect are the hallmarks of the attorney-client relationship. Within that relationship, the client looks to the attorney for expertise, education, sound judgment, protection, advocacy and representation. These expectations can be achieved only if the client fulfills the following responsibilities:

1. The client is expected to treat the lawyer and the lawyer's staff with courtesy and consideration.
2. The client's relationship with the lawyer must be one of complete candor and the lawyer must be apprised of all facts or circumstances of the matter being handled by the lawyer even if the client believes that those facts may be detrimental to the client's cause or unflattering to the client.
3. The client must honor the fee arrangement as agreed to with the lawyer, in accordance with law.
4. All bills for services rendered which are tendered to the client pursuant to the agreed upon fee arrangement should be paid promptly.
5. The client may withdraw from the attorney-client relationship, subject to financial commitments under the agreed to fee arrangement, and, in certain circumstances, subject to court approval.
6. Although the client should expect that his or her correspondence, telephone calls and other communications will be answered within a reasonable time frame, the client should recognize that the lawyer has other clients equally demanding of the lawyer's time and attention.
7. The client should maintain contact with the lawyer, promptly notify the lawyer of any change in telephone number or address and respond promptly to a request by the lawyer for information and cooperation.
8. The client must realize that the lawyer need respect only legitimate objectives of the client and that the lawyer will not advocate or propose positions which are unprofessional or contrary to law or the Lawyer's Code of Professional Responsibility.
9. The lawyer may be unable to accept a case if the lawyer has previous professional commitments which will result in inadequate time being available for the proper representation of a new client.
10. A lawyer is under no obligation to accept a client if the lawyer determines that the cause of the client is without merit, a conflict of interest would exist or that a suitable working relationship with the client is not likely.

6 Adopted by the NYS Bar Association and available on the NY Courts website at http://www.nycourts.gov/litigants/clientsresponsibilities.shtml

Sample Forms

Written Letters of Engagement[7]

Joint Order Of The Appellate Divisions

The Appellate Divisions of the Supreme Court, pursuant to the authority invested in them, do hereby add, effective March 4, 2002, Part 1215 to Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York, entitled "Written Letter of Engagement," as follows:

Part 1215 Written Letter of Engagement

§1215.1 Requirements

a. Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term "client" shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.
b. The letter of engagement shall address the following matters:
   1. Explanation of the scope of the legal services to be provided;
   2. Explanation of attorney's fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.
c. Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b).

§1215.2 Exceptions

This section shall not apply to:
1. representation of a client where the fee to be charged is expected to be less than $3000,

7 Available on the NY Courts website at http://www.nycourts.gov/litigants/lettersofengagementrules.shtml

2. representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client, or
3. representation in domestic relations matters subject to Part 1400 of the Joint Rules of the Appellate Division (22 NYCRR), or
4. representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

As amended April 3, 2002

Sample Form

Sample Fee Agreement

Dear _____ (*insert client name*):

Thank you for giving me the opportunity to be of service to you. This letter will set forth the terms of retaining my services as your counsel in the matter of your claim against _____.

In consideration of the services to be rendered on your behalf, you agree to pay a sum equal to _____% of any amount(s) recovered, whether by suit, settlement or otherwise. Said percentage will be computed on the net sum recovered after deducting any disbursements and/or expenditures incurred in obtaining the award. Please be advised that no settlement will be effective without your approval of the settlement terms and your written consent to accepting the settlement offer.

You also agree to pay certain sums for the costs and expenses incurred during the course of the case and prior to its final resolution. You will receive a monthly accounting of the expenditures, if any, up to a total of $_____. Any payments made prior to the conclusion of the case shall not be deducted from your final award or settlement.

Such charges billed may include telephone, travel, postage, photocopying, messenger service, fax, court and/or filing fees and other expenditures incurred during legal representation. The listing of these expenditures does not necessarily mean that they will apply to your matter. You will be consulted prior to any disbursements exceeding the amount of $ ____.

In the event that you decide to withdraw my services, you agree to pay, following any award to you, for those disbursements or expenditures made by me on your behalf.

Upon receipt of a settlement award during my representation, you will receive a final billing for services and expenditures not previously billed. If you require additional information or clarification of the bill, I will be happy to assist you.

If a dispute arises between us relating to our fees, you may have the right to arbitration of the dispute pursuant to Part 137 of the Rules of the Chief Administrator of the Courts, a copy of which will be provided to you upon request.

If you are in agreement with the terms and conditions set forth hereinabove, please sign, date and return a copy to my office. You may keep the additional copy for your records.

Very truly yours,
(*Attorney name*)

Accepted and Agreed to by:

_____ Date: _____

(*Client name*)

Sample Form

Sample Retainer Agreement

Dear _____ (*client name*):

Thank you for giving me the opportunity to be of service to you. This letter will set forth the terms of retaining my services as your counsel in the matter of your pending litigation against _____.

My fees will be billed at the rate of $____ per hour. There may be additional charges such as telephone, travel, postage, photocopying, messenger service, fax, court/filing fees and other expenditures which may arise during legal representation. The listing of these expenditures does not necessarily mean that they will apply to your matter. You will be consulted prior to any disbursement exceeding the amount of $____.

Your retainer deposit of $ ____ is acknowledged and will be applied towards the initial hourly services and disbursements. A supplemental deposit may be required when the deposit is depleted or with each new matter. At the close of my representation and final billing, any sums remaining in your account will be returned promptly.

I will maintain accurate records of time and services and forward bills on a monthly basis which will outline the services rendered and all disbursements during that period. Payment is required upon receipt of the bill. If you need additional information or clarification of your bill, I shall be happy to assist you.

In the event that you decide to withdraw my services before I have billed hourly services that would have exhausted the retainer fee, I will not retain the entire amount of the retainer fee and will only retain that portion representing the hours that I have spent working on your case. The remainder of the retainer fee will be returned to you promptly upon my withdrawal from your case.

If a dispute arises between us relating to our fees, you may have the right to arbitration of the dispute pursuant to Part 137 of the Rules of the Chief Administrator of the Courts, a copy of which will be provided to you upon request.

If you are in agreement with the terms and conditions set forth hereinabove, please sign, date and return a copy to my office. You may keep the additional copy for your records.

Very truly yours,
(*Attorney name*)

Accepted and Agreed to by:

_____ Date: _____

(*Client name*)

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BAR ASSOCIATIONS IN NEW YORK STATE[1]

STATEWIDE ASSOCIATIONS

New York State Bar Association

New York State Academy of Trial Lawyers

1 For futher information about the bar associations, see the NY courts website at http://www.courts.state.ny.us/attorneys/nybarassociations.shtml

New York State Association of Criminal Defense Lawyers

New York State Defenders Association

New York State Trial Lawyers Association

Women's Bar Association of New York

LOCAL ASSOCIATIONS

Association of the Bar of the City of New York

Albany County Bar Association

Brooklyn Bar Association

Bronx Bar Association

Cortland County Bar Association

Dominican Bar Association

Bar Association of Erie County

Latino Lawyers Association of Queens County

Lesbian, Gay, Bisexual & Transgender Law Association of Greater N.Y.

Monroe County Bar Association

Criminal Courts Bar Association of Nassau County

Nassau County Bar Association

New York County Lawyers Association

Onondaga County Bar Association

Ontario County Bar Association

Oswego County Bar Association

The Puerto Rican Bar Association

Queens County Bar Association

Richmond County Bar Association

Suffolk County Bar Association

Recent NYCLA Ethics Opinions

NYCLA COMMITTEE ON PROFESSIONAL ETHICS
FORMAL OPINION
No. 741
Date Issued: March 1, 2010

TOPIC: Lawyer learns after the fact that a client has lied about a material issue in a civil deposition.

DIGEST:

A lawyer who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case must take reasonable remedial measures, starting by counseling the client to correct the testimony. If remonstration with the client is ineffective then the lawyer must take additional remedial measures, including, if necessary, disclosure to the tribunal. If the lawyer discloses the client's false statement to the tribunal, the lawyer must seek to minimize the disclosure of confidential information. This opinion supersedes NYCLA Ethics Opinion 712.

RULES:

RPC 3.3, 1.6

QUESTION:

What are a lawyer's duties and obligations when the lawyer learns after the fact that the client has lied about a material issue in a civil deposition?

OPINION:

This opinion provides guidance under the newly-promulgated New York Rules of Professional Conduct, 22 NYCRR 1200 et seq. (April 1, 2009) (RPC), for a lawyer

who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case. As explained in detail below, this opinion presupposes that the lawyer has actual knowledge of the falsity of the testimony. Actual knowledge, however, may be inferred circumstantially.

Lawyers are ethically obliged to represent their clients competently and diligently and to preserve their confidential information. At the same time, lawyers, as officers of the court, are ethically and professionally obliged not to assist their clients in perpetrating frauds on tribunals or testifying falsely. Balancing the duties of competent representation, client confidentiality and candor to the tribunal requires careful and thoughtful analysis.

Rules of Professional Conduct

Effective April 1, 2009, the New York Rules of Professional Conduct, in RPC 3.3 (a)(3), forbid a lawyer from offering or using known false evidence, and requires a lawyer to take reasonable remedial measures upon learning of past client false testimony:

> If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Two other provisions of RPC 3.3 are also relevant here. RPC 3.3 (b) provides that a lawyer who "represents a client before a tribunal and knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." In addition, a lawyer is duty-bound to "correct a false statement of material fact previously made to the tribunal by the lawyer." RPC 3.3 (a) (1).

RPC 3.3 (c) requires a lawyer to remedy client false testimony "even if compliance requires disclosure of information otherwise protected by Rule. 1.6." The lawyer's duty of confidentiality is contained in RPC 1.6, and states that a lawyer shall not knowingly reveal confidential information, including information protected by the attorney-client privilege, except, in six enumerated circumstances. One of those circumstances is "when permitted or required under these Rules or to comply with other law or court order." (RPC 1.6(b)(6).) Under the explicit language of RPC 3.3 (c), the lawyer's duty to remedy an admitted fraud on the court, known client false testimony or to correct prior false statements offered by the lawyer supersedes the lawyer's duty to maintain a client's confidential information under RPC 1.6.[1]

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1 The Committee notes that Section 4503 of the New York Civil Practice Law and Rules ("C.P.L.R.") provides that unless the client waives the privilege, an attorney…shall not disclose or be allowed to disclose such communication. RPC 3.3 thus seemingly contradicts the C.P.L.R. The apparent contradiction between Section 4503 of the C.P.L.R. and the RPC 3.3 has not been addressed by any court thus far. Resolution of the contradiction is a matter of law, and Committee opinions do not address matters of law.

NYCLA Ethics Opinion 712 Is Superseded Because it Was Based Upon the Old Code

The lawyer's duty to remedy false statements by disclosure of confidential information if necessary represents a change in the ethics rules, and requires us to revisit and withdraw our prior opinion on client false testimony in depositions.

In a prior opinion on this issue, we stated that a lawyer who learns of a client's past false testimony at a deposition must maintain the confidentiality of that information but cannot use it in settlement or trial of the case. The former Code's protection of client confidences formed the basis for NYCLA Ethics Opinion 712, www.NYCLA.org, 1996 WL 592653 (1996), which addressed the issue of admitted past client false testimony in a civil deposition. That opinion analyzed the conflict between the lawyer's duty to preserve client confidences under former DR 4-101, and the lawyer's competing duty to avoid using perjured testimony or false evidence under former DR 7-102. We concluded, in Ethics Opinion 712, that the lawyer may not use the admitted false testimony, but also may not reveal it: "The information that the testimony was false may not be disclosed by the lawyer." The lawyer could ethically argue or settle the case, provided that the lawyer refrained from using the false testimony.

NYCLA Ethics Opinion 712 was based upon the prior Code of Professional Responsibility, which was superseded by the Rules of Professional Conduct on April 1, 2009. In light of the adoption of RPC 3.3 on April 1, 2009, N.Y. County 712 is no longer valid, and is accordingly does not provide guidance for conduct occurring after April 2009.[2]

Is a Deposition Tantamount to Testimony Before A Tribunal?

An important question under the new rules is whether deposition testimony is considered to be different from trial testimony.

The text of the rules does not explicitly refer to depositions and other pretrial proceedings in civil cases. RPC 3.3 (a) (3) applies when a witness, the client or the lawyer "has offered material evidence" that the lawyer learns to be false, and RPC 3.3 (b) applies to "criminal or fraudulent conduct related to the proceeding." RPC 1.0 (w) defines "Tribunal" as "a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter." RPC 1.0 (w).

The literal language of the RPC 3.3 (a) (3) applies when a lawyer "has offered material evidence," which the lawyer later comes to learn was false. While the phrase is not defined in the rules, the taking of a deposition is no different from calling a witness at a trial. Under certain circumstances, deposition testimony, which is offered under oath and penalty of perjury, is admissible evidence at trial.

2 New York State Bar Association has opined (Opinion 831) that if client fraud occurred before the effective date of the New York Rules of Professional Conduct, April 1, 2009, and the fraud is protected as a client confidence or secret (DR 4-101(A)), then an attorney may not reveal the fraud.

While not formally adopted as part of the Rules, the comments to the New York Rules of Professional Conduct explicitly contemplate the applicability of Rule 3.3 to depositions:

> This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. … It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.
>
> Rules of Professional Conduct 3.3 comment [1].

We conclude that testimony at a deposition is governed by RPC 3.3, and is subject to the disclosure provisions of RPC 3.3 (c). False testimony at a deposition may be perjury, punishable as a crime. The victim of the perjury is the adversary party, which may rely on the false testimony, and the justice system as a whole even if the deposition is not submitted to a court, or not submitted to the court for months or even years after the testimony is reduced to transcript form.

Remediation of False Testimony at a Deposition

A lawyer's duty under RPC 3.3 comes into effect immediately upon learning of the prior testimony's falsity, and requires a lawyer to remedy the false testimony. As a first step, a lawyer should certainly remonstrate with the client in an effort to correct known false testimony.

Remonstrating with a client who has offered false testimony can be accomplished in various ways. The attorney should explore whether the client may be mistaken or intentionally offering false testimony. If the client might be mistaken, the attorney should refresh the client's recollection, or demonstrate to the client that his testimony is not correct. If the client is acting intentionally, stronger remonstration may be required, including a reference to the attorney's duty under the Rules to disclose false testimony or fraudulent testimony to the Court.

Also, the process of remonstration may take time. For example, in the case of a corporate client, the lawyer may report the known prior false testimony up the ladder to the general counsel, chief legal officer, board of directors, or chief executive officer. See RPC 1.13 (organization as client).

Only if remonstration efforts fail should the lawyer take further steps. While there is no set time within which to remedy false testimony, it should be remedied before it is relied upon to another's detriment.

When faced with the necessity to remedy false deposition testimony, a lawyer no longer has the option to simply withdraw from representation while maintaining the client confidential information.[3] Prior to the adoption of the New York Rules of Professional conduct in April 2009, when remonstration failed, the attorney was presented with a dilemma. The attorney could not reveal a client confidence, and yet

3 Pursuant to RPC 1.6, confidential information includes the definition of confidences and secrets contained in former DR 4-101(A).

could not stand by and allow false testimony to be relied on by others. Withdrawal was the only option. The Committee now concludes that withdrawal from representation is not a sufficient method of handling false testimony by a client where prior remonstration has failed to correct the false deposition testimony. Withdrawal, without more, does not correct the false statement, and indeed increases the likelihood that the false statement, if unknown by a substituting attorney, will be presented to a tribunal or relied upon by the adverse party. Unless in withdrawing, the lawyer also communicates the problem sufficiently to enable the false testimony to be corrected, withdrawal from representation is no remedy.

Accordingly, a lawyer is required to remedy the false testimony. Depending on the circumstances a lawyer may be able to correct the false testimony or withdraw the false statement. RPC 3.4 directs a lawyer to abstain from preserving known false testimony. A lawyer may not "participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false." RPC 3.4 (a) (5). Once the lawyer is aware of material false deposition testimony, the lawyer may not sit by idly while the false evidence is preserved, perpetuated or used by other persons involved in the litigation process. Thus, if a settlement is based even in part upon reliance on false deposition testimony, the lawyer may not ethically proceed with a settlement. The falsity must be corrected or revealed prior to settlement.

Ultimately the false testimony cannot be perpetuated. If remonstration is not effective, the attorney must disclose the false testimony. However, disclosure of client confidential information should be limited to the extent necessary to correct the false testimony.

Knowledge of Falsity Under RPC 3.3 and 1.0

New York lawyers should note that the duty to correct client false testimony by revealing client confidential information comes into play only when the lawyer "comes to know of its falsity. . ." RPC 3.3 (a) (3). The lawyer may refuse to introduce, in a civil case, evidence "that the lawyer reasonably believes is false." RPC 3.3 (a) (3), (emphasis added). Thus, it is only when the lawyer knows that the prior testimony is false that the rules trigger a duty to take corrective action.

When does a lawyer "know" that a client's testimony is false? RPC 1.0 (k) defines knowledge as "actual knowledge of the fact in question," which "may be inferred from circumstances."

While there is no known precedent under the 2009 Rules, some guidance is provided by authorities decided under the prior rules. In *In re Doe*, the Second Circuit Court of Appeals articulated the standard of knowledge required to trigger reporting to the tribunal under former DR 7-102:

> [T]he drafters intended disclosure of only that information which the attorney reasonably knows to be a fact and which, when combined with other facts in his knowledge, would clearly establish the existence of a fraud on the tribunal.
>
> To interpret the rule to mean otherwise would be to require attorneys to disclose mere suspicions of fraud which are based upon incomplete information or information which may fall short of clearly establishing the existence of a fraud.

> We do not suggest, however, that by requiring that the attorney have actual knowledge of a fraud before he is bound to disclose it, he must wait until he has proof beyond a moral certainty that fraud has been committed. Rather, we simply conclude that he must clearly know, rather than suspect, that a fraud on the court has been committed before he brings this knowledge to the court's attention.

In re Doe, 847 F.2d 57, 63 (2d Cir. 1988). While the Court's discussion of a lawyer's duty to report a fraud on the tribunal dealt with a non-client's fraud, the Court's cogent analysis of the "knowledge" standard also applies to a lawyer's duty with respect to a client's fraud on a tribunal. It is clear that only actual knowledge triggers the duty to report the fraud on the tribunal. In *In re Doe*, the Court held that a lawyer's suspicion or belief that a witness had committed perjury was not sufficient to trigger the duty to report.

While the following case does not directly address the ethics rules, it may, nevertheless, provide further guidance by way of analogy, and illustrates the notion that actual knowledge may be gleaned from the circumstances. In *Patsy's Brand Inc. v. I.O.B. Realty et al.*,2002 U.S. Dist. LEXIS 491, (vacated by *In re Pennie & Edmonds LLP*, 2003 U.S. app LEXIS 4529 (2d Cir. 2003)) the United States District Court for the Southern District of New York sanctioned defense counsel for F. R.Civ. P. Rule 11 violations. There, a law firm having substituted as counsel for defendant offered an affidavit that prior counsel had disavowed in withdrawing. The Court stated that "rather than risk offending and possibly losing a client, counsel simply closed their eyes to the overwhelming evidence that statements in the client's affidavit were not true." The Court found that by the time the law firm substituted as counsel the affidavit had been conclusively proven to be false in very material respects. Counsel was aware that their client had made prior false statements under oath. Although the law firm discussed the false statements and the affidavit with their client, and relied on the client's explanation, the Court determined that all of the facts available to the law firm "should have convinced a lawyer of even modest intelligence that there was no reasonable basis on which they could rely on (their client's) statements.[4]

While *Patsy's Brands* was decided under Rule 11, a lawyer confronting the question of what may constitute actual knowledge may find some guidance in that opinion and in *Doe*, above.

Conclusion

A lawyer who comes to know that a client has lied about a material issue in a deposition in a civil case must take reasonable remedial measures, starting by counseling the client to correct the testimony. If remonstration with the client is ineffective then the lawyer must take additional remedial measures, including, if necessary, disclosure to the tribunal. If the lawyer does disclose the client's false statement to the tribunal, the lawyer must minimize the disclosure of client confidential information.

4 The finding was reversed on appeal because the law firm had not been given an opportunity to withdraw the false affidavit before sanctions were levied.

NYCLA COMMITTEE ON PROFESSIONAL ETHICS
FORMAL OPINION
No. 742
Date Issued: April 16, 2010

TOPIC

Can a lawyer ethically remain behind the scenes of a litigation and prepare pleadings and other submissions for a *pro se* litigant without disclosing the lawyer's participation to the court and adverse counsel?

DIGEST

Given New York's adoption of Rule 1.2(c) and the allowance of limited scope representation, it is now ethically permissible for an attorney, with the informed consent of his or her client, to play a limited role and prepare pleadings and other submissions for a *pro se* litigant without disclosing the lawyer's participation to the tribunal and adverse counsel. Disclosure of the fact that a pleading or submission was prepared by counsel need only be made "where necessary." Disclosure is necessary when mandated by (1) a procedural rule, (2) a court rule, (3) a particular judge's rule, (4) a judge's order in a specific case, or in any other situation in which the failure to disclose an attorney's assistance in ghostwriting would constitute a misrepresentation or otherwise violate a law or an attorney's ethical obligations. In cases where disclosure is necessary, unless required by the particular rule, order or circumstance mandating disclosure, the attorney need not reveal his or her identity and may instead indicate on the ghostwritten document that it was "Prepared with the assistance of counsel admitted in New York."

RULES OF PROFESSIONAL CONDUCT

NY Rules of Professional Conduct 1.2, 8.4; Model Rules 1.2, 8.4, 3.3, 3.4

QUESTION

Whether it is ethical for a lawyer to remain behind the scenes of a litigation and prepare pleadings and other submissions for a *pro se* litigant without disclosing the lawyer's participation to the court or adversary?

OPINION

As the number of *pro se* litigants continues to rise, attorneys have adapted their services to accommodate the trend in the form of "unbundled" legal services. In such arrangements, the attorney agrees to a limited scope representation of the client. While the types of limited scope representation vary, this opinion focuses primarily on the

attorney assisting the *pro se* litigant by preparing pleadings and other court documents without disclosing his or her role or identity to the court or adversary.

New York's Rules of Professional Conduct (RPC) recognize that clients might benefit from limited scope representation. Rule 1.2 states that a lawyer "shall abide by a client's decisions concerning the objectives of representation" and allows the lawyer to limit the scope of representation so long as the limitation is reasonable and the client gives informed consent. New York Rules of Professional Conduct (RPC) 1.2(a),(c). See also ABA Model Rules of Professional Conduct 1.2(a), (c). Such representation is consistent with a lawyer's duty to "seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession." Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM, URB. L.J. 1145 at n. 85 (2002). By limiting the scope of their representation, public interest lawyers, *pro bono* attorneys and those servicing clients of limited means can increase the number of clients they are able to assist. See State Bar of Arizona Opinion No. 05-06 (July 2005).

We believe that limited scope legal arrangements with *pro se* litigants provide substantial benefits to individual litigants. Such arrangements can provide equal access to justice for *pro se* litigants who do not qualify for or who are without access to free legal services but who are nonetheless unable to afford prevailing legal fees. As President Jimmy Carter stated, "Ninety percent of our lawyers serve ten percent of our people. We are overlawyered and underrepresented." (*quoted in* Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 371 (2004)). Unbundled legal services provide an opportunity to fill the gap between those who qualify for free legal services and those unable to afford counsel to appear on their behalf, thereby helping to level the playing field for clients of limited means facing a counseled adversary and an increasingly complex legal system. See Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro se Assistance and Accommodation in Litigation,* Note, 54 Am. U. L. Rev. 1537, 1556. Importantly, ghostwriting allows attorneys to fulfill their professional obligation to make the system of justice available to all.[5]

Moreover, limited scope arrangements can promote an efficient judicial system in a number of ways. Judges have no duty to assist *pro se* litigants in navigating the justice system. *See* Goldschmidt at fn. 39 and cases cited therein. Even if this were not the case, it would be overly burdensome to rely on judges to guide *pro se* litigants. Allowing a limited scope legal arrangement could reduce expensive and often needless motion practice and unnecessary delay by crystallizing and clarifying relevant issues for trial, thereby assisting untrained individuals through the complex legal and procedural aspects of litigation and assisting judges in making appropriate determinations.

5 The Colorado, Delaware, Kentucky, Massachusetts, Maine, New Hampshire, Arizona and Virginia Bar Association Ethics Committees support limited scope representation. The Colorado Bar Association Ethics Committee, for example, finds that limited scope representation is consistent with its state's rules of professional conduct requiring an attorney to abide by the client's decision regarding the objectives of the representation. *See* Colorado Bar Ass'n Ethics Committee, Formal Opinion No.101 (1998). The Colorado Bar reasons that "it may be preferable for a layperson to have limited legal services rather than no services at all." *Id.*

Therefore, the only issue is whether such limited scope representation can be provided without disclosing the attorney's participation.

