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New York Ethics Update 2020

August 28, 2020

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New York Practice Update 2020

August 28, 2020

Agenda

9:00am – 9:55am	Rules for the Registration of In-House Counsel (Part 522) Communicating with Represented and Unrepresented Parties and Persons ABA Formal Opinion 479: The "Generally Known" Exception of Former-Client Confidentiality (December 17, 2017) Conduct Before a Tribunal New York Adopts Rules Governing Multijurisdictional Practice Judiciary Law Section 470
9:55am – 10:00am	Break
10:00am – 10:55am	Duties to Prospective Clients Issues with Current Client Conflicts Issues with Former Client Conflicts The Rule of Imputed Disqualification 2020 Amendments to New York's Rule 1.8(e) and ABA Rule 1.8(e), Compared Ethics Issues in Social Media and Electronic Disclosure Fee Agreements New York State Bar Exam Replaced by Uniform Bar Exam, But Decision Now Under Reconsideration
10:55am – 11:00am	Break
11:00am – 12:00pm	Misconduct Under Rule 8.4 Inadvertent Disclosure Amendments to New York rule 7.5: Professional notices, letterheads and names New Standards of Civility Adopted in January 2020 Revised Statement of Client's Rights

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SPEAKER BIOGRAPHY

PATRICK M. CONNORS is the Albert and Angela Farone Distinguished Professor in New York Civil Practice at Albany Law School where he has taught New York Practice and Legal Ethics since 2000. Commencing with the January 2013 supplement, Professor Connors became the author for the treatise Siegel, New York Practice. The publication's sixth edition, "David D. Siegel & Patrick M. Connors, New York Practice (6th ed. 2018)," was released in March, 2018. The treatise has been cited in thousands of reported decisions and has been called "The Bible" for litigation in New York State courts.

He received his B.A. degree from Georgetown University and his J.D. degree from St. John's Law School, where he was an editor of the Law Review and research assistant to Professor David D. Siegel. Upon graduation from St. John's in 1988, Professor Connors served as a personal law clerk to Judge Richard D. Simons of the New York Court of Appeals until 1991. From 1991 until May of 2000 he was an associate and then member of the litigation department at Hancock & Estabrook, LLP, in Syracuse, New York.

Professor Connors is also the author of the McKinney's Practice Commentaries for CPLR Article 22, Stay, Motions, Orders and Mandates, Article 23, Subpoenas, Oaths and Affirmations, Article 30, Remedies and Pleading, and Article 31, Disclosure. He also authored the Practice Commentaries for the former New York Rules of Professional Conduct and several articles in the Surrogate's Court Procedure Act. He is currently an author of the New York Practice column and the annual Court of Appeals Roundup on New York Civil Practice, which are published in the New York Law Journal. From 1992 through 2003, he was a Reporter for the Committee on New York Pattern Jury Instructions ("PJI"), the panel of New York State Supreme Court Justices that drafts and oversees the frequent revisions of the standard jury charges in civil cases. His publications have been cited in hundreds of reported cases.

He was a member of the New York State Bar Association's Committee on Professional Ethics from 1996 through 2016. He served on the New York State Attorney Grievance Committee for the Fifth Judicial District from 1997 until 2000. He was the Reporter for the New York State Bar Association's Special Committee on the Code of Judicial Conduct, which published a report recommending substantial amendments to New York's Code of Judicial Conduct. He was also the Reporter for the New York State Bar Association's Task Force on Non-lawyer Ownership of Law Firms. He is a member of the Office of Court Administration's Advisory Committee on Civil Practice and served as a member of the New York State Bar Association's CPLR Committee from 2003 through 2007.

Professor Connors is a frequent lecturer at continuing legal education seminars on recent developments in New York Practice, professional ethics and legal malpractice. He has also served as an expert witness and consultant on issues pertaining to attorney ethics, legal malpractice, and civil procedure.

ETHICS UPDATE SUMMER 2020
ALBANY LAW SCHOOL SUMMER "IN SARATOGA" SERIES

AUGUST 28, 2020

PATRICK M. CONNORS

ALBERT AND ANGELA FARONE DISTINGUISHED PROFESSOR IN NEW YORK CIVIL PRACTICE

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I. Rules for the Registration of In-House Counsel (Part 522)

New York Rule 5.5(b) states that "[a] lawyer shall not aid a nonlawyer in the unauthorized practice of law."

The Court of Appeals amended its Rules for the Registration of In-House Counsel (Part 522), effective April 15, 2020. The amendments permit part-time in-house counsel practice; clarify that there is no New York residency requirement under Part 522; expand the grace period for registering as in-house counsel; authorize a 90-day period to cure any past failures to register as in-house counsel; eliminate the reciprocity requirement for in-house counsel registration by foreign attorneys; eliminate the requirement that foreign attorneys be and remain members in good standing of their home jurisdiction bars if such membership is unavailable to in-house counsel, as is the case in a number of civil law jurisdictions; permit foreign attorneys to apply for registration as in-house counsel on the basis of affidavits if their home jurisdiction is unable to provide proof of good standing because of a lack of structure of legal oversight of in-house counsel in that jurisdiction; and permit foreign attorneys who are registered as in-house counsel to provide pro bono services under the direct supervision of a duly registered New York attorney.

The new rules can be found here:

https://www.nycourts.gov/ctapps/news/nottobar/nottobar03302020.pdf

II. Communicating With Represented and Unrepresented Parties and Persons

New York 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.

(c) A lawyer who is acting pro se or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel 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] Paragraph (a) applies to communications with any party 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] [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 party applies only in circumstances where the lawyer knows that the party 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 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.

[12A] When a lawyer is proceeding pro se in a matter, or is being represented by his or her own counsel with respect to a matter, the lawyer's direct communications with a counterparty are subject to the no-contact rule, Rule 4.2. Unless authorized by law, the lawyer must not engage in direct communications with a party the lawyer knows to be represented by counsel without either (i) securing the prior consent of the represented party's counsel under Rule 4.2(a), or (ii) providing opposing counsel with reasonable advance notice that such communications will be taking place.

* * *

New York 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 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.

* * *

In NYSBA 1124 (2017), the New York State Bar Association Committee on Professional Ethics opined that a lawyer may ethically communicate with opposing counsel in any manner lawyer desires regardless of request of opposing counsel. Nonetheless, opposing counsel is not required to respond to the lawyer's chosen method. With the prior consent of opposing counsel, a lawyer may (but is not required to) send to opposing counsel's client copies of written communications to opposing counsel.

* * *

III. ABA Formal Opinion 479: The "Generally Known" Exception to Former-Client Confidentiality (December 17, 2017)

Digest: A lawyer's duty of confidentiality extends to former clients. Under Model Rule of Professional Conduct 1.9(c), a lawyer may not use information relating to the representation of a former client to the former client's disadvantage without informed consent, or except as otherwise permitted or required by the Rules of Professional Conduct, unless the information has become "generally known."

The "generally known" exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade. Information is not "generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.

* * *

Rule 1.6(a) of the New York Rules of Professional Conduct provides:

> (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.

* * *

Comment 4A thereto provides:

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 is not "generally known" simply because it is in the public domain or available in a public file.

Rule 1.8(b) of the New York Rules of Professional Conduct provides:

(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.

Rule 1.9(c) of the New York Rules of Professional Conduct provides:

(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.
>
> * * *

In *Jamaica Pub. Serv. Co. v. AIU Ins. Co.*, 92 N.Y.2d 631, 684 N.Y.S.2d 459,707 N.E.2d 414 (N.Y. 1998), the New York Court of Appeals applied former DR 5-108(a)(2), the predecessor provision to Rule 1.9(c), and held:

> Unlike the confidentiality protections afforded a current client (see, Code of Professional Responsibility DR 4–101 [22 NYCRR 1200.19]), however, DR 5–108(A)(2) recognizes that an attorney may divulge "generally known" information about a former client. Here, we are satisfied that Samaan's first affidavit comfortably falls within that exception. Plaintiff correctly notes, and defendant does not controvert, that information regarding the interrelationship of AIG and its member companies was readily available in such public materials as trade periodicals and filings with State and Federal regulators. It was thus "generally known."

ABA Formal Opinion 479 quoted the following passage:

> [T]he phrase "generally known" means much more than publicly available or accessible. It means that the information has already received widespread publicity. For example, a lawyer working on a merger with a Fortune 500 company could not whisper a word about it during the pre-offer stages, but once the offer is made—for example, once AOL and Time Warner have announced their merger, and the Wall Street Journal has reported it on the front page, and the client has become a former client—then the lawyer may tell the world. After all, most of the world already knows. . . .[O]nly if an event gained considerable public notoriety should information about it ordinarily be considered "generally known."

ROY D. SIMON & NICOLE HYLAND, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 685 (2017)

The Opinion also noted that:

> under Massachusetts Rule of Professional Conduct 1.6(a), a lawyer generally is obligated to protect "confidential information relating to the representation of a client." MASS. RULES OF PROF'L CONDUCT R. 1.6(a) (2017). Confidential information, however, does not ordinarily include information that is generally known in the local community or in the trade, field or profession to which the information relates." *Id.* at cmt. 3A.

Finally, Formal Opinion 479 provided what it called "A Workable Definition of Generally Known under Model Rule 1.9(c)(1)":

> Consistent with the foregoing, the Committee's view is that information is generally known within the meaning of Model Rule 1.9(c)(1) if (a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession, or trade. Information may become widely recognized and thus generally known as a result of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media. With respect to category (b), information should be treated as generally known if it is announced, discussed, or identified in what reasonable members of the industry, profession, or trade would consider a leading print or online publication or other resource in the particular field. Information may be widely recognized within a former client's industry, profession, or trade without being widely recognized by the public. For example, if a former client is in the insurance industry, information about the former client that is widely recognized by others in the insurance industry should be considered generally known within the meaning of Model Rule 1.9(c)(1) even if the public at large is unaware of the information.

Unless information has become widely recognized by the public (for example by having achieved public notoriety), or within the former client's industry, profession, or trade, the fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes. Information that is publicly available is not necessarily generally known. Certainly, if information is publicly available but requires specialized knowledge or expertise to locate, it is not generally known within the meaning of Model Rule 1.9(c)(1).

* * *

Food for Thought: "Devices like Alexa or Google Home present "low-level" risks for confidentiality breaches, said speakers at an online ethics panel Saturday at the Association of Professional Responsibility Lawyers' annual meeting."

IV. Conduct Before a Tribunal

Rule 3.3, entitled "Conduct Before a Tribunal," provides:

(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.

* * *

New York State Bar Association Addresses Lawyer's Obligation to Take Reasonable Remedial Measures Under Rule 3.3

In New York State Bar Association Formal Opinion 1123 (2017), the Committee concluded:

> A divorce lawyer who learns that a client omitted a material asset in a sworn Statement of Net Worth has a duty to take reasonable remedial measures that are available, even after the conclusion of the proceeding. What measures are reasonable will depend on the facts and circumstances. They will begin with remonstrating with the former client to correct the Statement. If the client refuses, they may include withdrawing the lawyer's certification of the incomplete statement and withdrawing the statement. Disclosure of client confidences is required only "if necessary."…
>
> N.Y. City 2013-2 concludes that Rule 3.3(a)(3) imposes a duty to take remedial action either before the tribunal to which the false evidence was presented, or before a tribunal that could review the decision of the tribunal to which the false evidence was submitted, as long as the tribunal is in a position to consider the new evidence and provide a basis for reopening the matter and/or amending, modifying or vacating the prior judgment. See also N.Y. City 2013-2, note 8 (discussing the bases for reopening a judgment under CPLR 5015(a)).

Court Reminds Lawyer of Obligation to "Reveal Controlling Legal Authority Known to the Lawyer to be Directly Adverse to the Position of the Client and Not Disclosed by Opposing Counsel"

In *Mazario v. Snitow Kanfer Holtzer & Millus LLP*, 2018 WL 6739091 (Sup. Ct., New York County 2018), the court cited to First Department caselaw in holding that:

> Defense counsel's reliance on a Second Department decision in support of her argument that a motion to reargue may be denied if the moving party fails to submit a full copy of the original motion papers is, at best, misplaced, as the First Department has held otherwise, and more recently.

Defense counsel apparently relied upon the Second Department's *Biscone* decision, which denied a motion for reargument where plaintiff failed to submit a copy of the original motion papers. *See* Siegel & Connors, New York Practice § 246.

The court also cited to Rule 3.3(a)(2) of the New York Rules of Professional Conduct, which provides that "[a] lawyer shall not knowingly . . . 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." Was there some indication that the lawyers were aware of the First Department's *Keech* and *Leary* decisions, which would control the New York County Supreme Court, but did not disclose them?

* * *

New York City Formal Opinion 2019-1: Defining "Ex Parte Proceeding" Under Rule 3.3(d)

In this opinion, the Committee concludes:

> In an "ex parte proceeding," a lawyer has a duty under Rule 3.3(d) of the New York Rules of Professional Conduct (the "Rules") to disclose to the tribunal material facts, including adverse facts, "that will enable the tribunal to make an informed decision." However, the rule does not define "ex parte proceeding." Given that the disclosure obligation marks a significant departure from the advocate's ordinary role, the obligation applies in limited

circumstances. It does not apply to proceedings in which an opposing party appearing pro se is absent by choice. It applies to proceedings in which, for practical or legal reasons, only one side has an opportunity to present its case. These proceedings include an application for a temporary restraining order where the adverse party has not been provided with notice, an opportunity to be heard on the application and time to appear, as well as to proceedings, such as search warrant applications, in which interested parties are not permitted to receive notice and to participate.

* * *

V. New York State Adopts Rules Governing Multijurisdictional Practice

A. Background of Multijurisdictional Practice Issues

Birbrower, Montalbano, Condon & Frank v. Superior Court of Santa Clara, 949 P2d 1 (Cal. 1998)

A New York law firm represented a California company in an arbitration. The arbitration required lawyers in the firm to travel to California to prepare for the arbitration. These lawyers were admitted in New York, but not California.

When the New York law firm sought to enforce its written fee agreement in California state court, the court held that the fee agreement violated public policy and that the firm had engaged in the unauthorized practice of law. In *Birbrower*, the California Supreme Court "decline[d] ... to craft an arbitration exception to [the California] prohibition of the unlicensed practice of law in this state." *Birbrower*, 949 P2d at 9. The court held that the unauthorized practice of law in California "does not necessarily depend on or require the unlicensed lawyer's physical presence in the state." A lawyer could be deemed to be engaged in the unauthorized practice of law in California "by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means."

The ruling in *Birbrower* was promptly overruled by the California legislature. *See* Cal.Civ.Proc.Code § 1282.4 (providing an arbitration exception to unauthorized practice rules).

B. ABA Model Rule 5.5: Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

Law Firms And Associations

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional 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, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

> (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
>
> (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
>
> (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
>
> (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

* * *

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 by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[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.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear

before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise

authorized to practice law, should consult the [*Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*].

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. See also *Model Rule on Temporary Practice by Foreign Lawyers*. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See *Model Rule for Registration of In-House Counsel*.

[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do

so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., *Model Rule on Practice Pending Admission*.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

* * *

13 states have adopted a MJP Rule virtually identical to ABA Model Rule 5.5. They are: Arkansas, Arizona, Illinois, Indiana, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, Rhode Island, Vermont, Washington, and West Virginia.

34 states have adopted a MJP Rule that is similar to ABA Model Rule 5.5. They are, with certain distinctions noted:

Alabama – Rule 5.5 (b) permits out-of-state lawyers to practice in Alabama on a temporary basis "including transactional, counseling, or other nonlitigation services" related to the lawyer's home-state practice.

Arizona – see below

California – California Court Rule 9.47, entitled "Attorneys practicing law temporarily in California as part of litigation," states that "[f]or an attorney to practice law under this rule, the attorney must:

> (1) Maintain an office in a United States jurisdiction other than California and in which the attorney is licensed to practice law;

(2) Already be retained by a client in the matter for which the attorney is providing legal services in California, except that the attorney may provide legal advice to a potential client, at the potential client's request, to assist the client in deciding whether to retain the attorney;

(3) Indicate on any Web site or other advertisement that is accessible in California either that the attorney is not a member of the State Bar of California or that the attorney is admitted to practice law only in the states listed; and

(4) Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency.

An attorney who satisfies these requirements may provide services that are part of:

(1)A formal legal proceeding that is pending in another jurisdiction and in which the attorney is authorized to appear;

(2)A formal legal proceeding that is anticipated but is not yet pending in California and in which the attorney reasonably expects to be authorized to appear;

(3)A formal legal proceeding that is anticipated but is not yet pending in another jurisdiction and in which the attorney reasonably expects to be authorized to appear; or

(4)A formal legal proceeding that is anticipated or pending and in which the attorney's supervisor is authorized to appear or reasonably expects to be authorized to appear.

The attorney whose anticipated authorization to appear in a formal legal proceeding serves as the basis for practice under this rule must seek that authorization promptly after it becomes possible to do so. Failure to seek that authorization promptly, or denial of that authorization, ends eligibility to practice under this rule.

To engage in the above activities in California, the lawyer cannot be a California resident.

Colorado – Colorado Rule of Civil Procedure 220 does not state any specific exceptions to the general prohibition against unauthorized practice. The Rule provides that if a lawyer is licensed elsewhere and in good standing, she may perform nonlitigation services in Colorado so long as the lawyer is not domiciled in Colorado and does not keep an office in Colorado from which they hold themselves out as practicing Colorado law.

Connecticut – Rule 5.5(c) contains a reciprocity requirement. Rule 5.5 (f) provides:

(f) A lawyer desirous of obtaining the privileges set forth in subsections (c) (3) or (4): (1) shall notify the statewide bar counsel as to each separate matter prior to any such representation in Connecticut, (2) shall notify the statewide bar counsel upon termination of each such representation in Connecticut, and (3) shall pay such fees as may be prescribed by the Judicial Branch.

Delaware – Rule 5.5(d) states:

> A lawyer admitted in another United States jurisdiction, or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
>
> (1) are provided to the lawyer's employer or its organizational affiliates after compliance with Supreme Court Rule 55.1(a)(1) and are not services for which the forum requires pro hac vice admission; or
>
> (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

District of Columbia – Rule 49 of the Rules of the District of Columbia Court of Appeals is a very detailed Rule which, among other things, allows lawyers licensed elsewhere to provide legal services in DC "on an incidental and temporary basis."

Florida

Georgia

Idaho

Kansas

Kentucky

Louisiana

Maine

Michigan

Minnesota

Missouri

Nevada

New Jersey

New Mexico

New York

North Carolina

North Dakota

Ohio

Oklahoma

Oregon

Pennsylvania

South Carolina

North Carolina

Tennessee

Utah

Virginia

Wisconsin

Wyoming

Texas has created a committee to study the adoption of MJP rules.

The ABA's Commission on Multijurisdictional Practice has a helpful website containing information on the adoption of MJP rules in various jurisdictions:

http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice.html

* * *

In ABA Formal Opinion 469 (2014), the Committee concluded that:

> A prosecutor who provides official letterhead of the prosecutor's office to a debt collection company for use by that company to create a letter purporting to come from the prosecutor's office that implicitly or explicitly threatens prosecution, when no lawyer from the prosecutor's office reviews the case file to determine whether a crime has been committed and prosecution is warranted or reviews the letter to ensure it complies with the Rules of Professional Conduct, violates Model Rules 8.4(c) and 5.5(a).