Recent commentary and ethics opinions reflect an emerging trend in support of ghostwriting[6] as one way of providing limited scope representation. *See* Goldschmidt at 1145; Los Angeles County Bar Ass'n Professional Responsibility and Ethics Comm. Op. 502 (1999); Los Angeles County Bar Ass'n Professional Responsibility and Ethics Comm. Op. 483 (1995); State Bar of Arizona Comm. on the Rules of Professional Conduct Op. 05-06 (2005) (submission of ghostwritten documents without informing the court or tribunal does not violate various ethical rules implicating candor toward the tribunal because the practice is not inherently misleading to the court or tribunal).

Consistent with these trends, the American Bar Association, in 2007, withdrew its previous opposition to extensive undisclosed participation of a lawyer on behalf of a *pro se* litigant and issued an opinion stating that "A lawyer may provide legal assistance to litigants appearing before tribunals '*pro se'* and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance." ABA Formal Ethics Op. No. 07-446 (May 5, 2007). Model Rules 3.3(b), 4.1(b) and 8.4(c) collectively prohibit attorneys from misrepresenting any fact material to a matter in litigation. In assessing whether ghostwriting runs afoul of these provisions, the ABA reasoned that the fact of assistance was not material to the merits of litigation, and concluded that there was no prohibition in the Model Rules against undisclosed assistance to *pro se* litigants, so long as the attorney does not do so in a way that otherwise violates rules that apply to the lawyer's conduct.

If lawyers were required to always identify the provision of limited scope representation to *pro se* litigants, there is a significant risk that the lawyer would be compelled to assume and/or continue the representation beyond the scope of the agreement. Not only would such a result undermine the purpose of Rule 1.2, it would force a client to spend more money than he or she is able to or force the lawyer to work free of charge. Either result would be problematic. Thus, permitting ghostwriting has the advantage of increasing access to justice on behalf of the unrepresented or underrepresented.

Moreover, permitting ghostwriting is consistent with practice in other areas of the law, in which lawyers draft documents for their clients' signatures, such as prospectuses, correspondence, offering plans, affidavits and legal notices, without disclosing the lawyer's authorship.

Criticisms of Ghostwriting

Despite the trend in favor of ghostwriting, there is authority in New York and other jurisdictions that has criticized ghostwriting for both ethical and procedural reasons. Some authorities that predate the adoption of the 2009 Rules of Professional Conduct, and, in some cases, predate the American Bar Association's 2007 opinion, disfavor the practice. *See, e.g. Delso v. Trustees for Plan of Merck & Co., Inc.,* 2007 U.S. Dist.

6 This opinion defines ghostwriting to be anything more than *de minimis* involvement on the part of an attorney in drafting submissions for a *pro se* litigant.

LEXIS 16643 at ∗17 (D.N.J., June 19, 2007) (ruling that ghostwriting violated the New Jersey Rules of Professional Conduct, ran afoul of the attorney's duty of candor to the court, and contravened the spirit of Fed.R.Civ.P. 11); *Anderson v. Duke Energy Corp.*, 2007 WL 4284904, at ∗1 n.1 (W.D.N.C. Dec. 4, 2007) ("The practice of 'ghostwriting' by an attorney for a party who otherwise professes to be *pro se* is disfavored and considered by many courts to be unethical."); *Duran v. Carris*, 238 F.3d 1268, 1271-72 (10th Cir. 2001) (ruling that attorneys who "author pleadings and necessarily guide the course of the litigation with an unseen hand" provide an unintended advantage to the *pro se* litigant and the failure of an attorney to acknowledge the giving of advice by signing his name constitutes a misrepresentation to the court by both the litigant and attorney); *Laremont-Lopez v. Southeastern Tidewater Opportunity Center,* 968 F.Supp. 1075, 1077-78 (E.D. Va. 1997) (holding that, while not prohibited by any specific rule, the practice of ghostwriting "unfairly exploits the ... mandate that the pleadings of *pro se* litigants be held to a less stringent standard than pleadings drafted by lawyers," as well as "effectively nullifies the certification requirements" of Fed.R.Civ.P. 11); *United States v. Eleven Vehicles*, 966 F. Supp. 361, 367 (E.D. Pa. 1997) (finding that policy considerations militate against validating a ghostwriting arrangement because (1) the arrangement "implicates the lawyer's duty of candor to the Court"; (2) the arrangement interferes with the Court's ability "to superintend the conduct of counsel and parties during the litigation"; and (3) it would be "unfair to construe a *pro se* litigant's pleadings more liberally than the pleadings of a counseled litigant when in reality the *pro se* litigant has had the benefit of counsel"); *Klein v. H.N. Whitney, Goadby & Co.*, 341 F. Supp. 699, 702 (S.D.N.Y. 1971) (litigant's statements and papers "strongly suggest that he is enjoying the assistance of a lawyer or lawyers who have not formally appeared in the case," a practice that is "grossly unfair" to court and opposing counsel and "should not be countenanced").

One area of concern focuses on the reality that *pro se* pleadings and submissions are generally construed liberally because of the lack of legal knowledge and experience possessed by the litigant. Therefore, it is argued that having an undisclosed attorney drafting pleadings behind the scenes would unfairly give *pro se* litigants broader latitude under pleading requirements. *See, e.g., Klein v. Speer Leeds*, 309 F. Supp. 341 (S.D.N.Y 1970) (stating that the court should not have to take extra steps to protect *pro se* litigant's rights where he has the assistance of an attorney). *See generally* Goldschmidt at 1150-51. *See also,* ABCNY Comm. Prof. & Jud. Ethics, Formal Op. No. 1987-2 (1987). This argument fails to take into consideration that pleadings drafted by a layperson compared to those drafted by an attorney are generally readily distinguishable. *See Klein,* 309 F. Supp. at 342 (observing about pleadings that "their legal content and phraseology most strongly suggest that they emanate from a legal mind"); *See also, American Bar Ass'n,* Formal Ethics Op. No. 07-446 (2007) (considering that effective assistance will be evident to a tribunal, and ineffective assistance will offer the *pro se* litigant no advantage). Therefore, judges will not be impelled to provide ghostwritten, competent pleadings more latitude.

Furthermore, such an argument seems to imply that judges provide greater deference to *pro se* litigants when ruling on the merits of an action. While judges may provide greater latitude to a *pro se* litigant as far as some procedural rules are concerned, a *pro*

se litigant should not enjoy the same extended latitude on the merits of his or her claim. *See Haines v. Kerner*, 404 U.S. 519 (1986) (allowing *pro se* litigant opportunity to offer proof although complaint was inadequate but stating "we intimate no view whatever on the merits of petitioner's allegations"). *Also see In re Hanehan v. Hanehan*, 8 A.D. 3d 712, 714 (3d Dep't 2004) ("The case law makes clear that '[a] litigant's decision to proceed without counsel does not confer any greater rights than those afforded to other litigants.'") (internal citations omitted). *But cf. Sloninski v. Weston*, 232 A.D.2d 913 (3d Dep't 1996) (stating that "an inexperienced litigant who chooses to represent himself or herself in court does so with a degree of risk involved. A litigant's decision to proceed without counsel does not confer any greater rights than those afforded to other litigants, nor may a *pro se* appearance serve to deprive parties in opposition of their right to a fair trial."). This is consistent with judges' duty of impartiality. Treating pleadings more leniently does not make it more likely that a *pro se* litigant will win. It simply makes it more likely that the *pro se* litigant's cause will be heard on the merits, as opposed to being dismissed at the pleading stage. Having limited scope assistance of an undisclosed attorney does not necessarily afford that litigant a substantive advantage, fair or otherwise, over his or her adversary. In fact, many adversary counsels would readily admit that having counsel involved makes proceedings easier, more efficient and fairer.

There is also concern regarding the court's inability to sanction frivolous behavior by party or counsel. On balance, however, we believe the obverse is true. Allowing ghostwriting does not relieve the attorney from any of his or her professional and ethical responsibilities. He or she must still act competently, diligently, without conflict and with due regard for duties to the court as well as to clients. The ghostwriting attorney remains obligated pursuant to ethics rules and court rules to refrain from promoting or participating in frivolous litigation. In fact, where the pleadings indicate that they were prepared by an attorney but do not disclose the identity of the ghostwriting attorney, the court can use its discretion to compel disclosure of counsel and order inquiry into the lawyer's role in frivolous filings. Moreover, with limited scope representation, there is a likelihood that fewer frivolous motions or allegations will be presented.

This Committee acknowledges that the Iowa Supreme Court Board of Professional Ethics and Conduct, the New York State Bar Association Committee on Professional Ethics and the New York City Bar Association have written that undisclosed representation impermissibly misleads the court. *See* Iowa Sup. Ct. Bd. Of Prof'l Ethics and Conduct, Formal Op. 96-31, N.Y. State Bar Ass'n Comm. On Prof'l Ethics, Op. 613 (1990), N.Y. City Bar Ass'n Comm. On Prof'l & Judicial Ethics, Formal Op. 1987-2 (1987). These associations reasoned, based on then-existing case law in New York and elsewhere, that undisclosed limited scope representation perpetuates a misrepresentation because the *pro se* litigant is not without the assistance of an attorney.[7] However, the cases on which these opinions relied (cases that predated the

7 The New York City Bar Association stated that an attorney ghostwriting a document must disclose but that he need only indicate that the document was "prepared by counsel" to avoid perpetuating a misrepresentation. *See also*, New Hampshire Bar Association, Practical Ethics Article (May 12, 1999) (opining that a cautious lawyer should have his client disclose the

change in New York's ethical rules) all involved actual misrepresentations by the attorneys in question, apart from the undisclosed representation, and, as will be discussed below, are limited to the facts of the particular cases before those committees.

While the arguments against undisclosed limited scope legal representation have some merit, we believe that ghostwriting is not an ethical violation in light of the plain language of New York's newly adopted Rule 1.2(c).

New York's RPC 1.2

New York has recently adopted a new set of attorney ethics rules, in particular Rule 1.2 (c), that appear to permit the practice of ghostwriting. The new ethics rules, which went into effect April 1, 2009, replace New York's Code of Professional Responsibility and are modeled after the ABA's Model Rules. In contrast to the former Code of Professional Responsibility, New York's new Rules of Professional Conduct expressly provide that a "lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel." NY Rules of Professional Conduct (RPC) 1.2(c) (emphasis added). Although Rule 1.2(c) does not expressly allow ghostwriting, it does so implicitly, by allowing limited scope representation and requiring notice only "where necessary." After all, the Appellate Divisions could have simply proscribed all ghostwriting, but chose not to do so.

Therefore, given that ghostwriting is a form of limited scope representation and that New York's new rules have taken a less restricted approach to limited scope representation, the subject is ripe for reevaluation.

When Is Disclosure Necessary?

RPC 1.2 requires disclosure of a limited scope representation "where necessary." It is essential to determine whether "where necessary" as used in the language of Rule 1.2(c) means that an attorney must disclose assistance through ghostwriting in *every* instance in view of case law in New York and other jurisdictions that hitherto deemed nondisclosure an inherent misrepresentation.

It makes sense that "where necessary" as used in Rule 1.2(c) does not mean that disclosure is needed in *every* circumstance but rather that "necessary" means disclosure must be made where it is essential, imperative, indispensable, required, compulsory or obligatory. Therefore, because "necessary" does not mean that disclosure is required in every circumstance, we believe that disclosure is *necessary* only in the following circumstances: where mandated by (1) a procedural rule, (2) a court rule, (3) a particular

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assistance to the court in every case, but that such disclosure need only state that "This pleading was prepared with the assistance of a New Hampshire Attorney."); Florida Ethics Op. 79-7 (Reconsideration) (Feb. 15, 2000) (concluding that to avoid a violation of the duty of candor to the court, pleadings prepared by an attorney for a *pro se* litigant must indicate "prepared with the assistance of counsel."). Rule 1.2(c) significantly changes the analysis and supersedes the ethics opinions and cases mandating disclosure in every instance. See discussion *infra*.

judge's rule, (4) a judge's order in a specific case, or in any other situation in which an attorney's ghostwriting would constitute a misrepresentation or otherwise violate a law or rule of professional conduct. Generally speaking, attorneys in New York will have to disclose their limited scope assistance in ghostwriting if a court rule, a judge-made rule or a judge's order in a specific case or a specific circumstance so requires. Even in such cases, we believe that unless otherwise required by the particular rule, order or circumstance mandating disclosure, the attorney must only indicate that the ghostwritten document was "prepared with the assistance of counsel admitted in New York."

What If There is No Rule or Order Mandating Disclosure?

Notably, there is some concern that if permitted, the limited representation of a *pro se* litigant might become so expansive that the lawyer will be *de facto* acting as litigation counsel without ever having to appear before the court or having his or her identity disclosed to the adversary. This is one circumstance where disclosure to the court and/or adversary of the attorney's involvement may very well be necessary because a failure to disclose could constitute a misrepresentation or otherwise violate a rule of professional conduct.

We believe that the limited case law, which in *dicta* stated that nondisclosure of ghostwriting was a misrepresentation, is consistent with this approach. The particular facts of these cases make evident that the attorneys whose conduct was at issue actually perpetuated an independent misrepresentation or fraud upon the court, not through their limited scope representation but, instead, through their violation and/or circumvention of other ethical rules. *See, e.g., Brandes v. Brandes*, 292 A.D.2d 129 (2nd Dept. 2002) (attorney's deliberate concealment of his representation of his ex-wife by hiring another lawyer was a sham whereby the lawyer participated in a proceeding in which he had a financial interest); *In re Potter*, 2007 WL 2363104, at *3-4 (Bankr. D.N.M. Aug. 13, 2007) (attorney not licensed in the jurisdiction used ghostwriting to circumvent local court rules); *In re Brown*, 354 B.R. 535, 541 (Bankr. N.D. Okla. 2006) (court admonishes attorney who acted as ghostwriter despite the fact that the attorney was previously forced to withdraw from the representation because of conflict of interest).

Even in the absence of overt misrepresentation, there is risk that courts might deem the undisclosed and substantial participation of an attorney on behalf of a *pro se* litigant to be a misrepresentation. While this Committee is hopeful that New York courts will recognize the benefits that will flow from the allowance of undisclosed ghostwriting, see discussion *supra*, until such a time comes, New York attorneys should err on the side of caution by ensuring that notice is given in circumstances where it is obvious that the court or opposing counsel is giving special consideration to an "unrepresented party" as a result of his or her *pro se* status. It is precisely those circumstances that have caused much of the controversy surrounding the issue of ghostwriting. Conversely, if a lawyer is asked merely to review a pleading or a letter for a *pro se* litigant, and the attorney's involvement is minimal, it appears that there is no duty to disclose under Rule 1.2(c).

While this Committee favors the allowance of ghostwriting, we are mindful that New York courts have yet to interpret Rule 1.2(c). Accordingly, it is possible that a court could determine that a *pro se* litigant has committed a fraud upon the tribunal where he or she fails to disclose to the tribunal and/or opposing counsel that he or she had the assistance of counsel in the preparation of pleadings or other submissions. Although such a holding would seemingly conflict with the plain language of Rule 1.2(c), requiring disclosure only "where necessary," the Appellate Divisions have given no clarification of what "where necessary" means. The language is not derived from either the ABA Model Rules of Professional Conduct or the former Code of Professional Responsibility. Given the lack of clarification from the Appellate Divisions, and New York's prior opinions disfavoring ghostwriting, best practices dictate that until there is such clarification, where the attorney's participation on behalf of a *pro se* litigant has been substantial and the circumstances so warrant, practitioners should give notice to the tribunal and/or to opposing counsel.

CONCLUSION

We believe that client interests are best served by allowing limited scope representation when the client requests it. Based on the newly adopted Rules of Professional Conduct in New York, we find that notice of limited representation need not be given in every circumstance. Instead, we believe that an attorney need only disclose his or her assistance in drafting pleadings or other submissions when required by a court rule, a judge's rule or order, or in any other situation in which an attorney's ghostwriting would constitute a misrepresentation or would otherwise violate a rule of professional conduct. In such circumstances, absent a more specific rule of court, a lawyer should usually be able to fulfill any disclosure obligation with the notation "Prepared with the assistance of counsel admitted in New York."

Recent NYSBA Ethics Opinions

New York State Bar Association

Committee on Professional Ethics

Opinion 830 (7/14/09)

Topic:	Solicitation; advertising; public education for lay persons
Digest:	A lawyer may ethically contact lay organizations to inform them that he or she is available as a public speaker on legal topics, but must adhere to advertising and solicitation requirements under the Rules where the communication is made expressly to encourage participants to retain the lawyer or law firm.
Rules:	1.0(a), 7.1(a), 7.3(a), (q), (r), Comment 9 to Rule 7.1

QUESTION

1. May a lawyer contact an organization of laymen and inform them of his or her availability as a public speaker on legal topics?

OPINION

2. Before *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), New York's Disciplinary Rules prohibited attorneys from engaging in any and all forms of solicitation. In N.Y. State 379 (1975), this Committee said that those pre-*Bates* Disciplinary Rules prohibited an attorney from initiating any contact to lay organizations. However, as explained in N.Y. State 508 (1979), the New York Code of Professional Responsibility was substantially revised in 1978 in light of *Bates*. As amended, DR 2-103(A) prohibited only those solicitations that were "in violation of any statute or court rule." Also before *Bates*, certain Ethical Considerations in the Code permitted lawyers to participate only in educational programs conducted or sponsored "under proper auspices" (such as bar associations). After *Bates*, the Ethical Considerations were amended and those restrictions were eliminated.

3. Accordingly, N.Y. State 508 went on to determine that a law firm may organize and promote by mail legal seminars expressly designed for non-lawyers. The Committee explained that "with advertising now permitted and the requirements of the Code relating to sponsorship now repealed, much of the rationale for the traditional prohibition on lawyers organizing and promoting legal seminars, or other programs of public education for lay persons, has been removed." The Committee noted, however, that it did not have the power to pass on whether such direct mailing constituted improper solicitation under New York Judiciary Law §479, or whether §479 was constitutional under *Bates* and its progeny.

4. Today, Rules 7.1 and 7.3 of the New York Rules of Professional Conduct, effective April 1, 2009, control attorney advertisements and solicitations. Specifically, Rule 7.1 regulates advertising by lawyers and Rule 7.3 regulates solicitation by lawyers.

5. An "advertisement" is defined under Rule 1.0(a) as:

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

6. Rule 7.3(a) defines "solicitation" as:

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

7. Rule 7.3(a) of the Code prohibits a lawyer from engaging in "solicitation" by the following means (among others):

> (1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or
>
> (2) by any form of communication if:
>
> (i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule.

8. Rule 7.1(a) prohibits any lawyer advertising that "(1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule."

9. Comment 9 to Rule 7.1 expressly recognizes that "lawyers should encourage and participate in educational and public-relations programs concerning the legal system, with particular reference to legal problems that frequently arise." Comment 9 further notes that "[a] lawyer's participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients." However, "a program might be considered to be advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm." *Id.* In that case, Rules 7.1 and 7.3 would regulate the communications. (The Comments have been adopted only by the New York State Bar Association, not by the Courts.)

10. We also note that Rule 7.1(q) expressly permits a lawyer to "accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services." Further, Rule 7.1(r) provides that "[w]ithout affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice."

11. Applying these rules, definitions and Comment 9 to this inquiry, a lawyer may contact a lay organization to participate in a program to educate the public in order to alert the organization that the lawyer is available to participate in a program as a public speaker on legal topics. However, if the communication is made expressly to encourage participants in the program to retain the lawyer or law firm, then the communication falls within the definitions of advertisements and solicitations, and such communications concerning the program must comply with Rules 7.1 and 7.3.

12. As previously noted, this Committee lacks jurisdiction to determine whether such communications are permitted under §479 of the Judiciary Law, which prohibits solicitation by attorneys, or whether §479 remains constitutional in light of *Bates* and its progeny.

CONCLUSION

13. For the reasons stated, and subject to the qualifications set forth above, a lawyer may ethically contact lay organizations to inform them that he or she is available as a public speaker on legal topics.

(8-09)

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Committee on Professional Ethics

Opinion 831 - 08/14/09

Topic:	Disclosure of fraud on the tribunal and fraudulent conduct
Digest:	Where a lawyer learns that a client, before April 1, 2009 (the effective date of the new N.Y. Rules of Professional conduct), had committed fraud on a tribunal, the lawyer's obligation to disclose the fraud is governed by DR 7-102(B)(1) of the former Code of Professional Responsibility, which generally did not permit disclosure of confidences or secrets, and not by rule 3.3 of the new Rules of Professional Conduct, which may require disclosure of confidential information necessary to remedy the fraud. Where the fraud occurred before April 1, 2009, this conclusion applies whether the lawyer learns of the fraud before or after April 1, 2009
Rules and Code:	Rules 1.0(i), 1.6, 1.7(b)(4), 1.9(a), 3.3(b); Code Definitions "fraud"; DR 4-101, 7-102(B)(1)

QUESTION

1. Where a lawyer, prior to April 1, 2009, represented a client in obtaining a conditional discharge of a misdemeanor charge, contingent on the client's not being arrested for a period of time, and then, after April 1, 2009, the lawyer learned from the client that the client had been arrested shortly before the plea, must the lawyer disclose the arrest to the prosecutor or the tribunal?

OPINION

2. The inquirer represented a defendant accused of a misdemeanor. The inquirer arranged a plea bargain under which the defendant pleaded guilty to a violation of disor-

derly conduct with a conditional discharge. Under the terms of the sentence of conditional discharge, the defendant avoided incarceration or probation as long as she was not arrested within the next six months. In the course of the plea, the client represented to the court and the prosecutor that she (the client) had "stayed out of trouble" since the misdemeanor arrest.

3. A short time later, but after April 1, 2009, the client told the inquirer that in fact she had been arrested the week before the plea in a different county. The inquirer asks whether he must inform the prosecutor or the court about the client's prior arrest.

4. New York adopted new Rules of Professional Conduct that became effective on April 1, 2009.[1] Both the new Rules and the former Code of Professional Responsibility have provisions addressing a lawyer's obligations where a client engages in fraudulent conduct before a tribunal. Both provisions require a lawyer to take remedial measures, but the rules differ on two significant points: First, and most clearly, the provisions differ on the critical question of whether a lawyer must disclose protected confidential information if required to remedy the fraud. Second, the definition of "fraudulent conduct" in the new rules differs from the interpretation we placed on the definition of "fraud" in the old rules with respect to whether fraudulent conduct includes misleading or deceptive conduct short of actual fraud under the applicable law.[2]

5. Under DR 7-102(B)(1) of the old Code, a lawyer who learned that a client had "perpetrated a fraud upon a person or tribunal" was required to "promptly call upon the client to rectify the same. If the client refuse[d] or [was] unable to do so," the lawyer was required to "reveal the fraud to the . . . tribunal, *except when the information is protected as a confidence or secret.*" (Emphasis added.)[3]

6. Rule 3.3(b) of the new Rules eliminates the exception for confidences and secrets (now called simply "confidential information"). Rule 3.3(b) provides:

> A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudu-

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1 Joint Order of the Appellate Divisions, December 30, 2008.

2 See paras. 9-10 below

3 The italicized language was added to the Code in 1976. *See* N.Y. State 454 (1976). This rule was not absolute. The exception extended only to information "protected" as a confidence or secret. We repeatedly held that information was not protected as a confidence or secret if one of the exceptions to disclosure in DR 4-101 applied. N.Y. State 797 ¶ 13 (2005); N.Y. State 781 (2004); N.Y. State 674 (1995); N.Y. State 466 (1977). In addition, the Court of Appeals stated that in certain circumstances "counsel has a duty to disclose witness perjury to the Court." *People v. Berroa*, 99 N.Y.2d 134, 142, 753 N.Y.S.2d 12, 18, 782 N.E.2d 1148, 1154 (2002) (*citing People v. DePallo*, 96 N.Y.2d 437, 729 N.Y.S.2d 649, 754 N.E.2d 751 (2001)).

lent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

7. Contrary to the Code exception for confidences and secrets, new Rule 3.3(c) expressly states that this duty applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6." (Rule 1.6 defines the protections accorded to confidential information.)[4]

8. There is also a difference in the definitions of the applicable conduct that triggers this requirement, at least as we had interpreted it. The definition of the term "fraud" in the old Code was not a definition as such, but rather a clarification. It said:

> "Fraud" does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another.