The opinion also observes:

> The participation by a prosecutor in the conduct described in this opinion, wherein the prosecutor supplies official letterhead to a debt collection company and allows the debt collection company to use it to send threatening letters to alleged debtors without any review by the prosecutor or staff lawyers to determine whether a crime was committed and prosecution is warranted, violates Rule 5.5(a) by aiding and abetting the unauthorized practice of law.

C. ABA Model Rule 8.5: Disciplinary Authority; Choice of Law

Maintaining The Integrity Of The Profession

Rule 8.5 Disciplinary Authority; Choice Of Law

a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
>
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. 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.

* * *

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22,

ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction 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 which impose 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 both 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 straightforward 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 rule, 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. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

[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 competent regulatory authorities in the affected jurisdictions provide otherwise.

D. Temporary Practice of Law in New York-Part 523 of Court of Appeals Rules

The unauthorized practice of law is a crime in New York. *See* Judiciary Law § 485-a (making certain violations of Judiciary Law §§ 478, 474, 486 and 495 a class E felony); Judiciary Law § 495 (No corporation or voluntary association shall (i) practice or appear as an attorney-at-law for any person in any court in this state, (ii) hold itself out to the public as being entitled to practice law, or (iii) furnish attorneys or counsel); Judiciary Law § 478 (unlawful for any natural person (i) to practice or appear as an attorney-at-law in a court of record in this state, (ii) to furnish attorneys or to render legal services, or (iii) to hold himself out in such manner as to convey the impression that he or she either alone or together with any other persons maintains a law office); § 484 (no natural person shall ask or receive compensation for preparing pleadings of any kind in any action brought before any court of record in this state).

Effective December 30, 2015, 22 N.Y.C.R.R. section 523 (Section 523), permits temporary practice of law in New York by out-of-state and foreign attorneys for the first time. The Court of Appeals website states:

> The Court of Appeals has amended its rules to add a new Part 523 pertaining to the temporary practice of law in New York by out-of-state and foreign attorneys. The amendment sets forth the circumstances under which an attorney not admitted in New York may provide temporary legal services in the State. An attorney providing such temporary legal services may not establish an office or other systematic presence in the State or hold out to the public or otherwise represent that the attorney is admitted to practice here. Additionally, an attorney practicing pursuant to Part 523 is subject to the New York Rules of Professional Conduct and the disciplinary authority of this State.
>
> The Court also has amended its Rules for the Registration of In-house Counsel (Part 522). Under the newly amended rules, registration is now available to a foreign attorney who is a member in good standing of a recognized legal profession in a non-United States jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority.
>
> The rule amendments are effective December 30, 2015. A copy of the Court's orders amending the rules is below.
>
> * * *

Rules of the Court of Appeals for the Temporary Practice of Law in New York

§ 523.1 General regulation as to lawyers admitted in another jurisdiction

A lawyer who is not admitted to practice in this State shall not:

> (a) except as authorized by other rules or law, establish an office or other systematic and continuous presence in this State for the practice of law; or
>
> (b) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this State.

§ 523.2 Scope of temporary practice

(a) A lawyer who is not admitted to practice in this State may provide legal services on a temporary basis in this State provided the following requirements are met.

(1) The lawyer is admitted or authorized to practice law in a state or territory of the United States or in the District of Columbia, or is a member of a recognized legal profession in a non-United States jurisdiction, the members of which are admitted or authorized to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority; and

(2) the lawyer is in good standing in every jurisdiction where admitted or authorized to practice; and

(3) the temporary legal services provided by the lawyer could be provided in a jurisdiction where the lawyer is admitted or authorized to practice and may generally be provided by a lawyer admitted to practice in this State, and such temporary legal services:

(i) are undertaken in association with a lawyer admitted to practice in this State who actively participates in, and assumes joint responsibility for, the matter; or

(ii) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer or a person the lawyer is assisting is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; or

(iii) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services are not services for which the forum requires pro hac vice admission; or

(iv) are not within paragraph (3)(ii) or (3)(iii) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted or authorized to practice.

* * *

Rule 1.5(g) of the New York Rules of Professional Conduct, which addresses a lawyers' fee split with a lawyer outside her firm, states:

> 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* (emphasis added);
>
> (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.

Are Lawyers Providing Legal Services in New York Pursuant to Part 523 Required to Adhere to Letter of Engagement Rule (Part 1215) and Attorney-Client Fee Dispute Resolution Program (Part 137)?

22 N.Y.C.R.R. section 1215.2, entitled "Exceptions," provides that the Letter of Engagement Rule does not apply to "(d) *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." (emphasis added).

22 N.Y.C.R.R. section 137.1, entitled "Application," provides that "(a)[t]his Part shall apply where representation has commenced on or after January 1, 2002, *to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter*." (emphasis added). The section also provides that "(b) [t]his Part shall not apply to …(7) *disputes 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 was rendered in New York." (emphasis added).

Reciprocity

There is no reciprocity requirement in section 523. In 2020, the Court of Appeals eliminated the reciprocity requirement for in-house counsel registration by foreign attorneys that was contained in section 522.

Malpractice

What standard will apply to lawyers who practice here temporarily? *See* NY PJI 2:152, jury charge for legal malpractice.

* * *

(b) A person licensed as a legal consultant pursuant to 22 N.Y.C.R.R. Part 521, or registered as in-house counsel pursuant to 22 N.Y.C.R.R. Part 522, may not practice pursuant to this Part.

§ 523.3 Disciplinary authority

A lawyer who practices law temporarily in this State pursuant to this Part shall be subject to the New York Rules of Professional Conduct and to the disciplinary authority of this State in connection with such temporary practice to the same extent as if the lawyer were admitted or authorized to practice in the State. A grievance committee may report complaints and evidence of a disciplinary violation against a lawyer practicing temporarily pursuant to this Part to the appropriate disciplinary authority of any jurisdiction in which the attorney is admitted or authorized to practice law.

§ 523.4 Annual report

On or before the first of September of each year, the Office of Court Administration shall file an annual report with the Chief Judge reviewing the implementation of this rule and making such recommendations as it deems appropriate.

* * *

In a March 10, 2016 piece titled Connors "No License Required: Temporary Practice in New York State," the new Part 523 is examined in further detail.

* * *

VI. Judiciary Law Section 470

Court of Appeals Holds That Judiciary Law Section 470 Requires Nonresident New York Attorneys to Maintain Physical Office in State and Second Circuit Declares Statute Constitutional

CPLR 2101(d) provides that "[e]ach paper served or filed shall be indorsed with the name, address and telephone number of the attorney for the party serving or filing the paper." In *Schoenefeld v. State*, 25 N.Y.3d 22, 6 N.Y.S.3d 221, 29 N.E.3d 230 (2015), an attorney residing in Princeton, New Jersey commenced an action in federal district court alleging, among other things, that Judiciary Law section 470 was unconstitutional on its face and as applied to nonresident attorneys. The federal district court declared the statute unconstitutional and, on appeal to the Second Circuit, that court determined that the constitutionality of section 470 was dependent upon the interpretation of its law office requirement. Therefore, it certified a question to the New York Court of Appeals requesting the Court to delineate the minimum requirements necessary to satisfy the statute.

Citing to CPLR 2103(b), the Court of Appeals acknowledged that "the State does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here." It noted, however, that the logistical difficulties present during the Civil War, when the statute was first enacted, are diminished today. Rejecting a narrow interpretation of the statute, which may have avoided some constitutional problems, the Court interpreted Judiciary Law section 470 to require nonresident attorneys to maintain a physical law office within the State.

The case then returned to the Second Circuit and on April 22, 2016, that court held that section 470 "does not violate the Privileges and Immunities Clause because it was not enacted for the protectionist purpose of favoring New York residents in their ability to practice law." *Schoenefeld v. State*, 821 F.3d 273 (2d Cir. 2016). Rather, the court concluded that the statute was passed "to ensure that nonresident members of the New York bar could practice in the state by providing a means, i.e., a New York office, for them to establish a physical presence in the state on a par with that of resident attorneys, thereby eliminating a service-of-process concern."

The case is discussed in further detail in Siegel, New York Practice § 202 (Connors ed., July 2016 Supplement) and in Connors, "The Office: Judiciary Law § 470 Meets Temporary Practice Under Part 523," where we addressed the interplay between the new Part 523 and Judiciary Law section 470's requirement that nonresident lawyers admitted to practice in New York maintain an office within the State.

The United States Supreme Court denied certiorari on April 17, 2017. *Schoenefeld v. State*, --- S.Ct. ----, 2017 WL 1366736 (2017).

The April 17, 2017 edition of the NYLJ reported:

> Now that the legal case is over, New York State Bar Association president Claire Gutekunst said in a statement, a group, chaired by former bar president David Schraver of Rochester, would review the issues and consider recommendations for changing § 470. The working group will be composed of state bar members who live in and outside New York.
>
> * * *
>
> The New Jersey State Bar Association also submitted an amicus brief to the Supreme Court.
>
> "The NJSBA feels New York's bona fide office rule is an anachronism in today's modern world, where technology and sophisticated forms of digital communication are standard throughout the business community, the bar and the public at large," president Thomas Prol said in a statement. "Indeed, the bona fide office rule, which New Jersey did away with in 2013, seems oblivious to modern attorneys who are increasingly mobile, some of whom may spend no time at the office because they have no need for one, at least not the traditional version contemplated by the rule."

Court of Appeals Holds That Violation of Judiciary Law Section 470 Does Not Render Pleadings a Nullity, and Reverses Dismissal of an Action

In *Arrowhead Capital Finance, Ltd. v. Cheyne Specialty Finance Fund L.P.*, 2016 WL 3949875 (Sup. Ct., New York County 2016), the court noted that "[n]umerous case[s] in the First Department have held, before the recent *Schoenfeld* rulings, that a court should strike a pleading, without prejudice, where it is filed by an attorney who fails to maintain a local office, as required by § 470. *Salt Aire Trading LLC v*

Sidley Austin Brown & Wood, LLP, 93 AD3d 452, 453 (1st Dept 2012); *Empire Healthchoice Assur., Inc. v Lester*, 81 AD3d 570, 571 (1st Dept 2011); *Kinder Morgan*, 51 AD3d 580 (1st Dept 2008); *Neal v Energy Transp. Group*, 296 AD2d 339 (2002); *cf Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 (1st Dept 2014) (finding no § 470 violation where firm leased and used New York office with telephone)."

The *Arrowhead* court concluded that:

> Receiving mail and documents is insufficient to constitute maintenance of an office. *Schoenfeld*, supra. This court holds that hanging a sign coupled with receipt of deliveries would not satisfy the statute. Furthermore, there is evidence that [plaintiff's attorney] criticized defendant for serving documents at 240 Madison and directed [defendant's attorney] to use the PA Office address, an address he has consistently used in litigation.

The court dismissed the complaint without prejudice. The First Department affirmed. 154 A.D.3d 523, 62 N.Y.S.3d 339 (1st Dep't 2017). The Court of Appeals reversed, holding that the "failure by a nonresident attorney to comply with this requirement at the time a complaint is filed does not render that filing a nullity and, therefore, dismissal of the action is not required." *Arrowhead Capital Fin., Ltd. v. Cheyne Specialty Fin. Fund L.P.*, 32 N.Y.3d 645, 95 N.Y.S.3d 128, 119 N.E.3d 768 (2019). Instead, "the party may cure the section 470 violation with the appearance of compliant counsel or an application for admission pro hac vice by appropriate counsel." The Court also observed:

> Where further relief is warranted, the trial court has discretion to consider any resulting prejudice and fashion an appropriate remedy (*see Dunn*, 35 N.Y.2d at 699, 361 N.Y.S.2d 348, 319 N.E.2d 709 [noting that plaintiffs did not assert any prejudice as a result of their attorney's disbarment]; *cf.* CPLR 321[c] [detailing procedure for cure when attorney is disbarred or otherwise disabled any time before judgment]) and the individual attorney may face disciplinary action for failure to comply with the statute.

The decision, and its impact, is discussed in further detail in Siegel & Connors, New York Practice § 202 (July 2019 Supplement).

Attorney Who Conducted Practice at "Virtual Office" Held in Violation of Judiciary Law 470

Some attorneys desire to practice from a "virtual law office." *See* Siegel & Connors, New York Practice § 202. In *Law Office of Angela Barker, LLC v Broxton*, 60 Misc. 3d 6 (App. Term, 1st Dep't 2018), the court held that plaintiff's counsel used a "virtual office" at a specified New York City address instead of maintaining a physical office for the practice of law within New York. This, the court held, constituted a violation of Judiciary Law section 470. While the *Broxton* court affirmed the dismissal of plaintiff's complaint, that relief will no longer be available after the Court of Appeals decision in *Arrowhead*, discussed in the entry above. Nonetheless, the plaintiff's attorney will need to cure the violation of Judiciary Law section 470 or promptly assist the plaintiff in securing compliant counsel. *See* New York Rules of Professional Conduct, Rule 1.16(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, [and] allowing time for employment of other counsel . . . .").

In Formal Opinion 2019-2, entitled "USE OF A VIRTUAL LAW OFFICE BY NEW YORK ATTORNEYS," the New York City Bar opined that:

> A New York lawyer may use the street address of a virtual law office ("VLO") located in New York as the lawyer's "principal law office address" for the purposes of Rule 7.1(h) of the New York Rules of Professional Conduct (the "New York Rules" or the "Rules"), provided the VLO qualifies as an office for the transaction of law business under New York's Judiciary Law. In addition, a New York lawyer may use the address of a VLO as the lawyer's office address on business cards, letterhead and law firm website. A New York lawyer who uses a VLO must also comply with other New York Rules, including Rules 1.4, 1.6, 5.1, 5.3, 8.4(a) and 8.4(c).

What Type of Presence Satisfies Judiciary Law Section 470?

As noted above, the Court of Appeals has held that Judiciary Law section 470 requires that nonresident attorneys admitted to practice in New York maintain a physical office in the State to practice law here. *Schoenefeld*, 25 N.Y.3d at 25. In *Sina v. United Frontier Mutual Insurance Co.*, 2019 WL 1517737 (Sup. Ct., Kings County 2019), the court concluded that plaintiff's attorney satisfied the requirements of Judiciary Law § 740. He affirmed that "he conducts business,

including client intake and depositions, from a physical office space with a telephone number and mailing address located in Manhattan at 20 W 23rd Street, which he has leased since September 2016."

Leased office space in New York, which does not have attorneys or law firm staff, has been held insufficient to satisfy Judiciary Law § 470. *Platinum Rapid Funding Grp., Ltd. v. HD W of Raleigh, Inc.*, 2017 WL 6806296 (Sup. Ct., Nassau County 2017)(" Indeed, the papers herein establish that Ngo and Higbee's pleading – the Verified Answer and Counterclaims -identified their principal office to be located in Santa Ana, California (Motion, Ex. 2). In addition, Ngo's attorney registration states that he is not an associate or partner of Higbee and is actually the principal of the Ngo Law Practice – a law firm based in Salt Lake City, Utah.").

In *Marina Dist. Dev. Co. v. Toledano*, 2018 WL 3038378 (Sup. Ct., New York County 2018), the court held:

> The court rejects the attorney's argument that his membership at a virtual law office at The New York City Bar qualifies as the office required by Judiciary Law § 470, supra. By definition, a virtual office is not an actual office. The court is not persuaded to the contrary by the affidavit the attorney provides from a person affiliated with the latter organization. That affidavit states that the organization will take telephone messages for a member and that it will forward mail to that member. It also states that meeting rooms may be made available to that member. However, the attorney's own papers negate any possibility that he uses the City Bar's facilities as his office and actually demonstrate that he does not use this as an office. His papers indicate that he does not want mail sent to the organization's address; rather, he directs that all correspondence be sent to his actual office in Philadelphia. He does not list the organization's telephone number on his papers; rather, he lists his Philadelphia telephone number. He does not assert that he has ever used the organization's physical facilities for any purpose.
>
> While the court is not bound by the holdings of courts other than the Court of Appeals or the Appellate Divisions (see Mountain View Coach v. Storms, 102 AD2d 663), the court agrees with the reasoning and holding in the recent Appellate Term, First Department in Law Offices of Angela Barker, LLC v. Broxton, __Misc.3d___, 2018 Slip Op 2816) That court declined to permit a virtual office to qualify as an physical office for the practice of law,

> as such an office, as is the office in this case, is nothing more than an address.

On appeal, the First Department reversed and remanded the matter for further consideration. *Marina Dist. Dev. Co.*, 174 A.D.3d 431 (1st Dep't 2019). The court concluded that:

> To the extent that counsel uses the VLOP only as a mailing address and an agent authorized to accept service of process, it is insufficient to meet the physical presence requirement of *Schoenefeld*. While the additional services VLOP provides may well satisfy physical presence, an attorney needs to actually take advantage of those services to meet the requirements of Judiciary Law § 470. At bar, counsel does not claim that he actually uses the VLOP for anything but the delivery of mail and packages and for service of process. Although office space and conference rooms may be available to him, there is no claim that he actually uses those services. His May 2018 letter to the court was unsworn, and his accompanying proofs did not include his own sworn statement or testimony as to how he makes use of the facilities afforded by the program (*cf. Reem Contr. v. Altschul & Altschul*, 117 A.D.3d 583, 986 N.Y.S.2d 446 [1st Dept. 2014] [Judiciary Law § 470 satisfied by attorney's affirmation that law firm leased New York office with a telephone, that firm partners used the office periodically, and that many of the firm's attorneys were admitted to practice in New York]; *Matter of Scarsella*, 195 A.D.2d 513, 600 N.Y.S.2d 256 [2d Dept. 1993] [statute satisfied by attorney's testimony that he maintained a desk in Manhattan office, with a telephone, shared the office with realty company, and there was a secretary available to him although not on his payroll]).
>
> Counsel's correspondence and the papers served on his adversary and/or filed in court contradicted any physical presence in New York. His very letterhead showed a Philadelphia office and a New York office at the bar association for his PC but stated, "REPLY TO: PHILADELPHIA OFFICE," and the telephone and fax numbers feature a "215" area code.

As to that part of the order that dismissed the action, the First Department ruled:

> Notwithstanding that we find that counsel is not authorized to maintain this action in New York State, we do not believe that it should have been dismissed. The Court of Appeals recently held that a nonresident attorney's failure to comply with the requirement of Judiciary Law § 470 of

> maintaining a physical office in New York State at the time a complaint is filed does not render the filing a nullity and therefore that dismissal of the action is not required (*433 Arrowhead Capital Fin., Ltd. v. Cheyne Specialty Fin. Fund L.P., 32 N.Y.3d 645, 95 N.Y.S.3d 128, 119 N.E.3d 768 [2019]). The party may cure the statutory violation with the appearance of compliant counsel or an application for admission pro hac vice by appropriate counsel (id. at 650, 95 N.Y.S.3d 128, 119 N.E.3d 768). Accordingly, we vacate the order and remand the matter to afford plaintiff an opportunity to cure the violation.

Apparent Failure to Comply with Judiciary Law §470 Noted by Court in Ordering Hearing on Sanctions

In *E. S. v. Windsor Owners Corp.*, 2019 WL 3752164 (Sup. Ct., New York County 2019), the defendant's motion under CPLR 327 (a), 3211 (a) (7), and 3211 (a) (8) to dismiss the complaint was denied with prejudice as violative of the single-motion rule of CPLR 3211 (e) because defendant had already moved pursuant to CPLR 3211 (a) (8) to dismiss the complaint. *See* Siegel & Connors, New York Practice § 273 ("Single Motion Rule").

In concluding that the arguments in defendant's motion lacked merit, the court noted that defense counsel:

> e-filed a consent to change attorney, dated March 22, 2019, substituting Matt Simon Law in as attorney of record for Sersch. (NYSCEF Doc No. 63.) "Judiciary Law § 470, which recognizes a nonresident attorney's right to practice law in New York, requires such attorney to maintain a physical office in this state for such purpose." (*Law Office of Angela Barker, LLC v Broxton*, 60 Misc3d 6, 7 [App Term, 1st Dept 2018], *citing Schoenefeld v State of New York*, 25 NY3d 22 [2015].) The address listed on the consent to change attorney is 19 Carteret Street, Montclair, NJ 07043 (the "Montclair Address"). The attorney registration details kept for Mr. Simon by the New York State Unified Court System show that he is currently registered and in good standing with the New York Bar and list that same Montclair address as his registration address. The Court takes judicial notice of the Matt Simon Law website, mattsimonlaw.com, which provides the Montclair Address as the address of the law office with "[a]dditional locations at 67 Summit Avenue, Hackensack, NJ and 520 Fellowship Road, Mount Laurel, NJ." (Last accessed August 8, 2019, 11:08 a.m.) As such, the Court finds cause

for concern that counsel for Sersch is not authorized to defend Sersch in this action in New York State.

Plaintiffs and co-defendants argued that defendant's motion was frivolous under 22 N.Y.C.R.R. 130-1.1. *See* Siegel & Connors, New York Practice § 414A. The court scheduled a hearing to determine whether sanctions should be imposed and to provide an opportunity for defense counsel "to be heard and to show cause as to why this Court should not find that Matt Simon, Esq., is not authorized to defend Sersch in this action in the State of New York based upon a failure to maintain a physical law office in the State."

VII. Duties to Prospective Clients

New York 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 within the meaning of paragraph (a).

* * *

First Department Affirms Order Denying Motion to Disqualify Defendant's Firm, Which Previously Had Meeting with Plaintiff and Was a "Prospective Client"

In *Azria v. Azria*, 184 A.D.3d 419 (1st Dep't 2020), a matrimonial action, the First Department affirmed the denial of the plaintiff wife's motion to disqualify the

husband's co-counsel (Dobrish Firm). In 2016, the wife had a meeting and a couple of follow-up phone calls with a partner in the Dobrish Firm, but she did not retain the firm. In 2019, the husband retained the firm as co-counsel. The court concluded that the wife failed to show that the partner with whom she met received information from her that could be "significantly harmful" to her in connection with the Dobrish Firm's representation of the husband. Rule 1.18(c); *see Mayers v. Stone Castle Partners, LLC*, 126 A.D.3d 1, 6–7 (1st Dep't 2015). In addition, the court observed that the financial information the wife shared with the partner would have been subject to discovery and was already known to the husband. *See* Rule 1.18(b).

* * *

VIII. Issues with Current Client Conflicts

New York 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.

* * *

First Department Denies Motion to Disqualify Where Firm Never Represented the Moving Party

In *HSBC Bank USA, N.A. v Santos*, ___A.D.3d___, 2020 WL 4005949 (1st Dep't 2020), plaintiff commenced a mortgage foreclosure action, alleging that defendant failed to make the required payments on his debt. Defendant, represented by Steven Zalewski & Associates (SZA), timely filed a verified answer. he court granted plaintiff's motion for a judgment of sale and foreclosure.

One week before the scheduled auction, a nonparty brought an order show cause to, among other things, stay the auction, dismiss the complaint, or in the alternative for permission to intervene. The nonparty claimed that it was the record owner of the subject property, and therefore a necessary party.

The nonparty's attorney on the order to show cause was Anderson, Bowman & Zalewski, PLLC (ABZ). This firm has substantial overlap in personnel with defendant's firm, SZA. "Screen shots of ABZ's website in the record indicate that Stephen Zalewski of SZA is a member of ABZ. No lawyer from ABZ or SZA has explained the relationship of the two firms in any of its written submissions."

The supreme court granted the nonparty's request to intervene. Defendant filed a notice of appeal, which indicated that defendant represented by ABZ, not by SZA! "Again, appellant's counsel does not trouble itself to explain this discrepancy."

Plaintiff moved to disqualify both SZA and ABZ, on the ground that the two related firms had a conflict, as both the defendant and the nonparty claimed to be the owner of the subject property. In opposition, defendant argued that plaintiff did not have standing to bring a motion to disqualify since it was undisputed that neither ABZ nor SZA had ever represented plaintiff. The supreme court granted the motion and disqualified both firms from representing either defendant.

The First Department reversed, noting:

> The basis for a disqualification motion is the alleged breach of the fiduciary duty owed by an attorney to a current or former client (*Rowley v Waterfront*

> *Airways, Inc.*, 113 AD2d 926, 927 [2d Dept 1985], *citing Greene v Greene*, 47 NY2d 447, 453 [1979]). When the law firm targeted by the disqualification motion has never represented the moving party, that firm owes no duty to that party. "[I]t follows that if there is no duty owed there can be no duty breached" (*Rowley* at 927; *see Develop Don't Destroy Brooklyn v Empire State Dev. Corp.*, 31 AD3d 144, 150 [1st Dept 2006], lv denied 8 NY3d 802 [2007]). Since plaintiff never had an attorney-client relationship with either SZA or ABZ, plaintiff had no standing to bring a motion to disqualify (*Rowley* at 927).

The court recognized that:

> has the authority to act sua sponte to disqualify counsel if it finds a conflict of interest warranting disqualification …. However, the record before us does not support disqualification. The two defendants present a united front to plaintiff at this juncture. Their answers raise virtually the same affirmative defenses and counterclaims to the complaint, and the defenses and counterclaims of one defendant do not undermine the position of the other (cf. Roddy v Nederlander Producing Co. of Am., Inc., 96 AD3d 509 [1st Dept 2012] [in personal injury action where two defendants have competing interests in minimizing their proportional share of damages, disqualification of counsel representing both defendants is warranted]). If defendants' interests do come to diverge in this litigation then counsel of course has a duty to ensure compliance with rule 1.7 of the New York Rules of Professional Conduct (22 NYCRR 1200.0).

* * *

Unwaivable Conflict of Interest Exists for a Lawyer or Law Firm Concurrently Representing Two Individuals in Separate Criminal Prosecutions That Arise Out of the Same Common Nucleus of Circumstances in Which Each Client Is a Witness in Each Matter

In N.Y. State 1185 (2020), the inquirer concurrently represented Client One and Client Two in two separate, but related, criminal matters. Client One was charged with a crime in which Client Two is the alleged victim. Client One and Client Two are in a relationship; Client Two denies Client One committed any wrongdoing, opposed Client One's arrest, and wishes to testify in favor of Client One. According to each Client, Client Two was intoxicated during the events at issue,

and, following Client One's arrest, Client Two was arrested for driving while intoxicated (DWI).

The inquirer's firm proposed to represent Client One and Client Two in two separate proceedings resisting the charges. The prosecution objected to the firm's representing Client Two (its alleged victim in the charge against Client One), suggesting that the firm has co-opted the prosecution's main witness against Client One. The inquirer asserted that no conflict exists because the prosecutions are separate, and that Client Two may testify in defense of Client One while invoking the Fifth Amendment on any questions probing intoxication.

The Committee observed:

> no party has a possessory interest in a witness, so we consider the prosecutor's position as inconsistent with the N.Y. Rules of Professional Conduct (the "Rules"). We also consider the fact of separate prosecutions as unpersuasive, because the two charges, though to be individually prosecuted, arise out of the same common nucleus of circumstances. Clients One and Two may be facing separate charges, but it is impossible to divorce the allegations of one from the allegations of the other.

The Committee concluded that Rule 1.7 governed the inquiry:

> Rule 1.7(a) says, in summary, that a conflict of interest exists for a lawyer concurrently to represent two clients if a reasonable lawyer would conclude that it will involve the lawyer in representing differing interests, or that a "significant risk" exists that the lawyer's professional judgment will be adversely affected by the lawyer's own financial, business, property or other personal interests. Rule 1.0(f) defines "differing interests" to "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."
>
> We believe that Client One's interests differ from those of Client Two, just as Client Two's interests differ from Client One's. For instance, a reasonable lawyer for Client One would have every incentive to establish that Client Two was indeed intoxicated based on eyewitnesses, the later arrest, behavior before the Client' One's arrest, and other evidence - all of which would be detrimental to Client Two in the DWI case. Similarly, a reasonable lawyer for Client Two might well advise Client Two not to testify in Client One's

> defense, not just for the aforementioned damage to Client Two's own legal status but also the risk of waiving Fifth Amendment rights. Likewise, a reasonable lawyer for Client One would have every incentive to advise Client One to testify against Client Two in the DWI case to justify the actions giving rise to Client One's arrest. This is not intended as an exhaustive list of the ways the interests of the two clients diverge, but simply as common sense examples of the way they do.
>
> Accordingly, in our judgment, advancing the legal interests of Client One would adversely affect the legal interests of Client Two, and vice-versa. "In order to be 'differing,' the interests need not arise in the same matter, and they need not arise in litigation." N.Y. State 990 (2013). "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." N.Y. State 867 (2011). We believe, too, that a significant risk exists that the firm's fiduciary duty to one client would be compromised by its concurrent fiduciary duty to the other.

The Committee also opined that "[e]ven if separate lawyers in the inquirer's firm would represent Client One and Client Two in their matters, Rule 1.10(a) imputes such lawyers' representations, and thus the conflict, to the entire firm."

The Committee then addressed whether the Rule 1.7(a) conflict could be waived, to permit the firm's simultaneous representation of Client One and Client Two:

> Rule 1.7(a) is subject to Rule 1.7(b), which permits a conflict to be waived if the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and if each client gives "informed consent confirmed in writing." Rule 1.0(j) defines "informed consent" to mean "the agreement by a person to a proposed course of action 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."

Whether a conflict of interest is subject to waiver is very fact-intensive and depends on a variety of factors of which we have limited knowledge here. Among these factors are the relationship between Clients One and Two, the timing of their respective hearings, the sophistication of the clients, their respective familiarity with the judicial processes they confront, and other matters. These considerations render us reluctant to conclude that a conflict may never be waived on the facts as presented. Nevertheless, we are very skeptical that informed consent is possible here, among other reasons because (1) Client Two's state of intoxication could be raised in both proceedings; (2) the possibility that inquirer's firm might cross-examine Client Two in Client One's proceeding (and vice versa); (3) the possibility that Client Two might have a change of mind about the content of testimony; (4) the judgment involved for both clients on questions such as which proceeding to push forward first, and whether to negotiate a plea; (5) the risk that the inquirer's firm might be tempted to withhold complete explanations of the considerations and risks to either client out of concern for harming the other's proceeding; (6) the ever-present possibility of negotiable plea options, which could adversely affect the legal interests of one client or the other; and (7) the inadvisability of Client One's counsel advising Client Two of Fifth Amendment issues.

We stress, finally, that our opinion is confined to an interpretation of the Rules and does not address issues under the Sixth Amendment of the U.S. Constitution on effective assistance of counsel. *See United States v. Schwarz*, 283 F.3d 76 (2nd Cir. 2002) (reversing conviction despite common defendants' informed consent to representation by one lawyer).

While not cited in N.Y. State 1185, Comment 23 to Rule 1.7 is instructive. It provides:

simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, 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 co-defendants in a criminal case, co-plaintiffs or co-defendants 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 co-defendant. On the other hand, multiple representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

* * *

Attorney Assigned by an Insurer to Represent an Insured Owes a Duty of Loyalty to the Insured

In N.Y. State 1154 (2018), the New York State Bar Association's Committee on Professional Ethics concluded that "[a]n attorney assigned by [an] insurance carrier to represent an insured owes a duty of loyalty to the insured, and may not restrict or limit communications to the insured concerning the representation, notwithstanding attorney's concerns that insured may use such information adversely to financial interests of insurance carrier."

In N.Y. State 1154, an automobile accident killed the driver husband and passenger wife. The Surrogate's Court appointed one of the couple's children as Executor of the Husband's Estate and the Wife's Estate. The Executor retained both an Estate Counsel and a Litigation Counsel. The Litigation Counsel commenced a wrongful death action on behalf of the Executor, acting for the Estates, as well as the Executor and the couple's other children in their individual capacities and as Beneficiaries of the Estates. Defendants in the wrongful death action are the owner and driver of the other vehicle involved in the collision. The wrongful death action seeks compensatory damages on behalf of the Beneficiaries, comprising lost monetary support, and survival damages on behalf of the Estates, consisting of physical and emotional pain and suffering of the decedents prior to death. The Beneficiaries of both Estates are the same.

In their answer to the wrongful death complaint, defendants asserted an affirmative defense of comparative fault alleging that the husband's negligence in operating the vehicle was the sole, or at least a contributing, cause of the accident. Defendants also asserted a counterclaim solely against the Husband's Estate for indemnification. "Neither the affirmative defense nor the counterclaim would reduce the recoveries by the other plaintiffs in the wrongful death action, but a successful affirmative defense could reduce any damages awarded to the

Husband's Estate and a successful indemnification claim could result in the Husband's Estate reducing the exposure of defendants to damages awarded plaintiffs." Litigation Counsel represents the Executor of each Estate and the Beneficiaries in opposing the comparative fault affirmative defense. The Wife's Estate and the Beneficiaries have interposed no direct claim against the Husband's Estate.

The inquirer in N.Y. State 1154 is the attorney assigned by the husband's insurance carrier to defend the Husband's Estate against the indemnification counterclaim. The inquirer believes that the insurance coverage may not be adequate to satisfy an award entered on the counterclaim. Although limiting the husband's culpability for the accident is in the interest of all plaintiffs in the wrongful death action, the inquirer believes that tension exists between the interests of the Husband's Estate, on the one hand, and the Wife's Estate and the Beneficiaries, on the other hand, with respect to the wrongful death damages each allegedly sustained. In the inquirer's view, the Executor, acting on behalf of the Husband's Estate in defense of the counterclaim, should seek to minimize the wrongful death damages to reduce the exposure of the Husband's Estate to indemnify defendants, but, acting on behalf of the Wife's Estate and the Beneficiaries, the Executor should seek to maximize the wrongful death damages allegedly due them.

The Executor directed the inquirer to communicate solely with Estate Counsel about the defense of the indemnification counterclaim. The inquirer is concerned, however, that confidential information received by the Estate Counsel from the inquirer will be shared by the Estate Counsel or by the Executor with Litigation Counsel. That confidential information would ordinarily concern, among other things, the inquirer's strategy for addressing the husband's allegedly culpable conduct and the compensatory wrongful death damages sustained by the Wife's Estate and the survival damages that could be distributed to the Beneficiaries. "For this reason, the inquirer wishes to circumscribe the communications to the Estate Counsel, because the inquirer believes that unrestricted communications may adversely affect the insurance company's exposure on the indemnification counterclaim."

The opinion concluded that an insurer-assigned counsel for an insured cannot limit communications to the counsel's client based on a belief that the client may use the communications to the financial detriment of the insurance company. The Committee expressly noted that it was offering "no opinion here on whether Litigation Counsel has a conflict of interest in representing all plaintiffs in the

wrongful death action. Our focus is confined to the inquirer's duties to the inquirer's client, the Executor of the Husband's Estate…."

The Opinion refers to Rule 1.8(f), which prohibits a lawyer from accepting compensation for representing a 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.

"Rule 1.8(f) makes clear that, no matter the source of the lawyer's compensation for representing a client, the lawyer's duty is to the client, not to the one paying the lawyer's fees." Comment 11 to Rule 1.8(f) elaborates:

> 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) .... 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 Feliberty v. Damon, 72 N.Y.2d 112, 120 (1988) ("[T] he paramount interest independent counsel represents is that of the insured, not the insurer."); N.Y. State 1102, ¶ 3 (2016) ("When the insurance company designates counsel for the assured, whether the designated counsel is inside or outside counsel, the lawyer's client is the insured and not the insurance company."); N.Y. State 716 (1999) (the lawyer's primary allegiance is to the client, the insured); N.Y. State 73 (1968) (attorney employed by carrier has superior duty to assured, the client).

The Opinion stresses that a lawyer compensated by an insurer:

> owes the same duties to a client as if the client were paying the lawyer's fees. Rule 1.2(a) provides that "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.

> Rule 1.4 imposes obligations on attorneys, among other things, promptly to inform the client of material developments in the matter, Rule 1.4(a)(1)(iii); reasonably to consult about the means by which the client's objectives are to be achieved, Rule 1.4(a)(2); to keep the client reasonably informed about the matter, Rule 1.4(a)(3); promptly to comply with the client's reasonable requests for information, Rule 1.4(a)(4); and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, Rule 1.4(b).
>
> It may be that the inquirer's counterclaim defense litigation strategy, if freely reviewed and discussed with the Executor or Estate Counsel in conformance with inquirer's obligations under Rules 1.2(a) and 1.4, and subsequently disclosed to Litigation Counsel, might harm the interests of the insurance carrier, but consideration of the insurer's interests in discharging the lawyer's obligations under Rules 1.2(a) and 1.4 would constitute interference with the inquirer's attorney-client relationship with the client Executor that Rule 1.8(f) forbids. *See Feliberty*, 72 N.Y.2d at 120 ("[t]he insurer is precluded from interference with counsel's independent professional judgments in the conduct of the litigation on behalf of its client") (citations omitted). Any strategy for opposing and defeating the comparative fault affirmative defense and the indemnification counterclaim is just one element of the larger picture that the Executor must consider, a picture which also presumably takes account of the limited coverage that the insurance carrier provides for the counterclaim. Accordingly, the inquirer's communications with the Executor, or with the Estate Counsel at the direction of the Executor, should be free and unrestricted, guided by the requirements of Rules 1.2(a) and 1.4. The use to which the Executor or Estate Counsel choose to make of those communications, in what they determine to be the overall best interests of the Estates and the Beneficiaries, is for the Executor or Estate Counsel to decide, not the inquirer.

The Opinion also addressed the inquirer's concern about the Husband's Estate's insurer and the inquirer's "own financial, business, property or other personal interests." Rule 1.7(a)(2). The Committee noted:

> The inquirer may rely on repeat business from the insurance carrier, whether through a longstanding business relationship between the carrier and the inquirer's law firm, personal relationships with claims agents or other carrier employees, or otherwise. We are mindful, for example, that insurance

> companies often maintain lists of approved counsel to represent their insureds in particular types of matters. Being so listed is obviously in the financial and business interests of the law firm. We recognize, too, that the interests of the insurer and the insured are not always perfectly aligned. Although each has an interest in minimizing a claimant's recovery, an insured may have other interests in seeking a resolution of a matter that the insurer regards as excessive in light of the insurer's more narrow interests - a situation that this inquiry potentially poses.
>
> If a lawyer depends on an insurance carrier for a regular flow of business, and the lawyer believes that the lawyer's insured client is pursuing a course of action that the lawyer considers potentially injurious to the insurance carrier, then the lawyer must determine whether, under Rule 1.7(a), a reasonable lawyer would conclude that a "significant risk" exists "that the lawyer's professional judgment on behalf" of the insured client "will be adversely affected by the lawyer's own financial, business, property or other personal interests." If the lawyer determines that such a "significant risk" is present, then, consistent with Rule 1.7(b), the lawyer must assess whether the lawyer nevertheless reasonably believes that the lawyer "will be able to provide competent and diligent representation" to the insured client and obtain the insured client's informed consent, confirmed in writing, to continuing the representation. In that circumstance, the inquirer should disclose the inquirer's relationship with the insurer and, if able to provide the requisite representation, obtain the Executor's consent to continuing the representation.