9. In the absence of a Code definition of "fraud," we interpreted the term "fraud upon a tribunal" in DR 7-102(B) to refer to the term "fraud" in the law outside of the Code (except to the extent that any such law should require a mental state other than that set forth in the above definition). We said in N.Y. State 797 (2005), "Whether the client has committed fraud on the court is a legal question beyond the jurisdiction of this Committee."[5]

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[4] It is unclear when the disclosure obligations under the new rule end. In past opinions, we appear to have assumed that the disclosure obligations in DR 7-102(B) where information was not "protected" as a confidence or secret ended when the proceeding in question concluded. N.Y. State 674 (discussing whether a lawyer must reveal perjury "discovered after the fact when the proceeding in which the perjury was committed (and later discovered) has not yet concluded"); N.Y. State 466 ("since the existence of the negotiable instrument is not relevant to any pending proceeding"). The New York State Bar Association proposal for the new rule, adopting the language of the ABA Model Rules, would have codified this interpretation in Rule 3.3. The proposal stated, "The duties stated in paragraphs (a) and (b) *continue to the conclusion of the proceeding* and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." New York State Bar Association Proposed Rules of Professional Conduct 160 (Feb. 1, 2008) (emphasis added) (available at www.nysba.org/proposedrulesofconduct020108. As noted in the text, Rule 3.3 as adopted by the courts omits the phrase "continue to the conclusion of the proceeding and." There is thus an argument that the courts in adopting the rule intended the obligation to continue past the end of the proceeding and, potentially, indefinitely – or at least for some reasonable period of time. The broadest version of this interpretation seems to us implausible. We believe the obligation extends for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding – but not forever. If disclosure could not remedy the effect of the conduct on the proceeding, but could merely result in punishment of the client, we do not believe the Rule 3.3 disclosure duty applies.

[5] *But see* N.Y. State 681 (1996) ("Regardless of the legal determination of the criminal effect of the client's actions, it appears that the client may be using the lawyer's services to perpetuate a fraud on the tribunal.").

10. The definition of "fraud" or "fraudulent" in the new rule appears to be broader. It provides:

> "Fraud" or "fraudulent conduct" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction *or has a purpose to deceive*, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.[6]

While the new phrase "denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction" codifies our interpretation of "fraud" under the Code, the inclusion of the disjunctive "or has a purpose to deceive" would appear to draw in conduct beyond conduct that constitutes "fraud" under applicable law.[7]

11. In this case, any "fraud" or "fraudulent conduct" occurred prior to April 1, 2009. In N.Y. State 829 (2009), we opined that the new rules requiring that waivers of conflicts of interest be "confirmed in writing"[8] apply only to waivers given by clients after April 1, 2009. We relied both on the language of the particular rules at issue there as well as on the general rule that, unless otherwise clearly stated, statutes are to be construed as prospective in application only.[9]

12. The application of the effective date here is less straightforward. The language of the rule does not provide much guidance. Conceivably, because the rule speaks of a lawyer who "knows" of fraudulent conduct -- in the present tense -- it could be interpreted to refer to anyone who has such knowledge on or after the effective date, regardless of when the fraudulent conduct occurred and regardless of when the lawyer learned of that conduct. We do not believe this interpretation is correct. The new rule is a dramatic break from the prior understanding of a lawyer's duties in the face of improper conduct by a client or witness.

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[6] Rule 1.0(i) (emphasis added).

[7] The use of the disjunctive here was a change from the New York State Bar Association proposal. New York State Bar Association Proposed Rules of Professional Conduct, *supra* n.3, at 4 ("'Fraud' or 'fraudulent conduct' denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction *and* has a purpose to deceive . . . .") (emphasis added).

[8] Rules 1.7(b)(4) and 1.9(a).

[9] *Id.* ¶¶ 5, 6 & n.4 (citing *Hays v. Ward*, 179 A.D.2d 427, 429, 578 N.Y.S.2d 168, 169 (1st Dep't 1992) ("Where a statute states in clear and explicit terms, as here, that it takes effect on a certain date, it is to be construed as prospective in application."); *Murphy v. Board of Education*, 104 A.D. 796, 797, 480 N.Y.S.2d 138, 139 (2d Dep't 1984), *aff'd*, 64 N.Y.2d 856, 476 N.E.2d 651, 487 N.Y.S.2d 325 (1985)).

13. The presumption that new rules do not apply retroactively has particular strength where a person may rely on the pre-existing rules. Where the rules have changed, a client -- even a client who has engaged in fraud -- should be able to rely on the advice or warnings he or she may have received, or the correct understanding he or she had, regarding the "rules of the road" that govern the lawyer-client relationship. We believe the same should apply whether the lawyer learns of the fraud before or after April 1, 2009, as long as the client's fraudulent conduct occurred prior to that date. The client has committed himself or herself when the fraud occurred.[10]

14. In this case, as noted, the fraudulent conduct in question occurred before the effective date of the new rules. We therefore apply DR 7-102(B)(2) and not Rule 3.3(b) to determine whether the lawyer has an obligation to disclose the fact that the client was arrested a week before entering a conditional discharge plea. Even if the client's false representation that he had stayed out of trouble was a "fraud on the tribunal" within the meaning of DR 7-102(B)(1) -- as seems likely -- it is clear that the information that the lawyer subsequently acquired was a confidence or secret. The lawyer would therefore have an obligation to disclose the information only if the information was not "protected" under DR 4-101.[11] Here, no exception to the duty of confidentiality applies, and therefore the information remains "protected" as a confidence or secret. While under DR 4-101(C)(3) (as under new Rule 1.6(b)(2)) a lawyer may disclose information necessary to prevent a future crime, the inquirer here learned of the client's misrepresentation after it occurred, when it was past wrongdoing, not a future crime.[12]

15. Some writers have questioned whether Rule 3.3 is inconsistent with the protections afforded criminal defendants under the Fifth and Sixth Amendments of the United States Constitution.[13] There is also some question whether the new requirement of Rule 3.3, a court-adopted rule, can override the statutory protection to the attorney-client privi-

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[10] Of course, once the lawyer learns of the fraud, he or she cannot use the fraudulent testimony in argument or otherwise. That was true under DR 7-102 as it is under Rule 3.3.

[11] *See* note 2 *supra*.

[12] The answer might be different if the lawyer himself had made a "written or oral opinion or representation . . . believed by the lawyer still to be relied upon by a third person [and that] was based on materially inaccurate information or is being used to further a crime or fraud." In that circumstance, the confidence might not be protected to the extent disclosure is implicit in the lawyer's withdrawing the prior representation. DR 4-101(C)(5).

[13] *See, e.g.*, Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. L. ETHICS 133, 157-163 (2008); John Wesley Hall, Jr., PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE 3d §§ 26:6, 26:21 n.8 (database updated July 2008); Joel Androphy, WHITE COLLAR CRIME § 20:12 (2d ed.) (database updated June 2008); 1 CRIMINAL PRACTICE MANUAL §§ 8:12, 8:23 (database updated March 2009); Formal Op. 92-2, Ethics Advisory Committee of National Association of Criminal Defense Lawyers.

lege afforded by CPLR § 4503(a).[14] In view of the result we reach, we express no opinion on these questions.

CONCLUSION

16. Where a lawyer learns that, prior to April 1, 2009, a client had committed fraud on a tribunal, the lawyer's obligation to disclose the fraud is governed by DR 7-102(B)(1) of the former Code of Professional Responsibility, and not by Rule 3.3 of the new Rules of Professional Conduct. Unlike Rule 3.3, DR 7-102(B)(1) did not permit disclosure of information protected as a confidence or secret in these circumstances.

(16-09)

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[14] "Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing . . . ."

Committee on Professional Ethics

Opinion 832 (12/3/09)

Topic: Attorney's provision of nonlegal services

Digest: Where a lawyer sells shelf corporations (a nonlegal service) to people he regards as non-clients, and provides no legal services in connection with those nonlegal services, but the lawyer's status as a lawyer is visible to the public, then absent a disclaimer or other steps, the recipients of the nonlegal services could reasonably believe there is an attorney-client relationship and thus the Rules of Professional Conduct would apply.

Rules: 5.7

Comments: Comments 1 & 3 to Rule 5.7

QUESTION

1. A sole practitioner would like to provide what the lawyer describes as a "nonlegal service" to non-clients. The "nonlegal service" is the sale of "shelf corporations." (The term "shelf corporation" means a company that has had no recent activity or that was created to be "put on the shelf" to age. Shelf corporations are often sold to investors who want to start a company but do not want to go through the incorporation process.) Do the New York Rules of Professional Conduct (the "Rules") relating to advertising and solicitation apply to the sale of shelf corporations to non-clients?

OPINION

2. Rule 5.7 contains rules relating to nonlegal services provided by lawyers. (The Appellate Divisions adopted new Rules of Professional Conduct effective April 1, 2009.) The first two subparagraphs – Rule 5.7(a)(1) and (a)(2) -- apply if an attorney is providing both legal and nonlegal services to clients. Under Rule 5.7(a)(1) if the nonlegal services are "not distinct" from the legal services provided by the lawyer to the client, then the Rules apply to both the legal and the nonlegal services. Under Rule 5.7(a)(2), if the nonlegal services and the legal services provided by the lawyer to the client are "distinct" from each other, then the Rules apply to both the legal and nonlegal services only "if the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship."

3. Rule 5.7(a)(4) addresses whether a person receiving nonlegal services "could reasonably believe that those services are the subject of an attorney-client relationship." Specifically, the rule states that even where the legal and nonlegal services provided to the client are distinct from each other, it is "presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship *unless* the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services ...." (Emphasis added.) However, the specified writing only serves to reverse the presumption, not to prove conclusively that the services are not legal services. As we noted in N.Y. State 755 (2002):

> We are not suggesting by this opinion that the mere statement, even in writing, to that effect is an automatic safe harbor, and DR 1-106 does not say so. The writing serves to reverse the presumption against the lawyer that would otherwise exist. It is possible that in certain circumstances, such as where the client is unsophisticated and has had a long relationship with the lawyer and where, despite the existence of a separate entity, the nonlegal services are not completely separated from the rendition of legal services, the writing would be insufficient to disabuse the client of a reasonable belief that the lawyer would be acting to protect the client.

Id. at 5; *see also* Rule 5.7, cmt. 3.

4. The lawyer's intention to sell shelf corporations only to people he regards as non-clients (and not to clients) appears to assume that he would not provide legal advice to the non-client purchasers of the corporations. That assumption may not be warranted. To test that assumption, we consider below three different ways in which the shelf corporations might be sold.

Scenario One: Lawyer Provides Legal Services

5. We first consider the possibility that the lawyer provides legal advice about shelf corporations to the purchasers, such as giving a prospective purchaser the attorney's views about (i) the legality of shelf corporations in general, (ii) the validity of a specific corporation, (iii) the advantages, rights, or benefits of shelf corporations, or (iv) the tax consequences of purchasing or owning a shelf corporation. The Rules do not define legal services, and many services do not fall neatly into the category of legal services because they may legally be undertaken by both lawyers and nonlawyers. However, "when such services are performed by a lawyer who holds himself out as a lawyer, they constitute the practice of law and the lawyer, in performing them, is governed by the Code." N.Y. State 557 (1984) at p. 2.

6. Thus, despite the fact that a nonlawyer might be entitled to provide some advice about a shelf corporation without committing the unauthorized practice of law, when a lawyer provides such advice it becomes the provision of legal services. Thus, if the lawyer provides legal advice about shelf corporations to purchasers, the lawyer would be providing legal services to them. In that situation, the Rules of Professional Conduct – including the rules regarding lawyer advertising and solicitation – would apply both to the legal advice and to the sale of the corporations. Moreover, because the lawyer would actually be rendering legal services, the disclaimer in Rule 5.7(a)(4) would not be effective.

Scenario Two: Lawyer Does Not Provide Legal Services

7. We next consider the possibility that the lawyer provides no legal advice whatsoever to the purchasers about the shelf corporations. For the assumption that the lawyer provides no legal advice to remain true, the lawyer could not answer the kinds of questions a prospective customer might ask that are likely to call for legal advice (*e.g.*, What are the tax consequences? How long may I leave the corporation on the shelf? Do I have to notify the state if I buy a shelf corporation? Is the corporation validly formed?). For example, if the shelf corporations were sold over the Internet, and the attorney was not identified anywhere on the web site as a lawyer, and any information about the corporations was provided only in writing (*e.g.*, via FAQs or links to articles), and purchasers never communicated with the lawyer directly and had no opportunity to ask for advice, then the lawyer would not be giving legal advice to purchasers. In that case the Rules would not generally apply to those sales.

8. Even where the lawyer would be generally exempt from the application of the Rules with respect to the sales, however, the exemption would not be absolute. Some Rules of Professional Conduct, such as Rule 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation), would still apply. Thus,

the lawyer could not engage in dishonest, fraudulent, or deceptive conduct relating to the advertising or solicitation of the nonlegal services.

Scenario Three: Lawyer's Status as a Lawyer Is Visible to the Public

9. Finally, we consider the possibility that the attorney does not provide any legal advice to the purchaser of the shelf corporation but the attorney's status as a lawyer is visible to the public (*e.g.*, the attorney uses a law office name or letterhead, or advertises the sales on the lawyer's web site, or puts "Esq." or "J.D." after the lawyer's name). In that case there is a substantial risk that the purchaser of the shelf corporations will be misled as to whether an attorney-client relationship exists. The risk is great because the client may be confused about the nature of the attorney's role. In speaking about the need for the lawyer to avoid potential confusion between legal and nonlegal services provided to an individual, Comment 1 to Rule 5.7 notes that avoiding confusion is essential

> so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that ordinarily accompany a client-lawyer relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services when that may not be the case.

10. The same concerns are relevant when the attorney sells to customers who are aware of the attorney's status as a lawyer. Even if the attorney merely identifies himself as a lawyer when selling shelf corporations but does not promise or provide legal services, the risk of confusion is great and purchasers could reasonably believe that they had an attorney-client relationship with the seller.

11. Where the attorney's status as a lawyer is visible, one way for a lawyer to avoid application of the Rules to the sale of nonlegal services would be to give the purchaser in writing the Rule 5.7(a)(4) disclaimer stating that the no legal services are being rendered and that the protection of an attorney-client relationship does not exist. We emphasize, however, that even if the lawyer provides the disclaimer specified in Rule 5.7(a)(4), it would not be effective if the lawyer actually provided legal advice or other legal services to the customer of the nonlegal business.

CONCLUSION

12. Where a lawyer provides legal services to a client, the Rules of Professional Conduct apply to the legal services. Where a lawyer provides nonlegal services

to non-clients, the Rules generally are not applicable to the provision of the nonlegal services although some Rules of Professional Conduct would still apply. Where the attorney provides no legal services in connection with the provision of nonlegal services such as those here – the sale of shelf corporations – but the attorney's status as a lawyer is visible to the public, then absent a disclaimer or other steps, the recipients of the nonlegal services could reasonably believe there is an attorney-client relationship, and thus the Rules would apply.

28-08 (12/3/09)

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 833 (12/15/09)

Topic: Clients (Prospective); Communications; Duty of Lawyer.

Digest: An attorney is not required to respond to unsolicited letters from incarcerated individuals requesting legal representation.

Rules: Rule 1.18(a); Rule 1.18(e).

QUESTION

[1] Is an attorney ethically required to respond to unsolicited letters from incarcerated individuals requesting legal representation for personal injury or other claims?

OPINION

[2] No provision of the New York Rules of Professional Conduct imposes a general obligation upon an attorney to promptly answer unsolicited mail – or to answer it at all. We found that such an obligation arose under the former New York Code of Professional Responsibility only in the context of communications from an adversary or a client. *See* N.Y. State 407 (1975) ("The consistent failure of a lawyer to respond to telephone calls and correspondence from fellow *attorneys* is in violation of the Code. A lawyer is obligated to return telephone calls and inquiries from fellow members of the Bar, as well as from *clients*.") (citing former EC 7-10, EC-7-37, EC 7-38, and EC 7-39); *see also* 22 NYCRR § 1210.1(5) (Statement of Client's Rights provides that a *client* is entitled to have "telephone calls returned promptly"); N.Y. State 396 (1975) ("The consistent failure of a lawyer to respond to calls from his *clients* is in violation of [former] Canons 6 and 9") (all emphasis added).

[3] We do not address whether an obligation to respond to communications from clients and other lawyers continues under the new Rules. We address here only unsolicited communications from incarcerated individuals who are neither adversaries nor clients. In New York, the only guideline of general application regarding an attorney's obligation to respond to unsolicited inquiries from persons other than adversaries or clients appears not in the Rules of Professional Conduct, which are mandatory, but rather in Standard IV of the New York State Standards of Civility, an aspirational goal not subject to enforcement through discipline. Standard IV says: "A lawyer should promptly return

telephone calls and answer correspondence *reasonably* requiring a response." 22 NYCRR Part 1200, app. at IV (emphasis added).

[4] Even applying that aspirational standard, however, we believe that an unsolicited letter from an incarcerated individual requesting legal representation does not, without more, reasonably require a response. We also note that a lawyer's receipt of truly unsolicited communications requesting legal representation does not create a lawyer-client relationship. *See, e.g., Knigge v. Corvese*, 2001 WL 830669, at *3-4 (S.D.N.Y. 2001) (holding that multiple voicemail messages seeking legal representation and requesting return phone calls did not result in formation of an attorney-client relationship because it was not reasonable for caller to believe that his "unilateral" decision to leave such messages could result in such a relationship).

[5] Nor, under Rule 1.18 of the New York Rules of Professional Conduct, does the sender become a "prospective client" unless the lawyer subsequently "discusses" with the sender the "possibility of forming a client-lawyer relationship." Rule 1.18(a); *see also* Rule 1.18(e)(1) ("A person who . . . communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship . . . is not a prospective client within the meaning of paragraph [1.18](a)"). Thus, Rule 1.18 confirms our view that an unsolicited letter from an incarcerated individual requesting legal representation, without more, does not reasonably require a response.

[5] This opinion does not address the circumstances, if any, in which an e-mail requesting legal representation or legal advice, although constituting the initial contact between a lawyer and the sender, may be deemed a response to a web site inviting public inquiry, in which case the communication could not be fairly characterized as "unsolicited." *Cf.* N.Y. City 2001-1 (absent a disclaimer warning that information sent by prospective clients will not be treated as confidential, information imparted to an attorney in good faith by a prospective client in an e-mail generated in response to an internet web site maintained by the law firm should be held in confidence even though the attorney has declined the representation).

CONCLUSION

[6] An attorney is not ethically required to respond to unsolicited letters from incarcerated individuals requesting legal representation.

(7-09)

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COMMITTEE ON PROFESSIONAL ETHICS

Opinion 834 (12/15/09)
Distinguishing N.Y. State 771 (2003) in light of rule changes

Topic: Use of disclaimer with client testimonials or endorsements.

Digest: Under the New York Rules of Professional Conduct, truthful client testimonials or endorsements are permitted if accompanied by the disclaimer specified in Rule 7.1(e)(3).

Rules: 7.1(a)(1), (d)(3), and (e)(3)

QUESTION

1. Must an advertisement that contains a client testimonial or endorsement also contain the disclaimer: "Prior results do not guarantee a similar outcome"?

OPINION

2. Our opinion in N.Y. State 771 (2003) concluded that as long as an advertisement containing client testimonials was not false, deceptive or misleading, it was not necessary for the advertisement to contain the disclaimer that prior results did not guarantee a similar outcome.[1] We now examine whether this conclusion is modified in the New York Rules of Professional Conduct that took effect on April 1, 2009 (the "Rules").[2]

3. Rule 7.1(d)(3) provides that an advertisement that complies with Rule 7.1(e) may contain "testimonials or endorsements of clients ... and of former clients."[3] Rule 7.1(e)(3) requires advertisements containing testimonials or

[1] N.Y. State 771 was decided in the context of website advertising, but the principles enunciated in that opinion applied to all forms of attorney advertising, as does this opinion.

[2] The rule amendments addressed in this opinion are based verbatim on language that took effect on February 1, 2007, when the Courts amended the Disciplinary Rules governing advertising and solicitation in the old Code of Professional Responsibility.

[3] A restriction on testimonials or endorsements from current clients is contained in Rule 7.1(c)(1), which provides that an advertisement shall not "include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending." Rule 7.1(c)(1) was declared unconstitutional and its enforcement was permanently enjoined in *Alexander v. Cahill*, 634 F.Supp.2d 239 (N.D.N.Y. 2007), but the defendants (disciplinary counsel in all four Departments) appealed to the Second Circuit, and the appeal

endorsements of clients to include the following disclaimer: "Prior results do not guarantee a similar outcome." Therefore, under the new Rules, an advertisement that contains a client testimonial requires the prescribed disclaimer concerning results.

4. At the time we decided N.Y. State 771, the New York Code of Professional Responsibility did not have a specific Disciplinary Rule dealing with client testimonials. However, DR 2-101(A) of the Code did prohibit advertisements that were "false, deceptive or misleading," so this Committee examined client testimonials under that standard. We opined under that standard that the nature of the testimonial determined whether a disclaimer of the kind now mandated by Rule 7.1(e)(3) was required. Like DR 2-101(A) of the old Code, new Rule 7.1(a)(1) prohibits testimonials that are false, deceptive or misleading, but now Rule 7.1(e)(3) always requires the disclaimer set out in that subparagraph.

CONCLUSION

5. We answer the question in the affirmative. Under Rule 7.1(e)(3), an advertisement that contains a client testimonial or endorsement must also contain the disclaimer: "Prior results do not guarantee a similar outcome."

(49-09)

was still pending when we issued this opinion. The outcome does not affect our analysis here because Rule 7.1(c) regulates only the types of testimonials and endorsements permitted, not whether they require a disclaimer.

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COMMITTEE ON PROFESSIONAL ETHICS

Opinion 835 (12/24/09)

TOPIC: Multijurisdictional law practice by corporate counsel

DIGEST: The question of whether an out-of-state lawyer may serve as in-house counsel for a New York corporation and maintain an office in New York is not answered by the New York Rules of Professional Conduct, but rather is a question of law beyond the Committee's jurisdiction.

RULES: Rule 5.5.

QUESTION

1. May a person who is not admitted to practice law in New York but who is admitted to practice law and is in good standing in another U.S. jurisdiction serve as general counsel for a corporation headquartered in New York and maintain an office in New York for that purpose?

OPINION

2. In New York, as elsewhere, the law generally forbids the unauthorized practice of law ("UPL"), which may include legal work performed by out-of-state lawyers as well as by non-lawyers. (The term "out-of-state lawyer" is not defined in the Rules but we use the term "out-of-state lawyer" for purposes of this opinion to mean a person who is not admitted to practice in New York but is admitted to practice and in good standing in another U.S. jurisdiction.) In New York, §§ 476-a, 478 and 484 of the Judiciary Law govern the unauthorized practice of law. Generally speaking, these provisions forbid individuals from maintaining a law practice or otherwise providing legal services in New York unless they are licensed to practice law in this state or otherwise authorized to render particular legal services in New York (for example, by admission *pro hac vice*).

3. The scope and application of these Judiciary Law provisions is a question of law that courts of New York have addressed, albeit infrequently. *See, e.g., El Gemayel v. Seaman*, 72 N.Y.2d 701, 707 (1988) (finding that "in the circumstances of this case, phone calls to New York by plaintiff, an attorney licensed in a foreign jurisdiction, to

advise his client of the progress of legal proceedings in that foreign jurisdiction, did not, without more, constitute the 'practice' of law in this State in violation of [Judiciary Law] § 478"); *Spivak v. Sachs*, 16 N.Y.2d 163 (1965) (holding that a California attorney engaged in the unlawful practice of law in New York by assisting an acquaintance in New York with her divorce, where the California attorney became substantially involved in the client's New York affairs -- spending 14 days in New York attending meetings, reviewing drafts of a separation agreement, discussing the client's financial and custody problems, recommending a change in New York counsel and, based on his knowledge of New York and California law, rendering his opinion as to the proper jurisdiction for the divorce action and related marital and custody issues).

4. Among other things, the case law suggests that out-of-state lawyers are not engaging in the "unauthorized practice of law" in New York when they perform "incidental and innocuous" legal work in New York in the course of representing clients from their home jurisdictions. *El Gemayel v. Seaman*, 72 N.Y.2d at 707; *accord Spivak v. Sachs*, 16 N.Y.2d at 168 ("recognizing the numerous multi-State transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York").

5. In New York, the question of whether an out-of-state lawyer is engaged in the unauthorized practice of law in New York is exclusively a matter of law. Unlike the professional conduct rules of most other states, the New York Rules of Professional Conduct ("N.Y. Rules") that took effect on April 1, 2009 do not include provisions modeled on ABA Model Rule 5.5(b), (c) & (d). In jurisdictions in which the courts have adopted provisions comparable to Model Rule 5.5(b)-(d), the provisions have two related effects – they both judicially "authorize" out-of-state lawyers to practice law in the jurisdiction within the limits set by Rule 5.5, and they interpret the conduct authorized by Rule 5.5 as conduct that does not violate the jurisdiction's statutory and common law regulation of UPL. The rule functions as if it were a global *pro hac vice* order admitting every out-of-state lawyer to practice in the jurisdiction within the limits described in Rule 5.5. (Of course, even in states that have adopted ABA Model Rule 5.5, an out-of-state lawyer who desires to appear in court in a state where the lawyer is not licensed to practice must still seek formal admission *pro hac vice* to that court.)

6. The New York State Bar Association has twice recommended (first in 2003, then again in 2008) that the New York courts adopt provisions similar to those in ABA Model Rule 5.5, but both times the Appellate Divisions have declined to do so. Consequently, the N.Y. Rules include no provision comparable to ABA Model Rule 5.5(d)(1), which would authorize out-of-state lawyers to work in New York as in-house corporate counsel other than in proceedings in which *pro hac vice* admission is required. Nor does New York have a court-adopted "in-house registration" rule, like that of many states, authorizing out-of-state lawyers who satisfy registration requirements to practice law in the state. See ABA Model Rule for Registration of In-House Counsel (adopted by the ABA

House of Delegates in August 2008).[1]

7. The jurisdiction of this Committee is limited to answering questions about the meaning and application of the New York Rules of Professional Conduct. We do not interpret court rules or statues. The question whether an out-of-state lawyer may serve as in-house corporate counsel with an office in New York without gaining admission to the New York Bar is entirely a matter of state law governed principally by the Judiciary Law, which is statutory. It is not governed by any provision in the N.Y. Rules of Professional Conduct. Consequently, this Committee lacks jurisdiction to answer the question.

CONCLUSION

8. The question whether an out-of-state lawyer may serve as in-house counsel for a New York corporation and maintain an office in New York for that purpose is a question of law, and is not answered by the New York Rules of Professional Conduct. The question is therefore beyond our jurisdiction and we offer no opinion on the question. Because the question is a recurring one, however, this Committee urges the Appellate Divisions and/or the New York State Legislature to provide further guidance regarding whether and to what extent out-of-state lawyers – especially in-house lawyers who provide services solely to a corporate employer – are authorized to practice law in New York.

(35-09)

[1] available at *www.abanet.org/legaled/standards/noticeandcomment/ModelRule.DOC.*

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COMMITTEE ON PROFESSIONAL ETHICS

Opinion 840 (3/26/10)
Distinguishing N.Y. State 786 (2005) in light of rule changes

TOPIC: Lawyer paying *pro bono* client's litigation expenses.

DIGEST: Under the New York Rules of Professional Conduct, a lawyer is ethically permitted to pay the litigation expenses of a *pro bono* client whether the *pro bono* client is indigent or not.

RULES: 1.8(e)(2)

CODE: DR 5-103(B)

QUESTION

1. Is a lawyer ethically permitted to pay the litigation expenses of its *pro bono* client, an organization that provides legal services to the indigent, even though the organization itself is not indigent?

OPINION

2. A lawyer represents, on a *pro bono* basis, a non-profit organization that provides legal services to indigent people. The lawyer wishes to pay the organization's expenses in the litigation, but the organization itself is not indigent. In N.Y. State 786 (2005), decided under the former New York Code of Professional Responsibility, this Committee concluded that a lawyer was ethically prohibited from paying the litigation expenses of a *pro bono* organizational client that provided legal services to the poor unless the organization itself was indigent.[1] We now examine whether the question would be answered differently

[1] N.Y. State 786 adopted a test for indigence of an organization relating to "objective financial wherewithal, and not one that is based on the worthiness of" the organization's cause or motivations.

under the New York Rules of Professional Conduct that took effect on April 1, 2009 (the "Rules").[2] We conclude that it would.

3. At the time N.Y. State 786 was issued, DR 5-103(B)(2) of the New York Code of Professional Responsibility required that a client be *both* pro bono *and* indigent in order for the lawyer to be permitted to pay the client's litigation expenses. In contrast, Rule 1.8(e)(2) of the New York Rules of Professional Conduct provides that "a lawyer representing an indigent *or* pro bono client may pay court costs and expenses of litigation on behalf of the client." (Emphasis added). Therefore, under the new Rules, as long as the lawyer is representing the client on a *pro bono* basis, the lawyer may pay the *pro bono* client's court costs and expenses of litigation whether the *pro bono* client is indigent or not.

CONCLUSION

4. A lawyer providing *pro bono* legal representation to an organization that provides legal services to the indigent is ethically permitted to pay the organization's litigation expenses whether or not the organization is indigent.

(47-09B)

[2] The rule amendments addressed in this opinion pre-date the April 1, 2009 amendments (which included adoption of the ABA Model Rules format). Specifically, the rule amendments at issue here originally took effect on February 1, 2007 in conjunction with extensive amendments to the advertising and solicitation rules in the old New York Code of Professional Responsibility.

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 841 (4/12/10)

Topic:	Lawyer sending e-mails to other lawyers seeking referrals of people injured by a particular pharmaceutical product.
Digest:	E-mails to other lawyers requesting referrals of clients are not "solicitations" regulated by Rule 7.3. However, the e-mails must comply with Rules 7.4 and 8.4(c).
Rules:	1.0(a); 1.5(g); 7.1; 7.3; 7.3(b); 7.4; 8.4(c).
Comments:	Rule 7.1, cmt. 7; Rule 7.3, cmt. 1.

QUESTION

1. May a lawyer send e-mails to other lawyers asking them to refer cases to the sending lawyer involving people injured by a particular pharmaceutical product?

FACTS

2. A lawyer who handles cases involving people injured by a particular pharmaceutical product proposes sending e-mails to other lawyers advising them that he is handling such cases and inviting the recipients of the e-mails to refer such cases to the lawyer.

OPINION

3. Rule 7.3 of the New York Rules of Professional Conduct (the "Rules") establishes restrictions on solicitation by lawyers and sets forth the filing requirements for any permitted solicitation. Rule 7.3(b) defines the term "solicitation." It states that, for purposes of Rule 7.3:

> "solicitation" means any *advertisement* initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. [Emphasis added.]

4. The communication in question here contains many elements of Rule 7.3(b) – it is "by a lawyer ... targeted at ... a group of recipients"; the "primary purpose" of the communication is "the retention of the lawyer"; and a "significant motive" for the communication is "pecuniary gain." But the communication lacks one crucial element of a solicitation: the communication is not an "advertisement" because it will be sent to other lawyers. Rule 1.0(a) (which defines "advertisement") expressly excludes communications to other lawyers from the definition of "advertisement." Specifically, Rule 1.0(a) provides:

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

5. Since the communication in question will be sent only to other lawyers, it is not an "advertisement." Therefore, it is also not a "solicitation" within the meaning of Rule 7.3(b). *See* Rule 7.3, cmt. 1 ("By definition, a communication that is not an 'advertisement' is not a solicitation.") A communication that is not a "solicitation" is not subject to the filing requirements (or any other requirements) of Rule 7.3. Moreover, since the communication is not an advertisement, it is also not subject to the provisions of Rule 7.1 ("Advertising"). Comment 7 to Rule 7.1 provides that communications to other lawyers are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm sending them.

6. Of course, the communications must nonetheless comply with Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation," and they must comply with Rule 7.4 ("Identification of Practice and Specialty"), which prohibits a lawyer or law firm from stating that the lawyer or law firm is a "specialist" or "specializes" in a particular field of law except in special circumstances.

7. Finally, if the attorney sending the communications intends to share a portion of the fee with a referring attorney, the sending attorney must comply with Rule 1.5(g), which regulates a division of legal fees with another lawyer not associated with the same law firm.

CONCLUSION

8. A lawyer may ethically send e-mails to other lawyers asking for referrals of clients who have been injured by a particular pharmaceutical product. Since a communication to other lawyers is expressly excluded from the definition of "advertisement," the communication is not an advertisement, and is therefore also not a "solicitation." Consequently, it is not subject to the provisions of either Rule 7.1 or Rule 7.3. However, it is subject to the provisions of Rule 7.4 and Rule 8.4(c).

(64-09)

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 842 (9/10/10)

Topic: Using an outside online storage provider to store client confidential information.

Digest: A lawyer may use an online data storage system to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality will be maintained in a manner consistent with the lawyer's obligations under Rule 1.6. In addition, the lawyer should stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client's information, and should monitor the changing law of privilege to ensure that storing the information online will not cause loss or waiver of any privilege.

Rules: 1.4, 1.6(a), 1.6(c)

QUESTION

1. May a lawyer use an online system to store a client's confidential information without violating the duty of confidentiality or any other duty? If so, what steps should the lawyer take to ensure that the information is sufficiently secure?

OPINION

2. Various companies offer online computer data storage systems that are maintained on an array of Internet servers located around the world. (The array of Internet servers that store the data is often called the "cloud.") A solo practitioner would like to use one of these online "cloud" computer data storage systems to store client confidential information. The lawyer's aim is to ensure that his clients' information will not be lost if something happens to the lawyer's own computers. The online data

storage system is password-protected and the data stored in the online system is encrypted.

3. A discussion of confidential information implicates Rule 1.6 of the New York Rules of Professional Conduct (the "Rules"), the general rule governing confidentiality. Rule 1.6(a) provides as follows:

> A lawyer shall not knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of a lawyer or a third person, unless:
>
> (1) the client gives informed consent, as defined in Rule 1.0(j);
>
> (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
>
> (3) the disclosure is permitted by paragraph (b).

4. The obligation to preserve client confidential information extends beyond merely prohibiting an attorney from revealing confidential information without client consent. A lawyer must also take reasonable care to affirmatively protect a client's confidential information. *See* N.Y. County 733 (2004) (an attorney "must diligently preserve the client's confidences, whether reduced to digital format, paper, or otherwise"). As a New Jersey ethics committee observed, even when a lawyer wants a closed client file to be destroyed, "[s]imply placing the files in the trash would not suffice. Appropriate steps must be taken to ensure that confidential and privileged information remains protected and not available to third parties." New Jersey Opinion (2006), *quoting* New Jersey Opinion 692 (2002).

5. In addition, Rule 1.6(c) provides that an attorney must "exercise reasonable care to prevent . . . others whose services are utilized by the lawyer from disclosing or using confidential information of a client" except to the extent disclosure is permitted by Rule 1.6(b). Accordingly, a lawyer must take reasonable affirmative steps to guard against the risk of inadvertent disclosure by others who are working under the attorney's supervision or who have been retained by the attorney to assist in providing services to the client. We note, however, that exercising "reasonable care" under Rule 1.6 does not mean that the lawyer guarantees that the information is secure from *any* unauthorized access.

6. To date, no New York ethics opinion has addressed the ethics of *storing* confidential information online. However, in N.Y. State 709 (1998) this Committee addressed the duty to preserve a client's confidential information when *transmitting* such information electronically. Opinion 709 concluded that lawyers may transmit

confidential information by e-mail, but cautioned that "lawyers must always act reasonably in choosing to use e-mail for confidential communications." The Committee also warned that the exercise of reasonable care may differ from one case to the next. Accordingly, when a lawyer is on notice that the confidential information being transmitted is "of such an extraordinarily sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyer's control, the lawyer must select a more secure means of communication than unencrypted Internet e-mail." *See also* Rule 1.6, cmt. 17 (a lawyer "must take reasonable precautions" to prevent information coming into the hands of unintended recipients when transmitting information relating to the representation, but is not required to use special security measures if the means of communicating provides a reasonable expectation of privacy).

7. Ethics advisory opinions in several other states have approved the use of electronic storage of client files provided that sufficient precautions are in place. *See, e.g.*, New Jersey Opinion 701 (2006) (lawyer may use electronic filing system whereby all documents are scanned into a digitized format and entrusted to someone outside the firm provided that the lawyer exercises "reasonable care," which includes entrusting documents to a third party with an enforceable obligation to preserve confidentiality and security, and employing available technology to guard against reasonably foreseeable attempts to infiltrate data); Arizona Opinion 05-04 (2005) (electronic storage of client files is permissible provided lawyers and law firms "take competent and reasonable steps to assure that the client's confidences are not disclosed to third parties through theft or inadvertence"); *see also* Arizona Opinion 09-04 (2009) (lawyer may provide clients with an online file storage and retrieval system that clients may access, provided lawyer takes reasonable precautions to protect security and confidentiality and lawyer periodically reviews security measures as technology advances over time to ensure that the confidentiality of client information remains reasonably protected).

8. Because the inquiring lawyer will use the online data storage system for the purpose of preserving client information - a purpose both related to the retention and necessary to providing legal services to the client - using the online system is consistent with conduct that this Committee has deemed ethically permissible. *See* N.Y. State 473 (1977) (absent client's objection, lawyer may provide confidential information to outside service agency for legitimate purposes relating to the representation provided that the lawyer exercises care in the selection of the agency and cautions the agency to keep the information confidential); *cf.* NY CPLR 4548 (privileged communication does not lose its privileged character solely because it is communicated by electronic means or because "persons necessary for the delivery or facilitation of such electronic communication may have access to" its contents).

9. We conclude that a lawyer may use an online "cloud" computer data backup system to store client files provided that the lawyer takes reasonable care to ensure that the system is secure and that client confidentiality will be maintained. "Reasonable

care" to protect a client's confidential information against unauthorized disclosure may include consideration of the following steps:

(1) Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information;

(2) Investigating the online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances;

(3) Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored; and/or

(4) Investigating the storage provider's ability to purge and wipe any copies of the data, and to move the data to a different host, if the lawyer becomes dissatisfied with the storage provider or for other reasons changes storage providers.

10. Technology and the security of stored data are changing rapidly. Even after taking some or all of these steps (or similar steps), therefore, the lawyer should periodically reconfirm that the provider's security measures remain effective in light of advances in technology. If the lawyer learns information suggesting that the security measures used by the online data storage provider are insufficient to adequately protect the confidentiality of client information, or if the lawyer learns of any breach of confidentiality by the online storage provider, then the lawyer must investigate whether there has been any breach of his or her own clients' confidential information, notify any affected clients, and discontinue use of the service unless the lawyer receives assurances that any security issues have been sufficiently remediated. *See* Rule 1.4 (mandating communication with clients); *see also* N.Y. State 820 (2008) (addressing Web-based email services).

11. Not only technology itself but also the law relating to technology and the protection of confidential communications is changing rapidly. Lawyers using online storage systems (and electronic means of communication generally) should monitor these legal developments, especially regarding instances when using technology may waive an otherwise applicable privilege. *See, e.g.*, *City of Ontario, Calif. v. Quon*, 130 S. Ct. 2619, 177 L.Ed.2d 216 (2010) (holding that City did not violate Fourth Amendment when it reviewed transcripts of messages sent and received by police officers on police department pagers); *Scott v. Beth Israel Medical Center*, 17 Misc. 3d 934, 847 N.Y.S.2d 436 (N.Y. Sup. 2007) (e-mails between hospital employee and his personal attorneys were not privileged because employer's policy regarding computer use and e-mail monitoring stated that employees had no reasonable expectation of privacy in e-mails sent over the employer's e-mail server). *But see Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 990 A.2d 650 (2010) (despite employer's e-mail policy

stating that company had right to review and disclose all information on "the company's media systems and services" and that e-mails were "not to be considered private or personal" to any employees, company violated employee's attorney-client privilege by reviewing e-mails sent to employee's personal attorney on employer's laptop through employee's personal, password-protected e-mail account).

12. This Committee's prior opinions have addressed the disclosure of confidential information in metadata and the perils of practicing law over the Internet. We have noted in those opinions that the duty to "exercise reasonable care" to prevent disclosure of confidential information "may, in some circumstances, call for the lawyer to stay abreast of technological advances and the potential risks" in transmitting information electronically. N.Y. State 782 (2004), *citing* N.Y. State 709 (1998) (when conducting trademark practice over the Internet, lawyer had duty to "stay abreast of this evolving technology to assess any changes in the likelihood of interception as well as the availability of improved technologies that may reduce such risks at reasonable cost"); *see also* N.Y. State 820 (2008) (same in context of using e-mail service provider that scans e-mails to generate computer advertising). The same duty to stay current with the technological advances applies to a lawyer's contemplated use of an online data storage system.

CONCLUSION

13. A lawyer may use an online data storage system to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality is maintained in a manner consistent with the lawyer's obligations under Rule 1.6. A lawyer using an online storage provider should take reasonable care to protect confidential information, and should exercise reasonable care to prevent others whose services are utilized by the lawyer from disclosing or using confidential information of a client. In addition, the lawyer should stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client's information, and the lawyer should monitor the changing law of privilege to ensure that storing information in the "cloud" will not waive or jeopardize any privilege protecting the information.

(75-09)

Opinion 843 (9/10/10)

Topic: Lawyer's access to public pages of another party's social networking site for the purpose of gathering information for client in pending litigation.

Digest: A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation.

Rules: 4.1; 4.2; 4.3; 5.3(b)(1); 8.4(c)

QUESTION

1. May a lawyer view and access the Facebook or MySpace pages of a party other than his or her client in pending litigation in order to secure information about that party for use in the lawsuit, including impeachment material, if the lawyer does not "friend" the party and instead relies on public pages posted by the party that are accessible to all members in the network?

OPINION

2. Social networking services such as Facebook and MySpace allow users to create an online profile that may be accessed by other network members. Facebook and MySpace are examples of external social networks that are available to all web users. An external social network may be generic (like MySpace and Facebook) or may be formed around a specific profession or area of interest. Users are able to upload pictures and create profiles of themselves. Users may also link with other users, which is called "friending." Typically, these social networks have privacy controls that allow users to choose who can view their profiles or contact them; both users must confirm that they wish to "friend" before they are linked and can view one another's profiles. However, some social networking sites and/or users do not require pre-approval to gain access to member profiles.

3. The question posed here has not been addressed previously by an ethics committee interpreting New York's Rules of Professional Conduct (the "Rules") or the former New York Lawyers Code of Professional Responsibility, but some guidance is available from outside New York. The Philadelphia Bar Association's Professional Guidance Committee recently analyzed the propriety of "friending" an unrepresented adverse witness in a pending lawsuit to obtain potential impeachment material. See Philadelphia Bar Op. 2009-02 (March 2009). In that opinion, a lawyer asked whether she could cause a third party to access the Facebook and MySpace pages maintained by a witness to obtain information that might be useful for impeaching the witness at trial. The witness's Facebook and MySpace pages were not generally accessible to the public, but rather were accessible only with the witness's permission (*i.e.,* only when the witness allowed someone to "friend" her). The inquiring lawyer proposed to have the

third party "friend" the witness to access the witness's Facebook and MySpace accounts and provide truthful information about the third party, but conceal the association with the lawyer and the real purpose behind "friending" the witness (obtaining potential impeachment material).

4. The Philadelphia Professional Guidance Committee, applying the Pennsylvania Rules of Professional Conduct, concluded that the inquiring lawyer could not ethically engage in the proposed conduct. The lawyer's intention to have a third party "friend" the unrepresented witness implicated Pennsylvania Rule 8.4(c) (which, like New York's Rule 8.4(c), prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation"); Pennsylvania Rule 5.3(c)(1) (which, like New York's Rule 5.3(b)(1), holds a lawyer responsible for the conduct of a nonlawyer employed by the lawyer if the lawyer directs, or with knowledge ratifies, conduct that would violate the Rules if engaged in by the lawyer); and Pennsylvania Rule 4.1 (which, similar to New York's Rule 4.1, prohibits a lawyer from making a false statement of fact or law to a third person). Specifically, the Philadelphia Committee determined that the proposed "friending" by a third party would constitute deception in violation of Rules 8.4 and 4.1, and would constitute a supervisory violation under Rule 5.3 because the third party would omit a material fact (*i.e.,* that the third party would be seeking access to the witness's social networking pages solely to obtain information for the lawyer to use in the pending lawsuit).

5. Here, in contrast, the Facebook and MySpace sites the lawyer wishes to view are accessible to all members of the network. New York's Rule 8.4 would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted.1 Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's

1 One of several key distinctions between the scenario discussed in the Philadelphia opinion and this opinion is that the Philadelphia opinion concerned an unrepresented *witness*, whereas our opinion concerns a *party* – and this party may or may not be represented by counsel in the litigation. If a lawyer attempts to "friend" a *represented* party in a pending litigation, then the lawyer's conduct is governed by Rule 4.2 (the "no-contact" rule), which prohibits a lawyer from communicating with the represented party about the subject of the representation absent prior consent from the represented party's lawyer. If the lawyer attempts to "friend" an *unrepresented* party, then the lawyer's conduct is governed by Rule 4.3, which prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer's role, and prohibits the lawyer from giving legal advice other than the advice to secure counsel if the other party's interests are likely to conflict with those of the lawyer's client. Our opinion does not address these scenarios.

profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so.

CONCLUSION

6. A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction).

Recent NYC Bar Association Ethics Opinions

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION *2009-1*

THE NO-CONTACT RULE AND COMMUNICATIONS SENT
SIMULTANEOUSLY TO REPRESENTED PERSONS AND THEIR LAWYERS

TOPIC: The no-contact rule and communications sent simultaneously to represented persons and their counsel; implied consent to such communications.

DIGEST: The no-contact rule (DR 7-104(A)(1)) prohibits a lawyer from sending a letter or email directly to a represented person and simultaneously to her counsel, without first obtaining "prior consent" to the direct communication or unless otherwise authorized by law. Prior consent to the communication means actual consent, and preferably, though not necessarily, express consent; while consent may be inferred from the conduct or acquiescence of the represented person's lawyer, a lawyer communicating with a represented person without securing the other lawyer's express consent runs the risk of violating the no-contact rule if the other lawyer has not manifested consent to the communication.

CODE: DR 7-104

QUESTIONS: (1) When a lawyer sends a letter or an email directly to a person known to be represented by counsel, can the lawyer satisfy the prior consent requirement of DR 7-104(A)(1) by simultaneously sending a copy of the letter or email to the represented person's lawyer?

(2) In the context of an email chain involving lawyers and represented persons, does the prior consent requirement of DR 7-104(A)(1) require express consent for a "reply to all" communication or may consent be implied?

OPINION

I. Sending Simultaneous Correspondence to A Represented Person And Her Lawyer Without Prior Consent Violates the No-Contact Rule Unless Otherwise Authorized By Law

The "no-contact rule," DR 7-104 of the Code of Professional Responsibility (the "Code "), provides that a lawyer shall not "[c]ommunicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so." DR 7-104(A)(1).[1]

We have been asked whether simultaneously sending a letter or email to a represented person and her lawyer, by itself, satisfies the prior consent requirement. We believe this question is readily answered in the negative by both the text and purpose of the no-contact rule.

At the outset, it is clear that a letter or an email is a "communication" covered by DR 7-104(A)(1). As the New York State Bar Association has noted, "[t]he Code does not define the word 'communicate,' but the plain and ordinary meaning of the word – to 'impart,' 'convey,' 'inform,' 'transmit,' or 'make known,' Webster's Third New International Dictionary (Unabridged) 460 (1993); see Black's Law Dictionary 253 (5th ed. 1979) – all presuppose some form of transmission of information." N.Y. State 768 (2003).

The no-contact rule, by its terms, requires that a lawyer have the "prior consent" of a represented person's lawyer before communicating directly with that person. Simultaneously sending a letter or email to a represented person and her lawyer does not satisfy this "prior consent" requirement. Prior consent means just that – consent obtained in advance of the communication. A lawyer receiving a copy of a letter or email sent to her client has not, by virtue of receiving the copy, consented to the direct communication with her client.[2]

Our conclusion is supported by a recent case and prior ethics opinions. In AIU Ins. Co. v. The Robert Plan Corp., 17 Misc. 3d 1104(A), 851 N.Y.S.2d 56, 2007 WL 2811366, at *14 (Sup. Ct. N.Y. County 2007), the plaintiffs' lawyers sent a letter to the directors of the defendant corporation with a copy to the company's counsel. Under New York law, the directors of a corporate client are included in the definition of "party" for purposes of DR 7-104. See AIU Ins. Co., 2007 WL 2811366, at *14 (citing Niesig v. Team I, 76 N.Y.2d 363 (1990)). The court concluded that sending a letter to the directors, even with a copy sent to the company's counsel, violated DR 7-104 and enjoined plaintiffs' lawyers from any further contact with the directors.

In the same vein, the American Bar Association (the "ABA") has addressed the situation where a lawyer fears that opposing counsel has failed to relay a settlement offer to her client. The ABA concluded that sending the settlement offer directly to the represented party is improper, absent the other lawyer's consent or specific legal authority to do so. See ABA Formal Op. 92-362 (offering party's lawyer not permitted to communicate with opposing party about settlement offer absent consent of other lawyer or unless authorized by law), ABA Informal Op. 1348 (offering party's lawyer not permitted to send opposing party carbon copy of settlement offer sent to opposing party's lawyer).