See also N.Y. State 1183 (2020)("A lawyer may accept appointments as designated counsel for underwriters, lenders or other funding sources involved in private equity or corporate financing transactions on the recommendation of the counter-party to the transaction, with the lawyer being paid out of the proceeds of the transaction, provided that no interference occurs with the lawyer's exercise of independent professional judgment on the clients' behalf, the lawyer preserves the confidentiality of client confidential information, and the lawyer obtains the clients' informed consent, confirmed in writing.").

* * *

IX. Issues with Former Client Conflicts

New York 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.

* * *

NYSBA Ethics Committee Addresses Attorney's Obligation to Accept Client Files from Attorney's Prior Law Firm

In N.Y. State 1195 (2020), the New York State Bar Association's Committee on Professional Ethics concluded that "[a] lawyer has no duty to represent clients who were clients of a former law firm and have not engaged the lawyer to represent

them at a new firm, no matter whether the lawyer did work on behalf of those clients at the former firm."

The inquirer in N.Y. State 1195 had recently left employment with Law Firm A, in which the inquirer had practiced for some years. Several partners left Law Firm A during the inquirer's last two years at the firm. The inquirer took on a number of matters these lawyers had handled, and settled several of them. In one matter, the inquirer reached a compromise of a lien, but then discovered that another lien existed, at which point the inquirer wrote the client to advise of the outstanding lien and the client's responsibility to pay the lien or negotiate a reduction. The inquirer left Law Firm A shortly thereafter and started Law Firm B. Several of the clients from Law Firm A retained Law Firm B.

Following the inquirer's departure from Law Firm A, the firm began sending files to Law Firm B for matters that the inquirer had handled before departure. The inquirer returned the files to Law Firm A with notice that the inquirer did not represent the affected clients. Nevertheless, Law Firm A re-sent the files to the inquirer at Law Firm B and apparently advised those clients in writing that the inquirer was now handling their matters.

The Committee noted that it considered clients of Law Firm A who did not retain Law Firm B to be "former clients" of the inquirer, and concluded:

> A lawyer owes only certain discrete obligations to former clients. The most prominent of these are set out in Rule 1.9 of the N.Y. Rules of Professional Conduct …, which, among other things, requires a lawyer not to reveal the confidential information of former clients protected by Rule 1.6, and not to represent a client adverse to the former client in a matter that is 'the same or a substantially related matter" to one in which the lawyer previously represented the former client. Rule 1.16(e) also makes provisions for avoiding prejudice to a client upon termination of the attorney-client relationship. For the most part, however, a lawyer's duty of care to clients dies with the end of the attorney-client relationship.
>
> The Rules explicitly state that the existence of an attorney-client relationship is a question of law, not ethics. Rules, Preamble ¶ 9. We do not issue opinions on legal questions, but we do not stray far from our charter in saying that an unaffiliated third party may not unilaterally impose such a relationship without the agreement of the lawyer and the client. Thus, unless clients of the former firm have agreed to retain the inquirer's new firm, the

inquirer's duties to those onetime clients are limited to those any lawyer owes a former client. *See* ALI, Restatement of Law Governing Lawyers (Third) § 14(1) (Formation of a Client-Lawyer Relationship) (a lawyer-client relationship arises when "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).

X. The Rule of Imputed Disqualification

New York 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.

* * *

Court Denies Plaintiff's Motion to Disqualify Defendant's Law Firm on Basis of Imputed Disqualification

In a memorable episode of The Sopranos, mob boss Tony Soprano consults with multiple top divorce attorneys in the area so in the event his wife Carmela decides to divorce him, she will be hard-pressed to find attorneys who will not be required to ethically preclude themselves from taking her as a client. Here, in what appears to be life-imitating-art-imitating-life, the plaintiff-wife consulted with at least two well-known New York City matrimonial law firms and then briefly retained a third when she was contemplating suing her husband for divorce. After plaintiff commenced the action, the defendant-husband sought to retain the two firms that his wife had consulted with, each of which declined to take his case as a result of the

consultation. Plaintiff now seeks to prevent the third firm, Cohen Clair Lans Greifer Thorpe & Rottenstreich, LLP (Cohen Clair), from representing her husband in the action.

Dudhia v. Agarwal, 66 Misc.3d 206, 207 (Sup. Ct., New York County 2019). The underlying facts in *Dudhia* are as follows:

> On November 21, 2014, plaintiff and her present attorney, who was then an associate at Cohen Clair, participated in a consultation regarding plaintiff's intention to sue defendant for divorce. Plaintiff alleges that a second attorney, a partner at Cohen Clair, was present for the consultation. One page of notes allegedly taken during the consultation appear to be in a different handwriting from plaintiff's or her attorney's and purportedly support the assertion that someone else was present at the meeting.
>
> Somewhat peculiarly, even though plaintiff claims to "vividly" recall details as to what was discussed at this hour and a half consultation almost five years ago, neither plaintiff nor her attorney can recall which partner was actually present, and no billing records exist that identify the mystery participant. Cohen Clair, for its part, states it has no record of any attorney other than plaintiff's current attorney interviewing the plaintiff, and none of the lawyers now at the firm have a recollection of meeting with plaintiff or being involved with her case.
>
> Plaintiff subsequently retained Cohen Clair, but worked exclusively with her present attorney. After billing $1,357 with Cohen Clair on this matter (which equated to less than 2.5 hours of legal work), plaintiff's attorney left the firm in late March 2015 and joined Warshaw Burstein, LLP (Warshaw), where she took plaintiff as her client in early April 2015.
>
> Plaintiff commenced the action for divorce in August of 2017. Although initially represented by another firm, defendant chose to retain Cohen Clair to represent him in December 2018. After a series of letters between counsel were unsuccessful in resolving the dispute over defendant's retention of Cohen Clair, plaintiff made this motion seeking the firm's disqualification. Part of the relief sought was a restraining order barring further substantive communications between defendant and anyone at Cohen Clair pending the determination of the motion, as well as an order by which the court would conduct an in camera review of the unredacted notes from the November 21, 2014 meeting. The court granted both applications. Defendant cross-moved

> for a hearing and various forms of disclosure to be granted in the event the court determined it could not deny plaintiff's request for disqualification on the motion papers and oral argument alone.

The court observed that "the general rule is that a movant seeking to disqualify his or her adversary's counsel on the basis of having previously been represented by that counsel must establish that: (1) an attorney-client relationship existed; (2) the matters involved are substantially related; and (3) the interests of the present and former client are materially adverse (*see Matter of Janczewski v. Janczewski*, 169 A.D.3d 795, 94 N.Y.S.3d 142 [2d Dept. 2019]; *see also Lyons v. Lyons*, 50 Misc.3d 876, 22 N.Y.S.3d 338 [Sup. Ct., Monroe County 2015])." There was no dispute that plaintiff met these requirements and therefore raised a presumption of disqualification.

The court found Rule 1.10(b) "particularly instructive." It provides:

> When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless: (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9 (c) that is material to the matter.

See also Solow v. W.R. Grace & Co., 83 N.Y.2d 303 (1994)(discussing imputed disqualification of firm after lawyers with adverse party's confidential information left the firm).

The court observed:

> Plaintiff and her attorney acknowledge that they cannot recall which partner was allegedly present at the consultation. And even though plaintiff places great emphasis on the existence of what she contends is the second participant's notes, the sheet of paper in question contains no identifying information whatsoever — no date, no identification of the author, no mention even of the client's name.

* * *

> Furthermore, plaintiff and her attorney's failure to identify the participants and other details of the consultation highlights (1) how long ago this event took place (almost five years), (2) the objective insignificance of Cohen Clair's legal representation of plaintiff as a whole (no more than 2.5 hours of total billing and none by any other person than plaintiff's current counsel), and (3) the likelihood that any confidential information transferred, which is vaguely and conclusively identified by plaintiff as her "substantial settlement positions," along with the information captured in the notes — consisting largely of numeric calculations and asset values— has become undoubtedly stale, immaterial, and of no strategic value to defendant. Plaintiff's counsel's argument that Cohen Clair does not allow an associate of the firm to work solely on a matter without "close and constant supervision from one or more partners" is belied by the simple fact that she fails to substantiate, by document or statement, which partner was tasked with such supervision.

The court acknowledged "that the likelihood of acquiring material client confidences increases in small law firms that are conducive to 'constant cross-pollination' and a 'cross-current of discussion and ideas' (*Kassis,* 93 N.Y.2d at 617-618, 695 N.Y.S.2d 515, 717 N.E.2d 674, *quoting Cardinale v. Golinello*, 43 N.Y.2d at 292, 401 N.Y.S.2d 191, 372 N.E.2d 26)", but concluded that "the size of the firm alone is certainly not determinative." Furthermore, the court noted that "[i]n any event, a busy, partner-heavy law firm with 20 or more attorneys occupying a 13,500 square foot floor of the Lipstick Building, such as Cohen Clair, does not squarely fit into this 'small firm' rubric."

Nonetheless, the court ruled that Cohen Clair was charged with meeting its burden to rebut the presumption of imputed disqualification:

> To do this, it must sufficiently disprove that the firm or anyone currently at the firm possesses confidential information that is significant or material that could be prejudicial to plaintiff in this litigation. To this end, the firm conducted an internal investigation and concluded that none of the attorneys at the firm remember the consultation or have retained confidential information about plaintiff.
>
> As to confidential documents, it is undisputed that plaintiff's counsel took plaintiff's physical file with her to Warshaw including the notes from the consultation that, after an in camera review, appear innocuous. Additionally, in accordance with the requirements set forth in *Kassis*, 93 N.Y.2d at 617,

> 695 N.Y.S.2d 515, 717 N.E.2d 674, rebutting the presumption of disqualification requires the firm employ "adequate screening measures" to eliminate any access or involvement of the potentially conflicted attorney. In satisfying this requirement, Cohen Clair has walled off the rest of the firm and has had their computer servers searched by a forensic expert to confirm that no relevant emails or related files remain on the firm's on-site servers. The firm also represents that it has taken all steps necessary to insure that any archives that may be present on off-site servers cannot be accessed by any of the attorneys there.

The court emphasized defendant's right to choose counsel of its choice, *see Kassis*, 93 N.Y.2d at 617, emphasizing that:

> This right is particularly important where, as here, plaintiff has consulted with multiple law firms and was twice barred by conflicts from retaining counsel of his choosing. Specifically, defendant was precluded from retaining two other leading matrimonial firms because plaintiff had consulted with a named partner, and that partner was still at the firm.

Finally, the court observed that "[a]bsent actual prejudice or a substantial risk thereof, the appearance of impropriety alone is not sufficient to require disqualification of an attorney, *see Cummin v. Cummin*, 264 A.D.2d 637, 695 N.Y.S.2d 346 [1st Dept. 1999]." "The appearance of impropriety is eliminated when adequate screening measures are employed as there were here. Further, any doubt that may exist relating to a conflict of interest in this case was created by the movant and her current counsel in failing to identify the second participant who was alleged to be in the room during the consultation."

In denying plaintiff's motion to disqualify defense counsel, the court concluded:

> The court agrees with Cohen Clair that there is no reasonable risk that it possesses confidential information relevant to this matter. Further, the possibility, however small, that any confidential material remains with the firm is outweighed by defendant's right to choose his own counsel. Lastly, the appearance of impropriety has sufficiently been eliminated by the representations and safeguards employed by Cohen Clair, and any doubt that a conflict of interest remains present cannot be resolved in favor of the plaintiff because that doubt is of her own making. Accordingly, the court

concludes that the presumption of disqualification has been adequately rebutted.

XI. 2020 Amendments to New York's Rule 1.8(e) and ABA Rule 1.8(e), Compared

Rule 1.8(e) of the New York Rules of Professional Conduct was amended on June 24, 2020 to now provide:

(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;

(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; **and**

(4) A lawyer providing legal services without fee, a not-for-profit legal services or public interest organization, or a law school clinical or pro bono program, may provide financial assistance to indigent clients but may not promise or assure financial assistance prior to retention, or as an inducement to continue the lawyer-client relationship. Funds raised for any legal services or public interest organization for purposes of providing legal services will not be considered useable for providing financial assistance to indigent clients, and financial assistance referenced in this subsection may not include loans or any other form of support that causes the client to be financially beholden to the provider of the assistance.

* * *

New York Rules of Professional Conduct, Comments 9B and 10 provide:

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.

* * *

Amended ABA Model Rule 1.8(e)

RESOLUTION

RESOLVED, That the American Bar Association amends Rule 1.8(e) and related commentary of the ABA Model Rules of Professional Conduct as follows…:

Model Rule 1.8: Current Clients: Specific Rules

* * *

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, 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 client may pay court costs and expenses of litigation on behalf of the client; **and**

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

Comment

Financial Assistance

[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 on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-

shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

* * *

XII. Ethics Issues in Social Media and Electronic Disclosure

A. NYCLA Ethics Opinion 745 (2013)

In Formal Opinion 745, the New York County Lawyers Ethics Committee concluded that attorneys may advise clients as to (1) what they should/should not post on social media, (2) what existing postings they may or may not remove, and (3) the particular implications of social media posts, subject to the same rules, concerns, and principles that apply to giving a client legal advice in other areas including Rule 3.1("Non-Meritorious Claims and Contentions"), 3.3 ("Conduct Before a Tribunal"), and 3.4 ("Fairness to Opposing Party and Counsel").

The opinion noted that:

> The personal nature of social media posts implicates considerable privacy concerns. Although all of the major social media outlets have password protections and various levels of privacy settings, many users are oblivious or indifferent to them, providing an opportunity for persons with adverse interests to learn even the most intimate information about them.

The opinion observes that "[i]t is now common for attorneys and their investigators to seek to scour litigants' social media pages for information and photographs" and that "[d]emands for authorizations for access to password-protected portions of an opposing litigant's social media sites are becoming routine."

The Committee opined that:

> There is no ethical constraint on advising a client to use the highest level of privacy/security settings that is available. Such settings will prevent adverse counsel from having direct access to the contents of the client's social media

> pages, requiring adverse counsel to request access through formal discovery channels.

Furthermore, an attorney "may advise clients as to what should or should not be posted on public and/or private pages." Finally, "[p]rovided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on 'private' social media pages, and what may be 'taken down' or removed."

There are issues of substantive law in this realm, also noted in the opinion, but these are beyond the jurisdiction of an ethics committee. For example, lawyers advising clients regarding the contents of a social media site must be aware of potential disclosure obligations and the duty of preservation, which begins at the moment litigation is reasonably anticipated. *See Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 N.Y.3d 543 (2015) (Court of Appeals essentially adopted the standards set forth by the First Department in its *VOOM* decision); *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dep't 2012); 2012-13 Supplementary Practice Commentaries, CPLR 3126, C3126:8A ("Sanction for Spoliation of Evidence"). The ethics opinion also notes that "a client must answer truthfully (subject to the rules of privilege or other evidentiary objections) if asked whether changes were ever made to a social media site, and the client's lawyer must take prompt remedial action in the case of any known material false testimony on this subject." *See* Rule 3.3(a) (3); 22 N.Y.C.R.R. Part 130 ("Costs and Sanctions").

Formal Opinion 745 states "we note that an attorney's obligation to represent clients competently (RPC 1.1) could, in some circumstances, give rise to an obligation to advise clients, within legal and ethical requirements, concerning what steps to take to mitigate any adverse effects on the clients' position emanating from the clients' use of social media."

Comment 8 to New York Rule 1.1 ("Competence") now states:

> To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

See North Carolina Bar Association: Advising A Civil Litigation Client About Social Media (July, 2015)(agreeing with New Hampshire Bar Association, N. H. Bar Ass'n Op. 2012-13/05, which concluded that "counsel has a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.").

B. Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association (2019).

NYSBA's Commercial and Federal Litigation Section has released a 2019 version of its Social Media Ethics Guidelines, which were last updated in 2017. These Guidelines are available at: https://www.nysba.org/2019guidelines/ (see pp. 24-26, citing NYCLA Op. 745). Guideline No. 5.A, entitled "Removing Existing Social Media Information," states:

> A lawyer may advise a client as to what content may be maintained or made nonpublic on her social media account, including advising on changing her privacy and/or security settings. A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else. However, the lawyer must be cognizant of preservation obligations applicable to the client and/or matter, such as a statute, rule, regulation, or common law duty relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media content is preserved, a party or nonparty may not delete information from a social media account that is subject to a duty to preserve.

Guideline No. 5.B, entitled "Adding New Social Media Content," states:

> A lawyer may advise a client with regard to posting new content on social media, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim." NYCLA, Formal Op. 745.

Guideline No. 5.C, entitled "False Social Media Statements," provides:

> A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit

involves the assertion of material false factual statements or evidence supporting such a conclusion and if proper inquiry of the client does not negate that conclusion.

C. *Forman v. Henkin*, 30 N.Y.3d 656, 70 N.Y.S.3d 157, 93 N.E.3d 882 (2018)

Court of Appeals Applies CPLR Article 31's "Well-Established" Rules to Resolve Dispute Regarding Disclosure of Information on Facebook

In *Forman v. Henkin*, 30 N.Y.3d 656, 70 N.Y.S.3d 157, 93 N.E.3d 882 (2018), the Court applied longstanding principles under CPLR Article 31 to resolve the issue of disclosure of information on a Facebook page.

As the *Forman* Court notes, CPLR 3101 grants certain categories of relevant information an immunity from disclosure. CPLR 3101(b) grants absolute immunity to any information that is protected by any of the recognized evidentiary privileges, while CPLR 3101(c) grants a similar immunity to the "work product of an attorney," which has been accorded a very narrow scope by the courts. *See* Siegel & Connors, New York Practice, §§ 346-47. CPLR 3101(d)(2) grants a conditional immunity to "materials. . . prepared in anticipation of litigation," commonly known as work product. *Id.*, § 348.

In *Forman*, plaintiff's alleged injuries were extensive, and included claims that she could "no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, … [and] that the accident negatively impacted her ability to read, write, word-find, reason and use a computer." *Forman*, 30 N.Y.3d at 659-60.

Many courts faced with motions to compel the production of materials posted by a plaintiff on a private social media site required the seeking party to demonstrate that information on the site contradicted the plaintiff's claims. *See, e.g.*, *Kregg v. Maldonado*, 98 A.D.3d 1289, 1290, 951 N.Y.S.2d 301 (4th Dep't 2012); *McCann v. Harleysville Ins. Co. of New York*, 78 A.D.3d 1524, 910 N.Y.S.2d 614 (4th Dep't 2010). This hurdle could be satisfied if there was material on a "public" portion of the plaintiff's site, which could be accessed by most anyone, that conflicted with the alleged injuries. If so, the courts deemed it likely that the private portion of the site contained similarly relevant information. *See Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 430 (Sup. Ct., Suffolk County 2010)(discussed in notes 30-31 and accompanying text). If, however, the defendant simply claimed that information on plaintiff's private social media site "may" contradict the

alleged injuries, the disclosure request was deemed a mere "fishing expedition" and the motion was denied. *See, e.g.*, *Tapp v. New York State Urban Dev. Corp.*, 102 A.D.3d 620 (1st Dep't 2013); *McCann*, 78 A.D. 3d at 1525, 910 N.Y.S.2d at 615.