Our conclusion that the no-contact rule forbids sending simultaneous communications to client and counsel is bolstered by consideration of the rule's purpose. As the Court of Appeals explained in Niesig, DR 7-104(A)(1)

fundamentally embodies principles of fairness. "The general thrust of the rule is to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact." (Wright v Group Health Hosp., 103 Wash. 2d 192, 197, 691 P.2d 564, 567.) By preventing lawyers from deliberately dodging adversary counsel to reach – and exploit – the client alone, DR 7-104(A)(1) safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions (see 1 Hazard & Hodes, Lawyering, at 434-435 [1989 Supp.]; Wolfram, Modern Legal Ethics § 11.6, at 613 [Practitioner's ed. 1986]; Leubsdorf, Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests, 127 U. Pa. L. Rev. 683, 686 [1979]).

Niesig, 76 N.Y.2d at 370; see also ABA Formal Op. 95-396 ("[T]he anti-contact rules provide protection of the represented person against overreaching by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests.").

It could be argued that the purpose of DR 7-104(A)(1) is satisfied when a copy of a communication sent by counsel to a represented person also is sent to the represented person's lawyer. Under that theory, the represented person would be adequately protected because her lawyer would be aware of the communication and could consult with her client before responding to it. We do not agree with this view. While it is true that sending a copy of the communication to counsel reduces the risk that the represented person will be subject to overreaching, the risk is not eliminated. In practical terms, there is no assurance that a letter or email sent simultaneously to a lawyer and her client will be received by them at the same time. For any number of reasons – the vagaries of the postal or computer system, the lawyer's work or travel schedule, or delays in the distribution of mail at the lawyer's office – the lawyer might not receive her copy of the communication until after the client has received it and made a direct uncounseled response. The risk is magnified with email communications, where a response by the client can be made with the touch of a button on a keyboard.

More fundamentally, permitting a lawyer to communicate directly with a represented person by letter or email, even if a copy is also sent to counsel, would undermine the role of the represented person's lawyer as spokesperson, intermediary and buffer. Under DR 7-104(A)(1), a represented person is entitled to be insulated from any direct communications from opposing counsel, aside from direct communications otherwise authorized by law. All other communications relating to the subject matter of the representation, whether in person, by letter or via email, must proceed through the represented person's lawyer absent prior consent.

II. "Prior Consent" To the Simultaneous Communication May Be Inferred From The Lawyer's Participation In The Communication And Other Surrounding Facts and Circumstances

While the "prior consent" of a represented person's lawyer is required for direct communications with the client (as set forth above), the question remains whether the consent must be express or may be inferred from the circumstances. In this age of instantaneous electronic communications, the issue of implied consent often presents itself in the context of group email communications involving multiple clients and their lawyers. For example, does the fact that a lawyer copies her own client on an email constitute implied consent to a "reply to all" responsive email from the recipient attorney?[3]

While there is a surprising dearth of authority addressing the issue of implied consent in the context of the no-contact rule, a comment to the Restatement of the Law Governing Lawyers sensibly explains that a lawyer "may communicate with a represented nonclient when that person's lawyer has consented to or acquiesced in the communication. An opposing lawyer may acquiesce, for example, by being present at a meeting and observing the communication. Similarly, consent may be implied rather than express, such as where such direct contact occurs routinely as a matter of custom, unless the opposing lawyer affirmatively protests." Rest. (Third) of Law Governing Lawyers § 99 cmt. j.

We agree that in the context of group email communications involving multiple lawyers and their respective clients, consent to "reply to all" communications may sometimes be inferred from the facts and circumstances presented. While it is not possible to provide an exhaustive list, two important considerations are (1) how the group communication is initiated and (2) whether the communication occurs in an adversarial setting.

Initiation of communication: It is useful to consider how the group communication is initiated. For example, is there a meeting where the lawyers and their clients agree to await a communication to be circulated to all participants? If so, and no one objects to the circulation of correspondence to all in attendance, it is reasonable to infer that the lawyers have consented by their silence to inclusion of their clients on the distribution list. Similarly, a lawyer may invite a response to an email sent both to her own client and to lawyers for other parties. In that case, it would be reasonable to infer counsel's consent to a "reply to all" response from any one of the email's recipients.

Adversarial context: The risk of prejudice and overreaching posed by direct communications with represented persons is greater in an adversarial setting, where any statement by a party may be used against her as an admission. If a lawyer threatens opposing counsel with litigation and copies her client on the threatening letter, the "cc" cannot reasonably be viewed as implicit consent to opposing counsel sending a response addressed or copied to the represented party. By contrast, in a collaborative non-litigation context, one could readily

imagine a lawyer circulating a draft of a press release simultaneously to her client and to other parties and their counsel, and inviting discussion of its contents. In that circumstance, it would be reasonable to view the email as inviting a group dialogue and manifesting consent to "reply to all" communications.

The critical question in any case is whether, based on objective indicia, the represented person's lawyer has manifested her consent to the "reply to all" communication. Accord ABCNY Formal Op. 2007-1 (setting forth objective indicia to determine whether in-house counsel is acting as a lawyer for purposes of DR 7-104(A)(1)). Using an objective test, express consent is preferable, but not invariably required, because actual consent may be inferred from counsel's conduct.

Even when consent is implied, it is not unlimited. Its scope will depend on the statements or conduct of the represented person's lawyer, and it will have both subject matter and temporal limitations. An email sent by a lawyer to opposing counsel, with a copy to the client, would imply the lawyer's consent to a "reply to all" response limited to the subject matter of the initial email (unless otherwise clearly indicated). And the duration of the implied consent would last only for a reasonable period of time based on the particular circumstances. It bears emphasis that an attorney who has previously consented to a direct communication with her client, or who has not explicitly objected to it, can make clear at any time that she does not consent. Consent, whether express or implied, can be revoked at any time by a clear statement to that effect.

The implied consent endorsed here is limited to those situations where a lawyer has initiated contact with other counsel and has done something to manifest consent to a response from counsel addressed to the initiating lawyer's client. This situation is to be distinguished from that presented in ABCNY Formal Op. 2005-4, where we were unwilling to recognize implied consent because the lawyer had not engaged in any conduct from which consent could be implied. In that opinion, we evaluated whether a lawyer was permitted to speak directly with a non-lawyer insurance adjuster where the insurance adjuster represented that counsel had consented to the communication. We noted that the other lawyer could not rely on the insurance adjuster's representation and that consent could not be implied in that situation. We reasoned:

[T]he plain language of DR 7-104(A)(1) requires that opposing counsel receive notice and provide actual consent before an attorney may participate in such communications with a non-lawyer representative. We further conclude that the opposing counsel's consent cannot be inferred from the circumstances, and that the consent must be conveyed in some form by opposing counsel to the attorney.

* * *

Because the rule requires the consent of opposing counsel, the safest course is to obtain that

consent orally or in writing from counsel. A lawyer who proceeds on the basis of other evidence of consent, such as the opposing client's assurance that its counsel has consented, runs the risk of violating the rule if opposing counsel did not in fact consent.

ABCNY Formal Op. 2005-4.

In the foregoing opinion, the Committee found no adequate indication of consent where the allegedly consenting lawyer was not a party to the communication in question and did nothing from which consent could be inferred. The type of implied consent recognized here, by contrast, presupposes that the lawyer is a party to the email exchange and has manifested consent to the direct communication.

A cautionary note is in order. An attorney who relies on "implied consent" to satisfy DR 7-104 (A)(1) runs the risk that the represented person's lawyer has not consented to the direct communication. To avoid any possibility of running afoul of the no-contact rule, the prudent course is to secure express consent. However, the absence of express consent does not necessarily establish a violation of DR 7-104(A)(1) if the represented person's lawyer otherwise has manifested her consent to the communication.

We are mindful that the ease and convenience of email communications (particularly "reply to all" emails) sometimes facilitate inadvertent contacts with represented persons without their lawyers' prior consent. Given the potential consequences of violating DR 7-104(A)(1), counsel are advised to exercise care and diligence in reviewing the email addressees to avoid sending emails to represented persons whose counsel have not consented to the direct communication.

CONCLUSION

We conclude that sending a letter or email to a represented person, and simultaneously sending a copy of the communication to counsel, is impermissible under DR 7-104(A)(1) unless the represented person's lawyer has provided prior consent to the communication or the communication is otherwise authorized by law.

We further conclude that express consent to such simultaneous communication, while preferred, is not always required. A lawyer's prior consent may be inferred where the represented person's lawyer has taken some action manifesting her consent. The scope of the implied consent will be determined by subject matter and temporal considerations, based on what a reasonable lawyer would understand was authorized by the represented person's lawyer. The safest course always is to obtain express prior consent.

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1. The Justices of the four Appellate Divisions of the Supreme Court of the State of New

York have approved and adopted new Rules of Professional Conduct ("the Rules"), which will become effective and replace the Code on April 1, 2009. Under the new Rules, DR 7-104(A)(1) of the Code has been adopted almost verbatim as Rule 4.2(a).

2. This opinion applies equally to simultaneous communications (i) addressed to the lawyer and "cc'd" to the client, (ii) addressed to the client and "cc'd" to the lawyer, and (iii) addressed to both lawyer and client.
3. An attorney who sends an email to another attorney can eliminate the possibility of being found to have provided such implied consent by simply removing the client as a "cc" on the email – the sending attorney can instead use the "bcc" or blind copy feature to send the email to the client or can forward to the client a copy of the email sent to the other lawyer.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION *2009-2*

ETHICAL DUTIES CONCERNING SELF-REPRESENTED PERSONS

TOPIC: Ethical duties concerning self-represented persons.

DIGEST: DR 7-104(A)(2) permits a lawyer to advise a self-represented person adverse to the lawyer's client to seek her own counsel and to make certain other related statements. These statements may include, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time explain or clarify the lawyer's role to the self-represented litigant and advise that person to obtain counsel. The lawyer must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer's role in the matter.

CODE/RULE : DR 1-102; 4-101; 7-104; 7-106; EC 2-7; 7-13; 7-14; 7-18; 7-23; 9-4; Canons 4-7; Rule 4.3

QUESTIONS: What are a lawyer's ethical duties when another party to a litigation or transaction is self-represented? Does the Code of Professional Responsibility limit what a lawyer may say to a self-represented person?

OPINION

I. Introduction

Among the many changes to courts in the State of New York in the past two decades has been a sharp increase in the number of self-represented litigants. 1There are nearly 1.8 million self-represented litigants in the New York State Unified Court System, according to a recent estimate. *See* Hon. Judith S. Kaye, The State of the Judiciary 2007 at 18. 2 Undoubtedly, the widespread foreclosure and credit crises will further increase that number as more people,

unable to afford legal representation, must nonetheless come to court to protect and assert their rights. *Cf.* Margery A. Gibbs, *More Americans serving as their own lawyers*, Associated Press News Wire, Nov. 11/25/08 (discussing the increasing numbers of self-represented litigants in domestic disputes).

Self-represented litigants provide many and varied challenges for tribunals. Some self-represented persons may have difficulty comprehending the rules and procedures of a tribunal. Others may not be able to adequately articulate facts, causes of action, or the relief they seek. Some may even misapprehend the respective roles of judicial officers, court personnel, or opposing counsel. The inexperience of self-represented persons can lead to additional litigation or motion practice, resulting in cost and delay for all parties, and sometimes an order setting aside an executed agreement. *See, e.g.*, *Cabbad v. Melendez*, 81 A.D.2d 626, 626 (2d Dep't 1981) (vacating consent judgment "'inadvertently, unadvisably or improvidently entered into'" by self-represented, non-English-speaking tenant (citation omitted)); *600 Hylan Assocs. v. Polshak*, 17 Misc.3d 134(A) (2d Dep't 2007) (table decision), *text available at* 2007 WL 4165282; *see also Schaffer Holding LLC v. Fleming*, 1 Misc.3d 131(A) (2d Dep't 2003) (table decision), *text available at* 2003 WL 23169883 (affirming order vacating stipulation).

Judicial response to the increase in self-represented litigants is ongoing and evolving. For example, state and federal courts in New York have opened offices to aid self-represented individuals appearing in their courtrooms. 3 Courses relating to self-represented litigants are now included in judicial training seminars. 4

There has, however, been little discussion of a lawyer's role when communicating with self-represented persons in the litigation and transactional contexts. This opinion considers whether the lawyer's duties to the court (*e.g.*, DR 7-106, EC 7-13, EC 7-23, EC 9-4), the administration of justice (*e.g.*, DR 1-102(A)(4)-(5), EC 2-7), and the lawyer's own client (Canons 4-7), require the lawyer to take proactive measures when dealing with an unrepresented person. We first address what communications between lawyers and their self-represented adversaries are permitted, and then articulate, consistent with the New York Code of Professional Responsibility (the "Code"), the newly-approved New York Rules of Professional Conduct and past precedent, a duty to warn self-represented persons who have objectively manifested their confusion about the opposing lawyer's role in a matter.

II. Discussion

A. What Communications Are Permissible Under DR 7-104(A)(2)

The Code explicitly recognizes that lawyers' encounters with self-represented litigants are inevitable. Indeed, Ethical Consideration 7-18 recognizes that attorneys acting on behalf of a client "may have to deal directly with" self-represented persons in a wide variety of transactional and litigation contexts.

The primary guidance the Code offers for managing these interactions is found in DR 7-104(A)(2) which provides in pertinent part:

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

See also EC 7-18 (extending this obligation to an unrepresented "person"). 5

Even when the interests of a self-represented person "conflict with the interests of the lawyer's client," ethics opinions have construed this Code provision to permit more than a simple statement that the self-represented person should obtain counsel. For example, the New York State Bar Association Committee on Professional Ethics concluded that an executor of a will could, but was not required to, advise an unrepresented surviving spouse of the need to obtain a lawyer to address a legal issue, and also could identify the relevant issue (the spouse's potential right to take an election against the estate) to be addressed by the lawyer. *See* N.Y. State 477 (1977). Even though the executor might take a contrary position on that issue, the opinion concluded that "to remain silent in the face of the surviving spouse's expressed dissatisfaction with his testamentary share might seem somewhat unfair and could, under certain circumstances, tend to mislead." The opinion further stated that it would be permissible for a lawyer to freely provide to a self-represented non-client information that is "purely a matter of fact and non-privileged," so long as it otherwise would be ethically permissible to do so (*e.g.*, no confidences or secrets would be revealed in violation of DR 4-101).

The New York County Lawyers' Association addressed a lawyer's ability to negotiate a settlement with an adverse party who had discharged her attorney. *See* N.Y. Cty 708 (1995). The opinion concluded that once an attorney had verified that the adverse party was no longer represented, she could communicate with the adverse party directly about the lawsuit and continue the negotiations -- but could not render any advice other than to secure counsel. The opinion cautioned, however, that under the circumstances presented, the attorney had an affirmative duty to advise the self-represented party to seek counsel while flagging a particular legal issue:

> At the outset of their dealings, . . . inquirer should advise [the unrepre-sented] plaintiff that there may be legal issues, such as the possible [discharged] attorney's charging lien, affecting plaintiff's right to recovery under whatever settlement is reached and that plaintiff should consult a lawyer to advise him about such issues because inquirer is barred from doing so.

The inquiring attorney had expressed her concern that any settlement she reached with the

unrepresented person might be affected by the charging lien of the former lawyer. Thus, it appeared that the *inquirer's client* could have been adversely affected had the unrepresented person failed to consider the impact of a potential charging lien before agreeing to a settlement.

More recently, the New York State Bar Association Committee on Professional Ethics recognized that in a governmental investigation, a government lawyer speaking to a self-represented person may, but is not required to, inform her of the need to retain counsel and alert her to the right against self-incrimination. *See* N.Y. State 728 (2000). The opinion reasoned that "the rule [DR 7-104(A)(2)] has been understood to allow a lawyer, additionally, to give certain non-controvertible information about the law to enable the other party to understand the need for independent counsel." *Id.* (citing N.Y. State 477 (1977) and N.Y. State 708 (1998); *s ee also* ABCNY Formal Op. 2004-3 (government lawyer "may advise" an unrepresented agency constituent of the "non-controvertible" legal proposition that "under no circumstances may the constituent testify falsely"). Concluding that the right against self-incrimination was such "non-controvertible information," and recognizing that a government attorney has a duty to "seek justice" even in civil matters (EC 7-14), the opinion stated that a government attorney "might reasonably conclude" that the government's "interest in dealing fairly with the public" warrants advising the unrepresented person to retain a lawyer even if a private attorney would be "disinclined" to do so.

Finally, the New York State Bar Association Committee on Professional Ethics examined the duties of a government lawyer when the other party to pending negotiations, although represented, was unaccompanied by its lawyers at a meeting. *See* N.Y. State 768 (2003). The opinion also considered the related issue of what a lawyer may do when she does not know that the other party is represented by counsel. Addressing a situation analogous to the lawyer who negotiates with a self-represented party, the opinion concluded that it would be permissible for the lawyer to describe her client's own position in negotiations. It further found that the lawyer would not violate DR 7-104(A)(2) by providing certain indisputable information to the unrepresented party, such as the filing requirements of the lawyer's agency client. *See id.*

The teachings of these opinions are, essentially, three-fold. First, a lawyer may, but need not, advise a self-represented party to retain counsel and identify the legal issues that could be usefully addressed by counsel. Second, the lawyer may be obligated to render this advice when it would advance the interests of her own client to do so. Third, the lawyer may, but need not, provide certain incontrovertible factual or legal information to the self-represented party, such as her client's own position in negotiations, non-negotiable procedural requirements for doing business, or the existence of a legal right such as the right against self-incrimination. We concur with each of these conclusions.

We also identify an additional option for matters pending before a court or other tribunal. In light of the efforts of a growing number of courts to provide support for self-represented litigants, we conclude that it is also appropriate for a lawyer to direct a self-represented

adversary to any available court facilities designed to aid those litigants, such as an Office of the Self-Represented, or to a clerk or other court employee designated to orient the self-represented person through the litigation process. 7

B. Duty To Clarify the Lawyer's Role

A lawyer engaging in any of these permissible communications, or choosing not to make them, should remain mindful of the need to avoid misleading the self-represented party. *See* DR 1-102(A)(4) (forbidding "conduct involving dishonesty, fraud, deceit, or misrepresentation"); DR 7-102(A)(5) (forbidding a lawyer from "[k]nowingly mak[ing] a false statement of law or fact" in representing a client); Restatement (Third) of the Law Governing Lawyers (hereafter, "Restatement") § 103(1) (2000) (in dealing with a constituent of the lawyer's organizational client who is not represented by counsel, a lawyer "may not mislead the nonclient, to the prejudice of the nonclient, concerning the identity and interests of the person the lawyer represents"); *cf.Niesig v. Team I*, 76 N.Y.2d 363, 376 (1990) (stating, in the context of permissible interviews with self-represented employees of a lawyer's corporate client who could not bind the corporation, that "it is of course assumed that attorneys would make their identity and interest known to interviewees" and otherwise comport themselves ethically).

Refraining from misleading or deceptive conduct, however, may not be sufficient to satisfy the requirements of the Code in all dealings with self-represented persons. For some self-represented persons, further action may be necessary. In that regard, we conclude that a lawyer should be ready, when dealing with a self-represented person, to clarify when needed that the lawyer (a) does not and cannot represent the self-represented person; (b) represents another party in the matter who may have (or does have) interests adverse to the self-represented person; and (c) cannot give the self-represented person any advice, other than to secure counsel, or, as described above, to consult an available court facility designed to assist self-represented persons.

The lawyer may provide this clarification at any time without violating DR 7-104(A)(2), but we conclude that she *must* do so whenever she knows or has reason to know that the self-represented person misapprehends the lawyer's role in the matter. This may require the lawyer to repeat the clarification more than once. If the represented side of a case or transaction involves multiple individual attorneys, each attorney may have to explain her role in the matter. If the lawyer believes it necessary under the circumstances, the lawyer should also ask the self-represented person to confirm that she understands what the lawyer has told her.

Although research has not revealed any New York authority previously recognizing this duty to a self-represented person, we believe it is supported by existing ethics principles. The Restatement, for example, specifically recognizes the need to correct misunderstandings between lawyers and self-represented individuals when an organization's attorney deals with an unrepresented constituent of the organization. Restatement, § 103(2) ("[W]hen the lawyer

knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the nonclient."); *s ee also* ABCNY Formal Op. 2004-3 ("When a lawyer . . . retained by an organization is dealing with the organization's . . . constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents") (citing DR 5-109 (A). The nuances of client identity and the lawyer's role are easily misunderstood when the lawyer is representing an organizational client. However, we believe the same logic compels clarification whenever a self-represented person objectively manifests her misunderstanding of a lawyer's role. We therefore believe the duty should be extended as discussed in this opinion.

We depart from the Restatement's "material prejudice" standard, however, and conclude that a stronger approach is appropriate under the Code (and the newly-approved Rules). When a self-represented nonclient objectively manifests a belief that an attorney for an adverse or potentially adverse party is also acting as her own counsel, or attempts to solicit or accept guidance from that attorney on legal issues, there is an *inherent* risk of material prejudice to the nonclient and an element of unfairness that warrants a clear affirmative statement by the lawyer that she is not the nonclient's attorney. Moreover, we note, as the Restatement itself does, that failure to intercede when the self-represented person is acting under a misapprehension may adversely affect the interests of the lawyer's client. For example, there could be prejudicial delay or additional expense if, as the result of a failure to correct a material misimpression, issues need to be re-litigated, agreements set aside, or attorneys disqualified. *Cf.* Restatement § 103 cmt. e ("Failing to clarify the lawyer's role and the client's interests may redound to the disadvantage of the [client] if the lawyer, even if unwittingly, thereby undertakes concurrent representation . . . .").

In reaching this conclusion, we are mindful that not all self-represented persons are alike. Some may be highly sophisticated and experienced business people, capable of handling delicate negotiations or maneuvering through the court system unaided. Others may be relatively uneducated and intimidated by the procedures of our legal system. The lawyer should consider where a specific self-represented person falls along that continuum in evaluating whether she has a duty to explain or clarify her role.

A lawyer also should determine, based on the facts and circumstances presented, whether the explanation to be provided to the self-represented person should be in writing. Relevant factors include, but are not limited to, the extent to which self-represented person has demonstrated her misunderstanding of the lawyer's role, and the existence or threat of litigation, where failure to make a clear record of communications could be prejudicial to the lawyer's client.

III. Conclusion

DR 7-104(A)(2) permits a lawyer to advise a self-represented person adverse to the lawyer's client to seek her own counsel and to make certain other related statements. These statements may include, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time, explain or clarify the lawyer's role to the self-represented litigant and advise that person to obtain counsel. 8 The lawyer must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer's role in the matter.

February 2009

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1 Persons proceeding in legal matters without an attorney are often interchangeably referred to as "pro se," "self-represented," or "unrepresented." This opinion uses the term "self-represented person/party" to refer to non-attorneys who are representing themselves in a litigation or transaction in which one or more other persons are represented by counsel. Corporations may not appear self-represented in court in New York.

2 Informal surveys of court managers in the New York City Housing Court and New York City Family Court in 2003 revealed that "most litigants (Family Court, approximately 75%; Housing Court, approximately 90%) appear without a lawyer for critical types of cases: evictions; domestic violence; child custody; guardianship; visitation; support; and paternity." Office of the Deputy Chief Administrative Judge for Justice Initiatives, New York State Unified Court System, *Self-Represented Litigants in the New York City Family Court and New York City Housing Court* at 1, *inSelf-Represented Litigants: Characteristics, Needs, Services: The Results of Two Surveys* (Dec. 2005), *available at* http://www.nycourts.gov/reports/AJJI_SelfRep06.pdf. Similarly, survey respondents at the Town and Village Courts estimated in 2003 that 78% of litigants appeared without a lawyer "*almost all or most of the time* in small claims matters, 77% in vehicle and traffic cases, 47% in housing cases, 38% in civil cases, and 15% in criminal cases." *Id.*, *Services for the Self-Represented in the Town and Village Courts* at 3 (emphasis in original).

3 Contact information for the Office of Self-Represented or Pro Se Office is available online for New York State courts (http://www.nycourts.gov/courthelp/nolawyer-text.htm#add) as well as federal district courts (http://www.nynd.uscourts.gov/prose.cfm; http://www1.nysd.uscourts.gov/courtrules_prose.php?prose=contact; http://www.nywd.uscourts.gov/mambo/index.php?option=com_content&task=section&id=8&Itemid=43; http://www.nyed.uscourts.gov/probono/Locations/locations.html) and federal appellate court (http://www.ca2.uscourts.gov/Docs/COAManual/everything%20manual.pdf) .

4 *See, e.g.* , Office of Justice Initiatives website http://www.nycourts.gov/ip/justiceinitiatives/srl2.shtml#6 (discussing the "Dealing Effectively with Self-Represented Litigants" program); New York State Unified Court System, *Handling Cases Involving Self-Represented Litigants: A Bench Guide for New York Judges* (Summer 2008) (working draft distributed in judicial training seminars); *see also* Cynthia Grey, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants* (American Judicature Society 2005) (discussion guide (pp. 59 ff.) containing "materials that can be used to plan and present a session on judicial ethics and self-represented litigants" (p. 59) including a self-test, hypotheticals, role plays, and small group exercises), *available at* http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf; Best Practice Institute, National Center for State Courts, *Judicial Management of Cases Involving Self-Represented Litigants*, *available at* http://www.ncsconline.org/Projects_Initiatives/BPI/ProSeCases.htm.

5 The Justices of the four Appellate Divisions of the Supreme Court of the State of New York have approved and adopted new Rules of Professional Conduct (the "Rules"), which will become effective and replace the Code on April 1, 2009. Rule 4.3 provides: "In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client." Although the term "legal advice" in Rule 4.3 suggests a narrower scope than the term "advice" in DR 7-104(A)(2), we see no need to discuss or resolve a possible distinction for the purposes of this opinion.

7 Although we believe that interactions between lawyers and self-represented persons typically will be far different than the relationship between a corporation's lawyer and the corporation's unrepresented employees that we addressed in ABCNY Formal Op. 2004-2, we acknowledge that there may be situations where a lawyer should not advise a nonclient to seek counsel. Indeed, we conclude that a lawyer is obligated to render such advice only where it is in the interest of the lawyer's client to do so, or the self-represented person has demonstrated confusion about the lawyer's role.

8 Nothing in this opinion alters a lawyer's duties under DR 7-106(B)(1) and EC 7-23, generally requiring a lawyer to advise the tribunal of controlling legal authority not cited by any other party, regardless of whether it is adverse to her client's position.

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2009-3

CONFLICTS ARISING WHEN HIRING LAW SCHOOL GRADUATES
WHO PARTICIPATE IN LAW SCHOOL LEGAL CLINICS

TOPIC: Addressing conflicts faced by law firms when hiring law school graduates who work in legal clinics operated by law schools.

DIGEST: Upon hiring a law school graduate, law firms generally may accept or continue representations adverse to clients of the clinic where the graduate worked. When the firm's representation involves a matter substantially related to the one previously handled by the graduate at the clinic, or the graduate acquired confidential information from her client that is material to the matter handled by the firm, the firm should implement adequate measures to screen the graduate upon commencement of employment to protect the confidences and secrets of her former client.

CODE/RULE : DR 4-101; DR 5-101a; DR 5-105; DR 5-108; DR 9-101

QUESTIONS: What are a law firm's ethical obligations when addressing conflicts that arise in connection with hiring a law school graduate who previously provided legal services to a client under the auspices of her school's legal clinic?

OPINION

I. Introduction

Most law schools run clinics offering free legal services to eligible clients. According to a recent survey, 85 percent of American law schools sponsor at least one clinic, and many operate multiple clinics covering a wide variety of legal fields ranging from family law to securities arbitration.1

The law students who staff the clinics gain invaluable real world experience helping clients

resolve their legal problems. But this "on-the-job" training may create conflicts of interest once the students seek to parlay their academic achievements and practice skills into employment with law firms. For example, if the student's clinical experience included representation of a client with interests adverse to a client of the law firm she hopes to join, the provisions of DR 5-108 of the Code of Professional Responsibility (the "Code") would be implicated, requiring the firm to determine whether it can hire the student and continue to represent its client without violating the rule. This opinion provides guidance to firms for addressing that question.

II. Application of DR 5-108 and DR 5-105

When hiring a law school graduate who worked at her school's legal clinic, a law firm must consider conflicts of interest that may arise once the graduate commences employment with the firm. *See* N.Y. State 774 (2004); N.Y. State 720 (1999); DR 5-105(E). This conflicts screening process necessarily would include consideration of the potential applicability of DR 5-108,2 which imposes certain restrictions on, among other things, representations affecting the interests of former clients of newly-hired lawyers joining the firm. DR 5-108(A) provides:

> A. Except as provided in DR 9-101(B) with respect to current or former government lawyers,3 a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:
>
> > 1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.
> >
> > 2. Use any confidences or secrets of the former client except as permitted by DR 4-101(C) or when the confidence or secret becomes generally known.

In addition, DR 5-108(B) further provides:

> B. Except with the consent of the affected client after full disclosure, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
>
> > 1. Whose interests are materially adverse to that person; and
> >
> > 2. About whom the lawyer had acquired information protected by DR 4-101(B) that is material to the matter.4

In situations where DR 5-108 prohibits a lawyer from continuing or commencing the representation of a client, DR 5-105(B) prohibits the other lawyers associated in the same law firm from undertaking the representation. DR 5-105(B) provides in pertinent part:

While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under . . . DR 5-108(A) or (B) 5

The provisions of the Code generally, and DR 5-108 and DR 5-105(B) in particular, are addressed to and regulate the conduct of "lawyers," *i.e.*, individuals admitted to the Bar, and do not specifically purport to regulate the activities of law students.6 Nevertheless, the provisions of the Code have been found applicable "to law students functioning as lawyers in clinical education programs." ABCNY Formal Op. 1991-1, *see also* ABCNY Formal Op. 79-37 (same). Moreover, "unless the Code otherwise provides, the rules governing law firms are equally applicable to [a] law school's legal clinic." N.Y. State 794 (2006). Consequently, if a law student, L, worked at a clinic representing client C in a wage dispute with C's employer, Company A, and law firm F represented Company A in that dispute, then absent the prior consent of C, DR 5-108(A) generally would impose the following restrictions following F's employment of L: (i) L could not represent Company A in the wage dispute with C, and no other lawyer employed by F could continue to represent Company A in that dispute; and (ii) neither L nor any other lawyer at the firm would be able to represent any firm client with interests materially adverse to *any* client of the clinic, unless L could show that she did not personally represent the adverse clinic client and did not acquire any material confidential information regarding the client while working at the clinic.

III. Screening Law School Graduates

As noted, in general, the Disciplinary Rules of the Code do "not apply to non-lawyers." NY Code of Prof'l Responsibility (prelim. stmt.). Nevertheless, the Code (and the newly adopted Rules) "do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment." Id.

Law students, of course, are not members of the bar. Yet, when working in a legal clinic, a law student typically "will be functioning as a lawyer, [and] the clients involved justifiably will regard the student as a lawyer." ABCNY Formal Op. 79-37. Mindful of this dual status, we must also consider the salutary objective of encouraging practical legal training without unduly limiting a student's prospects for employment. Balancing the two, we believe that the conflicts rules can and should be applied to protect client confidences without unduly hampering students' mobility following graduation.

In this connection, we note that the level of student involvement, and thus access to client

confidences, varies among clinics. In many cases, the services rendered by law students may be substantial and ongoing when, for example, the students have primary responsibility for representing pro bono clients over an extended period of time. In those situations, a law firm/employer must take appropriate precautions whenever the interests of the student's client are materially adverse to those of the client of the firm, the matters in question are substantially related, and/or the pro bono client has divulged confidences or secrets to the student that, if disclosed, would be material to the matter handled by the firm. In that event, the law firm employing the student following graduation should use an ethical screen to rebut any presumption (and eliminate any risk) that the new hire would share any confidences and secrets of her former pro bono client with other lawyers at the firm.

While the Code "specifically endorses the use of screens only in cases involving government attorneys and judges," ABCNY Formal Op. 2006-2, the Code's failure to mention screens with respect to law students is not dispositive. (*See id.*) As noted above, the Code does not specifically regulate the conduct of individuals, such as law students, occurring prior to their admission to the bar. Moreover, the New York Court of Appeals has refused to adopt an irrebutable presumption that all lawyers in a law firm have knowledge of all confidences or secrets disclosed to any one lawyer in the firm. Indeed, the court has held that such a rule "unnecessarily preclusive because it disqualifies all members of a law firm indiscriminately, whether or not they share knowledge of [a] former client's confidences and secrets." *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 309 (1994). It therefore has found that a firm may in appropriate circumstances avoid imputation of the knowledge of a disqualified lawyer by "erect [ing] adequate screening measures to separate the disqualified lawyer and eliminate any involvement by that lawyer in the representation." *Kassis v. Teacher's Insurance & Annuity Ass'n*, 93 N.Y.2d 611, 618 (1999). We believe that such measures are appropriate in this context and will be effective in achieving the salutary objective of protecting the confidences and secrets of affected clients without unduly restricting students' employment opportunities.

The propriety of screening law school graduates finds support in the American Bar Association's construction of its own imputed disqualification rule, Rule 1.10(a), which is substantially identical to DR 5-101(D). Indeed, the ABA specifically has recognized that screening is an appropriate procedure to ensure that law students refrain from communicating confidences or secrets learned from the clients they represented while still in law school. As explained in the Comment to Rule 1.10 of the ABA Model Rules:

> [The imputed disqualification rule] [does not] prohibit representation [by the law firm] if the [conflicted] lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter [handled by the firm] to avoid communications to others in the firm of confidential information that both the non-lawyers and the firm have a legal duty to protect.

See alsoMulhern v. Calder, 196 Misc. 2d 818, 823 (Sup. Ct. Albany County 2003) (denying motion to disqualify law firm where firm screened potentially tainted non-lawyer from any involvement in matters handled by non-lawyer's prior employer, an adversary of the firm); *Restatement (Third) of The Law Governing Lawyers*, § 123, Comment f (2000) (for purposes of the imputed disqualification rules, absent special circumstances, law students who clerk in law firms should be considered non-lawyer employees of the firm whose duties of confidentiality are not imputed to subsequent employers); D.C. Rules of Prof. Conduct, Rule 1.10(b) (2007) ("When a lawyer becomes associated with a firm . . ., [t]he firm is not disqualified if the lawyer participated in a previous [adverse] representation . . . prior to becoming a lawyer in the course of providing assistance to another lawyer").

There may be some instances, however, where screening will not adequately protect the secrets and confidences of the law student's former clients. For example, screening may be insufficient to avoid disqualifying a law firm if the law student had substantial exposure at the clinic to confidential information relevant to a matter handled by the law firm, and the size and structure of the firm make it difficult to effectively screen the law student from the firm lawyers involved in the matter. In that event, the firm may not be able to continue or accept a representation adverse to the law student's former client unless the firm (a) obtains the informed consent of the former client, (b) does not hire or terminates the employment of the law student, or (c) withdraws from or declines the adverse representation. *See* N.Y. State 774 (2004).

Of course, if the firm determines that screening would be appropriate, it must adopt measures adequate to isolate the newly-hired lawyer and eliminate any involvement in the matter in question to ensure that confidential client information will not be disclosed by the new lawyer to others at the firm. In ABCNY Formal Op. 2006-2, we discussed the factors considered by courts in determining whether a law firm has effectively screened a conflicted lawyer from the rest of the firm, thereby enabling the firm to represent a client with materially adverse interests to the lawyer's former client in a substantially related matter. Those factors include, among others, the timeliness of implementing the screen, the size of the law firm, the size of the office space, the accessibility of files and the relative informality of office interaction, including the extent of the disqualified lawyer's contact with the firm lawyers working on the matter in question. The same factors are appropriately considered when assessing the effectiveness of measures used to screen a law school graduate upon commencement of her employment with the firm.

IV. Application of DR 5-101-a

Not all clinical representations are substantial and ongoing. Some may be limited and short-term, such as where a law student has only a single meeting with a client who seeks narrowly circumscribed advice regarding, for example, how to respond to a summons. In that event, the provisions of DR 5-101-a may become applicable. Effective as of November 9, 2007, DR 5-

101-a creates certain exemptions from the conflict rules of Canon 5 of the Code for lawyers who provide limited representation to pro bono clients under the aegis of a qualified legal assistance organization. That rule provides in pertinent part as follows:

> A. A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
>
> > 1. shall comply with DR 5-101, DR 5-105, and DR 5-108 of these rules concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in this part, only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest;
> >
> > 2. shall comply with DR 5-101, DR 5-105 and DR 5-108 only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by those sections.
>
> B. Except as provided in paragraph (A)(2), DR 5-105 and DR 5-108 are inapplicable to a representation governed by this section.

As set forth above, when the conditions of DR 5-101-a(A) are satisfied, *i.e.*, a lawyer has no actual knowledge of any conflict upon commencement of a qualifying pro bono representation, neither the lawyer nor her law firm need comply with DR 5-105 or DR 5-108 to the extent either rule would otherwise be triggered by the representation. The question, then, is whether DR 5-101-a applies to a law school graduate who provided limited legal services at a clinic operated by her law school. If so, then when the graduate, L, accepts employment with a law firm, F, any conflicts resulting from L's prior work at a legal clinic will not be imputed to F when she joins the firm, and F will not be disqualified from continuing or accepting any representation adverse to the clients of the clinic, provided that L had no actual knowledge of any conflict at the outset of her representation of C, her client at the clinic.7*See* ABA Model Rules of Professional Conduct, Rule 6.5, Comment 4 ("a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices").8

In construing DR 5-101-a, we note that the rule, while "not a model of draftsmanship," apparently was not adopted with the clinical training activities of law students in mind. *See* Roy

Simon, *Simon's Code of Prof'l Resp. Ann.*, DR 5-101-a at 771 (West 2008). Rather, it appears principally intended to encourage pro bono work by relaxing the conflict of interest rules for members of law firms who, in addition to representing paying clients, wish to simultaneously provide short term pro bono legal services through programs sponsored by legal services organizations, courts or government agencies. *Id.* To that end, the rule, among other things, permits lawyers to represent pro bono clients without conducting a conflicts check unless they have "actual knowledge" of a conflict with a firm client upon commencement of the representation. The rule provides this accommodation because the programs to which the rule applies "are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest . . . before undertaking a representation." *Id.* (quoting ABA Model Rule 6.5, Comment 1) DR 5-101-a also dispenses with the imputed disqualification rule, DR 5-105(B), because the limited nature of the services provided in a qualifying pro bono program "reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm." ABA Model Rule 6.5, Comment 4.

The provision eliminating the need to clear conflicts plainly is designed to facilitate the ability of an admitted lawyer working full time at a law firm to simultaneously represent pro bono clients under the auspices of a qualifying legal services program. Law students, in contrast, typically would not need to rely on this provision when, as is usually the case, they begin their clinical work before receiving or accepting offers of employment from a law firm. But the provision potentially could be applicable where, for example, the student accepts an offer of employment with a firm during her third year of law school while still working at the school's clinic, albeit without knowledge of any existing conflict.9 We see no reason why in this context a law student should be treated any differently under the rule than an admitted attorney already working at a law firm. Indeed, the student would have, if anything, even greater justification for relying on the rule because until she joins the firm, she would have little, if any, ability to systematically screen for conflicts of interest.

We further note that for the rule to apply to a law school graduate, the graduate's prior work at the clinic would have to be limited to "short-term limited legal services," defined to mean the provision of "legal advice or representation free of charge as part of a [qualified legal services] program with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance." DR 5-101-a(C)10 If the clinical assignment meets the definition of "short-term limited legal services," there is less risk that conflicts will arise between the pro bono representation at the clinic and the other matters handled by the law firm that subsequently employs the law student. *See* ABA Model Rule 6.5, Comment 4.

conclusion

When addressing conflicts that may arise in connection with hiring a law school graduate who represented one or more pro bono clients through participation in her school's legal clinic(s),

law firms must balance a number of competing interests, including: (i) the interest of the graduate's former client in protecting her secrets and confidences; (ii) the interests of other clients in being represented by the counsel of their choice; and (iii) the interests of both law students and law firms in not unduly restricting the students' employment opportunities. In most cases, when the interests of the graduate's former client are directly adverse to a current client of the law firm, the appropriate balance is struck by permitting the law firm to continue representing its client, while effectively screening the graduate from any involvement with the matter in question or from contact with the firm lawyers handling it. There may be instances, however, where screening would not adequately protect the confidentiality interests of the graduate's former client, such as where the graduate gained significant exposure to the client's confidences, and the structure and practices of the firm make it difficult, if not impossible, to assure that the confidences will not be shared with others at the firm. In that event, the firm may conclude that it must withdraw from the adverse representation unless it can obtain the former client's consent to the representation after full disclosure of the conflict.

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1 Eliza Strickland, *Lawyers-To-Be Give Free Help to Environmental Groups*, Christian Science Monitor, July 26, 2005 at 14.

2 The Justices of the four Appellate Divisions of the Supreme Court of the State of New York have approved and adopted new Rules of Professional Conduct (the "Rules"), which will become effective and replace the Code on April 1, 2009. New Rule 1.9 is substantially identical to DR 5-108.

3 DR 9-101(B) in general provides that when a government lawyer accepts employment with a private law firm, other lawyers at the firm may represent a client in connection with a matter previously handled by the government lawyer, provided that the lawyer is effectively screened from any participation in the matter.

4 DR 4-101(B) provides in pertinent part that "a lawyer shall not knowingly: 1. Reveal a confidence or secret of a client. 2. Use a confidence or secret of a client to the disadvantage of the client. 3. Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure."

5 Rule 1.10 sets forth the provisions governing imputation of conflicts under the new Rules. Rule 1.10 effects no change to DR 5-105(B) altering the analysis of this opinion.

6 DR 1-104 indirectly regulates the conduct of non-lawyers (including law students) by requiring lawyers who hire non-lawyers to supervise those employees, and by holding lawyers responsible for the misconduct of non-lawyers under certain specified circumstances. *See* N.Y. State 774 (2004); DR 1-104(C) and (D). In addition, courts have sanctioned lawyers for

misconduct occurring before their admission to the Bar in the exercise of the courts' inherent power to regulate the conduct of attorneys. *See In re Wong*, 275 A.D.2d (1 st Dep't 2000).

7 This conclusion is subject to the proviso, found in DR 5-101-a(E), that the "provisions of this section shall not apply where the court before which the representation is pending determines that a conflict of interest exists or, if during the course of the representation, the attorney providing the services becomes aware of a conflict of interest precluding continued representation."

8 ABA Model Rule 6.5, DR 5-101-a and New York Rule 6.5 are substantially identical.

9 We note that if the student had substantial responsibility for representing a client at a clinic and had knowledge of a conflict at the time she sought or considered accepting future employment with a law firm, she could not continue her representation of the pro bono client absent receipt of the client's consent following full disclosure of the conflict. *See* ABCNY Formal Op. 1991-1. Conversely, if the law student played a minor role at the clinic, the student might be able to continue the representation while seeking employment with the firm without needing to obtain client consent. *See* Peter A. Joy and Robert Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 Clinical L. Rev. 493, 549 (2002); ABA Formal Op. 96-400.

10 In addition, the legal clinic or law student "must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of DR 4-101," i.e., the student will have a continuing obligation to preserve the confidences and secrets of the client during and after the representation. DR 5-101-a(D).

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION *2009-4*

PAYMENTS FOR PRO BONO REFERRALS

Topic : Pro bono organizations requiring payments for referral of pro bono matters.

Digest : It has been increasingly common for pro bono organizations to require lawyers or law firms to make payments for referral of pro bono assignments. Although there is some disagreement as to whether this practice is advisable or good policy, t he New York Rules of Professional Conduct permit such payments as long as they are "usual and reasonable" and made to "qualified legal assistance organizations."

Rule/Code : Rule 1.1 (former DR 6-101); Rule 1.5 (former DR 2-106); Rule 5.4(c) (former DR 5-107(b)); Rule 6.1; Rule 7.2 (former DR 2-103).

Question: Under what circumstances may a law firm or attorney, consistent with the New York Rules of Professional Conduct, make a payment to a pro bono organization to obtain pro bono assignments, and under what circumstances may a lawyer in such an organization seek and accept such a payment?

OPINION

Background

Lawyers long have been encouraged to provide pro bono legal services and recently they have answered the call in increasing numbers. This welcome development has been attributed to a number of factors, including a heightened desire by the private bar to "give back" to the community, business-driven efforts to elevate law firms' standing in the community and relative to other firms, and an effort to attract, train and retain associates. Whatever the reasons, lawyers and law firms are spending more time on pro bono representations, and many practitioners and firms have a strong interest in obtaining "quality" pro bono matters and being viewed as competitors for "desirable" pro bono assignments.

At the same time, various pro bono organizations over the years have been soliciting or even requiring payments from lawyers or law firms in exchange for referrals of pro bono assignments. Perhaps in recognition of the increasing value lawyers and firms place on pro bono representations, or simply because of greater budgetary constraints, pro bono organizations appear to have stepped up their requests for referral fees as lawyers and law firms spend more time on pro bono matters.

Recently these payments—at times pejoratively characterized as "pay to play arrangements" or "quid pro quo payments"—have attracted attention in the legal community and the press. The views expressed about this practice have been divided. Some observers have supported it as providing private lawyers with opportunities to serve the public, while at the same time funding non-profit organizations and providing competent representation to indigent clients. Others, however, question the advisability, if not necessarily the propriety, of such payments. Critics of this practice have argued that it undermines the salutary objective of making pro bono opportunities readily available to a wide range of attorneys, including solo practitioners, lawyers at small firms and in-house counsel.

Because pro bono organizations are increasingly soliciting payments in exchange for referrals, and because we have located no ethics opinions or other authority on the subject, we believe it is appropriate to provide guidance under the New York Rules of Professional Conduct (the "Rules").

Discussion

Rule 7.2, entitled "Payments for Referral," (former DR 2-103 (D) and (F)), primarily governs the payments at issue. Although referral fees are not expressly mentioned in the Rule or its predecessor under the Code of Professional Responsibility, we believe that the language of the Rule permits these fees as long as certain conditions are met.

Rule 7.2(a) provides in pertinent part that "[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client." Rule 7.2(a)(2), however, sets forth an exception to this broad prohibition, providing that "a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization . . . ." In turn, Rule 7.2(b) specifies which organizations are "qualified legal assistance organizations." But as the language of Rule 7.2 establishes, n othing in the rule prohibits qualified legal assistance organizations from limiting pro bono referrals only to those lawyers or firms who pay "usual and reasonable fees or dues." As long as any such fee is usual and reasonable and the pro bono organization meets the definition of a qualified legal assistance organization, Rules 7.2(a) and (b) permit lawyers or law firms to pay such fees to pro bono organizations.

Other rules, however, impose some limits. Regardless of whether payments made to or requested by a referring pro bono organization are otherwise permitted under Rule 7.2, lawyers accepting referrals must always also comply with Rules 1.1 (former DR 6-101) and 5.4 (c) (former DR 5-107(b)). Rule 1.1 requires a lawyer to "provide competent representation to a client," while prohibiting a lawyer from handling legal matters which "the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it." Rule 5.4(c) provides that a lawyer cannot "permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6." These provisions highlight the need for both the attorney undertaking a pro bono matter, and any attorney at a pro bono organization referring that matter, to ensure that the underlying pro bono client receives competent, independent representation.

These requirements are echoed in the comments to Rule 7.2 prepared by the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") . Comment 2 states that "a lawyer may pay the usual charges of a qualified legal assistance organization. A lawyer so participating should make certain that the relationship with a qualified legal assistance organization in no way interferes with independent professional representation of the interests of the individual client."

Comment 2 to Rule 7.2 also admonishes that "a lawyer should avoid . . . situations in which considerations of economy are given undue weight in determining the lawyers employed by [a qualified legal assistance] organization or the legal services to be performed for the member or beneficiary, rather than competence and quality of service." In other words, the interests of the client in securing independent, competent representation cannot be subordinated to the financial interests of the organization.

As for the fees themselves, the Rules do not define what is "usual and reasonable" and provide no specific examples of what is meant by the term. As with the assessment of attorneys' fees under Rule 1.5(a), which prohibits fees that are "excessive or illegal," the question of whether pro bono fees or dues are "usual and reasonable" will be a fact-specific inquiry. Consequently, a lawyer must adequately evaluate all pertinent facts and circumstances when determining whether fees or dues are "usual and reasonable" within the meaning of the Rule 7.2(a)(2).

As a general matter, we believe that "usual" fees or dues in this context would mean fees or dues charged in the ordinary course on some equivalent basis for all referrals to law firms and lawyers which accept referrals from an organization. A uniform flat fee, for example, would generally be deemed a "usual fee." In contrast, a fee would not be "usual" if it were imposed on an ad hoc basis (for "special" cases) or in response to a sudden budget shortfall.

The term "reasonable fees or dues" is more difficult to define in part because the marketplace may establish a range of reasonable amounts charged by different pro bono organizations. Although we believe reasonableness must be established on a case-by-case basis by the attorneys and firms involved, we note that in addition to the marketplace, another relevant factor would be the extent to which the fee is reasonable in relation to an organization's cost of providing services to its clients. Such services could include, among other things, an intake process, administrative overhead, and a supervising attorney's time.

In addition to satisfying the "usual and reasonable" requirement of the Rule, the lawyers of any organization making referrals, and the lawyers and law firms making payments in exchange for referrals, must also determine whether the organization in question is a "qualified legal assistance organization" within the meaning of Rule 7.2(b)(1)-(4). The Rules define a "qualified legal assistance organization" as "an office or organization of one of the four types used in Rule 7.2(b)(1)-(4) that meets all the requirements thereof." Rule 1.0(p). Rule 7.2(b)(1)-(4), in turn, recognizes four categories of qualified legal assistance organizations: (1) a legal aid or public defender office; (2) a military legal assistance office; (3) a lawyer referral service operated, sponsored, or approved by a bar association or authorized by law or court rule; and (4) a bona fide organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, provided that the specific conditions of the Rule with respect to these organizations are met.