The plaintiff sought to invoke the above precedent in *Forman*, but the Court of Appeals rejected the argument, noting that it permits a party to "unilaterally obstruct disclosure merely by manipulating 'privacy' settings or curating the materials on the public portion of the account." *Forman*, 30 N.Y.3d at 664, 70 N.Y.S.3d at _, 93 N.E.3d at 889. Moreover, the Court noted that "New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information." *Id.* In sum, the standard for obtaining disclosure remains one of relevance, regardless of whether the material is in a traditional print form or posted in an electronic format on a "private" Facebook page.

With the *Forman* decision on the books, disclosure of materials on social media websites should be easier to obtain. In the last paragraph to this section, we discuss CPLR 3101(i), which expressly allows disclosure of any picture, film or audiotape of a party, is another tool that can be used to secure materials posted on a social media site. The Court declined to address this subdivision in *Forman* because neither party cited it to the supreme court and, therefore, it was unpreserved. It should be noted, however, that the Court of Appeals previously observed that CPLR 3101(i) does not contain any limitation as to relevancy or subject matter, although a party is still free to seek a protective order to restrict disclosure under the subdivision. *See Tran v. New Rochelle Hosp. Medical Center*, 99 N.Y.2d 383, 756 N.Y.S.2d 509, 786 N.E.2d 444 (2003), 99 N.Y.2d at 388 n.2.

The *Forman* Court noted that a social media account holder, like any party to litigation, can seek to prevent the disclosure of sensitive or embarrassing material of minimal relevance through a motion under CPLR 3103(a). *See* Siegel & Connors, New York Practice § 352. In *Forman*, for example, the supreme court exempted from disclosure any photographs of plaintiff on the Facebook site depicting nudity or romantic encounters. (Just how "private" was this site?).

Moving forward, lawyers might consider requesting that their clients deactivate a social media site, as the plaintiff did in *Forman*, or remove certain postings from the site. Is such conduct ethical? In New York County Lawyers Association Ethics Opinion 745 (2013), the ethics committee concluded, among other things, that a

lawyer is permitted to advise a client to use the highest level of privacy settings available on a social media site to prevent others, such as adverse counsel, from having direct access to the contents of the site. From an ethics standpoint, an attorney is permitted to advise a client to remove postings from a social media site, but cannot advise the client to destroy such information. In this regard, Rule 3.4 (a)(1) of the New York Rules of Professional Conduct provides that a lawyer "shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce." Furthermore, under Rule 3.4 (a)(3), a lawyer may not "conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."

While not addressed in *Forman*, lawyers advising clients regarding the contents of a social media site must be aware of potential disclosure obligations and the duty of preservation, which begins at the moment litigation is reasonably anticipated. *See VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33 (1st Dep't 2012); Siegel & Connors, New York Practice §§ 362, 367 (discussing litigation holds and penalties for spoliation); McKinney's CPLR 3126 Practice Commentaries, C3126:8A ("Sanction for Spoliation of Evidence"). Once litigation is reasonably anticipated, anything of potential relevance that is removed from a site must be preserved so a party can comply with any future obligations to produce the materials in disclosure.

Court Requires Plaintiff to Respond to Defendant's Notice to Admit Regarding Pictures on Plaintiff's Instagram Account

In *Smith v. Brown*, 2018 WL 4656441 (Sup. Ct., Bronx County 2018), an automobile accident case, defendant served a notice to admit on plaintiff containing requests for admissions on the following matters: (1) whether plaintiff owns and maintains an Instagram account with a specific "handle"; (2) whether the account associated with that handle was changed from a public to a private account setting after a specific date; (3) whether plaintiff was depicted in a number of attached photographs obtained from the Instagram account; (4) whether the photographs were taken after the accident; and (5) whether plaintiff was depicted in a video obtained from the Instagram account; and (6) whether that video was taken after the accident.

Plaintiff sought a protective order under CPLR 3103(a) vacating or striking the notice to admit or, alternatively, an extension of time to respond to it. Plaintiff argued that defendant was impermissibly attempting to use the notice to admit in lieu of other disclosure devices, such as a deposition, and that it sought admissions on material issues in the litigation.

The court classified defendant's notice to admit as seeking "admissions from plaintiff as to uncontroversial, 'clear-cut matters of fact' that are within plaintiff's knowledge." Moreover, the notice did not seek admissions as to any ultimate conclusions pertaining to the negligence of a party. Furthermore, while the matters on which defendant sought admissions could be explored at a deposition, the court noted that this did not prohibit the use of the notice to admit device. "At bottom, the notice sought admissions of the truth of clear-cut matters of fact that defendant . . . reasonably believed there could be no substantial dispute at trial and were within the knowledge of plaintiff." Therefore, the court denied plaintiff's application for a protective order, but granted a 20-day extension to respond to the notice to admit.

The decision is discussed in further detail in Siegel & Connors, New York Practice § 364 (July 2019 Supplement).

D. Attorney's Obligations Regarding Disclosure

In *Lawrence v. City of New York*, 2018 WL 3611963 (S.D.N.Y. 2018), app. dismissed 2019 WL 4127603 (2d Cir. 2019), defendants moved for sanctions against the plaintiff and her former lawyer stemming from their production of 67 photographs purporting to show the immediate aftermath of the events at issue in this civil rights action. The complaint alleged that in August 2014, NYPD officers entered plaintiff's home without a warrant, pushed her to the floor, damaged her property, and stole more than $1,000 in cash. The court noted that "[t]his Opinion & Order showcases the importance of verifying a client's representations."

In September 2016, plaintiff provided her lawyer with photographs that she claimed depicted the condition of her apartment several days after the incident. The attorney "accepted his client's representations and after reviewing the photographs, saved them to a PDF, Bates-stamped them, and produced them to Defendants." At that time, the lawyer was unfamiliar with electronically stored metadata and "did not doubt [that] the photographs were taken contemporaneously with the occurrence of the damage."

During a December 2016 deposition, the plaintiff testified that her son or a friend took the photographs two days after the incident. In a subsequent deposition in April 2017, however, plaintiff "asserted that she had taken most of the pictures, that her son had taken a few, and that none of them were taken by the previously described friend." At that juncture, the lawyer believed that his client had memory

problems, but did not believe she was testifying falsely. In view of plaintiff's conflicting testimony, defendants requested the smartphones which plaintiff claimed were used to take the photos. In August 2017, the lawyer objected, but agreed to produce the photographs' native files, which included metadata.

When Defendants checked the photographs' metadata, they learned that 67 of the 70 photographs had been taken in September 2016, two years after the incident and immediately before plaintiff provided them to her lawyer. In September 2017, defendants sent a Rule 11 safe-harbor letter to plaintiff's lawyer. In October 2017, plaintiff's lawyer moved to withdraw as counsel, asserting that "based upon facts of which [he] was not aware ... [he] hereby disavow[ed] all prior statements made [regarding] the photographs." *See* New York Rules of Professional Conduct, Rule 1.16(b)(1)("a lawyer shall withdraw from the representation of a client when…the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law"); Rule 3.3(a)(3)("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.").

At an October 2017 conference, the lawyer's ethics counsel represented that at the time of production, Leventhal "did not believe or have reason to believe that there was any question about the date or provenance of the photographs." The lawyer's ethics counsel also stated that other events now compelled the lawyer to withdraw. While the lawyer's motion to withdraw was pending, plaintiff terminated the representation. The court granted the lawyer's motion to withdraw and afforded plaintiff two months to obtain new counsel. Plaintiff was unable to engage a new lawyer and appeared pro se.

By letter dated February 20, 2018, plaintiff claimed she provided the photographs to her attorney by accident because she had an eye infection. At a status conference, the court informed plaintiff that "if evidence comes out on [Defendants'] motion that in fact this is all fabricated, at a minimum, [the Court] may be duty bound to refer it to the United States attorney," that her case could be dismissed, and that she "may be subject to substantial monetary penalties." Nonetheless, plaintiff elected to proceed.

In the wake of defendants' motion for sanctions, plaintiff forwarded numerous documents to the court and attributed her production of the photographs to mental

illness, also claiming that her medications prevented her from testifying truthfully during depositions. The court noted that plaintiff's "medical records evince a history of mental illness." Plaintiff subsequently "amended her deposition testimony and now contends that the photographs were taken by her grandchild for a book report."

Defendants argued that sanctions were warranted under Federal Rules of Civil Procedure 11, 26, and 37, and sought dismissal of the action with prejudice and attorneys' fees. The motion was granted in part and denied in part, and the court dismissed the action.

The court observed:

> Rule 11 states that by signing a pleading, motion, or other paper, an attorney certifies that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the document is submitted for a proper purpose, the legal claims are nonfrivolous, and "the factual contentions have evidentiary support." Fed. R. Civ. P. 11(b). "Rule 11 imposes a duty on every attorney to conduct a reasonable pre-filing inquiry into the evidentiary and factual support for [a] claim...."

The court noted, however, that Rule 11 did not apply to the situation before it. Plaintiff's lawyer:

> produced documents in discovery that turned out to be fraudulent. Defendants' sanctions motion rests entirely on that production. "These incidents are not sanctionable under Rule 11 because they arose in the context of discovery and thus are not within the scope of Rule 11."

The court rejected defendants' contention that it was unreasonable for plaintiff's lawyer to commence the action. "[U]nder Rule 11, an attorney has an affirmative duty to make reasonable inquiry into the facts and the law." *In re Austr. & N.Z. Banking Grp. Ltd. Sec. Litig.*, 712 F. Supp. 2d 255, 263 (S.D.N.Y. 2010). The court concluded that plaintiff's lawyer made a reasonable inquiry by:

> (1) requesting plaintiff's medical records, which showed that she sought treatment for difficulty sleeping, nightmares, anxiety, depression, and weight loss from the alleged incident,

(2) reviewing the Civilian Complaint Review Board records regarding the incident and certain police officers' prior conduct, and

(3) interviewing both plaintiff and her son.

The court ruled that this investigation was sufficient, noting that "an attorney is entitled to rely on the objectively reasonable representations of the client."

The court also noted that:

> Rule 26 provides a parallel to Rule 11 for productions made in discovery. Under Rule 26(g), an attorney's signature on a discovery response or objection certifies that after reasonable inquiry, the production is: (1) "complete and correct as of the time it is made"; (2) consistent with existing law; (3) "not interposed for any improper purpose"; and (4) not unduly burdensome. Fed. R. Civ. P. 26(g)(1).

Under the facts, the court found that the lawyer's "production of the photos may have been careless, but was not objectively unreasonable."

As for Rule 37, the court ruled it did not apply to this situation because plaintiff's lawyer "did not fail to comply with discovery orders, to supplement an earlier response, or to preserve electronically stored information."

Nonetheless, the court dismissed the action under its "inherent power to sanction a party for bad faith litigation conduct."

E. The Ethical Implications of Attorney Profiles on LinkedIn

1) New York County Lawyers Association Professional Ethics Committee Formal Opinion 748 (2015)

In Formal Opinion 748 (2015), the New York County Lawyers Association Professional Ethics Committee observed that "LinkedIn, the business-oriented social networking service, has grown in popularity in recent years, and is now commonly used by lawyers… Lawyers may use the site in several ways, including to communicate with acquaintances, to locate someone with a particular skill or background—such as a law school classmate who practices in a certain jurisdiction for assistance on a matter—or to keep up-to-date on colleagues' professional activities and job changes."

The current version of LinkedIn allows:

> users and their connections to list certain skills, interests, and accomplishments, creating a profile similar to a resume or law firm biography. Users can list their own experience, education, skills, and interests, including descriptions of their practice areas and prior matters. Other users may also "endorse" a lawyer for certain skills—such as litigation or matrimonial law—as well as write a recommendation as to the user's professional skills.

The opinion addressed three ethical issues arising from an attorney's use of LinkedIn profiles:

> 1) whether a LinkedIn Profile is considered "Attorney Advertising" under the New York Rules of Professional Conduct;
>
> 2) whether an attorney may accept endorsements and recommendations from others on LinkedIn;
>
> 3) what information attorneys should include (and exclude) from their LinkedIn profiles to ensure compliance with the New York Rules of Professional Conduct

1) Whether a LinkedIn Profile is considered "Attorney Advertising" under the New York Rules of Professional Conduct?

Under New York's ethics rules, an "advertisement" is defined in Rule 1.0(a) as:

> [A]ny 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 comments to the rules make clear that "[n]ot all communications made by lawyers about the lawyer or the law firm's services are advertising" and the advertising rules do not encompass communications with current clients or former clients germane to the client's earlier representation. Rule 7.1, Comment 6. Similarly, 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." *Id.*, Comment 7.

Applying the above Rules, the Committee concluded that:

> a LinkedIn profile that contains only biographical information, such as a lawyer's education and work history, does not constitute an attorney advertisement. An attorney with certain experience such as a Supreme Court clerkship or government service may attract clients simply because the experience is impressive, or knowledge gained during that position may be useful for a particular matter. As the comments to the New York Rules of Professional Conduct make clear, however, not all communications, including communications that may have the ultimate purpose of attracting clients, constitute attorney advertising. Thus, the Committee concludes that a LinkedIn profile containing only one's education and a list of one's current and past employment falls within this exclusion and does not constitute attorney advertising.

2) Whether an attorney may accept endorsements and recommendations from others on LinkedIn?

The Committee noted that:

> additional information that LinkedIn allows users to provide beyond one's education and work history, however, implicates more complicated ethical considerations. First, do LinkedIn fields such as "Skills" and "Endorsements" constitute a claim that the attorney is a specialist, which is ethically permissible only where the attorney has certain certifications set forth in RPC 7.4? Second, even if certain statements do not constitute a claim that the attorney is a specialist, do such statements nonetheless constitute attorney advertising, which may require the disclaimers set forth in RPC 7.1?

In Formal Opinion 972 (2013) of the New York State Bar Association, the question before the Committee was whether an individual lawyer or law firm could describe the kinds of services they provide under the LinkedIn section labeled "Specialties."

New York's Rule 7.4(a) allows lawyers and law firms to make general statements about their areas of practice, but a "lawyer or law firm shall not state that the

lawyer or law firm is a specialist or specializes in a particular field of law." Rule 7.4(c) provides an exception and "allows a lawyer to state the fact of certification as a specialist, along with a mandated disclaimer, if the lawyer is certified as a specialist in a particular area" approved by the ABA or appropriate authority. *See* ABA Model Rule 7.4(d) ("A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and (2) the name of the certifying organization is clearly identified in the communication.").

The Committee opined that by listing areas of practice under a heading of "Specialties," a lawyer or law firm makes a claim that the lawyer or law firm "is a specialist or specializes in a particular field of law." Thus, proper certification would be required as provided in Rule 7.4(c). *See also Hayes v. Grievance Comm. of the Eighth Jud. Dist.*, 672 F. 3d 158 (2d Cir. 2012) (striking down as unconstitutional portions of New York Rule 7.4(c)'s disclaimers including the language that "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"). If, however, "a lawyer has been certified as a specialist in a particular area of law or law practice by an organization or authority as provided in Rule 7.4(c), then the lawyer may so state if the lawyer complies with that Rule's disclaimer provisions."

The NYSBA opinion did not address whether the lawyer or law firm could, consistent with Rule 7.4(a), list practice areas under other headings in LinkedIn, such as "Products & Services" or "Skills and Expertise." In Formal Opinion 748, the New York County Lawyers Association Professional Ethics Committee concluded that:

> With respect to skills or practice areas on lawyers' profiles under a heading, such as "Experience" or "Skills," this Committee is of the opinion that such information does not constitute a claim to be a specialist under Rule 7.4. The rule contemplates advertising regarding an attorney's practice areas, noting that an attorney may "publicly identify one or more areas of law in which the lawyer or 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)." RPC 7.4(a). This provision contemplates the distinction between claims that

> an attorney has certain experience or skills and an attorney's claim to be a "specialist" under Rule 7.4. Categorizing one's practice areas or experience under a heading such as "Skills" or "Experience" therefore, does not run afoul of RPC 7.4, provided that the word "specialist" is not used or endorsed by the attorney, directly or indirectly. Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists.

LinkedIn allows others to include endorsements and recommendations on an attorney's profile, which raises additional ethical considerations. "While these endorsements and recommendations originate from other users, they nonetheless appear on the attorney's LinkedIn profile." The Committee concluded that

> because LinkedIn gives users control over the entire content of their profiles, including 'Endorsements' and 'Recommendations' by other users (by allowing an attorney to accept or reject an endorsement or recommendation), we conclude that attorneys are responsible for periodically monitoring the content of their LinkedIn pages at reasonable intervals. To that end, endorsements and recommendations must be truthful, not misleading, and based on actual knowledge pursuant to Rule 7.1.

The Committee provided certain examples:

> if a distant acquaintance endorses a matrimonial lawyer for international transactional law, and the attorney has no actual experience in that area, the attorney should remove the endorsement from his or her profile within a reasonable period of time, once the attorney becomes aware of the inaccurate posting. If a colleague or former client, however, endorses that attorney for matrimonial law, a field in which the attorney has actual experience, the endorsement would not be considered misleading.

3) What information attorneys should include (and exclude) from their LinkedIn profiles to ensure compliance with the New York Rules of Professional Conduct?

If an attorney chooses to include information such as practice areas, skills, endorsements, or recommendations, the Opinion concludes that the attorney must treat his or her LinkedIn profile as attorney advertising and include appropriate disclaimers pursuant to Rule 7.1. While not opining on the requirements for all potential content on LinkedIn, the Committee concluded that:

> If an attorney's LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words "AttorneyAdvertising" on the lawyer's LinkedIn profile. See RPC 7.1(f). If an attorney also includes (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; or (4) statements describing or characterizing the quality of the lawyer's or law firm's services, the attorney should also include the disclaimer "Prior results do not guarantee a similar outcome." See RPC 7.1(d) and (e). Because the rules contemplate "testimonials or endorsements," attorneys who allow "Endorsements" from other users and "Recommendations" to appear on one's profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e). An attorney who claims to have certain skills must also include this disclaimer because a description of one's skills—even where those skills are chosen from fields created by LinkedIn—constitutes a statement "characterizing the quality of the lawyer's [] services" under Rule 7.1(d).

2) New York City Bar Association Formal Opinion Number 2015-7 (2015)

In Opinion 2017-7, the New York City Bar Association Opined that:

> An attorney's individual LinkedIn profile or other content constitutes attorney advertising only if it meets all five of the following criteria: (a) it is a communication made by or on behalf of the lawyer; (b) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising. Given the numerous reasons that lawyers use LinkedIn, it should not be presumed that an attorney who posts information about herself on LinkedIn necessarily does so for the primary purpose of attracting paying clients. For example, including a list of "Skills," a description of one's practice areas, or displaying "Endorsements" or "Recommendations," without more, does not constitute attorney advertising. If an attorney's individual LinkedIn profile or other content meets the definition of attorney advertising, the attorney must comply with the requirements of Rules 7.1, 7.4 and 7.5, including, but not limited to: (1) labeling the LinkedIn content "Attorney Advertising"; (2) including the name, principal law office address and telephone number of

> the lawyer; (3) pre-approving any content posted on LinkedIn; (4) preserving a copy for at least one year; and (5) refraining from false, deceptive or misleading statements. These are only some of the requirements associated with attorney advertising. Before disseminating any advertisements, whether on social media or otherwise, the attorney should ensure that those advertisements comply with all requirements set forth in Article 7 of the New York Rules.