Most non-profit organizations which both actively provide pro bono representation as well as refer pro bono matters to other lawyers and law firms will be considered qualified legal assistance organizations under either the first or fourth clause of Rule 7.2(b). For example, organizations such as the Legal Aid Society, the Office of the Appellate Defender, the Office of the Public Defender, and the Office of the Federal Defender fall within this first category.

Examples of pro bono organizations that fall within the fourth category include: Advocates for Children, The Door, Human Rights First, inMotion, The Lawyers' Committee for Civil Rights Under Law, Rainforest Alliance, and Volunteer Lawyers for the Arts. In this regard, it should be noted that the conditions set forth in Rule 7.2(b)(4)(i)-(vi) for the fourth category were specifically "designed to guard against one of the bar's great fears—the fear that lawyers themselves . . . will set up or promote organizations for the 'primary purpose' of making money, with only secondary attention to serving society. Thus, an organization is not 'bona fide' if the lawyer or any of the lawyer's cohorts started the organization or somehow 'promoted' it and if their primary purpose was to make money."

It merits emphasis that this opinion is not intended to discourage donations to non-qualified legal assistance organizations. To the contrary, the Rules strongly encourage lawyers both "to provide pro bono legal services to benefit poor persons" and "to contribute financially to organizations that provide legal services to poor persons." Rule 6.1(a)(1)-(2) . Thus, although payments to non-qualified legal assistance organizations in exchange for referrals are prohibited, donations generally to support such organizations are not. (Such a donation must

not, however, be made "pursuant to a tacit arrangement of compensation in exchange for referrals.")

CONCLUSION

Payments to a pro bono organization to obtain pro bono assignments may be made without violating the Rules provided that (a) t he fees or dues paid by the law firm or lawyer to the pro bono organization are "usual and reasonable"; and (b) the pro bono organization charging such fees or dues is a " qualified legal assistance organization" as defined by Rule 7.2(b)(1)-(4). General donations to non-qualified legal assistance organizations—as opposed to payments in exchange for pro bono referrals—may be made without violating the Rules so long as there is no tacit agreement that the donation is in exchange for case referrals. Any lawyer or law firm making the payment, and any responsible lawyer in the pro bono organization requesting or receiving the payment, must comply with the ethical standards for competent representation, Rule 1.1, independent professional judgment, Rule 5.4(c), and maintenance of confidences, Rules 1.6 and 5.4(c).

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ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2009-5

DISCOURAGING UNREPRESENTED WITNESSES FROM VOLUNTARILY COOPERATING WITH ADVERSARIES

TOPIC: Communicating with non-party witnesses, requesting that they refrain from voluntarily providing information to other parties and providing legal advice to unrepresented persons.

DIGEST: In civil litigation, a lawyer may ask unrepresented witnesses to refrain from voluntarily providing information to other parties to the dispute. A lawyer may not, however, advise an unrepresented witness to evade a subpoena or cause the witness to become unavailable. A lawyer also may not tamper with the witness (*e.g.*, bribe or intimidate a witness to obtain favorable testimony for the lawyer's client). And while lawyers generally are prohibited from rendering legal advice to unrepresented parties, they may inform unrepresented witnesses that they have no obligation to voluntarily communicate with others regarding a matter in dispute and may suggest retention of counsel.

RULES: 3.3, 3.4, 4.3, 8.4

QUESTION: May a lawyer ask a witness who has not been subpoenaed and not otherwise under court process to refrain from voluntarily providing information to other parties to the litigation?

OPINION

Introduction

In our adversary system, all parties to a litigated dispute are granted equal access to sources of proof. For this reason, among others, our courts allow liberal discovery into relevant topics, subject only to certain narrowly-drawn privileges.[1] Consistent with this process, witnesses do

[1] *See Kara Holding Corp. v. Getty Petroleum Marketing, Inc.*, No. 99 Civ. 0275 (RWS), 2004 WL 1811427, at *24 (S.D.N.Y. Aug. 12, 2004) (observing that federal discovery rules are designed to avoid surprise or trial by ambush) (quoting *American Stock Exchange, LLC v. Mopex, Inc.*, 215 F.R.D. 87, 93 (S.D.N.Y. 2002)); *Dorros v. Dorros Bros. Inc.*, 274 A.D. 11, 13, 80 N.Y.S.2d 25, 28 (1st Dep't 1948) ("As the trial should be an open meeting on the merits, both sides should have a fair opportunity, in advance of trial, to garner evidence.").

not belong to a plaintiff or defendant,[2] just as there can be no "plaintiff's evidence" or "defendant's facts."[3]

It therefore has long been clear that a lawyer may not ethically assist a witness in evading a subpoena,[4] nor can she help her client hide documents or other tangible evidence.[5] But may a lawyer ask a witness to refrain from voluntarily providing information to an adversary? In making that request, the lawyer does not flout any court's authority. Moreover, absent an express rule prohibiting such conduct, lawyers may feel constrained to make such requests in furtherance of the interests of their clients.

We conclude that under the New York Rules of Professional Conduct (the "Rules"), a lawyer may ethically ask a witness to refrain from speaking voluntarily to other parties or their counsel. But the lawyer may not, under any circumstances, engage in conduct amounting to "bribing, intimidating or otherwise unlawfully communicating with a witness."[6] Lawyers should also remain wary of providing legal advice to unrepresented witnesses; while a lawyer may inform an unrepresented witness that she is under no obligation to speak with the lawyer's adversary, the lawyer should not provide any other legal advice aside from recommending that the witness obtain counsel.[7]

Relevant Rules

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2 *See United States ex rel. Trantino v. Hatrak*, 408 F. Supp. 476, 481 (D.N.J. 1976) ("Witnesses belong neither to the prosecution nor to the defense."), *aff'd*, 563 F.2d 86 (3d Cir. 1977).

3 *See* ABCNY Formal Op. 2001-3 (lawyer with engagement limited in scope to avoid a conflict with one client may seek discovery of facts potentially harmful to that client if the sole purpose of the discovery is to assist another client within the scope of the limited engagement, because facts are inherently neutral). This opinion does not address requests to unrepresented witnesses not to cooperate with prosecutors or defense counsel in criminal matters.

4 *See, e.g., In re Lamb*, 105 A.D. 462, 94 N.Y.S. 331 (1st Dep't 1905) (disbarring lawyer for advising client to flout subpoena); *In re Newell*, 157 A.D. 907, 142 N.Y.S. 185 (1st Dep't 1913) (disbarring lawyer for dissuading subpoenaed witness from attending criminal proceedings); *In re Rouss*, 169 A.D. 629, 155 N.Y.S. 557 (1st Dep't 1915) (disbarring lawyer for participating in scheme to bribe a witness to evade subpoena).

5 *See, e.g., In re Joseph*, 135 A.D. 589, 120 N.Y.S. 793 (1st Dep't 1909) (disbarring lawyer for assisting client in scheme to hide property); *In re Osofsky*, 259 A.D. 718, 18 N.Y.S.2d 8 (2d Dep't 1940) (disbarring lawyer who destroyed files to thwart court investigation); *In re Maguire*, 275 A.D.2d 28, 713 N.Y.S.2d 63 (2d Dep't 2000) (disbarring lawyer for concealing subpoenaed documents); *see also* Rule 3.4, Comment [1] ("Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructionist tactics in discovery procedure, and the like.").

6 Rule 3.3, Comment [12].

7 Rule 4.3.

Neither the former New York Code of Professional Responsibility (the "Code") nor the current Rules, effective April 1, 2009, specifically address the question of whether a lawyer may ask a witness to refrain from communicating voluntarily with another party. Although a proposal to prohibit such requests was considered in connection with promulgation of the new Rules, it ultimately was rejected.

Proposed Rule 3.4(f)

The proposed Rules of Professional Conduct recommended by the New York State Bar Association included a proposed Rule 3.4(f) that would have prohibited lawyers from asking "a person other than a client to refrain from voluntarily giving relevant information to another party."[8] In explaining the background of the Proposed Rule, the Reporter's Notes state as follows:

> Rule 3.4(f) has no equivalent in the existing Disciplinary Rules but deserves a place in the mandatory rules because it provides clear guidance on a question lawyers for entities face on a daily basis. The Rule strikes an appropriate balance between the justice system's search for the truth through the presentation of evidence and an organization's right to control the disclosure of trade secrets or other proprietary information to the organization's adversaries.[9]

Sources for Proposed Rule 3.4(f)

Proposed Rule 3.4(f) closely tracked the ABA's Model Rule 3.4(f). That rule provides that:

> A lawyer shall not . . . request a person other than a client refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

The Restatement (Third) of the Law Governing Lawyers adopts a similar tack.[10] Subject to the foregoing exceptions of the ABA Rule, the Restatement would prohibit lawyers from asking a witness to refrain from communicating with an adversary. Nevertheless, the Restatement would permit lawyers to inform *any person* of the right *not* to be interviewed by any other party."[11] The comments to the Restatement acknowledge, however, that it can be difficult to distinguish between advising a witness that she need not speak with others, and requesting that she refrain from communicating with adversaries: "The line between informing a witness of the right not to

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[8] New York State Bar Association, Proposed Rules of Professional Conduct 3.4(f).

[9] *Id.*, Reporter's Notes at 142.

[10] *See Restatement (Third) of the Law Governing Lawyers*, § 116 (A.L.I. 2008).

[11] *Id.* (emphasis added).

cooperate or to cooperate only under restrictive conditions and attempting to induce non-cooperation may be a fine one."[12]

The Appellate Divisions' Decision to Omit the Rule

Proposed Rule 3.4(f) has been omitted from the Rules approved by the Appellate Divisions of the Supreme Court of the State of New York. Moreover, there is no rulemaking history shedding any light on the omission. We therefore must be guided by the provisions of Rule 3.4 approved by the Appellate Divisions.

Like former Disciplinary Rule 7-109, Rule 3.4(a) prohibits a lawyer from "suppress[ing] any evidence that the lawyer or client has an obligation to reveal or produce,"[13] or "advis[ing] or caus[ing] a person to hide or to leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein."[14] But neither the Rule nor its predecessor in the Code forbids lawyers from asking unrepresented witnesses to refrain from speaking voluntarily to adversaries.

This issue also implicates a lawyer's ethical obligations in communicating with unrepresented persons. Rule 4.3 states: "The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[15] And Rule 8.4(d) prohibits lawyers from engaging in "conduct that is prejudicial to the administration of justice."[16]

Analysis

Lawyers May Ask an Unrepresented Witness to Refrain from Voluntarily Providing Information to Another Party.

The Committee concludes that a lawyer may ask an unrepresented witness to refrain from providing information voluntarily to other parties. We are persuaded in part by the absence of any explicit rule to the contrary in the Code, and the absence of any specific prohibition in the new Rules, even though the New York State Bar Association recommended Proposed Rule 3.4(f), which specifically would have prohibited such conduct. We do not know why the Appellate Divisions declined to adopt Proposed Rule 3.4(f), but we view the omission as a factor

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[12] *Id.*

[13] Rule 3.4(a)(1); *see also* DR 7-109(A).

[14] New York Rules of Professional Conduct, Rule 3.4(a)(2); *see also* DR 7-109(B).

[15] *See also* DR 7-104(B).

[16] *See also* DR 1-102(A)(5).

reinforcing our conclusion that it would be inappropriate to imply a restriction nowhere found on the face of the Rule, as approved.[17]

We recognize that New York courts—including the Court of Appeals—have endorsed the practice of informal discovery through voluntary interviews of non-party witnesses.[18] As the Court of Appeals concluded in *Niesig v. Team I*, where it declined to flatly prohibit lawyers from interviewing the employees of a corporate adversary, "informal discovery of information" serves "both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes."[19] The Court recently reiterated this view in *Arons v. Jutkowitz*, in which it concluded that defendant's counsel could informally interview plaintiff's treating physician.[20] But authorization of informal discovery under specified circumstances through witness interviews is not tantamount to an ethical rule prohibiting lawyers from asking unrepresented witnesses to voluntarily decline to provide information to an adversary. Judicial sanction of informal discovery does not, by itself, overcome the express language and history of the Rule.

Nor do we believe that the administration of justice would be prejudiced by a lawyer's request that a non-party witness refrain from communicating voluntarily with the lawyer's adversary. Even when a witness complies with such a request, the adverse party still may subpoena the witness to compel testimony or production of documents. And, a lawyer, of course, is prohibited from assisting a witness in evading a subpoena.[21] Thus, an adverse party may compel the unrepresented witness to provide information through available discovery procedures even if that witness refuses to voluntarily speak with that party's lawyer.

While a forthright request to refrain from cooperating is permitted, misleading or deceptive conduct is not. To avoid confusion and any potential misunderstanding, the lawyer should

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[17] *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 558, 579-580 (2006) ("Congress' rejection of the very language that would have achieved the result the Government urges weighs heavily against the Government's interpretation."); *Doe v. Chao*, 540 U.S. 614, 622 (2004) ("drafting history show[s] that Congress cut out the very language in the bill that would have authorized any presumed damages").

[18] *See, e.g., Arons v. Jutkowitz*, 9 N.Y.3d 393, 850 N.Y.S.2d 345, 880 N.E.2d 831 (2007); *Niesig v. Team I*, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990).

[19] *Niesig*, 76 N.Y.2d at 372.

[20] *Arons*, 9 N.Y.3d at 406 ("We have written before about the importance of informal discovery practices in litigation—in particular, private interviews of fact witnesses.") (citing *Niesig*, 76 N.Y.2d 363).

[21] *See, e.g., In re Lamb*, 105 A.D. 462, 94 N.Y.S. 331 (1st Dep't 1905) (disbarring lawyer for advising client to flout subpoena); *In re Newell*, 157 A.D. 907, 142 N.Y.S. 185 (1st Dep't 1913) (disbarring lawyer for dissuading subpoenaed witness from attending criminal proceedings); *In re Rouss*, 169 A.D. 629, 155 N.Y.S. 557 (1st Dep't 1915) (disbarring lawyer for participating in scheme to bribe a witness to evade subpoena).

identify herself and make clear whom she represents. She should also disclose that her client's interests may differ from those of the unrepresented witness.[22]

Lawyers also still must comply with Rule 3.4(a)(2), which prohibits lawyers from "advis[ing] or caus[ing] a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein." Rule 3.4(b) prohibits lawyers from "offer[ing] an inducement to a witness that is prohibited by law or pay, offer[ing] to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter." And lawyers may not, under any circumstances, engage in conduct that involves "bribing, intimidating or otherwise unlawfully communicating with a witness."[23]

Lawyers Also May Advise Witnesses that They Have No Obligation to Voluntarily Provide Information to Others.

Lawyers should also observe Rule 4.3, which prohibits lawyers from providing legal advice to unrepresented persons: "The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

We conclude, however, that this rule does not prohibit a lawyer from advising an unrepresented witness that she has no obligation to speak voluntarily with the lawyer's adversary. Laypersons may feel obligated to speak with a lawyer who requests information and to volunteer information even when they do not wish to do so. To address this issue, a lawyer may (i) ask a witness whether she has been served with a subpoena and, if she has not, (ii) advise her that she need not speak with the lawyer's adversary. To ensure that lawyers do not abuse this latitude, we conclude that they should also explain that the witness can and should make her own decision whether to speak with an adversary, and suggest that she consider consulting her own lawyer to assist with that decision.

We believe this type of communication does not violate the prohibition against legal advice to unrepresented parties found in Rule 4.3. While Rule 4.3 (previously DR 7-104(A)(2)) prohibits a lawyer from rendering legal advice to unrepresented parties adverse to the lawyer's client, the rule allows lawyers "to give certain non-controvertible information about the law to enable the other party to understand the need for independent counsel."[24] Advising an unrepresented party

[22] *See* ABCNY Formal Op. 2009-2 (requiring lawyer to identify her client and make clear adversity between her client and a self-represented adversary where it appeared that the self-represented party misunderstood the lawyer's role); *see also Arons v. Jutkowitz*, 9 N.Y.3d at 410 ("[W]e assume that attorneys would make their identity and interest known to interviewees and comport themselves ethically.")(quotations, alterations and citations omitted).

[23] Rule 3.3, Comment [12].

[24] N.Y. State 728 (2000) (concluding that DR 7-104 (A)(2) did not prohibit municipality's lawyer from advising pro se civil claimant of risk of self-incrimination); *accord* N.Y. State 477 (1977)(executor's lawyer ethically permitted to advise surviving spouse of right of

that she has no obligation to speak with an adversary and should consider consulting her own counsel falls squarely within this exception. It informs the unrepresented witness of an indisputable legal conclusion that can assist her in determining whether to consult a lawyer.[25]

The Rules also do not prohibit a lawyer from asking an unrepresented witness to notify her in the event the witness is contacted by the lawyer's adversary. So long as the lawyer does not suggest that the witness must comply with this request, we believe it does not unduly pressure the witness, especially when accompanied by the suggestion that the witness consider retaining her own counsel.

CONCLUSION

Our adversary system provides equal access to evidence and liberal discovery for all parties. But these rules do not prohibit lawyers from asking unrepresented witnesses to refrain from voluntarily providing information to an adversary. The Rules *do* prohibit lawyers from assisting witnesses in avoiding court process, intimidating witnesses or bribing them. These protections are sufficient to ensure that a lawyer's adversary will have adequate access to sources of proof through formal discovery procedures. Consequently, permitting lawyers to ask witnesses to refrain from cooperating with the lawyer's adversary does not prejudice the administration of justice. Lawyers may also ethically inform unrepresented witnesses that they have no obligation to cooperate with a lawyer's adversary, and suggest that witnesses consider retaining their own counsel.

election); N.Y. County 708 (1995) (defendant's lawyer could identify for plaintiff legal issues as to which independent lawyer could provide advice).

[25] *See* ABCNY Formal Op. 2009-2 (a lawyer "may, but need not, provide certain incontrovertible factual or legal information to the self-represented party.").

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2009-6

AGGREGATE SETTLEMENTS

TOPIC: Multiple Representations; Aggregate Settlements; Advance Waivers

DIGEST: Rule 1.2(a) requires lawyers to "abide by a client's decision whether to settle a matter." Rule 1.8(g) further addresses a lawyer's obligations with respect to aggregate settlements on behalf of multiple, jointly represented clients. Under Rule 1.8(g), absent court approval, a lawyer may not conclude an aggregate settlement without first obtaining the informed written consent of each settling client. A lawyer may not ask clients to waive their rights under Rule 1.8(g) or to bind themselves to an aggregate settlement approved by some, but not all, of the affected clients.

RULES: 1.2(a), 1.7, 1.8(g)

QUESTION: May a client waive the right to approve the terms of an aggregate settlement negotiated on her behalf by her counsel?

OPINION

I. Rule 1.8(g): The Aggregate Settlement Rule

Rule 1.8 of the New York Rules of Professional Conduct (the "Rules") addresses conflicts that may arise between or among current clients of a lawyer or law firm. Rule 1.8(g) in particular focuses on conflicts presented when a lawyer seeks to settle disputes on behalf of multiple, jointly represented clients pursuant to a single, aggregate settlement agreement. The Rule provides as follows:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims involved and of the participation of each person in the settlement. [1]

[1] Rule 1.8(g) is substantially identical to Disciplinary Rule 5-106, the predecessor rule under the Code of Professional Responsibility. The most significant difference between the rules is the addition of the language "absent court approval" to Rule 1.8(g). In contrast to DR 5-106, Rule 1.8(g) obviates the need for client consent to an aggregate settlement in the event it is approved by a court. Absent court approval, Rule 1.8(g) requires the lawyer to obtain "informed consent in writing signed by the

The term "aggregate settlement" is not defined in the Rules, but has been defined by the American Bar Association (the "ABA") as follows:

> An aggregate settlement or aggregated agreement occurs when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas. It is not necessary that all of the lawyer's clients facing criminal charges, having claims against the same parties, or having defenses against the same claims, participate in the matter's resolution for it to be an aggregate settlement or an aggregated settlement. The rule applies when any two or more clients consent to have their matters resolved together.

ABA Formal Op. 06-438 (2006).

The purpose of Rule 1.8(g) is to "deter[] lawyers from favoring one client over another in settlement negotiations by requiring that lawyers reveal to all clients information relevant to the proposed settlement. That information empowers each client to withhold consent and thus prevent the lawyer from subordinating the interest of the client to those of another client or to those of the lawyer." ABA Formal Op. 06-438.

ABA Formal Opinion 06-438 provides guidance regarding the disclosures to be made by a lawyer when seeking informed consent in compliance with Rule 1.8(g). The recommended disclosures include:

- The total amount of the aggregate settlement.
- A description of all claims, defenses, or pleas covered by the settlement.
- The terms of each client's participation in the settlement, including the settlement consideration to be contributed and/or received by each client.
- The total fees and costs to be paid to the lawyer pursuant to the settlement if they will be paid, in whole or in part, from settlement proceeds or by an opposing party or parties.
- The method for apportioning fees and costs among clients.

Rule 1.8(g) supplements the provisions of Rule 1.7 addressing the general requirements for undertaking the concurrent representation of multiple clients. Pursuant to both rules, prior to undertaking the representation, a lawyer must disclose the risks attendant to the representation, including the potential conflicts that could arise when seeking to settle a contested matter on behalf of multiple clients. As explained in the ABA's *Ethical Guidelines for Settlement Negotiations* (2002): "[e]ven when the lawyer's initial conclusion that multiple clients can be represented was well-founded . . . consideration later of possible settlement options can generate circumstances where interests emerge as

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client." DR 5-106 had no writing requirement, mandating only consent after full disclosure.

potentially divergent, if not actually conflicting. Conflicts can arise from differences among clients in the strength of their positions or the level of their interests in settlement, or from proposals to treat clients in different ways or to treat differently positions clients in the same way." *Id.* § 3.5. A lawyer must discuss these risks and potential conflicts with each prospective client to obtain the informed consent required to proceed with the joint representation. Rules 1.7 and 1.8(g) thus work in tandem to ensure that clients are fully informed of the potential conflicts that could arise from joint representation, including the conflicts that could arise in connection with the negotiation and acceptance of aggregate settlements.

II. The Informed Consent Requirement of the Aggregate Settlement Rule Cannot Be Waived.

The question we address is the following: assuming informed consent at the outset of a joint representation of multiple clients, may the clients delegate complete authority to their lawyer to negotiate and bind them collectively to a settlement, thereby waiving any right to review and approve the settlement before it is concluded by counsel. A related question is whether the joint clients may agree to be bound collectively to any aggregate settlement approved by a specified number or percentage of those clients, following counsel's disclosure of the terms of the proposed settlement.

A number of commentators have argued that the prohibition of advance waivers in this context unnecessarily impedes multiparty settlements.[2] For example, they note that when a lawyer negotiates an aggregate settlement on behalf of 50, 100 or 1000 clients, it may be logistically difficult for the lawyer to make the requisite disclosures to, and obtain the written consent of, each and every client. They further observe that if each client has the right to veto the entire settlement, aggregate settlements rarely could be concluded. Critics of Rule 1.8(g) therefore argue that clients should be permitted to provide advance waivers and to grant their lawyer either unilateral authority to negotiate and conclude an aggregate settlement or authority to bind all jointly represented clients if a majority consents to the settlement.[3]

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[2] "[T]he academic disagreements concerning [the aggregate settlement rule's] merit and proper application have significant practical consequences for attorneys and clients. They make litigation more expensive and riskier than it ought to be because they prevent plaintiffs' attorneys from confidently taking advantage of opportunities to reduce costs. They expose excellent lawyers and shoddy lawyers alike to charges of having breached the duty of loyalty and to the threat of forfeiting fees. Ultimately, clients pay the bill for this. To cover or reduce their exposure, lawyers have to stay away from group lawsuits or charge higher fees. Both options make clients worse off." Lynn A. Baker and Charles Silver, Responses to the Conference: *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. Tex. L. Rev. 227, 246 (1999)(footnote omitted); *see also* Charles Silver and Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 Wake Forest L. Rev. 733 (1997).

[3] At its annual meeting in May 2009, the American Law Institute approved the final draft of *Principles of the Law of Aggregate Litigation*. Under Section 3.17(b) of the

This view, however, has been rejected both by most of the courts and ethics committees that have addressed the issue. The majority view, and the view of this Committee, is that a client may not waive her individual right to approve the terms of a proposed aggregate settlement that would, if accepted, bind her along with other parties jointly represented by the same counsel.