The New York City Bar expressed significant disagreement with NYCLA Opinion 748:

> Given LinkedIn's many possible uses, there should be clear evidence that a lawyer's primary purpose is to attract paying clients before concluding that her LinkedIn profile constitutes an "advertisement." In this regard, we differ sharply from Opinion 748 issued by the Professional Ethics Committee of the New York County Lawyer's Association ("NYCLA"), which concluded that "if an attorney chooses to include information such as practice areas, skills, endorsements, or recommendations, the attorney must treat his or her LinkedIn profile as attorney advertising and include appropriate disclaimers pursuant to Rule 7.1." NYCLA Ethics Op. 748 (2015) (emphasis added). This conclusion focuses exclusively on the content of a LinkedIn profile, and ignores the other factors that must be considered in determining whether a communication is an "advertisement," such as the primary purpose of the communication and the intended audience. Including a list of "Skills" or a description of one's practice areas, without more, is not an advertisement. Likewise, displaying Endorsements and Recommendations can have several purposes, beyond the goal of attracting paying clients. Accordingly, the inclusion of Endorsements or Recommendations does not, without more, make the lawyer's LinkedIn profile an "advertisement."

The City Bar did, however, "concur with the conclusion in NYCLA Ethics Op. 748 that attorneys are responsible for periodically monitoring third party Endorsements and Recommendations on LinkedIn "at reasonable intervals" to ensure that they are "truthful, not misleading, and based on actual knowledge." *See also* NYSBA 2015 Social Media Guidelines, at 9 ("A lawyer must ensure the accuracy of third-party legal endorsements, recommendations, or online reviews posted to the lawyer's social media profile" and "must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties.")."

Furthermore, the City Bar also:

> agree[d] with the conclusion in NYCLA Ethics Op. 748 that listing practice areas under the heading "Skills" or "Experience" does not "constitute a claim to be a specialist under Rule 7.4." We also agree with guidance in the NYSBA 2015 Social Media Guidelines, which states that "a lawyer may include information about the lawyer's experience elsewhere, such as under another heading or in an untitled field that permits biographical information to be included." NYSBA 2015 Social Media Guidelines, at 7-8.

XIII. Fee Agreements

A. New York 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.

* * *

NYSBA Ethics Committee Opines on Use of a Client's Credit Card to Secure Payment of Fees and Expenses

In New York State Bar Association Committee on Professional Ethics Formal Opinion 1112 (2017), the inquirer sought to add this provision to its fee agreement:

> In the event of your failure to pay any bill for legal fees, costs and/or disbursements in excess of 20-days from the date of the bill, you hereby authorize the undersigned attorney to bill your credit card for the full amount of the unpaid balance of the bill, without further notice to you. Your credit card information is as follows: X*%###

The opinion concludes that a lawyer's retainer agreement may provide that (i) the client secures payment of the lawyer's fees by credit card, and (ii) the lawyer will bill the client's credit card the amount of any legal fees, costs or disbursements that the client has failed to pay after 20 days from the date of the lawyer's bill for such amount.

The opinion noted that the client must be expressly informed of the right to dispute any invoice of the lawyer (and to request fee arbitration under Part 137 of the Uniform Rules) before the lawyer charges the credit card. Furthermore, the lawyer may not charge the client's credit card account for any disputed portion of the lawyer's bill. *Cf.* Rule 1.15(b)(4)(if the client disputes the lawyer's right to funds, the lawyer may not withdraw the disputed funds from the lawyer's special account until the dispute is finally resolved).

Previously, the Committee had approved the client's payment of a lawyers fee using a credit card as long as:

> (i) the amount of the fee is reasonable; (ii) the lawyer complies with the duty to protect the confidentiality of client information; (iii) the lawyer does not allow the credit card company to compromise the lawyer's independent professional judgment on behalf of the client; (iv) the lawyer notifies the client before the charges are billed to the credit card and offers the client the opportunity to question any billing errors; and (v) in the event of any dispute regarding the lawyer's fee, the lawyer attempts to resolve all disputes

> amicably and promptly and, if applicable, complies with the fee dispute resolution program set forth in 22 N.Y.C.R.R. Part 137.
>
> * * *

In New York State Bar Association Committee on Professional Ethics Formal Opinion 1134 (2017), the Committee addressed whether an attorney may use a client's credit card to secure payment of fees and expenses in a domestic relations matter and concluded that the issue presented a question of law on the meaning of 22 N.Y.C.R.R. Part 1400, which is an issue beyond this Committee's jurisdiction.

Part 1400 is a court rule requiring that engagement letters in domestic relations matters contain certain features. It applies:

> to all attorneys who…undertake to represent 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 claims, actions or proceedings. This Part shall not apply to attorneys representing clients without compensation paid by the client, except that where a client is other than a minor, the provisions of section 1400.2 of this Part shall apply to the extent they are not applicable to compensation.

After discussing its opinion in N.Y. State 1112, the Committee observed that:

> Rule 1.5(d)(2) provides that a "lawyer shall not enter into an arrangement for, charge or collect" a fee that is, among other things, "prohibited by law or rule of court." Thus, whether the lawyer's proposed use of a credit card to secure payment in a domestic relations matter depends on whether the practice would violate a law or rule of court.
>
> In domestic relations matters, the New York courts have mandated certain client protections not necessarily applicable in other matters. Most notable of these is 22 NYCRR 1400.5, which says in relevant part:
>
> > (a) An attorney may obtain a confession of judgment of promissory note, take a lien on real property, or otherwise obtain a security interest to secure his or her fee only where:

(1) the retainer agreement provides that a security interest may be sought;

(2) notice of an application for a security interest has been given to the other spouse; and

(3) the court grants approval for the security interest after submission of an application for counsel fees.

See also N.Y. Rule 1.5(d)(imposing restrictions of fees in domestic relations matters).

The Committee opined that the issue of whether the proposed credit card arrangement constitutes a "security interest" within the meaning of Part 1400 "is solely an issue of law beyond our jurisdiction to decide."

* * *

(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.

* * *

NYSBA Ethics Committee Opines on Whether Contingency Fee Agreement May Impose an Interest Charge on Unpaid Disbursements

In New York State Bar Association Committee on Professional Ethics Formal Opinion 1181 (2020), the Committee opined that a contingency fee agreement can "impose an interest charge on unpaid disbursements if a written agreement signed by the client fully discloses the terms on which interest may be charged and the terms are reasonable."

The Committee acknowledged "that recent changes in the law concerning contingency fee cases have sowed some confusion about our prior opinions on a lawyer's ability to charge interest on disbursements. This confusion, we are told, stems from the laws allowing a lawyer to fund disbursements rather than seeking immediate reimbursement from the client."

Several years ago, the Appellate Division Rules governing contingency fee agreements were all amended to permit an attorney in a personal injury or wrongful death action to compute a contingency fee off the gross amount of the recovery. For example, the Third Department's rule provides that an attorney's contingency fee in a personal injury or wrongful death action:

> (c) …shall be computed by one of the following two methods to be selected by the client in the retainer agreement or letter of engagement:
>
> (1) on the net sum recovered after deducting from the amount recovered expenses and disbursements for expert testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action; or
>
> (2) in the event that the attorney agrees to pay costs and expenses of the action pursuant to Judiciary Law section 488(2)(d), on the gross sum recovered before deducting expenses and disbursements. The retainer agreement or letter of engagement shall describe these alternative methods,

> explain the financial consequences of each, and clearly indicate the client's selection. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed part of the amount recovered. For the following or similar items there shall be no deduction in computing such percentages: liens, assignments or claims in favor of hospitals, for medical care and treatment by doctors and nurses, or self insurers or insurance carriers.

22 N.Y.C.R.R § 806.27 (3rd Dep't); *see also* 22 N.Y.C.R.R §§ 603.25 (1st Dep't.), 691.20 (2d Dep't), 1015.15 (4th Dep't).

The Committee noted that in N. Y. State 729 (2000), "which was issued under a substantially identical rule in the prior Code of Professional Responsibility (the "Code")," it opined:

> that a lawyer may [charge interest on disbursements in a contingency fee case] provided certain conditions are met. These conditions were: (a) that the client is clearly advised in writing that disbursements not paid within an expressly stated time period would be subject to an interest charge; (b) that the client is billed for the disbursement promptly after the disbursement is incurred so that the client may pay the disbursement, if the client so chooses, before the client incurs an interest charge; (c) that the period of time between the bill and the imposition of the interest charge is reasonable; (d) that the disbursement is itself appropriate (see, e.g., ABA 93-379 (1993) (citing appropriate disbursements); (e) that the interest rate is reasonable; and (f) that the client gives informed consent in writing to the arrangement before the arrangement goes into effect. We believe that the conditions set forth in Opinion 729 are equally applicable under the Rules, and we thus continue to endorse them as appropriate conditions when a lawyer seeks to charge interest on disbursements in a contingency fee case, whether the interest rate is flat or fluctuating.

Relying on its "adherence to Opinion 729," the Committee concluded "that a lawyer may charge interest on disbursements but must offer the client a reasonable chance to pay the expense before the interest charge is incurred."

As far as the amount of interest that can be charged, the Committee observed that in "Opinion 729, we declined to opine on the amount of interest a lawyer may charge other than to conclude that the amount must be reasonable." It again adhered to that view in Opinion 1181 and noted:

we see no obvious relationship between, on the one hand, a legislative policy on the interest that must be paid on judgments (that is, 9%) and, on the other, the ethical reasonableness of an interest charge on unpaid disbursements in a contingency case. It is possible that one may bear on the other, but the connection is not ineluctable. We believe, instead, that the reasonableness of an interest rate varies with the facts and circumstances of a particular lawyer-client relationship. It follows that, in our view, a lawyer is not required to use the statutory interest rate as an interest charge, and that whether a lawyer may do so depends on the facts and circumstances.

For example, we have previously opined that a lawyer may pass on to a client the interest rate (but no more) that the lawyer actually incurs if the lawyer borrows from a bank to fund the disbursements. N.Y. State 754 (2002); *see* N.Y.C. 1997-1 (1997). In our Opinions 729 and 754, we said, too, that whether the lawyer uses the lawyer's own funds to finance the disbursements rather than borrowing those funds should not matter; in each instance, there is an economic cost to the lawyer which the lawyer may ethically pass on to the client provided the conditions set forth above are satisfied. The factors comprising the lawyer's cost of money in the absence of bank financing are impossible to identify to any useful effect, except to note that laws exist (such as usury laws) that regulate these matters and hence apply.

* * *

(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.

* * *

New York State Bar Association Addresses Lawyer's Obligations When Taking a Mortgage Against a Client's Property to Secure a Fee in a Divorce Matter

In New York State Bar Association Formal Opinion 1156 (2018), the Committee was presented with the following inquiry:

> Discussions between the client and the inquirer have led to a tentative understanding, which the inquirer would like to incorporate into a written agreement, to be signed by both parties as a revision of the original retainer agreement. The proposed revision would provide: (1) that the inquirer would accept a specified amount – significantly less than the amount currently owed – in full payment of the fee obligation; (2) that the inquirer would take a mortgage against the house in the amount of the reduced fees; and (3), recognizing that the client may not be able to sell the house immediately, the inquirer would charge no interest on the fee balance for approximately seven months, after which interest at a low rate would start to accrue.

The Committee concluded:

> If a lawyer representing a client in a divorce matter agrees with the client that the lawyer will take a mortgage on the client's house to secure the legal fees, the lawyer may do so only upon compliance with the requirements of Rules 1.5(d)(5)(iii) and 1.8(a), such as fairness, proper advice to the client, a sufficient writing signed by the client, notice to the adversary, and approval by the court.

* * *

(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.**

* * *

Lawyer Who Refers Matter to Another Lawyer Undertakes Representation of Client

ABA Formal Opinion 474 (2016) concludes that "[a] lawyer who refers a matter to another lawyer outside of the first lawyer's firm and divides a fee from the matter with the lawyer to whom the matter has been referred, has undertaken representation of the client." Therefore, "[f]ee arrangements arrangements under Model Rule 1.5(e) [New York Rule 1.5(g)] are subject to Rule 1.7" and its conflict of interest provisions. "Unless a client gives informed consent confirmed in writing, a lawyer may not accept a fee when the lawyer has a conflict of interest that prohibits the lawyer from either performing legal services in connection with or assuming joint responsibility for the matter. The opinion also cautions that "[w]hen one lawyer refers a matter to a second lawyer outside of the firm and the first lawyer either performs legal services in connection with or assumes joint responsibility for the matter and accepts a referral fee, the agreement regarding the division of fees, including client consent confirmed in writing, must be completed be-fore or within a reasonable time after the commencement of the representation."

Court of Appeals Resolves Disputes Over Fee Splitting Agreements

In *Marin v. Constitution Realty*, LLC, 28 N.Y.3d 666, 49 N.Y.S.3d 39, 71 N.E.3d 530 (2017), the Court of Appeals resolved a fee dispute between the plaintiffs' attorney of record in a Labor Law action (L-1), and two attorneys L-1 engaged to assist her in the litigation: L-2 and L-3.

L-1 initially engaged L-2 to act as co-counsel and provide advice in the action. Their written agreement provided that L-2 would receive 20% of net attorneys' fees if the case settled before trial, and 25% once jury selection commenced. Neither L-1 nor L-2 informed the clients of L-2's involvement in the action, although L-2 believed L-1 had informed the client. The Court noted that the failure to inform the clients of L-2's involvement in the matter violated both the former Code of Professional Responsibility, DR 2–107(a), and the current Rules of Professional Conduct, Rule 1.5(g)(if lawyer is sharing fees with a lawyer outside her firm, the client must "agree[] 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").

Six months later, L-1 wrote to L-2 "unilaterally discharging him and advising him that his portion of the fees would be determined on a quantum meruit basis." L-2 did not respond to L-1 and did no further work on the case.

L-1 ultimately obtained partial summary judgment on liability under Labor Law § 240(1) on plaintiffs' behalf and then sought the assistance of L-3 for a mediation of the matter. Under L-1's agreement with L-3, L-3 was entitled to 12% percent of all attorneys' fees whenever the case was resolved. The agreement provided that "[a]fter … mediation," L-3 "will be entitled to forty (40%) percent of all attorneys' fees whenever the case is resolved."

After the one-day mediation session concluded, L-3 continued to have discussions with the mediator and, ten days after the session, accepted a settlement offer of $8 million on behalf of plaintiff, which was tendered by the mediator.

L-1 moved for an order establishing L-3's attorneys' fees at 12% of net attorneys' fees and, after L-2 intervened, L-1 also moved for an order setting his fees on a quantum meruit basis. L-2 and L-3 each cross-moved: L-2 to fix his fee at 20% of net attorneys' fees and L-3 to fix his fee at 40% of net attorneys' fees.

The Court of Appeals concluded that L-1's agreements with L-2 were enforceable, despite the failure to comply with Rule 1.5(g)'s fee splitting provisions, and entitled L-2 to 20% of net attorneys' fees. While the Court classified L-1's "failure to inform her clients of [L-2]'s retention" as "a serious ethical violation," it did "not allow her to avoid otherwise enforceable contracts under the circumstances of this case (see Samuel v. Druckman & Sinel, LLP, 12 N.Y.3d 205, 210, 879 N.Y.S.2d 10, 906 N.E.2d 1042 [2009])." The Court stressed that "it ill becomes defendants, who are also bound by the Code of Professional Responsibility, to seek to avoid on 'ethical' grounds the obligations of an agreement to which they freely assented and from which they reaped the benefits." The Court found this to be "particularly true here, where [L-1] and [L-2] both failed to inform the clients about [L-2]'s retention, [L-1] led [L-2] to believe that the clients were so informed, and the clients themselves were not adversely affected by the ethical breach."

Applying "general principles of contract interpretation," the Court concluded that L-3 was only entitled to 12% of the net attorneys' fees because the matter was essentially resolved through mediation.

* * *

(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. In this situation, whether the lawyer is responsible for a violation must be determined by reference to Rules 5.1, 5.2 and 5.3. As noted in Comment [8] to Rule 5.1, nothing in that Rule alters the personal duty of each lawyer in a firm to abide by these Rules and in some situations, other Rules may impose upon a supervising lawyer a duty to ensure that the books and records of a firm are accurate. See Rule 1.15(j).

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 also precludes 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. See Rule 1.0(g) (defining "domestic relations matter" to include an action to enforce such a judgment).

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.

* * *

B. 22 N.Y.C.R.R. Part 1215 Written Letter of Engagement

Section 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:

(1) if otherwise impractible; or

(2) 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

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section 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) of this section.

Section 1215.2. Exceptions

This section shall not apply to:

(a) representation of a client where the fee to be charged is expected to be less than $3,000;

(b) representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client;

(c) representation in domestic relations matters subject to Part 1400 of this Title; or

(d) 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.

* * *

C. Appellate Division Rules

Appellate Division Rules 22 N.Y.C.R.R. §§ 603.7, 691.20, 806.13, 1022.31 also contain provisions governing contingent fees in personal injury and wrongful death actions. The Third Department’s rule is included below:

Section 806.13. Contingent fees in claims and actions for personal injury and wrongful death

(a) In any claim or action for personal injury or wrongful death, other than one alleging medical, dental or podiatric malpractice, whether determined by judgment or settlement, in which the compensation of claimant's or plaintiff's attorney is contingent, that is, dependent in whole or in part upon the amount of the recovery, the receipt, retention or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than that contained in the schedule of fees in subdivision (b) of this section is deemed to be fair and

reasonable. The receipt, retention or sharing of compensation which is in excess of such schedule of fees shall constitute the exaction of unreasonable and unconscionable compensation, unless authorized by a written order of the court as provided in this section. Compensation of claimant's or plaintiff's attorney for services rendered in claims or actions for personal injury alleging medical, dental or podiatric malpractice shall be computed pursuant to the fee schedule in Judiciary Law, section 474-a.

(b) The following is the schedule of reasonable fees referred to in subdivision (a) of this section: either,

SCHEDULE A

(1) 50 percent on the first $1,000 of the sum recovered,

(2) 40 percent on the next $2,000 of the sum recovered,

(3) 35 percent on the next $22,000 of the sum recovered,

(4) 25 percent on any amount over $25,000 of the sum recovered; or

SCHEDULE B

A percentage not exceeding 33 1/3 percent of the sum recovered, if the initial contractual arrangement between the client and the attorney so provides, in which event the procedure provided in this section for making application for additional compensation because of extraordinary circumstances shall not apply.

(c) Such percentage shall be computed by one of the following two methods to be selected by the client in the retainer agreement or letter of engagement:

> (1) on the net sum recovered after deducting from the amount recovered expenses and disbursements for expert testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action; or
>
> (2) in the event that the attorney agrees to pay costs and expenses of the action pursuant to Judiciary Law section 488(2)(d), on the gross sum recovered before deducting expenses and disbursements. The retainer agreement or letter of engagement shall describe these alternative methods,

explain the financial consequences of each, and clearly indicate the client's selection. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed part of the amount recovered. For the following or similar items there shall be no deduction in computing such percentages: liens, assignments or claims in favor of hospitals, for medical care and treatment by doctors and nurses, or self-insurers or insurance carriers.

(d) In the event that claimant's or plaintiff's attorney believes in good faith that Schedule A, of subdivision (b) of this section, because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the client and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the trial term calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to a special term of Supreme Court in the judicial district in which the attorney has an office. Upon such application, the justice, in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in Schedule A, of subdivision (b) of this section; provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the client and the attorney. If the application be granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application.

(e) Nothing contained in this section shall be deemed applicable to the fixing of compensation for attorneys representing infants or other persons, where the statutes or rules provide for the fixation of such compensation by the court.

(f) Nothing contained in this section shall be deemed applicable to the fixing of compensation of attorneys for services rendered in connection with collection of first-party benefits as defined in article XVIII of the Insurance Law.

* * *

The New York State Bar Association’s website has some helpful examples of letters of engagement:
https://nysba.org/app/uploads/2020/01/SampleLetterofEngagement.pdf

* * *

XIV. New York State Bar Exam Replaced by Uniform Bar Exam, But Decision Now Under Reconsideration

The Court of Appeals appoints and oversees the Board of Law Examiners and promulgates the rules for the admission of attorneys to practice. In a February 26, 2016 Outside Counsel piece in the New York Law Journal, we discussed the Court's changes to the New York State Bar Exam, which will essentially be replaced with the Uniform Bar Exam. *See* Patrick M. Connors, "Lowering the New York Bar: Will New Exam Prepare Attorneys for Practice?," N.Y.L.J, Feb. 26, 2016, at 4. Given the scant knowledge of New York law required to pass the new bar exam, it is highly probable that there will be an increase in the number of newly admitted attorneys who have minimal knowledge of our state's law.

Law firms and lawyers with managerial responsibility or supervisory authority will now have additional responsibilities. They must be especially mindful of ensuring that newly admitted lawyers practicing in areas requiring knowledge of New York law are competent to do so. *See* New York Rules of Professional Conduct, Rule 5.1 ("Responsibilities of Law Firms, Partners, Managers, and Supervisory Lawyers"); Rule 1.1 ("Competence").

Enrollments in New York Civil Procedure courses have dropped dramatically since the change in the Bar Exam and are now less than 20% of what they were before the change.

In April, 2019, NYSBA President Michael Miller announced the formation of the NYSBA Task Force on the New York Bar Exam. The Task Force investigated and reported on the experience and impact of New York's adoption of the Uniform Bar Exam and New York Law Exam in May 2015 and made recommendations regarding the future content and form of the New York Bar Examination in a March 5, 2020 Report.

The Court of Appeals' website recently announced:

> On July 16, 2020, following the Board of Law Examiner's decision to cancel the planned September 2020 administration of the Uniform Bar Examination

(UBE) as a consequence of the public health crisis, Chief Judge DiFiore announced the creation of a Working Group to study the future of the bar examination. Under the leadership of its Chair, retired Court of Appeals Judge Howard A. Levine, the Working Group was immediately tasked with examining whether emergency measures should be taken to address the disruption experienced by aspiring attorneys in New York, including whether New York should participate in the remote testing option offered by the National Conference of Bar Examiners (NCBE). On July 23, 2020, the Court of Appeals announced that the Working Group (comprised of Judge Levine, Justice Erin M. Peradotto, Seymour James, Esq., and Matthew Biben, Esq.) had issued a comprehensive report recommending, in light of the exigencies presented by the pandemic, that New York administer the October 2020 remote examination offered by the NCBE on a one-time basis – a recommendation that was promptly adopted by the Court.

As the Working Group now turns its attention to its broader mission of evaluating the primary assessment tool for New York bar applicants (presently the UBE) as well as other proposed metrics for bar admission, Chief Judge DiFiore is pleased to announce the addition of nine new members: Hon. Richard C. Wesley, Judge, United States Court of Appeals for the Second Circuit (former Judge of the New York Court of Appeals); Hon. Alan D. Scheinkman, Presiding Justice, Appellate Division, Second Department; Hon. Randy F. Treece, Magistrate Judge (ret.), United States District Court for the Northern District of New York; Jennifer Beckage, Beckage PLLC; John M. Desmarais, Desmarais LLP; Dean John D. Feerick, Fordham University School of Law; Caitlin Halligan, Selendy & Gay PLLC; James J. Wisniewski, Law Clerk to Judge Catherine Leahy-Scott, New York Court of Claims; and Mark C. Zauderer, Ganfer, Shore, Leeds & Zauderer LLC. With Judge Levine at the helm, this extraordinary group of distinguished Judges and attorneys -- reflecting a wide range of experience in the judiciary, public service, private practice and legal academia – is well-positioned to examine the efficacy of the UBE and to explore innovative methods of adapting our professional licensure process to ensure an equitable and responsible path to attorney admission that maintains the high standards of the New York bar and continues to fulfill the core objective of protecting the public.

XV. Misconduct Under Rule 8.4

A. ABA Model Rule 8.4: Misconduct (amended August 2016)

It is professional misconduct for a lawyer to:

(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) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(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 to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct 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; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Rule 8.4 Misconduct – 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 the lawyer's 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, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] **Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.** Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations. (emphasis added)

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide

legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. *See* Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 1.2(b).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] 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.

* * *

New York's Rule 8.4(g) was amended in 2018 to now provide:

> A lawyer or law firm shall not:
>
> (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, sexual orientation**, gender identity, or gender expression**. 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.

* * *

ABA Model Rule 8.4(g)'s reach is more expansive, as noted in Comment 4 thereto. An ABA report noted evidence of sexual harassment at "activities such as law firm dinners and other nominally social events at which lawyers are present

solely because of their association with their law firm or in connection with their practice of law."

On April 23, 2018, the Tennessee Supreme Court rejected a proposed revision to their rules of professional conduct that would have incorporated Rule 8.4(g) of the ABA Model Rules of Professional Conduct. This is the second time in five years the Tennessee Supreme Court has rejected similar proposals. It was reported that the proposal generated numerous comments from law professors, practitioners, and religious groups. "Many commenters didn't see the need for such a rule and opposed 'big brother' looking over a lawyer's shoulder." ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports, May 02, 2018. The ABA/BNA Article also notes:

> South Texas College of Law constitutional law professor Josh Blackman told Bloomberg Law that lawyers "don't forsake all of [their] free speech rights by becoming an attorney." And the bar doesn't have the same interest in disciplining lawyers for conduct at a bar association dinner or at continuing legal education classes, as it does in disciplining lawyer conduct in a courtroom, deposition or mediation, Blackman said. The rule is a tool "to silence and chill people."
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> Blackman was recently protested and heckled by students at CUNY Law School for speaking about free speech. Blackman said those kids will be enforcing 8.4(g) in a few years and "if you give these kids a loaded weapon, they'll use it to discipline people who speak things they don't like."
>
> But Rule 8.4(g) has vocal proponents as well. New York University School of Law professional responsibility professor Stephen Gillers advocated for the ABA's adoption of 8.4(g) and said that "[n]o lawyer has a First Amendment right to demean another lawyer (or anyone involved in the legal process)."
>
> …To date, only Vermont has adopted the Model Rule's version of 8.4(g). Many other states have anti-discrimination provisions, but they have been described as being more narrow than 8.4(g).

The South Carolina Supreme Court and Montana legislature have also rejected a proposal based on ABA Model Rule 8.4(g). The South Carolina Supreme Court received comments from 29 individual attorneys and three groups, and it was reported that a majority of the comments were in opposition to the rule.

It has been reported that 24 states already adopted an anti-discrimination provision in their rules of professional conduct before the ABA adopted 8.4(g) as part of the Model Rules in August of 2016.

Illinois Rule of Professional Conduct 8.4(j) provides that it is professional misconduct for a lawyer to "violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer."

Indiana's Rule of Professional Conduct 8.4(g) states that it is professional misconduct for a lawyer to "engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status or similar factors."

B. "The ABA Overrules the First Amendment"

See Ron Rotunda, *The ABA Overrules the First Amendment*, THE WALL STREET JOURNAL (Aug. 16, 2016 7:00 p.m.), http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418 ("Consider the following form of 'verbal' conduct when one lawyer tells another, in connection with a case, 'I abhor the idle rich. We should raise capital gains taxes.' The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.").

See also Ron Rotunda, The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought, The Heritage, (Oct. 6, 2016), http://www.heritage.org/research/reports/2016/10/the-aba-decision-to-control-what-lawyers-say-supportingdiversity-but-not-diversity-of-thought.

C. New York State Bar Association Committee on Professional Ethics Opinion 1111 (1/7/17)

Topic: Client representation; discrimination

Digest: A lawyer is under no obligation to accept every person who may wish to become a client unless the refusal to accept a representation amounts to unlawful discrimination.

Rules: 8.4(g)

FACTS

1. A lawyer has been requested to represent a person desiring to bring a childhood sex abuse claim against a religious institution. The lawyer is of the same religion as the institution against which the claim is to be made. Because of this religious affiliation, the lawyer is unwilling to represent the claimant against the institution.

QUESTIONS

2. Is a lawyer ethically required to accept every request for representation?

3. Does the refusal to accept a representation under the facts of this inquiry amount to illegal discrimination?

OPINION

Lawyer's Freedom to Decide Which Clients to Represent

4. It has long been a principle of the practice of law that a "lawyer is under no obligation to act as advisor or advocate for every person who may wish to become a client . . ." EC 2-35 [formerly EC 2-26] of the former Code of Professional Responsibility (the "Code"). Although this language was not carried over to the current Rules of Professional Conduct (the "Rules"), the principle remains sound. The principle that lawyers have discretion to determine whether to accept a client has been "espoused so repeatedly and over such a long period of time that it has virtually reached the level of dogma." Robert T. Begg, *Revoking the Lawyer's License to Discriminate in New York*, 7 Geo. J. Legal Ethics 280, 280-81 (1993). *See also Restatement (Third), The Law Governing Lawyers* § 14 cmt. b (Am. Law Inst. 2000) ("The client-lawyer relationship ordinarily is a consensual one. Lawyers generally are as free as other persons to decide with whom to deal, subject to generally applicable statutes such as those prohibiting certain kinds of discrimination"); Henry S. Drinker, Legal Ethics 139 (1953) ("[T]he lawyer may choose his own cases and for any reason or without reason may decline any employment which he does not fancy"); Canon 31, ABA Canons of Professional Ethics (1908) ("No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment."); George Sharswood, *An Essay on Professional Ethics* 84 (5th ed.

1884) (stating, in one of the earliest American works on legal ethics, that a lawyer "has an undoubted right to refuse a retainer, and decline to be concerned in any cause, at his discretion").

5. We applied this principle in N.Y. State 833 (2009), where we held that a lawyer ethically was not required to respond to an unsolicited written request for representation sent by a person in prison.

Prohibition Against Unlawful Discrimination

6. However, a lawyer's unfettered ethical right to decline a representation is subject to federal, state and local anti-discrimination statutes.

7. For example, N.Y. Exec. Law § 296(2)(a) provides: "It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation ... because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof ...." In *Cahill v. Rosa*, 674 N.E.2d 274, 277 (N.Y. 1996), a case involving a dentist in private practice who refused to treat patients whom he suspected of being HIV positive, the Court of Appeals held that a dental practice is a "place of public accommodation" for purposes of the Executive Law. At least one scholar has argued that *Cahill v. Rosa* prohibits lawyers from discriminating as well. *See* Robert T. Begg, *The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-Discrimination Disciplinary Rule*, 64 Albany L. Rev 153 (2000) (discussing whether discrimination by New York lawyers is illegal after *Cahill*); *but see* G. Chin, *Do You Really Want a Lawyer Who Doesn't Want You?*, 20 W. New Eng. L. Rev. 9 (1998) (arguing that a lawyer should not be required to undertake representation where the lawyer cannot provide zealous representation).

8. Rule 8.4(g) recognizes that anti-discrimination statutes may limit a lawyer's freedom to decline representation, stating that a lawyer or law firm "shall not ... unlawfully discriminate in the practice of law . . . on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. ..." What constitutes "unlawful discrimination" within the meaning of Rule 8.4(g) is a question of law beyond the jurisdiction of this Committee. Consequently, we do not opine on whether a lawyer's refusal to represent a prospective client in a suit

against the lawyer's own religious institution constitutes "unlawful discrimination."

CONCLUSION

9. A lawyer is under no obligation to accept every person who may wish to become a client unless the refusal to accept a person amounts to unlawful discrimination. Whether a lawyer's refusal to represent a particular client amounts to unlawful discrimination is a question of law beyond this Committee's jurisdiction.

D. Associate Disciplined for Lying to Partner

In *Matter of McCoobery*, 169 A.D.3d 74 (1st Dep't 2019), the respondent was employed as an associate with a law firm from 2008 to 2017. Both allegations in this grievance petition stemmed from work he performed for one partner at the firm.

In the first allegation, respondent's law firm was representing a commercial landlord in a real estate litigation matter and, at the request of the partner, respondent was tasked with drafting the client's appellate brief to be submitted to the First Department. Respondent actually filed the client's brief without the partner's knowledge or direction.

Approximately one month later, not knowing that respondent had already filed the client's brief, the partner asked respondent for his work so that he could review it. Rather than inform the partner that he had already filed the brief, respondent gave the partner what he falsely labelled as a "draft of the brief." The partner, believing the brief to be only a draft, made revisions which he then gave to respondent. When the partner discovered respondent's actions, he confronted respondent, who acknowledged that he had filed the brief prior to allowing the partner to review it.

In the second allegation, respondent's firm was representing a plaintiff in connection with a real estate matter. The client's appellate brief was due to be filed in November 2016. The partner asked respondent to send the brief and record on appeal to the firm's printing vendor for service upon the opposing counsel and for filing with the court. Respondent forwarded the relevant documents to the printing vendor, but failed to instruct the vendor to serve and file them. "Nevertheless, respondent falsely told the partner that he had instructed the vendor to file and serve the documents."

In an attempt to conceal the problem, respondent falsely told the partner that there had been a stipulation between himself and opposing counsel to permit an extension for the brief to be filed in late January 2017.

To further conceal his misrepresentation, respondent fabricated an opposition brief, which he provided to the partner as though it were genuine. Respondent constructed a false chain of emails to make it appear as if he had received the fabricated brief from opposing counsel, which he forwarded to the partner.

The partner, who believed the opposition brief to be genuine, drafted a reply brief, which respondent falsely told the partner was due on February 10, 2017. The partner forwarded the reply brief to the client for review.

Respondent also falsely told the partner that the client's appeal was calendared for this Court's June 2017 term. On May 1, 2017, when this Court released its June 2017 calendar, the client's appeal was not on it. After noticing the appeal had not been calendered, the partner told respondent he was going to call opposing counsel to find out why the appeal had not been calendared. Respondent then admitted to the partner that he failed to inform the printing vendor to serve and file the subject documents and admitted his deceptions. On May 2, 2017, respondent tendered his resignation from the firm.

Respondent conditionally admitted that his actions violated all four charges against him, which included violations of Rule 8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) (two charges); Rule 1.3(b) (a lawyer shall not neglect a legal matter entrusted to the lawyer); and Rule 8.4(h) (a lawyer shall not engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer).

The parties agreed that there were no aggravating factors outside of respondent's misconduct itself and also stipulated to the following facts in mitigation:

> there was no irreparable harm to any client as a result of respondent's misconduct; during the period at issue, respondent's father was diagnosed with a terminal illness and passed away in May 2018, the stress of which caused respondent to be distracted at work for a significant period of time; and he has no prior disciplinary history in more than 20 years of practicing law.

The court ruled that "[i]n light of respondent's admitted misconduct, the mitigating factors presented and lack of aggravation, and the relevant case law, … a three-month suspension is a reasonable punishment for the type of misconduct in which respondent engaged."

E. Lawyer Disciplined for Secretly Taping Court Conference

In *Matter of Schorr*, 86 N.Y.S.3d 75 (1st Dep't 2018), the respondent, "in his own divorce proceeding in which he was the defendant spouse and proceeded pro se, during a court conference before Supreme Court Justice Deborah Kaplan, … covertly made an unauthorized recording through the use of his iPhone, which was prohibited by 22 NYCRR 29.1. The recording was technically a video recording but captured no images since respondent's iPhone was inside his inner jacket pocket."

The First Department publicly censured the lawyer for "conduct prejudicial to the administration of justice" in violation of Rule 8.4(d).

F. Lawyer Suspended for 18 Months for Sexting with Client and Having Sexual Relations with Client in Courthouse

In *Matter of Scudieri*, 174 A.D.3d 168 (1st Dep't 2019), three charges were brought against respondent attorney. Charge 1 alleged that respondent failed to enter into a written retainer agreement in a domestic relations matter in violation of rule 1.5(d)(5). Respondent admitted that he failed to execute the required retainer agreement, and during the hearing, he acknowledged that he technically violated the rule, characterizing it as an oversight, since his client lived out of state. However, respondent argued that his failure was unintentional, and since it did not reflect adversely on his fitness, no sanction should be imposed.

Charge 2 alleged that respondent engaged in a continued pattern of sexting/texting over a period of several months with his client in violation of rule 8.4(h). Respondent admitted that during the representation, over a period of several months, he exchanged texts with his client which contained sexually explicit language and intimate photos. Respondent testified that he was not sure who had initiated the idea of sexting/texting and the exchange of photos, but argued that since the exchanges were consensual, although improper, they did not interfere with his representation, nor did it reflect adversely on his fitness and should not result in a suspension.

Charge 3, which respondent vehemently denied, alleged that after a court appearance in a child support matter, he and his client went to a stairwell at 111 Centre Street and engaged in physical contact of a sexual nature in violation of rules 1.8(j)(iii) (a lawyer shall not, in domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client) and 8.4(h).

The Court noted:

> there have been no decisions by [the First Department] directly on point with respect to respondent's conduct underlying charges 2 and 3; however, in *Matter of Raab*, 139 A.D.3d 116, 29 N.Y.S.3d 322 (1st Dept. 2016), this Court accepted the disciplinary resignation of an attorney, who had engaged in one, isolated and consensual "personal encounter" with his matrimonial client at the time her case was concluding. Raab was publicly reprimanded in Florida, where he practiced, and the Committee brought a reciprocal discipline proceeding seeking a two-year suspension. In finding a violation of rule 1.8(j)(1)(iii), this Court noted that the rule "recognizes that because a sexual relationship between a lawyer and client creates the risk of impairing the professional judgment of the lawyer, and rendering the client unable to make rational decisions related to his or her case, the relationship may be detrimental to the client's interests."

The court noted that "[i]t is well settled that the standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence." The Court observed that "the prime issue with charge 3 depends on the credibility of the witnesses, and we conclude that the findings of the Referee are fully supported by the record."

Regarding sanction, the court concluded:

> the sexting and courthouse sexual encounter here was consensual, isolated in time and arguably would not be considered "overreaching" with respect to Ms. A. However, "respondent's misconduct contravenes New York's strong public policy prohibiting lawyers from engaging in sexual relations with clients in domestic relations matters during the course of their representation."

Accordingly, the findings of fact and conclusions of law as found by the Referee are confirmed and respondent is suspended from the practice of law for a period of 18 months.

XVI. Inadvertent Disclosure.

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, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that it 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 and law firms sometimes receive a document, electronically stored information, or other "writing as defined in Rule 1.0(x), that was mistakenly sent, produced, or otherwise inadvertently made available by opposing parties or their lawyers. A document, electronically stored information, or other writing is "inadvertently sent" within the meaning of paragraph (b) when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or other writing is accidentally included with information that was intentionally transmitted. One way to resolve this situation is for lawyers and law firms 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 or law firm knows or reasonably should

know that such a document or other writing was sent inadvertently, this Rule requires only that the receiving lawyer promptly notify the sender in order to permit that person to take protective measures. Although this Rule does not require that the receiving 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 or law firm is required to take additional steps, such as returning the document or other writing, is a matter of law beyond the scope of these Rules, as is the question whether the privileged status of a document or other writing has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or other writing that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document, electronically stored information or other writing" includes not only paper documents, but also email and other forms of electronically stored information – including embedded data (commonly referred to as "metadata") – that is subject to being read or put into readable form. See Rule 1.0(x).