Our conclusion is based on several factors. First, neither the text of Rule 1.8(g) nor the comments to the Rule provide for waiver of the informed consent requirement. The provisions of Rule 1.8(g) are unequivocal and unqualified, and there appears to be no compelling need to permit waiver of this requirement, which protects clients against inadequate settlements and unfair allocations. The importance of this protection outweighs any "burden" a lawyer may face in handling the logistics of obtaining the requisite consent of all jointly represented clients. It also outweighs the benefit of making it easier for joint clients to conclude an aggregate settlement by agreeing to be bound by a majority vote.

In that regard, Rule 1.8(g) is of a piece with other Rules creating non-waivable rights for the protection of clients. For example, Rule 1.2(c) provides that lawyers may not limit the scope of representation, even with the client's informed consent, unless the limitation is reasonable. Rule 1.5(a) flatly prohibits lawyers from charging "excessive" legal fees. Rule 1.7(b) prohibits lawyers from representing clients with conflicting interests, unless the lawyer reasonably believes she will be able to provide competent and diligent representation to each client; the Rule also flatly prohibits a lawyer from asserting a claim by one client against another client represented by the same lawyer in the same litigation.

Moreover, because of the dynamics of litigation and the settlement process, "informed consent" to an advance waiver is virtually a contradiction in terms. Comment 22 to Rule 1.7 states that "[t]he effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails." In most cases, at the outset of an engagement, and indeed at any point prior to an actual settlement negotiation, it may be difficult, if not impossible, for a lawyer to possess, and therefore disclose, enough information to enable the client to understand the risks of waiving the right to approve a settlement following disclosure of all material facts and terms. The client therefore would be in no position to intelligently evaluate the waiver of the right.

The authorities are in accord. The detailed disclosures required by Rule 1.8(g) "must be made in the context of a specific offer or demand. Accordingly, the informed consent required by the rule generally cannot be obtained in advance of the formulation of such an offer or demand." ABA Formal Op. 06-438. As stated in the ABA's *Ethical Guidelines for Settlement Negotiations*, "[c]onditioning agreement to representation on a

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draft, subject to certain conditions including informed consent, a plaintiff may "be bound by a substantial majority vote of all claimants concerning an aggregate-settlement proposal."

waiver of the client's right to approve a future settlement would fundamentally and impermissibly alter the lawyer-client relationship and deprive the client of ultimate control of the litigation." *Id.*§ 3.2.3. committee notes.

Courts also have invalidated advance waivers of the right to approve aggregate settlements. For example, in *In re Hoffman*, 883 So. 2d 425 (La. 2004), the Louisiana Supreme Court, referencing Rule 1.8(g), held that "[u]nanimous informed consent by the lawyer's clients is required before an aggregate settlement may be finalized. The requirement of informed consent cannot be avoided by obtaining client consent in advance of a future decision by the attorney or by a majority of the clients about the merits of an aggregate settlement." *Id.* at 433(footnote and citation omitted). In *Tax Authority, Inc. v Jackson Hewitt, Inc.*, 187 N.J. 4, 898 A.2d 512 (2006), the New Jersey Supreme Court ruled that Rule 1.8(g) "forbids an attorney from obtaining consent in advance from multiple clients that each will abide by a majority decision in respect of an aggregate settlement. Before a client may be bound by a settlement, he or she must have knowledge of the terms of the settlement and agree to them." *Id.* at 21, 898 A.2d at 522. And in *Hayes v. Eagle-Picher Industries, Inc.*, 513 F.2d 892 (10th Cir. 1985), the Tenth Circuit Court of Appeals invalidated an agreement whereby multiple clients represented by the same attorney agreed to allow a majority to govern the rights of the minority under an aggregate settlement. Referring to the agreement, which was entered prior to the date of settlement negotiations, the court ruled: "[i]t is difficult to see how this could be binding on non-consenting plaintiffs as of the time of the proposed settlement and in the light of the terms agreed on. In other words, it would seem that plaintiffs would have the right to agree or refuse to agree once the terms of the settlement were made known to them." *Id.* at 894; *see also Knisley v. City of Jacksonville*, 147 Ill. App. 3d 116, 497 N.E.2d 883, 100 Ill. Dec. 705 (1986).

CONCLUSION

To bind multiple clients jointly represented by the same lawyer, an aggregate settlement requires the informed written consent of each and every client. The requirement of individual informed consent may not be waived by any of the jointly represented clients.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2010

USE OF CLIENT ENGAGEMENT LETTERS TO AUTHORIZE THE RETURN OR DESTRUCTION OF CLIENT FILES AT THE CONCLUSION OF A MATTER

TOPIC: Agreements for the disposition of client files at the end of an engagement.

DIGEST: Retainer agreements and engagement letters may authorize a lawyer at the conclusion of a matter or engagement to return all client documents to the client or to discard some or all such documents, subject to certain exceptions.

RULES: 1.0(j), 1.15, 1.16(e)

QUESTION: May a lawyer and client at the outset of a representation agree to the disposition of the client's files upon conclusion of the engagement?

OPINION

Background

Lawyers routinely face questions regarding the disposition of client files upon completion of an engagement.1 In addressing these questions, ethics opinions have focused almost exclusively on an attorney's obligations absent an express agreement with, or directive from, the client. There appears to be little, if any, guidance regarding consensual arrangements for the final disposition of client files.

Plainly, upon termination of the attorney-client relationship, the client is "presumptively accord [ed] . . . full access" to the lawyer's files on a represented matter. *See Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 91 N.Y.2d 30, 34 (1997) (hereinafter, *Sage Realty*). And to provide that access, a "lawyer may simply deliver [the files] to the client" at the end of an engagement. ABCNY Formal Op. 1986-4. But if the client does not seek access or

makes no provision for delivery, her attorney may have an obligation to retain certain documents, although the lawyer need not permanently retain all files after an engagement is concluded. *See* N.Y. State 623 (1991) (citing N.Y. State 460 (1977) and ABA Informal Op. 1384 (1977)); *seealso* Restatement (Third) of Law: the Law Governing Lawyers § 46 (1998) (lawyers' obligation to take reasonable steps to preserve and safeguard documents relating to a representation of a former client does not require lawyers to preserve documents indefinitely).2 Nevertheless, over time, the burden of dealing with closed files may be substantial as the volume of paper and electronic data mounts, and the cost of storage increases. Lawyers understandably wish to minimize this burden and expense consistent with their obligations to their clients and former clients upon completion of a matter or engagement.

This opinion addresses the use of engagement letters to provide a practical and ethical solution for handling client files at the conclusion of a matter. We find that an attorney may include a provision in retainer agreements and engagement letters authorizing the lawyer at the conclusion of a matter or engagement to return all client documents to the client or to discard some or all such documents (other than original deeds, wills or similar documents with intrinsic value). Prior to discarding any documents, however, the attorney must take reasonable steps to preserve all documents that she has an obligation to retain or return to the client.

A Lawyer's Obligation to Retain Client Files

The New York Rules of Professional Conduct provide little guidance on what a lawyer must do with client files upon completion of a matter. Rule 1.16(e) addresses, among other things, the handling of client files, but only in the context of transferring an ongoing matter to another attorney. The rule provides that

> [u]pon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, *delivering to the client all papers and property to which the client is entitled*, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

N.Y. Prof'l Conduct R. 1.16(e) (2009) (emphasis added).

Other than Rule 1.16(e), there are no Rules specifically applicable to the retention or disposition of client documents.3 Nevertheless, prior ethics opinions and case law establish that attorneys may have continuing obligations with respect to documents in closed client files depending on the nature and contents of the documents in question. *See, e.g.*, *Sage Realty*, 91 N.Y.2d 30 (1997); ABCNY Formal Op. 2008-1; ABCNY Formal Op. 1986-4; N.Y. State 460 (1977); N.Y. State 623 (1991); D.C. Bar Op. 283 (1998). These authorities categorize client

documents as follows: *Category 1*: documents with intrinsic value or those that directly affect property rights such as wills, deeds, or negotiable instruments. *See* D.C. Bar Op. 283 (1998). *Category 2*: documents that a lawyer knows or should know may still be necessary or useful to the client, perhaps in the assertion of a defense in a matter for which the applicable limitations period has not expired. *See* N.Y. State 460 (1977). *Category 3*: documents that need not be returned to the client because they "would furnish no useful purpose in serving the client's present needs for legal advice," *Sage Realty*, 91 N.Y.2d at 36, or are "intended for internal law office review and use." *Id.* at 37.

III The Use of Engagement Letters to Specify the Disposition of a Client's File Upon the Conclusion of a Matter

The foregoing categories provide a useful framework when drafting a provision in an engagement letter governing the disposition of a client's file at the end of a matter. Category 1 documents must be preserved or returned to the client, unless the client specifically directs a different disposition. In contrast, there is no obligation to preserve Category 3 documents. Consequently, an engagement letter may provide for their destruction at the end of the engagement, although express permission of the client may not be required. *See* N.Y. State 623 (1991) (documents belonging to the attorney may immediately be destroyed without consultation or notice, absent "extraordinary circumstances manifesting a client's clear and present need for such documents.").

With regard to documents in Category 2, there must be an analysis to determine the appropriate disposition of this material. For example, the lawyer needs to consider whether the document in question is one a client foreseeably may need for pursuit of a claim following completion of the engagement, or whether no such need exists because the document relates solely to a claim fully and finally resolved through litigation. This determination, however, cannot in all cases be made prospectively, *i.e.*, at the beginning of the engagement. At that juncture, the attorney may not have seen or be able to anticipate all of the documents that will become part of the client file, much less anticipate the need, if any, the client may have for such documents at the end of the matter. The determination, therefore, most likely will have to be made when the representation has ended, before any such documents are discarded. And the client may authorize the lawyer at the outset of the engagement to undertake a final review of the closed file and determine in her sole discretion which of the Category 2 documents, if any, should be retained by the lawyer or returned to the client.

An engagement letter therefore may stipulate to the procedure governing disposition of client documents upon conclusion of a matter. In that connection, with client consent, the engagement letter may authorize an attorney to take one of the following steps after the file is closed: discard all documents in the file (apart from Category 1 documents), return all documents to the client, or return only those documents requested by the client and discard the balance of the file. This approach has support in a number of ethics opinions finding or

suggesting that a lawyer and her client may agree on the final disposition of the client's documents at the outset of an engagement. *See* ABCNY Formal Op. 2008-1 (suggesting the use of engagement letters to define obligations regarding preservation of e-data at the conclusion of the matter); N.Y. State 623; Ariz. State Bar Op. 08-02 ("[a] lawyer *may* fulfill the lawyer's ethical obligations [regarding file retention] by tendering the entire file to the client at the termination of the representation") (italics in original); Cal. State Bar Standing Comm. On Prof'l Responsibility & Conduct, Formal Op. 2001-57 (stating that written fee agreements may provide "that following the termination of the representation the contents of the file [excluding Category 1 documents] may be destroyed without review at the end of a specified and reasonable period of time, unless the client has requested delivery of the files to the client"); D. C. Bar Op. 283 (retainer agreement may provide for the immediate delivery, temporary storage, or immediate destruction of files following completion of the representation).4

This approach raises the question of whether it is permissible to agree in advance to the disposition of Category 2 documents at a time when it may be difficult, if not impossible, to fully foresee the client's need, if any, for any particular document(s) after the matter has been concluded. We believe that such an agreement is permissible under the Rules provided that at the outset of the engagement, the lawyer obtains the informed consent of the client.5 As we previously have noted, "a client's sophistication is an important determinant of the degree of disclosure required to obtain informed consent . . . " ABCNY Formal Op. 2008-2. Thus, depending on the sophistication of the client and the other pertinent circumstances affecting the representation, to obtain informed consent, the lawyer may need to explain to her client the likely categories of documents anticipated to comprise the file, the lawyer's obligation to retain or return Category 1 documents, the lawyer's obligation to identify and retain or return documents the lawyer knows the client will need following completion of a matter or engagement, and the risk that the lawyer may discard certain documents that may prove useful to the client in light of developments occurring only after the documents have been discarded.

We address two additional practical questions. First, what must a lawyer do at the end of a matter if she is directed by her client to discard the entire file (including Category 1 and 2 documents), even after she has advised the client to retain some or all of the documents? In such circumstances, the lawyer is obligated to provide competent advice on the matter and to follow the client's instructions regarding the pursuit of any lawful course of action: "once the client is fully informed (taking into consideration the client's level of sophistication) as to the legal consequences" of the decision, the lawyer should abide by the client's instruction. N.Y. State 713 (1999) (lawyer should comply with client's instructions so long as fully informed and client is not directing lawyer to engage in illegal activity).

Second, there may be instances where the lawyer is unable to locate her client at the conclusion of an engagement, precluding the lawyer from returning files as directed by the client. In such circumstances, prudence will dictate that the lawyer retain Category 1 and 2

documents for some period of time. This approach has been adopted in a number of ethics opinions from other jurisdictions, some of which prescribe the length of time that such files should be retained. *See, e.g.*, Conn. Bar Ass'n Informal Op. 98-23 (1998) (retain Category 1 records for "as long as is practicable"); D.C. Bar Op. 283 (five year retention period beginning at time of termination); Ala. Bar Op. 93-10 (1993) (six year retention period). Special circumstances may require a longer preservation period than others, including for example, representations involving clients who were minors during a period of the engagement or matters involving estate planning.

Below, we include a sample engagement letter provision, but the facts and circumstances of any particular engagement may require that it be modified.

VI Sample Engagement Provision For Disposition of Files at the Termination of the Engagement

> Once our engagement in this matter ends, we will send you a written notice advising you that this engagement has concluded. You may thereafter direct us to return, retain or discard some or all of the documents pertaining to the engagement. If you do not respond to the notice within sixty (60) days, you agree and understand that any materials left with us after the engagement ends may be retained or destroyed at our discretion. Notwithstanding the foregoing, and unless you instruct us otherwise, we will return and/or preserve any original wills, deeds, contracts, promissory notes or other similar documents, and any documents we know or believe you will need to retain to enforce your rights or to bring or defend claims. You should understand that "materials" include paper files as well as information in other mediums of storage including voicemail, email, printer files, copier files, facsimiles, dictation recordings, video files, and other formats. We reserve the right to make, at our expense, certain copies of all documents generated or received by us in the course of our representation. When you request copies of documents from us, copies that we generate will be made at your expense. We will maintain the confidentiality of all documents throughout this process.
>
> Our own files pertaining to the matter will be retained by the firm (as opposed to being sent to you) or destroyed. These firm files include, for example, firm administrative records, time and expense reports, personnel and staffing materials, and credit and account records. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any documents or other materials retained by us within a reasonable time after the termination of the engagement.

Some additional caveats should be noted here:

1. At the end of the engagement, the attorney and firm should develop a process whereby the attorney and other assistants at the firm cull through the various documents to ensure that Category 1 and 2 documents are reviewed and preserved or, where authorized and appropriate, discarded.
2. While not required, it may be prudent for the lawyer, when sending a closure letter advising that the engagement is concluded, to describe the category of documents contained in her files that will be discarded. From a risk management standpoint, use of closure letters that more specifically describe what steps are to be taken with regard to a client's files may be the best practice.
3. A lawyer may charge the client "customary fee schedules" for gathering and producing records to a client.6 ABCNY Formal Op. 2008-1 applied this principle to e-data retrieval and production, finding that the reasonableness of such fees will depend on the circumstances, including the need for engaging third parties to assist in the work and the accessibility of the e-data. Lawyers should use their good judgment as to what a reasonable, customary fee is and disclose the charges to the client in an engagement letter.
4. An attorney must ensure that the client's confidences are maintained during this process, including the use of third-party services regarding e-data and the destruction of e-data.
5. If a client can no longer be found, reasonable efforts should be made to locate the client to return the documents, as previously requested by the client.
6. An attorney should keep a record describing the disposal of any client documents for a reasonable period of time.

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1 Lawyers have sought to address these questions by, among other things, preparing and implementing records retention and destruction policies ("RRD policies"). This Opinion does not address the ethical, legal and other issues presented in drafting RRD policies. We note, however, that there are a number of helpful guides regarding the proper construction and implementation of those policies. *See, e.g.*, Lee R. Nemchek, *Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools*, 93 L. Libr. J. 7 (2001).

2 This Opinion addresses ethical considerations bearing on the disposition of client files. It does not address obligations to retain files imposed by applicable law or other specific circumstances, including statutory obligations imposed upon certain financial institutions, requirements to preserve electronic and other data upon notice of a potential claim, or retention periods imposed by an attorney's malpractice insurance carriers.

3 Certain local court rules require attorneys to keep copies of all files for seven years in personal injury, property damage, and wrongful death cases. *See, e.g.*, N.Y. Ct. App. 1st Dept.

R. 603.7(f) (2009). And New York Rule of Professional Conduct 1.15 provides detailed requirements for the preservation of an attorney's own financial records.

4 A number of ethics opinions and other authorities have observed that a written arrangement with the client may help define the attorney's obligations regarding the handling of client files during and at the end of the representation. *See, e.g.*, Pa. Bar Ass'n Comm. on Legal Ethics, Op. 2007-100, at 5 (2007); Neb. Advisory Op. 2001.3 (the scope of the "file" to which the client is entitled depends in part on the agreement between the client and the lawyer and engagement letters/fee agreements can specify responsibilities for file retention and copying costs, but any such terms must be reasonable and not violate Rules of Professional Conduct); *seealso* John Allen, *Focus on Professional Responsibility: Ownership of Lawyer's Files About Client Representations—Who Gets the "Original"? Who Pays for the Copies?*, 79 Mich. B. J. 1062 (2000) (most difficult issues regarding the scope of the file, rights of access to the file, and allocation of copying costs can be specified in the engagement letter; providing text of suggested sample engagement letter).

5 Rule 1.0(j) of the New York Rules of Professional Conduct provides that "'[i]nformed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives."

6 *Sage Realty*, 91 N.Y.2d at 38.

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2010-2

OBTAINING EVIDENCE FROM SOCIAL NETWORKING WEBSITES

DIGEST: A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent.

RULES: 4.1(a), 5.3(c)(1), 8.4(a) & (c)

QUESTION: May a lawyer, either directly or through an agent, contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation?

OPINION

Lawyers increasingly have turned to social networking sites, such as Facebook, Twitter and YouTube, as potential sources of evidence for use in litigation.[1] In light of the information regularly found on these sites, it is not difficult to envision a matrimonial matter in which allegations of infidelity may be substantiated in whole or part by

1 Social networks are internet-based communities that individuals use to communicate with each other and view and exchange information, including photographs, digital recordings and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to employ and may limit those who view their profile page to "friends" – those who have specifically sent a computerized request to view their profile page which the user has accepted. Examples of currently popular social networks include Facebook, Twitter, MySpace and LinkedIn.

postings on a Facebook wall.[2] Nor is it hard to imagine a copyright infringement case that turns largely on the postings of certain allegedly pirated videos on YouTube. The potential availability of helpful evidence on these internet-based sources makes them an attractive new weapon in a lawyer's arsenal of formal and informal discovery devices.[3] The prevalence of these and other social networking websites, and the potential benefits of accessing them to obtain evidence, present ethical challenges for attorneys navigating these virtual worlds.

In this opinion, we address the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively "deceptive" behavior to "friend" potential witnesses. We do so in light of, among other things, the Court of Appeals' oft-cited policy in favor of informal discovery. See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 372, 559 N.Y.S.2d 493, 497 (1990) ("[T]he Appellate Division's blanket rule closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes."); Muriel, Siebert & Co. v. Intuit Inc., 8 N.Y.3d 506, 511, 836 N.Y.S.2d 527, 530 (2007) ("the importance of informal discovery underlies our holding here"). It would be inconsistent with this policy to flatly prohibit lawyers from engaging in any and all contact with users of social networking sites. Consistent with the policy, we conclude that an attorney or her agent may use her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request.[4] While there are ethical boundaries to such "friending," in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements. See, e.g., id., 8 N.Y.3d at 512, 836 N.Y.S.2d at 530 ("Counsel must still conform to all applicable ethical standards when conducting such [ex parte] interviews [with opposing party's former employee]." (citations omitted)).

The potential ethical pitfalls associated with social networking sites arise in part from the informality of communications on the web. In that connection, in seeking

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2 See, e.g. , Stephanie Chen, Divorce attorneys catching cheaters on Facebook, June 1, 2010, http://www.cnn.com/2010/TECH/social.media/06/01/facebook.divorce.lawyers/index.html?hpt=C2.

3 See, e.g., Bass ex rel. Bass v. Miss Porter's School, No. 3:08cv01807, 2009 WL 3724968, at *1-2 (D. Conn. Oct. 27, 2009).

4 The communications of a lawyer and her agents with parties known to be represented by counsel are governed by Rule 4.2, which prohibits such communications unless the prior consent of the party's lawyer is obtained or the conduct is authorized by law. N.Y. Prof'l Conduct R. 4.2. The term "party" is generally interpreted broadly to include "represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties." N.Y. State 735 (2001). Cf. N.Y. State 843 (2010)(lawyers may access public pages of social networking websites maintained by any person, including represented parties).

access to an individual's personal information, it may be easier to deceive an individual in the virtual world than in the real world. For example, if a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness's home, view the witness's photographs and video files, learn the witness's relationship status, religious views and date of birth, and review the witness's personal diary, the witness almost certainly would slam the door shut and perhaps even call the police.

In contrast, in the "virtual" world, the same stranger is more likely to be able to gain admission to an individual's personal webpage and have unfettered access to most, if not all, of the foregoing information. Using publicly-available information, an attorney or her investigator could easily create a false Facebook profile listing schools, hobbies, interests, or other background information likely to be of interest to a targeted witness. After creating the profile, the attorney or investigator could use it to make a "friend request" falsely portraying the attorney or investigator as the witness's long lost classmate, prospective employer, or friend of a friend. Many casual social network users might accept such a "friend request" or even one less tailored to the background and interests of the witness. Similarly, an investigator could e-mail a YouTube account holder, falsely touting a recent digital posting of potential interest as a hook to ask to subscribe to the account holder's "channel" and view all of her digital postings. By making the "friend request" or a request for access to a YouTube "channel," the investigator could obtain instant access to everything the user has posted and will post in the future. In each of these instances, the "virtual" inquiries likely have a much greater chance of success than if the attorney or investigator made them in person and faced the prospect of follow-up questions regarding her identity and intentions. The protocol on-line, however, is more limited both in substance and in practice. Despite the common sense admonition not to "open the door" to strangers, social networking users often do just that with a click of the mouse.

Under the New York Rules of Professional Conduct (the "Rules"), an attorney and those in her employ are prohibited from engaging in this type of conduct. The applicable restrictions are found in Rules 4.1 and 8.4(c). The latter provides that "[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." N.Y. Prof'l Conduct R. 8.4(c) (2010). And Rule 4.1 states that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." Id. 4.1. We believe these Rules are violated whenever an attorney "friends" an individual under false pretenses to obtain evidence from a social networking website.

For purposes of this analysis, it does not matter whether the lawyer employs an agent, such as an investigator, to engage in the ruse. As provided by Rule 8.4(a), "[a] lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Id. 8.4(a). Consequently, absent some exception to the Rules, a lawyer's investigator or other agent also may not use deception to obtain information from the user of a social networking website. See id. Rule 5.3(b)(1) ("A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if . . . the

lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it . . . .").

We are aware of ethics opinions that find that deception may be permissible in rare instances when it appears that no other option is available to obtain key evidence. See N.Y. County 737 (2007) (requiring, for use of dissemblance, that "the evidence sought is not reasonably and readily obtainable through other lawful means"); see also ABCNY Formal Op. 2003-02 (justifying limited use of undisclosed taping of telephone conversations to achieve a greater societal good where evidence would not otherwise be available if lawyer disclosed taping). Whatever the utility and ethical grounding of these limited exceptions—a question we do not address here—they are, at least in most situations, inapplicable to social networking websites. Because non-deceptive means of communication ordinarily are available to obtain information on a social networking page—through ordinary discovery of the targeted individual or of the social networking sites themselves—trickery cannot be justified as a necessary last resort.[5] For this reason we conclude that lawyers may not use or cause others to use deception in this context.

Rather than engage in "trickery," lawyers can—and should—seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful "friending" of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line.[6]

Accordingly, a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.

September 2010

5 Although a question of law beyond the scope of our reach, the Stored Communications Act, 18 U.S.C. § 2701(a)(1) et seq. and the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq., among others, raise questions as to whether certain information is discoverable directly from third-party service providers such as Facebook. Counsel, of course, must ensure that her contemplated discovery comports with applicable law.

6 While we recognize the importance of informal discovery, we believe a lawyer or her agent crosses an ethical line when she falsely identifies herself in a "friend request". See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 376, 559 N.Y.S.2d 493, 499 (1990) (permitting ex parte communications with certain employees); Muriel Siebert, 8 N.Y.3d at 511, 836 N.Y.S.2d at 530 ("[T]he importance of informal discovery underlie[s] our holding here that, so long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct ex parte interviews of an opposing party's former employee.").

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