[3] Refraining from reading or continuing to read a document or other writing once a lawyer realizes that it was inadvertently sent and returning the document to the sender or permanently deleting electronically stored information, 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 or other writing, 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 other writing, or to return the document or other writing to the sender or permanently delete electronically stored information, or both. Accordingly, in deciding whether to retain or use an inadvertently received document or other writing, 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 a document or other writing or instead to return them, or both, are matters of professional judgment reserved to the lawyer. See Rules 1.2, 1.4.

* * *

In Formal Opinion 2019-3 (2019), the New York City Bar Association opined that:

> Rule 4.4(b) requires a lawyer who receives a document related to the representation of the lawyer's client, and who knows or reasonably should know that it was inadvertently sent, to promptly notify the sender. Although substantive law, procedural rules, judicial decisions, court orders, and/or agreements between the parties may impose additional obligations, Rule 4.4(b) does not in itself prohibit the receiving lawyer from using inadvertently sent information. If using the inadvertently sent information would reasonably be expected to advance the client's objectives and the law permits its use, then Rules 1.2(a) and 1.4 direct the lawyer to consult with the client about the risks and benefits of using the information. The client's desire to use the information should be treated by the lawyer as controlling when the failure to do so would constitute a failure "to seek the objectives of the client through reasonably available means permitted by law and these Rules" under Rule 1.1(c), and/or would "prejudice the rights of the client" under Rule 1.2(e). This determination may depend on whether reasonably available alternative means exist for obtaining the information in admissible form from independent sources, and how much time and expense would be involved in those efforts. If the lawyer reasonably determines that Rules 1.1(c) and 1.2(e) do not require using the inadvertently sent information, then the lawyer may refrain from using it, provided that the lawyer's decision is consistent with the lawyer's duties to competently and diligently seek the client's objectives in the representation. If the potential significance of the information is unclear, or if other law governing the use of such information in the jurisdiction is uncertain, a lawyer may refrain from using the information even over the client's objection. Finally, if the lawyer and the client have a fundamental disagreement over whether to use the inadvertently disclosed information, the lawyer may be permitted or required to withdraw from the representation depending on the circumstances.

Fed. R. Civ. P. 26(b)(5)(B) provides that when information produced in discovery in a federal civil proceeding is subject to a claim of privilege or work product protection and the receiving party is so notified, the receiving party "must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim."

Fed. R. Evid. 502 provides that when information is disclosed in a federal proceeding or to a federal office or agency, the disclosure does not operate as a

waiver of the attorney-client privilege or work product protection if (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

XVII. Amendments to New York Rule 7.5: Professional notices, letterheads and names.

On June 24, 2020, the New York Courts adopted substantial revisions to Rule 7.5. The revisions followed a period of public comment announced by Eileen D. Millett, counsel for the Office of Court Administration, in a memo dated April 17, 2020, which stated:

> NYSBA's COSAC Committee proposed the amendments considering a lawsuit filed in the United States District Court for the Southern District of New York against counsel for the grievance committees (which have the authority to regulate and discipline lawyers in New York State). The lawsuit asserts that the current version of Rule 7.5 banning all law firm trade names is in violation of the First Amendment of the United States Constitution. COSAC's proposed amendments of Rule 7.5 (Exhibit B – NYSBA House of Delegates Approved Proposal), which were approved by the NYSBA's House of Delegates on April 4, 2020, also reorganize the structure of the rule (including moving language from 7.5(b)(3) to 7.5(b)(2)(iii)), delete superfluous portions, and add guidance regarding proper and improper law firm names.
>
> After further review, the Administrative Board has added language to COSAC's proposed amendment so that Rule 7.5(b)(1) reads: "A lawyer or law firm in private practice shall not practice under: (i) a false, deceptive, or misleading trade name; (ii) a false, deceptive, or misleading domain name; or . . ." (Exhibit A).
>
> COSAC notes that it further intends to propose amendments to the Comments to Rule 7.5, which will be considered by the NYSBA's House of Delegates on June 15. (Exhibit C –COSAC memorandum.)

Rule 7.5 now reads:

Rule 7.5: Professional notices, letterheads and names.

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

(b)

(1) A lawyer or law firm in private practice shall not practice under:

(i) a false, deceptive, or misleading trade name;
(ii) a false, deceptive, or misleading domain name: or
(iii) a name that is misleading as to the identity of the lawyer or lawyers practicing under such name.

(2) Specific Guidance Regarding Law Firm Names.

(i) Such terms as "legal aid," "legal service office," "legal assistance office," "defender office," and the like may be used only by bona fide legal assistance organizations.
(ii) A law firm name, trade name, or domain name may not include the terms "non-profit" or "not-for-profit" unless the law firm qualifies for those designations under applicable law.
(iii) A lawyer or law firm in private practice may not include the name of a nonlawyer in its firm name.
(iv) The name of a professional corporation shall contain "PC" or such symbols permitted by law.
(v) The name of a limited liability company or limited liability partnership shall contain "LLC," "LLP" or such symbols permitted by law.
(vi) A lawyer or law firm may utilize a telephone number that contains a trade name, domain name, nickname, moniker, or motto that does not otherwise violate these Rules.

(3) 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 may not include in its firm name the name of the

nonlegal professional service firm or any individual nonlegal professional affiliated therewith.

(4) 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.

Comment

Professional Affiliations and Designations

[1] A lawyer's or law firm's name, trade name, domain name, web site, social media pages, office sign, business cards, letterhead, and professional designations are communications concerning a lawyer's services and must not be false, deceptive, or misleading. They must comply with this Rule and with Rule 7.1.

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

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

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

[5] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a "firm" as defined in Rule 1.0(h), because to do so would be false and misleading. In particular, it is misleading for lawyers to hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners. It is also misleading for lawyers to hold themselves out as being counsel, associates, or other affiliates of a law firm if that is not a fact, or to hold themselves out as partners, counsel, or associates if they only share offices. Likewise, law firms may not claim to be affiliated with other law firms if that is not a fact.

Professional Web Sites, Cards, Office Signs, and Letterhead

[6] A lawyer or law firm may use internet web sites, social media pages, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided they do not violate any statute or court rule and are in accordance with Rule 7.1.
Thus, a lawyer may use the following:

> (i) a professional card identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the lawyer's law firm, the names of the law firm's members, counsel, and associates, and any information permitted under Rule 7.2(c);
>
> (ii) 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, counsel, and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state or describe the nature of the legal practice to the extent permitted under Rule 7.2(c);

(iii) 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 to the extent permitted under Rule 7.2(c);

(iv) a letterhead 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 7.2(c). A letterhead of a law firm may also give the names of members, associates, and counsel, names and dates relating to deceased and retired members, and the names and dates of predecessor firms in a continuing line of succession; and

(v) internet web sites or social media pages or sites that comply with these Rules.

Professional Status

[7] To avoid misleading clients, courts, and the public, lawyers should be scrupulous in representing their professional status. For example:

(i) A lawyer or law firm may be designated "Counsel," "Special Counsel," "Of Counsel," and the like on a letterhead or professional card if there is a continuing relationship with another lawyer or law firm other than as a partner or associate;

(ii) 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 law firm devotes a substantial amount of professional time to representing that client;

(iii) To alert clients, the public, and those who deal with a lawyer or law firm about possible limitations on liability, the name of a professional corporation shall contain "PC" or such symbols permitted by law, and the name of a

limited liability company or limited liability partnership shall contain "LLC," "PLLC," "LLP" or such symbols permitted by law;

(iv) A law firm name, trade name, or domain name may not include the terms "non-profit" or "not-for-profit" unless the law firm qualifies for those designations under applicable law, such as the New York Not-for-Profit Corporation Law ("NPCL").

[8] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but all enumerations of the lawyers listed on the firm's letterhead and in other permissible listings should make clear the jurisdictional limitations
on those members, counsel, and associates of the firm not licensed to practice in all listed jurisdictions.

Trade Names and Domain Names

[9] Some lawyers and law firms may prefer to practice under trade names and/or domain names to make it easier for clients to remember or locate them. A lawyer may practice under a trade name or domain name that is not false, deceptive, or misleading. Provided a lawyer or law firm uses a name otherwise complying with these Rules, it is proper to practice under the lawyer's or law firm's own name, initials, trade name, domain name, abbreviations, areas of practice, variations of the foregoing, or a combination of those features, among other things.

[10] For example, with respect to trade names, a law firm whose practice includes real estate matters may use and practice under a name such as AbleBaker Real Estate Lawyers, A&B Real Estate Lawyers, or Dirt Lawyers. Likewise, a law firm may use and practice under a trade name such as Albany Personal Injury Lawyers if the firm practices in Albany and its practice includes personal injury law. With respect to domain names, if the law firm of Able & Baker practices real estate law, the firm may use and practice under a descriptive domain name such as www.realestatelaw.com or www.ablerealestatelaw.com, or under a colloquial domain name such as www.dirtlawyers.com, as long as the name is not false, deceptive, or misleading.

[11] Neither trade names nor domain names may be false, deceptive, or misleading. A law firm may not use a trade name such as "Win Your Case," or a domain name such as www.winyourcase.com because those names imply that the law firm can obtain favorable results regardless of the particular facts and

circumstances. In all events, neither a trade name nor a domain name may be false, deceptive, or misleading or violate Rule 7.1 or any other Rule.

Telephone Numbers

[12] A lawyer or law firm may use telephone numbers that spell words or contain a trade name, domain name, nickname, moniker, or motto that does not otherwise violate these Rules. As with domain names, lawyers and law firms may always properly use telephone numbers consisting of (i) their own names or initials, or (ii) combinations of names, initials, numbers, and words. For example, the law firm of Red & Blue may properly use phone numbers such as RED-BLUE, 4-RED-LAW, or RB-LEGAL. By way of further 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.)

* * *

XVIII. New Standards of Civility Adopted in January 2020

On January 24, 2020, the New York State Courts adopted a new version of the Standards of Civility. The New York State Bar Association's Committee on Attorney Professionalism spent nearly four years examining the standards to create the first revision of the Standards since 1997.

STANDARDS OF CIVILITY

PREAMBLE

The New York State Standards of Civility for the legal profession set forth principles of behavior to which the bar, the bench and court employees should aspire. (The term "court" as used herein also may refer to any other tribunal, as appropriate.) They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Rules of Professional Conduct or any other applicable rule or requirement governing conduct. Instead they are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful

status as an honorable and respected profession where courtesy and civility are observed as a matter of course.

The Standards of Civility are divided into two main sections, one that is generally applicable but also contains a number of items specifically directed to the litigation setting, and one that is more specifically directed to transactional and other non-litigation settings. The first section, in turn, is divided into four parts: lawyers' duties to other lawyers, litigants, witnesses and others; lawyers' duties to the court and court personnel; court's duties to lawyers, parties and witnesses; and court personnel's duties to lawyers and litigants. There is also a Statement of Client's Rights appended to the Standards of Civility.

As lawyers, judges, court employees and officers of the court, and as attorneys generally, we are all essential participants in the judicial process. That process cannot work effectively to serve the public unless we first treat each other with courtesy, respect and civility.

SECTION 1 – GENERAL STANDARDS

LAWYERS' DUTIES TO OTHER LAWYERS, LITIGANTS WITNESSES AND CERTAIN OTHERS

I. Lawyers should be courteous and civil in all professional dealings with other persons.

A. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.

B. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.

C. Lawyers should not engage in conduct intended primarily to harass or humiliate witnesses.

D. Lawyers should require that persons under their supervision conduct themselves with courtesy and civility.

II. When consistent with their clients' interests, lawyers should cooperate with opposing counsel in an effort to avoid litigation and to resolve litigation that has already commenced.

A. Lawyers should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with other counsel whenever it is practicable to do so.

B. Lawyers should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another and imposing reasonable and meaningful deadlines in light of the nature and status of the case.

III. A lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of the client's interests.

A. In the absence of a court order, a lawyer should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected.

B. Upon request coupled with the simple representation by counsel that more time is required, the first request for an extension to respond to pleadings ordinarily should be granted as a matter of courtesy.

C. A lawyer should not attach unfair or extraneous conditions to extensions of time. A lawyer is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize, and may request, but should not unreasonably insist on, reciprocal scheduling concessions.

D. A lawyer should endeavor to consult with other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts. A lawyer should likewise cooperate with opposing counsel when scheduling changes are requested, provided the interests of his or her client will not be jeopardized.

E. A lawyer should notify other counsel and, if appropriate, the court and other persons at the earliest possible time when hearings, depositions, meetings or conferences are to be canceled or postponed.

IV. Responding to communications.

A lawyer should promptly return telephone calls and electronic communications

and answer correspondence reasonably requiring a response, as appropriate. (For the avoidance of doubt, the foregoing refers to communications in connection with matters in which the lawyer is engaged, not to unsolicited communications.) A lawyer has broad discretion as to the manner and time in which to respond and need not necessarily follow the same means or format as the original communication or the manner requested in the original communication.

V. The timing and manner of service of papers should not be designed to cause disadvantage to the party receiving the papers.

A. Papers should not be served in a manner designed to take advantage of an opponent's known absence from the office.

B. Papers should not be served at a time or in a manner designed to inconvenience an adversary.

C. Unless specifically authorized by law or rule, a lawyer should not submit papers to the court without serving copies of all such papers upon opposing counsel in such a manner that opposing counsel will receive them before or contemporaneously with the submission to the court.

VI. A lawyer should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.

A. A lawyer should avoid discovery that is not necessary to obtain facts or perpetuate testimony or that is designed to place an undue burden or expense on a party.

B. A lawyer should respond to discovery requests reasonably and not strain to interpret the request so as to avoid disclosure of relevant and non-privileged information.

VII. In depositions and other proceedings, and in negotiations, lawyers should conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect.

A. Lawyers should not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

B. Lawyers should advise their clients and witnesses of the proper conduct expected of them in court, depositions and conferences, and make reasonable efforts to prevent clients and witnesses from causing disorder or disruption.

C. A lawyer should not obstruct questioning during a deposition or object to deposition questions unless necessary.

D. Lawyers should ask only those questions they reasonably believe are necessary for the prosecution or defense of an action. Lawyers should refrain from asking repetitive or argumentative questions and from making self-serving statements.

VIII. A lawyer should adhere to all express promises and agreements with other counsel, whether oral or in writing, and to agreements implied by the circumstances or by local customs.

IX. Lawyers should not mislead.

A. A lawyer should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

B. A lawyer should not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct.

C. In preparing written versions of agreements and court orders, a lawyer should attempt to correctly reflect the agreement of the parties or the direction of the court.

X. Lawyers should be mindful of the need to protect the standing of the legal profession in the eyes of the public. Accordingly, lawyers should bring the New York State Standards of Civility to the attention of other lawyers when appropriate.

LAWYERS' DUTIES TO THE COURT AND COURT PERSONNEL

I. A lawyer is both an officer of the court and an advocate. As such, the lawyer should always strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court.

A. Lawyers should speak and write civilly and respectfully in all communications with the court and court personnel.

B. Lawyers should use their best efforts to dissuade clients and witnesses from causing disorder or disruption in the courtroom.

C. Lawyers should be punctual and prepared for all court appearances; if delayed, the lawyer should notify the court and counsel whenever possible.

II. Court personnel are an integral part of the justice system and should be treated with courtesy and respect at all times.

JUDGES' DUTIES TO LAWYERS, PARTIES AND WITNESSES

I. A Judge should be patient, courteous and civil to lawyers, parties and witnesses.

A. A Judge should maintain control over the proceedings and insure that they are conducted in a civil manner.

B. Judges should not employ hostile, demeaning or humiliating words in opinions or in written or oral communications with lawyers, parties or witnesses

C. Judges should, to the extent consistent with the efficient conduct of litigation and other demands on the court, be considerate of the schedules of lawyers, parties and witnesses when scheduling hearings, meetings or conferences.

D. Judges should be punctual in convening all trials, hearings, meetings and conferences; if delayed, they should notify counsel when possible.

E. Judges should make all reasonable efforts to decide promptly all matters presented to them for decision.

F. Judges should use their best efforts to insure that court personnel under their direction act civilly toward lawyers, parties and witnesses.

DUTIES OF COURT PERSONNEL TO THE COURT, LAWYERS AND LITIGANTS

I. Court personnel should be courteous, patient and respectful while

providing prompt, efficient and helpful service to all persons having business with the courts.

A. Court employees should respond promptly and helpfully to requests for assistance or information.

B. Court employees should respect the judge's directions concerning the procedures and atmosphere that the judge wishes to maintain in his or her courtroom.

SECTION 2 - STANDARDS FOR TRANSACTIONAL/NON-LITIGATION SETTINGS

INTRODUCTION

Section 1 of the Standards of Civility, while in many respects applicable to attorney conduct generally, in certain respects addresses the practice of law in the setting of litigation and other formal adversary proceedings, where conduct is governed by a variety of specific procedural rules of order and may be supervised by a judge or other similar official. This Section 2, which is more directed to transactional and other non-litigation settings, should be read with Section 1 as one integrated whole for a profession that has multiple facets and spheres of activity.

The differences in practice between lawyers' roles and the expectations in litigation and other settings can sometimes be significant. Although fewer formal rules of conduct and decorum apply outside of the litigation setting, lawyers conducting transactional work should keep Section 1 of Standards of Civility in mind, along with the following additional items.

ADDITIONAL TRANSACTIONAL/NON-LITIGATION STANDARDS

I. A lawyer should balance the requirements and directions of the client in terms of timing with a reasonable solicitude for other parties. Unless the client specifically instructs to the contrary, a lawyer should not impose deadlines that are more onerous than necessary or appropriate to achieve legitimate commercial and other client-related outcomes.

II. A lawyer should focus on the importance of politeness and decorum, taking into account all relevant facts and circumstances, including such elements as the formality of the setting, the sensitivities of those present and

the interests of the client.

III. Where an agreement or proposal is tentative or is subject to approval or to further review by a lawyer or by a client, the lawyer should be careful not to proceed without proper authorization or otherwise imply that authority from the client has been obtained when such is not the case.

XIX. Revised Statement of Client's Rights

22 N.Y.C.R.R. Section 1210.1. Posting

Every attorney with an office located in the State of New York shall insure that there is posted in that office, in a manner visible to clients of the attorney, a statement of client's rights in the form set forth below. Attorneys in offices that provide legal services without fee may delete from the statement those provisions dealing with fees. The statement shall contain the following:

STATEMENT OF CLIENT'S RIGHTS

1. You are entitled to be treated with courtesy and consideration at all times by your lawyer and the other lawyers and nonlawyer personnel in your lawyer's office.

2. You are entitled to have your attorney handle 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 discharge your attorney and terminate 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 reasonable fees and expenses and to have your lawyer explain before or within a reasonable time after commencement of the representation how the fees and expenses 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 arrangement for fees and expenses 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 promptly and to receive a prompt rely to your letters, telephone calls, emails, faxes, and other communications.

6. You are entitled to be kept reasonably informed as to the status of your matter and are entitled to have your attorney promptly comply with your reasonable requests for information, including your requests for copies of papers relevant to the matter. You are entitled to sufficient information to allow you to participate meaningfully in the development of your matter and make informed decisions regarding the representation.

7. You are entitled to have your legitimate objectives respected by your attorney. In particular, the decision of whether to settle your matter is yours and not your lawyer's. Court approval of a settlement is required in some matters.

8. You have the right to privacy in your communications with your lawyer and to have your confidential information preserved by your lawyer to the extent required by law.

9. You are entitled to have your attorney conduct himself or herself ethically in accordance with the New York Rules of Professional Conduct.

10. You may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, **gender identity, gender expression**, age, national origin, or disability.